



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-07**

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

Registrar: Fidelma Donlon

Date: 23 June 2021

Original language: English

Classification: **Public**

Decision on the Defence Appeals Against Decision on Preliminary Motions

Specialist Prosecutor's Office:

Jack Smith

Counsel for Hysni Gucati:

Jonathan Elystan Rees

Counsel for Nasim Haradinaj:

Toby Cadman

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers (“Court of Appeals Panel” or “Panel” and “Specialist Chambers”, respectively),¹ acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 169 of the Rules of Procedure and Evidence (“Rules”), is seised of the “Defence Submissions for Mr. Haradinaj on Appeal of Decision KSC-BC-2020- 07/F00147” (“Haradinaj Appeal”), filed on 13 April 2021 by Haradinaj,² and of the “Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 170(2)” (“Gucati Appeal”, collectively the “Appeals”) filed on 15 April 2021 by Gucati,³ challenging the “Decision on Defence Preliminary Motions” (“Impugned Decision”).⁴ The Specialist Prosecutor’s Office (“SPO”) responded on 23 April 2021 that the Appeals should be dismissed in their entirety.⁵ Haradinaj and Gucati (collectively the “Accused” or “Defence”) replied on 27 April 2021 and 30 April 2021, respectively.⁶

I. BACKGROUND

1. On 30 October 2020, the SPO submitted for confirmation a strictly confidential and *ex parte* indictment against Gucati and Haradinaj.⁷

¹ F00001, Decision Assigning a Court of Appeals Panel, 6 April 2021.

² F00002, Defence Submissions for Mr. Haradinaj on Appeal of Decision KSC-BC-2020-07/F00147, 13 April 2021 (“Haradinaj Appeal”).

³ F00003, Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 170(2), 15 April 2021 (“Gucati Appeal”).

⁴ F00147/RED, Public Redacted Version of Decision on Defence Preliminary Motions, 8 March 2021 (original version filed on 8 March 2021) (“Impugned Decision”).

⁵ F00004, Consolidated Prosecution response to interlocutory appeals of Decision on the Defence Preliminary Motions, 23 April 2021 (“Response”), para. 28.

⁶ F00005, Defence Reply to Consolidated Prosecution Response to Interlocutory Appeals of Decision on the Defence Preliminary Motions, 27 April 2021 (“Haradinaj Reply”) (confidential); F00006, Reply to Prosecution Response to Notice of Interlocutory Appeal with Leave from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 170(2), 30 April 2021 (“Gucati Reply”).

⁷ F00063, Submission of Indictment for confirmation and related requests, 30 October 2020 (strictly confidential and *ex parte*, reclassified as confidential on 24 February 2021); F00063/A01, Indictment, 30 October 2020 (strictly confidential and *ex parte*, reclassified as confidential on 24 February 2021).

2. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment against Gucati and Haradinaj and ordered the SPO to submit a revised indictment, as confirmed.⁸ On 14 December 2020, the SPO submitted the operative Indictment.⁹

3. On 2 and 4 February 2021, Gucati and Haradinaj submitted their respective preliminary motions alleging defects in the form of the Indictment.¹⁰ On 10 February 2021, the SPO filed a consolidated response.¹¹ On 15 and 16 February 2021, respectively, Haradinaj and Gucati submitted their replies.¹²

4. On 8 March 2021, the Pre-Trial Judge issued the Impugned Decision, rejecting Gucati's and Haradinaj's preliminary motions.¹³ In particular, the Pre-Trial Judge dismissed Gucati's challenge to the form of the Indictment, joined by Haradinaj, and the former's request for the Indictment to be amended or alternatively dismissed.¹⁴ The Pre-Trial Judge found that the Indictment sets out with sufficient clarity and specificity the facts underpinning the charges, including the modes of liability charged.¹⁵

⁸ F00074/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment, 22 December 2020 (original version filed on 11 December 2020) ("Confirmation Decision"), para. 155.

⁹ F00075/A02, Redacted Indictment, 14 December 2020 (strictly confidential, reclassified as public on 14 December 2020) ("Indictment").

¹⁰ F00113/RED, Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b), 3 February 2021 (original version filed on 2 February 2021) ("Gucati Preliminary Motion"); F00116/RED, Amended Filing with Public Redactions – Preliminary Motion on the Issue of the Indictment Being Defective, 31 March 2021 (original version filed on 4 February 2021).

¹¹ F00120/RED, Public Redacted Version of 'Consolidated Prosecution response to preliminary motions', KSC-BC-2020-07/F00120, dated 10 February 2021, 22 February 2021 (original version filed on 10 February 2021).

¹² F00126, Defence Reply to Prosecution Response to Preliminary Motion, 15 February 2021 (confidential, reclassified as public on 30 March 2021); F00128/RED, Public Redacted Version of Reply to Prosecution Response to Preliminary Motion, 18 March 2021 (original version filed on 16 February 2021).

¹³ Impugned Decision, paras 18-72.

¹⁴ Impugned Decision, paras 35-72.

¹⁵ Ibid.

5. On 15 March 2021, Gucati sought leave to appeal the Impugned Decision on five issues,¹⁶ joined on the same day by Haradinaj (collectively “Certification Requests”).¹⁷ On 25 March 2021, the SPO submitted a consolidated response, requesting that the Certification Requests be rejected in their entirety.¹⁸ On 31 March 2021, Gucati filed a reply.¹⁹

6. On 1 April 2021, the Pre-Trial Judge certified the five issues raised by Gucati (“Certified Issues”),²⁰ defined as follows:

(a) Whether the Pre-Trial Judge erred in finding that references in the Indictment to co-perpetrators, in the absence of further particulars as to their identities, are sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability (“Issue 1”);²¹

(b) Whether the Pre-Trial Judge erred in finding that references in the Indictment to accomplices, in the absence of further particulars as to their identities, are sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability (“Issue 2”);²²

(c) Whether the Pre-Trial Judge erred in finding that references in the Indictment to assisted or incited persons, in the absence of further particulars as to their

¹⁶ F00151, Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 77(1), 15 March 2021, para. 3.

¹⁷ F00153, Application for Leave to Appeal through Certification from Decision KSC-BC-2020-07/F00147 pursuant to Article 45(2) and Rule 77(1), 15 March 2021 (confidential, reclassified as public on 1 April 2021).

¹⁸ F00161, Prosecution response to applications for leave to appeal the Decision on Defence Preliminary Motions, 25 March 2021, para. 13.

¹⁹ F00168, Reply to Prosecution Response to Applications for Leave to Appeal the Decision on Defence Preliminary Motions (F00161), 31 March 2021.

²⁰ F00169, Decision on the Defence Applications for Leave to Appeal the Decision on the Defence Preliminary Motions, 1 April 2021 (“Decision Granting Leave to Appeal”), paras 5, 21, 34, 36.

²¹ Decision Granting Leave to Appeal, paras 5, 21.

²² Ibid.

identities, are sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability (“Issue 3”);²³

(d) Whether the Pre-Trial Judge erred in finding that the alternative formulations (“and/or”) used in relation to the Accused, co-perpetrators or accomplices are, in the specific instances of the Indictment, sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability (“Issue 4”);²⁴ and

(e) Whether the Pre-Trial Judge erred in finding that open-ended formulations used in relation to known and unknown forms of further dissemination are, in the specific instances of the Indictment, sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability (“Issue 5”).²⁵

7. On 9 June 2021, the Pre-Trial Judge set as tentative date for the transmission of the case file under Rule 98(1) of the Rules Friday, 2 July 2021, provided that the preliminary motions have been disposed of by the Court of Appeals Panel.²⁶

II. STANDARD OF REVIEW

8. The Court of Appeals Panel previously decided to apply *mutatis mutandis* to interlocutory appeals the standard of review provided for appeals against judgments under Article 46(1) of the Law.²⁷ Article 46(1) of the Law specifies, in relevant part, the following grounds of appeal:

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ F00224, Revised Calendar for the Remainder of the Pre-Trial Proceedings and Order Setting the Date for the Sixth Status Conference, 9 June 2021, para. 29(d).

²⁷ F00005, Decision on Hysni Gucati’s Appeal on Matters Related to Arrest and Detention, 9 December 2020 (“Gucati Appeal Decision”), paras 4-13; F00005, Decision on Nasim Haradinaj’s Appeal Against Decision Reviewing Detention, 9 February 2021 (“Haradinaj Appeal Decision”), paras 11-13.

- (i) an error on a question of law invalidating the judgement;
- (ii) an error of fact which has occasioned a miscarriage of justice;
or
- (iii) [...].

9. The Law states in relation to errors of law that:

When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case to the Trial Panel to review its findings and the evidence based on the correct legal standard.²⁸

10. Regarding errors of fact, the Law provides the following:

In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact or where the evaluation of the evidence is wholly erroneous.²⁹

11. If challenging a discretionary decision, the appellant must demonstrate that the lower level panel has committed a discernible error in that the decision is: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the lower level panel's discretion.³⁰ The Court of Appeals Panel will also consider whether the lower level panel has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.³¹

²⁸ Article 46(4) of the Law.

²⁹ Article 46(5) of the Law.

³⁰ *Gucati* Appeal Decision, para. 14; *Haradinaj* Appeal Decision, para. 14.

³¹ *Ibid.*

III. DISCUSSION

A. PRELIMINARY MATTERS

1. Reclassification

12. The Court of Appeals Panel notes that the Haradinaj Reply has been filed confidentially, that no reason for such classification has been stated, and that it does not appear warranted.

13. Considering that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential,³² and finding no basis for maintaining the confidential classification, the Panel accordingly orders the Registry to reclassify the Haradinaj Reply (F00005) as public.

2. Formal Requirements on Appeal

14. For the Court of Appeals Panel to assess a party's arguments on appeal, the party is expected to present its case clearly, logically and exhaustively. In addition, the Panel may dismiss submissions as unfounded without further reasoning, if a party's submissions are "obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".³³ The Panel recalls that "an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".³⁴ The Panel's functions

³² See KSC-BC-2020-06, F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021, para. 10. See also e.g. ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Decision on Prosecution's Motion for Summary Dismissal or Alternative Remedies, 5 July 2013, para. 9.

³³ ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement"), para. 16; ICTY, *Prosecutor v. Martić*, IT-95-11-A, Judgement, 8 October 2008, para. 14; ICTY, *Prosecutor v. Strugar*, IT-01-42-A, Judgement, 17 July 2008, para. 16; ICTY, *Prosecutor v. Orić*, IT-03-68-A, Judgement, 3 July 2008, paras 13-14.

³⁴ ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-1019, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, para. 69.

cannot be effectively and efficiently carried out without focused, structured, clear and well-reasoned submissions by the parties.

15. When applying these basic principles, the Panel has identified, as a general matter, the following arguments as warranting summary dismissal: (i) arguments irrelevant to the Impugned Decision or arguments raised for the first time on appeal; (ii) arguments that fail to identify the challenged findings or misrepresent the findings; and (iii) mere assertions unsupported by any evidence, undeveloped assertions, or failures to articulate errors.³⁵ The Panel will identify within its discussion which of Haradinaj's and Gucati's arguments are to be summarily dismissed on this basis.

16. Additionally, the Court of Appeals Panel notes several instances in which both Accused's Appeals and Replies (collectively "Defence Appeal Submissions") either do not substantiate their arguments with any specific reference to the applicable law, case-law³⁶ or filings,³⁷ and/or provide incomplete or incorrect references.³⁸ The Panel notes in particular that on numerous occasions Haradinaj does not use any footnotes,³⁹ fails to refer to the Impugned Decision,⁴⁰ and mentions filings without indicating the precise reference and relevant paragraphs.⁴¹

³⁵ See e.g. ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgement, 19 July 2010, paras 13, 112; *Krajišnik Appeal Judgement*, paras 18-19, 26; ICTY, *Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007, paras 24, 26.

³⁶ See e.g. Haradinaj Appeal, para. 43 (mention of "previous cases before tribunals" without concretely citing these cases).

³⁷ See e.g. Haradinaj Appeal, paras 18-19, 23, 26, 32, 50; Gucati Appeal, paras 10, 17-18, 20.

³⁸ See e.g. Haradinaj Appeal, fns 13, 15, 18, 27 (no reference is made to the relevant paragraph(s) of the authorities cited); Gucati Appeal, fns 21-22, 24, 27, 29 (no reference is made to the titles of the authorities cited or an erroneous paragraph is provided).

³⁹ See e.g. Haradinaj Reply.

⁴⁰ See e.g. Haradinaj Appeal, paras 54-64 (under Ground 5, no reference is made to the Impugned Decision).

⁴¹ See e.g. Haradinaj Appeal, paras 19, 23, 26, 30, 32, 40, 50 and Haradinaj Reply, paras 7-8, 15 (mention of the SPO's Pre-Trial Brief without indicating relevant paragraphs).

17. The Panel recalls that a party cannot simply refer to the jurisprudence of other courts and tribunals without indicating the precise source of such information. In that regard, the Panel stresses that, pursuant to the Registry Practice Direction “Files and Filings before the Kosovo Specialist Chambers” (“Practice Direction”), interlocutory appeals shall notably contain the grounds of appeal and the arguments in support of the grounds “with specific reference to applicable law relied upon”.⁴² In this respect, Article 32(2) of the Practice Direction provides that “[r]eferences to a Filing, transcript or other authority shall be placed in footnotes.” The Panel further recalls that “[e]ach reference shall, at a minimum, indicate the date and title of the Submission and, where applicable, the file number, the file name and the relevant paragraph or page number.”⁴³ However, in the interest of justice, the Panel will nonetheless consider the Defence Appeal Submissions in this instance. At any rate, the Panel reminds the Parties to abide strictly by the Practice Direction in any future filing.

3. Issues Falling Outside the Scope of the Appeals

18. The Court of Appeals Panel recalls that, according to Article 45(2) of the Law and Rule 77 of the Rules, any interlocutory appeal other than the ones relating to detention on remand or preliminary motions challenging the jurisdiction of the Specialist Chambers, must first be granted leave to appeal through certification by the Pre-Trial Judge or Trial Panel on the basis that it involves an issue which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and for which, in the opinion of the Pre-Trial Judge or Trial Panel, an immediate resolution by a Court of Appeals Panel may materially advance proceedings.

19. Appeals against decisions on preliminary motions under Rule 97(1)(b) of the Rules alleging defects in the Indictment fall into this category, as per Rule 97(3) of the

⁴² KSC-BD-15, Registry Practice Direction, Files and Filings before the Kosovo Specialist Chambers, 17 May 2019 (“Practice Direction”), Article 46(1).

⁴³ Practice Direction, Article 32(2).

Rules. Haradinaj and Gucati filed their Appeals after having sought and being granted certification by the Pre-Trial Judge to appeal the Certified Issues in the Impugned Decision.⁴⁴ The Pre-Trial Judge granted all the issues raised for certification.

20. Pursuant to Rule 170(2) of the Rules, an appeal shall be filed exclusively in respect of the issues certified by the lower panel. The scope of the Court of Appeals Panel's review therefore lies strictly within the confines of the issues certified by the Pre-Trial Judge in the Decision Granting Leave to Appeal.⁴⁵ It is for the Pre-Trial Judge or the Trial Panel to determine not only whether a decision may be appealed, but also to what extent.⁴⁶ The Panel may thus decline to consider arguments of an appellant that go beyond the issue in relation to which certification has been granted.⁴⁷ Furthermore, the Panel recalls that it will only decide issues that actually arise from

⁴⁴ Decision Granting Leave to Appeal, paras 5, 21, 34, 36.

⁴⁵ This is also in line with the Roman Law principles *tantum devolutum quantum appellatum* and *ne ultra petita* (*ne eat iudex ultra petita partium*).

⁴⁶ See e.g. ICC, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-572, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 16 December 2013, para. 63; ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-744, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, para. 13; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.6, Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on the Oneissi Defence's Request for Disclosure Regarding a Computer", 12 May 2014 ("*Ayyash et al.* Decision of 12 May 2014"), para. 11.

⁴⁷ See e.g. STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge's Decision on Protective Measures, 10 April 2013, para. 22; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2582, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the WVU", 8 October 2010, para. 45; ICC, *Prosecutor v. Kony et al.*, ICC-02/04-179, Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06" of Pre-Trial Chamber II, 23 February 2009, para. 32. See also ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.14, Decision on the Interlocutory Appeal Against the Trial Chamber's Decision on Presentation of Documents by the Prosecution in Cross-Examination of Defence Witnesses, 26 February 2009, para. 17.

the Impugned Decision, which here adjudicates the challenges to the form of the Indictment raised by the Defence pursuant to Rule 97(1)(b) of the Rules.⁴⁸

21. Before addressing their substance, the Panel will assess whether the Defence Appeal Submissions exceed the scope of the Certified Issues.

22. The Panel first notes that, under Ground 5, the Haradinaj Appeal contains submissions on the alleged lack of specificity of pleadings on the victims and/or their family members, as well as on the forms of intimidation and actions constituting intimidation.⁴⁹ The Panel recalls that Haradinaj raised similar arguments in another filing before the Court of Appeals Panel.⁵⁰ It is unclear from the content of Haradinaj's submissions in his Appeal how these arguments relate to the pleading of known and unknown forms of further dissemination in the Indictment, which is the subject matter of Issue 5.⁵¹ Accordingly, these arguments fall outside of the scope of the Certified Issues, as defined in the Decision Granting Leave to Appeal. As Haradinaj chose to refrain from seeking certification to appeal these issues from the Impugned Decision pursuant to Rule 77 of the Rules, they are not properly brought before the Panel.⁵² The Panel therefore declines to consider Haradinaj's arguments in this regard and formally dismisses these challenges.

⁴⁸ *Ayyash et al.* Decision of 12 May 2014, para. 11.

⁴⁹ Haradinaj's arguments relate to the allegations of intimidation and centre around the Indictment allegedly failing to specify the actions constituting intimidation, the victims thereof and the consequences suffered by them. See Haradinaj Appeal, paras 54-57, 59-62, 64, 77.

⁵⁰ See F00005, Decision on the Admissibility of Appeal and Joinder Against Decision on Preliminary Motions, 12 May 2021, paras 17-18. The Court of Appeals Panel indicated that, because they pertained to a challenge to the form of the Indictment rather than a challenge to the jurisdiction of the Specialist Chambers, the admissibility of these arguments – as well as, if applicable, their merits – would be addressed in another decision. See also F00001, Appeal in Respect of the Decision on Defence Preliminary Motion, 18 March 2021 (confidential, reclassified as public on 12 May 2021), paras 71-77, 80, referring to Impugned Decision, para. 60.

⁵¹ Decision Granting Leave to Appeal, para. 21 and fn. 38 citing Impugned Decision, paras 44, 70. See also above, para. 6.

⁵² The Panel notes that the SPO submits that such arguments should be dismissed on those grounds. See Response, paras 1, 6, 27, fn. 85.

23. In addition, the Court of Appeals Panel notes that Haradinaj makes submissions pertaining to the adequacy of the SPO investigation, the evidentiary basis for the confirmation of the Indictment and the nature of the evidence that will be adduced at trial.⁵³ The Panel finds that these arguments not only fall outside the scope of the Certified Issues, but also do not constitute challenges to the form of the Indictment under Rule 97(1)(b) of the Rules and as such do not arise from the Impugned Decision.⁵⁴ Haradinaj's arguments on this matter are therefore not properly brought before the Panel. The Panel consequently declines to consider them and formally dismisses these challenges.

B. CHALLENGES

1. Alleged errors concerning the Pre-Trial Judge's finding on the lack of particularity in the Indictment as to the identities of co-perpetrators, accomplices and/or assisted or incited persons (Grounds 1-3)

24. The Court of Appeals Panel finds that the first, second and third grounds of appeal presented by Haradinaj and Gucati substantially overlap, as they all relate to the identification of other people allegedly involved in the charged offences; therefore, these grounds will be considered together.

(a) Submissions of the Parties

25. Haradinaj first submits that, when an individual is accused of having committed offences through or with others – others being co-perpetrators, accomplices and/or assisted or incited persons – those others need to be sufficiently identified in the indictment, including identification by name if known.⁵⁵ He contends that these constitute material facts that have to be pleaded in the Indictment.⁵⁶

⁵³ See Haradinaj Appeal, paras 24-29, 40, 47, 58, 63.

⁵⁴ The Panel notes that the SPO submits that such arguments should be dismissed on those grounds. See Response, paras 1, 6, 11, 18, fns 34, 55.

⁵⁵ Haradinaj Appeal, para. 17. See also Haradinaj Reply, paras 19-20.

⁵⁶ Haradinaj Appeal, paras 68-69, 71-73, 75. See also Haradinaj Reply, paras 19-20.

Haradinaj argues that the Pre-Trial Judge erred in concluding that additional details in that regard did not need to be further pleaded in the Indictment.⁵⁷

26. Haradinaj submits that the Pre-Trial Judge erred in finding that the nature of the purported events, such as the holding of press conferences and broadcasted events, and the number of persons allegedly involved, “do not allow for the identification of each co-perpetrator or accomplice by name”.⁵⁸ He submits that, on the contrary, it appears from the content of the Pre-Trial Brief that the SPO was in fact in a position to identify the alleged co-perpetrators in the Indictment and should have done so.⁵⁹ He argues that the Pre-Trial Judge’s error is “compounded” by the submission of the SPO Pre-Trial Brief, which “departs” from the Indictment.⁶⁰

27. Similarly, Haradinaj submits that the Pre-Trial Judge erred in finding that, since the charged offences and modes of liability depend solely on the conduct of the two Accused, additional details as to the names of the assisted or incited persons need not be pleaded further in the Indictment and “can be addressed at trial”.⁶¹

28. Haradinaj further argues that the Pre-Trial Judge erred in finding that the reference in the Indictment to “unknown individuals” did not create ambiguity.⁶² He avers that the Pre-Trial Judge erred in finding that these issues do not constitute defects within the Indictment but constitute evidential issues that should be addressed at trial.⁶³

⁵⁷ Haradinaj Appeal, paras 19, 30, 38-39, 65-66, 70, 76. See also Haradinaj Reply, para. 6.

⁵⁸ Haradinaj Appeal, paras 21-22, referring to Impugned Decision, para. 51.

⁵⁹ Haradinaj Appeal, para. 23, referring in general – without providing specific references – to F00181/A01, Specialist Prosecutor’s Pre-Trial Brief in the case against Hysni Gucati and Nasim Haradinaj, 9 April 2021 (confidential) (“Pre-Trial Brief”). See also Haradinaj Appeal, paras 19, 32, 50; Haradinaj Reply, paras 7-8, 15, 17-18.

⁶⁰ Haradinaj Appeal, para. 30.

⁶¹ Haradinaj Appeal, paras 35-36, referring to Impugned Decision, para. 52. See also Haradinaj Appeal, paras 37-38.

⁶² Haradinaj Appeal, para. 39, referring to Impugned Decision, para. 53. See also Haradinaj Appeal, paras 41, 65-66.

⁶³ Haradinaj Appeal, paras 40, 62-63, 67.

29. Haradinaj submits that these ambiguities in the Indictment force the Accused to defend himself “in the abstract”, which prejudices him and impacts his right to a fair trial.⁶⁴

30. Gucati, in turn, submits that the Pre-Trial Judge erred in finding that the Indictment was not defective in the absence of further particulars as to the identity of alleged co-perpetrators, accomplices, and assisted or incited persons.⁶⁵ Gucati argues that their identities, if known, must be provided in the Indictment.⁶⁶

31. Gucati submits that the Pre-Trial Judge contradicted himself and erred in law when finding that the nature of the events and the number of persons involved “do not allow for the identification of each co-perpetrator or accomplice by name”, in light of his earlier statement that such particulars had to be provided when known and given that the SPO is able to identify one or more alleged co-perpetrators.⁶⁷ Gucati adds that the same applies to the assisted or incited persons.⁶⁸ He contends that the Pre-Trial Judge did not find, and it was not open to him to find, that it was impossible for the SPO to identify by name any alleged co-perpetrator or any alleged assisted or incited person.⁶⁹

32. Gucati submits that the above-mentioned ambiguities affecting the Indictment may divert the trial process by obliging the Parties and the Trial Panel to examine “in an unfocussed manner” the allegations of co-perpetrators, accomplices, and assisted or incited persons.⁷⁰ In his view, although the Pre-Trial Brief identifies two additional alleged co-perpetrators left unnamed in the Indictment, it remains vague and ambiguous and does not provide further details as to other missing identities.⁷¹ Gucati

⁶⁴ Haradinaj Appeal, paras 28, 38, 64, 74, 78, 81-82. See also Haradinaj Reply, paras 18-19.

⁶⁵ Gucati Appeal, paras 5, 13-14, 18, 24-25. See also Gucati Reply, paras 8, 10.

⁶⁶ Gucati Appeal, paras 13, 16, 21-22.

⁶⁷ Gucati Appeal, paras 10-13, 18, 25. See also Gucati Appeal, paras 7-8, 24.

⁶⁸ Gucati Appeal, para. 23.

⁶⁹ Gucati Appeal, paras 11, 23.

⁷⁰ Gucati Appeal, para. 41.

⁷¹ Gucati Reply, paras 13-14.

argues that, in any case, the Pre-Trial Brief cannot and in this case does not “cure” the defects in the Indictment.⁷² Gucati finally requests that the SPO be ordered to provide an amended indictment containing the necessary details in relation to the matters in Certified Issues 1 to 3.⁷³

33. The SPO responds that the Pre-Trial Judge correctly applied Articles 21(4)(a) and 38(4) of the Law and Rule 86(3) of the Rules when finding that the Indictment “sets out with sufficient clarity and specificity the facts underpinning the charges and the crimes, including the modes of liability”,⁷⁴ and argues that nothing in the Impugned Decision was so unfair or unreasonable as to constitute an abuse of discretion.⁷⁵ The SPO considers that the Appeals ignore both the applicable legal framework and the specificities of the case.⁷⁶

34. The SPO submits that the Indictment sufficiently identifies co-perpetrators, accomplices, and incited or assisted persons by referring to a group or category, including by referring to certain events or affiliations.⁷⁷ According to the SPO, further specificity is unnecessary for the Accused to prepare because: (i) the Indictment describes in detail “the relevant context and the events in which these groups are alleged to have taken part”; and (ii) the alleged statements and conduct of the Accused at the events involved a large group of people, including journalists and members of the public in possession of confidential information.⁷⁸ The SPO submits that the identities of specific group members constitute evidentiary details that need not be pleaded in the Indictment.⁷⁹ According to the SPO, the evidentiary details sought by the Defence have been or will be provided, notably in the Pre-Trial Brief and in

⁷² Gucati Reply, para. 15. See also Gucati Reply, paras 11-12.

⁷³ Gucati Appeal, para. 44. See also Gucati Reply, paras 10, 16.

⁷⁴ Response, para. 1, referring to Impugned Decision, para. 72. See also Response, para. 7.

⁷⁵ Response, para. 1.

⁷⁶ Response, paras 7, 12.

⁷⁷ Response, para. 13.

⁷⁸ Response, paras 13-14.

⁷⁹ Response, para. 14.

disclosed materials, enabling the Defence to fully prepare.⁸⁰ As a result, any amendment of the Indictment is unjustified.⁸¹

(b) Assessment of the Court of Appeals Panel

35. As rightly recalled by the Pre-Trial Judge in the Impugned Decision, in accordance with Articles 21(4)(a) and 38(4) of the Law, as well as Rule 86(3) of the Rules, an indictment must set forth with sufficient specificity and clarity the facts underpinning the charged crimes, including the modes of liability charged.⁸² This ensues directly from the principle that the Accused has to be informed of the nature and cause of the accusation against him or her, as enshrined in Article 30(1) of the Constitution of Kosovo and Article 6(3)(a) of the European Convention on Human Rights.

36. As an important element of the guarantee of a fair trial, firmly established jurisprudence from international criminal tribunals provides that judges can only convict an accused of crimes that are charged in the indictment.⁸³ The charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused and enable

⁸⁰ Response, para. 15.

⁸¹ *Ibid.*

⁸² Impugned Decision, para. 38 and references cited therein. See KSC-BC-2020-06, F00010, Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, 2 July 2020 (strictly confidential and *ex parte*, reclassified as public on 20 November 2020) (“*Thaçi et al.* Rule 86(4) Order”), paras 8, 10. See also Ambos, K., *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Oxford University Press 2016 (“*Ambos, Treatise on International Criminal Law III*”), p. 347 (internal footnotes omitted): With regard to the charging document, “[t]he relevant provisions [of the legal instruments of different international courts] require, generally, a concise, detailed, and self-contained statement of both the alleged facts and the respective crimes to be attributed to the person(s) charged. More concretely, it must be specified ‘the name and particulars of the suspect’, the ‘full name’ and ‘any other relevant identifying information’, ‘the time and place of the alleged crimes’ as well as a ‘legal characterization of the facts’, including the ‘precise form of participation’.”

⁸³ ICTR, *Rukundo v. Prosecutor*, ICTR-2001-70-A, Judgement, 20 October 2010, para. 29; ICTR, *Muvunyi v. Prosecutor*, ICTR-2000-55A-A, Judgement, 1 April 2011, para. 19; ICTR, *Prosecutor v. Munyakazi*, ICTR-97-36A-A, Judgement, 28 September 2011, para. 36.

him or her to prepare a meaningful defence.⁸⁴ As held by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”):

There is a clear distinction between counts or charges made in an indictment and the material facts that underpin that charge or count. The count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts).⁸⁵

37. The Panel further recalls that the Prosecution is expected to know its case before it goes to trial. Even where it is impracticable or impossible to provide full details of a material fact, the Prosecution must indicate its best understanding of the case against the accused, and the trial should only proceed where the right of the accused to know the case against him or her and to prepare his or her defence has been assured.⁸⁶

38. As recalled by the Pre-Trial Judge in the Impugned Decision, the Indictment does not need to set out the evidence proving the pleaded material facts underpinning the charges.⁸⁷ In addition, whether a fact is “material” cannot be decided in the abstract

⁸⁴ Impugned Decision, para. 38 and references cited in fn. 61; ICTR, *Mugenzi and Mugiraneza v. Prosecutor*, ICTR-99-50-A, Judgement, 4 February 2013, para. 116; ICTR, *Ndindiliyimana et al. v. Prosecutor*, ICTR-00-56-A, Judgement, 11 February 2014, para. 171; ICTY, *Prosecutor v. Šainović et al.*, IT-05-87-A, Judgement, 23 January 2014 (“*Šainović et al. Appeal Judgement*”), paras 213, 225, 262. See also ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-1562, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’, 17 July 2019, para. 69.

⁸⁵ ICTR, *Prosecutor v. Muvunyi*, ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 2005, para. 19.

⁸⁶ ICTY, *Prosecutor v. Đorđević*, IT-05-87/1, Judgement, 27 January 2014, para. 575. See also ICTY, *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka et al. Appeal Judgement*”), para. 28; ICTY, *Prosecutor v. Simić*, IT-95-9-A, Judgement, 28 November 2006 (“*Simić Appeal Judgement*”), para. 71; ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Judgement, 29 November 2017 (“*Prlić et al. Appeal Judgement*”), para. 30.

⁸⁷ Impugned Decision, para. 40 and references cited therein. See ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Judgement, 23 October 2001 (“*Kupreškić et al. Appeal Judgement*”), para. 88; ICTR, *Uwinkindi v. Prosecutor*, 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. 4; *Simić Appeal Judgement*, para. 20. See also Ambos, *Treatise on International Criminal Law III*, pp. 347-348.

but on a case-by-case basis, and depends on the nature of the Prosecution's case.⁸⁸ An indictment is defective when it fails to plead the facts underpinning the charges or it does so in an insufficient or unclear manner, creating ambiguity as regards the pleaded charges, including the modes of liability, and thus impairing the Defence's ability to prepare.⁸⁹ Further fundamental principles are recalled throughout this Decision when relevant to a specific issue.

39. The Panel will first address whether the identity of the co-perpetrators and accomplices constitutes a material fact that should have been pleaded in the Indictment, as alleged by Haradinaj and Gucati in their Appeals. At the outset, the Panel notes that, although Gucati and Haradinaj challenge the lack of particulars with regard to "co-perpetrators" and "accomplices" separately, the Indictment does not seem to distinguish between the two terms and rather indistinctly refers to "Associates" and "others".⁹⁰ Likewise, in the Impugned Decision, the Pre-Trial Judge considered co-perpetrators and accomplices jointly when determining whether their identities had to be included in the Indictment.⁹¹ Moreover, the requirements for the notice to be provided in the Indictment do not differ for the two categories, according to the jurisprudence of international criminal tribunals.⁹² As a result, the Panel will address the Defence's arguments in that regard together.

40. When addressing the particulars to be provided in the Indictment, the Pre-Trial Judge stated in the Impugned Decision that, where the alleged offences are by their nature directed against a group or collectivity of people, the accused must be provided

⁸⁸ Impugned Decision, para. 39 and references quoted therein. See *Kupreškić et al.* Appeal Judgement, para. 89; ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 210; *Uwinkindi* Appeal Decision, para. 4.

⁸⁹ Impugned Decision, para. 46 and references cited therein.

⁹⁰ See e.g. Indictment, paras 25-26, 28-31, 33-34, 39, 41, 44-46. Although the use of the term "associates" may, in certain circumstances, give rise to some ambiguity with regard to the modes of liability, the Panel finds however that, in the context of the present Indictment, it is clear that such term refers to co-perpetrators and accomplices.

⁹¹ See Impugned Decision, para. 51.

⁹² See below, para. 45 and references cited therein.

with as much detailed information as possible regarding, *inter alia*, the identities of any alleged co-perpetrator, if known.⁹³ He further stated that, when such identities cannot be established, the co-perpetrators can be identified by pseudonym, affiliation or group, and that there is no requirement to identify all individuals involved in the offences who are not considered to be co-perpetrators of the charged offences.⁹⁴

41. The Pre-Trial Judge then considered that, while the events alleged in the Indictment “revolve around the alleged acts and statements of the two Accused”, other individuals are also alleged to have been involved. He however found that the nature of the events and the “number of persons [...] involved in the events” do not allow for the identification of each co-perpetrator or accomplice by name.⁹⁵ According to the Pre-Trial Judge, the Indictment identifies these individuals by group⁹⁶ and identifies “at least one individual from [that] group also by affiliation”, namely as a “representative of the KLA WVA [Kosovo Liberation Army War Veterans Association]”.⁹⁷ The Pre-Trial Judge considered that, since the charged offences and modes of liability depend “solely on the conduct of the two Accused” save for one count, additional details as regards co-perpetrators or accomplices do not need to be further pleaded in the Indictment and can be addressed at trial.⁹⁸ He added, to that end, that such “evidentiary” details are contained in the Rule 86(3)(b) Outline submitted by the SPO as an annex to the Indictment and in the Confirmation Decision.⁹⁹

42. The Panel agrees with the Pre-Trial Judge that the degree of specificity to be provided in an indictment depends on the nature and circumstances of the case.¹⁰⁰ The

⁹³ Impugned Decision, para. 41, referring, *inter alia*, to *Thaçi et al.* Rule 86(4) Order, para. 18.

⁹⁴ Impugned Decision, para. 42.

⁹⁵ Impugned Decision, para. 51.

⁹⁶ Impugned Decision, para. 51, referring to Indictment, paras 6-7, 16, 30.

⁹⁷ Impugned Decision, para. 51, referring to Indictment, para. 16.

⁹⁸ Impugned Decision, para. 51 (emphasis added).

⁹⁹ Impugned Decision, para. 51, referring, *inter alia*, to F00063/A02, Rule 86(3)(b) Outline, 30 October 2020 (confidential) (“Rule 86(3)(b) Outline”).

¹⁰⁰ See Impugned Decision, paras 39, 51.

Panel recalls that decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case are the Prosecution's characterisation of the alleged criminal conduct, the proximity of the accused to the events or underlying offences and the scale of the alleged crimes.¹⁰¹

43. In the present case, the Panel observes that the Accused are alleged to have directly carried out the crimes charged. The Panel recalls that, when the proximity of an accused to the alleged criminal conduct is high, the pleading requirements are more rigorous.¹⁰²

44. The Panel further notes the Pre-Trial Judge's assertion that, save for one count, the charged offences and modes of liability depend *solely* on the conduct of the two Accused.¹⁰³ However, the Indictment in fact also directly involves other co-perpetrators, and the modes of liability of co-perpetration and agreement to commit criminal offence are pleaded for each count.¹⁰⁴ That the alleged acts do not only involve Gucati and Haradinaj but also other co-perpetrators is plainly demonstrated by the fact that the Indictment specifies that Gucati, Haradinaj *and* "Associates" committed each crime charged in co-perpetration and/or agreed to commit such crime.¹⁰⁵ This is further reflected in the Confirmation Decision, which systematically mentions these "Associates" alongside the Accused when describing the charged offences.¹⁰⁶

¹⁰¹ *Blaškić* Appeal Judgement, para. 210; *Kvočka et al.* Appeal Judgement, para. 28; *Prlić et al.* Appeal Judgement, para. 28; *Uwinkindi* Appeal Decision, para. 5; IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Dick Prudence Munyeshuli's Motion Alleging Defects in the Indictment, 12 March 2019 ("*Turinabo et al.* Decision"), para. 6; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Judgment pursuant to Article 74 of the Statute ("*Bemba* Trial Judgement"), 21 March 2016, para. 34.

¹⁰² Cf. *Turinabo et al.* Decision, para. 15; *Kvočka et al.* Appeal Judgement, para. 65 (As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the Prosecution relies to establish his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him).

¹⁰³ See Impugned Decision, para. 51.

¹⁰⁴ Indictment, paras 39, 47. Save for Count 2 with regard to co-perpetration. See Confirmation Decision, para. 87.

¹⁰⁵ See Indictment, paras 25, 29, 31, 33-34, 39.

¹⁰⁶ See Confirmation Decision, paras 100-106, 108-123, 125.

45. The Panel recalls the established principle that the Prosecutor is required, in an indictment, to identify co-perpetrators at a minimum by category or group, and to provide their specific identities when known.¹⁰⁷ For instance, where a Prosecutor alleges liability pursuant to a joint criminal enterprise, the indictment must specify, *inter alia*, the identities of its members.¹⁰⁸ Likewise, where an accused is charged on the basis of a common plan to commit crimes, detailed information regarding, *inter alia*, the identities of any alleged co-perpetrators must be provided.¹⁰⁹ Although it is not necessary or always possible to name each of the individuals involved,¹¹⁰ if the identities of some members cannot be individually identified, they should be identified by referring to categories or groups of persons, rather than by referring to “others”.¹¹¹ Based on the above-mentioned principles, the Panel considers that the same requirements with regards to co-perpetrators should apply when the

¹⁰⁷ *Uwinkindi* Appeal Decision, para. 15; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-PT, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, 31 May 2006, para. 40; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-A, Judgement, 14 December 2015 (“*Nyiramasuhuko et al. Appeal Judgement*”), para. 494; ICTR, *Renzaho v. Prosecutor*, ICTR-97-31-A, Judgement, 1 April 2011, para. 64; cf. also for co-conspirators: *Nyiramasuhuko et al. Appeal Judgement*, para. 474; STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/TC, Decision on Alleged Defects in the Form of the Amended Indictment of 21 June 2013, 13 September 2013, para. 42.

¹⁰⁸ ICTR, *Prosecutor v. Bagaragaza*, ICTR-05-86-I, Decision on the Prosecutor’s Application for Leave to Amend the Indictment, 30 November 2006, para. 12; ICTY, *Prosecutor v. Pavković et al.*, IT-03-70-PT, Decision on Vladimir Lazarević’s Preliminary Motion on Form of Indictment, 8 July 2005 (“*Lazarević Decision*”), para. 25; IRMCT, *Ngirabatware v. Prosecutor*, MICT-12-29-A, Judgement, 18 December 2014 (“*Ngirabatware Appeal Judgement*”), para. 248; IRMCT, *Prosecutor v. Stanišić and Simatović*, MICT-15-96-T, Decision on Stanišić’s Motion for Further Particularisation of the Prosecution Case, 2 May 2018, para. 12; *Šainović et al. Appeal Judgement*, para. 214; *Simić Appeal Judgement*, para. 22; *Kvočka et al. Appeal Judgement*, para. 28.

¹⁰⁹ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, para. 123; ICC, *Prosecutor v. Yekatom and Ngaiisona*, ICC-01/14-01/18-703-Red, Public redacted version of Decision on Motions on the Scope of the Charges and the Scope of the Evidence at Trial, 30 October 2020, para. 19.

¹¹⁰ ICTR, *Karemera and Ngirumpatse v. Prosecutor*, ICTR-98-44-A, Judgement, 29 September 2014 (“*Karemera and Ngirumpatse Appeal Judgement*”), para. 150; *Prlić et al. Appeal Judgement*, para. 1522.

¹¹¹ *Prlić et al. Appeal Judgement*, para. 1522; *Pavković et al. Decision*, para. 26; *Uwinkindi Appeal Decision*, paras 15, 17; ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-PT, Decision on Defence Preliminary Motion Alleging Defects in the Indictment, 28 April 2009 (“*Ntawukulilyayo Decision*”), para. 25; ICTY, *Prosecutor v. Čermak and Markač*, IT-03-73-PT, Decision on Ivan Čermak’s and Mladen Markač’s Motions on Form of Indictment, 8 March 2005, paras 56-57. See also ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-R72, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 20; ICTR, *Prosecutor v. Ndahimana*, ICTR-2001-68-PT, Decision on Ndahimana’s Motion on Defects in the Amended Indictment, 30 April 2010, paras 6, 15.

Prosecution is pleading in the indictment the modes of liability of co-perpetration and agreement to commit a criminal offence pursuant to Articles 31 and 35 of the Kosovo Criminal Code, respectively.¹¹²

46. In light of the above, the Panel considers that, given the circumstances of the case, the nature of the charged events, the proximity of the Accused to the alleged facts and underlying offences, the alleged involvement of other individuals in the commission of such crimes, and the fact that co-perpetration and agreement to commit a criminal offence are pleaded for every count in the Indictment,¹¹³ the identities of the co-perpetrators and accomplices constitute material facts that have to be pleaded in the Indictment.¹¹⁴ The Panel finds some merit in Gucati's assertion that the Pre-Trial Judge contradicted himself when stating, at the same time, that such particulars had to be provided when known but that in the present case "additional details as regards co-perpetrators or accomplices" did not need to be pleaded further in the Indictment and could be addressed at trial.¹¹⁵ Therefore, the Panel considers that the Pre-Trial Judge erred in finding that the identity of the co-perpetrators and accomplices was not a material fact that had to be pleaded in the Indictment.

47. In addition, contrary to the SPO's assertion that the Indictment sufficiently identifies co-perpetrators and accomplices by group, affiliation or category,¹¹⁶ the Panel observes that the Indictment in fact does not do so and does not indicate to whom the term "others" refers to, not even by group or affiliation.¹¹⁷ The reference in the Indictment to "Associates" is merely the generic term used to refer to "certain others" without any further information.¹¹⁸ On a single occasion, at paragraph 16, the Indictment refers to a "representative of the KLA WVA", but at no other point does

¹¹² See Confirmation Decision, paras 84-86, 93-94.

¹¹³ Save for Count 2 with regard to co-perpetration. See Confirmation Decision, para. 87.

¹¹⁴ See above, para. 45.

¹¹⁵ Compare Impugned Decision, para. 41 with para. 51. See Gucati Appeal, para. 13.

¹¹⁶ Response, para. 13. See also Impugned Decision, para. 51, fn. 95.

¹¹⁷ See e.g. Indictment, paras 6-7, 16, 30 cited at Impugned Decision, fn. 95.

¹¹⁸ Indictment, para. 25.

the Indictment provide any further indication as to what the terms “others” or “certain others” amount to, while the Indictment’s statement of facts section is replete with such references to (certain) others.¹¹⁹ Therefore, the Panel finds that it was incorrect for the Pre-Trial Judge to state that the Indictment identified the co-perpetrators and accomplices by “group” or category.¹²⁰ Although the Rule 86(3)(b) Outline mentions that the co-perpetrators include “other members and representatives of the KLA WVA”,¹²¹ and the Confirmation Decision also connects these others to the KLA War Veteran Association and defines the Associates as including “members” of this organisation,¹²² no such link is in fact made in the Indictment. The Panel finds that, where the specific identities of the co-perpetrators and accomplices are not known, the SPO should be ordered, at a minimum, to amend the Indictment in order to identify them by group, category or affiliation.¹²³ The Panel finds it to be of little relevance whether the Accused themselves are referring to such co-perpetrators or accomplices in a generic way.¹²⁴ What matters is that this information constitutes a material fact to plead in the Indictment, and whether such information was available to the SPO.

48. Turning next to Haradinaj’s and Gucati’s allegation that information regarding the identities of the co-perpetrators was already available to the SPO at the time when the Indictment was submitted, the Panel observes that the Rule 86(3)(b) Outline provides additional details as to the specific identities of some of the “Associates” and as to alleged events involving them directly.¹²⁵ The Panel also notes that the

¹¹⁹ See Indictment, paras 6-7, 16, 25-26, 28-31, 33-34.

¹²⁰ See Impugned Decision, para. 51.

¹²¹ Rule 86(3)(b) Outline, pp. 34, 49.

¹²² See Confirmation Decision, para. 100.

¹²³ The Panel notes that although Rule 97 of the Rules does not expressly specify the legal consequences of an indictment found defective as a result of a decision on preliminary motions under Rule 97(1)(b) of the Rules, or as a result of a decision of a Court of Appeals Panel on an interlocutory appeal against such decision, the Panel considers that it has inherent jurisdiction to order the SPO to amend its indictment to remedy these defects. See e.g. ICTY, *Prosecutor v. Mucić et al.*, IT-96-21-Abis, Judgment on Sentence Appeal, 8 April 2003, para. 16.

¹²⁴ Contra Impugned Decision, para. 51, fn. 94, referring to Confirmation Decision, fn. 165.

¹²⁵ Rule 86(3)(b) Outline, pp. 2, 6-7, 23, 26, 29, 31-33, 35.

Confirmation Decision fills a gap in the Indictment by specifically identifying one of the “Associates” by name.¹²⁶ The Confirmation Decision further relies on supporting material involving two named co-perpetrators, namely Mr Faton Klinaku and Mr Tomë Gashi.¹²⁷ As pointed out by Gucati and Haradinaj, and although Haradinaj fails to provide any specific reference in support of his assertion,¹²⁸ the Panel observes that indeed the Pre-Trial Brief identifies these two alleged co-perpetrators, relying on supporting evidentiary materials that were submitted at the same time as the Indictment.¹²⁹ The Panel however considers that Haradinaj’s submission that the Pre-Trial Brief “departs from the previously sparsity of information and sets out a substantially different narrative” than in the Indictment must be summarily dismissed as vague and lacking any support or argumentation.¹³⁰

49. The Panel recalls that the Indictment is the primary accusatory instrument¹³¹ and that an accused should not have to decipher the alleged basis of his criminal responsibility from scattered factors read together.¹³² As rightly pointed out by the Pre-Trial Judge, an accused should not be required to consult documents other than the Indictment in order to understand and piece together the factual allegations underpinning the charges.¹³³

50. As found above, the Pre-Trial Judge erred in finding that such information merely constituted “evidentiary” material to be addressed at trial and not material facts to be included in the Indictment. From the Pre-Trial Judge’s own

¹²⁶ See Confirmation Decision, para. 100, referring to Mr Faton Klinaku.

¹²⁷ See e.g. Confirmation Decision, fns 57, 60, 79-80, 82, 108, 161, 163, 197.

¹²⁸ See Haradinaj Appeal, para. 23; Gucati Reply, para. 13.

¹²⁹ See e.g. Pre-Trial Brief, paras 10, 22, 24, 30-31, 34, 57-58, 79-80, 83-85, 93-94, 97-100, 116, 122, 128, 130, 132, 140, 154-155, 161, 169, 173, 175-179, 186-187, 192-194, 197, 208-213, 215.

¹³⁰ See Haradinaj Appeal, para. 30. See above, para. 15.

¹³¹ See e.g. *Uwinkindi* Appeal Decision, para. 13. See also ICTR, *Prosecutor v. Bikindi*, ICTR-2001-72-PT, Decision on the Amended Indictment and the Taking of a Plea Based on the Said Indictment, 11 May 2005, para. 7.

¹³² *Nyiramasuhuko et al.* Appeal Judgement, para. 2538.

¹³³ See Impugned Decision, para. 38. See also *Thaçi et al.* Rule 86(4) Order, para. 11.

acknowledgment,¹³⁴ this information was available and known to the SPO at the time of filing the Indictment for confirmation, as reflected in its Rule 86(3)(b) Outline. As already stated above,¹³⁵ it cannot be stated, on the one hand, that the nature of the events and the number of persons involved does not allow for the identification of all co-perpetrators by name and, on the other hand, acknowledged that the SPO is in possession of information as to the precise identity of some of these co-perpetrators.¹³⁶ Recalling that, where the Prosecution is in a position to identify perpetrators by name, it is obliged to do so,¹³⁷ the Panel finds some merit in Haradinaj's submission that the SPO was in a position to identify the co-perpetrators at the time it filed the Indictment for confirmation and should therefore have included that information in the Indictment. The Panel finds that, as a result, the Indictment is defective in that regard and should be amended to include such particulars.

51. Turning to Gucati's argument on whether the Pre-Trial Brief could cure the defects in the Indictment, the Panel considers that defects in the Indictment may be cured by the provision of timely, clear and consistent information detailing the factual basis underpinning the charges against the Accused, and that in certain circumstances this can be achieved through the Pre-Trial Brief. However, when deficiencies surface at the pre-trial stage, they should be resolved before the start of the trial by amending the Indictment.¹³⁸ The Panel therefore considers, in light of the current stage of the proceedings, that it is more appropriate to order the SPO to amend the Indictment to ensure that any ambiguity concerning the charges against the Accused be rectified and removed from the primary charging instrument before the trial commences.

¹³⁴ See Impugned Decision, para. 51, fn. 98.

¹³⁵ See above, para. 46.

¹³⁶ See Impugned Decision, para. 51. See e.g. *Uwinkindi* Appeal Decision, para. 41; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, paras 74, 78.

¹³⁷ See above, para. 45, fn. 107 and authorities cited therein.

¹³⁸ See e.g. *Uwinkindi* Appeal Decision, para. 13; ICTR, *Prosecutor v. Nizeyimana*, ICTR-00-55C-PT, Decision on Ildephonse Nizeyimana's Motion for Certification, 12 August 2010, para. 8; *Ntawukulilyayo* Decision, para. 13.

Consequently, given that amending the Indictment at this stage by providing further particulars as to the identity of the co-perpetrators and accomplices will ensure that the Accused receive timely, clear and sufficient notice of these material facts, it is not necessary to address whether such defects could be cured or were cured by the Pre-Trial Brief.¹³⁹

52. Moving next to the identity of assisted or incited persons, the Panel recalls that the Pre-Trial Judge found that the present case involves a series of statements by the two Accused made during three press conferences and other broadcasted events where they addressed a large collectivity of individuals, including those presents at these events, in particular “members of the press in general” and “any person in possession of or with access to” confidential information relating to the Specialist Chambers.¹⁴⁰ The Pre-Trial Judge considered that, since the offences and modes of liability depended “solely on the conduct of the two Accused”, additional details as to the names of the assisted or incited persons did not need to be further pleaded in the Indictment and could be addressed at trial.¹⁴¹

53. The Panel recalls that, where it is alleged that the accused planned, instigated, ordered, or aided and abetted crimes, the Prosecution is required to identify the “particular acts” or the “particular course of conduct” on the part of the accused and that, in case of instigation, the instigated persons or group(s) of persons must be precisely described in the indictment.¹⁴² As a result, and following the above-mentioned principle, the Panel considers that, when the Prosecution alleges that the accused “incited” or “assisted” others to commit crimes pursuant to Articles 32 and 33

¹³⁹ See Haradinaj Appeal, paras 28, 38, 64, 74, 78, 81-82; Gucati Appeal, paras 41, 46.

¹⁴⁰ Impugned Decision, para. 52.

¹⁴¹ Ibid.

¹⁴² *Uwinkindi* Appeal Decision, para. 36; *Blaškić* Appeal Judgement, para. 226. See also Impugned Decision, para. 42; Gucati Appeal, para. 21; Haradinaj Appeal, para. 37. This is also the case, for instance, with regard to ordering: the persons to whom the accused allegedly gave orders must be identified, at least by category. See *Nyiramasuhuko et al.* Appeal Judgement, para. 1099, referring by analogy to *Uwinkindi* Appeal Decision, para. 36.

of the Kosovo Criminal Code respectively,¹⁴³ the Prosecution must similarly identify, at a minimum by category, group or affiliation, the persons allegedly assisted or incited by the accused, and that these constitute material facts to be pleaded in the Indictment.

54. Recalling that there may be instances where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity,¹⁴⁴ the Panel finds that determination of the degree of detail required to be pleaded in the Indictment with regards the incited and assisted persons will depend on the nature and circumstances of the case. In the present case, given that, as pointed out by the Pre-Trial Judge,¹⁴⁵ the Accused allegedly addressed large audiences, the Panel considers that it is neither possible nor required to identify in the Indictment each and every person that attended or otherwise watched those press conferences and other broadcasted events. In this sense, the Panel finds no error in the Pre-Trial Judge's affirmation that the specific identities of assisted or incited persons do not constitute, in the present case, material facts to be pleaded in the Indictment but are evidence that can be adduced at trial.¹⁴⁶ However, the Panel nevertheless considers that some information as to who these incited or assisted persons are – at a minimum by reference to a group or category to which they belong – needs to be included in the Indictment.

55. The Panel notes that, under the section addressing the modes of liability “incitement” and “assistance”, the Indictment only states, without further detail, that the Accused incited or provided assistance to “one another, Associates and certain others” in the commission of the charged crimes.¹⁴⁷ The Panel is of the view that the

¹⁴³ See Confirmation Decision, paras 88-92.

¹⁴⁴ See e.g. ICTR, *Bagosora and Nsengiyumva v. Prosecutor*, ICTR-98-41-A, Judgement, 14 December 2011, para. 150.

¹⁴⁵ Impugned Decision, para. 52.

¹⁴⁶ See Impugned Decision, para. 52.

¹⁴⁷ See Indictment, paras 41-46.

mere mention of “*certain others*” is insufficient to provide adequate notice to the Accused with regard to the persons they allegedly incited and/or assisted.

56. The Panel recalls however that, in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole and select paragraphs read in the context of the entire document.¹⁴⁸ Consequently, the Panel notes that the Indictment does elsewhere provide additional information on the persons assisted and/or incited by the Accused, which can be categorised as follows: (i) the persons who attended the three press conferences and other public appearances;¹⁴⁹ (ii) certain members of the press;¹⁵⁰ and (iii) persons in possession of or with access to confidential and non-public information in relation to the Specialist Chambers.¹⁵¹

57. The Panel is satisfied that these elements available in the Indictment, read in combination, are sufficient to provide notice to the Accused of the identity of the incited and assisted persons.¹⁵²

58. As a result, Haradinaj’s and Gucati’s allegations of error in that respect are dismissed. Although the Indictment considered as a whole provides sufficient notice concerning the identity of the incited and assisted persons, the Panel nevertheless considers that, since the Indictment needs to be amended to remedy some defects found elsewhere in the present Decision,¹⁵³ it would provide further clarity if the amended version of the Indictment also included, in its paragraphs 41 to 46

¹⁴⁸ *Ngirabatware* Appeal Judgement, para. 249; *Prlić et al.* Appeal Judgement, para. 27; ICTR, *Rutaganda v. Prosecutor*, ICTR-96-3-A, Judgement, 26 May 2003, para. 304; STL, *Prosecutor v. Ayyash*, STL-18-10/PT/TC, Decision on Alleged Defects in the Form of the Indictment, 28 September 2020, para. 14(e). See also Impugned Decision, para. 39.

¹⁴⁹ See Indictment, paras 9, 13-14, 17-18, 30(vi), 33(ii), 34, 40(viii).

¹⁵⁰ See Indictment, paras 11(v), 16(xii), 26, 30(vi), 33(ii), 34, 40(viii).

¹⁵¹ See Indictment, paras 20, 26, 30(v), 33(i), 40(vii).

¹⁵² Similar details regarding the categories of persons being incited and assisted are also provided in the Confirmation Decision and the Rule 86(3)(b) Outline. See e.g. Confirmation Decision, paras 134-135, 139; Rule 86(3)(b) Outline, pp. 51-52.

¹⁵³ See above, paras 47, 49-51.

addressing incitement and assistance,¹⁵⁴ further particulars as to the categories of incited and assisted persons identified elsewhere in the Indictment.¹⁵⁵

2. Alleged error concerning the Pre-Trial Judge's finding on the use of the alternative formulation "and/or" in the Indictment (Ground 4)

(a) Submissions of the Parties

59. Haradinaj argues that the Pre-Trial Judge erred in finding that the use of the formulation "and/or" to refer alternatively to the Accused and unnamed co-perpetrators or accomplices pertains to "evidentiary issues" to be determined at trial and that it does not create ambiguity in respect of the charged offences or modes of liability.¹⁵⁶ In his view, the ambiguity of the use of the formulation "and/or" considered together with the failure to identify alleged co-perpetrators does not allow the Accused to prepare an adequate defence.¹⁵⁷

60. Gucati presents similar arguments.¹⁵⁸ He argues that, contrary to the Pre-Trial Judge's assessment, some usages of "and/or" in the Indictment refer to alleged modes of liability and create ambiguity:¹⁵⁹ (i) in paragraph 39 of the Indictment where the alternative "or" seems to determine the Accused's liability on the sole basis that his associates committed the crimes in co-perpetration;¹⁶⁰ and (ii) in paragraph 47(i) of the Indictment where the formulation "and" creates an unknown mode of liability which is simultaneously "alone and in co-perpetration".¹⁶¹ Gucati requests that the Prosecution be ordered to amend the Indictment by removing such formulations.¹⁶²

¹⁵⁴ See Indictment, paras 41-46.

¹⁵⁵ See above, para. 56.

¹⁵⁶ Haradinaj Appeal, paras 43-53. See also Haradinaj Appeal, paras 65-67; Haradinaj Reply, para. 25.

¹⁵⁷ Haradinaj Appeal, paras 18-19, 45-46, 52-53. See also Haradinaj Reply, para. 25.

¹⁵⁸ Gucati Appeal, paras 26-34. See also Gucati Reply, para. 22.

¹⁵⁹ Gucati Appeal, paras 27-31. See also Gucati Reply, para. 17.

¹⁶⁰ Gucati Appeal, para. 29. See also Gucati Reply, paras 18-20.

¹⁶¹ Gucati Appeal, para. 30. See also Gucati Reply, paras 18, 21.

¹⁶² Gucati Appeal, para. 44. See also Gucati Reply, paras 20-21, 23.

61. The SPO responds that the Accused fail to demonstrate any discernible error in the Impugned Decision and that their unsubstantiated assertions, some of which exceeding the scope of the Certified Issues, should be dismissed.¹⁶³

62. The SPO submits that Gucati only challenges the use of the formula “and/or” in paragraphs 39 and 47(i) of the Indictment and his submissions are out of context and based on a selective reading of these paragraphs.¹⁶⁴ The SPO contends that the case revolves around the conduct of the Accused themselves and the allegations in paragraph 39 of the Indictment clearly details the different alternatives pleaded.¹⁶⁵ As for paragraph 47(i) of the Indictment, it clearly alleges either physical commission or co-perpetration alternatively.¹⁶⁶

63. Gucati replies that he challenges all the usages of the term “and/or” in the Indictment, and not only two occurrences.¹⁶⁷

(b) Assessment of the Court of Appeals Panel

64. The Pre-Trial Judge held that alternative formulations such as “and/or” are permitted as long as they pertain to evidentiary material to be determined at trial, and do not create ambiguity as regards the charged offences or modes of liability.¹⁶⁸ Addressing the Defence arguments on this matter the Pre-Trial Judge found that such formulations, when read in the context of the whole Indictment, provided sufficient notice as regards the charged offences and modes of liability.¹⁶⁹

65. At the outset, the Panel notes that the Accused do not refer to specific references to paragraphs of the Indictment where the formulation and/or would allegedly be

¹⁶³ Response, paras 17-19.

¹⁶⁴ Response, para. 20.

¹⁶⁵ Response, paras 20-22.

¹⁶⁶ Response, para. 23.

¹⁶⁷ Gucati Reply, paras 17-21. See also Gucati Reply, fn. 17, referring to Gucati Preliminary Motion, pp. 5-14.

¹⁶⁸ Impugned Decision, para. 45 and references cited therein.

¹⁶⁹ Impugned Decision, para. 63, referring to Indictment, para. 49.

problematic, save for a few instances.¹⁷⁰ The Panel recalls the formal requirements on appeal formulated elsewhere in this Decision.¹⁷¹ The Panel further notes that Gucati simply incorporates, by way of a reference in a footnote, arguments he had made before the Pre-Trial Judge in his preliminary motion.¹⁷² Such an approach lacks the necessary substantiation since parties cannot incorporate earlier submissions by mere reference without properly substantiating them before the competent Appeals Panel.¹⁷³

66. The Panel observes however that Certified Issue 4 concerns the formulation “and/or” “used in relation to the Accused, co-perpetrators or accomplices” and is not confined to specific paragraphs of the Indictment.¹⁷⁴ Therefore, the Panel considers as admissible challenges to the use of the formulation “and/or” in the Indictment to the extent that it relates specifically to the Accused, co-perpetrators or accomplices. Accordingly, the Panel will focus its analysis on the following paragraphs of the Indictment: 11, 16, 20, 26, 28, 30, 39 and 46.¹⁷⁵

¹⁷⁰ Gucati specifically challenges Indictment, paragraphs 39 and 47(i). See Gucati Appeal, paras 29-30. Haradinaj specifically challenges Indictment, paragraph 25. See Haradinaj Appeal, para. 49.

¹⁷¹ See above, paras 16-17.

¹⁷² See Gucati Reply, fn. 17, referring to Gucati Preliminary Motion, pp. 5-14, referring in turn to Indictment, paras 11, 16, 20, 22, 26, 28, 30, 32, 39.

¹⁷³ See e.g. ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009, para. 13 (the Appeals Chamber decided not to treat the arguments put forward by the accused in his preliminary motion before the trial chamber); ICC, *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-2170-Corr2-Red, Public redacted version of “Further Corrected version of ‘Prosecution’s Consolidated Response to the Appellants’ Documents in Support of Appeal””, 13 October 2017, para. 150 (recalling notably that an appellant cannot incorporate by reference arguments from another brief).

¹⁷⁴ See Decision Granting Leave to Appeal, para. 21.

¹⁷⁵ See Impugned Decision, para. 63, fns 126-127, referring to Indictment, paras 11, 16, 20, 25, 26, 28, 30, 39. The Panel however notes that Indictment, paragraph 25 refers to “serious threat and/or common action”. It does not relate specifically to the Accused, co-perpetrators or accomplices and should therefore be excluded from the scope of the present appellate review. The Panel further notes that while Indictment, paragraph 46 does not expressly concern the use of the “and/or” formulation, the reference to Gucati, Haradinaj “and, as applicable, Associates, and others [...]” is similar and shall be included in the present assessment.

67. Recalling that the scope of the appellate review lies strictly within the confines of the Certified Issues,¹⁷⁶ the Panel finds that challenges to paragraphs of the Indictment related to, *inter alia*, the use of the formulation “and/or” with regard to witnesses and their families or modes of liability fall outside the scope of the Appeals.

68. Turning to challenges to the paragraphs in the Indictment referring to Gucati, Haradinaj and/or co-perpetrators or accomplices (including references to “Associates”, “others”),¹⁷⁷ the Panel recalls its previous finding under Grounds 1-3 that the identity of the co-perpetrators and accomplices constitutes a material fact that has to be pleaded in the Indictment and that they must be identified at a minimum by group, category or affiliation, and named specifically when their precise identity is known.¹⁷⁸ As a result, given that the allegation of error concerns the use of the “and/or” formulation when referring to the Accused and co-perpetrators or accomplices referred to as Associates/others, the Panel does not find that these issues pertain to evidentiary matters but rather to material facts.¹⁷⁹

69. The Panel finds merits in the Accused’s submissions that the use of the “and/or” formulation when referring alternatively and collectively to the Accused and their alleged co-perpetrators or accomplices, creates ambiguity as regards the charged modes of liability as it does not sufficiently indicate on which form of responsibility the SPO intends to rely as well as the specific conduct of the Accused.¹⁸⁰ The Panel

¹⁷⁶ See above, para. 20.

¹⁷⁷ Indictment, paras 16, 26, 28, 30, 39, 46.

¹⁷⁸ See above, paras 47, 49-51.

¹⁷⁹ See *Uwinkindi* Appeal Decision, para. 40; contra Impugned Decision, paras 45, 63.

¹⁸⁰ See Haradinaj Appeal, paras 43-45. See also Haradinaj Reply, para. 25; Gucati Appeal, paras 26-28, 32-34. See also Gucati Reply, para. 22. The Panel acknowledges that in other cases such as the IRMCT *Turinabo et al.* case, the Single Judge found that formulations such as “directly and/or through others”, “and/or” and “with or through” to qualify the alleged conduct of the different co-accused were permissible in the specific instances; however, the Single Judge made clear that they did not create any ambiguity because of the precision with which their alleged conduct was identified in the following subparagraph or because the other relevant individuals allegedly involved or interfered with were identified with specificity. IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on Maximilien Turinabo’s, Anselme Nzabonimpa’s and Marie Rose Fatuma’s Motions Challenging the Form of the Indictment, 12 March 2019 (“*Turinabo and Nzabonimpa* Decision”), paras 24, 28, 30, 34, 42.

recalls that the alleged nature of the responsibility of the Accused should be stated unambiguously in the Indictment and the SPO should indicate precisely which form of liability is invoked based on the facts alleged.¹⁸¹

70. The Panel recalls that for the purpose of addressing arguments on sufficient notice, the International Criminal Court, adopting the jurisprudence of other courts such as the European Court of Human Rights, has taken a case-by-case approach, ensuring that the information provided in each case is adequate so as to enable the accused to prepare his or her defence accordingly.¹⁸² The Panel is aware that previous ICTY and ICTR jurisprudence has allowed the Prosecution to refer to forms of criminal responsibilities in broad categories, yet this position evolved with time towards requiring the Prosecution to provide greater specificity.¹⁸³ The Panel is of the view that the SPO should also be guided by the more recent stricter standards and avoid, if possible, the “and/or” formulation.¹⁸⁴

71. While the Panel limits its analysis on the use of the formulation “and/or” to those instances where it relates specifically to the Accused, co-perpetrators, or accomplices, it is concerned when the formulation “and/or” is used twice in the same paragraph. For example and as raised by Gucati, in paragraph 39 of the Indictment, the following wording creates an unacceptable level of ambiguity: “Hysni GUCATI, Nasim HARADINAJ, and/or Associates committed the crimes in co-perpetration

¹⁸¹ See *Uwinkindi* Appeal Decision, para. 48.

¹⁸² See ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-874, 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 Decision*”), paras 38-40.

¹⁸³ *Yekatom Decision*, paras 40-42, referring, *inter alia*, to Dixon, R. and Khan, K., *Archbold International Criminal Courts: Practice, Procedure & Evidence* (Fourth Edition), Sweet & Maxwell 2013, section 6-83; Jordash, W. and Coughlan, J., “The Right to be Informed of the Nature and Cause of the Charges: A Potentially Formidable Jurisprudential Legacy” in Darcy, S. and Powderly, J. (eds), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press 2010, pp. 300 et seq.

¹⁸⁴ The Panel notes that this is further confirmed by the obligation for the SPO, under Rule 86(3)(b) of the Rules, to provide, alongside the indictment, a “detailed outline” demonstrating the relevance of each item of evidentiary material to each allegation.

and/or agreed to commit the crimes".¹⁸⁵ To the view of the Panel, this formulation allows for several interpretations: the Accused may be charged with committing the offence only together ("in co-perpetration"), alone together or with others ("Associates") or the Accused merely agreed (alone or with others) to the commission of the crimes which then may have been executed by others or not executed at all.¹⁸⁶ It is obvious that such a variety of interpretations makes the Indictment a moving target and thus an effective defence very difficult.

72. Taking the Indictment as a whole, the Panel further recalls its prior finding that the mere reference to "Associates" is insufficient.¹⁸⁷ In fact, it adds another layer of ambiguity to the formulation of the just quoted paragraph. For similar reasons, the Panel also finds that the use of the formulation "and/or" twice in paragraphs 26 and 46 of the Indictment is ambiguous.

73. In light of the above, the Panel finds that the Pre-Trial Judge erred in finding that the use of the "and/or" formulation when referring to the Accused and co-perpetrators or accomplices, read in the context of the whole Indictment, provides sufficient notice as regards the charged modes of liability.¹⁸⁸ Considering the circumstances of the case, the nature of the charged events, the proximity of the Accused with the alleged facts and underlying crimes, the Panel finds that the paragraphs referring to Gucati, Haradinaj and/or co-perpetrators or accomplices alternatively, lack sufficient precision. As a consequence, the Accused are not adequately informed about their alleged role in the alleged offences charged in the Indictment and this might impair the preparation of their defence.

¹⁸⁵ Indictment, para. 39. See also Gucati Appeal, para. 29; Gucati Reply, paras 18-20.

¹⁸⁶ A further possible reading of this paragraph is presented in Gucati Appeal, para. 29 referring to "guilt by association" because of the possibility that the charge is only leveled against Associates by using the conjunctive "or". Note that Article 35 of the Kosovo Criminal Code provides for a mere "agreement to commit" as a mode of liability.

¹⁸⁷ See above, para. 47.

¹⁸⁸ Impugned Decision, para. 63, referring to Indictment, para. 49.

74. The Panel finds that, as a result, paragraphs 16, 26, 28, 30, 39 and 46 of the Indictment are defective and thus shall be reviewed and amended in conformity with the above findings.

75. Turning to challenges to the paragraphs referring to Gucati “and/or” Haradinaj, the Panel observes that the formulation “and/or” at paragraphs 11 and 20 of the Indictment is used to refer to the Accused alternatively. These paragraphs of the Indictment expressly mention that both Gucati and Haradinaj allegedly made multiple public statements relating to the first and third disclosures. The Indictment clearly indicates elsewhere that the Accused held a press conference on 7 September 2020 were the First Disclosure allegedly occurred and on 22 September 2020 were the Third Disclosure allegedly occurred.¹⁸⁹ The formulation “Gucati and/or Haradinaj” is only used to refer to their alleged actions or to the content of the statements they allegedly uttered after these press conferences.¹⁹⁰

76. The Panel considers that the formulation “Gucati and/or Haradinaj” in paragraphs 11 and 20 of the Indictment does not create ambiguity and is, in the light of the mentioned context, specific enough. Thus, this part of the Indictment does not inhibit the Accused’s ability to prepare their respective defences since it provides them with sufficient notice with regard to the dates, location, nature of the events as well as with regard to the alleged conduct.¹⁹¹ Moreover, paragraph 24 of the Indictment makes clear that the SPO seeks to hold Gucati and Haradinaj responsible for their respective conduct alleged in paragraphs 11 and 20 of the Indictment. Whether or not this conduct will in fact result in criminal liability is an evidentiary matter for trial.¹⁹²

¹⁸⁹ Indictment, paras 8, 17.

¹⁹⁰ Indictment, paras 11, 20.

¹⁹¹ See a similar reasoning in *Turinabo and Nzabonimpa* Decision, paras 24, 28, 34, 42.

¹⁹² See a similar reasoning in IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, Decision on the Nzabonimpa and Ndagijimana Defence Challenges to the Form of the Third Indictment, 30 January 2020, paras 18, 49.

Accordingly, the Accused's challenges to paragraphs 11 and 20 of the Indictment referring to Gucati "and/or" Haradinaj are dismissed.

3. Alleged error concerning the Pre-Trial Judge's finding on the use of the open-ended formulations in the Indictment (Ground 5)

(a) Submissions of the Parties

77. Haradinaj submits that the Indictment is ambiguous and lacks specificity with regard material facts such as the Accused's own conduct and actions.¹⁹³ He argues that he is being required to defend himself against an allegation whose "specifics" "have not been confirmed within the Indictment", and which has "only been pleaded in the abstract".¹⁹⁴ Haradinaj contends that such lack of specificity hinders his ability to prepare his defence and impact his possibility to receive a fair trial, thus causing him prejudice.¹⁹⁵

78. Gucati submits that the Pre-Trial Judge erred in not ordering the SPO to amend the Indictment by removing the reference to "unknown forms" of further dissemination of confidential and non-public information.¹⁹⁶ In his view, the Pre-Trial Judge's finding that the unknown forms of further dissemination "do not impact on the charged offences of modes of liability" may mean that the charges will be assessed solely in relation to known forms of further dissemination.¹⁹⁷ However, Gucati highlights the "danger" of leaving such formulation in the Indictment which is required to be clear and specific.¹⁹⁸

79. He also argues that such ambiguities affecting the Indictment may divert the trial process by obliging the Parties and the Panel to examine "in an unfocused

¹⁹³ Haradinaj Appeal, para. 54. See also Haradinaj Appeal, paras 70-78.

¹⁹⁴ Haradinaj Appeal, paras 55, 59-60. See also Haradinaj Appeal, para. 82.

¹⁹⁵ Haradinaj Appeal, paras 61, 64. See also Haradinaj Appeal, paras 74-75.

¹⁹⁶ Gucati Appeal, paras 35, 37. See also Gucati Reply, paras 24-28.

¹⁹⁷ Gucati Appeal, paras 35-36, referring to Impugned Decision, para. 70. See also Gucati Reply, paras 25-27.

¹⁹⁸ Gucati Appeal, para. 37. See also Gucati Reply, paras 27-28.

manner” the allegations of conduct which may or may not have taken place or be attributable to the Accused.¹⁹⁹ As a result, he requests that the Prosecution be ordered to amend the Indictment by redacting the allegations of “unknown forms” of further dissemination.²⁰⁰

80. The SPO responds that the Indictment pleads “as far as possible” the known means of further dissemination and that use of inclusive language is appropriate since “the relevant material fact is that confidential information was further disseminated following the First Disclosure and Third Disclosure”.²⁰¹ According to the SPO, the Accused’s liability “does not depend on any particular means of further dissemination”. Therefore, additional details need not be pleaded in the Indictment and are matters for trial.²⁰²

(b) Assessment of the Court of Appeals Panel

81. In the Decision Granting Leave to Appeal, the Pre-Trial Judge explained that Issue 5 challenges the finding, at paragraphs 44 and 70 of the Impugned Decision, “that open-ended formulations used in relation to known and unknown forms of further dissemination are, in the specific instances of the Indictment, sufficiently clear and specific and do not create ambiguity as regards the charged offences or modes of liability”.²⁰³ The Panel recalls that, in the Indictment, the SPO pleads that certain information “was further disseminated, including in the press and online”.²⁰⁴

82. As noted above, the Panel declines to consider Haradinaj’s submissions as they fall outside the scope of Certified Issue 5 and are therefore inadmissible.²⁰⁵ The Panel will then turn to Gucati’s appellate submissions that the Pre-Trial Judge erred in

¹⁹⁹ Gucati Appeal, paras 41-43. See also Gucati Appeal, paras 45-46.

²⁰⁰ Gucati Appeal, paras 37, 44. See also Gucati Reply, para. 28.

²⁰¹ Response, paras 24, 26.

²⁰² Response, para. 26.

²⁰³ Decision Granting Leave to Appeal, para. 21 and fn. 38.

²⁰⁴ Indictment, paras 12, 21, 27.

²⁰⁵ See above, para. 22.

deciding to retain the word “including” in relation to the means of further dissemination in the Indictment.

83. The Panel finds that the specificities regarding the means of further dissemination constitute material facts which must be pleaded in the Indictment.²⁰⁶ Simply stating that material was “further disseminated” would clearly be insufficient to allow the Accused to be meaningfully informed of the case against him and to prepare an effective defence concerning this allegation.²⁰⁷

84. Turning to the use of the formulation “including”, the Panel agrees with the Pre-Trial Judge that this is impermissible unless exceptionally necessary in light of the circumstances of the case or the nature and scope of the charges, and on the condition that its use does not create ambiguity in the charges.²⁰⁸ The Panel must therefore turn to consider whether the Pre-Trial Judge erred in applying these principles by nevertheless maintaining the formulation “including” in the context of the means of further dissemination.²⁰⁹

85. In the Impugned Decision, the Pre-Trial Judge found that the “phrases ‘including in the press and online’ signify that, *next to the pleaded and known* forms of further dissemination, *other, unknown* forms, may have also occurred”, but that “[i]n any event” these unknown forms of further dissemination would “not impact on the

²⁰⁶ IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgement, 20 March 2019, para. 62, citing *Prlić et al.* Appeal Judgement, para. 27; ICTR, *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004, para. 193; *Kupreškić et al.* Appeal Judgement, para. 88.

²⁰⁷ *Bemba* Trial Judgement, para. 33, citing *Simić* Appeal Judgement, para. 32. See also ICTY, *Prosecutor v. Popović et al.*, IT-05-88-A, Judgment, 30 January 2015, para. 65; *Karemera and Ngirumpatse* Appeal Judgement, para. 105; ECtHR, *Pélissier and Sassi v. France*, no. 25444/94, Judgment, 25 March 1999, para. 53; ECtHR, *Giosakis v. Greece* (No. 3), no.5689/08, Judgment, 3 May 2011, para. 29.

²⁰⁸ Impugned Decision, para. 44, citing ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465-Red, Decision on the confirmation of charges, 16 December 2011 (“*Mbarushimana* Decision”), paras 82-83; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 (“*Ruto et al.* Decision”), paras 99, 101, 103; ICC, *Prosecutor v. Muthaura et al.*, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 106.

²⁰⁹ See Indictment, paras 12, 21, 27.

charged offences or modes of liability”.²¹⁰ The Appeals Panel understands the Pre-Trial Judge to mean that the Indictment does not charge the Accused with unknown forms of further dissemination. The Panel concurs with this interpretation.

86. However, as Gucati points out, allowing the word “including” to remain in the Indictment in relation to the means of further dissemination leaves scope for the SPO to bring, at trial, evidence of further dissemination carried out by means other than in the press and online (i.e. means of further dissemination which are currently “unknown”). Therefore, contrary to the Pre-Trial Judge’s statement that unknown forms of further dissemination would have no impact, the effect of the word “including” might in fact entail that the Accused could be found liable for alleged further dissemination through means which are currently “unknown”. The Panel finds some merits in Gucati’s assertion that this creates ambiguity within the Indictment with respect to the scope of the charges, thereby affecting the Accused’s ability to prepare an effective defence.²¹¹ Thus, removing the word “including” from the Indictment would remedy any resulting ambiguity and ensure, in line with the Pre-Trial Judge’s interpretation that forms of further dissemination which are currently “unknown” do not form part of the charges against the Accused and that they cannot incur any criminal liability at trial on that basis.²¹²

87. The Panel considers that, if the SPO wishes to plead means of further dissemination other than “in the press and online”, the correct course of action would be to amend the Indictment. Pursuant to Rule 90(2) of the Rules, such amendment would only be granted if it is established that the amendment would not be prejudicial

²¹⁰ Impugned Decision, para. 70 (emphasis added).

²¹¹ See Gucati Appeal, paras 36-37; Gucati Reply, paras 27-28.

²¹² See e.g. ICC, *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-450, Decision on the Updated Document Containing the Charges, 6 February 2015, paras 28, 45. See also *Mbarushimana* Decision, paras 81-83.

to or inconsistent with the rights of the Accused. The formulation “including” cannot be used to circumvent this need for amendments.²¹³

88. The Panel observes that, in relation to further dissemination, the Pre-Trial Judge refers in the Impugned Decision to the Rule 86(3)(b) Outline, where the SPO appears to rely exclusively on evidence of dissemination of information via press articles available online.²¹⁴ However, in the Confirmation Decision, the Pre-Trial Judge found that protected information was revealed or referenced *inter alia* “through further dissemination between at least 7 and 25 September 2020, including by social media statements”,²¹⁵ citing, *inter alia*, social media posts by the two Accused²¹⁶ and television interviews by the Accused and others.²¹⁷

89. The Panel therefore finds that the Pre-Trial Judge erred in finding that the pleading of further dissemination is sufficiently clear and specific.²¹⁸ The Panel finds that, as a result, the Indictment is defective. The formulation of paragraphs 12, 21 and 27 of the Indictment should be reviewed and the word “including” should be deleted from these paragraphs.

²¹³ *Mbarushimana* Decision, para. 82.

²¹⁴ Impugned Decision, para. 70, fn. 142; Rule 86(3)(b) Outline, pp. 4-5, 16, fns 24, 93.

²¹⁵ Confirmation Decision, para. 100. See also Confirmation Decision, para. 105, where the Pre-Trial Judge similarly found that information was revealed *inter alia* by “further dissemination between at least 7 and 25 September 2020, including by social media statements”, without however citing any such social media statements.

²¹⁶ Confirmation Decision, fn. 64.

²¹⁷ Confirmation Decision, fn. 65. It is in relation to the charge of incitement specifically that the Pre-Trial Judge cited the press articles which, in the Impugned Decision, he went on to cite in relation to further dissemination generally. See Confirmation Decision, para. 135 and fn. 186.

²¹⁸ Impugned Decision, paras 70-71.

IV. DISPOSITION

90. For these reasons, the Court of Appeals Panel:

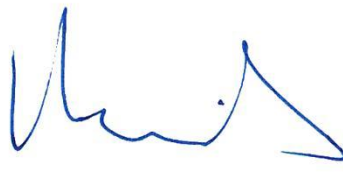
PARTIALLY GRANTS the Appeals;

ORDERS the Panel in charge of the case to direct the SPO to file a corrected version of the Indictment in light of the following instructions:

- (a) further particulars as to the identity of the co-perpetrators and accomplices (at a minimum, by group, category or affiliation, and, when available, by name) should be included in the Indictment in conformity with the findings of the Court of Appeals Panel under Grounds 1-3;
- (b) further particulars as to the categories of incited and assisted persons should be included in paragraphs 41, 42, 43, 44, 45 and 46 of the Indictment in conformity with the findings of the Court of Appeals Panel under Grounds 1-3;
- (c) the formulation “and/or” in paragraphs 16, 26, 28, 30, 39 and 46 of the Indictment should be amended in conformity with the findings of the Court of Appeals Panel under Ground 4;
- (d) the word “including” should be removed from paragraphs 12, 21 and 27 of the Indictment and the formulation of these paragraphs should be reviewed in conformity with the findings of the Court of Appeals Panel under Ground 5;

DISMISSES the remainder of the Appeals; and

ORDERS the Registry to reclassify the Haradinaj Reply (F00005) as public.



**Judge Michèle Picard,
Presiding Judge**

Dated this Wednesday, 23 June 2021

At The Hague, the Netherlands