



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-07
Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **Court of Appeals Panel**
Judge Michèle Picard
Judge Emilio Gatti
Judge Kai Ambos

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Language: English

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**Consolidated Prosecution response to interlocutory appeals of Decision on the
Defence Preliminary Motions**

with public Annex

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I. INTRODUCTION

1. The Court of Appeals Panel ('Panel')¹ should summarily dismiss the Appeals² because they are founded on deficient submissions incapable of demonstrating any error in the Impugned Decision³ and exceed the scope of Rule 97 of the Rules⁴ and the Certification Decision.⁵ To the extent the Appeals are considered on their merits, the Impugned Decision should be affirmed. Consistent with Articles 21(4)(a) and 38(4) of the Law⁶ and Rule 86(3), the Pre-Trial Judge weighed relevant considerations and, in the proper exercise of his discretion,⁷ found that the Indictment⁸ 'sets out with sufficient clarity and specificity the facts underpinning the charges and the crimes, including the modes of liability'.⁹ Nothing in the Impugned Decision was 'so unfair or unreasonable as to constitute an abuse' of the Pre-Trial Judge's discretion.¹⁰

¹ Decision Assigning a Court of Appeals Panel, KSC-BC-2020-07/IA004/F00001, 6 April 2021.

² Defence Submission for Mr. Haradinaj on Appeal of Decision KSC-BC-2020-07/F00147, KSC-BC-2020-07/IA004/F00002, dated 12 April 2021, filed 13 April 2021 ('HARADINAJ Appeal'); Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 170(2), KSC-BC-2020-07/IA004/F00003, 15 April 2021 ('GUCATI Appeal'; collectively with the HARADINAJ Appeal, 'Appeals'). In this response, the defence teams for Mr HARADINAJ and Mr GUCATI are referred to as the HARADINAJ Defence and GUCATI Defence, respectively, and collectively, the 'Defence'.

³ Decision on Defence Preliminary Motions, KSC-BC-2020-07/F00147, 8 March 2021, Confidential ('Impugned Decision').

⁴ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁵ Decision on Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, KSC-BC-2020-07/F00169, 1 April 2021 ('Certification Decision').

⁶ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

⁷ Decisions concerning the form of the indictment are discretionary. See ICTR, *Prosecutor v. Uwinkindi*, ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011 ('*Uwinkindi* Appeal Decision'), para.6 ('A trial chamber's decision on defects in the form of the indictment is a matter related to the general conduct of trial proceedings and thus falls within the discretion of the trial chamber. In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a "discernible error" resulting in prejudice to that party').

⁸ Annex 1 to Submission of confirmed Indictment, KSC-BC-2020-07/F00075/A01, 14 December 2020, Confidential ('Indictment').

⁹ Impugned Decision, KSC-BC-2020-07/F00147, para.72.

¹⁰ Decision on Nasim Haradinaj's Appeal Against Decision Reviewing Detention, KSC-BC-2020-07/IA002/F00005, 9 February 2021 ('Detention Appeal Decision'), para.14.

II. PROCEDURAL HISTORY

2. On 14 December 2021, pursuant to the Confirmation Decision,¹¹ the Specialist Prosecutor's Office ('SPO') filed the confirmed Indictment.

3. On 8 March 2021, the Pre-Trial Judge issued the Impugned Decision, dismissing, *inter alia*, the Defence's Rule 97(1)(b) challenges to the form of the Indictment.¹²

4. On 1 April 2021, the Pre-Trial Judge issued the Certification Decision, granting the Defence leave to appeal the Impugned Decision on five issues ('Certified Issues').¹³

5. On 13 and 15 April 2021, respectively, the HARADINAJ Defence filed the HARADINAJ Appeal and the GUCATI Defence filed the GUCATI Appeal. The Appeals challenge the Impugned Decision on the following grounds, which correspond with the Certified Issues:¹⁴

a. Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars to the identity of co-perpetrators, given the requirement to provide in the indictment as much detail as possible regarding the identities of any alleged co-perpetrators ('Ground 1');

b. Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars to the identity of accomplices, given the requirement to provide in the indictment as much detail as possible regarding the identities of any alleged accomplices ('Ground 2');

¹¹ Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074, 11 December 2020, Confidential ('Confirmation Decision').

¹² Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b), KSC-BC-2020-07/F00113, 2 February 2021, Confidential ('GUCATI Motion'); Preliminary Motion on the Issue of the Indictment Being Defective, KSC-BC-2020-07/F00116, 3 February 2021, Confidential. *See also* Impugned Decision, KSC-BC-2020-07/F00147, paras 1-7 (setting out the procedural background, including all relevant submissions).

¹³ Certification Decision, KSC-BC-2020-07/F00169, paras 1-4 (setting out the procedural background, including all relevant submissions).

¹⁴ HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, para.10; GUCATI Appeal, KSC-BC-2020-07/IA004/F00003, para.3.

- c. Whether the Pre-Trial Judge erred in finding that the Confirmed Indictment was not defective in the absence of further particulars to the identity of assisted or incited persons, given the requirement to provide in the indictment as much detail as possible regarding the identities of any assisted or incited persons ('Ground 3');
- d. Whether the Pre-Trial Judge erred in finding that it was not a defect for the Confirmed Indictment to use the formula 'and/or' to refer alternatively to the Accused, unnamed co-perpetrators or unnamed accomplices when attributing actions allegedly undertaken, given the requirement that formulations should not be used which create ambiguity as to the alleged responsibility of the accused ('Ground 4'); and
- e. Whether the Confirmed Indictment is defective in that it pleads 'unknown' actions which allegedly 'may' have occurred next to 'known' actions which allegedly 'did' occur, given the requirement that open-ended statements in respect of the facts underpinning the charges are not permitted, unless they are exceptionally necessary, which is not asserted ('Ground 5').

III. SUBMISSIONS

6. The Appeals are based on deficient, unfounded submissions that do not justify detailed analysis by the Panel and should be summarily dismissed in the interest of fair, efficient, and effective proceedings.¹⁵ In particular, as set out below,¹⁶ the Appeals: (i) misrepresent and ignore relevant parts of the Impugned Decision and Indictment; (ii) exceed the scope of Rule 97 and of the Certified Issues; and (iii) otherwise fail to substantiate alleged errors and demonstrate how they materially affected the Impugned Decision.¹⁷

¹⁵ Detention Appeal Decision, KSC-BC-2020-07/IA002/F00005, paras 28-29. See also ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009 ('*Krajišnik Appeal Judgment*'), para.16.

¹⁶ See paras 7, 11-13, 18-23, 26-27 below.

¹⁷ Detention Appeal Decision, KSC-BC-2020-07/IA002/F00005, paras 28-29. See also *Krajišnik Appeal Judgment*, paras 17-27; IRMCT, *Prosecutor v. Orić*, MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, para.14; ICC, *Prosecutor v.*

7. To the extent the Panel considers the Appeals on their merits, the Impugned Decision should be affirmed. It was properly reached in light of Articles 21(4)(a) and 38(4) and Rule 86(3) and the nature and scale of the crimes charged, the circumstances of this case, the alleged proximity of the Accused, and the charged modes of liability.¹⁸ The Appeals largely ignore both the applicable framework and these case-specific considerations.

8. As is abundantly clear from the Indictment and as emphasised by the Pre-Trial Judge,¹⁹ this case is based on the Accused's public statements and alleged direct participation in the repeated, unlawful dissemination of confidential information relating to confidential investigations of the Special Investigative Task Force ('SITF')/SPO.²⁰ The Indictment therefore describes in detail,²¹ *inter alia*, the context, timing, content, and circumstances of the Accused's statements and conduct;²² the contents of the confidential information disseminated;²³ the common purpose or agreement;²⁴ the Accused's mental state;²⁵ and the affected witnesses, family members, and consequences for them.²⁶ Further, in light of the nature of the charges and

Abd-Al-Rahman, ICC-02/05-01/20 OA2, Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Pre-Trial Chamber II of 14 August 2020 entitled 'Decision on Defence Request for Interim Release', 8 October 2020, para.16.

¹⁸ Impugned Decision, KSC-BC-2020-07/F00147, para.39. *See also* paras 11-12, 51, 52, 63, 70.

¹⁹ *See, for example*, Impugned Decision, KSC-BC-2020-07/F00147, para.51 ('the events in the Confirmed Indictment revolve around the alleged acts and statements of the two Accused'). *See also* para.68 (considering that the Indictment describes 'in detail all actions undertaken by the Accused in relation to the alleged First, Second, and Third Disclosures'). The Defence has not challenged this finding concerning the pleading of the Accused's own conduct, upon which the charges primarily depend.

²⁰ Unless indicated otherwise, certain terms defined in the Indictment are intended to have the same meaning when used in these submissions.

²¹ *See* Impugned Decision, KSC-BC-2020-07/F00147, paras 38-46 and the sources cited therein (setting out the relevant pleading requirements in reference to a number of cases from different international and hybrid courts and concerning cases of varying size, scope, and circumstances).

²² Indictment, KSC-BC-2020-07/F00075/A01, paras 6-9, 11, 13-14, 16-18, 20. *See also* paras 25-26, 29-31, 33-34, 36-44.

²³ Indictment, KSC-BC-2020-07/F00075/A01, paras 6, 10, 12, 15, 19, 21. *See also* paras 30, 34-35, 38, 40.

²⁴ Indictment, KSC-BC-2020-07/F00075/A01, para.39. *See also* paras 6-9, 11-14, 16-18, 20-21, 25-26.

²⁵ Indictment, KSC-BC-2020-07/F00075/A01, paras 24, 36, 45-46. *See also* para.5.

²⁶ *See* Impugned Decision, KSC-BC-2020-07/F00147, paras 57-60 (considering that such allegations are sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability). The Defence did not seek leave to appeal this part of the Impugned Decision.

circumstances of this case, the Pre-Trial Judge correctly found that the material facts relating to alleged co-perpetrators, accomplices, assisted and incited persons are also pleaded in the Indictment with sufficient clarity and specificity and do not create ambiguity as regards the charged offences or modes of liability.²⁷ As the Defence acknowledged, additional evidentiary details, including those requested, have already been provided in accordance with the relevant framework, thereby ensuring the ability of the defence to prepare and the fairness of these proceedings.²⁸ Any claim of ambiguity or unfairness therefore necessarily fails.

A. GROUNDS 1-3: THE INDICTMENT ADEQUATELY PLEADS THE IDENTITIES OF CO-PERPETRATORS, ACCOMPLICES, AND ASSISTED AND INCITED PERSONS

9. The Pre-Trial Judge correctly found that the Indictment, with sufficient clarity and specificity:

- a. adequately identifies co-perpetrators and accomplices by group, in reference to specific events and at least one by affiliation considering that: (i) the events described in the Indictment revolve around the alleged acts and statements of the Accused; and (ii) the nature of the events, including press conferences and broadcasts, and the number of persons involved therein do not allow the identification of each co-perpetrator or accomplice by name;²⁹ and
- b. adequately identifies assisted and incited persons by group, including by reference to specific events, considering that: (i) the case involves a series of statements by the Accused publicly addressed to a large collectivity of individuals, including members of the press in general and any person in possession of or with access to confidential information; and (ii) the charged offences and modes of liability depend on the conduct of the Accused themselves and, for some modes of liability, conduct consequential thereto.³⁰

²⁷ Impugned Decision, KSC-BC-2020-07/F00147, paras 51-53, 63-64, 70-71.

²⁸ See, *inter alia*, para.15 below.

²⁹ Impugned Decision, KSC-BC-2020-07/F00147, paras 51, 53.

³⁰ Impugned Decision, KSC-BC-2020-07/F00147, paras 52-53.

10. The Defence fails to demonstrate any discernible error in the Impugned Decision resulting in prejudice.³¹ In particular, the Defence fails to show that the Impugned Decision was: (i) based on an incorrect interpretation of governing law; (ii) based on an incorrect conclusion of fact; or (iii) so unfair and unreasonable as to constitute an abuse of discretion.³² Further, the Pre-Trial Judge did not give weight to extraneous or irrelevant considerations and gave sufficient weight to relevant considerations in reaching the Impugned Decision.³³

11. Grounds 1-3 are based solely on two arguments. First, the HARADINAJ Defence makes misplaced and unfounded submissions on the adequacy of the investigation, evidence, and basis of the Confirmation Decision.³⁴ Such submissions are irrelevant to indictment form and exceed the scope of Rule 97³⁵ and the Certified Issues. They should be summarily dismissed.

12. Second, the Defence claims that the names of specific co-perpetrators, accomplices, and incited and assisted persons are known to the SPO and should have been included in the Indictment.³⁶ These submissions are made in the abstract, without engaging with the specific circumstances of the case, and, as such, are incapable of demonstrating any error in the Impugned Decision.³⁷

³¹ *Uwinkindi* Appeal Decision, para.6.

³² Detention Appeal Decision, KSC-BC-2020-07/IA002/F00005, para.14.

³³ Detention Appeal Decision, KSC-BC-2020-07/IA002/F00005, para.14.

³⁴ HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, paras 24-29, 40.

³⁵ Rule 86(7); ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para.40; STL, *Prosecutor v. Ayyash*, STL-18-10/PT/TC, Decision on Alleged Defects in the Form of the Indictment, 28 September 2020 ('STL Decision'), para.14(o). See also Impugned Decision, KSC-BC-2020-07/F00147, para.40 and the sources cited therein; ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-AR72.1, Decision on Tolimir's "Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal", 25 February 2009, para.10 (albeit in the context of a jurisdictional challenge, considering that objections on framing and support for indictment counts relate to issues that can be properly advanced and argued during the course of the trial).

³⁶ HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, paras 17-23, 30, 32-33, 34-42, 49-52; GUCATI Appeal, KSC-BC-2020-07/IA004/F00003, paras 5-25.

³⁷ Whether a fact is material and must therefore be pleaded must be considered in light of the specific circumstances of the case. See Impugned Decision, KSC-BC-2020-07/F00147, paras 39 and the sources cited therein. See also paras 7-8 above.

13. The Defence ignores the nature and purpose of the Indictment, which is necessarily a *concise* statement of the facts of the case and crimes, in particular the alleged modes of liability.³⁸ It pleads the material facts, but not the supporting details and evidence.³⁹ In this context, co-perpetrators, accomplices, and incited and assisted persons may, depending on the circumstances of the case, be sufficiently identified by group or category, including by reference to certain events or affiliation,⁴⁰ as has been done in the Indictment.⁴¹ Further specificity is unnecessary to enable defence preparations because, *inter alia*: (i) the relevant context and the events in which these groups are alleged to have taken part are described in detail in the Indictment, thereby enabling defence preparations; and (ii) the alleged statements and conduct of the Accused at such events, by their very nature and as intended by the Accused, involved and were directed at a large collectivity of persons, including members of the press in general and any member of the public in possession of confidential information.⁴²

14. Accordingly, the SPO's case – and in turn, Defence preparation – does not depend on the identity of any specific member of this group, full membership of which may never be known; rather, such specific identities constitute evidentiary details that need not be pleaded in the Indictment.⁴³

³⁸ Article 38(4); Rule 86(3). *See also* ECtHR, *Sampech v. Italy*, 55546/09, Decision, 19 May 2015 ('*Sampech Decision*'), para.110 (considering that, by their very nature, the charges were drafted in a summary manner and details of the alleged conduct would normally result from other documents); ECtHR, *Previti v. Italy*, 45291/06, Decision, 8 December 2009 ('*Previti Decision*'), para.208.

³⁹ STL Decision, para.14(a)-(d) and the sources cited therein. *See also* Impugned Decision, KSC-BC-2020-07/F00147, para.40.

⁴⁰ Impugned Decision, KSC-BC-2020-07/F00147, paras 41-42 (relying on a range of sources concerning indictments in cases of varying size and scope).

⁴¹ The Accused's co-perpetrators and accomplices are adequately identified by group to include those who, together with the Accused, reviewed the confidential and non-public information, partook in decisions as to whether and how to disseminate it, and organised and participated in related events, including press conferences and public appearances, where confidential and non-public information was publicly disseminated and discussed. *See* Indictment, KSC-BC-2020-07/F00075/A01, paras 6, 16. *See also* paras 25-26, 28-31, 33-34, 39, 41-44. This group included at least one other representative of the KLA WVA. *See* Indictment, KSC-BC-2020-07/F00075/A01, para.16.

⁴² Impugned Decision, KSC-BC-2020-07/F00147, paras 51-53.

⁴³ STL Decision, para.54(b); *Sampech Decision*, para.110; *Previti Decision*, para.208.

15. The Pre-Trial Judge noted⁴⁴ and the Defence has acknowledged⁴⁵ that the evidentiary details sought by the Defence – to the extent they are available – have been or will be provided in accordance with the established framework under the Law and Rules. That the Defence asserts that extra details it seeks to add to the Indictment are in the Pre-Trial Brief demonstrate both the absence of any unfairness to the Accused and their command over the charges as phrased. Indeed, the Defence was on notice of certain of these details and the contours of the charges from service of the Arrest Warrants⁴⁶ and notification of the Arrest Request⁴⁷ and Arrest Decision.⁴⁸ Further evidentiary details have been provided in the Rule 86(3)(b) Outline,⁴⁹ Confirmation Decision, Pre-Trial Brief, and disclosed materials. The combined information provided through these documents and the Indictment ensures the ability of the Defence to fully prepare and the fairness of these proceedings.⁵⁰ In such circumstances, where the Defence is unable to substantiate any prejudice and all material facts have

⁴⁴ Impugned Decision, KSC-BC-2020-07/F00147, paras 40, 51.

⁴⁵ HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, paras 19, 23, 30, 32.

⁴⁶ Arrest Warrant for Hysni Gucati, KSC-BC-2020-07/F00012/A01, 24 September 2020, Confidential and *Ex Parte* ('Gucati Warrant'); Corrected Version of Arrest Warrant for Nasim Haradinaj, KSC-BC-2020-07/F00012/A03/COR, 24 September 2020, Confidential and *Ex Parte* (collectively with the Gucati Warrant, 'Arrest Warrants'). In assessing whether sufficient information concerning the charges has been provided for Defence preparations, information received before notification of the Indictment may be taken into account. *See, for example*, ECtHR, *Ayçoban and others v. Turkey*, 42208/02 et al., Judgment, 22 December 2005, para.22.

⁴⁷ Confidential Redacted Version of 'URGENT Request for arrest warrants and related orders', filing KSC-BC-2020-07/F00009 dated 22 September 2020, KSC-BC-2020-07/F00009/CONF/RED, 1 October 2020, Confidential ('Arrest Request').

⁴⁸ Decision on Request for Arrest Warrants and Transfer Orders, KSC-BC-2020-07/F00012, 24 September 2020 ('Arrest Decision').

⁴⁹ Annex 2 to Submission of Indictment for confirmation and related requests, KSC-BC-2020-07/F00063/A02, Confidential ('Rule 86(3)(b) Outline').

⁵⁰ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06 A5, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para.128; STL Decision, para.47; ICC, *Prosecutor v. Yekatom and Ngaiisona*, ICC-01/14-01/18 OA2, Judgment on the appeal of Mr Alfred Yekatom against the decision of Trial Chamber V of 29 October 2020 entitled 'Decision on motions on the Scope of the Charges and the Scope of Evidence at Trial', 5 February 2021 ('Yekatom Appeal Decision'), para.57; *Previti* Decision, para.208; *Sampech* Decision, para.110. *See also* Impugned Decision, KSC-BC-2020-07/F00147, para.40.

been adequately pleaded, any amendment of the Indictment to include further detail supporting the material facts would be unjustified.⁵¹

B. GROUND 4: THE ALTERNATIVE ALLEGATIONS IN THE INDICTMENT DO NOT CREATE AMBIGUITY

16. The Pre-Trial Judge correctly found that: (i) the formulations used in the Indictment to refer alternatively to the Accused, co-perpetrators, or accomplices when describing a list of acts undertaken or to identify alternative courses of conduct are sufficiently clear and specific, when read in the context of the Indictment as a whole; and (ii) which alternative factual allegations are supported by the evidence can be addressed at trial.⁵²

17. The Defence fails to demonstrate any discernible error in the Impugned Decision resulting in prejudice.⁵³

18. The HARADINAJ Defence makes: (i) general, undeveloped assertions amounting to mere disagreement with the Impugned Decision and incapable of demonstrating error;⁵⁴ and (ii) unsubstantiated submissions concerning the adequacy of the evidence,⁵⁵ which exceed the scope of Rule 97 and the Certified Issues. Such submissions should be summarily dismissed.

19. In formulating the relevant certified issue amounting to Ground 4, the GUCATI Defence accepted that, as found by the Pre-Trial Judge, alternative formulations may be appropriately used where they do not create ambiguity as regards the charged

⁵¹ *Yekatom* Appeal Decision, para.54 (the right to be informed does not impose any special formal requirement as to the manner in which an accused is to be informed of the nature and cause of the charges against him or her); ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015, para.2271 (where it is clear that the accused was informed of the charges in a sufficiently precise and timely manner, mere technicalities of pleading should not be permitted to intrude).

⁵² Impugned Decision, KSC-BC-2020-07/F00147, paras 63-64.

⁵³ See para.10 above and the sources cited therein.

⁵⁴ HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, paras 43-48, 52-53.

⁵⁵ HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, para.47. To the extent the HARADINAJ Defence makes submissions concerning the identities of certain co-perpetrators at paragraph 25 of the Indictment, such submissions are addressed and should be dismissed for the reasons set out in Section III(A) above. See HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, paras 49-52.

offences or modes of liability.⁵⁶ In turn, arguments challenging this standard and asserting that use of ‘and/or’ is by definition ambiguous⁵⁷ are outside the scope of the Certified Issues and in any event, are unsubstantiated. The alternative formulations used in the Indictment are supported by the material facts pleaded and do not create any ambiguity.⁵⁸

20. Indeed, despite the purported breadth of Ground 4, the GUCATI Appeal only specifically challenges the use of the term ‘and/or’ in two allegations in paragraphs 39 and 47(i) of the Indictment.⁵⁹ Such submissions attempt to manufacture ambiguities based on a selective reading of those paragraphs in isolation, without regard to either the plain meaning of those allegations or the Indictment as a whole.⁶⁰ Read in their proper context, the challenged allegations are clear.

⁵⁶ GUCATI Motion, KSC-BC-2020-07/F00113, para.3(iv) ([...] given the requirement that formulations should not be used which create ambiguity as to the alleged responsibility of the accused’); GUCATI Appeal, KSC-BC-2020-07/IA004/F00003, para.3(iv). In turn, the Pre-Trial Judge certified this issue on the understanding that it contested the use of alternative formulations ‘in the specific instances of the Confirmed Indictment’. See Impugned Decision, KSC-BC-2020-07/F00147, para.21.

⁵⁷ GUCATI Appeal, KSC-BC-2020-07/IA004/F00003, paras 31-32.

⁵⁸ ICTY, *Prosecutor v. Naletilić et al.*, IT-98-34-A, Judgement, 3 May 2006, paras 102-103 and the sources cited therein (alternative and cumulative charging is permissible because ‘prior to the presentation of all evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven’). Alternative charging and alternative factual allegations have been accepted in a range of case of varying size and scope. See, for example, European Commission, *A v. The Netherlands*, 15243/89, Decision, 11 May 1992, pp.1, 5 (dismissing as manifestly unfounded a challenge to the overall detail of the charges where it was alleged, *inter alia*, that an accused committed a crime ‘together and in association with others or another, in any event alone (repeatedly)’); ICTY, *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, para.19; ICTY, *Prosecutor v. Mrkšić*, IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003, para.57 (rejecting an argument that such pleading would require the defence to prepare ‘in two opposite ways’); SCSL, *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgement, 3 March 2008, para.85; ICTY, *Prosecutor v. Hadžić*, IT-04-75-PT, Decision on Defence Motion Alleging Defects in Form of First Amended Indictment, 10 November 2011, paras 16-17; IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on the Nzabonimpa and Ndagijimana Defence Challenges to the Form of the Third Amended Indictment, 30 January 2020, paras 15, 18, 49. See also Impugned Decision, KSC-BC-2020-07/F00147, para.45 and the sources cited therein.

⁵⁹ GUCATI Appeal, KSC-BC-2020-07/IA004/F00003, paras 29-30.

⁶⁰ The Indictment must be read as a whole and select paragraphs should be read in the context of the entire document. See STL Decision, para.14(e) and the sources cited therein; *Yekatom* Appeal Decision, para.54. See also Indictment, KSC-BC-2020-07/F00075/A01, para.49 (providing that all sections of the Indictment should be read in conjunction with one another); Impugned Decision, KSC-BC-2020-07/F00147, para.39 and the sources cited therein.

21. Considering that co-perpetration and agreement to commit a criminal offence require the participation of two or more persons,⁶¹ the allegation in paragraph 39 of the Indictment⁶² challenged by the Defence⁶³ plainly alleges the following alternatives:

- a. both Accused committed the crimes in co-perpetration or agreed to commit the crimes with one or more Associates;
- b. if no Associate is found to have committed the crimes in co-perpetration or agreed to commit the crimes with either of the Accused, then the Accused committed the crimes in co-perpetration or agreed to commit the crimes; or
- c. if one Accused is ultimately found to have not committed the crimes in co-perpetration or agreed to commit the crimes, then the other Accused did with one or more Associates.

These alternatives are supported by the pleaded material facts,⁶⁴ which are ultimately to be proven by the evidence at trial.⁶⁵

22. Unfounded assertions that the Accused may be held responsible through 'guilt by association' ignore:⁶⁶ (i) the fact that, as set out in the Indictment, this case revolves around the conduct of the Accused themselves;⁶⁷ (ii) the allegations throughout the Indictment that the Accused are individual criminally responsible,⁶⁸ substantially contributed to and undertook substantial acts toward the commission of the crimes in

⁶¹ Confirmation Decision, KSC-BC-2020-07/F00074, paras 84 (setting out the elements of co-perpetration under Article 31 of the Kosovo Criminal Code), 93 (setting out the elements of agreement to commit a criminal offence under Article 35 of the Kosovo Criminal Code).

⁶² Indictment, KSC-BC-2020-07/F00075/A01, para.39 ('As demonstrated by their declared purpose to obstruct the SC/SPO and concerted acts in furtherance of this common purpose, as described in paragraphs 6-9, 11-14, 16-18, and 20-21, Hysni GUCATI, Nasim HARADINAJ, and/or Associates committed the crimes in co-perpetration and/or agreed to commit the crimes').

⁶³ GUCATI Appeal, KSC-BC-2020-07/IA004/F00003, para.29 (challenging only the part of the allegation that reads 'Hysni GUCATI, Nasim HARADINAJ, and/or Associates committed the crimes in co-perpetration...').

⁶⁴ Indictment, KSC-BC-2020-07/F00075/A01, para.39 (referring to paragraphs 6-9, 11-14, 16-18, and 20-21).

⁶⁵ See fn.58 above and the sources cited therein.

⁶⁶ GUCATI Appeal, KSC-BC-2020-07/IA004/F00003, para.29.

⁶⁷ See para.4 above

⁶⁸ Indictment, KSC-BC-2020-07/F00075/A01, paras 24, 36, 47-48.

furtherance of the common purpose or agreement,⁶⁹ and had the requisite knowledge and intent for the crimes and modes of liability;⁷⁰ and (iii) the elements of the relevant modes of liability, which require, *inter alia*, the Accused's agreement and intent to commit the crimes, and participation or contribution.⁷¹

23. Further, contrary to Defence submissions,⁷² the allegation in paragraph 47(i),⁷³ read in its proper context, clearly alleges that that Accused either: (i) physically committed the charged crimes; or (ii) committed the charged crimes in co-perpetration.⁷⁴ These alternatives are supported by the pleaded material facts,⁷⁵ which are ultimately to proven by the evidence at trial.⁷⁶

C. GROUND 5: THE INDICTMENT ADEQUATELY THE PLEADS MEANS OF FURTHER DISSEMINATION

24. The Pre-Trial Judge correctly found that the means of further dissemination following the First Disclosure and Third Disclosure⁷⁷ were pleaded with sufficient clarity and specificity using the phrase 'including in the press and online', considering that: (i) the manner in which the confidential information was allegedly revealed at press conferences and broadcasted events makes it impracticable to trace all the ways in which such confidential information was further disseminated; (ii) the means pleaded are those known on the basis of the evidence; (iii) use of the word 'including'

⁶⁹ Indictment, KSC-BC-2020-07/F00075/A01, para.40.

⁷⁰ Indictment, KSC-BC-2020-07/F00075/A01, paras 24, 36, 45-46. *See also* paras 5, 31.

⁷¹ Confirmation Decision, KSC-BC-2020-07/F00074, paras 82, 84, 93.

⁷² GUCATI Appeal, KSC-BC-2020-07/IA004/F00003, para.30.

⁷³ Indictment, KSC-BC-2020-07/F00075/A01, para.47 ('Through the acts and omissions described above, Hysni GUCATI and Nasim HARADINAJ: i. committed, alone and/or in co-perpetration, the crimes of obstructing official persons in performing official duties, intimidation during criminal proceedings, retaliation, and violating the secrecy of proceedings; [...]').

⁷⁴ Paragraph 47(i) of the Indictment is on its face, clear and in any event, as expressly stated, must be read in light of the 'acts and omissions described above', namely, the clearly pleaded facts pertaining to commission and co-perpetration. *See* Indictment, KSC-BC-2020-07/F00075/A01, paras 37, 39-40. *See also* paras 36, 45-46.

⁷⁵ Indictment, KSC-BC-2020-07/F00075/A01, paras 37 (for commission, referring to paragraphs 6-9, 11, 13-14, 16-18, 20), 39 (for co-perpetration, referring to paragraphs 6-9, 11-14, 16-18, and 20-21).

⁷⁶ *See* fn.58 above and the sources cited therein.

⁷⁷ As defined in the Indictment, *see* Indictment, KSC-BC-2020-07/F00075/A01, paras 8, 17.

signifies that, next to the pleaded and known forms of further dissemination, other, unknown forms of further dissemination may have also occurred; and (iv) the unknown forms of further dissemination do not impact on the charged offences or modes of liability.⁷⁸

25. The Defence fails to demonstrate any discernible error in the Impugned Decision resulting in prejudice.⁷⁹

26. The GUCATI Defence arguments in support of Ground 5 rest entirely on the unfounded assertion that the challenged allegation is meaningless.⁸⁰ To the contrary, consistent with the Impugned Decision, it accurately reflects the nature, scope, and circumstances of the Accused's alleged conduct and the potentially wide-ranging consequences thereof. As far as possible,⁸¹ the Indictment pleads the known means of further dissemination next to a detailed description of the public and indiscriminate nature of the Accused's public statements and conduct.⁸² Use of inclusive language is appropriate, as the relevant material fact is that confidential information was further disseminated following the First Disclosure and Third Disclosure. In this regard, liability in this case does not depend on any particular means of further dissemination, the full scope of which may never be known.⁸³ Additional details need not be pleaded in the Indictment and are matters for trial.

27. Finally, the HARADINAJ Defence submissions concerning Ground 5: (i) make general and abstract allegations of ambiguity expressing mere disagreement with the Impugned Decision and incapable of demonstrating any error;⁸⁴ (ii) address matters

⁷⁸ Impugned Decision, KSC-BC-2020-07/F00147, paras 70-71.

⁷⁹ See para.10 above and the sources cited therein.

⁸⁰ GUCATI Appeal, KSC-BC-2020-07/IA004/F00003, paras 35-37.

⁸¹ See Impugned Decision, KSC-BC-2020-07/F00147, paras 39, 41-42 and the sources cited therein (details need only be pleaded 'as far as possible' and 'as much as possible' provided necessary particulars have been provided to make out the elements of the crimes); STL Decision, para.14(m) and the sources cited therein (the Prosecution must offer its best understanding of the case in the Indictment based on the best information available).

⁸² See para.4 above.

⁸³ See fn.43 above and the sources cited therein.

⁸⁴ HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, paras 54-55, 59-62, 64.

unrelated to and exceeding the scope of the Certified Issues;⁸⁵ and (iii) impermissibly address the adequacy of the evidence and basis of the Confirmation Decision,⁸⁶ which exceed the scope of Rule 97 and these proceedings. These submissions should be summarily dismissed.

IV. RELIEF REQUESTED

28. For the foregoing reasons, the Panel should dismiss the Appeals in their entirety.

Word count: 5067



Jack Smith

Specialist Prosecutor

Friday, 23 April 2021

At The Hague, the Netherlands.

⁸⁵ The Haradinaj Defence challenges allegations concerning intimidation and the impact on and identities of victims and family members. *See* HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, paras 56-57. The Pre-Trial Judge correctly found that the Indictment adequately pleaded such matters in the circumstances of this case. *See* Impugned Decision, KSC-BC-2020-07/F00147, paras 57-60. The Defence did not seek leave to appeal such findings and they fall outside the scope of the Certified Issues. *See* Certification Decision, KSC-BC-2020-07/F00169, paras 5, 21.

⁸⁶ HARADINAJ Appeal, KSC-BC-2020-07/IA004/F00002, paras 58, 63.