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In:	**KSC-BC-2020-07**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**Pre-Trial Judge**
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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PUBLIC REDACTED SUBMISSION OF INTERIM PRE-TRIAL BRIEF ON BEHALF OF THE DEFENCE OF NASIM HARADINAJ

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I. INTRODUCTION

1. As per the 'Consolidated Calendar for the Remainder of the Pre-Trial Proceedings', issued by the Pre-Trial judge on 8 March 2021,[1] and amended on 23 June 2021,[2] the Defence for Mr. Haradinaj now seeks to file its Pre-Trial Brief in accordance with Rule 95(5) of the Rules of Evidence and Procedure before the Kosovo Specialist Chambers ("Rules").

2. The Defence for Mr. Haradinaj re-assert their previous submissions however, in that both the deadline imposed, and the short extension granted, are not feasible in terms of filing a full brief, having regard to the position regarding disclosure, the unresolved issues before the Court of Appeals Chamber, and issues raised with the SPO on an *inter-partes* basis that are yet to be entirely resolved.

3. It is noted that the Pre-Trial Judge has indicated, as per the ruling on the Amended Consolidated Calendar,[3] that no further extension on the previous grounds outlined in the Defence request, will be considered. In this regard, the Defence notes, with some concern, that there appears to be a strong desire to expedite this case with insufficient consideration of it being ready for trial. There remain unresolved issues that will impact on whether there is even a

[1] KSC-BC-2020-07/F00148

[2] KSC-BC-2020-07/F00249

[3] KSC-BC-2020-07/F00249

proper basis for the trial to proceed at this stage. The Defence repeats its concerns as raised in the Defence request seeking disclosure of material relating to diplomatic briefing conducted by the President of the Kosovo Specialist Chambers ("KSC")[4] about improper conduct over judicial decision making. These are matters that will need to be resolved before this case can properly be assigned to a Trial Panel.

4. This brief therefore complies with the requirements per the Rules; however, the submissions on certain elements are brief given the lack of appropriate deadline and sections such as the Historical Context will be served as annexes to the Pre-Trial Brief.

5. On 25 September 2020, Mr. Haradinaj was arrested, pursuant to a warrant issued on 24 September 2020, and held in detention in the Republic of Kosovo until the following day when he was transferred to the KSC detention facilities.[5]

6. On 30 October 2020, the SPO submitted an indictment for confirmation against Mr. Haradinaj and Mr. Gucati.[6]

[4] KSC-BC-2020-07, F00138, Defence for Mr Haradinaj, *Defence Submissions Following Order Setting the Date for the Second Conference and Related Matters (KSC-BC-2020-07/F00129)* ("Request"), 23 February 2021, confidential, paras 43-54.

[5] Annex 2 - Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, KSC-BC-2020-07, F00012, Public, 24 September 2020.

[6] Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-07, F00063, Strictly Confidential and *ex parte*, 30 October 2020.

7. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment, and ordered the SPO to submit a revised indictment as confirmed.[7]

8. On 14 December 2020, the SPO submitted the Confirmed Indictment with redactions.[8]

9. That indictment contains 6 counts, namely that:

a. **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 the Criminal Code of the Republic of Kosovo, Code No.06/L-074(2019), Articles 17, 28, 31, 32(1)-(3), 33, 35, and 401(1) and (5), and Articles 15(2) and 16(3) of the Law;[9]

b. **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;

[7] Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07, F00074/RED, Public, 11 December 2020.

[8] Submission of confirmed Indictment with strictly confidential Annexes 1 and 2, KSC-BC-2020-07, F00075, Public, 14 December 2020.

[9] Law No.05/L-053 on Specialist Chambers and Specialist prosecutor's Office, 3 August 2015.

c. **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;

d. **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 Article 17, 28, 31, 32(1)-(2), 33, 35, and 388(1), and Articles 15(2) and 16(3) of the Law;

e. **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 Article 17, 31, 32(1)-(2), 33, 35, and 392(1), and Articles 15(2) and 16(3) of the Law; and

f. **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 Article 17, 28, 31, 32(1)-(3), 33, 35, and 392(2)-(3), and Articles 15(2) and 16(3) of the Law.

10. On 8 January 2021, a plea of not guilty to all six counts on the indictment was formally entered for the Defendant by the Pre-Trial Charge on the basis of his failure to enter a plea to the charges in the indictment in accordance with Rule 92(2)(f).

11. Those Not Guilty pleas remain as entered, and thus the allegations in their entirety are denied.

12. The Specialist Prosecutor's Office (SPO) is therefore required to prove each and every element of each and every count on the indictment, beyond all reasonable doubt.

13. For the avoidance of doubt, unless an assertion by the Prosecution is expressly and unequivocally agreed in this brief, no admission by the Defence is made and thus the Prosecution is required to prove any and all such facts.

14. Further, Mr. Haradinaj at the time of filing this brief, has not had opportunity to review the Pre-Trial Brief filed, or to be filed, on behalf of the Defendant Gucati. It may be therefore that there are matters of law and/or fact contained within that brief with which Mr. Haradinaj agrees. Accordingly, the Defence for Mr. Haradinaj reserves the right to file a joinder with respect to any such relevant matters at a later time.

15. Further, it is noted that the SPO, on 5 July 2021, submitted a "Corrected Indictment with Confidential Annex 1 and Public Annex 2"[10] following the Order of the Pre-Trial Judge of 23 June 2021[11] in response to the Decision on the Defence Appeals Against Decision on Preliminary Motions of the Court of Appeals Panel of 23 June 2021.[12]

16. As of the date of the filing of the Pre-Trial Brief, it is noted that no further decision has been issued by the Pre-Trial Judge in respect of the Corrected Indictment.

II. SUMMARY ALLEGATIONS

17. The case against the Defendant may be summarised as follows. He is alleged to have leaked three sets of documents that the SPO allege are confidential, but which the Defence are not entitled to examine nor scrutinise, in which no chain of custody has been produced, nor any statement of the investigator(s) who purports to have seized the material. There are further allegations of witnesses being intimidated or placed in a state of fear which the defence will not be able to cross-examine, and the Trial Panel will not be able to observe or question. The entire case will be presented by two members of the SPO's own staff who will present hearsay statements in closed session, under full

[10] KSC-BC-2020-07/F00251/A01

[11] KSC-BC-2020-07/F00244

[12] KSC-BC-2020-07/IA004/F00007

anonymity with voice and face distortion. That is to say that the trial will be conducted almost entirely in secrecy behind closed doors. Such a process is not in accordance with the fundamental right to have a fair trial, in public, by an independent and impartial tribunal of law.

18. The allegations faced by the Defendant centre on a chain of events that led to there being a 'leak' of three (3) separate batches of documents held by the SPO, those documents being said to have been 'confidential' and/or 'non-public', the Defendant being alleged to have further disseminated some of those documents, and further, made certain comments in public to individuals and/or media outlets about the documents and their content.

19. It is repeated that the Defence are unable to comment on the contents of those documents, or even confirm whether they were 'confidential' and/or 'non-public' as in the words of the SPO, quite inappropriately, to provide the Defence with the purportedly seized documents would be to "provide the Defendants with the tools with which they committed the offences". Regrettably, the rather obstinate position adopted by the SPO is this regard means that we are not able to establish whether there was in fact a weapon or whether it was in fact loaded. The SPO, due to serious failings in its investigation, is not even able to prove whether the "weapon", if it existed, was put in the hands of the Defendant by its own staff or some other person.

20. The Defendant is alleged, by virtue of the manner in which he is said to have disclosed those documents, to have threatened and/or intimidated individuals, and/or sought to retaliate against certain individuals.

21. The alleged disclosures are said to have taken place during three (3) separate press conferences called, and various appearances through various media outlets at which, the leaks were discussed.

22. It is of note at the outset,[13] that at no stage has the SPO identified any witness that has been intimidated and/or threatened by the alleged actions of the Defendant.

23. Further, the SPO has not at any stage identified 'who' the Defendant is said to have retaliated against.

24. Still further, it is of note that the SPO has confirmed that there is no intention to call any evidence of fact to support the allegations contained within the indictment, including there being no intention to call any actual witnesses other than the two members of its investigative team.

25. It would appear clear therefore, that rather than rely on evidence of fact, or the testimony of victims, the SPO seeks to rely almost entirely on the

[13] The lack of specificity is an issue to be examined further in subsequent parts of this brief

submission of 'Hearsay' evidence,[14] despite there being no indication that the whereabouts of relevant witnesses are known.

26. In terms of the leaked documents themselves, as noted above, it is not known 'who' leaked those documents as the identity of the individual responsible for the initial disclosure remains unknown.

27. Further, it has not been confirmed 'how' the three batches of documents came to be leaked.

28. Still further, it has not been confirmed whether any investigation has been undertaken into 'how' those documents came to be leaked.

29. It is however clear, that a number of investigative opportunities into the leak(s) and the identity of the individual(s) responsible have not been pursued, and further, no reason or justification has been provided as to why there has been such a failure.

30. Accordingly, the Defence adopt the position that there has been a complete investigative failure on the part of the SPO,[15] a fact that would appear to be a common theme running throughout the entirety of the proceedings specific to the Defendant, and one that extends throughout, from the initial

[14] Similar to the point raised concerning the lack of specificity, issues surrounding hearsay evidence and its admissibility or otherwise, are examined further in subsequent parts of this brief.

[15] See Section IV.

investigation to the arrest and detention of the Defendant, to the manner in which the proceedings have been pursued by the SPO at each stage.

31. In short therefore, any and all allegations made by the SPO in terms of the alleged criminal conduct of the Defendant, are rejected, and will be defended.

32. For clarity, the Defendant rejects the allegation that he at any stage or at all:

a. Obstructed any officials of the Kosovo Specialist Chamber and/or the Specialist Prosecutor's Office;

b. Intimidated any witness and/or any individual involved in the investigation of any matter as alleged or at all;

c. Retaliated against any witness and/or individual involved in the investigation of any matter as alleged or at all;

d. Violated the secrecy of proceedings as alleged or at all.

III. APPLICABLE LEGAL STANDARDS

A. Burden and Standard of Proof

33. It is an entrenched principle, that the 'Burden' of proving the allegations and each and every element of those allegations, falls on the SPO, the Defendant is not required to prove anything.

34. Further, it is a similarly entrenched principle that the allegations faced by the Defendant must be proved by the SPO '*beyond all reasonable doubt*'.

35. Given the manner in which the SPO appear to be intending on presenting their case, a further analysis of the definition of 'beyond all reasonable doubt', and the requirements necessary for such a finding, is warranted.

36. There is a need to consider the fact that the standard of proof requirement, is not limited to just the final question of 'guilt', but also, it applies to the underlying facts, noting *Kupreškić:*[16]

> "*On appeal, the Prosecution argues that it was not incumbent upon the Trial Chamber to apply the standard of "beyond reasonable doubt" in evaluating the evidence of Witness H. Rather, it contends, the Trial Chamber was at liberty to simply assess the evidence of Witness H by reference to the standard of probative value applicable to evidence generally. In particular, argues the Prosecution, the evidence of Witness H "…forms nothing more than a constituent in the entire composition of evidence against the Appellant for count [persecution]" The Appeal Chamber disagrees.*"[17]

37. It is perhaps particularly relevant to the instant case to note, that any submission made by the SPO that the standard of proof applies only to the

[16] *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgment, 23 October 2001.

[17] *Ibid* at paragraph 226. See also *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgement, 16 October 2007, paras. 111-125.

ultimate question of guilt, and not to any of the underlying predicate facts essential to the finding of that guilt, must be rejected, in accordance with established jurisprudence of the international tribunals:

"[t]he standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt."[18] (emphasis added).

38. Accordingly, the findings of the Chamber, and therefore the obligations upon the SPO must be to demonstrate:

a. That each element of each of the indicted crimes has been proved beyond a reasonable doubt;

b. That each element of any indicted mode of liability has been proved beyond a reasonable doubt;[19] and

c. That any fact which is indispensable to or aimed at obtaining a conviction, must also be proved beyond a reasonable doubt, noting *Blagojević "The standard of proof at trial requires that a Trial Chamber may*

[18] *Blagojević and Jokić,* IT-02-60, Appeal Judgement, para. 226 , see also, *Prosecutor v. Halilović,* IT-01-48-A, Appeal Judgement, 16 October 2007, paras. 111-125 and *Prosecutor v. Ntagerura et al., ICTR-99-46-A, Appeals Judgment, 7 July 2006, paras 169-170*

[19] *See Prosecutor v. Brima et al*, SCSL-04-15-T, Trial Judgment, 20 June 2007, at paragraph 98

only find an accused guilty of a crime if the Prosecution has proved…any fact which is indispensable for the conviction, beyond reasonable doubt".[20]

39. Again, the Defence would highlight, that each fact adduced at trial which is suggestive of being proof of either the *actus reus* or *mens rea* or both, of each of the charged crimes must itself be established beyond reasonable doubt, in the absence of which, no conviction can be properly returned.

40. A similar position applies to the veracity of documentary evidence, in that it is accepted that the same may be adduced to prove either the physical or mental elements of an offence. However, it may be that the authenticity of such documents may itself constitute what might be referred to as a 'predicate' fact, and therefore, this must also be proved beyond a reasonable doubt before that evidence might form part of the basis for a criminal conviction, *per Stakić*, where the Trial Chamber found:

"In its evaluation of the evidence, the Trial Chamber relied primarily on documentary evidence. It was especially cautious when dealing with documents attributed to Dr. Stakić and found corroborating evidence from an expert statement under Rule 98 and/or convincing witness testimony necessary."[21]

[20] *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, Appeal Judgment, 9 May 2007

[21] *Prosecutor v. Stakic* IT-97-24-T, Trial Judgement, 31 July 2003, at para. 14

41. In terms of what constitutes a fact that can be said to be 'indispensable' or 'aimed at', there is potential for dispute, and further, the Defence accepts that each case turns on its own facts, it is perhaps useful to cite two examples.

42. Firstly, in *Limaj et al*, in dealing with eyewitness identification, the Trial Chamber held:

"*With particular regard to the evidence of the visual identification of each of the Accused by various witnesses, it is to be emphasized that, like all elements of an offense, the identification of each Accused as a perpetrator as alleged must be proved by the Prosecution beyond a reasonable doubt*."[22]

43. It was not deemed sufficient for the Prosecution to just present evidence that the accused had been identified by certain witnesses, but instead, the Prosecution was required to prove that the identifications were reliable and accurate beyond a reasonable doubt as the identifications themselves were essential to a conviction.

44. Secondly, in *Kupreškić et al*, when dealing with a similar question concerning facts that were 'indispensable' or otherwise, the Appeals Chamber ruled:

"*The Prosecution's argument reflects the misconception that the attack on Witness H's house was only evidence of persecution, not a material fact integral to the crime*

[22] *Prosecutor v. Limaj et al*, IT-03-66-T, Trial Judgment, 20 November 2005, at para. 20.

of persecution.[…] The persecution conviction of Zoran and Mirjan Kupreškić hinged upon their participation in the attack on Witness H's house. The Prosecution's argument that the Trial Chamber was at liberty to employ anything other than the standard of proof beyond a reasonable doubt in assessing Witness H's evidence implicating Zoran and Mirjan Kupreškić in that attack cannot be sustained."[23]

45. Accordingly, the specifics of the allegations, or the indispensable facts of those allegations must be proved to the required standard as well as the elements of the offences themselves.

46. The clear position is that the SPO cannot prove those allegations to the required standard, and therefore, cannot discharge their burden.

IV. INVESTIGATIVE FAILINGS

47. The Defence maintains that there has been an abject failure on the part of SPO to investigate the allegations appropriately, with numerous avenues or strands of investigation being ignored and thus, significant gaps in the fact and evidential framework allowed to persist.

48. In sum, the allegations, as noted, centre on the fact that there were three (3) alleged 'leaks' of documents from the SPO, noting that it cannot be confirmed

[23] *Prosecutor v. Kupreskic et al*, Appeal Judgment, 23 October 2001, at para. 226

with any certainty what those documents were given the refusal of the SPO to allow anyone to examine or verify the same.[24]

49. It is seemingly apparent that at no stage has this element been investigated appropriately or at all.

50. On 13 March 2021, a detailed list of questions was put to the SPO, communicated via e-mail, in an effort to ascertain what steps were taken, and further, whether any relevant evidence existed concerning the same.

51. On 23 March 2021, the SPO responded to the Defence request. On the basis of the request, it would appear that none of these steps have been undertaken, and therefore essential evidence has since been lost given the failure of the SPO to seize the same.

52. The SPO continues to maintain the position that these matters are irrelevant to the charges faced by the Defendant.

53. Further, the Defendant is alleged to have sought to evade arrest, including an allegation that he tried to run away from officers seeking to detain him.

[24] It is accepted that there is a statement from an SPO investigator who purports to confirm what the documents are on a generic basis, however, they have not been scrutinised or analysed in any meaningful way, there being a refusal to allow the Defence to examine the same.

54. It is of concern that this incident has apparently not been recorded on 'body-cam' footage, and only the last moments of the actual arrest recorded. No statements were taken even though there being eyewitnesses to the event.

55. The scene of where the drop-off is said to have taken place is a busy street in the middle of Prishtinë. There are numerous CCTV cameras in the vicinity, including commercial premises directly adjacent and opposite the premises where the drop-off is said to have taken place. No statements were taken, nor was any CCTV footage at that time secured, and no attempts were made to identify the mystery person(s) said to have dropped off the documents. One can only speculate as to the reasons for such a negligent investigation.

56. This is indicative of the SPO's approach to the investigation, dealing with each and every step in a haphazard and thoroughly opaque manner.

57. The net result of this approach is that there are significant and important questions to be asked that cannot be answered, or, there is a refusal to answer on the part of the SPO.

58. As a consequence, the Defendant has been precluded from investigating and/or preparing elements that could prove essential to his case.

59. It is of further note that within the SPO Pre-Trial Brief, the decision has been taken to 'name' two individuals who are said to have committed the offences within the allegations, jointly, with the Defendant.[25]

60. If it is that these individuals are criminally liable as per the allegations levied against the Defendant, why is it that it has taken until now for them to be named, noting that they were not named within the indictment, and of more importance, why is that the SPO has chosen not to indict those that it deems criminally responsible.

61. This is yet again, an example of the SPO being selective in its approach, and failing to provide a justification for the decisions taken, and in turn, its failures to investigate in a fair, independent, and appropriate manner.

62. The SPO is reminded that its mandate is not to secure a conviction at all costs, its mandate is to investigate allegations, independently and impartially, an obligation that has summarily failed to have been met.

V. ADMISSIBILITY OF EVIDENCE

A. General Observations

63. Ordinarily, issues concerning the admissibility or otherwise of a piece of evidence would be considered on an individual basis, and as much as that

[25] For instance, see para.97 - KSC-BC-2020-07/F00181/A01

position holds true in the instant case, it is essential that issues are highlighted at the outset given the manner in which the SPO appears to intend to present its case.

64. Both individually, and cumulatively, the issues apparently result, or will result, in it being impossible for the Defendant to receive a fair trial, given the stark and obvious prejudice.

65. The central issues can be highlighted thusly:

a. The failure to present witness evidence;

b. The use of anonymous witnesses;

c. The intention to prevent witnesses from being subjected to cross-examination; and

d. The admissibility of hearsay evidence, in particular when direct evidence is available.

66. As highlighted, the intended approach by the SPO to the trial is replete with the above and thus not only is the majority, if not all, of the evidence inadmissible in the defendant's submission, but of that which might be deemed admissible, it prejudices the Defendant to such an extent that a fair trial is not possible.

67. The modest (in the extreme) amount of evidence that is both admissible and non-prejudicial, does not demonstrate that the Defendant committed the offences as alleged or at all.

68. What follows, is an examination of relevant evidential principles, with direct application to the instant case.

69. Rehearsing each and every individual rule in terms of 'evidence' for the purposes of the Law on the Specialist Chambers and Specialist Prosecutor's Office (Law 05/L-053) ("Law") and the Rules, is not warranted for the purposes of this pre-trial brief, however, what might be referred to as a guiding principle is Article 21(4)(f):

> *"In the determination of any charge against the accused pursuant to this Law, the accused shall be entitled to the following minimum guarantees, in full equality:*
>
> > *(f) to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."*[26]

[26] Article 21(4)(f), Law No.05/L-053

70. The Rules entail specific provisions concerning the examination of witnesses.[27] The relevant Rules are the following: Rule 141(1), Rule 144(1) and (3), Rule 147(1), Rule 153(1) and (3), Rule 154, Rule 155(1), (2), (3) and (5). The attention of the Chamber is drawn to the contents of those rules, and the Defendant would seek their application to the instant case and the approach to be taken by the SPO.

B. Oral Evidence and the Right to Examine Prosecution Witnesses

71. It is a generally recognised principle that:

> "*witnesses…should give their evidence orally rather than have their statement entered into the record…The principle of orality, and its complement, the principle of immediacy, act as analogues to common law hearsay rules and are meant to ensure the adversarial nature of criminal trials, and the right of the accused to confront witnesses against him.*"[28]

72. There are acceptable exceptions to these principles;[29] however, the instant case does not present itself as falling into any such exception, and further, the SPO

[27] KSC-BD-03/Rev3/2020

[28] *Prosecutor v. Halilović*, IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, para 16.

[29] See Rule 155(1) of the Rules of Procedure and Evidence dealing with the admission of written statements of unavailable persons for instance.

has heretofore demonstrated its reluctance to call any witnesses of fact for the purposes of giving oral evidence.[30]

73. This position of wilful neglect is taken to the extreme in that the SPO has gone so far to refuse to disclose all the names of its investigators that took part in the operations on 7, 16 and 22 September 2020 to seize the purported confidential and/or non-public documents that form Batches 1-3. A statement has been provided by the investigator [REDACTED], but he is not being called to testify at trial. It has further confirmed that during the search and seizure operation of 25 September 2020 no statements were made by the officers present other than [REDACTED] ("W04841") and the Independent Observer.

74. Again, the principle of orality is not absolute, but rather a preference for the oral introduction of evidence.[31] Nevertheless, where there is a departure from this rule, there must be justification for doing so.

75. Rule 155(2) provides circumstances where a written statement might be admitted in lieu of oral testimony, and notably, subsections (a)-(e) of that rule cannot be said to apply to the instant case, or at least there is no reference within the pleaded case to any or all of those exceptions applying.

[30] 088301-088301 RED; 090025-090025 RED; 084249- 084250 RED; 082102-082103 RED; 089940-089941 RED; 090177-090177 RED; 089946-089947 RED; 089938- 089939 RED; 084247-084248 RED; 085880-085883 RED; 084236-084242 RED; 089936-089937 RED; 089953- 089954 RED; 089955-089956 RED; 089988-089988 RED; 089991-089992 RED; 090004-090005 RED; 090006- 090007 RED; 090052-090053 RED; 090175-090176 RED; 091216-091217 RED; 084303-084303 RED; 092911- 092912 RED; 093383-093383 RED; 093386-093387 RED; 093388-093388 RED.

[31] *Ibid*, para 17.

76. Rule 155(3) goes on to consider the 'interests of justice' limb in further detail, however, it must be further considered that any determination must be made on a case-by-case basis, by taking under scrutiny the surrounding circumstances as well as the proposed evidence of the witness. In its evaluation, it may consider factors, such as the lack of opportunity to assess the credibility of the witness, the lack of cross-examination and the curtailment of a right to a fair and public hearing, although these factors could also play a role in the determination of the weight that should be attached to the evidence in question.[32]

77. In terms of the instant case, the evidence goes to proof of the acts and conduct of the Accused as charged in the indictment, which is a factor that militates against the admission of such evidence, ergo evidence in the form of written statements as provided by the SPO, and therefore the exceptions referred to do not apply, and therefore Rule 155(5) must be considered as carrying significant weight.

78. The right to examine witnesses should be given to a Defendant in that this right consists in having prosecution witnesses testify in person, so that the Defendant or Specialist Counsel is able to challenge each witness in cross-examination. It is clear that in the instant case, this is not to occur, and thus

[32] *Prosecutor v. Milošević*, IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements, 30 September 2003, paras 20-21.

the Defendant's rights have, and will continue to be violated given the lack of any counter-balancing measures to mitigate the prejudice caused to the Defendant.

79. It is worth noting that a phone call with witness A.7, B.5, E took place on [REDACTED] and this witness expressly stated that she [REDACTED]. This is self-explanatory in that the aforementioned witness voluntarily expressed a willingness to give oral evidence. It is also quite clear that her testimony, as evidenced by her statement, does not support the prosecution case.

80. Further to this, a second witness has been told by the SPO that he would be called to testify in the event of a trial, and the witness has clearly given tacit assent in this respect, adding that cooperation will continue with the SPO. To be specific, when the SPO Team met witness A.7, B.5, E. on [REDACTED] in order to discuss the witness's current security situation following the third disclosure by the War Veterans' Association, it was *verbatim* stated the following:[33]

[REDACTED]

81. The position would therefore appear to be abundantly clear, in that there are witnesses available to testify and yet the decision has been taken not to call any witness of fact. This in itself is not necessarily an issue, it is a matter for

[33] 084236-084242 RED, para 18.

the prosecution on the case it puts forward; however, the issue arises where the prosecutorial authority, the SPO, still seeks to rely upon this evidence and in doing so deliberately and wantonly is seeking to prevent the Defence from examining and testing that evidence.

82. The result of this position is that the SPO is seeking to obtain an unsustainable advantage in the presentation of their case, to the detriment of the Defendant.

83. The European Court of Human Rights ('ECtHR') has confirmed that in assessing the right to examine witnesses:

> "*the Court will look at the proceedings as a whole, including the way in which the evidence was obtained, having regard to the rights of the defence but also to the interest of the public and the victims in seeing crime properly prosecuted…and, where necessary, to the rights of witnesses.*"[34]

84. Having regard to the ECtHR case-law, a Defendant should be granted adequate opportunity to question a witness against him "*either at the time the witness was making the statement or at some later stage of the proceedings*."[35] As a result of this, if the Defendant is not able to examine a witness at trial, the Court will take into account whether the defence was able to examine the

[34] *Schatschaschwili v. Germany*, Appl. no. 9154/10, 15 December 2015, para 101.

[35] *Al-Khawaja and Tahery v. The United Kingdom*, Appl. nos. 26766/05 and 22228/06, 15 December 2011, para 127.

witness prior to trial, thereby considering it as a counterbalancing measure when assessing whether the trial was still fair.

85. The Defence has not been able to examine any witnesses prior to trial and will not be able to examine them at trial either. The SPO is adamant in spite of the fact that such evidence goes to proof of the acts and conduct of the Accused as charged in the indictment, considering that these witnesses have alleged that they have been subjected to anxiety, stress, feelings of unsafety, threats and intimidation as a result of the Accused's actions.[36]

C. Cross-Examination – Evidence Untested Through Cross-Examination

86. The evidence to be adduced by the SPO, including the accounts of investigators of those statements of others,[37] go to the heart of the matter, in that they purport to evidence the acts and conduct of the Accused amounting to the offence or an element of that offence, and therefore relate to a "*'a critical element of the Prosecution's case' or put another way, to a live and important issue between the parties, as opposed to a peripheral or marginally relevant issue*".[38] In such

[36] 084008-084010, pp.084008-084009, para.6; 084008-084010, p.084009, para.7; 093386-093387 RED; 084008-084010, p.084009, para.8; 089946-089947 RED; 084008-084010, p.084009, para.9; 090177-090177 RED; 084008-084010, p.084009, para.10; 089938-089939 RED; 084008-084010, p.084009, para.11; 084247-084248 RED; 084008-084010, p.084009, para.11; 084247-084248 RED; 084008-084010, p.084009, para.12; 085880-085883 RED.

[37] Such accounts amount to hearsay, either first or second-hand, the admissibility of such or otherwise is considered later in this section.

[38] *Prosecutor v. Milošević*, Decision on Prosecution's Request to have Written Statements Admitted under Rule 92*bis*, 21 March 2002, para 24.

circumstances, the Accused must be given the right to cross-examine the witnesses.

87. The principal criterion for determining whether a witness should appear for cross-examination is the overriding obligation of a Court to ensure a fair trial; among the matters for consideration are whether the transcript goes to the proof of a critical element[39] of the Prosecution's case against the Accused.[40] Even if the evidence of a witness does not relate to the conduct of an Accused, it can have such a significant and direct bearing on the case against the Accused that he should have the opportunity to cross-examine the witness.[41]

88. In determining whether cross-examination is required, the following factors should be considered:

a. firstly, whether the evidence relates to a live and important issue between the parties;

b. secondly, the cumulative nature of the evidence;

[39] See section III of this pre-trial brief in dealing with the Burden of Proof, and what facts must be proved to the required standard.

[40] *Prosecutor v. Sikirica et al.*, Decision on Prosecution's Application to Admit Transcripts under Rule 92*bis*, 23 May 2001, paras 3-4.

[41] *Ibid*, para 35.

c. thirdly, whether the evidence is "crime base" evidence or relates to the acts and conduct of subordinates for whom the Accused is alleged to be responsible;

d. fourthly, the proximity of the Accused to the acts and conduct described in the evidence; and

e. fifthly, whether the cross-examination of the witness in the earlier proceedings dealt adequately with the issues relevant to the current proceedings.[42]

89. Furthermore, particular emphasis should be placed on factors such as whether there had been any cross-examination in other proceedings, whether this cross-examination adequately dealt with the issues relevant to the Defence in the current proceedings, whether it had been thoroughly conducted by a party with a common interest to the Accused, and whether the question relates to live and important issues between the parties.[43]

90. Witnesses would normally be required to attend for cross-examination in these specific circumstances:

[42] *Prosecutor v. Popović et al.*, IT-05-88-T, Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 12 September 2006, para 16.

[43] *Prosecutor v. Martić*, IT-95-11-T, Decision on Prosecution's Motions for Admission of Written Evidence Pursuant to Rule 92*bis* of the Rules, 16 January 2006, para 15.

a. firstly, they were eyewitnesses to the crimes charged in the indictment, which crimes were denied by the Accused;

b. secondly, testimony of non-eyewitnesses were also of sufficient importance to require cross-examination;

c. thirdly, a good deal of the proffered evidence was hearsay; and

d. fourthly, cross-examination at the prior trial was conducted by a self-represented Accused.[44]

91. In addition, if evidence is admitted without cross-examination, it ought to be corroborated by other evidence in order to be sufficient for a conviction.[45]

92. Accordingly, the aforementioned circumstances that are pertinent to this case and arguably of particular importance are the second and the third conditions.

93. In the instant case, the admission of a statement without cross-examination may, and in the defence submission does infringe the right to a fair trial. Therefore, in compliance with its overriding examination to ensure a fair trial, cross-examination should be allowed in these circumstances, specifically on account of the fact that "*the [statements touch] upon a critical element of the*

[44] *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Decision on Prosecution's Rule 92*bis* Motion, 4 July 2006, para 18.

[45] *Prosecutor v. Martić*, IT-95-11-T, Trial Judgment , 12 June 2007, para 27.

prosecution's case, or goes to a live and important issue between the parties, as opposed to peripheral or marginally relevant issue".[46]

94. Prior statements made to Prosecution investigators by prospective witnesses for the purposes of legal proceedings raise serious issues of reliability that are most effectively tested through the process of cross-examination.[47]

95. Therefore, considering the above paragraph, it is argued that:

> "*where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness, the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborates the statement.*"[48]

96. In other words, the inability on behalf of the Defendant to cross-examine key witnesses will not result in an automatic exclusion of evidence, but that if untested evidence is crucial to the Prosecution case it "*will require corroboration if used to establish a conviction*".[49]

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[46] *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony, 1 May 2008, para 19.

[47] *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-41-T, Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses, 22 January 2003, para 23.

[48] *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002, fn. 34, p9.

[49] *Prosecutor v. Martić*, IT-95-11-AR73.2, Appeals Chamber Decision on appeal against the Trial Chamber's decision on the evidence of witness Milan Babić, 14 September 2006, para 20.

97. This issue concerning evidence untested through cross-examination will be briefly reiterated subsequently in light of its close connection to hearsay evidence.

D. Admission of Evidence – Relevance, Probative Value, Prejudice and Reliability

98. The overriding principle is that the purpose of the rules on evidence is "*to promote a fair and expeditious trial and the Trial Chambers must have the flexibility to achieve this goal*".[50]

99. It is submitted that the Court has an obligation to refuse evidence which is irrelevant or which has no probative value, because evidence whose reliability cannot adequately be tested on behalf of the Defence cannot have probative value.[51] Consequently, the Court "*may rule on the relevance or admissibility of any evidence and any prejudice that such evidence may cause to a fair trial or to a trial evaluation of the testimony of a witness, in accordance with the Rules of Evidence and Procedure*".[52] In order to complement this, "*[t]here should be no automatic*

[50] *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para 19.

[51] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DBQ, 18 November 2003, para 8.

[52] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para 150; *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, 29 January 2007, para 120.

reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall."[53]

E. Relevance and Probative Value

100. The starting position is that evidence must be relevant to an allegation or issue in the trial, and there must be a nexus between it and the subject-matter.[54] The probative value of evidence relates to whether it tends to prove an issue, which is relevant to the proceedings.[55]

101. Furthermore, it has been held that "*[r]elevance, probative value and even prejudice are all relational concepts. The content of the putative facts must be defined and then evaluated in relation to their possible value as proof of the existence of a crime as described in the indictment*".[56]

102. As this present case distinctly shows, the Defence is unable to cross-examine Prosecution witnesses. Although the parties' inability to cross-examine a Prosecution source does not render the evidence inadmissible *per se*, it is one of the factors the Court will consider indeed for the purpose of determining

[53] *Prosecutor v. Lubanga*, ICC-01/04-01/06-1399, Decision on the admissibility of four documents, 13 June 2008, para 29.

[54] *Prosecutor v. Tadić*, IT-94-1-T, Decision on Defence Motion on Hearsay, 5 August 1996, para 18.

[55] *Prosecutor v. Delalić et al.*, Decision on the Prosecutor's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucić, to provide a handwriting sample, 19 January 1998, para 29.

[56] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para 18.

its probative value,[57] and thus it is essential that the presentation of the instant case is considered 'in the round' so as to fully appreciate the consequences for the Defendant.

103. Most importantly, taking under scrutiny the witness summaries provided by the SPO and the fact that these witnesses are all anonymous, the probative value of this type of evidence contained within the summaries must be affected if not corroborated.[58]

F. Probative Value and Prejudice

104. The Chamber's attention is drawn to the evidence provided by the SPO as far as witnesses are concerned, it is argued that this evidence directly addresses the conduct of the Accused. Therefore, its admission without cross-examination is utterly unfair and prejudicial to the Accused.

105. Alternatively, if the Court decides to admit evidence which was not subject to cross-examination, it must be corroborated before any conviction may be based on it:

[57] *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, paras 109, 194.

[58] *Ibid*, paras 156-160.

> *"[E]vidence which has not been cross-examined and goes to the acts and conduct of the Accused or is pivotal to the Prosecution case will require corroboration if used to establish a conviction."*[59]

106. However, the ECtHR would allow for the admission of such evidence, but:

> *"where a conviction is based solely or to a decisive degree…made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6."*[60]

107. Nevertheless, referring to the jurisprudence of the ECtHR concerning the issue of corroboration of untested evidence, it concluded that the issue "*is not one of quantity, but of quality; in other words, how much importance was attached to the corroborating evidence in convicting the accused*".[61] Furthermore and of particular importance, "*in order for a piece of evidence to be able to corroborate untested evidence, it must not only induce a strong belief of truthfulness of the latter,*

[59] *Prosecutor v. Martić*, IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babić, 14 September 2006, para 20.

[60] *Lucà v. Italy*, Appl. no. 33354/96, 27 February 2001, para 40; *Prosecutor v. Martić*, Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babić, 14 September 2006, para 20.

[61] *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4, Judgment on Allegations of Contempt, 17 December 2008, paras 23-24.

i.e. enhance its probative value, but must also be obtained in an independent manner".[62]

108. Additionally, evidence which would meet "*the requirement of 'sufficient corroboration', which is aimed at preventing an encroachment on the rights of the accused*",[63] may include pieces of evidence that, although originating from the same source, arose under different circumstances, at different times and for different purposes.

109. The jurisprudence of the International Criminal Tribunal for Rwanda ("ICTR") has attached great importance to fair trial principles in its determination of admissibility. In fact, it was held that "*any relevant evidence having probative value may be admitted into evidence, provided that it is being in accordance with the requisites of a fair trial*".[64] However, it is argued that relevant and probative evidence may be excluded on the grounds of prejudice to the Accused. In addition to this, the following was held:

> "*it being recognised that all relevant Prosecution evidence is prejudicial to the Accused and the more probative the more prejudicial, still it is possible in some cases to say that the probative value of the particular evidence is*

[62] *Ibid*, para 41.

[63] *Ibid*.

[64] *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para 136.

> *outweighed by its prejudicial effects, in such a case the evidence is to be excluded.*"[65]

110. In fact, the International Criminal Court ("ICC") refers to prejudice as one of the factors to be taken into consideration in assessing the admissibility of evidence, and it was held that the Chamber "*must, where relevant, weigh the probative value of the evidence against its prejudicial effect*", but that in doing so, "*the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case*"[66]; consequently, this is a "*fact-sensitive decision*".[67]

G. Reliability

111. Evidence can only be relevant and probative if it is reliable. To be specific:

> "*[t]he reliability of evidence does not constitute a separate condition of admissibility; rather it provides the basis for the findings of relevance and probative value…for evidence to be admitted. As a general principle, the*

[65] *Prosecutor v. Nahimana et al.*, ICTR-97-27-AR72, Decision on the Interlocutory Appeals, Separate Opinion of Judge Shahabuddeen, 5 September 2000, para 19.

[66] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1399, Corrigendum to the Decision on the admissibility of four documents, 20 January 2011, para 31.

[67] *Ibid*, para 32.

Chamber attaches probative value to evidence according to its credibility and relevance to the allegations at issue."[68]

112. Most importantly, reliability must be assessed in the context of the facts of each particular case and requires a consideration of the circumstances under which the evidence arose, the content of the evidence, whether and how the evidence is corroborated, as well as the truthfulness, voluntariness, and trustworthiness of the evidence.[69]

113. In the instant case, reliability cannot be assessed to any meaningful degree, given the manner in which it is submitted. The nature of how it was obtained, its content etc is being shielded from assessment and testing given the approach of the SPO.

114. It is therefore submitted that these circumstances should be considered in depth prior to admitting evidence that is untested, unreliable and lacks probative value owing to the SPO's flagrant omission of corroboration.

H. Hearsay – Admissibility, Limitations to the Right to Examine Witnesses, Conviction "Solely or decisively" on the basis of Hearsay Evidence

[68] *Prosecutor v. Musema*, ICTR-96-13-A, Judgment, Trial Chamber, 27 January 2000, paras 38-39.

[69] *Ibid*, para 42.

115. As highlighted at the outset of this section, the SPO is seeking to base its prosecution almost entirely on the basis of hearsay evidence.

116. The declaration by [REDACTED] ("W04842") and all the witness summaries obtained by the Prosecution, witness security officers and investigators amount to hearsay evidence, specifically incorporating first-hand as well as second-hand hearsay. This evidence entails descriptions about how the potential witnesses felt, how they were subjected to intimidation, harm and fear, including their concerns,[70] and yet there is not an attempt to admit statements or accounts of those witnesses and no intent to call a single one of those witnesses to give evidence at trial.

117. Questions must, and do arise as to the reliability of these statements as well as their probative value.

118. Hearsay evidence may be admitted if sufficient indicia of reliability are established, in that it is not merely a matter of going to the weight of the evidence.[71]

[70] 084008-084010, pp.084008-084009, para.6; 084008-084010, p.084009, para.7; 093386-093387 RED; 084008-084010, p.084009, para.8; 089946-089947 RED; 084008-084010, p.084009, para.9; 090177-090177 RED; 084008-084010, p.084009, para.10; 089938-089939 RED; 084008-084010, p.084009, para.11; 084247-084248 RED; 084008-084010, p.084009, para.11; 084247-084248 RED; 084008-084010, p.084009, para.12; 085880-085883 RED; 088301-088301 RED; 090025-090025 RED; 084249-084250 RED; 082102-082103 RED; 089940-089941 RED; 084236-084242 RED; 089936-089937 RED; 089953-089954 RED; 089955-089956 RED; 089988-089988 RED; 089991-089992 RED; 090004-090005 RED; 090006-090007 RED; 090052-090053 RED; 090175-090176 RED; 091216-091217 RED; 084303-084303 RED; 092911-092912 RED; 093383-093383 RED; 093388-093388 RED.

[71] *Prosecutor v. Milošević*, IT-02-54-T, Decision on Testimony of Defence Witness Dragan Jasovic, 15 April 2005, p5; *See also Prosecutor v. Natelić and Martinović*, IT-98-34-A, Appeal Judgment, 3 May 2006, paras 217 and 516;

119. Further to this, which supports the present situation encountered by the Defence, the absence of the opportunity to cross-examine the witnesses is a factor to be taken into account when assessing the probative value of the evidence, and if it is admitted, the weight to be assigned to such evidence.[72]

120. Per the *Milosevic* case "*although it depends upon infinitely variable circumstances of the particular case, the weight or probative value to be afforded to hearsay evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined*".[73] More importantly and complementary to this, whether any weight will be attached to this hearsay evidence will ultimately depend on the way in which the question of hearsay is clarified by other evidence, which is shown to be reliable.[74]

121. In this situation, the International Criminal Tribunal for the former Yugoslavia ("ICTY") held that,

> "*[W]e, in receiving this evidence, will treat it as merely, in a sense, an introductory summary and it will be of no weight in our view unless later witnesses substantiate the basis for it […] we will not ourselves attach any*

Prosecutor v. Aleksovski, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para 15.

[72] *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, para 15.

[73] *Prosecutor v. Milošević*, IT-02-54-T, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, para 18.

[74] *Prosecutor v. Limaj et al.*, IT-03-66-T, Oral Ruling of 18 November 2004, pp447-449.

weight to what is said about these facts if that does not prove to be substantiated by other evidence."[75]

122. Therefore, hearsay evidence on its own has limited probative value, and the reliability of the testimony as well as its probative value primarily depends on corroborative or contradictory evidence to be presented by the Defence or Prosecution.[76] The reliability of any hearsay evidence which has been admitted has to be thoroughly evaluated before reliance is placed on it in order to establish guilt.[77]

123. Of paramount importance is that original source of the evidence, ergo the anonymous witnesses, have neither been tested in cross-examination nor been the subject of an oath or solemn declaration.[78]

124. Considering all the above, the probative value of hearsay evidence of which the source is known must be assessed on a case-by-case basis taking under scrutiny factors such as the consistency of the information itself and its

[75] *Ibid*.

[76] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DP, 18 November 2001, para 8.

[77] *Prosecutor v. Limaj et al.*, IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, para 27.

[78] *Prosecutor v. Brima et al.*, SCSL-2004-16-A, Trial Judgment, 20 June 2007, para 100.

consistency with the evidence as a whole, the reliability of the source and the possibility for the Defence to challenge the source.[79]

I. Non-attendance of Witnesses at Trial and Anonymous Witnesses

125. As previously expressed above, the SPO does not intend to call any witnesses of fact. From the perspective of the ECtHR jurisprudence, hearsay evidence could even be the sole or decisive evidence in a conviction without breaching the right to a fair trial in an automatic manner under Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR').[80] However, the use of such evidence must be closely considered in order to determine whether the trial can still be regarded, on the whole, as fair, especially in a situation where such hearsay evidence is the sole or decisive basis for a conviction.

126. The ECtHR has held:

> *"[W]here a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales…"*[81]

[79] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para 141.

[80] *Al-Khawaja and Tahery v. The United Kingdom*, Appl. nos. 26766/05 and 22228/06, 15 December 2011, para 147.

[81] *Ibid*.

127. The ECtHR stated that the question in each case is "*whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place*"[82]. This is particularly in relation to the witness summaries provided by the SPO, considering that such a fair and proper assessment is conducted concerning the reliability of these witness summaries without the makers of these statements being available for examination, and where the evidence is deemed as decisive, whether there are sufficient counterbalancing measures, including strong procedural safeguards, in order to ensure that the trial is fair pursuant to Article 6(1) and Article 6(3)(d) of the ECHR.[83]

128. Certainly, the Accused's ability to cross-examine witnesses against him is prejudiced if the Defence has no information about the witnesses' identity, despite the fact that the SPO is cognisant of the identity of the anonymous witnesses.

129. The ECtHR has held that although "*the use of statements made by anonymous witnesses to found a conviction is not under all circumstances incompatible with the Convention*", the use of such evidence may be permissible only so long as it is necessary ("*a real need*") to protect the identity of these witnesses, and it is not

[82] *Ibid*.

[83] *Ibid*, para 152.

the sole or decisive evidence used to convict a Defendant.[84] Nevertheless, the European Court stated that anonymous and absent witnesses both result "*in a potential disadvantage for the defendant*".[85]

130. In the instant case, particularly in terms of those counts on the indictment involving threats against witnesses etc, this evidence is the sole or decisive evidence that will be used in an effort to convict the Defendant.

131. Most importantly, the balancing test for anonymous witnesses is stringent, in that counterbalancing measures must ensure that the Accused "*should not be prevented from testing the anonymous witness's reliability*" and that "*no conviction should be based either solely or to a decisive extent on anonymous statements*".[86]

132. In undertaking this balancing exercise, currently, the balance is solely weighted in favour of the SPO in that the Defendant is being explicitly prevented from testing the reliability or credibility of any witness.

133. It is important to recall that Article 6(3)(d) of the ECHR is in place for the purpose of ensuring equality of arms between the parties. In order for the fundamental protection to have any meaning, there must be an "*adequate and proper opportunity to challenge and question a witness against him*"[87] and that it

[84] *Yakuba v. Ukraine*, Appl. no. 1452/09, 12 February 2019, paras 47 and 51.

[85] *Al-Khawaja and Tahery v. The United Kingdom*, Appl. nos. 26766/05 and 22228/06, 15 December 2011, para 127; *Asani v. The Former Yugoslav Republic of Macedonia*, Appl. no. 27962/10, 1 February 2018, para 33.

[86] *Krasniki v. The Czech Republic*, Appl. no. 51277/99, 28 February 2006, para 76.

[87] *Al-Khawaja and Tahery,* paras. 118-119

should be "*normally produced in the presence of the accused at a public hearing with a view to adversarial argument*".[88] Where, as in *Ausedbeyli & Others v. Azerbaijana*,[89] the authorities fail to show (a) that non-attendance was justified; (b) reasonable efforts have been shown to secure presence; and (c) insufficient counterbalancing measures are in place, the Defendant will be deprived a fair trial.

134. The ECtHR has recognised three categories of witnesses that impact on the application of Article 6(3)(d) of the ECHR. The first concerns anonymous witnesses who have their identity concealed as a result of protective measures. The second concerns absent witnesses who are not available due to death, illness or some other limiting factor. The third involves witnesses who invoke a privilege against self-incrimination. Considering any of the three factors the Court will need to carefully scrutinise any application for non-disclosure or non-attendance and will need to carefully apply the test of whether the evidence is solely or to decisive extent used to found a conviction.

135. In making such an assessment, the Court will need to carefully balance the competing interests of the Defendant, the Witness, potential Victims, and the public interest in the administration of justice.[90]

[88] *Gani v. Spain*, no. 61800/07, para. 37, 19 February 2013; *S.N. v. Sweden,* no. 34209/96, para. 44, ECHR 2002-V.

[89] Nos. 3653/05, 14729/05, 20908/05, 26242/05, 36083/05, and 16519/06, para. 134, 11 December 2012

[90] *Al-Khawaja and Tahery,* para. 146

136. The SPO will need to consider whether, in its view, the disclosure of the identity of the witness and the public nature of the witness's testimony at trial, presents such a challenge that it cannot rely on such a witness, and it can no longer discharge its burden in proving a charge beyond reasonable doubt. What it does not mean, is that the right to a fair trial and the fundamental guarantees that it entails can be watered down to such an extent that the prosecution case is effectively unchallenged and the prosecution is relieved of its obligation to prove the charge to the criminal standard.

J. Limitations of the Right to Examine Witnesses

137. As previously highlighted, there is a high correlation between the limitations of the right to examine witnesses and hearsay evidence. In order to determine whether a trial can be fair despite the fact that the evidence of the witnesses is admitted without the opportunity to challenge them through cross-examination, the ECtHR has applied a three-part test. The Court will consider the following factors:

a. firstly, "*whether there was a good reason for the non-attendance of the witness and, consequently, for the admission of the absent witness's untested statements as evidence*";

b. secondly, "*whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction*"; and

c. thirdly, "*whether there were sufficient counterbalancing factors…to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and…ensure that the trial, judged as a whole, was fair*".[91]

138. It is noteworthy that the ECtHR has applied this test, as mentioned earlier, to the right to examine not only absent, but also anonymous witnesses, emphasising that these three aforementioned steps are interrelated.[92]

i. Good reason for non-attendance of a witness

139. The requirement that there be a good reason for the non-attendance of a witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive in founding a conviction. When witnesses do not attend to give live evidence, there is a duty to enquire whether such absence is justified.[93] Therefore, failure to justify a refusal to examine or call a witness can amount to a limitation of defence rights that is incompatible with the guarantees of a fair trial under Article 6(1) of the Convention.[94]

[91] *Al-Khawaja and Tahery*, paras 118-147.

[92] *Schatschaschwili v. Germany*, Appl. no. 9154/10, 15 December 2015, para 118.

[93] *Al-Khawaja and Tahery* para 120.

[94] *Bocos-Cuesta v. The Netherlands*, Appl. no. 54789/00, 10 November 2005, para 72.

140. It is acknowledged that the SPO has gratuitously decided to evade the Defendant's right to examine prosecution witnesses. In other words, the SPO has provided no reasons at all for the non-attendance of these anonymous witnesses nor has it provided any information as to whether these witnesses are subject to protective measures orders. Although the lack of good reason for the absence of a witness is not conclusive of the lack of fairness of a trial, it is nevertheless the case that it remains a pivotal factor to be weighed in the balance when assessing the fairness *in toto*, and one which might be the deciding factor in favour of finding a violation of Article 6(1) and Article 6(3)(d) of the ECHR. Accordingly, even where the Court finds that there was no good reason for the witnesses' absence, it should proceed into assessing the other elements of the test.[95]

141. It is important to consider that Article 6(1) jointly with Article 6(3)(d) require steps to be taken in order to enable the Accused to examine or have examined witnesses against him.[96] There are a number of reasons why a witness may not attend trial, and these reasons that justify their absence encompass the

[95] *Gökbukut v. Turkey*, Appl. No. 7459/04, 29 March 2016, paras 52, 58.

[96] *Trofimov v. Russia*, Appl. no. 1111/02, 4 December 2008, para 33.

following: death or fear,[97] health grounds,[98] or the inability to locate the witness.[99]

142. As far as fear is concerned, which is potentially relevant to this case particularly in relation to the witnesses' safety, this may be consistent with a Defendant's right to examine witnesses in exceptional circumstances and as a "*measure of last resort*";[100] furthermore, "*this does not mean…that any subjective fear of the witness will suffice*"[101] in terms of justifying their absence at trial. According to the ECtHR, "*[t]he trial court must conduct appropriate enquiries to determine, firstly, whether or not there are objective grounds for that fear, and, secondly, whether those objective grounds are supported by evidence*".[102]

143. The European Court has held that:

> "*Before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness*

[97] *Ferrantelli and Santangelo v. Italy*, Appl. no. 19874/92, 7 August 1996, para 52; *Al-Khawaja and Tahery v. The United Kingdom*, Appl. nos. 26766/05 and 22228/06, 15 December 2011, paras 120-125.

[98] *Bobeş v. Romania*, Appl. no. 29752/05, 9 July 2013, paras 39-40; *Vronchenko v. Estonia*, Appl. no. 59632/09, 18 July 2013, para 58.

[99] *Schatschaschwili v. Germany*, Appl. no. 9154/10, 15 December 2015, paras 139-140; *Lučić v. Croatia*, Appl. no. 5699/11, 27 February 2014, para 80.

[100] *Al-Khawaja and Tahery*, para 125.

[101] *Ibid*, para 124.

[102] *Ibid*.

> *anonymity and other special measures, would be inappropriate or impracticable*."[103]

144. Further to this, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness summary in lieu of live evidence at trial must be a measure of last resort.[104] This is for the main reason that admitting as evidence statements of absent witnesses results in a potential disadvantage for the Defendant who should have an effective opportunity to challenge the evidence against him. The Defendant should be able to test the truthfulness and reliability of the evidence given by these witnesses, by having them orally examined in his presence, either at the time the witness was making the statement or at a later stage in the proceedings.[105]

145. It is submitted to be of particular relevance that at least two witnesses cited, and referred to elsewhere in these submissions have indicated their willingness to attend trial and give evidence, and thus any suggestion that fear is a relevant factor will take into account that that same fear has not been attested to by those witnesses. That fundamentally undermines the position of the SPO. In such circumstances, it is submitted that any such suggestion

[103] *Ibid*, para 125.

[104] *Seton v. The United Kingdom*, Appl. no. 55287/10, 31 March 2016, para 58.

[105] *Ibid*.

advanced by the SPO must be summarily dismissed as not being evidenced and therefore not credible.

ii. Evidence as the 'sole or decisive basis' for the Defendant's conviction

146. In a situation where there is a compelling reason for a witness's absence at trial, the weight of their evidence will need to be considered in assessing whether the trial is fair despite the restriction on the Defendant's right to cross-examine. It is argued that in this present case, the witness summaries including the declaration by W04842 are important evidence, hence "*the more important that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair*".[106] Therefore, this depends on "*whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place*".[107]

147. The ECtHR will also consider whether the absent witness's evidence was the sole or decisive basis for the Defendant's conviction in deciding whether the Defendant's right to examine witnesses has been violated.[108]

[106] *Schatschaschwili v. Germany*, Appl. no. 9154/10, 15 December 2015, para 116.

[107] *Al-Khawaja and Tahery*, para 147.

[108] *Al-Khawaja and Tahery*, para 123.

148. According to the 'sole or decisive rule', it is the current *status quo* that if the conviction of a Defendant is solely or mainly based on evidence provided by witnesses whom the Accused is unable to question at any stage of the proceedings, his defence rights are unduly restricted.[109]

iii. Counterbalancing Factors

149. The extent of the counterbalancing factors necessary for a trial to be considered fair would depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors would have to carry in order for the proceedings as a whole to be considered fair. These counterbalancing factors must permit a fair and proper assessment of the reliability of that evidence.[110]

150. The ECtHR considers that the adequacy of counterbalancing measures must be addressed both in cases in which the witness' testimony is the sole or decisive evidence, and in cases in which it carried significant weight in situations where it finds it uncertain whether the evidence is indeed the sole or decisive basis. The admission of such evidence in both cases would place the defence at a distinct disadvantage.[111]

[109] *Seton v. The United Kingdom*, Appl. no. 55287/10, 31 March 2016, para 58.

[110] *Schatschaschwili v. Germany*, Appl. no. 9154/10, 15 December 2015, paras 116 and 125.

[111] *Ibid*, para 116.

151. A counterbalancing factor that would favour a conclusion that the Defendant's trial is fair has been mentioned previously, would be the need for corroboration of absent witnesses' evidence. According to the ECtHR, such evidence may encompass the testimony of other witnesses who give evidence at trial,[112] forensic or other physical evidence,[113] and expert opinions.[114] In the case of *Schatschaschwili v. Germany*, the Court found a violation because the corroborative evidence that was relied on in convicting the Defendant was itself untested or inconclusive,[115] circumstances that can be anticipated as arising in the instant case.

152. The SPO seeks to call two witnesses, W04841 and W04842, neither of whom is able to provide corroborative evidence. The SPO is not able to provide any other corroborative evidence that meet a counterbalancing. The SPO argues that W04841 and W04842 constitute sufficient counterbalancing to ensure the rights of the Defendant. This very statement demonstrates a distinct lack of understanding or appreciation of the right concerned as in *Schatschaschwili*.

153. An element that may be relevant for the purposes of illustration in terms of counterbalancing factors would entail the possibility for the Defence to put its

[112] *Nájera v. Spain*, Appl. no. 61047/13, 11 February 2014, para 55; *McGlynn v. The United Kingdom*, Appl. no. 40612/11, 16 October 2012, para 24; *Al-Khawaja and Tahery v. The United Kingdom*, Appl. nos. 26766/05 and 22228/06, 15 December 2011, para 156.

[113] *McGlynn v. The United Kingdom*, Appl. no. 40612/11, 16 October 2012, para 24.

[114] *Gani v. Spain*, Appl. no. 61800/08, 19 February 2013, para 48; *Nájera v. Spain*, Appl. no. 61047/13, 11 February 2014, para 56; *Rosin v. Estonia*, Appl. no. 26540/08, 19 December 2013, para 61.

[115] *Schatschaschwili v. Germany*, Appl. no. 9154/10, 15 December 2015, para 144.

own questions to the witness indirectly, for instance in writing, in the course of the trial or where appropriate in the pre-trial stage of the proceedings.[116]

154. It would appear that the Rules envisage such circumstances arising and provide for written questioning of witnesses,[117] and yet it is notable that the SPO have not sought to raise this is a possibility.

155. A further element is the possibility for the Defence to question the witnesses during the investigation stage, in that these pre-trial hearings are classified as an important procedural safeguard which can compensate for the handicap faced by the Defence on account of absence of a witness from the trial.[118] These are significant examples derived from the jurisprudence of the ECtHR and accordingly, it is conspicuous that none of these elements have been fulfilled in this case.

156. Unfortunately, no such provision has been made or offered, and further, given the piecemeal, or spoon-fed, approach to disclosure on the part of the SPO it is unlikely whether this would have, or is, possible prior to the trial date now in any event.

[116] *Paić v. Croatia*, Appl. no. 47082/12, 29 March 2016, para 47.

[117] Rule 147 of the Rules of Evidence and Procedure

[118] *Palchik v. Ukraine*, Appl. no. 16980/06, 2 March 2017, para 50.

157. Lastly, the Defendant must be afforded the opportunity to give his own version of the events and to cast doubt on the credibility of the absent witnesses. Although this cannot be regarded *per se* a sufficient counterbalancing factor to compensate for the handicap,[119] the Court must provide sufficient reasoning when dismissing the arguments put forth on behalf of the Defence.[120] It is worth noting that in some instances, an effective possibility to cast doubt on the credibility of the absent witness evidence may depend on the availability to the defence of all the material in the file related to the events to which the witnesses' statement relates.[121]

158. Considering all the above, if the anonymity of Prosecution witnesses is maintained, the Defence will be indeed faced with difficulties which criminal proceedings should not normally involve. In such cases, the handicap faced by the Defence must be sufficiently counterbalanced by the procedures followed by the judicial authorities[122] and if they cannot be overcome, the proceedings must be discontinued.

K. Hearsay – Anonymous Hearsay and Summaries of Anonymous Witness Statements

[119] *Ibid*, para 48.

[120] *Prăjină v. Romania*, Appl. no. 5592/05, 7 January 2014, para 58.

[121] *Yakuba v. Ukraine*, Appl. no. 1452/09, 12 February 2019, paras 49-51.

[122] *Asani v. The Former Yugoslav Republic of Macedonia*, Appl. no. 27962/10, 1 February 2018, para 37.

159. The probative value of the anonymous hearsay evidence will be determined in the following manner:

> *"…in light of other evidence which was also admitted for the purpose of the confirmation hearing. However, mindful of the difficulties that such evidence may present to the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chambers decides that, as a general rule, it will use this type of anonymous hearsay evidence only to corroborate other evidence."*[123]

160. Most importantly, it has been reiterated that information based on anonymous hearsay must be given a low probative value in view of the inherent difficulties in ascertaining the truthfulness and authenticity of such information.[124] Therefore, on these grounds, the weight is affected in light of the difficulties the Defence may face in respect of the anonymous hearsay evidence.[125]

161. As already mentioned above, the evidence is characterised not only as first-hand hearsay, but also second-hand hearsay. As a general rule, anonymous hearsay contained in witness statements "*will only be used for the purposes of*

[123] *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges, 29 January 2007, para 106.

[124] *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, para 78.

[125] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, paras 118-120.

corroborating other evidence" while second degree (i.e. second-hand) and more remote anonymous hearsay contained in witness statements will be used with even more caution, even as a means of corroborating other evidence.[126]

162. Drawing to the witness summaries available, these amount to first-hand hearsay and the following constitute anonymous hearsay on behalf of the prosecution, witness security officers and investigators:

a. Messages that took place on 7 September 2020. The document is dated 7 September 2020.[127]

b. The telephone conversation on 24-25 September 2020. The document is dated 25 September 2020.[128]

c. The telephone conversation that took place on 26 September 2020. The document is dated 28 September 2020.[129]

d. The telephone conversation on 27 September 2020. The document is dated 28 September 2020.[130]

[126] *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the confirmation of charges, 16 December 2011, para 49; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para 138.

[127] 091216-091217 RED.

[128] 090175-090176 RED.

[129] 090025-090025 RED.

[130] 089988-089988 RED.

e. Messages that took place on 27 September 2020. The document is dated 15 March 2021.[131]

f. The telephone conversation on 28 September 2020. The document is dated 29 September 2020.[132]

g. The telephone conversation on 29 September 2020. The document is dated 29 September 2020.[133]

h. The telephone conversation on 29 September 2020. The document is dated 30 September 2020.[134]

i. The telephone conversation on 6 October 2020. The document is dated 19 October 2020.[135]

163. Therefore, caution must be exercised in deploying such evidence in order to affirm or reject any assertion made by the Prosecution, and in reaching conclusions, the ICC held that it will not rely solely on anonymous hearsay evidence, in that such evidence may be probative only to the extent it

[131] 093383-093393 RED.

[132] 089991-089992 RED.

[133] 090004-090005 RED.

[134] 092911-092912 RED.

[135] 090006-090007 RED.

corroborates other evidence in the record or is corroborated by other evidence in the record.[136]

164. It is indeed the case that the use of such summaries is permissible only on the basis that the Court takes sufficient steps to ensure that these summaries of evidence in the circumstances described above are deployed in a manner that is not prejudicial to or inconsistent with the rights of the Accused and with a fair and impartial trial.[137] However, the ability to challenge the evidence is manifestly affected. To be specific and as already stated previously, the Defence is not cognisant of the witnesses' identity and have only received summaries, rather than full statements or other information which could authenticate them.[138]

165. Therefore, it is argued that the evidence will certainly have a lower probative value if the Defence does not know the witnesses' identity, given only summaries of these statements may be challenged or assessed, rather than entire statements.[139] Furthermore, as the ICC held in *Katanga & Ngudjolo*:

[136] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, paras 139-140.

[137] *Prosecutor v. Lubanga*, ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, para 51.

[138] *Ibid*.

[139] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para 159.

> "*despite the fact that, […] summaries have a lesser probative value than unredacted parts of redacted statements, interview notes or interview transcripts, the difference in probative value between a summary and the unredacted parts of heavily redacted statements, interview notes or interview transcripts is minimal*."[140]

166. Accordingly, although corroboration of summary evidence of anonymous witnesses is not a requirement for its admissibility, the lack thereof could affect the probative value of such summary evidence,[141] in the instant case these must be deemed to be apparent, and the distinct lack of corroboration renders the evidence, and its probative value, entirely meaningless.

L. Hearsay – Declaration by the SPO's Witness Security Officer (W04842)

167. Having regard to the witness summaries provided by SPO officers and investigators, it is worth noting that the ICTY Trial Chamber excluded evidence from a Prosecution investigator because the evidence consisted of a summary compiled by him of numerous written statements of potential witnesses. The Trial Chamber considered that the investigator's conclusions

[140] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-428-Corr, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, para 89.

[141] *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para 160.

amounted to hearsay evidence of little or no probative value and it was the Trial Chamber's function to determine the weight of the evidence on which the conclusions were based. Being prepared with the specific purpose of proving the guilt of the Accused in that case, the OTP investigator's conclusions on the testimony of anticipated witnesses may not appear to the public as an independent evaluation of the evidence.[142] Therefore, in light of the aforementioned situation, this is akin to the declaration provided by W04842, a Witness Security Officer with the Witness Security Team of the SPO.[143]

168. Considering the above and focusing solely upon the declaration, the following paragraphs are categorised as first-hand, second-hand and anonymous hearsay:

a. Paragraph 6, which describes how witnesses felt "[REDACTED]". This is classified both as first-hand and second-hand hearsay. W04842 is aware of these alleged feelings by virtue of other officers and investigators of the SPO who consequently produced witness summaries that *per se* amount to first-hand hearsay.[144]

[142] *Prosecutor v. Milošević*, IT-02-54-T, Transcript of Milošević Trial of 20 February 2002, pp672-673; Transcript of Milošević Trial of 30 May 2002, pp5931-5933, 5936, 5940-5944.

[143] 084008-084010.

[144] 084008-084010, p084008.

b. Paragraph 7, which describes how one particular witness "[REDACTED]" amounts to first-hand hearsay. This is due to the fact that W04842 was the officer who had telephone conversations as well as exchanged messages with this witness on [REDACTED].[145]

c. Paragraph 8, which states that a witness "[REDACTED]" amounts to second-hand hearsay, in that W04842 knows of this alleged fact by virtue of the [REDACTED] in his telephone conversation on [REDACTED].[146]

d. Paragraph 9, which states that a witness [REDACTED] amounts to second-hand anonymous hearsay. This phone conversation took place on [REDACTED] and the witness security officer is anonymous, thus W04842 is aware of this alleged fact expressed by this anonymous witness by virtue of that conversation.[147]

e. Paragraph 10, where a witness allegedly describes how [REDACTED] is second-hand hearsay. Again, the call was between the [REDACTED], and the anonymous witness on [REDACTED].[148]

[145] 084008-084010, p084009; 093386-093387 RED.

[146] 084008-084010, p084009; 089946-089947 RED.

[147] 084008-084010, p084009; 090177-090177 RED.

[148] 084008-084010, p084009; 089938-089939 RED.

f. Paragraph 11, where it states that a witness "[REDACTED]", including *inter alia*, feelings of isolation and danger, amount to second-hand hearsay. The meeting was between the [REDACTED], including [REDACTED], on [REDACTED].[149]

g. Paragraph 12 states that a witness expressed feelings that "[REDACTED]", including the fact that his business allegedly suffered a detriment as a result of the publication. This amounts to second-hand hearsay since a message was exchanged between an SPO investigator and the anonymous witness on [REDACTED].[150]

169. Furthermore, the Defence would submit that the deprivation of the right to cross-examine the makers of the statement would not be compensated by allowing the Defence to cross-examine employees of the SPO who supplied these summaries.[151] This is supported by the ICTY Trial Chamber and confirmed by the ICTY Appeals Chamber, stating that "*the opportunity to cross-examine the person who summarised those statements does not overcome the absence of the opportunity to cross-examine the persons who made them*."[152] In the instant case the Defence are only being given the opportunity to question an

[149] 084008-084010, p084009; 084247-084248 RED.

[150] 084008-084010, p084009; 085880-085883 RED.

[151] The witnesses are not identified, nor has any statement been compiled or disclosed and thus we are reliant on what appears to be the recollection of an investigator on purported facts that cannot be tested and/or challenged for the reasons already given.

[152] *Prosecutor v. Milošević*, IT-02-54-T, Decision on Admissibility of Prosecution Investigator's Evidence, 30 September 2002, paras 22-24; Transcript of Milošević Trial of 30 May 2002, p5933.

individual's recollection of something that may have been said to that person. The evidence itself is not being tested nor is it capable of being tested given the position adopted by the SPO.

170. It is abundantly clear that such a process is comprehensively unfair and prejudicial to the Defendant.

M. Hearsay – Evidence Untested Through Cross-Examination

171. As previously advanced, the evidence is, and will remain, untested through cross-examination and therefore it has a strong connection with hearsay evidence in this respect.

172. Although there is nothing that impedes the admission of evidence that is untested or might not be tested through cross-examination, it has recognised that "*[u]nacceptable infringements of the rights of the defence […] occur when a conviction is based solely, or in a decisive manner, on the depositions of a witness whom the accused has had no opportunity to examine or to have examined either during the investigation or at trial*."[153] Therefore, in light of this, the ICTY held that "*[i]t would run counter to the principles of fairness […] to allow a conviction based on evidence of this kind without sufficient corroboration*."[154]

[153] *Prosecutor v. Prlić et al.*, Decision on appeals against decision admitting transcript of Jadranko Prlić's questioning into evidence, 23 November 2007, para 53.

[154] *Ibid*, para 59.

173. In addition to this, whether evidence that is untested is sufficiently corroborated is a fact-specific inquiry and varies on a case-by-case basis. The main question is whether a conviction rests specifically on untested evidence, and although not all evidence characterised as hearsay is deemed as untested or unreliable, as a matter of law, caution is warranted in circumstances where a conviction is based on hearsay evidence.[155]

174. It is further noted as of particular relevance to this case that "*there may be good reason for [the Court] to consider whether hearsay evidence is supported by other credible and reliable evidence adduced by the Prosecution in order to support a finding of fact beyond reasonable doubt*"[156] and in that case, there was good reason to consider whether hearsay evidence was supported since neither witness provided any detail on the crimes themselves. It was concluded that "*no reasonable trier of fact could have concluded that…in circumstances where it heard no evidence about even a single incident*."[157]

175. The position is therefore comparable to the instant case where not one single witness will give evidence in terms of the allegations, but rather, simply the

[155] *Prosecutor v. Haraqija and Morina*, IT-04-84-R77.4-A, Appeals Chamber Judgement, 23 July 2009, para 62; *Prosecutor v. Tharcisse Muvunyi*, ICTR-2000-55A-A, Appeals Chamber Judgement, 29 August 2008, para 70.

[156] *Ibid*, para 70

[157] *Ibid*, para 70.

evidence of two SPO staff members will be called, neither of whom can give direct evidence in terms of the alleged criminality.

176. In *Kordić,*[158] dealing with an investigator's statement, the Chamber held that although *"[t]he International Tribunal is not bound to reject hearsay evidence the position with regard to the Report is somewhat different … The Investigator is not reporting as a contemporary witness of fact, he has only recently collated statement and other materials for the purposes of this Application. He could, in reality, only give evidence that material was or was not in the Dossier. The Report therefore is of little or no probative value and will not be admitted into evidence".*

177. The position in *Kordić* related to a dossier of evidence that was to be admitted, the investigator's report being that which reported on those other materials being adduced. In the instant case the position is somewhat different, in that the materials that form the Investigator's report, <u>are not</u> being adduced themselves, the report therefore is of even less probative value than the position in *Kordić*, and accordingly, cannot satisfy any relevant test in terms of its admissibility or otherwise.

178. Further, no documentary evidence essential to the allegations within the indictment is to be adduced, disclosed, or made subject to scrutiny.

[158] *Prosecutor v. Dario Kordić & Mario Čerkez*, Decision on the Prosecution Application to Admit the Tulica Report and Dossier and Dossier into Evidence, 29 July 1999, paras. 19-20.

179. The reality of the matter is that the SPO have failed at this stage to *prima facie* raise a positive case, and even where the Specialist Chamber has deemed such a case to be have been raised, to enable that case to continue is so prejudicial to the Defendant given the explicit restrictions being placed upon him, and it is impossible for him to be given a fair trial in the context of the legal, regulatory and constitutional framework applicable in the Republic of Kosovo – noting that the Specialist Chamber is a domestic institution, the European Convention on Human Rights, and those other international Conventions, treaties, and instruments to which Kosovo is a State Party, by virtue of Part II to the Constitution, that seek to guarantee a fair trial and due process.

O. Chain of Custody

180. In a similar vein to the fact that the majority, if not all of the evidence the SPO seeks to adduce is hearsay, the evidence proposed as being admissible must also fall foul of the principles concerning establishing an effective 'Chain of Custody', in that all evidence collated by the SPO appears to have been done so in complete ignorance of this obligation.

181. Accordingly, there is no guarantee that what the SPO states has been seized or considered or adduced etc, is what is being purported given provenance cannot be proved.

182. As one example, the search that took place after the delivery of Batch 3 appears to have no record of any such search, further:

a. No witnesses have provided statements to confirm that they were present;

b. No witness has confirmed that they undertook the search;

c. No witness has confirmed what it is that they seized, if anything, from that search;

d. No witness has exhibited any document, or statement, or any other element of the evidential basis; and

e. No witness has confirmed that anything seized, including the Batch 3 was indeed seized, and where it was seized, and further, whether it was placed in a tamper proof bag etc;

183. The SPO has provided a series of video recordings of the search of the KLA WVA premises that took place on 25 September 2020. The video footage is not exhibited and has been made available to the Defence under strict conditions that is not entirely clear as to why such measures are necessary.

184. The Defence have requested, through *inter-partes* communications, the statements of all SPO personnel present during the search of 25 September

2020. The Defence have further requested disclosure of the identities of all SPO personnel. Those requests have been refused.

185. The Defence have further requested, through *inter-partes* communications, disclosure of video recordings, statements and the identity of SPO personnel, present during the search and seizure operations on 8, 17 and 22 September 2020 related to Batches 1, 2, and 3, respectively. Those requests have been denied.

186. In the absence of any such evidence, all of the exhibits the SPO seeks to adduce at trial fail to be admissible as their provenance cannot be confirmed, nor who is providing them, nor whether they have been subject to any analysis at any time and by whom.

187. Further, if we are to take Batch 3 for example, in the absence of an unbroken chain of custody, it cannot be confirmed that a document hasn't been removed, included, altered, or the batch otherwise been interfered with.

188. In short, it cannot be demonstrated, to the appropriate standard, that the documents asserted as being seized by the SPO at the KLA WVA offices were in fact seized there.

189. Accordingly, the evidence cannot be said to any appropriate standard, to be reliable.

190. In terms of reliability, the circumstances under which that evidence arose and/or collated must be considered, the content of the evidence, whether and how the evidence is corroborated, as well as the truthfulness, voluntariness, and trustworthiness of the evidence.[159]

191. In the instant case, these factors although falling to be considered, cannot be considered fully given the complete absence of a chain of custody; notably, per Archbold International Criminal Courts, Practice and Procedure, at part 9-110:

> "*In order to assess whether the required indicia of reliability are sufficiently established for the admission of a document, the Trial Chamber will consider factors, such as:*
>
> *(1) The place where the document was seized;*
>
> *(2) The chain of custody after seizure of the document;*
>
> *(3) Corroboration of the contents of the document with other evidence;*
>
> *(4) The nature of the document itself such as signature, stamps, handwriting* (emphasis added)

[159] *Prosecutor v. Musema,* Judgment 27 January 2000 p.42; *Prosecutor v. Tadić,* Decision on Defence Motion on Hearsay, 6 August 1996 p.19; *Prosecutor v. Kajelijeli,* Decision on Motion to Limit the Admissibility of Evidence, 2 June 2001.

192. It is unclear why the SPO has not provided a statement from an Evidence Officer and offered such a witness for live testimony at trial. It is further unclear why the SPO Investigator, [REDACTED], who [REDACTED] leading up to the purported seizure of Batches 1, 2, and 3, has not been warned as a witness to give live evidence.

193. It is respectfully submitted that offering W04841 and W04842 to give evidence on the basis of matters in which they have little or no direct knowledge or involvement is woefully deficient.

194. It is accepted that proof of a chain of custody is not necessarily determinative of admissibility, given the clear difficulty of maintaining the chain of custody in war crimes investigations and particularly during armed conflict,[160] it can be a factor in determining whether that evidence is admissible or otherwise.[161]

195. It is submitted that the instant case can be distinguished from the position adopted in *Orić*,[162] on the basis that the documents at the centre of the indictment were not seized during, in connection with or directly after a period of armed conflict, but rather in times of peace, from an office free from any and all encumbrances. The Defendant is not charged with war crimes and

[160] *Prosecutor v. Orić,* Trial Judgment, 30 June 2006, para.27

[161] *Prosecutor v. Šešelj, Decision on Prosecution's Motion for Admission of Evidence, Relating to Mladić's Notebooks, 22 October 210, p.219*, in which the Trial Chamber denied a prosecution request to admit into evidence extracts from notebooks allegedly written by Ratko Mladic given the doubts as to "*the exact date and the chain of custody and handover*", of the notebooks which undermined the reliability and probative value of the evidence.

[162] *Op. cit, para. 27*

the conduct alleged was not committed during or in connection with an armed conflict.

196. That fact alone demonstrates that the SPO has no excuse for failing to provide evidence sufficient to show an effective and unbroken chain of custody.

197. There is no reason whatsoever as to why an appropriate chain of custody could not be kept.

198. The entirety of the evidential foundation of this case is flawed, on the basis that little, if any of the evidence is actually admissible before any credible tribunal.

VI. ISSUES WITHIN THE PROSECUTION PRE-TRIAL BRIEF

199. For the reasons already raised both within this brief, and previous filings before the Chamber, the deadline imposed has not allowed a full analysis to be detailed below in terms of the issues taken with the pre-trial brief, however, insofar as the deadline has allowed, the Defence note the immediate issues as per the below.[163]

200. The issues raised will follow the same structure as the SPO Pre-Trial Brief, and further, all paragraph numbers referred to are those adopted within the same.

[163] The fact that a point has not be taken within this brief ought not to be read as an indication as any such point, allegation, or purported fact is accepted as being correct. The Defence do not accept the allegations in their entirety, and therefore, do not accept the characterisation of the position in its entirety.

201. At the outset however the Defence again highlights that Batches 1-3 have not been disclosed, nor does it appear, that they have even been disclosed to the Pre-Trial Judge who confirmed the Indictment. That fact alone is a real for concern as to how this matter can properly proceed.

202. It is therefore impossible for the Defence to object substantively on that which is alleged given it has been explicitly prevented from considering the documentary and therefore the evidential foundation underpinning the allegations.

203. Counts 1 and 2 in particular cannot be proved to the required standard as there is no opportunity to consider the documents referred to and therefore no opportunity to assess whether any disclosure of the same would amount to obstruction.

204. It is simply impossible to ascertain the documents are what the SPO state that they are, and therefore, again, it is submitted that the SPO ought to be required to prove the contents of those batches and allow the same to be subject to scrutiny and cross-examination, without which, there is palpable unfairness and therefore prejudice to the Defendant.

A. Introduction

205. The introduction to the Brief, at paragraphs 1-7 mischaracterises the position and makes a number of unsubstantiated allegations, in the same manner that

the Counts on the indictment are similarly unsubstantiated without any evidential basis.

206. At paragraph 6, the SPO assert that "*the Accused disparaged and threatened witnesses*". No evidence has been adduced on this point, noting that no witness evidence is to be adduced that details any threats as alleged or at all. Accordingly, the SPO make allegations without any victims being named.

207. At paragraph 7, the SPO refers to "*as well as during the years preceding these events when the Accused overtly sought to obstruct the work of the SC and SPO pursued their abolition*".

208. In the first instance it is noted that little or no evidence has been adduced to substantiate this very general allegation. There is no specificity as to the time, the location and the manner in which this allegation of obstructing the work of the institution is made.

209. Secondly, the SPO appears to be taking issue with the inherent and fundamental right to disagree or criticise. It is not unlawful, nor can it ever be unlawful for an individual to voice opposition. The SPO is any event required to prove that the voicing of opposition or criticism is in any way unlawful.

210. The position of the SPO on this point is a clear mischaracterisation of a position, and does not go towards the allegations, or any purported intent as alleged or at all.

211. The Defendant has openly criticised the manner in which the SPO has adopted a selective approach to its investigations, by targeting only Kosovo Albanians, characterising the hostilities as an armed conflict rather than Serbian aggression. Considering that in the absence of a peace agreement and recognition of Kosovo's independence there still exists a state of war between the two States, these are matters to which the Defendant is entitled to object .

212. The Defendant is quite clear in that he has consistently called for all persons who committed war crimes to be held accountable, irrespective of who they are, and his criticisms have been aimed at the abject failure to do so.

213. At paragraphs 9-16, the SPO is again seeking to criminalise free-speech and hold an individual criminally responsible for the expression of an opinion. By way of one example, at paragraph 15, the SPO notes "*Haradinaj stated that the documents prove that the SC are selective, racist, and working with the same people who were part of 'Milosevic's apparatus. He added that to the KLA WVA, the SC was 'non-existent' and that the Court should pay its price*".

214. This constitutes an opinion, and one that the Defendant is entitled to hold. The Defendant is clearly referring to the fact that the Specialist Chambers, and the SPO at this stage, has no Kosovo Albanian employees, and further, has only targeted purported members of the KLA at the exclusion of those other individuals party to the conflict who have been subjected to credible

allegations of criminality during the conflict.[164] On this basis, the SPO is selective. In any event, the expression of such an opinion is not criminal nor can it ever be thus.

215. At paragraphs 17-40, the SPO recount a narrative that raises significant concern, predominantly in that it names other individuals who appear within the brief on numerous occasions as being party to the offending and jointly responsible for the offending. The SPO have not indicted those other individuals however, an omission that appears to be quite startling.

216. Further, if it is maintained that the alleged actions of the Defendant after the delivery of the first batch of documents amounted to offences being committed, why is that no action was taken by the SPO until the third batch was delivered, including, but not limited to, the arrest of those involved, an immediate investigation into how those documents had come to leave the offices of the SPO, and, surveillance of the KLA WVA building to ensure that should any further deliveries be made as threatened, the individual responsible was capable of identification and/or detention.

217. It will be the Defendant's case that the SPO not only failed to take any reasonable steps, or at all, to investigate the leak of documents that are

[164] The Defendant is quite happy to be corrected on this point, if it is that Kosovan citizens are employed within the offices of the SPO, and/or if it is the intention of the SPO to investigate any Serbian, or individual of other nationality who is alleged to be responsible for the commission of offences during the conflict.

purported to be confidential and/or non-public SPO documents, it has also prevented the local authorities from taking any action to identify the mystery person(s) alleged to have delivered the three batches of documents.

218. The SPO's factual outline raises significant questions.

219. Paragraphs 41-95 follow a similar theme, in that reference is made to individuals who have not been charged but suggested by the SPO as being equally as responsible.

220. Further, there is significant attention drawn to information that appears to at least in part be in the public domain and in any event, in the public domain prior to the events leading to these allegations being made.

221. Further, the SPO again makes reference to incidents that are merely an example of free speech and free expression.

222. What the SPO fails to do, is to adduce any evidence that demonstrates how the counts on the indictment are satisfied, noting that no victims are to be called or identified and so forth.

B. Counts on the Indictment

223. Generic across all counts on the indictment is the suggestion that "*between at least 7 and 25 September 2020, the Accused participated in a group of persons, composed of the Accused,* [REDACTED] *and others, including* [REDACTED],

whose common action obstructed or attempted to obstruct one or more official persons in performing official duties".[165]

224. The SPO therefore suggests that there are least three other individuals as culpable as the Defendant, and yet at least those three other individuals are not subject to any formal charge. The SPO has failed to explain as to why such a selective and prejudicial approach has been taken.

225. Paragraph 174 of the Brief is not evidence of co-ordination.

226. At paragraph 175, the SPO have failed to adduce evidence that the three named individuals "*and others*" reviewed the three batches of documents.

227. The remainder of the SPO pre-trial brief and as it relates to Count 1 is merely a narrative; the evidence disclosed does not demonstrate that which is being alleged, and further, does not demonstrate that the work of the SPO or the Chamber has been obstructed. It provides no evidence at all to show how any of the other matters under investigation or at the pre-trial stage have been affected by any actions of the Defendant or any other person.

C. Count 3

[165] *Per* paragraph 173, page 62, of the SPO Pre-Trial Brief

228. The SPO have not substantiated the allegations at paragraph 178 and 179, in that there is no evidence of any actual threats being made.[166]

229. Further, the SPO have failed to acknowledge that the Defendant has suggested, within the media interviews and press conferences to state, "*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*". Such a suggestion would at a minimum suggest that there was no intention to intimidate a witness as if the position is correct as quoted, the Defendant has taken active steps to ensure names will not be mentioned.

230. Accordingly, any suggestion of the offence itself and the intention behind that offence is immediately negated.

231. At paragraph 181, the SPO allege that the Defendant sought to ensure the maximum possible dissemination. This is simply not correct, as taking the SPO's case at its highest, the Defendant gave the media the opportunity to publish the purported documents but left the decision to the individual. Accordingly, the allegation of the SPO simply is not made out.

[166] The SPO have not substantiated the allegation see *Beggi (Trial Chamber) May 27, 2005*, and further, *Haragija and Morina (Trial Chamber) December 17, 2008*.

232. Paragraphs 183-184 are merely details concerning a conversation, an interview, and is an example of the SPO being selective in the alleged comments it seeks to quote.

233. The outline is a mischaracterisation of the position.

234. Further paragraphs 184-185 do not demonstrate criminality but exemplify free speech and opinion and/or expression. The Defendant is within his rights to pass comment on a process if he does not agree with that process, noting that concerns had been raised privately on a number of occasions on what is suggested to be a 'mono-ethnic' and 'discriminatory' process, as noted earlier, with a state (Serbia) that does not even recognise the existence of the State of Kosovo, and further, a State within which Kosovo is still technically at war, noting that no formal peace agreement has ever been entered into and thus a situation akin to that between North and South Korea.

235. In any event, the SPO brief under this head does not demonstrate the intimidation of witnesses and thus the allegations contained therein are rejected as being baseless, without evidential foundation, and selective in its failure to highlight where the Defendant is purported to have stated that he will not release names.

236. Finally in terms of Count 3, the final paragraph of 185 is noted, which reads "[REDACTED] *intent mirrored that of the Accused*".

237. This is a clear and direct allegation of criminal conduct made by the SPO and yet neither individual has been indicted. This would suggest that the alleged comments of the Defendant, referring to the SPO as being discriminatory and 'selective' in its approach is made out.

D. Count 4

238. Paragraphs 186-191 do not demonstrate any retaliation on the part of the Defendant as alleged or at all.

239. The SPO has not adduced any evidence or any evidence that is admissible to substantiate the allegation at paragraph 189, in that "*The Accused's actions were indeed harmful to witnesses…Witnesses felt worried, stressed, unsafe, threatened and/or intimidated in the wake of the Accused's actions*".

240. Paragraph 190 makes a direct accusation in terms of specific witnesses, and yet it does not appear that any statement was taken from any witness referred to, nor is that witness available for cross-examination, and therefore the point is merely hearsay, and inadmissible.

241. The same submission is made in respect of paragraph 191, again, a wholly anonymous witness who has not provided a statement.

242. The SPO have not proven that any such individual was spoken to, nor that if they were spoken to, they are indeed a witness or relevant individual, and

again, as per paragraph 211 above, the evidence cannot be tested by way of cross-examination and is therefore entirely prejudicial with little, if any probative value.

243. Paragraph 192 of the SPO Brief simply is not made out on the evidence submitted. The focus being on the evidence, rather than the narrative, the two in this case being significantly different.

E. Count 5

244. At paragraph 193 the SPO again refers to individuals as being jointly responsible who have not been charged and no reason given or this failure.

245. Paragraphs 193-196 of the SPO Pre-Trial brief fail, on every level, to acknowledge that the documents said to have been seized and therefore constitute 'secret' or 'confidential' information, have not been disclosed to anyone, including the pre-trial judge, and therefore, the SPO have not, nor can they, in the absence of such disclosure, demonstrate that there has been any violation of secrecy in the absence of proving the secrecy in the first instance.

246. This simple fact has been the subject of misdirection and mischaracterisation of the indictment from the moment it was confirmed, however, the simple fact remains that in the absence of disclosure that has been subjected to challenge and cross-examination where appropriate, and further, in the absence of proof to the required standard, the SPO cannot demonstrate any such violation.

247. Again, the Defence notes that named individuals are included as being responsible for the offending and yet not subject to indictment, again suggestive of the selective approach taken by the SPO in terms of its investigative and prosecutorial policy.

F. Count 6

248. As per that which has been submitted in terms of Count 5, the SPO have actively sought to prevent the disclosure of the evidential basis to this count on the indictment, and thus there has been no consideration of whether the information said to be within Batches 1-3 is actually contained within those Batches.

249. It is accepted that there is a statement of an investigator having reviewed material that purports to be that seized; however, this is not enough, as regardless, the documentary evidence cannot be considered.

250. Further and in any event, the suggestion that the fact that the investigator can be cross-examined, is not a substitute for consideration of the actual evidence in that the anonymous investigator[167] will not be permitted to comment on the actual documents themselves, in terms of what they are and their specific contents.

[167] Noting the absurd lengths taken to conceal the identity of W04841.

251. Even if the investigator giving evidence was accepted as being an appropriate counter-balancing measure, the fact that cross-examination will in effect be limited to what is permitted by that same investigator renders any such measure meaningless.

252. To be specific therefore, the assertion at paragraph 198 that "*the identities and personal data of hundreds of witnesses included in Batches 1,2 and 3 were classified and protected as confidential by the SPO*", has not been demonstrated as fact as no one has been able to assess the accuracy of this statement.

253. Paragraph 199 is with respect, a mischaracterisation of the position, in that nowhere in the 'First Order' does the judge make any finding and/or declaration that the information contained within Batch 1 was 'confidential'.

254. The 'proof', upon which the SPO seeks to rely is in fact the statement of an investigator, a member of their own staff, again, as per previous submissions, this is evidence that cannot be tested and therefore the Court is being asked to take the word of the SPO that the Batches contain what they say they contain.

255. The same argument is made in respect of the issues raised at paragraphs 199-202 of the SPO pre-trial brief, the relevant evidence is not being disclosed and therefore the SPO cannot demonstrate to the required standard that the allegation has an evidential basis at its most fundamental level.

256. In terms of the allegation made at paragraph 203, it must be read with the caveat that the order made by the Pre-Trial Judge was made without having sight of the evidence underpinning the allegation and therefore the order was made on an acceptance of the SPO's characterisation of what the documents were, rather than there being an actual assessment of what those documents are.

G. Individual Criminal Responsibility

257. The allegation as set out at paragraph 206 is rejected in its entirety, there is in fact no evidence to the required standard that the Defendant committed the crimes as alleged or at all.

258. There are a series of allegations made by the SPO centred on secret evidence that has not been considered by any individual other than the SPO, nor will that evidence be considered by anyone other than the SPO, and therefore that same evidence has not been subjected to scrutiny, testing, or challenge.

259. Regarding paragraph 207, contrary to the position espoused by the SPO, similar to the position in terms of paragraph 206, there is no evidence to suggest that the Defendant 'attempted' to commit the offences as indicted.

260. Regarding paragraph 208, the Defence rejects the contention that the Defendant acted jointly with others to commit the offences as per the indictment.

261. Further, the Defence re-asserts the point already made on a number of previous occasions, in that, if it is that those other named individuals or other individuals known to the SPO acted in concert, why is it that those same individuals have not been indicted.

262. It is therefore submitted that those individuals have not been indicted given the lack of evidence in respect of the same, and therefore, that same lack is also applicable to the Defendant.

263. The assertions of the SPO in terms of 'joint' commission is not borne out on the facts as outlined by the SPO even if it was to be accepted that the SPO's characterisation of events was correct.

264. Regarding paragraph 210 and 211, the concerns raised at 232 above, and the previous instances of this argument, are again rehearsed. In any event, they are irrelevant for the purposes of the indictment against the Defendant.

265. Further, by asserting that at least two non-indicted individuals are jointly responsible prejudices the Defendant's position in that he is not in a position to challenge any evidence that they may give on the issue of liability.

The Accused Agreed to Commit the Crimes

266. The allegations at paragraphs 212-213 of the SPO pre-trial brief are without foundation, and not supported even if the SPO case was taken at its highest.

H. The Accused Incited the Crimes

267. The suggestion in paragraph 215 is that the Accused incited themselves and one another by carrying out acts of disseminating, encouraging, accusing, holding public events and otherwise revealing confidential information. In this regard it is submitted that the allegations are somewhat unclear as they appear to confuse direct perpetration, co-perpetration and forms of inchoate liability.

268. The allegations at paragraph 215 (i)-(v) of the pre-trial brief do not amount to incitement as they suggest individual responsibility for those actions described. The Defendant cannot be said to have incited the commission of an offence when in the same vein the basis of that incitement is said to be the Defendant committing the offence itself, any such submission is oxymoronic. The SPO seem to suggest that the Defendant is liable for directly perpetrating, for co-perpetrating with other named and unnamed persons, inciting himself and inciting others.

269. In terms of 215(vi) and (vii), and 216, the prosecution case at its highest does not demonstrate incitement.

270. Such a scattergun approach to liability is one of little more than desperation.

D. The Accused Assisted the Commission of the Crimes

271. The Defence rejects the submission at paragraph 217 on the basis that the offences as indicted were not committed by the Defendant nor can the SPO demonstrate to the required standard that those same offences were committed as alleged or at all.

272. It therefore naturally follows that the Defendant cannot be said to have assisted in the commission of a crime when it has not been established that any such crime occurred.

VII. STATEMENT OF THE NATURE OF MR. HARADINAJ'S DEFENCE

273. The Defendant is charged with six (6) counts on the indictment.

274. In terms of liability for the offences indicted, it is alleged that the Defendant is individually criminally responsible[168] for those offences as indicted, the Defendant denies that he is individually criminally responsible for any crimes found to have occurred.

275. For the avoidance of doubt, the Defendant denies that he:

a. Committed the crimes as alleged or at all;[169]

b. Attempted to commit the crimes as alleged or at all;[170]

[168] *Per* page. 75 of the SPO Pre-Trial Brief

[169] *Ibid* at para. 206

[170] *Ibid* at para. 207

c. Jointly committed the crimes as alleged or at all;[171]

d. Agreed to commit the crimes as alleged or at all;[172]

e. Incited the crimes as alleged or at all;[173]

f. Assisted in the commission of the crime as alleged or at all;[174]

276. Further, the Defendant would aver the following:

a. That the SPO have not adduced sufficient evidence to demonstrate Counts 1-6, and therefore have failed to satisfy the burden and/or standard of proof;

b. In terms of Counts 1-2 on the Indictment, the SPO have failed to demonstrate how any investigation and/or the work of the SPO/the Specialist Chamber, has been obstructed by the alleged actions of the Defendant.

c. In terms of Count 3 on the Indictment, the SPO have failed to identify which, if any individual(s), have been intimidated as alleged or at all;

d. In terms of Count 4 on the Indictment, the SPO have failed to demonstrate the required elements of crime, including which, if any, individual(s) were subject to 'retaliation'; and

[171] *Ibid* at para. 208

[172] *Ibid* at para. 212

[173] *Ibid* at para. 214

[174] *Ibid* at para. 217

e. In terms of Counts 5 and 6 on the Indictment, the SPO have failed to demonstrate the required elements of crime are satisfied, in that, there is no evidence to demonstrate the documents contained in Batches 1-3 are what the SPO allege they are, any requests to examine those documents having been refused; further or in the alternative, the SPO have failed to adduce any documents within those Batches into evidence, and thus the allegation cannot be proved.

277. The Defendant also gives notice at this stage of an intention to raise the following 'active' Defences to the allegations per the Indictment:

a. Entrapment;

b. Mistake of Law;

c. Mistake of Fact;

d. That any disclosures found to have been proved to have made were done so on the basis that they were justified in the public interest, accordingly the Defendant ought to enjoy protection from prosecution as a 'whistle-blower'.

A. Entrapment

278. That having regard to the circumstances surrounding the disclosure of the 'three batches', the failure of the SPO to investigate adequately or at all, the

failure to take any or adequate steps to prevent any further disclosure, and as the ECtHR held in *Ramanauskas*,[175] there is a credible basis to raise an allegation of entrapment.

279. Further, having regard to *Ramanauskas*, "*it falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable*".[176]

280. For the reasons aforesaid, the allegation made by the Defendant is not wholly improbable, and at the very least, it has a credible basis. Accordingly, it is for the SPO to prove otherwise.

B. Mistake of Law

281. In that any illegality found by the Court on the part of the defendant ought to be dismissed on the basis that the defendant held an honest and genuine belief that any actions that are found to have been undertaken were done so within the confines of the law, and not unlawful.

C. Mistake of Fact

[175] *Ramanauskas v Lithuania*, Appl. no 74420/01 (GC), 5 February 2008.

[176] *Ibid,* para. 70

282. In that any illegality found by the Court on the part of the defendant ought to be dismissed on the basis that the Defendant held an honest and genuine belief in terms of the actions he might be found to have undertaken.

C. Public Interest Disclosure

283. Any disclosures that are found to have been made that were in contravention of the law were made on the basis that there was a public interest in doing so, in that, *per* the words of the Defendant:

> *"[these files] are definitely confirmed that our members of parliament, our government and those who voted for the Court have fallen prey, are scoundrels, renegades and the most harmful people who do not wish Kosovo well, even though they seek the vote and say that they are working for the state. How can one legitimize and support a mono-ethnic Court, a Court managed by foreigners who, as you will see it here, have unfortunately fallen prey to and have bitten the bait of Serbia, particularly the apparatus, the people of Milosevic state apparatus? They have harmed Kosovo and are continuing to harm Kosovo with the information they have received from and the cooperation they have had with MILOSEVIC state apparatus, which is still functional today.*
>
> …

> *However, these [files] prove that they [Specialist Chambers] are selective, racist and are simply working with the assistance and cooperation of the same people who were part of MILOSEVIC apparatus, who carried out massacres in the name of MILOSEVIC, …*".[177]

284. Any such disclosures were therefore motivated by a reasonable belief that they were necessary to highlight issues relevant to the clear controversy in terms of the Specialist Chambers itself and the manner in which the SPO was undertaking its work, those issues being in the public interest of both the domestic and international community.

285. Particular attention must be drawn to the information concerning, and associated with, the mono-ethnicity of the Court, its work, and its prosecutorial practices. It is of note that although the Court purports to be a domestic rather than an international tribunal, its work is entirely exclusionary to the community that it purports to serve, both in terms of those within its employment, and those that are targeted for investigation.

286. To the extent that any disclosures were made, those disclosures were therefore motivated by a desire to bring those practices to the attention of the international and domestic communities with an interest in and affected by the Court's work.

[177] 081344-01-TR-ET Revised 1, p.2; 081344-01, min.00:01:26-00:06:30.

287. Reference in this regard is drawn to *Kudeshkina v. Russia,* where the Court observed:

> *"[T]he applicant made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge. Indeed, her interviews referred to a disconcerting state of affairs, and alleged that instances of pressure on judges were commonplace and that this problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence. There is no doubt that, in so doing, she raised a very important matter of public interest, which should be open to free debate in a democratic society."*[178]

288. On that basis, any disclosure that is found to have been made was necessary in that it encompassed matters of fundamental importance in a democratic society, and further, matters in which the public have a legitimate interest in knowing about and which also arguably falls within the scope of legitimate political debate.

289. Further, any disclosure was motivated by a desire to highlight the lack of independence of the Specialist Chambers and the SPO, which can be said to have had a significant and negative effect upon public confidence, both

[178] *Kudeshkina v. Russia*, Appl. no. 29492/05, 26 February 2009, para 94

internationally, and more specifically in Kosovo, in that it is purported to be a domestic organ of the state and therefore Kosovar citizens have a legitimate interest in knowing whether those state organs are acting in accordance with the law or otherwise.

290. Again with reference to the ECtHR, what may be deemed to contribute to public debate on a matter of general interest relates to questions that concern the following:

> *"the functioning of the justice system, an institution that is essential for any democratic society, fall within the public interest. In this connection, regard must be had to the special role of the judiciary in society. As the guarantor of justice, a fundamental value in a State governed by the rule of law, it must enjoy public confidence if it is to be successful in carrying out its duties."*[179]

291. Accordingly:

> *"[w]hat is at stake as regards protection of the judiciary's authority is the confidence which the courts in a democratic society must inspire in the accused, as far as criminal proceedings are concerned, and also in the public at large".*[180]

[179] *Morice v. France*, Appl. no. 29369/10 (GC), 23 April 2015, para 128

[180] *Kudeshkina v. Russia*, Appl. no. 29492/05, 26 February 2009, para 86

292. That same public interest, in terms of the functioning of the judiciary, is also deemed to be valid when proceedings are still pending in respect of other defendants.[181]

293. Noting the public nature of the alleged disclosures, the Defence would seek to highlight the previous reports to EULEX, and other national and international organisations and mandate holders, made by the Defendant regarding these issues, reports that would appear to have remained unactioned, and otherwise ignored.

294. The Defendant had therefore sought to disclose the issues highlighted above to EULEX, but his efforts in this regard did not lead, and still have not led, to any action being taken.

295. Faced with this inactivity, he had no further official channels for his complaints to be heard, which EULEX, and the executive authority of the European External Action Service ("EEAS"), were seemingly content to allow to go unaddressed.

296. To the extent they were made, any disclosures therefore represented a last resort attempt to bring the issues noted above to the knowledge of the public,

[181] *Morice v. France*, Appl. no. 29369/10 (GC), 23 April 2015, para 125

so as to protect the public interest of the international and Kosovar public, and in order to represent the interests of KLA veterans targeted by the Court.

297. In light of the aforesaid, any disclosure that is found to have occurred, and where that disclosure is found to be *prima facie* unlawful, therefore must be found to be justified, and more specifically necessary.

298. That public interest significantly outweighs the need to maintain the confidentiality of the relevant information.

D. Ancillary

299. As per the previously filed submissions, there is no intention to call 'Alibi' evidence.

300. The Defence is not in a position to develop the proposed defences further at this stage, given the lack of time provided for the same, as per the previous applications for an extension.

VIII. AGREED FACTS

301. The facts capable of agreement in the instant case are limited, and to an extent, this is given the opacity concerning the investigation and the case itself as pleaded.

302. Accordingly, the Defence are prepared to accept the agreed facts as per the following:

a. That on the dates alleged three Batches of documents were delivered to the officers of the Kosovo Liberation Army War Veterans Association (KLA WVA);

b. That following the delivery of those documents, three press conferences took place;

c. That the Defendant was arrested;

303. No further facts are agreed at this stage, although this position is subject to change. Accordingly, any and all other relevant issues are for the SPO to prove to the required standard.

304. The obligation to prove any other fact or point relied upon in terms of the prosecution of these allegations, falls upon the SPO.

IX. CONCLUDING REMARKS

305. Given the now consistently argued position in terms of the approach taken to disclosure by the SPO, and the refusal of the Pre-Trial judge to grant anything more than an 8-day extension to the previous deadline for submission of this brief, the Defence have not been in a position to draft what it would term as a full brief, in that there are a number of issues that have yet to be developed.

306. For instance, the defence(s) that may be put forward by the Defendant have not been developed any further than simply listing those deemed appropriate at this stage.

307. The Defence would have welcomed a further period of extension so as to develop these points, and thus ensure that the Trial Chamber is fully informed prior to the trial commencing. This is, however, not possible.

308. The position in short however is that all allegations are denied, and prior to any trial commencing, there are extensive preliminary issues that need to be addressed, including, but not limited to, the admissibility or otherwise of the SPO's list of exhibits.

309. A table of exhibits whose admissibility is objected to is annexed to this brief, but again, as per the position throughout, it simply has not been possible to develop the arguments fully, over, and above highlighting in one sentence, the basis of the objection.

310. Given the number of objections raised, and the issues underpinning those objections it is respectfully submitted that the Pre-Trial Judge ought to order submissions on this point so as to ensure that all relevant exhibits are ruled on appropriately, in terms of their admissibility, including giving the opportunity to both defence and the SPO, to fully develop and argue their respective positions.

311. This is not an issue that ought to be determined on the basis of a table, and a single sentence, the issues are complex, and require analysis of significant jurisprudence concerning the admissibility of hearsay or otherwise, and indeed, the admissibility of evidence where there is no chain of custody.

312. Again, these are not simple or quick issues to determine and in the interests of fairness to all parties, particularly the Defendant, there should be an opportunity for submissions to be heard.

313. It is submitted that these issues are of paramount importance to resolve as to be quite clear, if, as is anticipated, the Trial Chamber rules that the exhibits are hearsay evidence and therefore inadmissible and/or given the failure to adduce any form of chain of custody all exhibits, or certain exhibits, are inadmissible, the SPO will not be able to adduce any evidence, and therefore, there will be no option but to acquit and immediately release the Defendant.

314. Highlighting that the Defendant remains detained in custody, the above suggestion is submitted as being the most appropriate way to deal with the cited issues, both to ensure the expeditious use of the Chambers' time, and further, to ensure that the Defendant is not detained in custody any longer than is necessary.

315. We would highlight that such a course of action would not delay matters further, noting that a decision of the Appeals Chamber is awaited in respect

of one application, and a further application has recently been certified for leave.

316. It is therefore anticipated that no decision in respect of that second issue, will be handed down for at least a period of one month, taking into account the dates of submissions, responses, and replies, and therefore to order full submissions on the point of admissibility would not in any way delay the referral of this matter to the Trial Chamber, noting that a matter cannot be transferred to the Trial Chamber until all preliminary matters pending an appeals judgment have been dealt with to their conclusion.

Word Count: 19,529 words

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