

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

Before: **The Trial Panel**
Judge Charles L. Smith III, Presiding Judge
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 13 December 2021

Language: English

Classification: **Public**

Public Redacted Version of Motion to Dismiss pursuant to Rule 130

Specialist Prosecutor

Jack Smith
Valeria Bolici
Matthew Halling
James Pace

Counsel for Hysni Gucati

Jonathan Elystan Rees QC
Huw Bowden
Eleanor Stephenson

Counsel for Nasim Haradinaj

Toby Cadman
Carl Buckley
Jonathan Peter Worboys

I. INTRODUCTION

1. On 9 November 2021, the Trial Panel directed the SPO to submit a written notification formally closing its case pursuant to Rule 129 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ('Rules')¹, by 10 November 2021 at 16:00².
2. The Trial Panel further ordered the Defence, who had previously notified the Panel of its intention to file a motion to dismiss after the closing of the SPO case, to file their respective motion pursuant to Rule 130(2) of the Rules by 17 November 2021 at 16:00³.
3. The following submissions are made without prejudice to any submissions as to the sufficiency of the Prosecution evidence in relation to any ingredient of the offences charged that may subsequently be made in the Final Trial Brief and/or in the defence closing statement, in the event that a case to answer is found on any or all of the charges at this stage.

II. APPLICABLE LAW

4. Rules 130(1) of the Rules provides that: 'immediately after the closing of the Specialist Prosecutor's case, the Defence shall notify the Panel of its intention to file a motion to dismiss any or all of the charges in the Indictment'.

¹ KSC-BD-03/Rev2/2020, Public

² KSC-BC-2020-07/F00428, *Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings*, Trial Panel II, Public at paragraph 16(a)

³ KSC-BC-2020-07/F00428, *Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings*, Trial Panel II, Public at paragraph 16(b)

5. Rule 130(2) of the Rules provides that 'such motion shall be submitted within 10 days of the closing of the Specialist Prosecutor's case'. In the present case, that time limit has been shortened by the order of the Trial Panel (see above).
6. Rule 130(2) continues: 'The Specialist Prosecutor may file a response within 10 days of the motion'. In the present case, that time limit has been shortened by order of the Trial Panel (see above). The Defence is not entitled to reply (see Rule 130(2)).
7. The Panel may hear oral arguments from the Parties, which it may limit to a particular charge or charges (see Rule 130(2)).
8. Rule 130(3) provides: 'having heard the Parties... the Panel may dismiss some or all charges therein by oral decision, if there is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charge in question'.
9. The test for determining whether the evidence is insufficient to sustain a conviction is whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question⁴.
10. Where there is no evidence to sustain a charge, the Motion is to be allowed⁵.

⁴ *Prosecutor v Slobodan Milosevic*, IT-02-54-T, "Decision on Motion for Judgment of Acquittal", Trial Chamber, 16 June 2004 at paragraph 9; *Prosecutor v Brima et al*, SCSL-04-16-T, "Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98", Trial Chamber II, 31 March 2006 at paragraph 10

⁵ *Prosecutor v Slobodan Milosevic*, IT-02-54-T, "Decision on Motion for Judgment of Acquittal", Trial Chamber, 16 June 2004 at paragraph 13(1)

11. Where there is some evidence, but it is such that, taken at its highest, a Trial Panel could not convict on it, the Motion is also to be allowed⁶. This will be the case even if the weakness in the evidence derives from the weight to be attached to it⁷.
12. The sufficiency of the evidence is to be assessed as it pertains to elements of a charge – the motion will succeed if an essential ingredient for a crime was not made out in the Prosecution’s case; for, if on the basis of evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would be insufficient to sustain a conviction⁸.
13. It is not necessary under Rule 130 for the Trial Panel to inquire into the sufficiency of the evidence in relation to each paragraph of the indictment. There is no need at the Rule 130 stage to examine whether each paragraph of the Indictment is supported by the Prosecution evidence. Rather, the evidence should be examined in relation to the counts as charged⁹.
14. In accordance with Article 2(3) of the Kosovo Criminal Code 2019 (‘KCC 2019’)¹⁰, when identifying the ingredients of each offence under the KCC 2019, the definition of the offence shall be strictly construed and any ambiguity shall be interpreted in favour of the Accused.

⁶ *Prosecutor v Slobodan Milosevic*, IT-02-54-T, “Decision on Motion for Judgment of Acquittal”, Trial Chamber, 16 June 2004 at paragraph 13(2)

⁷ *Prosecutor v Slobodan Milosevic*, IT-02-54-T, “Decision on Motion for Judgment of Acquittal”, Trial Chamber, 16 June 2004 at paragraph 13(2)

⁸ *Prosecutor v Nahimana et al*, ICTR-99-52-T, “Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal”, Trial Chamber I, 25 September 2002 at paragraph 19; *Prosecutor v Slobodan Milosevic*, IT-02-54-T, “Decision on Motion for Judgment of Acquittal”, Trial Chamber, 16 June 2004 at paragraph 13(1)

⁹ *Prosecutor v Brima et al*, SCSL-04-16-T, “Decision on Defence Motions for Judgment of Acquittal pursuant to Rule 98”, Trial Chamber II, 31 March 2006 at paragraph 12

¹⁰ Criminal Code of the Republic of Kosovo 2019, Code No.06/L-074

15. The present case is not a ‘contempt’ case – the Accused are not charged with being in contempt of court (an offence under Article 393 of the KCC 2019, formerly Article 401 of the Kosovo Criminal Code 2012, and an offence contrary Article 15(2) of the Law) but with specific offences contrary to Articles 387, 388, 392, and 401 of the KCC 2019. Interpretation by analogy shall not be permitted¹¹.

III. SUBMISSIONS

Count 1: OBSTRUCTING OFFICIAL PERSONS IN PERFORMING OFFICIAL DUTIES, by serious threat, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST PUBLIC ORDER, punishable under KCC Articles 17, 28, 31, 32(1)-(3), 33, 35, and 401(1) and (5), and Articles 15(2) and 16(3) of the Law.

16. Article 401(1) of the KCC 2019 provides that: “whoever, by force or serious threat, obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished...”

17. Article 401(5) of the KCC 2019 provides for an aggravated form of offence: “When the offense provided for in paragraph 1 or 2 of this Article is committed against a judge, a prosecutor, an official of a court, prosecution officer or a person authorised by the court and prosecution office, a police officer, a

¹¹ Article 2(3) of the KCC 2019

military officer, a customs officer or a correctional officer during the exercise of their official functions”.

18. The aim of Article 401 is to protect official persons performing official duties against violent or threatening actions¹².
19. The offences created by Article 401 are ‘criminal offences against *public order*’ within Chapter XXXII of the KCC 2019 (emphasis added) not offences against the administration of justice and public administration under Chapter XXXI or offences of ‘contempt’. The fundamental nature of the offences created by Article 401 relate to the use of force and public disorder.
20. ‘Serious threat’ in the context of Article 401 thus means serious threat of force¹³. Articles 401(4) and (6) accordingly provide for aggravated offences where injury is actually caused by the use of force or the threat involves a weapon.
21. In contrast with the offence under Article 387 (an offence against the administration of justice and public administration), ‘any other means of compulsion’ will not suffice.
22. Force is defined in Article 113(5) KCC 2019 as: ‘the implementation of hypnosis or other means of intoxication for the purpose of bringing a person against his or her will into a state of unconsciousness or incapacitating him or her for resistance’. The definitions in Article 113 KCC 2019, including the definition of

¹² *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3; also Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1164 margin number 1-2 (translation at KSC-BC-2020-07/F00341/A01 page 11 of 18)

¹³ Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1165 margin number 2-3 (translation at KSC-BC-2020-07/F00341/A01 page 12 of 18)

the term 'force', are stated to be comprehensive: 'For the purpose of this Code the terms below have the following meanings...'.

23. By contrast, the definition of 'force' previously set out in the Provisional Criminal Code of Kosovo 2003 ('PCC 2003') at Article 107(10) only *included* the implementation of hypnosis or other means of intoxication for the purpose of bringing a person against his will into a state of unconsciousness or incapacitating him for resistance. Whether it can be safely inferred that 'the legislature intentionally removed this qualification' and thereby fundamentally altered the nature of 'force' for later Codes is a moot point – Article 2(3) KCC 2019 requires any ambiguity to be resolved in favour of the defence and prohibits interpretation by analogy.

24. If 'force' for the purposes of Article 401 is, nevertheless, said to include the use of some other form of physical violence (other than hypnosis or intoxication), the Defence draws attention to the definition of force in Article 113(5) requiring the person to be brought into a state of unconsciousness or incapacitation, demonstrating the required severity of the force used or threatened¹⁴.

25. It is submitted therefore that the offence under Article 401 relates to the actual or threatened use of serious force which has the consequences (or threatened consequences) set out in Article 113(5) (namely, unconsciousness or incapacitation).

¹⁴ Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1165 margin number 3 (translation at KSC-BC-2020-07/F00341/A01 page 12 of 18)

26. It is consistent with the wording and the purpose of Article 401(1) that the offence requires the force or serious threat of force to be directed against an official person.
27. Indeed, the aggravated offence under Article 401(5) specifically requires the offence to be committed *against* an official person *during* the exercise of their official functions.
28. For the purposes of Article 401, the Prosecution has to prove that the use of force or serious threat was concurrent, or simultaneous, with the official action obstructed. The use of force or serious threat must be directed at the person when they are performing official duties¹⁵. The Prosecution is required, accordingly, to specify the official action which the use of force or serious threat is alleged to be concurrent with and obstructed (e.g. the execution of a search warrant or the seizure of evidence). To that extent, the Prosecution are required to prove that the actions of the accused were directed against an official person performing a specific official duty¹⁶. The threat must be of *immediate* use of force¹⁷.
29. In the present case, no evidence has been adduced of the use of force or serious threat against an official person. The Trial Panel has heard no complaint from an official person that they have been subject to the use of force or have received a serious threat (of force, or of any other type of threat for that matter).

¹⁵ "Threat is a declaration made to warn, that is, to inform a certain person that he might suffer something bad. In the context of this criminal offence, such a declaration might be considered a threat only when it is used to inform the official person that he would be subjected to force on the spot if he refuses to give up performing his official duty" - Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1165 margin number 2, 3 & 4 (translation at KSC-BC-2020-07/F00341/A01 page 12 of 18)

¹⁶ Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1166 margin number 5 (translation at KSC-BC-2020-07/F00341/A01 page 13 of 18)

¹⁷ *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3

30. No evidence has been adduced that an attempt was made, by the Accused or another, to use force or serious threat against an official person.
31. No evidence has been adduced that the Accused incited another to the use of force of serious threat against an official person.
32. No evidence of an agreement to use force or serious threat against an official person has been adduced.
33. Count 1 should accordingly be dismissed.

Count 2: OBSTRUCTING OFFICIAL PERSONS IN PERFORMING OFFICIAL DUTIES, by participating in the common action of a group, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST PUBLIC ORDER, punishable under KCC Articles 17,28, 32(1)-(3), 33, 35, and 401(2)-(3) and (5), and Articles 15(2) and 16(3) of the Law.

34. Article 401(2) of the KCC 2019 provides that an offence is committed where a person ‘participates in a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties’.
35. As ‘peaceful and lawful’ activity falls outside the scope of this provision¹⁸, some boundary is to be implied to demarcate ‘peaceful and lawful’ means from ‘non-

¹⁸ KSC-BC-2020-07/F00341, “Prosecution Submissions on the Applicable Law with one public annex”, Prosecutor, 30 September 2021, Public at paragraph 14

peaceful and unlawful' means. Consistent with the nature of Article 401 the boundary lies where common action involves the use of force or the serious threat of force.

36. The aim of Article 401 is to protect official persons performing official duties against violent or threatening actions¹⁹.

37. The offences created by Article 401 are 'criminal offences against *public order*' within Chapter XXXII of the KCC 2019 (emphasis added), not offences against the administration of justice and public administration under Chapter XXXI or offences of 'contempt'.

38. Article 401(2) is an aggravated form of the offence set out in Article 401(1). 'Common action', as referred to in Article 401(2) and (3), refers accordingly to common action to use force or serious threat (of force) as criminalised in Article 401(1).

39. As per Article 401(1), the common action to use force or serious threat must be directed against an official person 'in performing official duties'. Accordingly, the Prosecution has to prove that the common action to use force or serious threat was concurrent, or simultaneous, with the official action obstructed. The common action to use force or serious threat must be directed at the person when they are performing official duties²⁰. The Prosecution is required,

¹⁹ *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3; also Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1164 margin number 1-2 (translation at KSC-BC-2020-07/F00341/A01 page 11 of 18)

²⁰ "Threat is a declaration made to warn, that is, to inform a certain person that he might suffer something bad. In the context of this criminal offence, such a declaration might be considered a threat only when it is used to inform the official person that he would be subjected to force on the spot if he refuses to give up performing his official duty" - Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1165 margin number 2, 3 & 4 (translation at KSC-BC-2020-07/F00341/A01 page 12 of 18)

accordingly, to specify the official action which the common action to use force or serious threat is alleged to be concurrent with and obstructed (e.g. the execution of a search warrant or the seizure of evidence). To that extent, the Prosecution are required to prove that the actions of the accused were directed against an official person performing a specific official duty²¹. The threat must be of *immediate* use of force²².

40. The 'common actions' for the purposes of Article 401(2) must involve the use of force or threat of immediate use of force – the offence is a Chapter XXXII offence against *public order* (not an offence against the administration of justice and public administration under Chapter XXXI or an offence of 'contempt').
41. No evidence of common action to use force or serious threat (of force, or otherwise) against an official person has been adduced.
42. No evidence of attempted common action to use force or serious threat against an official person has been adduced.
43. No evidence has been adduced that the Accused incited another to the use of force or serious threat against an official person as part of a common action or otherwise.
44. No evidence of an agreement to use force or serious threat against an official person as part of a common action has been adduced.
45. Accordingly, Count 2 should be dismissed.

²¹ Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1166 margin number 5 (translation at KSC-BC-2020-07/F00341/A01 page 13 of 18)

²² *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3

***Count 3: INTIMIDATION DURING CRIMINAL PROCEEDINGS**, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC ADMINISTRATION, punishable under KCC Articles 17, 28, 31, 32(1)-(3), 33, 35, and 387, and Articles 15(2) and 16(3) of the Law.*

46. Article 387 provides that:

‘Whoever uses force or serious threat, or any other means of compulsion, a promise of a gift or any other form of benefit to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings shall be punished...’

47. Article 387 of KCC 2019 requires force or serious threat or any other means of compulsion or promise of a gift or any other form of benefit.

48. As with Article 401, it is submitted that “serious threat” means “serious threat of force”.

49. In contrast to Article 401, however, Article 387 can be committed using ‘any other means of compulsion’ or ‘promise of a gift or any other form of benefit’.

50. “Compulsion” is to be understood in light of the definition of force (a means of compulsion) in Article 113(5) KCC 2019 – i.e. where the consequence of the means used is that a person is brought against his or her will into a state of incapacitation for resistance.

51. The offence under Article 387 requires that a person is induced to refrain from making a statement or to make a false statement or to otherwise fail to state true information. The offence requires proof of consequence.
52. Article 387 also requires that the statement refrained from being made, the false statement made, or the information failed to be stated, to be information which relates to the obstruction of criminal proceedings.
53. Obstruction of criminal proceedings is a separate offence contrary to Article 386 of the KCC 2019.
54. Both the offence contrary to Article 386 and the offence contrary to Article 387 can be committed through force or threat, or other means of compulsion or bribery/promise of gift/benefit (see Article 386(1) and (4))²³.
55. Like Article 387, Article 386 covers acts of intimidation of witnesses, including acts of intimidation of witnesses which result in bodily injury (see Articles 386(4) and (5)).
56. Both the offences contrary to Article 386 and Article 387 require proof of consequence, namely that a person is induced to refrain from giving a statement, or to make a false statement, or to otherwise fail to state information to the police (see Article 386(1.1), (1.3) and (1.7)).
57. Unlike Article 386, however, an offence is only committed under Article 387 where a person is induced to refrain from giving a statement, or to make a false

²³ Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1124 margin number 1 (translation at KSC-BC-2020-07/F00341/A01 page 4 of 18)

statement, or to otherwise fail to state information to the police in relation to an offence under Article 386.

58. There is no basis, neither literal or purposive, to restrict the relevance of the words “when such information relates to obstruction of criminal proceedings” in Article 387 to ‘failing to state true information to the police, a prosecutor or a judge’ only²⁴. Restricting the application of the words ‘when such information relates to obstruction of criminal proceedings’ in that manner would lead to a distinction in Article 387 without any merit, namely:

(a) that inducing a witness, by any means of compulsion, to refrain from making a statement in non-obstruction proceedings is an offence under Article 387; but

(b) inducing a witness, by the same means of compulsion, to fail to state true information to the police, a prosecutor or judge, in non-obstruction proceedings is not an offence under Article 387; where

(c) what constitutes a statement of a witness for the purposes of legal proceedings is determined not by its form or the name given to it, but by its content function, purpose and source²⁵; and where

(d) both ‘statement’ and ‘information’ are expected to be true.

²⁴ As previously submitted by the Prosecution in KSC-BC-2020-07/F00341, “Prosecution Submissions on the Applicable Law with one public annex”, Prosecutor, 30 September 2021, Public at paragraph 19

²⁵ KSC-BC-2020-07/F00334, “Decision on the Prosecution Request for Admission of Items Through the Bar Table”, Trial Panel II, 29 September 2021, Public at paragraph 84

59. Given that acts of witness intimidation, including where injury is actually caused, are ordinarily punishable under Article 386, Article 387 is properly restricted on its terms to those further aggravated offences where intimidation is employed in proceedings relating to an antecedent offence contrary to Article 386 of obstruction of criminal proceedings.

60. In the present case, no evidence has been adduced that:

- (a) Any person has been induced to refrain from making a statement relating to the obstruction of criminal proceedings (or at all);
- (b) Any person has been induced to make a false statement relating to the obstruction of criminal proceedings (or at all);
- (c) Any person has been induced to fail to state true information to the police, a prosecutor or a judge relating to the obstruction of criminal proceedings (or at all); and that
- (d) The Accused used any of the means set out in Article 387 to induce any of the above occurrences in relation to an antecedent offence of obstruction of criminal proceedings.

61. Indeed, no evidence has been adduced that the Accused used force to induce another to refrain from making a statement, or to make a false statement, or to fail to state true information to the police.

62. No evidence has been adduced that the Accused used the promise of a gift or other form of benefit to induce another to refrain from making a statement, or to make a false statement, or to fail to state true information to the police.

63. No evidence has been adduced that the Accused used a serious threat (of force, or any other form of threat) to induce another to refrain from making a statement, or to make a false statement, or to fail to state true information to the police:

(a) the Prosecution's case is that the Accused's actions were directed at those persons who had *already* provided a statement or information to investigators;

(b) As to use of a threat (serious or not), the Trial Panel has heard that only two anonymous persons have complained of being subjected to a threat but: (a) neither complaint is admissible as to the truth of their contents (i.e. the complaints do not amount to admissible evidence that either person was, in fact, subjected to a threat²⁶); (b) one amounted to reference to a further anonymous opinion only and (c) the other could not directly be linked to the actions of the Accused in any event²⁷.

64. No evidence of incitement of others by the Accused, or provision of assistance to others by the Accused, to commit an offence under Article 387, as strictly construed in accordance with Article 2(3) KCC 2019, has been adduced. Nor has any evidence of an attempt to commit an offence under Article 387 been adduced.

65. Accordingly, Count 3 should be dismissed.

²⁶ KSC-BC-2020-07/F00334, "Decision on the Prosecution Request for Admission of Items Through the Bar Table", Trial Panel II, 29 September 2021, Public at paragraphs 91, 93 and 94

²⁷ Transcript, 4 November 2021, at page 1833 lines 21 to page 1837 line 13

Count 4: RETALIATION, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC ADMINISTRATION, punishable under KCC Articles 17, 28, 31, 32(1)-(2), 33, 35, and 388(1), and Articles 15(2) and 16(3) of the Law.

66. Article 388(1) of KCC 2019 provides that: 'Whoever takes any action harmful to any person, including interference with lawful employment or livelihood of any person, with the intent to retaliate for providing truthful information relating to the commission or possible commission of any criminal offense to police, an authorized investigator, a prosecutor or a judge, shall be fined and punished...'

67. The offence under Article 388(1) penalises retaliation (any harmful action) directed towards a person who has provided truthful information relating to the commission or possible commission of any criminal offense to the police, with the intent to retaliate against that person for providing truthful information relating to the commission or possible commission of any criminal offense to the police.

68. The offence requires that:

- (a) the subject of retaliation had provided truthful information relating to the commission or possible commission of any criminal offense; and
- (b) the perpetrator must believe that the information provided by the subject of retaliation was truthful.

69. If the information provided was false, or the perpetrator believes that the information provided was false, no offence is committed.
70. In the present case, no evidence has been adduced as to the truthfulness or otherwise of the information provided by the alleged subjects of retaliation. No evidence as to the contents of the information provided has been adduced at all.
71. No evidence has been adduced to the effect that the Accused believed that information provided to investigators was truthful (so as to establish the specific intent required, namely the intention to retaliate against persons giving truthful information). On the contrary, such evidence as has been adduced in relation to the Accused is to the effect that he believed that false information had been provided.
72. Further, no evidence has been adduced that would support criminal liability for attempt, incitement, assistance, or agreement in the circumstances.
73. Accordingly, Count 4 should be dismissed.

***Count 5: VIOLATING SECRECY OF PROCEEDINGS**, through unauthorised revelation of secret information disclosed in official proceedings, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC ADMINISTRATION, punishable under KCC Articles 17, 31, 32(1)-(2), 33, 35, and 392(1), and Articles 15(2) and 16(3) of the Law.*

74. Article 392(1) of KCC 2019 provides that ‘whoever, without authorization, reveals information disclosed in any official proceeding which must not be

revealed according to law or has been declared to be secret by a decision of the court or a competent authority shall be punished...'

75. Count 5 is specifically particularised as the revelation of "secret" information disclosed in official proceedings (not "information disclosed in any official proceedings which must not be revealed according to law").

76. The classification of information as "secret" is defined in the Law on Classification of Information and Security Clearances, Law No.03/L-178 at Article 6.1.2 ("Secret" shall be applied to information the unauthorized disclosure of which could seriously damage security interests of the Republic of Kosovo) and is distinct from classifications of information as 'confidential' or 'restricted' or 'protected' (see, for example, the Law on Classification of Information and Security Clearances, Law No.03/L-178 at Articles 6(1.3), 6(1.4), 11(1), Article 30, Article 31, 35, 50.

77. No evidence has been adduced that any relevant information has been declared to be 'secret' by a decision of the court or a competent authority.

78. Further, Article 392(1) requires that the information declared to be secret must have been disclosed to the perpetrator in an official proceeding²⁸.

79. No evidence has been adduced that any relevant material was disclosed to the Accused in an official proceeding.

²⁸ Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1141 margin number 8 (translation at KSC-BC-2020-07/F00341/A01 page 8 of 18): "A condition for the existence of this criminal offence is that it concerns information and facts made known during the judicial, misdemeanour, administrative proceedings or the investigative parliamentary proceedings of Kosovo Parliament. As a rule, it is related to people who take part in a particular proceeding as procedural subjects. However, it is also related to other people, who make presentations during certain procedural acts, (court interns, scientific experts etc.)"

80. Moreover, the perpetrator must have knowledge that the relevant information had been declared to be secret by a decision of the court or a competent authority²⁹. The perpetrator must know about the existence of the order (or declaration) and its content.
81. No evidence has been adduced that the Accused was aware that any relevant information had been declared to be 'secret' by a decision of the court or a competent authority.
82. Further, no evidence has been adduced that would support criminal liability for attempt, incitement, assistance, or agreement in the circumstances.
83. Count 5 should be dismissed accordingly.

Count 6: VIOLATING SECRECY OF PROCEEDINGS, through unauthorised revelation of the identities and personal data of protected witnesses, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC ADMINISTRATION, punishable under KCC Articles 17, 28, 31, 32(1)-(3), 33, 35, and 392(2)-(3), and Articles 15(2) and 16(3) of the Law.

84. Article 392(2) of KCC 2019 provides that: 'Whoever without authorization reveals information on the identity or personal data of a person under

²⁹ MZ, PAKR336/16, Judgment, 13 December 2016 at page 7

protection in the criminal proceedings or in a special program of protection shall be punished...'

85. Article 392(3) further provides for an aggravated form of the offence 'if the offence provided for in paragraph 2 of this Article results in serious consequences for the person under protection or the criminal proceedings are made impossible or severely hindered'.

86. Consistent with Article 392(1), the information said to be revealed must be of a person under protection in *the* criminal proceedings, that is, the criminal proceedings in which the information was disclosed to the perpetrator; or otherwise of a person in a special program of protection.

87. There is no evidence that any relevant material was disclosed to the Accused in criminal proceedings.

88. It is not sufficient for the purposes of Article 392(1) that information has been classified as 'confidential', even if the information relates to the identity or personal data of a person featuring in criminal proceedings (for example, as a 'witness' or 'potential witness').

89. The information must be of a person under 'protection' at the time of the alleged offence, i.e. a person subject to current specific measures of protection in criminal proceedings or in a special program of protection³⁰.

³⁰ Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1143 margin number 2: "[The offence contrary to Article 392(2)] is the result of new legal options in relation to the special category of the participants in the proceedings who, in conformity with the provisions of the Criminal Procedure Code and the law on witness protection, have been given a special status and, consequently, special protection."

90. Further, the perpetrator must have knowledge that the relevant information is of a person subject to specific measures of protection in criminal proceedings or in a special program of protection³¹. The perpetrator must know about the existence of the order granting protection and its content.

91. The evidence heard by the Trial Panel in relation to protective measures does not meet the above requirements.

92. Although the witness Zdenka Pumper said [REDACTED]³²:

(a) [REDACTED]³³;

(b) [REDACTED]

93. [REDACTED]³⁴.

94. [REDACTED]³⁵.

95. [REDACTED]³⁶.

96. Further, no evidence has been adduced that would support criminal liability for attempt, incitement, assistance, or agreement in the circumstances.

97. Count 6 should be dismissed accordingly.

³¹ MZ, PAKR336/16, Judgment, 13 December 2016 at page 7

³² Transcript, 19 October 2021 at page 1008 lines 3-5

³³ Transcript, 25 October 2021 at page 1333 lines 8-15

³⁴ Transcript, 19 October 2021, at page 954 line 16 to page 955 line 3

³⁵ Transcript, 25 October 2021 at page 1323 lines 14-19 re *Salih Mustafa*; Transcript, 25 October 2021 at page 1325 lines 4-12 re *Thaçi et al*; Transcript, 25 October 2021 at page 1325 lines 22-24 re *Pjetër Shala*

³⁶ Transcript, 25 October 2021, at page 1324 lines 9-12 re *Salih Mustafa*; Transcript, 25 October 2021, at page 1326 lines 4-11 re *Pjetër Shala*

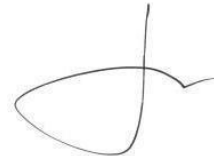
IV. CLASSIFICATION

98. This filing is classified as confidential as the evidence in relation to protective measures was heard in private session at the Trial Panel's direction. The Defence is content that the filing be reclassified as public.

V. CONCLUSION

99. For the above reasons, it is submitted that Counts 1 to 6 should be dismissed pursuant to Rule 130 of the Rules on the basis that there is no evidence capable of supporting a conviction beyond reasonable doubt.

Word count: 5802 words



JONATHAN ELYSTAN REES QC

Specialist Counsel for Mr Gucati

HUW BOWDEN

Specialist Co-Counsel for Mr Gucati

ELEANOR STEPHENSON

Specialist Co-Counsel for Mr Gucati

13 December 2021

Cardiff, UK