PUBLIC
Date original: 17/11/2021 15:02:00
Date public redacted version: 13/12/2021 11:09:00

In:	**KSC-BC-2020-07**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**Trial Panel II**
	Judge Charles L. Smith, III, Presiding Judge
	Judge Christoph Barthe
	Judge Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
Date:	27 November 2021
Language:	English
Classification:	**Public**

Publicly Redacted Defence Motion under Rule 130 'Dismissal of Charges'

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Jonathan Peter Worboys

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

Eleanor Stephenson

I. INTRODUCTION

1. The Defence for Mr. Haradinaj, in accordance with Rule 130 of the Rules of Procedure and Evidence before the Specialist Chambers ("Rules")[1] seek to make an application to dismiss all charges currently contained within the indictment, it being clear, on any objective assessment, that, in accordance with Rule 130(3) of the Rules "*there is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charges in question*".

2. The case against Mr. Haradinaj was and remains, replete with disclosure failings and evidential gaps, to such an extent that there is no basis upon which this case can properly be allowed to proceed.

3. At the outset of these proceedings, during the pre-trial and trial phase, the Defence have consistently raised significant concerns as to the Specialist Prosecutor's Office ("SPO" or "Prosecution") cavalier attitude to its disclosure obligations, its failure to properly investigate the case, its failure to adhere to recognised investigative standards and that such failures should have been remedied prior to any trial commencing.

4. The question to falls be answered now must be, if the case were to end now, and no defence case called, would there be sufficient evidential basis upon which to convict the Defendant of those offences with which he is charged,

[1] KSC-BD-03/Rev3/2020.

reminding ourselves that the Defendant does not have to prove one single matter and is not required to present any evidence, it is the prosecution that has to prove each and every element of those offences contained within the indictment.

5. The question therefore must be, if the Trial Panel were to convict the Defendant on any of the charges contained in the indictment, would such a conviction be safe.

6. As noted above, on any objective assessment, it cannot be concluded that the prosecution has discharged its burden; put simply, there is simply no evidence upon which to satisfy the elements of crime, and even if it is accepted that evidence has been adduced to suggest culpability, given the manner in which this case has been presented, and the steadfast refusal of the prosecution to call witnesses of fact, instead seeking to rely upon an unorthodox interpretation of the Rules, the probative value of that evidence, including that which has been given by the four (4) witnesses called by the prosecution, is at best limited, and in reality of no probative value at all.

7. The prosecution has not demonstrated that its case has been proved beyond all reasonable doubt, and so short of that threshold have they fallen, the only proper course of action is for the Trial Panel to dismiss all charges currently faced by the Defendant.

8. These submissions comprise two elements:

a. A breakdown of the 'elements of crime'; and

b. An assessment as to the extent that the evidence presented satisfies those elements.

9. Further, the Defence for Mr. Haradinaj would highlight from the outset, that although we base our submissions on the 'Elements' and 'Modes of Liability' as confirmed by the Pre-Trial Judge in his decision on Confirmation of the Indictment;[2] however, it is highlighted that a decision concerning a challenge to those elements and modes of liability from the Trial Panel is still awaited.[3]

10. The concerns in respect of the inappropriate 'widening' of both the elements of crime, and modes of liability remain.[4] It may therefore be that these submissions need to be augmented upon receipt of that decision given that there is a very real possibility that the same will impact any decision of the Trial Panel in terms of this application to dismiss.

11. It is noted in this regard, that the Defence do not consider that the Pre-Trial Judge's determination of the elements of crime in particular are in accordance

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

[3] KSC-BC-2020-07/F00342, Defence Submissions on Elements of Crimes and Modes of Liability, 30 September 2021.

[4] KSC-BC-2020-07/F00342, Defence Submissions on Elements of Crimes and Modes of Liability, 30 September 2021.

with the Code of the Criminal Procedure of the Republic of Kosovo.[5] The Defence for Mr. Haradinaj would further seek to highlight at this juncture that it adopts the position as submitted by the Gucati Defence in terms of the elements of crimes and modes of liability[6] and further adopts the written submissions on the applicable law in the Gucati Defence in its Motion to Dismiss filed on 17 November 2021.[7]

II. ELEMENTS OF CRIME

12. It is respectfully submitted, that the Indictment, is almost impenetrable in its drafting, with the narrative prior to the individual counts alleging duplicitous offences, various sub offences contained within the offence itself, and various examples of how the offence has been satisfied. In short however, the Defendant faces six (6) counts on the indictment, namely:

a. Obstructing Official Persons by Serious Threat;

b. Obstructing Official person in Performing Official Duties by Common Group Action of a Group;

[5] KSC-BC-2020-07/F00342, Defence Submissions on Elements of Crimes and Modes of Liability, 30 September 2021.

[6] KSC-BC-2020-07/F00345, Further Written Submissions on the Elements of the Offence and Modes of Liability, 30 September 2021.

[7] KSC-BC-2020-07/F00439, Motion to Dismiss Pursuant to Rule 130, 17 November 2021, Confidential.

c. Intimidation during Criminal Proceedings;

d. Retaliation;

e. Violating the Secrecy of Proceedings – Protected Information; and

f. Violating the Secrecy of Proceedings – Protected Persons

13. The Defence for Mr. Haradinaj would highlight at this juncture that the Trial Panel in their deliberations must caution against criminalising free speech, a fact that was explicitly referenced by the Specialist Prosecutor, Mr. Jack Smith in his opening speech wherein he noted:

> *"…I want to be very clear, vigorous debate on important public issues is a sign of a healthy society. Rather than be suppressed, of course, it should be fostered. There are people in Kosovo who believe very strongly in this institution. They see it as a sign of Kosovo's commitment to the rule of law and a place that will give justice to many victims. Others do not yet trust this Court and that is okay. It is okay to question aspects of this Court. It is okay to say what you do not like about this Court, and it is kay to say why you do not like this Court. That is all part of a free society*".

14. Accordingly, criticism is acceptable, vocal and strong criticism is acceptable, in fact, as per the comments of the Specialist Prosecutor, not only is this acceptable but ought to be encouraged; further, free speech and expression is

explicitly protected within Article 10 of the European Convention for the Protection of Human Rights and Freedoms ("ECHR"), as contained in Chapter II to the Constitution of the Republic of Kosovo[8] and therefore part of the domestic law, and thus in determining the guilt or innocence of the Defendant(s), and further, whether, for the purposes of this submission, the prosecution have at this juncture proved their case beyond all reasonable doubt, the Trial Panel must also determine whether certain actions, if demonstrated as having occurred, crossed the line between free speech, and thus protected in the public interest, and criminal conduct.

15. This case is arguably a watershed for the Specialist Chambers; however, not for the reasons that the SPO may seek to advance.

16. It is an arguable watershed for how the Specialist Chambers are viewed in the Republic of Kosovo and internationally, in that it has become part of this case that the question must be asked as to whether it is acceptable to prosecute individuals who, in part, are alleged to have criticised the work of the Specialist Chambers, sought to highlight instances of hypocrisy and discriminatory practices, and further, highlighted the fact that the investigations are focussing solely on the Kosovo Liberation Army ("KLA") veterans or Kosovo nationals of ethnic Albanian origin, with not one current

[8] K-09042008, 9 April 2008 (as amended on 7 September 2012 (04-V-436), 5 August 2013 (05-V-139), 11 March 2016 (05-V-229) and 30 September 2020 (KUV-07-V-058-KUSHT)).

open investigation into a Serbian national[9] or members of the Yugoslav National Army ("JNA"), law enforcement or paramilitary forces who are alleged to have participated in numerous massacres of civilians throughout the territory of what is now the Republic of Kosovo.

17. Do actions seeking to shine a light into the darkness and opacity that surrounds these investigations, or lack thereof, constitute criminal conduct or, is the prosecution merely a reaction to the exposure of prosecutorial duplicity, serving no-one's interests other than its own.

18. These are questions that must be determined alongside that of whether the prosecution has proven its case 'beyond all reasonable doubt'.

Obstructing Official Persons by Serious Threat

19. As per paragraphs 25-28 of the 'Indictment',[10] the prosecution alleges, and therefore must prove, that the Defendant 'by serious threat and/or common action, obstructed or attempted to obstruct' Specialist Chambers Proceedings.

20. Further, the prosecution seeks to allege that the Defendants "*organised and coordinated the group committing such acts*".[11]

[9] KSC-BC-2020-07, Trial Transcript of 26 October 2021, at page 1425, lines 13-18.

[10] KSC-BC-2020-07/F00075/A01, Indictment, 14 December 2020.

[11] *Ibid.* at paragraph 25.

21. In substantiating this first Count, the prosecution states that the Defendant(s) disseminated Confidential Information, accused witnesses identified in that information as being liars, spies, and traitors, and declared that their purpose was to obstruct the Special Chambers proceedings.

22. Further, the prosecution goes on to submit that the Defendant(s) publicly encouraged, instructed, and/or advised others to continue providing such information, and further, certain members of the press and public to take and/or record the information for further dissemination.

23. Regardless of the rhetoric of the prosecution, however; the offence itself, is 'Obstruction' by way of 'Serious Threat', and thus the process of determining guilt in respect of this first count is that it focusses solely on whether the actions of the Defendant(s) 'Obstruct Official Persons by Serious Threat'.

24. If it is that the evidence adduced before the Trial Panel does not satisfy the three elements of the offence, i.e. first, Obstruction, second, Official Persons, and third, Serious Threat, it matters not what actions and/or omissions were undertaken by the Defendant(s) or indeed others.

25. If the prosecution has not proven that those three elements of crime have been satisfied, the offence has not been proven beyond all reasonable doubt and therefore, count 1 on the indictment must be dismissed.

Obstructing Official person in Performing Official Duties by Common Group Action of a Group

26. In a similar vein to that submitted at paragraphs 3 *et seq*., the actions of the Defendant are immaterial if it is that those actions do not satisfy the individual elements of the Count on the Indictment, in terms of Count 2, that being that firstly, an official person was obstructing, secondly, in performance of their official duties, and thirdly, by common group action of a group.

27. Again therefore, all three elements of the offence must be satisfied, and again, the actions and/or omissions of the Defendant(s) are immaterial if it is that those actions and/or omissions do not satisfy those individual elements of crime.

Intimidation During Criminal Proceedings

28. The prosecution alleges that the Defendant(s) used 'serious threats' to 'induce or attempt to induce' 'witnesses to refrain from making a statement' or 'to make a false statement' or 'otherwise fail to state true information to the SPO and/or SC'.

29. Again, the burden is upon the prosecution to demonstrate that each element of the offence has been satisfied, it must therefore be proven that firstly, there were threats, secondly, that those threats were serious, thirdly that the intention was to induce a witness to refrain from making a statement, or in

the alternative, make a false statement, or otherwise fail to state true information to the SPO and/or SC.

30. Although explicitly referred to within paragraph 29-30 of the Indictment, the offence also includes 'during criminal proceedings' and therefore it is respectfully submitted that it is not enough to prove that 'intimidation' took place in the manner described within the aforementioned paragraphs, but the witness at which it was directed, was party to 'criminal proceedings'.

31. The inclusion of 'criminal proceedings' naturally suggests that it is not enough that an individual who is not party to any proceedings, or an individual who has been spoken to by the prosecution but not with specific reference to any specific proceedings, has been affected by the actions of the Defendant(s) proven to the required standard by the prosecution. Rather, any such relevant individual must also be party to 'criminal proceedings', and thus allowing such an individual to enjoy the status of a 'witness', noting that the prosecution in numerous written and oral submissions before the panel has questioned the definition of a 'witness'.[12]

Retaliation

32. The prosecution alleges that the Defendant(s) and Associates 'took or attempted to take' 'actions harmful to witnesses' with 'the intent to retaliate'

[12] *See, e.g.*, KSC-BC-2020-07/F00281, Prosecution submissions on use of the term 'witness', 23 August 2021.

for 'providing truthful information relating to the commission or possible commission of criminal offences to the SPO'.

33. Similar to the above, it is therefore incumbent upon the prosecution to prove beyond all reasonable doubt that firstly, the actions *were* harmful to witnesses, secondly, that there was an intention to retaliate, and thirdly, that there had been the provision of truthful information relating to criminal offences to the prosecution.

34. Again therefore, the prosecution is required to prove that where an individual was affected, that individual was a witness, and that witness had provided such information to the prosecution, further, and arguably the most important element, is the evidence of 'retaliation', as without the same, the offence cannot be properly made out.

35. There is a clear distinction between the offences of intimidation and retaliation, and the fact that an individual was intimidated by a proven action, does not necessarily translate to the incident being one of retaliation, therefore being a clear difference of intent between the two offences.

36. The definition of retaliation is an attack or harm caused to an individual following that individual attacking or causing harm to another.

37. Accordingly, there must first be evidence of harm being caused to an individual, and that harm was intended on being caused, and further, it was intended because of the previous actions of that individual.

38. In differentiating between the offences of intimidation and retaliation, and as noted above, it is not enough that harm may have been caused, it is the intention that is important.

Violating the Secrecy of Proceedings

39. In terms of the instant case, there are two counts on the indictment in respect of the violation of privacy, namely one relating to 'protected persons'[13] and a further count relating to 'protected information'.[14]

40. The simplistic position being that the Defendant(s) without any prior authorisation, 'revealed Confidential Information', both the names, and therefore identities of protected individuals (protected persons), and further, general confidential information (protected information) that could not be released without prior authorisation.

41. Accordingly, the prosecution must not only prove that the Defendant(s) revealed information, but that the information said to have been revealed, was indeed confidential or 'protected', and further, that in terms of any

[13] KSC-BC-2020-07/F00074, Confirmation Decision, count 6.

[14] KSC-BC-2020-07/F00074, Confirmation Decision, count 5.

information in respect of individuals that can be shown to have been revealed, those individuals were similarly 'protected' and the formal measures that resulted in them enjoying this status.

V. EVIDENTIAL ASSESSMENT

42. The Rules are silent in terms of that which must be satisfied in terms of an application to dismiss, other than Rule 130(3) which reads:

> "*…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.*"

43. The wording would appear to be a mirror reflection of that of Rule 98 *bis* of the ICTY Rules of Procedure and Evidence which reads:

> "*the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.*" (emphasis added)

44. The Appeals Chamber in *Delalić*[15] held that the standard to be applied "*is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence (if accepted) but whether it could*."[16]

45. The above therefore requires that the Trial Panel makes the assumption "*…that the prosecution's evidence was entitled to credence unless incapable of belief*".[17]

46. The Defence would submit that in the first instance, the Trial Panel 'could not' convict the Defendant(s) beyond all reasonable doubt on the evidence, and secondly, that a significant portion of the evidence adduced by the prosecution, particularly the evidence of the third prosecution witness, [REDACTED] (W04842), is simply not credible, and thus the weight to be attached ought to be reduced accordingly.

47. With the above test in mind, each count on the indictment will be dealt with in turn.

Obstructing Official Persons by Serious Threat

48. The Trial Panel has heard no evidence that either, official persons were 'Obstructed', or even if the Trial Panel considered they were obstructed,

[15] *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgment, 20 February 2001.

[16] *Ibid* at para. 434.

[17] *Ibid*.

which is not accepted, that such obstruction was brought about by way of serious threat.

49. It is submitted that no evidence was tendered by the prosecution that supports a charge of obstruction.

50. In respect of the issue of 'Obstruction', the evidence that the Trial Panel has heard, suggests that somewhere in the region of 200 phone-calls were made following the leaks, with Witness W04842 giving evidence that he made approximately 30 calls, with each call lasting approximately 15 minutes.[18]

51. Witness W04842 went on to dispute that these 30 calls took longer than one day to make, despite it being clear that on such a basis it would have taken under 8 hours to make those calls, and the witness noting that 'a day' is considered to be 12 hours.[19]

52. Regardless of the witness's inability to maintain any consistency in his evidence, the stark fact remains, that at no stage did he adduce any evidence as to how he, or any other member of the SPO, had been obstructed.

53. Witness W04842 is not an investigator, and therefore it is arguable that the work he undertook was in accordance with his job description and mandate. In any event, as noted above, no evidence was adduced as to how he was

[18] KSC-BC-2020-07, Trial Transcript of 4 November 2021, at page 1824, line 11.

[19] KSC-BC-2020-07, Trial Transcript of 4 November 2021, at page 1824, line 4.

prevented from undertaking alternative tasks or work as a consequence, and therefore, Witness W04842 was not able to adduce any evidence that he was obstructed.

54. The first witness, [REDACTED] (W04841), *is* an investigator. However, similarly to Witness W04842, no evidence was adduced as to how the incident in question led to her being obstructed and/or being unable to focus on other tasks. In fact, she gave evidence that she was involved in other investigations.[20]

55. It is accepted that the cause of the leaks would fall to be investigated, and this investigation is not one that was anticipated; however, it is clear, both from the way in which the prosecution has presented its case, and the opening statement of the Specialist Prosecutor, that the Defendant(s) *are not* alleged to be involved in the procurement of the documents, or of the leaks themselves, and therefore any obstruction caused by the leak is not the responsibility of the Defendant(s) nor can they be held responsible for the subsequent investigation ensuing.

56. The Trial Panel have not heard any evidence to demonstrate how this resulted in there being obstruction "*of an official person in performing official duties*".[21]

[20] *See, e.g.*, KSC-BC-2020-07, Trial Transcript of 18 October 2021, at pages 930-932.

[21] KSC-BC-2020-07/F00074, Confirmation Decision, at paragraph 67.

57. With regard to the second element of the offence 'serious threat', no evidence has been adduced to demonstrate that the Defendant(s) offered any threats to any individual, serious or otherwise.

58. As per the decision of the Pre-Trial Judge, 'force or serious threat' is not defined explicitly.[22] Accordingly reference is drawn to Article 387 of the Criminal Code of the Republic of Kosovo ("KCC").[23] Even taking into account that the definition is not delimited, no evidence has been adduced of threats to the health, well-being, safety, security, or privacy of an individual.

59. The Defendant(s) simply did not, nor have they since, made any sort of threat to any individual.

60. The Trial Panel is respectfully reminded that the question, when determining the strength of the prosecution case on this count, is not whether the 'leak' itself obstructed an official person,[24] but whether the specific actions of the Defendant(s) did so.

61. Taking direct, from paragraph 70 of the Pre-Trial Judge's decision:

> *"In the context of SC Proceedings, obstruction would entail impeding, hindering or delaying the work of SC/SPO Officials."*

[22] *Ibid* at paragraph 68.

[23] *Ibid* at paragraph 60.

[24] Noting the instant Defendant's submissions at paragraph 63.

62. It is submitted that no evidence of the above been adduced by the prosecution and accordingly, it is not able to prove this count beyond all reasonable doubt.

63. It therefore follows that the count should be dismissed from the indictment.

Obstructing Official person in Performing Official Duties by Common Group Action of a Group

64. Submissions at paragraphs 46-63 are not repeated here, in terms of the 'Obstruction' or otherwise.

65. In the first instance, it is submitted that having established that no 'obstruction' has been caused within the meaning of the Indictment, it is not necessary to consider the second limb of the offence, namely 'Common Group Action of a Group'.

66. However, where the Trial Panel does deem that this second limb falls to be considered, the following is submitted.

67. The issue that falls to be considered therefore is whether the Defendant(s) acted in concert with a 'group' and that group took part in a 'common action'.

68. Having regard to the Pre-Trial Judge's decision,[25] for 'group' to be satisfied there must be three (3) or more persons. It is of note that only two persons

[25] KSC-BC-2020-07/F00074, Confirmation Decision, at para. 75.

have been indicted, and therefore, the prosecution are alleging that at least one other individual was involved in the offence, and that one person, or more individuals, is not subject to indictment.

69. The prosecution in the amended indictment[26] appear to seek to suggest that the 'group' comprises the Defendant(s), Mr. Faton Klinaku, Mr. Tome Gashi, and "*other members and representative of the KLA WVA*".

70. The prosecution have not however, adduced evidence as to how those individuals not indicted were part of the group committing criminal offences.

71. The identification of three or more persons or potential 'groups' therefore fall to be considered when determining whether the elements of crime have been satisfied, having regard to the evidence adduced, and not the outline as provided with the indictment.

72. Firstly, and as already referred to, there is no allegation that the Defendant(s) were involved in the procurement of the Batches of evidence from the SPO, the Specialist Prosecutor being abundantly clear in his opening statement that "*The accused are charged with illegally disseminating these documents, not with actually stealing them*".[27]

[26] KSC-BC-2020-07/F00251/A02, Submission of corrected Indictment, Annex 2.

[27] KSC-BC-2020-07, Trial Transcript of 7 October 2021, at page 790, lines 8-9.

73. It cannot be alleged retrospectively, therefore, that the 'group action' is related to the procurement of the documents themselves.

74. Secondly, as much as Mr. Klinaku and Mr. Gashi are named in the indictment as being 'involved' in the offences and therefore presumably, alleged to be part of 'the group', those two individual have not been charged with any offence nor any evidence adduced as to their alleged involvement, and therefore it is difficult to ascertain precisely what their part was according to the prosecution case.

75. In terms of the evidence adduced before the Trial Panel, both individuals were present when the offices of the KLA War Veterans Association ("KLA WVA") were searched, and provided assistance to those officers in attendance.[28] In terms of the video evidence that was shown, it is clear that both Klinaku and Gashi facilitated parts of the search and seizure of items, and therefore their actions cannot be construed as 'obstruction', quite the contrary.[29]

76. No evidence was adduced that would suggest their involvement was to the alternative.

77. Accordingly, there is no evidence adduced, recalling that the text of the indictment is not evidence, that would suggest that either individual was part

[28] *See, e.g.*, KSC-BC-2020-07, Trial Transcript of 26 October 2021, at pages 1482, 1484, 1485, 1488-1490.

[29] *See, e.g.*, KSC-BC-2020-07, Trial Transcript of 26 October 2021, at pages 1482, 1484, 1485, 1488-1490.

of a group that was involved in 'Obstruction', those individuals just happen to be members of the KLA WVA, and further, present on the relevant dates. Neither of these two facts however point towards establishing the elements necessary for a charge of 'Obstruction'.

78. Thirdly, the prosecution refers on a number of occasions within the indictment, to 'others', but do not name, or make any attempt to further particularise who those others are, or what the specifics of the actions taken by 'others' was, so as to satisfy the definition of a criminal group.

79. The only identifiable group who, supported by evidence, evidence that the Defence has not seen, may have been involved in the commission of a criminal offence, are those involved in the procurement and/or theft of the 'Batches' of documents, an event(s) that the Defendant(s) have been explicitly said not to be alleged to be involved in.

80. None of the four witnesses called by the prosecution indicate that the Defendant(s) were part of a wider conspiracy or group action, nor is there any evidence to suggest that anyone who could be said to form part of a group with the Defendant(s) took any action that could be said to be criminal much less took that action in concert with the Defendant(s).

81. As aforementioned, the other individuals named within the indictment are not alleged to have engaged in conduct that can be characterised as

'obstructive', within the meaning of the elements of crime or otherwise; in fact, those individuals actually assisted and facilitated, as per the evidence given orally, and the video evidence presented.[30]

82. It is abundantly clear therefore, that even were the Trial Panel to determine that this second limb of the offence falls to be considered, no evidence at all has been adduced by the prosecution to satisfy the 'group action' limb, and therefore the offence has not, or can it, be considered to have been proven beyond all reasonable doubt, and therefore it ought to be dismissed.

Intimidation during Criminal Proceedings

83. With regard to the decision of the Pre-Trial Judge, taking into account the caveat highlighted at paragraphs 9-11 above, the Defence submits that the elements of crime have not been satisfied, nor has the *mens rea*.

84. In terms of the material elements, the Pre-Trial Judge references Article 387 of the KCC and notes that that there must be the use of force or serious threat, or any other means of compulsion, promise, gift, or any other form of benefit.

[30] *Ibid*.

85. At no stage has the prosecution adduced any evidence that demonstrates the Defendant(s) intimidated any individual in the terms provided for within the confirmation decision.[31]

86. Taking the prosecution case at its highest, the evidence suggests that names may have been published by members of the press.

87. This is not the offence, however. At no stage has any evidence been adduced that the Defendant(s) used force, threatened, sought to compel, offered a benefit or promise to any individual with the intent of intimidating that individual, or conversely given the inclusion of 'eventual intent'.[32]

88. At no stage has the Defendant(s) taken any active step to prevent an individual from providing evidence or sought to threaten and/or intimidate in terms of any definition of the offence.

89. The Defence has not sought to delve into the evidence given in respect of this offence as quite clearly, given that which has been tendered during the brief presentation of the prosecution case, no such evidence has been presented.

90. Further or in the alternative, any evidence that has been admitted is of limited probative value when compared to its prejudicial effect, on account of the

[31] *See e.g.*, KSC-BC-2020-07/F00260, Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, at paragraph 20, *et seq*.

[32] Again, highlighting that it is not accepted that the offence is one that can be committed by way of eventual intent, or by way of omission as suggested. The offence is one of specific intent and therefore the only appropriate mens rea is that of 'direct intent'.

actual individuals said to have been affected by the leaks, have not been called to give evidence and therefore neither Defendant has had any opportunity to challenge any account, at any level, and the Trial Panel has been unable to assess the reliability of any such account.

91. For the above reasons, the Defence submit that the elements of crime have not been satisfied and that there is no evidence upon which the Trial Panel could properly, or safely, convict.

92. Accordingly, the count of 'Intimidation' ought to be dismissed.

Retaliation

93. With regard to the Decision of the Pre-Trial Judge in confirming the Indictment,[33] it is respectfully submitted to be abundantly clear that the prosecution submitted no evidence to substantiate this count on the Indictment.

94. Having regard to paragraph 53 of the decision and Article 388(1) of the KCC, it is accepted that there is no delimiting of scope, however, in the same vein, there must be some form of 'harmful action' such as violence, serious threats, or interreference with individual safety must be demonstrated.

[33] KSC-BC-2020-07/F00074, Confirmation Decision, at paragraphs 51-57.

95. Further, in terms of the mental element, and the decision of the Pre-Trial Judge on this point, there must be evidence of direct intent of causing harmful action, or further,[34] eventual intent that the Defendant had 'awareness' of possible retaliation.

96. The evidence heard simply does not support the elements of the offence.

97. To satisfy the elements, it is submitted that there must be evidence of the Defendant(s) conduct either intending to retaliate, or awareness of that possible retaliation.

98. The prosecution provided no evidence of this fact.

99. Finally, and again as per the confirmation decision, the prosecution must prove that the apparent 'victim' of the retaliation was targeted on account of that person "*providing truthful information relating to the commission or possible commission of any criminal offence…*".[35]

100. The prosecution has summarily failed to demonstrate how any purported victim is within this category of person, there being no evidence submitted that would demonstrate that an individual has provided information, truthful

[34] As much as the Defence do not accept the offence is one of eventual intent as per the submissions still under consideration by the Trial Panel.

[35] KSC-BC-2020-07/F00074, Confirmation Decision, at paragraph 56.

or otherwise, concerning the commission of, or possible commission of a crime.

101. The prosecution refused to call a single witness who it says was directly affected by the actions of the Defendant(s), instead seeking to rely upon the evidence of three SPO employees, none of whom can give that evidence, but merely recount what they were told, often second and third-hand hearsay.[36]

102. Even if it were accepted by the Trial Panel, that the evidence provided does constitute evidence of retaliation, regard must be had to the fact that, as noted above, the prosecution has consistently refused to call a single witness of fact to support the charge and therefore there has been no opportunity, effective or otherwise, for the Defendant(s) to challenge that evidence through an adversarial process.

103. The prosecution is asking the Trial Panel to simply accept the evidence as being accurate without it being tested or challenged, and thus the veil of opacity with which these proceedings have been brought are allowed to proliferate.

104. Witness W04842 is arguably the most relevant for the purposes of this offence; however, his evidence in the first instance does not assist in satisfying the elements of crime, and secondly, was inconsistent and undermined to the

[36] *See e.g.,* KSC-BC-2020-07, Trial Transcript of 18 October 2021, at pages 850-851.

extent that it cannot be rendered credible and therefore ought to be dismissed by the Trial Panel in its entirety.

105. It is respectfully submitted that Witness W04842 was so lacking in credibility, his evidence being wholly inconsistent and unbelievable, it cannot be safely relied upon.

106. At page 53 of the transcript of 28 October 2021, at line 23, the witness suggests "*there were a lot of people who expressed their fears and a lot of people, they felt threatened after the publishing of the…of the documents and their names*."

107. The use of the words 'a lot', is with respect, meaningless. One must enquire as the identity of such individuals, what exactly is their evidence, were the complaints recorded contemporaneously, has this evidence been called.

108. Such questions cannot be answered because the evidence to answer these questions in the affirmative or negative, simply has not been adduced.

109. Further, the witness at page 1703, line 2 onwards seeks to suggest "*So all the persons were very upset. Some of them, they start to scream on the phone*".

110. Firstly, the same questions posed at paragraph 90 above again cannot be answered because no evidence has been called. Further, of that evidence that has been called, namely the 'contact notes' of which this witness was the author, or even those contact notes that he had reviewed, not a single witness

is described as screaming, and therefore the prosecution was unable to adduce any evidence to support such an allegation.

111. In the absence of any evidence being called to substantiate this allegation the Trial Panel is simply being asked to accept Witness W04842's word for it.

112. On the same page of the transcript at line 23, the witness suggests that of those individuals who called the SPO rather than the SPO calling them, all of them expressed their anger immediately. Once again however, no such witness in the contact notes submitted is stated to have called in to the SPO, and therefore the Trial Panel must enquire as to why no such witness was included within the contact notes submitted into evidence. Again, we are being asked to simply accept the Witness W04842's word for it. Regardless of whether this is an appropriate position to take, the witness's unsubstantiated opinion is not evidence, it is at best second or third hand hearsay, and it is at worst, an example of something that simply did not occur and an example of the prosecution seeking to bolster a weak case.

113. The Trial Panel was able to observe the manner in Witness W04842 gave evidence and will be able to make its own assessment as to his credibility.

114. In any event, it is not enough to satisfy the elements of crime for 'retaliation'.

115. At page 1706 and line 23, the witness states "*all the persons contacted me, they were scared and upset*". With respect, this again simply is not true as there are

contact notes where the witness does not express any such emotion and suggests that they are not concerned at all. Witness W04842 has therefore given demonstrable inaccurate evidence that goes to his overall credibility.

116. It is accepted that two witnesses were relocated following the leaks, although the circumstances behind the relocation as well as any contact with the SPO prior to September 2020; however, this is in and of itself is clearly not enough to demonstrate retaliation, as the justification may have been grounded on the leak, the breach of the SPO's security, not the Defendant(s) alleged conduct.

117. Accordingly therefore, on the basis that the Defendant(s) are not alleged at any time to have procured the leak, this being explicitly ruled out in the opening statement of the Specialist Prosecutor,[37] the leak is down to others and/or the SPO acts or omissions, and therefore it these others who are responsible and whose actions gave rise to the action taken to relocate these two witnesses.

118. It is notable, in this regard that the prosecution has been unable to establish that the leak was not the result of a current or former employee or some other person working with a current or former employee of the SPO thus resulting in the Defendant(s) being entrapped or incited.

[37] KSC-BC-2020-07, Trial Transcript of 7 October 2021, at page 790, line 8.

119. Further and/or in the alternative, it is of note that information appeared in a number of media releases, and yet not one of these media houses or journalists have been charged. The question must be asked therefore why the prosecution has deemed the conduct such individuals to not involve any criminal liability and yet the Defendant(s) are criminally liable.

120. It is of import to highlight that the third witness called by the prosecution, [REDACTED] (W04866), a Kosovan journalist, justified his actions on the basis of the 'public interest' in making the public disclosures[38] and this was not challenged by the SPO and therefore appears by that lack of challenge, to have been accepted. It is noted that at the outset of giving evidence, Witness W04866 was informed by the prosecution, in clear and unambiguous terms, that he had not committed a criminal offence, he was not appearing as a suspect, nor had he ever been considered a suspect.[39]

> *"The SPO's position throughout is that W04866 is a witness and is not a suspect. He was interviewed as a witness and Mr. Koci is present today at the request of the witness.*

[38] *See e.g.,* KSC-BC-2020-07, Trial Transcript of 27 October 2021, at pages 1584, lines 3-9, page 1588, lines 3-5, page 1601, lines 1-7, page 16-2, lines 15-21, page 1603, lines 18 – page 1604, line 6, page 1605, lines 11-15, page 1609, lines 4-13, page 1612, lines 7-14, page 1613, lines 19-25, page 1626, lines 21-24, page 1629, lines 2-6, page 1640, lines 16-18.

[39] KSC-BC-2020-07, Trial Transcript of 26 October 2021, at page 1507, lines 3-14.

> *I wanted to make it clear on the record, and on the authority of the Specialist Prosecutor himself, that we will not be prosecuting this witness for anything he did in relation to this case*."[40]

121. The position therefore must be the same as the Defendant(s) having regard to the long held and advanced position that any actions taken were justified given the public interest in the information.

122. At page 1719 of the transcript, Witness W04842 is questioned in respect of his declaration exhibit 084008 onwards, in which the witness described "*tens of witnesses*" as feeling worried, unsafe.

123. Again, not one of those witnesses has been called to give evidence, and further, this evidence does not appear to be in line with the actions taken by the SPO in terms of two witnesses being relocated.

124. Further, it is of note that the significant majority, if not all witnesses, taking the case at its highest, learned of the disclosure through the media or through being contacted by the SPO, not one individual received a direct or indirect threat through the Defendant(s) and therefore the question to be asked is as per the appropriate test, taking into account that none of the evidence can be challenged given the fact that those witnesses were not called to give evidence, and further, the evidence is at best second, or third hand hearsay,

[40] KSC-BC-2020-07, Trial Transcript of 26 October 2021, at page 1507, lines 3-14.

can the Trial Panel safely convict the Defendant(s) of the offence, on the evidential basis submitted.

125. It would appear to be quite clear, and therefore is respectfully submitted, that the prosecution has not come close to proving their case beyond all reasonable doubt and therefore Count 4 ought to be dismissed.

126. The Trial Panel must make a determination as to whether they believe W04842 to be a truthful witness. It is respectfully submitted that, having regard to his evidence, it is difficult to see how this question can be answered in the affirmative. To convict on the basis of the evidence presented by the prosecution would be unsafe.

127. At page 1749, line 23 of the transcript, Witness W04842 seeks to suggest that he was present in a meeting as an observer despite there being no record of him ever attending that meeting, and all other parties being named. It is of note that the SPO have not sought to call any other witness who may confirm his presence or otherwise.

128. At page 1762, lines 1-14 the witness seeks to suggest that over 100 of those witnesses contacted expressed concern, and yet we have not seen over 100 examples of this concern in evidence, in fact whatever concerns were expressed were significantly lower.

129. Further, at page 1763 the witness notes under questioning from Judge Barthe that "*very few*" witnesses received direct threats, and yet again, we do not see this in evidence, save for Witness W04842 uncorroborated account, and further, not something that was volunteered in examination-in-chief, and therefore the statement is at best an afterthought. It is quite clear, from the evidence, that there were in fact no accounts of witnesses having received threats.

130. Under cross-examination, the evidence of Witness W04842 is so littered with inconsistencies that it can be said to be no longer credible and ought to be disregarded.

131. We would draw the Trial Panel's attention to the entirety of the evidence given by Witness W04842 on 4 November 2021,[41] but would seek to highlight certain points for context and the sheer audacity of the evidence given.

132. At page 1777 at line 10, Witness W04842 states [REDACTED]. This is simply wrong and a clear example of an inaccurate, or at worst, an untruthful witness.[42] The fourth witness called by the SPO, [REDACTED] (W04876) confirmed [REDACTED], and further, it is <u>fact</u> that the SPO does have an [REDACTED], therefore one must enquire as why would Witness W04842

[41] KSC-BC-2020-07, Trial Transcript of 4 November 2021, at page 1765 *et seq*.

[42] KSC-BC-2020-07, Trial Transcript of 5 November 2021, at page 1941.

state something that is so obviously incorrect, unless it as to cover up the failures in his own evidence, in particular the lengthy lapses, in some cases several months, in witness Contact Notes being entered into the ZyLAB database.[43]

133. We would further draw reference to pages 1780-1793 of the transcript and Witness W04842's evidence [REDACTED].

134. Again, in terms of credibility, attention is drawn to pages 1818-1825, wherein again, the witness struggles to justify his answers when challenged in cross-examination, offering a version of events that is simply not credible.

135. At page 1834 Witness W04842 again provides an inconsistent version of events changing the number of witnesses who were threatened to his knowledge from "*very few*" in evidence-in-chief, to a "*majority*" when cross-examined. This is not a small change or correction; this is an entirely different position being adopted.

136. The Defence does not seek to highlight every single point on which the witness is either inconsistent, or offers a wholly improbable version of events, to do so is beyond the scope of this application. The Trial Panel heard Witness

[43] *See e.g.,* KSC-BC-2020-07, Trial Transcript of 4 November 2021, at pages 1843-1844.

W04842's evidence and was able to assess his credibility in terms of whether the answers he gave were truthful.

137. It is our submission that Witness W04842 cannot, on any objective assessment, be deemed as credible and therefore his evidence, even where it is his evidence rather than rehearsing hearsay, is of minor, if any, probative value.

138. Further, even where Witness W04842 offers evidence that can be deemed to be probative by the Trial Panel, no evidence has been offered by this, or any other witness, that would substantiate the elements of crime for the offence of retaliation and therefore the charge ought to be dismissed.

Violating the Secrecy of Proceedings – Protected Information

139. The central issue that falls to be considered, is whether the information said to have been disclosed by the Defendant(s) is protected within the definition of the applicable legal framework, consisting of the KCC, the Kosovo Code of Criminal Procedure ("KCPC") and the Law on the Specialist Chambers and Specialist Prosecutor's Office ("Law"), and further, that the Defendant(s) intended in that they acted in awareness of, and desire from revealing 'protected information'.

140. In the alternative, the Defendant(s) must have acted with the awareness that the protected information might be revealed.[44]

141. The starting point, ordinarily, would be that the information said to have been disclosed, and therefore, the information said to be protected, was indeed categorised as such.

142. However, given the manner in which the investigation, search and seizure, and presentation of its case, has been undertaken by the prosecution, there are serious and significant questions that remain unresolved, and have not been resolved by way of evidence adduced at trial. In particular, the prosecution has failed to establish the integrity of the investigation, whether there was an effective chain of custody and whether the information was 'protected information'.

143. Firstly, it cannot be said with any certainty, due to the complete inadequacy of any chain of custody record, that the documents that the prosecution say are contained within the 'Batches' are actually contained within those batches and that it is established through an effective chain of custody, as the prosecution has refused to disclose their contents.

144. Further, the prosecution has refused to disclose the full contents to the Pre-Trial Judge, who confirmed the indictment without having seen the material

[44] KSC-BC-2020-07/F00074, Confirmation Decision, at paras. 34-40.

in its entirety, and/or the Trial Panel, and therefore, the Court is being asked to accept that documents are what they are said to be, entirely on the say the unsupported statement of the prosecution.

145. This is no proper basis upon which a Defendant can be convicted, particularly when the Defendant has been prevented from challenging the evidence. Any allegation substantiated by secret evidence that no one, other than the prosecution, has had sight of, cannot be deemed to have been proven beyond all reasonable doubt as such a decision would quite obviously and flagrantly violate Article 6 of the ECHR.

146. Secondly, it is of note that at no time have the documents allegedly seized from the KLA WVA offices been indexed in terms of what those documents are said to contain in accordance with a proper chain of custody record.[45] Accordingly, there are again serious questions that have not been answered in terms of exactly what was delivered to the WVA offices, and further, what was actually seized. There is no proper record and no evidence in the form of an exhibits list or similar, has ever been adduced, accordingly, that question cannot now be answered.

147. Thirdly, in terms of that which was seized, and that which was delivered to the SPO offices after that seizure, again, there is no way to validate that which

[45] The SPO has tendered what is referred to as 'SPO Delivery Documents' (ERN 080449; ERN 078569; ERN 079500) which does provide any index or inventory of what was seized.

was seized was in fact that which was considered at the SPO office given the abject absence of any form of chain of custody or exhibits list.

148. Further, as much as there has been reference to the 'evidence bags', the same have not been exhibited, nor has there been any evidence adduced that they were sealed at the time of seizure, who sealed them, who re-opened them, when they were further sealed, and a chain of custody record maintained. In fact, during the evidence of Witness W04876 ([REDACTED]), it was confirmed that the evidence bags were not sealed at the time of seizure,[46] thereby confirming that the SPO is unable to establish any continuity in the chain of custody to authenticate that the documents seized at the KLA WVA are the same documents that purported to have been analysed by W04841.

149. At this juncture, all we have is the SPO's undocumented statement for an event, an issue that would appear to be a common theme running throughout these proceedings in that the Trial Panel are simply being asked to take the SPO's word for something, rather than the SPO seeking to discharge its evidential burden by adducing evidence of what it purports to state as a documented fact.

150. Fourthly, the prosecution is not in a position confirm that the documents that it purports to have analysed at the SPO office (leaving aside whether they

[46] KSC-BC-2020-07, Trial Transcript of 5 November 2021, at page 1940, line 23.

were the same documents seized) were indeed legitimately taken from the SPO records.

151. The evidence of the Witness W04841 is replete with acceptance of not undertaking checks, both in terms of whether information was in the public domain prior to the 'Batches' being delivered,[47] whether the names of individuals were already in the public domain,[48] and further, whether the documents said to have been seized were authentic and indeed from the SPO.[49]

152. Witness W04841 in evidence appears to suggest that a process of validation in terms of the provenance of the documents, was begun, but it then stopped prior to it being complete.[50]

153. No evidence was given as to why the process stopped, and further, no evidence was given as to what documents were considered, what documents

[47] *See e.g.,* Trial Transcript of 20 October 2021, at pages 1089-1090 and 1095-1098.

[48] *See e.g.,* Trial Transcript of 20 October 2021, at pages 1089-1090 and 1095-1098. The Defence have deliberately chosen not to name those individuals given the orders of the Court already in place and the fact that such individuals were referred to in private session during the trial. It is therefore assumed that the Trial Panel are aware of the individuals obliquely referred to and issue will not be taken with this submission as being fact and accurate. If it is that the SPO takes issue with this approach, the same can be addressed in supplemental oral submissions.

[49] *See e.g.,* Trial Transcript of 20 October 2021, at pages 1063-1065, 1069.

[50] KSC-BC-2020-07, Trial Transcript of 20 October 2021, at page 1068.

were not considered, and whether all of those documents considered were validated as being from the SPO.[51]

154. The simple position, therefore, is that the prosecution cannot demonstrate with any degree of certainty, much less to the required standard of 'beyond all reasonable doubt', that any secrecy has been violated, and further, that any information that might have been disclosed was indeed protected.

155. Accordingly, the investigation, and therefore the prosecution itself, has a further glaring hole, and one that leads to an explicit element of crime failing to be satisfied.

156. Further, Witness W04866 called by the SPO was a journalist who published certain documents, the justification given by that witness being that it "*was in the public interest*" to do so.[52] No criticism of the witness is made for the actions taken, however, the actions of the prosecution thereafter are a cause for real concern in respect of an apparent double standard being adopted.

157. The prosection have maintained a clear position that they do not consider this witness, or any other journalist at this stage, to have committed a relevant criminal offence by publishing or making public documents, and therefore it

[51] *Ibid*.

[52] KSC-BC-2020-07, Trial Transcript of 27 October 2021, at pages 1584 line 6, page 1589 line 4, page 1601 line 6, page 1603 line 20, page 1604 line 5 and lines 19-22, page 1605 lines 9-15, page 1609 lines 11-13, page 1612 lines 1-14, page 1613 lines 16-25, 1628 -29.

naturally follows that the prosecution do not deem these documents to be secret, or the information contained therein to be secret, else otherwise, such individuals would naturally face criminal charges.

158. In the alternative, the prosecution might tacitly accept that the position put forward by Witness W04866, that publication by the witness was indeed in the public interest as his evidence in this regard was not challenged.

159. The question, therefore, is how the two events are separated in terms of criminal conduct, i.e. if the alleged actions of the Defendants are mirrored by Witness W04866 and/or any other journalist, why is it that the actions of the Defendant(s) are deemed to be criminal in nature.

160. The position is at first glance, is entirely selective. With the actions of journalists mirroring that of the Defendant(s), either all, or none have committed an offence, it cannot be that it is only an offence when the Defendant(s) undertake such actions but not when a witness, upon which the prosecution seeks to rely, does so.

161. Again, referring to the question to be asked of the Trial Panel, the Trial Panel cannot or, could not, convict the Defendant(s) on the basis of the evidence presented, and accordingly, the charge ought to be dismissed.

Violating the Secrecy of Proceedings – Protected Persons

162. The submissions above, in respect of 'secrecy' are reaffirmed, without the need for repetition.

163. In terms of the 'protected persons' element of the indictment, the Trial Panel is asked to consider two central questions.

164. Firstly, who, if anyone, did the Defendant(s) actually name as being witnesses or prospective witnesses and were any such individuals subject to any protective measures.

165. It is essential, both for the elements of the crime themselves, and the submitted modes of liability, that the position of the Defendant is noted as per interviews given, for example:

> "*I do not think that it is a criminal offence to reveal the names of the officials. I mean, Williamson, Schwiderman* [sic], *these. These are official people. We are not talking about individuals here. We have never given names*"[53]
>
> and
>
> "*…not mentioning names other than prosecutors*"[54]
>
> and

[53] KSC-BC-2020-07, 081344-02-TR-ET, at page 7.

[54] *Ibid.* at page 13.

> *"NH repeats that warned journalists not to publish names of witnesses and stated that he is aware publishing their names would peril their lives"*[55]

and

> *"and we are not responsible for anything, as long as no names are revealed. We do not want to disclose any names…but willing to disclose names of SPO officials"*[56]

and

> *"I won't talk about the Albanian, or Serbian and Roma witnesses…We won't talk about them and we won't mention their names"*[57]

166. Further in the statement of an SPO member[58] dated 17 September 2020:

> *"Nasim Haradinaj said at the press conference he warned journalists not to publish names and said he was aware that publishing the witnesses' names would peril their lives"*.[59]

167. Secondly, the Trial Panel must take account of the fact that a number of individuals who are said to be protected are in fact publicly known within

[55] KSC-BC-2020-07, 089919-089927, at page 9.

[56] KSC-BC-2020-07, 081979-07-TR-ET, at page 3.

[57] *Ibid*.

[58] Respecting the order of the Trial Panel the witness is not cited here.

[59] KSC-BC-2020-07, 082010-082013 RED, at para. 9.

Kosovo to be witnesses or potential witnesses, many of whom have publicly stated that they are witnesses or have been summonsed.[60] Further, certain of those individuals have publicly gone on record as to their status and therefore, any release of an individual's name is moot when that name is already within the public domain.[61]

168. The Trial Panel must be satisfied, based on the evidence presented at trial as part of the prosecution case, beyond all reasonable doubt, that the Defendant(s) are guilty of this count on the indictment. It is respectfully submitted that the evidence submitted falls woefully short of what would be considered a sufficient evidential basis to conclude that the Trial Panel may safely convict the Defendant(s).

VI. CONCLUSION

169. It is respectfully submitted that that the simple conclusion to be drawn having heard the prosecution case, is that the evidence does not support the conclusion that the six counts have been proven to the required criminal standard of 'beyond all reasonable doubt', and having regard to the test as outlined at paragraph 44 above, the Trial Panel cannot be satisfied that a

[60] KSC-BC-2020-07, Trial Transcript of 20 October 2021, at pages 1089-1090.

[61] KSC-BC-2020-07, Trial Transcript of 25 October 2021, pages 1313-1321.

conviction would be safe and must acquit the Defendant(s) of all charges in the Indictment.

170. The prosecution has clearly demonstrated that its investigation, its seizure of evidence, its adherence to its disclosure obligations, and further, the evidence that it has presented before the Trial Panel, falls woefully short of that which is required to establish a criminal conviction.

171. The elements of crime have not been satisfied, nor has the prosecution demonstrated that the Defendant(s) formulated the necessary intent.

172. Still further, one must be mindful that the narrative underpinning the indictment is not evidence, and the questions posed must be determined solely on the evidence tendered as part of the prosecution case; that evidence is wholly inadequate, and even where there is evidence that falls to be considered, given the abject failure to adhere to even the most basic standards of investigation and evidence collation and retention, the Trial Panel simply cannot be satisfied that the documents are what the Prosecution submit.

173. Again, we must rehearse that no-one has inspected the documents and therefore not only have the Trial Panel not been able to assess their validity, the Defendant(s) have been explicitly prevented from challenging that evidence.

174. Further, on account of the abject refusal of the SPO to call relevant witnesses, much of the evidence, including that contained within the numerous 'contact notes' has no probative value given its clear and massive prejudicial effect.

175. This case presents a cacophony of errors and missteps, the Defendant(s) being abjectly prejudiced to the extent that it remains the Defence submission that the Defendant has not and cannot receive a fair trial.

176. For all of the reasons set out above, the Trial Panel is invited to dismiss the indictment against Mr. Haradinaj in full, or, in the alternative, to the extent that the Trial Panel determines that it could not convict at this juncture.

Word Count: 8,999 words

Toby Cadman

Specialist Counsel

Carl Buckley

Specialist Co-Counsel