



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

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

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

Registrar: Fidelma Donlon

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Decision on the Defence Motions to Dismiss Charges

Specialist Prosecutor

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TRIAL PANEL II (“Panel”), pursuant to Articles 40(6)(h) of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 130 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (“Rules”), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 25 and 26 September 2020, Hysni Gucati (“Mr Gucati”) and Nasim Haradinaj (“Mr Haradinaj”) (collectively, the “Accused”) were arrested in Kosovo and transferred to the detention facilities of the Specialist Chambers (“SC”) in The Hague, the Netherlands.¹

2. On 30 October 2020, the Specialist Prosecutor submitted for confirmation before the Pre-Trial Judge a strictly confidential and *ex parte* indictment against Mr Gucati and Mr Haradinaj.²

3. On 11 December 2020, the Pre-Trial Judge confirmed in part the indictment (“Confirmation Decision”) and ordered the Specialist Prosecutor’s Office (“SPO”) to submit a revised indictment, as confirmed.³

4. On 8 March 2021, the Pre-Trial Judge issued a decision on the Defence preliminary motions (“Decision on Preliminary Motions”).⁴

¹ KSC-BC-2020-07, F00012/A01/RED, Single Judge, *Public Redacted Version of Arrest Warrant for Hysni Gucati*, 24 September 2020, public; F00012/A02/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public; F00012/A03/COR/RED, Single Judge, *Public Redacted Version of the Corrected Version of Arrest Warrant for Nasim Haradinaj*, 24 September 2020, public; F00012/A04/RED, Single Judge, *Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers*, 24 September 2020, public.

² KSC-BC-2020-07, F00063, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests*, 30 October 2020, confidential, with Annexes 1 and 2, confidential.

³ KSC-BC-2020-07, F00074/RED, Pre-Trial Judge, *Public Redacted Version of Decision on the Confirmation of the Indictment* (“Confirmation Decision”), 11 December 2020, public.

⁴ KSC-BC-2020-07, F00113/RED, Defence for Mr Gucati, *Public Redacted Version of Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b)*, 3 February 2021, public; F00116/RED, Defence for Mr Haradinaj, *Amended Filing with Public Redactions Preliminary Motion on the*

5. On 23 June 2021, the Court of Appeals Panel rendered its decision on the Defence appeal against the Decision on Preliminary Motions and, finding that the indictment lacked specificity, ordered the competent Panel to direct the SPO to file a corrected version of the indictment in light of its instructions.⁵
6. On 5 July 2021, further to the Pre-Trial Judge's order,⁶ the SPO filed the corrected indictment ("Indictment").⁷
7. On 16 July 2021, the Pre-Trial Judge transmitted the case file to the Trial Panel pursuant to Rule 98 of the Rules.⁸
8. On 7 October 2021, the SPO opened its case and on 18 October 2021, the presentation of its evidence began. On 5 November 2021, the Panel heard the testimony of the last witness of the SPO.
9. On 9 November 2021, the Panel issued a consolidated decision providing written reasons for the oral order on the admission of the exhibits tendered through W04841, and ruling upon the classification of a number of exhibits.⁹
10. On the same day, the Panel issued a scheduling order for work plan and time limits for the next steps in the proceedings, setting out, *inter alia*, deadlines for filing any motions to dismiss charges and responses thereto.¹⁰

Issue of the Indictment Being Defective, 31 March 2021, public; F00147, Pre-Trial Judge, *Decision on Defence Preliminary Motions*, 8 March 2021, public.

⁵ KSC-BC-2020-07, IA004/F00007, Court of Appeals Panel, *Decision on the Defence Appeals Against Decision on Preliminary Motions*, 23 June 2021, public.

⁶ KSC-BC-2020-07, F00244, Pre-Trial Judge, *Order for the Submission of a Corrected Indictment and for a Second Revised Calendar for the Remainder of the Pre-Trial Proceedings*, 23 June 2021, public, para. 22(e).

⁷ F00251/A01, Specialist Prosecutor, *Annex 1 to Submission of Corrected Indictment*, 5 July 2021, confidential. *See also* F00251/A02, Redacted Indictment, public.

⁸ F00265, Pre-Trial Judge, *Decision Transmitting Case File to Trial Panel II*, 16 July 2021, public.

⁹ F00427, Panel, *Decision on the Admissibility of Deferred Exhibits and the Classification of Certain Admitted Exhibits*, 9 November 2021.

¹⁰ F00428, Panel, *Scheduling Order for Work Plan and Time Limits for the Next Steps in the Proceedings ("Scheduling Order")*, 9 November 2021.

11. On 10 November 2021, pursuant to the Panel's order,¹¹ the SPO submitted a written notice formally closing its case.¹²

12. On 17 November 2021, the Defence filed their respective motions to dismiss charges ("Gucati Motion", "Haradinaj Motion", collectively, "Motions").¹³

13. On 24 November 2021, the SPO filed its consolidated response to the Defence motions to dismiss charges ("SPO Response").¹⁴

II. SUBMISSIONS

14. The Defence seeks the dismissal of all counts on the basis that there is no evidence capable of supporting a conviction beyond reasonable doubt.¹⁵

15. The SPO responds that the Panel should dismiss the Motions in their entirety since there is evidence capable of supporting a conviction beyond reasonable doubt on all six charges against the Accused.¹⁶

16. The Parties' submissions are detailed below in relation to each count.

III. APPLICABLE LAW

17. Pursuant to Rule 130(3) of the Rules, after the closing of the Specialist Prosecutor's case, upon motion by the Defence and having heard the SPO, the Panel may dismiss some or all charges by oral decision, if there is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charge in question.

¹¹ Scheduling Order, paras 10, 16(a).

¹² F00431, Specialist Prosecutor, *Prosecution Notice of the Closing of Its Case*, 10 November 2021.

¹³ F00439, Gucati Defence, *Motion to Dismiss Pursuant to Rule 130* ("Gucati Motion"), 17 November 2021, confidential. F00440, Haradinaj Defence, *Defence Motion under Rule 130 'Dismissal of Charges'* ("Haradinaj Motion"), 17 November 2021, confidential.

¹⁴ F00447, Specialist Prosecutor, *Prosecution Consolidated Response to Requests to Dismiss the Charges* ("SPO Response"), 24 November 2021, confidential.

¹⁵ Gucati Motion, para. 99; Haradinaj Motion, para. 1.

¹⁶ SPO Response, para. 1.

A. GENERAL LEGAL STANDARD

18. A decision on a motion to dismiss charges does not involve an evaluation of the guilt or innocence of the Accused in light of all the evidence adduced by the end of the SPO case.¹⁷ At this stage of the proceedings, the Panel should not be drawn into evaluations of the credibility of witnesses, the quality and reliability of the evidence or the strengths and weaknesses of contradictory or different evidence.¹⁸ The function of Rule 130 of the Rules is not to terminate prematurely cases where the evidence appears to be weak.¹⁹ Instead, the Panel merely assesses the *capability* of the evidence to support a conviction; if one possible view of the facts could support a conviction, than the Panel will not enter a judgment of acquittal.²⁰ Thus the test is not whether the Panel *would* in fact arrive at a conviction beyond reasonable doubt on the SPO evidence, if accepted, but whether it *could*.²¹

19. As a consequence, denying a motion to dismiss a particular charge at the close of the SPO case is not incompatible with an acquittal of the Accused on that same count at the end of the trial.²² At the close of the SPO case, the Panel may find that the SPO

¹⁷ Similarly, ICTY, *Prosecutor v. Strugar*, IT-01-42-T, Trial Chamber, [Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98bis](#) (“Strugar 98bis Decision”), 21 June 2004, para. 10.

¹⁸ Similarly, SCSL, *Prosecutor v. Norman et al.*, SCSL-04-14-T, Trial Chamber, [Decision on Motions for Judgement of Acquittal Pursuant to Rule 98](#), 21 October 2005, para. 38; *Prosecutor v. Brima et al.*, SCSL-04-16-T, Trial Chamber, [Decision on the Defence Motions for Judgment of Acquittal Pursuant to Rule 98](#) (“Brima et al. 98bis Decision”), 31 March 2006, para. 8; ICTY, *Prosecutor v. D. Milošević*, IT-98-29/1, Trial Chamber, [Oral Decision on Rule 98bis Motions](#), 3 May 2007, [Transcript](#), p. 5640; *Prosecutor v. Popović et al.*, IT-05-88-T, Trial Chamber, [Oral Decision on Rule 98bis Motions](#) (“Popović et al 98bis Oral Decision”), 3 March 2008, [Transcript](#), p. 21461.

¹⁹ Similarly, ICTY, [Strugar 98bis Decision](#), para. 20; *Prosecutor v. Hadzihasanović and Kubura*, IT-01-47-T, Trial Chamber, [Decision on Motions for Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence](#), 27 September 2004, para. 20.

²⁰ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 8.

²¹ Similarly, ICTY, *Prosecutor v. Jelisić*, It-95-10-A, Appeals Chamber, [Judgment](#) (“Jelisić Appeal Judgment”), 5 July 2001, para. 37; *Prosecutor v. Milošević*, IT-02-54-T, Trial Chamber, [Decision on Motion for Judgement of Acquittal](#) (“Milošević 98bis Decision”), 16 June 2004, para. 13(6); STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Trial Chamber, [Oral Decision on the Oneissi Defence Application for a Judgment of Acquittal Under Rule 167\(A\)](#) (“Ayyash et al. 167(A) Oral Decision”), 7 March 2018, [Transcript](#), p. 3.

²² Similarly, MICT, *Prosecutor v. Ngirabatware*, MICT-12-29-A, Appeals Chamber, [Judgment](#), 18 December 2014, para. 20.

evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the SPO has not in fact proved guilt beyond reasonable doubt.²³

B. ASSESSMENT OF THE LAW

20. A decision on a motion to dismiss charges does not necessarily involve a determination of the elements of the charged offences or modes of liability.²⁴ Such a determination is intrinsically connected to the evaluation of whether the Accused is guilty or not guilty to be made in the judgment at the end of the trial.

21. Nonetheless, where there is a significant dispute between the Parties as to (an) element(s) of a charge *and* where there is no evidence capable of supporting the disputed element, in the form charged, the Panel can exercise its discretion to make a determination of the existence and/or content of that element in its decision under Rule 130 of the Rules.²⁵ The Panel might exercise its discretion to clarify the existence or content of an element of an offence where doing so would remove any ambiguity that could affect the assessment of the evidence. The Panel would generally opt not to do so when, as in the cases cited above,²⁶ resolution of the dispute would have little or no bearing on the Panel's assessment of the evidence at the end of the case.²⁷

²³ Similarly, ICTY, [Jelišić Appeal Judgment](#), para. 37; [Milošević 98bis Decision](#), para. 13(6). See also ICC, *Prosecutor v. Ruto and Sang*, Trial Chamber V(A), [Decision No. 5, on the Conduct of Trial Proceedings \(Principles and Procedure on 'No Case to Answer' Motions\)](#), ICC-01/09-01/11-1334, 3 June 2014, para. 23. The Panel notes, however, that the ICC Statute does not have a provision equivalent to Rule 130 of the Rules.

²⁴ Similarly, ICTY, *Prosecutor v. Kordić*, IT-95-14/2, Trial Chamber, [Decision on Defence Motions for Judgement of Acquittal](#), 6 April 2000, para. 36; *Prosecutor v. Karadžić*, IT-95-5/18-T, [Oral Decision on Rule 98bis Motion](#), 28 June 2021, [Transcript](#), p. 28735.

²⁵ Similarly, ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23, Trial Chamber, [Decision on Motion for Acquittal \("Kunarac et al. 98bis Decision"\)](#) 3 July 2000, para. 11.

²⁶ See *supra* fn. 24.

²⁷ Similarly, ICTY, [Kunarac et al. 98bis Decision](#), para. 12.

C. ASSESSMENT OF THE EVIDENCE

22. When determining a motion to dismiss charges, the Panel must assume that the evidence adduced during the prosecution case is entitled to credence unless incapable of belief and must take such evidence at its highest, rather than pick and choose among parts of that evidence.²⁸ Where there is no evidence to sustain a charge or where the only relevant evidence is so incapable of belief that it could not properly sustain a conviction, even when the evidence is taken at its highest credence, the particular charge must be dismissed.²⁹ To be incapable of belief, the evidence must be manifestly unreliable.³⁰

23. Furthermore, for the purpose of dealing with the present motions, the Panel need not inquire into the sufficiency of the evidence in relation to each paragraph of the Indictment. Rather, the evidence should be examined in relation to each count.³¹ The determination whether there is evidence on the basis of which the Panel could convict under a specific count should be made on the basis of the evidence as a whole,³² including Defence evidence adduced during the prosecution case.³³ Where the Accused are charged under multiple modes of liability, it is sufficient if there is evidence capable of supporting a conviction on the basis of one of those modes of liability.³⁴

24. Where the Panel refers to specific evidence in support of its findings for the purpose of this particular decision, it does so for illustrative purposes. The fact that

²⁸ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 11; ICTY, *Prosecutor v. Karadžić*, IT-95-5-18-AR98bis.1, Appeals Chamber, [Judgement](#), 11 July 2013, para. 37; STL, [Ayyash et al. 167\(A\) Oral Decision](#), p. 3.

²⁹ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 11; ICTY, [Popović et al 98bis Oral Decision](#), p. 21461.

³⁰ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 11.

³¹ Similarly, SCSL, [Brima et al. 98bis Decision](#), para. 12.

³² Similarly, ICTY, [Milošević 98bis Decision](#), para. 13(4).

³³ Similarly, ICTY, *Prosecutor v. Hadzihasanović and Kubura*, IT-01-47-A, Appeals Chamber, [Judgement](#), 22 April 2008, para. 55; STL, [Ayyash et al. 167\(A\) Oral Decision](#), p. 4.

³⁴ Similarly, ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Trial Chamber, Oral Decision on Rule 98bis Motions, 18 May 2007, [Transcript](#), p. 12772.

some evidence has been considered for the purpose of a decision under Rule 130 of the Rules is no indication that the Panel will ultimately accept that evidence or any part of it for the purposes of the judgment. Similarly, the fact that the Panel does not mention certain evidence in a decision under Rule 130 of the Rules does not mean that the Panel does not accept that evidence, nor does it mean that the Panel may not rely upon it in the judgment.³⁵

IV. DISCUSSION

A. GENERAL CONSIDERATIONS

1. Elements of the Charged Offences

25. The Panel notes that there are a number of significant differences between the SPO and the Defence in respect of some of the elements of the charged offences. These differences are summarised below in relation to each count.

26. In line with the applicable law outlined above, the Panel refrains at this stage from setting out the elements of the charged offences, as that exercise pertains to the determination of whether the Accused are guilty or not guilty for the purposes of the judgment. Accordingly, for the purpose of the present decision, the Panel has assessed the evidence against the elements of the charged offences as identified by the Pre-Trial Judge.³⁶ These elements have been known to the Defence since the issuance of the Confirmation Decision. Furthermore, the Defence did not raise a jurisdictional challenge based on these elements and they have been relied upon by the SPO as the normative basis relevant to the presentation of its evidence.³⁷ While the Defence is, of

³⁵ Similarly, ICTY, *Popović et al 98bis Oral Decision*, p. 21462; STL, *Ayyash et al. 167(A) Oral Decision*, p. 6.

³⁶ Confirmation Decision, paras 33-80.

³⁷ Response, para. 8.

course, permitted to dispute those elements as part of its case, it suffers no prejudice from the Panel deciding upon such challenges only at the end of the case.

27. The Panel will, therefore, consider below, in relation to each count, whether any of the elements under dispute lacks evidence capable of supporting it, necessitating a determination of its existence and/or content for the purpose of a finding under Rule 130 of the Rules. When assessing the evidence supporting the particular element, the Panel has taken into consideration the element as charged by the SPO and confirmed by the Pre-Trial Judge. The Panel will not make a determination of a disputed element where the Defence interpretation would require it to consider evidence of elements that do not form part of the definition of the offence charged and confirmed by the Pre-Trial Judge. Such a determination will be made in the judgment.

28. In any event, further to the submissions received during and after the Trial Preparation Conference and in order to give guidance to the Parties, the Panel indicates in this decision a number of areas of relevant legal dispute, which will be addressed in the judgment.

2. Assessment of the Evidence of the SPO Case

29. During the SPO case, the Panel heard four (4) witnesses and received 160 exhibits in evidence.³⁸ The Panel found that each exhibit was relevant, authentic, had *prima facie* reliability and probative value and its probative value was not outweighed by its prejudicial effect, if any. For the purposes of deciding their admission, the Panel did not determine what weight to give to these exhibits, in the sense that it did not conduct a complete evaluation of their reliability and it did not assess the credibility of the witnesses heard. It is only for the purposes of the judgment, in accordance with Rule 139 of the Rules, that the Panel will determine the weight of the evidence.

³⁸ The Panel heard witnesses W04841, W04866, W04842 and W04876. The Panel admitted into evidence exhibits P00001-P00098, P00098.1, P00099-P00102, P00104, P00106-P00126, P00128-P00161 and 1D00002.

30. Consistent with the above, the Panel will only determine whether there is *any* evidence admitted during the SPO case which is probative of one or more of the elements of the charged offences, on the basis of which the Panel *could* convict the Accused on the charges in question.

31. The applicable standard does not require the Panel to consider arguments or “defences” that seek to exclude or affect the weight of evidence, provide grounds for exculpation and/or pertain to the lawful curtailment of a fundamental right. For these reasons, the Panel has refrained from considering and making any determination regarding the Defence claims of “entrapment”, “public interest”, mistake of law/fact, necessity or claims of acts of “minor significance”.

3. The Panel’s Written Decision

32. According to Rule 130(3) of the Rules, the Panel may dismiss some or all charges by oral decision. The Panel interprets this provision as affording it discretion to issue an oral or a written decision on any motion to dismiss charges.

33. While being mindful of the heightened efficiency and expeditiousness of oral decisions, the Panel opted in this instance for a written decision. The Panel’s choice was guided by the current hearing schedule, the need to ensure expeditious proceedings in light of the timelines and target dates set in its previous orders and the need to provide clarifications on the legal standards and application of Rule 130 of the Rules.

B. OFFENCES

Count 1

34. Under Count 1, the Accused are charged, pursuant to Article 15(2) of the Law and Article 401(1) and (5) of the Kosovo Criminal Code (“KCC”),³⁹ with obstructing official persons in performing official duties, by serious threat, between at least 7 and 25 September 2020.⁴⁰

35. The Gucati Defence asserts that “serious threat” in the context of Article 401 of the KCC means serious threat of force.⁴¹ Drawing the Panel’s attention to the definition of “force” provided in Article 113(15) of the KCC, the Gucati Defence submits that the offence under Article 401 of the KCC relates to the actual or threatened use of serious force which has the (threatened) consequence of the person being brought into a state of unconsciousness or incapacitation.⁴² The Gucati Defence also affirms that it is consistent with the wording and the purpose of Article 401(1) of the KCC that the offence requires the force or serious threat of force to be directed against an official person, and that the aggravated offence under Article 401(5) of the KCC specifically requires the offence to be committed *against* an official person during the exercise of their official functions.⁴³ The Gucati Defence submits that the use of force or serious threat must be simultaneous with the official action obstructed, and that the SPO must specify the official action which the use of force or serious threat is alleged to be concurrent with and obstructed.⁴⁴ Finally, the Gucati Defence asserts that no evidence has been

³⁹ Code No. 06/L-074 Criminal Code of the Republic of Kosovo, 14 January 2019.

⁴⁰ Indictment, para. 48.

⁴¹ Gucati Motion, para. 20.

⁴² Gucati Motion, paras 22-25.

⁴³ Gucati Motion, paras 26-27.

⁴⁴ Gucati Motion, para. 28.

adduced in the present case of the use of force or serious threat (of force, or otherwise) against an official person.⁴⁵

36. The Haradinaj Defence submits that no evidence was tendered by the SPO that supports a charge of obstruction.⁴⁶ Regardless of what it considers as inconsistencies in W04842's evidence,⁴⁷ the Haradinaj Defence asserts that the work W04842 undertook was in accordance with his job description and mandate and that he was not able to adduce any evidence that he was obstructed.⁴⁸ The Haradinaj Defence also submits that no evidence has been adduced to demonstrate that the Accused offered any threats to any individual, serious or otherwise.⁴⁹ The Haradinaj Defence reminds the Panel that the question is not whether the leak obstructed an official person, but whether the specific actions of the Accused did so.⁵⁰ The Haradinaj Defence concludes that the SPO is not able to prove Count 1 beyond all reasonable doubt, and that therefore it should be dismissed.⁵¹

37. The SPO responds that the attempts of the Gucati Defence to read an additional requirement that the "serious threat" be one of force into the language of Article 401(1) and (5) of the KCC have no statutory basis.⁵² The SPO avers that, had such an additional requirement been intended in relation to Article 401(1) of the KCC, the legislature would have required a "threat of violence" or "threat of an imminent danger to the life or body", as these terms are used in other KCC provisions.⁵³ The SPO further submits that serious threats need not be directed at official persons themselves; they can be directed at third persons, as long as such threats have the

⁴⁵ Gucati Motion, para. 29.

⁴⁶ Haradinaj Motion, para. 49.

⁴⁷ Haradinaj Motion, paras 50-51.

⁴⁸ Haradinaj Motion, para. 53.

⁴⁹ Haradinaj Motion, para. 57.

⁵⁰ Haradinaj Motion, para. 60.

⁵¹ Haradinaj Motion, paras 62-63.

⁵² SPO Response, para. 10.

⁵³ SPO Response, para. 11, *referring to* Articles 114, 227(3) and 229(2) of the KCC.

effect of obstructing or attempting to obstruct the official person in performing official duties.⁵⁴ The SPO avers that there is evidence capable of supporting a conviction under Count 1, as there is evidence that, *inter alia*: the Accused repeatedly made confidential information available, and/or mentioned contents thereof including the identities, personal data, and evidence of witnesses, to members of the press, television viewers, and other members of the public;⁵⁵ the Accused repeatedly threatened to continue disseminating information of confidential investigations, including witness identities, and to obstruct the mandate of the SC/SPO;⁵⁶ the Accused sought the maximum possible dissemination of confidential information and constantly pressured the media to further publish it;⁵⁷ witnesses expressed anger, concern and fear, unwillingness to continue cooperation with the SPO and felt threatened and/or intimidated as a result of the Accused's actions;⁵⁸ the SPO had to divert its resources and undertake security measures in relation to witnesses.⁵⁹ The SPO further cites evidence it regards as establishing the intent of the Accused to commit the offence charged under Count 1.⁶⁰

38. The Panel notes that the Parties dispute the elements of the offence under Count 1 in relation to: (i) the meaning of "serious threat"; (ii) whether the "serious threat" must be directed against an official person; (iii) the existence of a requirement of simultaneity between the obstructive conduct and the official action; and (iv) the existence of a requirement of specificity of the official action obstructed. The Panel further observes that there is also a dispute as to meaning of "obstruction", *i.e.* whether the diversion of SPO resources amounts to obstruction under Article 401 of the KCC.

⁵⁴ SPO Response, para. 12.

⁵⁵ SPO Response, para. 15.

⁵⁶ SPO Response, para. 16.

⁵⁷ SPO Response, para. 16.

⁵⁸ SPO Response, para. 18.

⁵⁹ SPO Response, para. 18.

⁶⁰ SPO Response, paras 20-28.

39. The Panel further notes that it has heard evidence that, in the aftermath of the Accused's actions, witnesses and potential witnesses of the SPO expressed concerns and fear to the SPO,⁶¹ and that some of these individuals expressed a wish no longer to be contacted by the SPO.⁶² The Panel also heard evidence that the SPO had to undertake several security measures, including contacting and meeting witnesses as well as providing phones to some of them, and had to put in place protective measures (including emergency risk plans and relocation), which resulted in a re-ordering of the SPO's priorities and in SPO resources being committed to this task.⁶³

40. The Panel considers that this evidence goes to the SPO's allegations under Count 1 that witnesses were intimidated, that the SPO's ability to effectively investigate and prosecute crimes was threatened and that its resources and time were diverted to address the consequences of the Accused's alleged conduct.⁶⁴ In line with the applicable legal standard outlined above, the Panel shall not assess the reliability, strength and weaknesses of this evidence, nor the credibility of the witnesses providing it. In the same vein, the Panel will also not assess whether the evidence of re-ordering SPO priorities and committing SPO resources to the relevant tasks falls within the meaning of obstruction under Article 401 of the KCC, as this analysis is also dependent on an assessment of the strength and weaknesses of the evidence.

41. In light of the above, for the purposes of Rule 130 of the Rules, the Panel is satisfied that the evidence presented during the SPO case, if accepted, is capable of supporting a conviction under Count 1. For this reason, the Panel also need not determine the existence and/or content of any of the disputed elements indicated above. Such a determination will be made in the judgment.

⁶¹ See e.g., Testimony of W04842, Transcript, 28 October 2021, pp 1693, 1699, 1703-1705, 1706-1707, 1712, 1714-1715, 1731-1732, 1761-1762.

⁶² See e.g., Testimony of W04842, Transcript, 28 October 2021, pp 1702-1703; Transcript, 4 November 2021, p. 1905; Testimony of W04841, Transcript, 19 October 2021, p. 1012.

⁶³ See e.g., Testimony of W04842, Transcript, 28 October 2021, pp 1693, 1697-1698, 1700-1701, 1707-1708, 1715, 1761-1763.

⁶⁴ Indictment, para. 28.

Count 2

42. Under Count 2, the Accused are charged, pursuant to Article 15(2) of the Law and Article 401(2)-(3) and (5) of the KCC, with obstructing official persons in performing official duties, by participating in the common action of a group, between at least 7 and 25 September 2020.⁶⁵

43. As for Count 1, the Gucati Defence asserts that the common action must be simultaneous with the official action obstructed, and that accordingly, the SPO is required to specify the official action which the common action is alleged to be concurrent with and obstructed.⁶⁶ It adds that the common action must involve the use of force or threat of immediate use of force.⁶⁷ The Gucati Defence also submits that no evidence has been adduced of common action using force or serious threat (of force, or otherwise) against an official person.⁶⁸

44. The Haradinaj Defence argues that the submissions made in relation to Count 1 are equally applicable to Count 2.⁶⁹ In addition, the Haradinaj Defence asserts that the SPO has failed to precisely define the “group” alleged to have committed criminal offences,⁷⁰ which is to be considered by the Panel when determining whether the elements of crime have been satisfied.⁷¹ The Haradinaj Defence further submits that the named associates in the Indictment are not alleged to have engaged in conduct that can be characterised as “obstructive”, and that in fact, those individuals actually assisted and facilitated parts of the search and seizure.⁷² On that basis, the Haradinaj Defence affirms that Count 2 has not

⁶⁵ Indictment, para. 48.

⁶⁶ Gucati Motion, para. 39.

⁶⁷ Gucati Motion, para. 40.

⁶⁸ Gucati Motion, para. 41.

⁶⁹ Haradinaj Motion, para. 63.

⁷⁰ Haradinaj Motion, paras 68-70, 74-79.

⁷¹ Haradinaj Motion, para. 71.

⁷² Haradinaj Motion, para. 81.

been proven beyond all reasonable doubt, and accordingly ought to be dismissed.⁷³

45. The SPO responds that members of the “group” for the purposes of Count 2 have been named in the Indictment and relevant evidence has been admitted in relation to the role of Faton Klinaku (“Mr Klinaku”) and Tomë Gashi (“Mr Gashi”) in this group.⁷⁴ The SPO further submits that the term “common action” in Article 401(2) of the KCC has no qualifier, and is not limited to common action to use force or serious threat of force.⁷⁵ The SPO avers that, while neither “serious threat” nor “force” is required in relation to Article 401(2) of the KCC, the evidence establishes that the actions jointly carried out by the Accused and their Associates did amount to a serious threat obstructing or attempting to obstruct official persons in performing official duties.⁷⁶ The SPO submits that the evidence shows that, *inter alia*: the Accused, Mr Klinaku and Mr Gashi and others were involved in reviewing the documents disclosed;⁷⁷ the Accused and others took part in organising the three press conferences at which they disclosed confidential information;⁷⁸ the Accused spoke at the press conferences, which were also attended by other members of the Kosovo Liberation Army War Veterans’ Association (“KLA WVA”);⁷⁹ one or more of the Accused, Mr Klinaku and Mr Gashi, at times jointly, represented the KLA WVA at over fifteen media appearances at which confidential information was further disseminated.⁸⁰ The SPO further avers that the evidence establishes that the Accused were aware of, and desired to, participate in a group in order to obstruct official persons in performing official duties; alternatively, the Accused were aware that, as a result of participation

⁷³ Haradinaj Motion, para. 82.

⁷⁴ SPO Response, para. 30.

⁷⁵ SPO Response, para. 31.

⁷⁶ SPO Response, para. 31.

⁷⁷ SPO Response, para. 32.

⁷⁸ SPO Response, para. 32.

⁷⁹ SPO Response, para. 32.

⁸⁰ SPO Response, para. 32.

in the group, obstruction might ensue, and they acceded to the occurrence of this prohibited consequence.⁸¹ The SPO adds that Mr Klinaku and Mr Gashi also made clear that their intent mirrored that of the Accused.⁸²

46. The Panel notes that, in addition to the elements disputed under Count 1, the Parties dispute under Count 2 whether “common action” involves a “serious threat” or “force”. The Panel further observes that there is also a dispute between the Parties as to the relationship between Counts 1 and 2, *i.e.* the interaction between paragraphs (1) and (2) of Article 401 of the KCC.

47. The Panel further notes that, in addition to the evidence indicated under Count 1, it has also received evidence that the Accused, in their capacity as chairman and deputy chairman of the KLA WVA,⁸³ acted with others in, *inter alia*, inviting media outlets to attend press conferences,⁸⁴ reviewing the documents received,⁸⁵ participating in press conferences and other broadcast events⁸⁶ as well as discussions pertaining to the disclosure of the impugned material,⁸⁷ and providing justifications for disclosing this information.⁸⁸ The Panel has also received evidence of the Accused repeatedly using the terms “we”, “us” and “our” in describing their common actions,⁸⁹ and evidence of the involvement of at least two other individuals, Mr Klinaku and

⁸¹ SPO Response, para. 35.

⁸² SPO Response, para. 35.

⁸³ *See e.g.*, P00001ET, p. 6; P00002ET, p. 2; P00003ET p. 2, P00004ET, pp 2-3, P00006ET, p. 39; P00013ET, p. 1.

⁸⁴ *See, e.g.*, Testimony of W04866, Transcript, 26 October 2021, pp 1515-1516.

⁸⁵ P00001ET, p. 1; P00003ET, pp 1-2; P00012ET, p.2; P00017ET, p. 2; P00018ET, p. 3-4; P00021ET, p. 4; P00025ET, pp. 2, 4.

⁸⁶ *See e.g.*, P00001ET, p. 1; P00002ET, p. 1; P00021ET, p. 2; P00025ET, p. 1; P00030ET, p. 1; P00034ET, p. 3; P00039, p. 1.

⁸⁷ *See e.g.*, P00008ET, p. 33; P00004ET, in particular, pp 2-4; P00012ET, p. 1-2; P00030ET, p. 2.

⁸⁸ *See e.g.*, P00003ET; P00012ET; pp 5, 23; P00018ET, pp 1-2, P00021, p. 3.

⁸⁹ *See e.g.*, P00001ET, p. 2; P00004ET, pp 1-5; P00018ET, pp 3-4; P00021ET, p. 4; P00025ET, p. 10; P00026ET, p. 2; P00028ET, p. 11; P00030ET, p. 3; P00034ET, p. 1.

Mr Gashi.⁹⁰ The Panel makes it clear, however, that these findings do not suggest that it has found either of these non-indicted individuals guilty of an offence.

48. The Panel considers that this evidence, together with the evidence indicated under Count 1, goes to the SPO's allegations under Count 2 that the Accused, together with others, by common action of a group, obstructed or attempted to obstruct official persons in performing official duties.⁹¹ In line with the applicable legal standard outlined above, the Panel shall not assess the reliability, strength and weaknesses of this evidence.

49. In light of the above, for the purposes of Rule 130 of the Rules, the Panel is satisfied that the evidence presented during the SPO case, if accepted, is capable of supporting a conviction under Count 2. For this reason, the Panel also need not determine the existence and/or content of any of the disputed elements indicated above, nor does the Panel need to address the relationship between Counts 1 and 2. Such determinations will be made in the judgment.

Count 3

50. Under Count 3, the Accused are charged, pursuant to Article 15(2) of the Law and Article 387 of the KCC, with intimidation during criminal proceedings, between at least 7 and 25 September 2020.⁹²

51. The Gucati Defence submits that the offence under Article 387 of the KCC requires proof of consequence, and proof that the statement refrained from being made, the false statement made, or the information failed to be stated, was information which relates to the obstruction of criminal proceedings.⁹³ In that regard, the Gucati Defence submits that there is no basis to restrict the relevance of the words "when such

⁹⁰ See e.g., P00001ET, p. 1; P00007ET; P00012ET; P00013ET; P00023ET.

⁹¹ Indictment, paras 25-28.

⁹² Indictment, para. 48.

⁹³ Gucati Motion, para. 51.

information relates to obstruction of criminal proceedings” in Article 387 of the KCC to “failing to state true information to the police, a prosecutor or a judge” only.⁹⁴ Considering that acts of witness intimidation are ordinarily punishable under Article 386 of the KCC, the Gucati Defence submits that Article 387 of the KCC is properly restricted on its terms to those further aggravated offences where intimidation is employed in proceedings relating to an offence of obstruction.⁹⁵ The Gucati Defence submits that no evidence has been adduced that any person was induced to refrain from making a statement, to make a false statement or to fail to state true information to the police, a prosecutor or a judge, or that the Accused used any of the means set out in Article 387 of the KCC to induce any of these occurrences.⁹⁶ With regards to threats, the Gucati Defence notes that the Panel heard that only two anonymous persons complained of having been subjected to a threat and that neither complaint is admissible as to the truth of its contents since one only amounted to reference to a further anonymous opinion, and the other could not directly be linked to the actions of the Accused.⁹⁷

52. The Haradinaj Defence submits that, to satisfy Count 3, it is not enough to prove that intimidation took place, it must also be proven that the witness at which it was directed was a party to criminal proceedings.⁹⁸ The Haradinaj Defence asserts that at no stage has any evidence been adduced that the Accused used force, threatened, sought to compel, or offered a benefit or promise to any individual with the specific intent of intimidating that individual.⁹⁹ The Haradinaj Defence further submits that the admitted evidence is of limited probative value when compared to its prejudicial effect, given that the individuals said to have been affected did not give evidence and

⁹⁴ Gucati Motion, para. 58.

⁹⁵ Gucati Motion, para. 59.

⁹⁶ Gucati Motion, para. 60.

⁹⁷ Gucati Motion, para. 63.

⁹⁸ Haradinaj Motion, para. 30.

⁹⁹ Haradinaj Motion, para. 87.

that therefore the Accused have not had the opportunity to challenge their account, nor has the Panel has been able to assess the reliability of any such account.¹⁰⁰

53. The SPO responds that, on the plain language of Article 387 of the KCC, it is not required to prove that the person was actually intimidated and that it is the conduct of the Accused that must be intimidating.¹⁰¹ The SPO further submits that the inducement required by the provision is for a person: (i) to refrain from making a statement; (ii) to make a false statement; or (iii) to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings. The SPO accordingly avers that the requirement that information in question must relate to the “obstruction of criminal proceedings” is only relevant for the third of the listed alternatives.¹⁰² The SPO further submits that the language of Article 387 of the KCC only speaks of intimidating “another person”, rather than a “witness” or some other term requiring the person to be part of a particular criminal proceeding. The SPO also argues that, as the provision includes inducing persons to “refrain from making a statement” at any point to the authorities, interpreting the provision as covering only those who are a “party to ‘criminal proceedings’” would be inappropriately narrow.¹⁰³ The SPO further submits that, while no specific intent is required for this offence, there is ample evidence indicating that the Accused did specifically intend to induce witnesses within the meaning of the provision.¹⁰⁴ The SPO states that the evidence shows that the Accused, *inter alia*: announced that documents including names, personal details and previous statements of SPO witnesses had been made available to the press;¹⁰⁵ referred to specific witness names and locations of residence, along with other personal details;¹⁰⁶

¹⁰⁰ Haradinaj Motion, para. 90.

¹⁰¹ SPO Response, para. 37.

¹⁰² SPO Response, para. 38.

¹⁰³ SPO Response, para. 39.

¹⁰⁴ SPO Response, para. 40.

¹⁰⁵ SPO Response, para. 41.

¹⁰⁶ SPO Response, para. 41.

made it clear that the documents they were making public contained this type of information and that, now, the public would find out who these witnesses were;¹⁰⁷ intended, through their aforementioned public assertions, to put anyone who cooperated with the SITF/SPO and may be known to the Accused on notice that their cooperation was known;¹⁰⁸ sought to ensure the maximum possible dissemination of the information they made public and constantly pressured the media to further publish this information;¹⁰⁹ and made several disparaging comments against witnesses.¹¹⁰

54. The Panel notes that the Parties dispute the elements of the offence under Count 3 in relation to: (i) the meaning of “serious threat” and “compulsion”; (ii) whether the offence requires proof of consequence; (iii) whether the person at which the conduct is directed must be a party to “criminal proceedings”; (iv) the scope of application of the phrase “when such information relates to obstruction of criminal proceedings”; and (v) whether the offence requires specific intent.

55. The Panel considers that a number of factors and circumstances could be relevant to assessing whether conduct attributed to the Accused could be said to amount to intimidation within the meaning of Article 387 of the KCC, including: the nature of the acts and conduct attributed to the Accused; the nature of the offences in relation to which the witness provided information; the position and identity of those being investigated in respect of which information was provided; the nature and general context in which the impugned statements were made and actions taken by the Accused or those associated with them; the identity of those making such statements; and the whereabouts and vulnerability of those concerned.

¹⁰⁷ SPO Response, para. 41.

¹⁰⁸ SPO Response, para. 42.

¹⁰⁹ SPO Response, para. 43.

¹¹⁰ SPO Response, para. 44.

56. In particular, the Panel notes that it has heard and received evidence that the names and details of SPO witnesses (as well as information they provided to authorities) was put in the public domain by the Accused or their associates.¹¹¹ The Panel also received evidence that the Accused identified some of these witnesses by name and/or disclosed other personal details relating to them,¹¹² with the intention of making the public aware of who they were.¹¹³ The Panel has further received evidence that the Accused made a number of negative statements in respect of those cooperating with the SPO and SC,¹¹⁴ and repeatedly expressed their view that the SPO and/or SC was unable to protect those concerned.¹¹⁵ The Panel also received evidence that the Accused and others questioned the veracity of accounts given by witnesses and claimed that statements were given under duress or in return for benefits.¹¹⁶

57. The Panel considers that this evidence goes to the SPO's allegations under Count 3 that the Accused used serious threats to induce or attempt to induce witnesses to refrain from making a statement or to make a false statement or otherwise fail to state true information to the SPO and SC.¹¹⁷ In line with the applicable legal standard outlined above, the Panel shall not assess the reliability, strength and weaknesses of this evidence.

58. In light of the above, for the purposes of Rule 130 of the Rules, the Panel is satisfied that the evidence presented during the SPO case, if accepted, is capable of supporting a conviction under Count 3. For this reason, the Panel also need not determine the

¹¹¹ See e.g., P00001ET, pp 1-6; P00012ET, p. 2; P00013ET, p. 1; P00035ET, pp 1-3, 5-7.

¹¹² See e.g., P00001ET, pp 2-3; P00002ET, pp 1-3; P00011ET, p. 30; P00017, pp 2-3, 6-8; P00018ET, p. 3; P00019ET pp 1, 3-4; P00033ET, pp 1-2; P00035, pp 2-3.

¹¹³ P00001ET, pp. 4-5; P00008ET, pp 5, 8-9; P00012ET, p. 2.

¹¹⁴ P00001ET, pp 4-5; P00007ET, pp 6-7, 10-13; P00008ET, pp 7, 26.

¹¹⁵ See e.g., P00001ET, pp. 2-3, 5; P00002ET, p. 4; P00007ET, pp 4-5, 14; P00008ET, p. 26; P00009ET, p. 5; P00017ET, pp 1, 4, 9; P00030ET, p. 12; P00034ET, p. 2; P00059ET, p. 1.

¹¹⁶ See e.g., P00001ET, p. 2; P00006ET, p. 26; P00008ET, p. 7; P00009ET, p. 11; P00017ET, p. 2; P00020ET, p. 5; P00025ET, pp 5-6; P00059ET, pp 2, 5.

¹¹⁷ Indictment, para. 29.

existence and/or content of any of the disputed elements indicated above. Such a determination will be made in the judgment.

Count 4

59. Under Count 4, the Accused are charged, pursuant to Article 15(2) of the Law and Article 388 of the KCC, with retaliation, between at least 7 and 25 September 2020.¹¹⁸

60. The Gucati Defence submits that the offence requires the subject of retaliation to have provided truthful information relating to the commission, or possible commission, of a criminal offence and the perpetrator to believe that the information provided by the subject of retaliation was truthful.¹¹⁹ Therefore, the Gucati Defence asserts that if the information provided was false, or the perpetrator believes that the information provided was false, no offence is committed.¹²⁰ The Gucati Defence further argues that no evidence has been adduced as to the truthfulness or contents of the information provided by the alleged subjects of retaliation, or to the effect that the Accused believed that the information provided to investigators was truthful.¹²¹

61. The Haradinaj Defence submits that the SPO has presented no evidence to substantiate Count 4.¹²² The Haradinaj Defence also asserts that the SPO refused to call a single witness who claims to have been directly affected by the actions of the Accused, instead relying upon the evidence of three SPO employees, who merely recounted what they had been told, which often constitutes second- and third-hand hearsay.¹²³ The Haradinaj Defence goes on to claim that this has prevented the Defence from effectively challenging the evidence through an adversarial process.¹²⁴

¹¹⁸ Indictment, para. 48.

¹¹⁹ Gucati Motion, para. 68.

¹²⁰ Gucati Motion, para. 69.

¹²¹ Gucati Motion, paras 70-71.

¹²² Haradinaj Motion, para. 93.

¹²³ Haradinaj Motion, para. 101.

¹²⁴ Haradinaj Motion, para. 102.

Furthermore, the Haradinaj Defence submits that W04842 is the most relevant witness for Count 4, and that the Panel should disregard W04842's testimony since it contains demonstrably inaccurate evidence that goes to his overall credibility.¹²⁵

62. The SPO responds that the harmful action required by Article 388(1) of the KCC relates to the conduct itself.¹²⁶ The SPO avers that the harm need not have occurred and need not be directed only against a "witness".¹²⁷ The SPO further submits that, whether or not a witness actually gave truthful information is not an element of the offence; all that is required is an intent to retaliate against such persons.¹²⁸ According to the SPO, the Accused need not know with certainty that the information is true, noting that it is sufficient for "intent" under the KCC that the perpetrator intends to retaliate against someone who may have given truthful information and accedes to that result.¹²⁹ The SPO adds that a contrary interpretation would lead to a disproportionate inquiry, as every retaliation trial in Kosovo would include a collateral trial on the credibility and reliability of the information originally provided in a separate proceeding.¹³⁰ The SPO further submits that the evidence shows that the Accused, *inter alia*: made accusations against, and disparaging remarks about, witnesses; repeatedly disseminated their identities, personal data, and evidence, and announced such dissemination; and repeatedly encouraged others to disseminate such information.¹³¹

63. The Panel notes that the Parties dispute the elements of the offence under Count 4 in relation to: (i) the meaning and scope of application of "truthful information";

¹²⁵ Haradinaj Motion, paras 104-115, 126-138.

¹²⁶ SPO Response, para. 48.

¹²⁷ SPO Response, para. 48.

¹²⁸ SPO Response, para. 49.

¹²⁹ SPO Response, para. 49, *referring to* Article 21 of the KCC.

¹³⁰ SPO Response, para. 49.

¹³¹ SPO Response, para. 50.

(ii) whether the “harmful action” must be directed against a witness or any person; and (iii) whether the offence requires proof of consequence.

64. The Panel further notes it has heard and received evidence that the names and details of SPO witnesses (as well as information they provided to authorities) was knowingly put in the public domain by the Accused or their associates.¹³² The Panel also received evidence that the Accused identified some of these witnesses by name or disclosed other personal details relating to them,¹³³ while accepting the potential consequences in this regard.¹³⁴ The Panel has further received evidence that the Accused made a number of negative statements in respect of those cooperating with the SPO and SC,¹³⁵ and made claims and insinuations about the reasons why witnesses had provided information to the authorities.¹³⁶

65. The Panel notes that the SPO does not appear to have identified by name or relevant category any particular individual(s) whom, it claims, was subject to retaliation within the meaning of Article 388 of the KCC. The Panel invites the SPO to clarify its position on this point in its Final Trial Brief and/or closing statements. For present purposes, however, the Panel will approach the matter in the same way as it was approached by the Pre-Trial Judge.

66. The Panel considers that the evidence summarized above goes to the SPO’s allegations under Count 4 that the Accused took or attempted to take actions harmful to witnesses with the intent to retaliate for providing truthful information relating to the commission or possible commission of criminal offences to the SPO.¹³⁷ In line with

¹³² See e.g., P00001ET, pp 1-6; P00012ET, p. 2; P00013ET, p. 1; P00035ET, pp 1-3, 5-7.

¹³³ See e.g., P00001ET, pp 2-3; P00002ET, pp 1-3; P00011ET, p. 30; P00017, pp 2-3, 6-8; P00018ET, p. 3; P00019ET pp 1, 3-4; P00033ET, pp 1-2; P00035, pp 2-3.

¹³⁴ See e.g., P00008ET, pp 5, 8-9; P00009ET, p. 8; P00012ET, p. 2.

¹³⁵ See e.g., P00001ET, pp 4-5; P00008ET, pp 7, 26, P00009ET, pp 6-7, 10-12, P00044ET, p. 1.

¹³⁶ See e.g., See e.g., P00001ET, p. 2; P00006ET, p. 26; P00008ET, p. 7; P00009ET, p. 11; P00017ET, p. 2; P00020ET, p. 5; P00025ET, pp 5-6; P00059ET, pp 2, 5.

¹³⁷ Indictment, para. 32.

the applicable legal standard outlined above, the Panel shall not assess the reliability, strength and weaknesses of this evidence.

67. In light of the above, for the purposes of Rule 130 of the Rules, the Panel is satisfied that the evidence presented during the SPO case, if accepted, is capable of supporting a conviction under Count 4. For this reason, the Panel also need not determine the existence and/or content of any of the disputed elements indicated above. Such a determination will be made in the judgment.

Count 5

68. Under Count 5, the Accused are charged, pursuant to Article 15(2) of the Law and Article 392(1) of the KCC, with violating the secrecy of proceedings, through unauthorized revelation of secret information disclosed in official proceedings, between at least 7 and 25 September 2020.¹³⁸

69. The Gucati Defence submits that Count 5 is particularised as the revelation of “secret” information and that the classification of information as “secret” is distinct from classifications of information as “confidential”, “restricted” or “protected”.¹³⁹ Further, the Gucati Defence asserts that Article 392(1) of the KCC requires that the information declared to be secret must have been disclosed to the perpetrator in an official proceeding.¹⁴⁰ The Gucati Defence also affirms that the perpetrator must have knowledge that the relevant information had been declared to be secret by a decision of court or a competent authority.¹⁴¹ In that regard, the Gucati Defence submits that no evidence has been adduced that any relevant information has been declared to be “secret”, that any relevant material was disclosed to the Accused in an official

¹³⁸ Indictment, para. 48.

¹³⁹ Gucati Motion, para. 76.

¹⁴⁰ Gucati Motion, para. 78.

¹⁴¹ Gucati Motion, para. 80.

proceeding, or that the Accused was aware that any relevant information had been declared to be “secret” by a competent authority.¹⁴²

70. The Haradinaj Defence submits that it cannot be said with certainty that the documents that the SPO claims to be contained within the “Batches” are actually contained within those batches, and that the Panel is being asked to accept the alleged content of the Batches entirely on the unsupported statement of the SPO.¹⁴³ The Haradinaj Defence asserts that the SPO cannot demonstrate with certainty that any secrecy has been violated and that any information disclosed was indeed protected based on the SPO’s failure to establish a proper chain of custody record, noting that W04841 accepted that she had not undertaken checks to confirm authenticity and/or whether the information was already in the public domain.¹⁴⁴ Furthermore, the Haradinaj Defence submits that it follows from the fact that W04866 is not facing criminal charges, despite having published certain documents in the press, that the SPO does not deem these documents – or the information contained therein – to be secret.¹⁴⁵ In the alternative, the Haradinaj Defence claims that the SPO might tacitly accept that publication by W04866 was in the public interest.¹⁴⁶ Either way, the Haradinaj Defence submits that Count 5 ought to be dismissed.¹⁴⁷

71. The SPO responds that the protected information under Article 392(1) of the KCC goes beyond information declared secret by a court or competent authority; it also extends to all information which “must not be revealed according to the law”, and therefore includes all information protected under the SC statutory framework.¹⁴⁸ The SPO submits that, as regards knowledge of the protected character of the information,

¹⁴² Gucati Motion, paras 77, 79, 81.

¹⁴³ Haradinaj Motion, paras 143-144.

¹⁴⁴ Haradinaj Motion, paras 146-155.

¹⁴⁵ Haradinaj Motion, paras 156-157.

¹⁴⁶ Haradinaj Motion, para. 158.

¹⁴⁷ Haradinaj Motion, para. 161.

¹⁴⁸ SPO Response, para. 54.

either direct or eventual intent suffices.¹⁴⁹ The SPO also avers that there is no requirement that the information was disclosed to the perpetrator in an official proceeding in the sense of formal disclosure during trial. The SPO argues that this interpretation would allow for easy circumvention of the protected interest, for example when a third person outside of any proceeding reveals protected information obtained through an accused who received it through formal disclosure.¹⁵⁰ According to the SPO, information need only have been disclosed in “any official proceeding”, and not to any particular person or in any particular form. The SPO adds that “official proceedings” include prosecutorial investigations and that information exchanged during criminal investigation is also disclosed in an “official proceeding” within the meaning of the KCC.¹⁵¹ The SPO further submits that the evidence shows that the Accused, *inter alia*, repeatedly made confidential information available and mentioned contents thereof to members of the press, television viewers, and other members of the public.¹⁵² The SPO finally avers that there is evidence that the Accused revealed such information without authorisation.¹⁵³

72. The Panel notes that the Parties dispute the elements of the offence under Count 5 in relation to: (i) the definition and scope of “secret information”; (ii) the proof required as to the secrecy of information, including the legal authority to order such status; (iii) whether the information needs to be disclosed to the alleged perpetrator during official proceedings; and (iv) the definition and scope of “official proceedings”.

73. The Panel notes at the outset that the confidential and/or non-public status of the impugned material will be decided at the end of the trial based on the evidence as a

¹⁴⁹ SPO Response, para. 54.

¹⁵⁰ SPO Response, para. 55.

¹⁵¹ SPO Response, para. 55.

¹⁵² SPO Response, para. 56.

¹⁵³ SPO Response, para. 57.

whole. For the present purposes, the Panel has considered the matter, as the Pre-Trial Judge did, at a generic level based on categories of material and their origin.

74. Consistent with the above, the Panel has heard and received evidence that at least some of the information made available by the Accused was confidential, bore indicia of confidentiality or has not been made public before.¹⁵⁴ The Panel also received evidence that some of that material was specifically covered by court orders requiring that the information in question be kept confidential.¹⁵⁵ The Panel has also heard and received evidence that the documents seized by the SPO at the KLA WVA premises were transported and delivered to the SPO, where they were digitalized and then put in a database.¹⁵⁶ The Panel has further received evidence of the Accused's own, repeated statements regarding the confidential, secret and/or sensitive nature of the information.¹⁵⁷

75. The Panel considers that this evidence goes to the SPO's allegations under Count 5 that the Accused, without authorization, revealed confidential information.¹⁵⁸ In line with the applicable legal standard outlined above, the Panel shall not assess the reliability, strength and weaknesses of this evidence, nor the credibility of the witnesses providing it.

76. In light of the above, for the purposes of Rule 130 of the Rules, the Panel is satisfied that the evidence presented during the SPO case, if accepted, is capable of supporting a conviction under Count 5. For this reason, the Panel also need not determine the

¹⁵⁴ See e.g., P00086, paras 8-12, 22-27, 29; P00090, paras 3-4, 7-10, Annex 1, Annex 5; P00104Red2, pp 615-620; Testimony of W04841, Transcript, 18 October 2021, pp 861, 869-872, 876-879, 882-885; Transcript, 19 October 2021, pp 946-961; Transcript, 26 October 2021, pp 1470-1471, 1474.

¹⁵⁵ See e.g., P00151, para. 150(c) and (g), P00152, para. 163 (c) and (g); P00153; P00154, p. 21. See also, Testimony of W04841, Transcript, 19 October 2021, 953-960.

¹⁵⁶ See e.g., P00092, paras 10-12, 14-15; Testimony of W04876, Transcript, 5 November 2021, pp 1931-1932, 1940-1941, 1952, 1958.

¹⁵⁷ See e.g., P00001ET, pp 5-6, 10; P00002ET, pp 5-7; P00006ET, pp 19, 21; P00034ET, p. 1.

¹⁵⁸ Indictment, para. 33.

existence and/or content of any of the disputed elements indicated above. Such a determination will be made in the judgment.

Count 6

77. Under Count 6, the Accused are charged, pursuant to Article 15(2) of the Law and Article 392(2)-(3) of the KCC, with violating the secrecy of proceedings, through unauthorized revelation of the identities and personal data of protected witnesses, between at least 7 and 25 September 2020.¹⁵⁹

78. The Gucati Defence submits that, consistent with the wording of Article 392(1) of the KCC, the information said to be revealed must be of a person under protection in the criminal proceedings in which the information was disclosed to the perpetrator.¹⁶⁰ In this regard, the Gucati Defence asserts that there is no evidence that any relevant material was disclosed to the Accused in criminal proceedings.¹⁶¹ Furthermore, the Gucati Defence submits that the information must be of a person under “protection” at the time of the alleged offence,¹⁶² and that the perpetrator must have knowledge that the relevant information is of a person subject to specific measures of protection in criminal proceedings.¹⁶³ The Gucati Defence also affirms that the evidence heard by the Panel does not meet these requirements, given that: (i) W04841 carried out no checks to confirm whether or not the protective measures granted in cases from other courts remained in force as of September 2020; and (ii) no evidence has been adduced that the Accused was aware of the orders for those protective measures.¹⁶⁴ In relation to protective measures in SC proceedings, the Gucati Defence submits that no protective measures had been granted by the end of September 2020 and that there is

¹⁵⁹ Indictment, para. 48.

¹⁶⁰ Gucati Motion, para. 86.

¹⁶¹ Gucati Motion, para. 87.

¹⁶² Gucati Motion, para. 89.

¹⁶³ Gucati Motion, para. 90.

¹⁶⁴ Gucati Motion, paras 91-92.

no evidence that the Accused was aware, in September 2020, of the permissions which had been granted to withhold disclosure of names on an interim basis.¹⁶⁵

79. The Haradinaj Defence argues that its submissions under Count 5 in respect of “secrecy” are equally applicable under Count 6.¹⁶⁶ The Haradinaj Defence submits that the Panel must determine whether the individuals named by the Accused were actually witnesses or prospective witnesses; and whether they were subject to any protective measures.¹⁶⁷ In that regard, the Haradinaj Defence points to statements of the Accused where he reveals official names and states that other names should not be revealed.¹⁶⁸ Furthermore, the Haradinaj Defence asserts that a number of individuals said to be protected publicly revealed that they are witnesses or have been summonsed,¹⁶⁹ and that therefore any release of an individual’s name is moot when that name is already within the public domain.¹⁷⁰

80. The SPO responds that neither of the offences under Counts 5 or 6 require disclosure to the perpetrator in a criminal proceeding.¹⁷¹ The SPO submits that persons whose information is revealed must have been “under protection in the criminal proceedings”, but there is no statutory language requiring that the perpetrator was part of those proceedings; nor would it make sense for the provision to be confined in that manner.¹⁷² The SPO adds that public knowledge that a certain individual was summonsed for interview at a certain point would not change that person’s subsequent protected status under the law.¹⁷³ The SPO further avers that there is no statutory requirement of proving “specific” or “formal” measures of protection, as any

¹⁶⁵ Gucati Motion, paras 93-95.

¹⁶⁶ Haradinaj Motion, para. 162.

¹⁶⁷ Haradinaj Motion, paras 163-164.

¹⁶⁸ Haradinaj Motion, paras 165-166.

¹⁶⁹ Haradinaj Motion, para. 167.

¹⁷⁰ Haradinaj Motion, para. 167.

¹⁷¹ SPO Response, para. 60.

¹⁷² SPO Response, para. 60.

¹⁷³ SPO Response, para. 60.

person protected under the law in the criminal proceedings qualifies as such.¹⁷⁴ The SPO maintains that when the SITF/SPO is in confidential correspondence with third parties in relation to criminal investigations, persons whose identities and/or personal data appear in those materials fall within the meaning of the Law and, consequently, Article 392(2)-(3) of the KCC.¹⁷⁵ The SPO further submits that the evidence shows, *inter alia*, that: the identities and personal data of hundreds of witnesses in Batches 1, 2, and 3 were classified and protected as confidential by the SITF/SPO;¹⁷⁶ documents in Batches 1, 2, and 3 that included such information were marked confidential, were stated to refer to confidential investigations, and related to witnesses whose identities, personal data, and evidence had previously been classified and treated confidentially by the SITF/SPO or had been under SC protection orders;¹⁷⁷ Batch 3 included references to the names, pseudonyms and evidence of witnesses whose identities were subject to prior Kosovo court-ordered protective measures or whose information and evidence were provided by international organisations subject to confidentiality and use restrictions.¹⁷⁸

81. The Panel notes that, in addition to or in furtherance of the elements disputed under Count 5, the Parties dispute the elements of the offence under Count 6 in relation to: (i) the definition and scope of “protected person”; and (ii) the proof required as to such protection, including the legal authority to order such status, the duration of such status and whether proof of (non-)rescission is required.

82. The Panel further notes that, in addition to the evidence indicated under Count 5, it has also heard and received evidence that at least some of the information made available by the Accused contained identifying information of what are said to be

¹⁷⁴ SPO Response, para. 61.

¹⁷⁵ SPO Response, para. 61.

¹⁷⁶ SPO Response, para. 63.

¹⁷⁷ SPO Response, paras 63-64.

¹⁷⁸ SPO Response, para. 65.

protected persons.¹⁷⁹ The Panel has further received evidence of the Accused's own, repeated references to identifying information of persons named in the documents disclosed and their statements alerting others as to the availability of such information in the documents.¹⁸⁰ The Panel has also received evidence of statements made by the Accused that the publication of the identity of some of the persons named in the documents was prohibited by law.¹⁸¹ In relation to the evidence heard and received regarding the aggravated form of Count 6, the Panel refers to its findings in relation to Count 1.¹⁸²

83. The Panel considers that this evidence goes to the SPO's allegations under Count 6 that the Accused, without authorization, revealed or attempted to reveal the identities and personal data of witnesses under protection in SC proceedings and prior criminal proceedings in Kosovo, and that such unauthorised revelation resulted in serious consequences for the witnesses and severely hindered SPO investigations.¹⁸³ In line with the applicable legal standard outlined above, the Panel shall not assess the reliability, strength and weaknesses of this evidence, nor the credibility of the witness providing it.

84. In light of the above, for the purposes of Rule 130 of the Rules, the Panel is satisfied that the evidence presented during the SPO case, if accepted, is capable of supporting a conviction under Count 6, including for its aggravated form. For this reason, the Panel also need not determine the existence and/or content of any of the disputed elements indicated above. Such a determination will be made in the judgment.

¹⁷⁹ See e.g., P00086, paras 9-12, 22-27, 31, 33-34; P00088, para. 12; P00090, paras 3-9, Annex 1, Annex 3, Annex 5; P00126; P00161; Testimony of W04841, Transcript, 18 October 2021, pp 860-861, 866, 870-888, 915-918; Transcript, 19 October 2021, pp 949-950; Transcript, 26 October 2021, pp 1470-1471, 1474. See also, P00108, P00112, P00114, P00116, and P00118.

¹⁸⁰ See e.g., P00001ET, pp 3-5; P00002ET, pp 2, 4-5; P00003ET, p. 4.

¹⁸¹ See e.g., P00001ET, p. 3; P00002ET, p. 7; P00003ET, p. 1; P00028ET, pp 1-2.

¹⁸² See *supra* para. 39.

¹⁸³ Indictment, paras 34-35.

C. MODES OF LIABILITY

85. The Panel notes that the Defence has not raised any specific or detailed challenge and has made only limited submissions regarding the question of applicable modes of liability. Nonetheless, the Panel finds it instructive to address briefly this matter.

86. In line with the legal standard outlined above, where the Accused are charged under multiple modes of liability, it is sufficient for the Panel to find that there is evidence capable of supporting a conviction on the basis of one of those modes of liability.¹⁸⁴ Accordingly, the Panel will limit its own findings to one particular mode of liability charged against the Accused: co-perpetration.

87. The Panel has received evidence that the Accused acted jointly, at times with others – some identified, some not – with a view to committing the above offences.¹⁸⁵ In particular, the Panel has heard and received evidence that several persons, including both of the Accused, took part, with some degree of coordination, in the process of making public the information subject to these proceedings and they were aware of the actions of the others and sometimes encouraged or assisted each other.¹⁸⁶ As stated above, the Panel has also received evidence of the Accused repeatedly using the terms “we”, “us” and “our” in describing their common actions.¹⁸⁷ The Panel is further satisfied that the evidence it received would be capable, under the applicable test, to meet the required *mens rea* applicable to this form of liability.

88. In light of the above, for the purposes of Rule 130 of the Rules, the Panel is satisfied that this evidence, if accepted, is capable of supporting a conviction for co-perpetration of the charged offences. Having found that the requirements of this mode

¹⁸⁴ See *supra*, para. 23.

¹⁸⁵ P00001ET, pp. 1-3; P00002ET, pp. 1-4; P00021ET, p. 4; P00024ET, p. 8; P00026ET, p. 2; P00035ET, pp 1-3.

¹⁸⁶ P00001ET, p. 2; P00004ET, p. 3; P00009ET, pp 5-8; P00011ET, pp 29-30; P00018ET, pp 2-5; P00021ET, p. 4; P00028ET, p. 11; P00033ET, pp 1-2; P00035ET, pp 1-3.

¹⁸⁷ See *e.g.*, P00001ET, p. 2; P00004ET, pp 1-5; P00018ET, pp 3-4; P00021ET, p. 4; P00025ET, p. 10; P00026ET, p. 2; P00028ET, p. 11; P00030ET, p. 3; P00034ET, p. 1.

of liability have been met, the Panel will refrain from establishing whether the relevant threshold has also been met in respect of other charged modes of liability.

V. CLASSIFICATION

89. The Panel notes that the Parties' submissions have been filed confidentially, due to references to confidential information, including evidence received in private sessions. The Panel has refrained from such references in this decision and issues it publicly. The Parties are ordered to submit public redacted versions of their submissions or request their reclassification as public.

VI. DISPOSITION

90. For the above-mentioned reasons, the Panel hereby:

- a. **DENIES** the Motions; and
- b. **ORDERS** the Parties to file public redacted versions of their written submissions or request their reclassification as public, by **13 December 2021**.



Judge Charles L. Smith, III

Presiding Judge

Dated this Friday, 26 November 2021

At The Hague, the Netherlands