



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

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Language: English

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Public Redacted Version of 'Prosecution consolidated response to requests to dismiss the charges', KSC-BC-2020/07/F00447

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I. INTRODUCTION

1. The Trial Panel should dismiss the Rule 130 Motions¹ in their entirety since there is evidence capable of supporting a conviction beyond reasonable doubt on all six charges against the Accused. The Rule 130 Motions misstate the relevant legal elements of the charges and ignore or misrepresent the voluminous relevant evidence admitted during the case of the Specialist Prosecutor's Office ('SPO').

2. Further, the Haradinaj Request is littered with submissions which should be rejected *in limine* since they are entirely outside the scope of the Rule 130 procedure.² These submissions amount to unfounded and untimely complaints about the indictment, selective prosecution, disclosure, the manner in which the SPO investigated, charged and led its case, and other matters, all of which are based on mischaracterisations of the case record. None of these submissions are relevant for the purposes of the Trial Panel's ruling pursuant to Rule 130(3).³

3. Below, the SPO sets out its position on the standard of review for Rule 130 decisions prior to addressing Defence arguments on a count-by-count basis. The SPO also incorporates its prior submissions concerning the elements of the relevant crimes by reference.⁴

¹ Motion to Dismiss pursuant to Rule 130, KSC-BC-2020-07/F00439, 17 November 2021, Confidential ('Gucati Request'); Defence Motion under Rule 130 'Dismissal of Charges', KSC-BC-2020-07/F00440, 17 November 2021, Confidential ('Haradinaj Request', together with the Gucati Request, the 'Rule 130 Motions'). All references to 'Rule' or 'Rules' herein refer to the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'), unless otherwise specified.

² See, e.g. Haradinaj Request, paras 2-3, 6, 12-17, 78, 102-103, 119, 142, 144, 156-160, 170, 173; See ICTR, *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Defence Motion for a Judgement of Acquittal [...], 27 September 2001, paras 18-22; ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Motion for Judgement of Acquittal, 2 February 2005 ('Bagosora Decision'), para.7.

³ See paras 4-8.

⁴ Prosecution submissions on the applicable law, KSC-BC-2020-07/F00341, 30 September 2021 ('Applicable Law Submissions').

II. SUBMISSIONS

A. STANDARD OF REVIEW FOR DISMISSAL OF CHARGES

4. Pursuant to Rule 130(3), which echoes corresponding provisions at other international courts and tribunals,⁵ the Trial Panel may only dismiss some or all charges at this stage ‘if there is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charge in question.’

5. The Trial Panel is not currently tasked with assessing whether the SPO has proved its case beyond reasonable doubt;⁶ that it is clearly a matter only to be addressed in the trial judgement. What must be assessed is the capacity of the SPO evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact, meaning that the test is not whether the Trial Panel *would* in fact arrive at a conviction but whether it *could*.⁷

6. As correctly set out in the Gucati Request, the Trial Panel’s review should relate to each of the six counts as charged, not their constitutive parts.⁸ Further, at this stage of the case, the Trial Panel should not assess the credibility and reliability of SPO evidence unless the SPO case can be said to have ‘completely broken down’.⁹

⁵ See ICTY Rule 98*bis*, ICTR Rule 98*bis*, IRMCT Rule 121, STL Rule 167, SCSL Rule 98.

⁶ *Contra* Haradinaj Request, paras 6-7, 14, 18, 25, 33, 82, 125; See SCSL, *Prosecutor v. Norman et al.*, SCSL-04-14-T, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005 (*Norman Decision*), paras 34-41.

⁷ See, e.g., ICTY, *Prosecutor v. Jelisić*, IT-95-10-A, Judgment, 5 July 2001, para.37; ICTY, *Prosecutor v. Radoslav Brđjanin Concerning Allegations Against Milka Maglov*, IT-99-36-R77, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, 19 March 2004 (*Maglov Decision*), paras 7, 9; *Bagosora Decision*, para.6; STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript, 7 March 2018 (*Ayyash et al. Decision*), pp.6-9; SCSL, *Prosecutor v. Brima et al.*, SCSL-04-16-T, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, para.10; See also Gucati Request, para.9.

⁸ Gucati Request, para.13; See also ICTR, *Prosecutor v. Ntawukulilyayo*, ICTR-05-82-T, Decision on Defence Motion for No Case To Answer, 2 July 2009, para.5; ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11, Decision No. 5 on the Conduct of Trial Proceedings [...], 3 June 2014 (*Ruto Decision*), para.27.

⁹ See *Maglov Decision*, para.9; ICTY, *Prosecutor v. Mrkšić et al.*, Case No, IT-95-13/1-T, Transcript of hearing on 28 June 2006 (*Mrkšić Decision*), pp.11311-2; *Norman Decision*, paras 37-38; *Ayyash et al. Decision*, pp.10-11.

7. For the purposes of Rule 130, if there is evidence capable of supporting a conviction on the basis of one of the charged modes of liability there is no need to consider the others.¹⁰

8. Finally, despite Defence challenges to the legal elements of each of the crimes charged,¹¹ nothing in the plain language of Rule 130 requires the Trial Panel to rule thereon at this time if the evidence is 'capable of supporting a conviction' on a plausible interpretation of the relevant provisions.¹² The SPO's interpretation is consistent with that articulated in the Confirmation Decision.¹³

B. OBSTRUCTING OFFICIAL PERSONS IN PERFORMING OFFICIAL DUTIES

1. Obstruction by serious threat (Count 1)

9. As detailed below, the evidence establishes that between at least 7 and 25 September 2020, the Accused obstructed or attempted to obstruct SC/SPO officials through serious threat. These threats were made by, *inter alia*: (i) disseminating the Confidential Information,¹⁴ including names and evidence of (potential) witnesses; (ii) stating that identities of all those who cooperated with the SITF/SPO would be publicly known, and accusing them of being, *inter alia*, liars, spies and traitors; and (iii) declaring that their purpose in disseminating the Confidential Information and related acts was to obstruct SC proceedings. By virtue of these serious threats: (i) witness security and well-being were endangered and witnesses were intimidated; (ii)

¹⁰ See ICTY, *Prosecutor v. Milan Milutinović et al.*, IT-05-87-T, Transcript, 18 May 2007, p.12772; *Mrkšić Decision*, pp.11312-11313; *Ruto Decision*, para.28.

¹¹ Gucati Request; Haradinaj Request, para.11.

¹² *Contra* Haradinaj Request, paras 9-10; See ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Transcript, 28 June 2012, p.28735; ICTY, *Prosecutor v. Kordić and Čerkez*, Decision on Defence Motions for Judgment of Acquittal, IT-95-14/2-T, 6 April 2000, para.36.

¹³ Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020 ('Confirmation Decision').

¹⁴ The confidential and non-public documents disseminated following the receipt of documents at the KLA WVA on 7 September 2020 ('First Disclosure'), 16 September 2020 ('Second Disclosure'), and 22 September 2020 ('Third Disclosure') are hereafter referred to as the 'Confidential Information'.

the SPO's ability to effectively investigate and prosecute crimes, including by obtaining relevant evidence while ensuring witness security and well-being, were hindered; and (iii) SPO resources and time were diverted to address actual and potential consequences of the Accused's conduct, including in relation to witnesses and SC proceedings.

10. Attempts to read an additional requirement that the 'serious threat' be one of *force* into the clear language of Article 401(1) and (5) of the Kosovo Criminal Code ('KCC') have no statutory basis.¹⁵ The ordinary meaning of a serious 'threat', without more, connotes no such limitation. As such, for example, the crime of 'threat' under Article 181 KCC refers to 'whoever seriously threatens by words, acts or gestures to harm another person in order to frighten or cause anxiety to such person', without further qualifying the nature of the harm to be inflicted. When such qualification is required, it is set out in the relevant provision.¹⁶

11. 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.¹⁷ Further, past criminal codes in Kosovo expressly required that the threat had to be of force, which was removed in the 2012 and 2019 KCC. The latter means that any cases applying previous versions of the KCC, such as that cited in the Gucati Request,¹⁸ are inapposite as to the requirement that threats be of 'force'. That the offence falls under 'offences against public order' in the KCC is immaterial in this regard,¹⁹ noting that some offences in this chapter clearly do not connote force or violence.²⁰

¹⁵ Confirmation Decision, paras 60, 68; *Contra* Gucati Request, paras 20-26.

¹⁶ *See, e.g.*, Article 181(2) of the KCC.

¹⁷ *See, e.g.*, Articles 114, 227(3) and 229(2) of the KCC

¹⁸ *See* Gucati Request, para.28, fn.17.

¹⁹ *Contra* Gucati Request, para.19.

²⁰ *E.g.* Articles 410(1) and 411 of the KCC.

12. In light of the plain language of Article 401(1), serious threats need not be directed at official persons themselves; they can be directed at third persons, as long as such threats have the effect of obstructing or attempting to obstruct the official person in performing official duties. There is nothing ambiguous in the formulation of the KCC provision on this point, nor is it a violation of the principle of strict construction to not read words into a statutory provision which do not exist.²¹ Had the legislature intended to circumscribe who could be threatened, it would have specifically done so as it has in relation to other crimes, such as Article 402 of the KCC, which can only be committed if the perpetrator seriously threatens to attack an official person or a person who assists in performing official duties, but not third persons.

13. In the present case, considering, *inter alia*: (i) the necessity of witness testimonies to carry out investigations and criminal trials; (ii) the SC/SPO interest and statutory duty to protect the security and well-being of witnesses;²² and (iii) the Accused's declared purpose,²³ the Accused's serious and public threats to the security and well-being of witnesses plainly fall within the meaning of Article 401(1) and (5) of the KCC, as such threats were directed to prevent SC/SPO officials from continuing to carry out investigations and criminal proceedings by threatening that, otherwise, witness security and well-being would be seriously endangered.

14. Furthermore, while it is not alleged that the Accused procured the documents they made public in September 2020, it is they who are alleged to have made them public and disseminated them. Accordingly, the obstruction alleged is clearly due to the Accused's actions and words.²⁴

²¹ *Contra* Gucati Request, paras 28-29.

²² *See, e.g.*, Articles 23, 35(2)(f), 39(11), 40(6)(f), 58 of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'), and Rules 30(2)(a), 80, 81, 105, 108.

²³ *See* para.22.

²⁴ *Contra* Haradinaj Request, para.55.

15. There is evidence capable of supporting a conviction beyond reasonable doubt on Count 1. In particular, the evidence shows that during the Three Press Conferences,²⁵ which the Accused took part in organizing; the over fifteen media appearances concerning the First, Second and/or Third Disclosure that the Accused, KLINAKU and/or GASHI attended, at times jointly; and in posts uploaded to social media, the Accused repeatedly made the 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.²⁶

16. Further, the Accused repeatedly threatened to continue disseminating information of confidential investigations, including witness identities, and to obstruct the mandate of the SC/SPO.²⁷ They sought to ensure the maximum possible dissemination of the Confidential Information and constantly pressured the media to further publish it.²⁸ The Accused and GASHI publicly praised the unidentified sources

²⁵ The term 'Three Press Conferences' refers to the press conferences held at the KLA WVA premises on 7, 16 and 22 September 2020, depicted in P00001, P00051, P00002, P00050, P00035, and P00003.

²⁶ P00001ET, pp.1-3; P00001, min.00:01:26-00:06:30; P00002ET, pp.1-3; P00002, min.00:00:01-00:02:31; P00018ET, pp.2-3; P00018, min.09:30-11:01, 24:45-25:32; P00033ET, pp.1-2; P00033, min.00:00:19-00:03:50; P00019ET, pp.1, 3-4; P00019, min.00:00:13-00:01:49, 00:06:33-00:08:53; P00017ET, pp.6-7; P00017, min.00:14:21-00:17:28; P00035ET, pp.1-3; P00035, min.00:03:15-00:10:28; P00011ET, pp.29-30; P00011, min.00:39:20-00:39:58; P00009ET, pp.5-8; P00009, min.00:59:42-01:03:52; P00098; *See also* P00060, p.SPOE00220752 (P00060ET, p.SPOE00220752) and P00024ET, p.8; P00024, min.00:14:24-00:15:51.

²⁷ P00021ET, pp.3-5; P00021, min.00:06:03-00:06:55, 00:09:41-00:11:53; P00002ET, pp.2-4; P00002, min.00:02:40-00:09:49; P00006ET, p.4; P00006, min.00:24:40-00:25:12; P00004ET, p.3; P00004, min.00:02:27-00:03:57; P00008ET, pp.3-4; P00008, min.00:32:59-00:34:11; P00035ET, pp.1-3; P00035, min.00:03:15-00:11:45; P00026ET, pp.4-5; P00026, min.00:09:29-00:10:50.

²⁸ P00035ET, pp.5-6, 11-13; P00035, min.00:14:19-00:15:30, 00:23:40-00:25:41; P00024ET, pp.3, 10; P00024, min.00:04:44-00:05:37, 00:20:23-00:21:06; P00033ET, p.3; P00033, min.00:05:02-00:07:52; P00019ET, p.2; P00019, min.00:04:24-00:05:16; P00004ET, p.8; P00004, min.00:17:26-00:17:40; P00080 (P00080ET); P00006ET, pp.6, 15; P00006, min.00:27:21-00:27:53, 00:35:33-00:35:48; P00008ET, p.21; P00008, min.00:44:46-00:45:53; *See also* P00011ET, pp.4-5; P00011, min.00:05:55-00:07:34; P00013ET, p.1; P00013, min.00:12:22-00:12:49.

who provided the documents to the KLA WVA and/or welcomed future disclosures from such sources.²⁹

17. Additionally, the Accused and GASHI made disparaging comments about, and/or threats in relation to, witnesses.³⁰ The Accused made it clear that the documents they were making public contained specific witness names and locations of residence, along with other personal details³¹ and that, now, persons would find out who these witnesses are.³² This threat was also echoed by GASHI.³³

18. Due to the impact or potential impact of the Accused's actions on witnesses, the SPO's ability to ensure witness security and well-being and to effectively investigate and prosecute crimes, including by obtaining and securing relevant evidence, was threatened. In particular, as set out by W04842, witnesses expressed anger, concern and fear, and felt threatened and/or intimidated as a result of the Accused's actions.³⁴ Witnesses also expressed an unwillingness to continue their cooperation with the SPO,³⁵ and SPO resources and time were diverted and devoted to address actual and potential consequences, including to witnesses and SC

²⁹ P00006ET, p.4; P00006, min.00:24:40-00:25:12; P00008ET, pp.3-4; P00008, min.00:32:59-00:33:30; P00035ET, pp.2-3, 7-8; P00035, min.00:06:54-00:10:28, 00:19:14-00:19:30; P00024ET, p.7; P00024, min.00:13:54-00:15:51; P00034ET, p.2; P00034, min.00:06:24-00:08:04; P00028ET, pp.12-13; P00028, min.00:16:12-00:17:50; P00031ET, p.2; P00031, min.0:28:46-0:30:37; P00007ET, pp.4-5; P00007, min.00:08:26-00:09:47.

³⁰ P00001ET, pp.1-6; P00001, min.00:01:26-00:09:09, 00:11:27-00:13:16; P00009ET, pp.6-7, 9-13; P00009, min.01:01:00-01:02:33, 01:05:00-01:10:49; P00008ET, pp.7, 11, 26; P00008, min.00:34:48-00:35:22, 00:38:39-00:38:51, 00:50:33-00:51:07; P00007ET, pp.5-6; P00007, min.00:09:48-00:10:22; *See also* P00044ET, p.1; P00044, min.08:01-08:54.

³¹ P00001ET, pp.1-6; P00001, min.00:01:26-00:06:30, 00:09:43-00:13:16; P00009ET, pp.6-8; P00009, min.01:01:00-01:03:52; P00035ET, pp.2-3; P00035, min.00:06:54-00:10:28.

³² P00008ET, pp.11, 26, 30-31; P00008, min.00:38:39-00:38:51, 00:50:33-00:51:07, 00:59:42-00:59:50; P00001ET, pp.3-4; P00001, min.00:06:31-00:09:09.

³³ P00007ET, pp.5, 8-9; P00007, min.00:09:48-00:10:22, 00:15:33-00:16:08; P00012ET, p.2; P00012, min.00:01:31-00:04:33.

³⁴ W04842, Transcript, 28 October 2021, pp.1693, 1703-7, 1699-1700, 1719; *See also* W04842, Transcript, 28 October 2021, pp.1712, 1714-5, 1722-4, 1726, 1731-2.

³⁵ W04842, Transcript, 28 October 2021, pp.1702-3, Transcript, 4 November 2021, p.1905; W04841, Transcript, 19 October 2021, p.1012.

Proceedings.³⁶ For example, the SPO had to undertake several security measures, including relocation, in order to ensure witness safety following the disclosures.³⁷

19. As set out above,³⁸ at this stage of the proceedings, the Trial Panel should not assess the credibility of the witnesses.³⁹ Nevertheless, contrary to the Haradinaj Defence assertion,⁴⁰ W04842's evidence is credible, with the witness providing a clear, solid basis therefor.⁴¹

20. The evidence also establishes the Accused's intent in relation to Count 1, and indeed in relation to all six charges.

21. First, the Accused's actions between 7 and 25 September 2020 clearly demonstrate that they repeatedly and persistently disseminated the Confidential Information containing, and publicly revealed, the identities and personal details of witnesses.⁴² The consistent pattern of conduct makes it clear that their actions were deliberate throughout. Indeed, HARADINAJ himself acknowledged that if he and others wanted, they would not have made the documents public at all.⁴³

22. Second, between 7 and 25 September 2020, the Accused, KLINAKU and GASHI publicly made their opposition to the SC and their intention to obstruct the work of

³⁶ See W04842, Transcript, 28 October 2021, pp.1692-5, 1697-8, 1700-1, 1711, 1715, 1761, Transcript, 4 November 2021, pp.1803-5, 1832; W04841, Transcript, 19 October 2021, pp.1009-1012.

³⁷ P00130-P00137; W04842, Transcript, 28 October 2021, pp.1707-9, 1762-3, 1763, Transcript, 4 November 2021, pp.1882-4, 1901-2, 1906.

³⁸ See para.6.

³⁹ *Contra* Haradinaj Request, para.126.

⁴⁰ Haradinaj Request, para.126.

⁴¹ See, e.g., W04842 Transcript, 28 October 2021, pp.1690-3, 1708-9, 1711, 1719-1720, 1751-3.

⁴² See, e.g., P00001ET, pp.1-3; P00001, min.00:01:26-00:06:30; P00002ET, pp.1-3; P00002, min.00:00:01-00:02:31; P00018ET, pp.2-3; P00018, min.09:30-11:01, 24:45-25:32; P00033ET, pp.1-2; P00033, min.00:00:19-00:03:50; P00019ET, pp.1, 3-4; P00019, min.00:00:13-00:01:49, 00:06:33-00:08:53; P00017ET, pp.6-7; P00017, min.00:14:21-00:17:28; P00035ET, pp.1-3; P00035, min.00:03:15-00:10:28; P00011ET, pp.29-30; P00011, min.00:39:20-00:39:58; P00009ET, pp.5-8; P00009, min.00:59:42-01:03:52.

⁴³ P00001ET, p.8; P00001, min.00:16:02-00:16:11.

the SC/SPO crystal clear.⁴⁴ For example, GUCATI stated that he and others 'are interested in unmasking the Special Chambers' adding that in informing persons about any material received by the KLA WVA, the KLA WVA will show why they are against the SC, and that: '[w]e have said for a long time that this Court is racist, it is biased. It is unacceptable for us and therefore this is the reason why we publish all these documents.'⁴⁵ HARADINAJ stated that he and others are going to make anything that undermines the SPO known because they do not recognize the SPO,⁴⁶ and that what was important was that the documents provided to the KLA WVA undermine the work carried out by the court over five years.⁴⁷ The Accused also made their intentions clear prior to the temporal scope of the Indictment.⁴⁸

23. Third, the Accused and others publicly acknowledged having reviewed the documents before making them public and displayed a high degree of familiarity with the contents thereof.⁴⁹ This evidence further illustrates that the Accused and others

⁴⁴ P00001ET, pp.1-3; 6 P00001, min.00:01:26-00:09:09, 00:13:21-00:14:32; P00013ET, p.1; P00013, min.00:12:22-00:12:49; P00021ET, pp.3-5; P00021, min.00:06:03-00:06:55, 00:09:41-00:11:53; P00006ET, pp.25-26; P00006, min.00:46:29-00:47:54; P00002ET, pp.2-4, 6-7; P00002, min.00:02:40-00:09:49, 00:12:09-00:12:45; P00007ET, pp.3-5, 16-17; P00007, min. 00:03:27-00:04:38, 00:04:59-00:10:22, 00:27:52-00:28:49, 00:29:03-00:30:22; P00008ET, p.7; P00008, min.00:34:48-00:35:22; P00029ET, p.2; P00029, min.00:03:29-00:04:17; P00012ET, pp.2, 4-5; P00012, min. 00:01:31-00:04:33, 00:09:45-00:13:18; P00026ET, pp.2, 4-5; P00026, min.00:06:32-00:07:30, 00:09:29-00:10:50; P00015ET, p.2; P00015, min.00:03:24-00:04:59; P00018ET, pp.1-2; P00018, min.00:27-01:10; P00034ET, p.2; P00034, min.00:06:24-00:08:04; P00011ET, p.56; P00011, min.01:14:00-01:14:06; *See also* P00011ET, p.3; P00011, min.00:04:16-00:05:55; P00028ET, pp.2-3, 7-9, 11; P00028, min. 00:01:36-00:03:08, 00:08:55-00:13:16, 00:14:47-00:16:12.

⁴⁵ P00004ET, p.8; P00004, min.00:15:25-00:17:19; *See also* P00004ET, pp.3, 8; P00004, min.00:02:27-00:03:57, 00:17:26-00:17:40.

⁴⁶ P00025ET, pp.9-10; P00025, min.00:14:17-00:15:48.

⁴⁷ P00030ET, p.18; P00030, min.00:21:08-00:22:51; *See also* P00030ET, p.15; P00030, min.00:15:02-00:18:18.

⁴⁸ *See, e.g.* P00083, pp.SPOE00222243-SPOE00222244 (P00083ET, pp.SPOE00222243-SPOE00222244); P00083, pp.SPOE00222241-SPOE00222242 (P00083ET, pp.SPOE00222241-SPOE00222242); P00040ET, p.1; P00040, min.02:35-04:12; P00041ET, p.1; P00041, min.10:23-10:57; P00043ET, pp.1-3, P00043, min.13:28-15:42; P00083, p.SPOE00222219, SPOE00222264-SPOE00222267, SPOE00222268-SPOE00222268 (P00083ET, p.SPOE00222219, SPOE00222264-SPOE00222267, SPOE00222268-SPOE00222268); P00037ET, pp.1-5; P00037, min.00:34:20-00:35:42, 00:36:02-00:36:57, 01:01:38-01:03:16, 01:03:57-01:05:30, 01:44:49-01:45:23; P00047ET, p.1; P00047 min.18:48-19:33; P00036ET, p.1; P00036, min.0:19:57-0:21:22; P00038ET, pp.1-2, P00038 min.28:21-28:58, 36:39-37:51; P00039ET, pp.2-3; P00039 min.05:34-06:43, 07:48-08:50.

⁴⁹ *See, e.g.*, P00001ET, pp.1-2, 4-5; P00001, min.00:00:01-00:01:22, 00:01:26-00:06:30, 00:09:43-00:11:21; P00009ET, p.6; P00009, min.01:01:00-01:02:33; P00024ET, pp.7-8; P00024, min.00:13:22-00:13:47, 00:14:24-

were by no means ignorant of the specific content of the documents they chose to make public. Rather, they reviewed the information therein and chose to disseminate it because of its content.

24. Fourth, the documents which the Accused made public contained numerous markings indicating confidentiality and/or internal work product.⁵⁰ For example, some of the indicia indicating the confidentiality of Batch 1⁵¹ are included in the images of documents from Batch 1 published online following the First Disclosure⁵² and in the corresponding disclosed pages from Batch 1.⁵³ Most of the 489 pages contained in Batch 3 display an unmissable header, which includes the symbol of the SPO and the wording 'Specialist Prosecutor's Office' as well as the wording 'CONFIDENTIAL, Internal Work Product, JCE Linkage Narrative December 2019', and footer, which includes the word 'Confidential'.⁵⁴ Full and partial versions of these headers and/or footers are included in several images of documents from Batch 3 published online following the Third Disclosure,⁵⁵ and are visible in the disclosed pages from Batch 3.⁵⁶

00:15:51; P00021ET, pp.4-5; P00021, min.00:07:17-00:11:53; P00018ET, pp.3-4; P00018, min.25:32-26:20; P00033ET, p.3; P00033, min.00:05:02-00:07:52; P00008ET, p.9; P00008, min.00:37:46-00:37:48; P00035ET, p.2; P00035, min.00:03:15-00:06:04; P00012ET, p.3; P00012, min.00:07:18-00:08:24; *See also* P00082 (P00082ET).

⁵⁰ P00086, paras 8, 23, 25-27; P00088, para.7, P00090, paras 3-6, Annexes 1-4; *See also* W04841, Transcript, 18 October 2021, pp.871-876; W04866, Transcript, 26 October 2021, pp.1523-1524.

⁵¹ *See* P00090, para.4, Annex 2.

⁵² Compare: (i) P00090, Annex 2(a) with P00125, pp.081362, 081365-081367, and P00124, pp.081915-081916, 081918-081919; (ii) Annex 2(b) with P00125, p.081362, and P00124, pp.081918-081919.

⁵³ *See* P00093-P00097.

⁵⁴ P00086, para.35; P00090, paras 7-10, Annex 5; W04841, Transcript, 18 October 2021, pp.929-930.

⁵⁵ Compare: (i) P00090, Annex 5(a) with P00155 (pp.081384, 081386-081391), P00157 (pp.0813995-081404), P00159 (pp.081414, 081416-081421), P00120 (pp.SPOE00220852-SPOE00220855), P00121 (pp.SPOE00220859-SPOE00220860, SPOE00220862-SPOE00220863), P00122 (pp.SPOE00220867-SPOE00220868, SPOE00220870-SPOE00220871); (ii) P00090, Annex 5(b)(2) with P00155 (pp.081384-081385), P00121 (p.SPOE00220863), P00122 (p.SPOE00220871); and (iii) P00090, Annex 5(c) with P00157 (pp.081399-081400, 081402, 081404), P00159 (pp.081414, 081417-081418, 081421), P00120 (p.SPOE00220852), P00121 (p.SPOE00220859), P00122 (p.SPOE00220867).

⁵⁶ *See* P00106-P00119.

25. Fifth, the Accused themselves characterised the documents which they made public as confidential, or otherwise used language indicating they were fully aware of the sensitive nature of the documents they chose to disseminate.⁵⁷ For example, during the First Press Conference, HARADINAJ pointed to the documents and stated: '[h]ere are the names of all the witnesses who they say are under their protection. All of them.'⁵⁸ He also referred to the documents as 'confidential' and 'top secret'.⁵⁹ GUCATI published a post on his Facebook profile in which he stated that the files handed over to the KLA WVA were official documents of the SC which included the names of the majority of witnesses; he referred to the documents as emerging from the SC's offices and as 'very confidential and sensitive'.⁶⁰

26. Sixth, the Accused and others expressly acknowledged the potential consequences of their deliberate actions, both to witnesses and the judicial process, accepting that witnesses' lives may be imperilled and that the judicial process may be damaged.⁶¹ During an interview on 16 September 2020, in response to a question as to whether he was aware that what was happening could damage the judicial process, HARADINAJ stated that that is what he would like to happen.⁶²

27. The Accused also acknowledged the potentially criminal nature of their conduct, recognising that their actions may lead to their incarceration.⁶³ For example, during the Third Press Conference, when it was noted that the SC law stated that the publication of the documents is prohibited by law and carries a sentence of up to 10

⁵⁷ P00006ET, p.20; P00006, min.00:39:29-00:39:36; P00019ET, p.2; P00019, min.00:02:48-00:04:05; P00017ET, p.2; P00017, min.00:02:10-00:06:38, 00:18:58-00:19:24; P00008ET, p.24; P00008, min.00:49:08-00:49:27; P00028ET, p.14; P00028, min.00:17:50-00:19:36.

⁵⁸ P00001ET, p.2; P00001, min.00:01:26-00:06:30.

⁵⁹ P00001ET, p.3; P00001, min.00:06:31-00:09:09.

⁶⁰ P00059; P00059ET, pp.081983-081986.

⁶¹ P00009ET, pp.6-9; P00009, min.01:01:00-01:02:33, 01:03:52-01:05:00; P00024ET, p.8; P00024, min.00:13:54-00:15:51; P00007ET, pp.8-9; P00007, min.00:15:33-00:16:08.

⁶² P00018ET, pp.5-6; P00018, min.28:52-29:38.

⁶³ P00025ET, pp.1-2; P00025, min.00:01:01-00:04:03; *See also* P00011ET, pp.28-29; P00011, min.00:37:46-00:38:13; P00059; P00059ET, pp.081983-081986; P00028ET, pp.1-2; P00028, min.00:00:00-00:03:08.

years' imprisonment, HARADINAJ responded: 'In which case I will end up in prison, too', later adding: 'You think you will scare me with ten years! Even if you sentence me to 300 years, I will still disclose them. I am speaking on my behalf and on the behalf of the whole presidium [...] We are ready to face 300 years [...] We are ready to die.'⁶⁴ When he was asked whether he would have any regrets about publishing the documents if he were to face punishment as a consequence, GUCATI stated he would not have any regrets even if he were to be imprisoned for five years.⁶⁵

28. Seventh, SC and SPO orders served at the KLA WVA on 8,⁶⁶ 17⁶⁷ and 22⁶⁸ September 2020 notified the Accused⁶⁹ that the information they were making public was sensitive and non-public, and should not be further disseminated.

2. Obstruction by participating in the common action of a group (Count 2)

29. The evidence establishes that between at least 7 and 25 September 2020, the Accused participated in a group of persons, composed of the Accused, KLINAKU, GASHI and others, including other members and representatives of the KLA WVA, whose common action obstructed or attempted to obstruct one or more official persons in performing official duties. The evidence shows that, in their capacities as chairman and deputy chairman, respectively, of the KLA WVA,⁷⁰ GUCATI and HARADINAJ coordinated and organised the group in taking these actions, which were carried out against SPO officials, including Prosecutors, Investigators and other staff members, during an exercise of their official functions, specifically the SPO's

⁶⁴ P00035ET, pp.12-13; P00035, min.00:24:06-00:24:15, 00:24:44-00:25:16.

⁶⁵ P00028ET, p.12; P00028, min.00:14:47-00:16:12.

⁶⁶ P00052; P00052AT.

⁶⁷ P00053; P00053AT.

⁶⁸ P00054.

⁶⁹ See P00078 (P00078ET); P00079 (P00079ET); P00083, p.SPOE00222202; P00004ET, pp.3, 8; P00004, min.00:02:27-00:03:57, 00:16:42-00:17:19; P00033ET, p.1; P00033, min.00:00:19-00:03:50; P00017ET, pp.1, 4-5; P00017, min.00:01:38-00:02:06, 00:06:48-00:11:44; P00007ET, p.3; P00007, min.00:01:20-00:01:58, 00:03:22-00:04:38; P00017ET, p.6, P00017, min.00:12:44-00:15:00; P00058.

⁷⁰ See, e.g., P00001ET, pp.7-8; P00001, min.00:14:48-00:15:02; P00002ET, pp.1-2; P00002, min.00:00:01-00:02:31; P00004ET, p.2; P00004, min.00:02:00-00:02:26.

ongoing criminal investigations. The actions of the group were also against SC officials.

30. Members of the 'group' for the purposes of Count 2 have been named in the Indictment⁷¹ and relevant evidence has been admitted, in particular, in relation to the role, within this group, of KLINAKU⁷² and GASHI.⁷³

31. The term 'common action' in Article 401(2) of the KCC has no qualifier, and does not require one. The provision is not limited only to situations of common action to use force or serious threat of force.⁷⁴ That the official duties must be 'obstructed' necessarily requires the use of unlawful means; peaceful and lawful activity necessarily falls outside the provision. The assertion that Article 401(2) is an aggravated form of 401(1) of the KCC⁷⁵ is unfounded, especially in view of the fact that the Article 401 aggravations are clearly those set out at sub-paragraphs (3)-(5) thereof. As such, neither 'serious threat' nor 'force' is required in relation to Article 401(2).⁷⁶ Nonetheless, in the framework of the present case, 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.

32. That the common action must be concurrent with the official duties⁷⁷ is correct, but this is precisely what the evidence establishes.

⁷¹ Indictment, paras 6, 25.

⁷² P00001ET, pp.1-3; P00001, min.00:00:01-00:06:30; P00092, para.7; P00089, para.10 (P00091); P00057 (P00057ET); P00023ET; P00023; P00013ET, p.1; P00013, min.00:12:22-00:12:49; P00023ET, p.6; P00023, min.00:10:04-00:10:07; *See also* P00023ET, p.7; P00023, min.00:10:57-00:11:04.

⁷³ P00007ET, pp.3-5, 8-9, 16-17; P00007, min.00:04:59-00:10 :22, 00:15:33-00:16:08, 00:27:52-00:28:49, 00:29:03-00:30:22; P00012ET, pp.2-5; P00012, min.00:01:31-00:06:21, 00:09:45-00:13:18.

⁷⁴ *Contra* Gucati Request, para.35.

⁷⁵ Gucati Request, para.38.

⁷⁶ *Contra* Gucati Request, paras 38-40.

⁷⁷ Gucati Request, para.39.

33. The evidence shows that the Accused, KLINAKU, GASHI and others were involved in reviewing the First, Second and Third Disclosures.⁷⁸ The Accused, and others took part in organising the First, Second and/or Third Press Conferences at which they made the First, Second and Third Disclosures public.⁷⁹ The Accused spoke at the press conferences, which were also attended by other members of the KLA WVA sitting next to them as they addressed those in attendance.⁸⁰ One or more of the Accused, KLINAKU and GASHI, at times jointly, represented the KLA WVA at over fifteen media appearances concerning the First, Second and/or Third Disclosure,⁸¹ including appearances by the Accused when the Confidential Information was disseminated further.⁸²

34. The Accused and GASHI publicly praised the unidentified sources who provided the documents to the KLA WVA and/or welcomed future disclosures from such sources.⁸³ Further, the Accused repeatedly threatened to continue disseminating information of confidential investigations, including witness identities, and to

⁷⁸ P00001ET, pp.1-3; P00001, min.00:00:01-00:06:30; P00021ET, pp.3-5; P00021, min.00:07:17-00:11:53; P00008ET, p.9; P00008, min.00:37:46-00:37:48; P00035ET, pp.1-2; P00035, min.00:03:15-00:06:03; P00007ET, pp.3-5; P00007, min.00:04:59-00:08:25.

⁷⁹ See, e.g., P00001ET, pp.1-3; P00001, min.00:00:01-00:06:30; P00002ET, pp.1-4; P00002, min.00:00:01-00:09:49; P00035ET, pp.1-3; P00035, min.00:03:15-00:10:28.

⁸⁰ See P00001ET; P00001; P00002ET; P00002; P00035ET; P00035.

⁸¹ P00009ET; P00009; P00013ET; P00013; P00024ET; P00024; P00021ET; P00021; P00018ET; P00018; P00004ET; P00004; P00033ET; P00033; P00019ET; P00019; P00007ET; P00007; P00017ET; P00017; P00008ET; P00008; P00012ET; P00012; P00011ET; P00011; P00030ET; P00030; P00023ET; P00023; P00027ET; P00027; P00026ET; P00026.

⁸² P00009ET, pp.5-8; P00009, min.00:59:42-01:03:52; P00024ET, p.8; P00024, min.00:14:24-00:15:51; P00018ET, pp.2-3; P00018, min.09:30-11:01; P00033ET, pp.1-2; P00033, min.00:00:19-00:03:50; P00011ET, pp.29-30; P00011, min.00:39:20-00:39:58.

⁸³ P00006ET, p.4; P00006, min.00:24:40-00:25:12; P00008ET, pp.3-4; P00008, min.00:32:59-00:33:30; P00035ET, pp.2-3, 8; P00035, min.00:06:54-00:10:28, 00:19:14-00:19:30; P00024ET, pp.7-8; P00024, min.00:13:54-00:15:51; P00034ET, p.2; P00034, min.00:06:24-00:08:04; P00028ET, pp.12-13; P00028, min.00:16:12-00:17:50; P00031ET, p.2; P00031, min.0:28:46-0:30:37; P00007ET, pp.4-5; P00007, min.00:08:26-00:09:47.

obstruct the mandate of the SC/SPO.⁸⁴ The Accused and GASHI made disparaging comments about, and/or threats in relation to, witnesses.⁸⁵

35. The evidence⁸⁶ 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 in the group, this prohibited consequence might ensue, and they acceded to the occurrence of this prohibited consequence. KLINAKU⁸⁷ and GASHI⁸⁸ also made it clear that their intent mirrored that of the Accused.

C. INTIMIDATION DURING CRIMINAL PROCEEDINGS (COUNT 3)

36. The evidence establishes that between at least 7 and 25 September 2020, the Accused and Associates, including KLINAKU and GASHI, used serious threats to induce or attempt to induce witnesses to refrain from making a statement or to make a false statement or otherwise fail to state true information to the SPO and/or SC.

37. On the plain language of Article 387 of the KCC, it is not required to prove that the person induced was actually intimidated.⁸⁹ It is the conduct that is intimidating; no particular consequence is required. This is in contrast to Article 386(1) of the KCC, which expressly requires a causal result for similar conduct.

⁸⁴ P00021ET, pp.3-5; P00021, min.00:06:03-00:06:55, 00:09:41-00:11:53; P00002ET, pp.2-4; P00002, min.00:02:40-00:09:49; P00004ET, p.3; P00004, min.00:02:27-00:03:57; P00008ET, p.6; P00008, min.00:32:59-00:34:11; P00035ET, pp.2-3; P00035, min.00:03:15-00:11:45; P00026ET, pp.4-5; P00026, min.00:09:29-00:10:50.

⁸⁵ P00001ET, pp.2-6; P00001, min.00:01:26-00:09:09, 00:11:27-00:13:16; P00009ET, pp.10-14; P00009, min.01:06:42-01:10:49; P00008ET, pp.7, 26; P00008, min.00:34:48-00:35:22, 00:50:33-00:51:07; P00007ET, pp.5-6; P00007, min.00:09:48-00:10:22.

⁸⁶ See paras 20-28.

⁸⁷ P00013ET, p.1; P00013, min.00:12:22-00:12:49.

⁸⁸ P00007ET, pp.3-6, 16-17; P00007, min.00:04:59-00:08:25, 00:27:52-00:28:49, 00:29:03-00:30:22; P00012ET, pp.2, 4-6; P00012, min. 00:01:31-00:04:33, 00:09:45-00:13:18.

⁸⁹ Confirmation Decision, para.62. *Contra* Gucati Request, paras 51, 56.

38. 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. That the information in question relates to the 'obstruction of criminal proceedings' is only relevant for the third of these alternatives.⁹⁰ The third alternative therefore serves as an additional catch-all in the context of obstructing proceedings, as a failure to state true information in a non-obstruction case is covered by the first alternative.⁹¹ If all three alternatives only applied in the context of 'obstruction of criminal proceedings', this would lead to an absurd interpretation whereby only witnesses with information about obstruction could be intimidated within the meaning of Article 387 of the KCC.⁹²

39. The statutory language 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.⁹³ Noting that 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"'⁹⁴ would be inappropriately narrow.

40. No specific intent is required for this offence, meaning that the standard direct or eventual intent suffices.⁹⁵ Regardless, there is ample evidence indicating that the Accused did specifically intend to induce witnesses within the meaning of Article 387 of the KCC.

⁹⁰ *Contra* Gucati Request, para.58; Haradinaj Request, para.30.

⁹¹ *Contra* Gucati Request, para.58.

⁹² *See* Gucati Request, paras 58-59.

⁹³ *See* Prosecution submissions on use of the term 'witness', KSC-BC-2020-07/F00282, 23 August 2021.

⁹⁴ Haradinaj Request, para.31.

⁹⁵ *Contra* Haradinaj Request, paras 29, 87, fn.32.

41. The evidence shows that the Accused announced that documents including names, personal details and previous statements of SPO witnesses had been made available to the press.⁹⁶ They referred to specific witness names and locations of residence, along with other personal details,⁹⁷ and made it clear that the documents they were making public contained this type of information⁹⁸ and that, now, the public will find out who these witnesses are.⁹⁹ This threat was also echoed by GASHI.¹⁰⁰

42. The Accused's public assertions that they had recognized several of the names contained in the documents¹⁰¹ were clearly intended to put anyone who cooperated with the SITF/SPO and may be known to the Accused on notice that their cooperation was now known. Indeed, HARADINAJ stated that he and others were making public the names, surnames, and former and current places of residences of persons who gave statements 'so it is known',¹⁰² and that the First Disclosure was intended to make it clear to witnesses that, rather than being protected, they would be exploited, also noting that persons who have provided information have not been protected but have been killed, discredited, or derided.¹⁰³

43. The Accused and others sought to ensure the maximum possible dissemination of the information they made public and constantly pressured the media to further

⁹⁶ P00001ET, pp.1-6; P00001, min.00:01:26-00:06:30, 00:09:43-00:13:16; P00035ET, pp.1-3, 5-7; P00035, min.00:03:15-00:10:28, 00:15:30-00:16:18; P00013ET, p.1; P00013, min.00:12:22-00:12:49; P00012ET, p.2; P00012, min.00:01:31-00:04:33.

⁹⁷ P00001ET, pp.2-3; P00001, min.00:01:26-00:06:30; P00002ET, pp.1-3; P00002, min.00:00:01-00:02:31; P00018ET, p.3; P00018, min.24:45-25:32; P00033ET, pp.1-2; P00033, min.00:00:19-00:03:50; P00019ET, pp.1, 3-4; P00019, min.00:00:13-00:01:49, 00:06:33-00:08:53; P00017ET, pp.2-3; P00017, min.00:02:10-00:06:38; P00017ET, pp.6-8; P00017, min.00:14:21-00:17:28; P00035ET, pp.2-3; P00035, min.00:06:54-00:10:28; P00011ET, p.30; P00011, min.00:39:20-00:39:58.

⁹⁸ P00001ET, pp.1-6; P00001, min.00:01:26-00:06:30, 00:09:43-00:13:16; P00009ET, pp.6-8; P00009, min.01:01:00-01:03:52; P00035ET, pp.2-3; P00035, min.00:06:54-00:10:28.

⁹⁹ P00008ET, pp. 26, 30-31; P00008, min. 00:50:33-00:51:07, 00:59:42-00:59:50; P00001ET, pp.3-4; P00001, min.00:06:31-00:09:09.

¹⁰⁰ P00007ET, pp.5, 8-9; P00007, min.00:09:48-00:10:22, 00:15:33-00:16:08; P00012ET, p.2; P00012, min.00:01:31-00:04:33.

¹⁰¹ P00009ET, pp.9-10; P00009, min.01:05:00-01:06:42; P00008ET, p.11; P00008, min.00:38:39-00:38:51.

¹⁰² P00001ET, pp.4-5; P00001, min.00:09:43-00:13:16.

¹⁰³ P00008ET, p.26; P00008, min.00:50:33-00:51:07.

publish this information.¹⁰⁴ During an appearance on a television programme on 17 September 2020, HARADINAJ told a journalist from Gazeta Infokus, the same media house that handed over Batch 4 to the SPO,¹⁰⁵ who was also a guest on the programme, that this journalist had received the files but did not publish them, so he had not done his job.¹⁰⁶ HARADINAJ also told this journalist that he and others would pay this journalist to publish the documents.¹⁰⁷

44. Finally, GUCATI and HARADINAJ made several disparaging remarks and accusations against witnesses, including GUCATI referring to them as ‘Albanian-speaker[s]’ or ‘traitor[s]’ who lie,¹⁰⁸ and HARADINAJ describing them as ‘criminals, bloodsuckers’¹⁰⁹ and spies who betrayed their people.¹¹⁰ GUCATI accused witnesses of cooperating in order to obtain documents for asylum purposes.¹¹¹

45. GUCATI and HARADINAJ’s objectives in carrying out their actions were transparent. They themselves acknowledged that their actions were carried out as part of their efforts to obstruct the work of the SC/SPO.¹¹²

46. The evidence¹¹³ establishes that the Accused were aware of, and desired to, induce witnesses to refrain from making a statement or to make a false statement or otherwise fail to state true information to the SPO and/or SC; alternatively, the

¹⁰⁴ P00035ET, pp.5-6, 11-13; P00035, min.00:14:19-00:15:30, 00:23:40-00:25:41; P00024ET, pp.3, 10; P00024, min.00:04:44-00:05:37, 00:20:23-00:21:06; P00033ET, p.3; P00033, min.00:05:02-00:07:52; P00019ET, p.2; P00019, min.00:04:24-00:05:16; P00004ET, p.8; P00004, min.00:17:26-00:17:40; P00080 (P00080ET); *See also* P00013ET, p.1; P00013, min.00:12:22-00:12:49; W04866, Transcript, 26 October 2021, pp.1521-1522; P00008ET, pp.21-22; P00008, min.00:44:46-00:45:53; P00011ET, pp.4, 28, 31; P00011, min.00:05:55-00:07:34, 00:37:46-00:37:58, 00:40:19-00:40:41.

¹⁰⁵ W04866, Transcript, 26 October 2021, pp.1520-1521, 1531-1533,1535-1536; P00099.

¹⁰⁶ P00006ET, p.6; P00006, min.00:27:21-00:27:53.

¹⁰⁷ P00006ET, p.15; P00006, min.00:35:33-00:35:48.

¹⁰⁸ P00009ET, pp.6-7, 12-13; P00009, min.01:01:00-01:02:33, 01:09:36-01:10:49.

¹⁰⁹ P00008ET, p.7; P00008, min.00:34:48-00:35:22.

¹¹⁰ P00008ET, p.26; P00008, min.00:50:33-00:51:07.

¹¹¹ P00009ET, pp.10-12; P00009, min.01:06:42-01:09:36; *See also* P00044ET, p.1; P00044 min.08:01-08:54.

¹¹² *See* para.22.

¹¹³ *See* paras 20-28.

Accused were aware that, as a result of their actions, this prohibited consequence might ensue, and that they acceded to the occurrence of this prohibited consequence. KLINAKU's¹¹⁴ and GASHI's¹¹⁵ intent mirrored that of the Accused.

D. RETALIATION (COUNT 4)

47. The evidence establishes that between at least 7 and 25 September 2020, the Accused and Associates, including KLINAKU and GASHI, 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.

48. The harmful action required by Article 388(1) of the KCC relates to the conduct itself. The harm intended need not have occurred,¹¹⁶ as otherwise the KCC would specify the harm as being 'caused' or being a 'consequence' as done in Article 388(5) and other offences against the administration of justice.¹¹⁷ The harmful action may be directed at any person; the provision does not limit itself only to a 'witness'.¹¹⁸

49. Whether or not the witness actually gave truthful information is not an element of the offence;¹¹⁹ all that is required is an intent to retaliate against such persons. 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.¹²⁰ That 'truthful information' is only discussed as part of the offence's subjective elements makes clear that the information's truth or falsity is not part of the objective elements

¹¹⁴ P00013ET, p.1; P00013, min.00:12:22-00:12:49.

¹¹⁵ P00007ET, pp.5, 8-9; P00007, min.00:09:48-00:10:22, 00:15:33-00:16:08.

¹¹⁶ *Contra* Haradinaj Request, paras 33-34, 36-37.

¹¹⁷ *E.g.* Articles 382(2), 384(3), 386(1), 392(3), 394(2), 404(1) and 404(4) of the KCC. *See also* Applicable Law Submissions, paras 23-24.

¹¹⁸ *Contra* Haradinaj Request, para.35.

¹¹⁹ *Contra* Gucati Request, paras 68-70.

¹²⁰ Article 21 of the KCC.

of the offence. 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. Especially in circumstances where witnesses give evidence on highly complex factual matters, such as on the commission of international crimes, the collateral trial to establish the truth of the information provided would dwarf the trial on the remainder of the retaliation offence.

50. The evidence shows that for the declared purpose of obstructing the work of the SC/SPO,¹²¹ during the Three Press Conferences, the over fifteen media appearances concerning the First, Second and/or Third Disclosure that they, KLINAKU and/or GASHI attended, at times jointly, and in posts uploaded to social media, the Accused made accusations against, and disparaging remarks about, witnesses,¹²² repeatedly disseminating their identities, personal data, and evidence, and announcing such dissemination,¹²³ and repeatedly encouraging others to disseminate such information.¹²⁴

51. When the presenter of a programme on which GUCATI appeared noted that things could happen because the documents contained names, GUCATI, clearly

¹²¹ See para.22.

¹²² P00009ET, pp.6-7, 12-13; P00009, min.01:01:00-01:02:33, 01:09:36-01:10:49; P00008ET, pp.7, 26; P00008, min.00:34:48-00:35:22, 00:50:33-00:51:07; P00009ET, pp.10-12; P00009, min.01:06:42-01:09:36; See also P00044ET, p.1; P00044, min.08:01-08:54.

¹²³ P00001ET, pp.1-3; P00001, min.00:01:26-00:06:30; P00002ET, pp.1-2; P00002, min.00:00:01-00:02:31; P00018ET, p.3; P00018, min.24:45-25:32; P00033ET, pp.1-2; P00033, min.00:00:19-00:03:50; P00019ET, pp.1, 3-4; P00019, min.00:00:13-00:01:49, 00:06:33-00:08:53; P00017ET, pp.6-7; P00017, min.00:14:21-00:17:28; P00035ET, pp.2-3; P00035, min.00:06:54-00:10:28; P00011ET, p.30; P00011, min.00:39:20-00:39:58; See: (i) P00060, p.SPOE00220752 (P00060ET, p.SPOE00220752), P00024ET, p.8, P00024, min.00:14:24-00:15:51; and (ii) P00060, p.SPOE00220731 (P00060ET, p.SPOE00220731), P00017ET, pp.2-3, P00017, min.00:02:10-00:06:38.

¹²⁴ P00035ET, pp.5-6, 11-13; P00035, min.00:14:19-00:15:30, 00:23:40-00:25:41; P00024ET, pp.3, 10; P00024, min.00:04:44-00:05:37, 00:20:23-00:21:06; P00033ET, p.3; P00033, min.00:05:02-00:07:52; P00019ET, p.2; P00019, min.00:04:24-00:05:16; P00004ET, p.8; P00004, min.00:17:26-00:17:40; P00080 (P00080ET); See also P00013ET, p.1; P00013, min.00:12:22-00:12:49; P00006ET, p.15; P00006, min.00:35:33-00:35:48; P00008ET, pp.21-22; P00008, min.00:44:46-00:45:53; P00011ET, pp.4-5; P00011, min.00:05:55-00:07:34.

unperturbed by the potential consequences of his actions, responded that this could happen.¹²⁵ The Accused's actions were indeed harmful to witnesses.¹²⁶

52. The evidence¹²⁷ establishes that the Accused were aware of, and desired to, take actions harmful to witnesses to retaliate for providing truthful information relating to the commission or possible commission of criminal offences to the SPO; alternatively, the Accused were aware that as a result of their acts or omissions, this prohibited consequence might ensue, and that they acceded to the occurrence of this prohibited consequence. KLINAKU's¹²⁸ and GASHI's¹²⁹ intent mirrored that of the Accused.

E. VIOLATING THE SECRECY OF PROCEEDINGS

1. Violation through unauthorized revelation of protected information (Count 5)

53. The evidence establishes that between at least 7 and 25 September 2020, the Accused and Associates, including KLINAKU, without authorisation by the SPO, SC, or any other competent authority, revealed the Confidential Information, which included, but was not limited to:¹³⁰

- (i) Batch 1, containing confidential requests for assistance in criminal investigations ('Requests') addressed by the SITF to the competent Serbian authorities between 2013 and 2015, as well as documents of the Serbian authorities, including responses to the Requests ('Serbian Documents'); both the Requests and Serbian Documents pertain to confidential SITF/SPO investigations and criminal proceedings.¹³¹ Batch 1 also includes internal

¹²⁵ P00009ET, p.8; P00009, min.01:03:52-01:05:00.

¹²⁶ See para.18.

¹²⁷ See paras 20-28.

¹²⁸ P00013ET, p.1; P00013, min.00:12:22-00:12:49.

¹²⁹ P00007ET, pp.5, 8-9; P00007, min.00:09:48-00:10:22, 00:15:33-00:16:08.

¹³⁰ See also para.24.

¹³¹ P00086, para.7; P00088, paras 6-12; P00090, paras 3-4, Annex 1.

reports and correspondence of Serbian authorities.¹³² The vast majority of the over one hundred Requests contain annexes which are expressly indicated to be confidential,¹³³ and these confidential annexes list hundreds of names of witnesses and potential witnesses who have never been publicly identified by the SITF/SPO.¹³⁴ Thirty-five statements or parts of statements of victims and witnesses that were taken by Serbian authorities are included in Batch 1; these statements include personal data and detailed information about serious crimes;¹³⁵

- (ii) Batch 2,¹³⁶ which consists of 937 pages, six of which are identical to those from Requests and Serbian Documents already included in Batch 1¹³⁷ and in Batch 4,¹³⁸ including [REDACTED].¹³⁹ The remaining 931 pages include, as specifically noted by HARADINAJ during the Second Press Conference,¹⁴⁰ copies of indictments, including against Fatmir LIMAJ, Ramush HARADINAJ and others;¹⁴¹
- (iii) Batch 3, which is comprised of two incomplete copies of an SPO confidential document pertaining to SPO investigations and official proceedings, which constitute internal work product.¹⁴² It includes an analysis of certain available evidence and applicable law in relation to five individuals.¹⁴³ It

¹³² P00088, para.8; P00090, paras 3-4, Annex 1; W04841, Transcript, 18 October 2021, pp.860-861.

¹³³ P00086, paras 8-9; P00090, paras 3-4, Annex 1.

¹³⁴ P00086, paras 9-12; P00090, paras 3-4, Annex 1; W04841, Transcript, 18 October 2021, pp.861, 869-872, 876-879, 882-885, Transcript, 26 October 2021, pp.1470-1471, 1474.

¹³⁵ P00088, para.12; P00090, paras 3-4, Annex 1; P00087, para.4; W04841, Transcript, 18 October 2021, pp.885-887.

¹³⁶ P00104.

¹³⁷ See P00139-P00144.

¹³⁸ See P00145-P00150.

¹³⁹ P00086, paras 22-27; P00090, paras 5-6, Annex 3; W04841, Transcript, 18 October 2021, pp.915-917.

¹⁴⁰ P00002ET, pp.4-5; P00002, min.00:09:49-00:10:29.

¹⁴¹ P00104, pp.080007-080030, 080032-080034, 080346-080441; P00002ET, pp.4-5; P00002, min.00:09:49-00:10:29.

¹⁴² P00086, para.29; P00090, paras 7-10, Annex 5; W04841, Transcript, 19 October 2021, pp.949-961.

¹⁴³ P00086, para.29; P00090, paras 7-9.

also contains references to approximately 150 (potential) witnesses, including the name of [REDACTED],¹⁴⁴ as well as detailed references to witnesses' and suspects' statements,¹⁴⁵ and

(iv) Batch 4, the contents of which largely overlap with Batch 1.¹⁴⁶

54. The charges in Count 5 are based on Article 392(1) of the KCC; contrary to the Defence assertion,¹⁴⁷ the protected information 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 As regards knowledge of the protected character of the information, either direct or eventual intent suffices.

55. There is no requirement that the information was 'disclosed to the perpetrator in an official proceeding'¹⁴⁹ in the sense of formal disclosure during trial. Such an 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. The information need only have been disclosed in 'any official proceeding', and not to any particular person or in any particular form. Official proceedings include proceedings by a court, but also include criminal proceedings more generally and, in particular, prosecutorial investigations.¹⁵⁰ In this regard, information exchanged during a criminal investigation is also disclosed in an 'official proceeding' within the meaning of the KCC.

¹⁴⁴ See [REDACTED].

¹⁴⁵ P00086, p.084020, para.31; P00090, paras 7-9.

¹⁴⁶ P00089, pp.091927-091929, paras 8-13 (P00091); P00057 (P00057ET); W04841, Transcript, 18 October 2021, pp.893-895.

¹⁴⁷ Gucati Request, paras 75-76, 80.

¹⁴⁸ Indictment, paras 6, 7,10, 15, 19, 23, 33; *See also*, Confirmation Decision, para.37.

¹⁴⁹ *Contra* Gucati Request, para.78.

¹⁵⁰ *See* Article 376 of the KCC; Article 6(2) of the KCPC; Confirmation Decision, para.36; *See also* Applicable Law Submissions, para.29.

56. The evidence shows that during the Three Press Conferences, the over fifteen media appearances concerning the First, Second and/or Third Disclosure that they, KLINAKU and/or GASHI attended, at times jointly, and in posts uploaded to social media, the Accused repeatedly made the 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.¹⁵¹

57. The fact that the Accused were not authorised, by the SPO, SC, or any other competent authority, to reveal the information in the First, Second and Third Disclosures is evident by the immediate action taken by the SC and SPO to stop the further dissemination of the Confidential Information.¹⁵²

58. The evidence¹⁵³ establishes that the Accused acted with awareness of, and desire for, revealing the Confidential Information without authorization, or at a minimum, were aware that this prohibited consequence might ensue as a result of their acts or omissions, and that they acceded to the occurrence of this prohibited consequence.

2. Violation through revelation of the identities and personal data of protected witnesses (Count 6)

¹⁵¹ P00001ET, pp.1-3; P00001, min.00:01:26-00:06:30; P00002ET, pp.1-3; P00002, min.00:00:01-00:02:31; P00018ET, p.3; P00018, min.24:45-25:32; P00033ET, pp.1-2; P00033, min.00:00:19-00:03:50; P00019ET, pp.1, 3-4; P00019, min.00:00:13-00:01:49, 00:06:33-00:08:53; P00017ET, pp.6-7; P00017, min.00:14:21-00:17:28; P00035ET, pp.2-3; P00035, min.00:03:15-00:10:28; P00011ET, pp.29-30; P00011, min.00:39:20-00:39:58; *See*: (i) P00060, p.SPOE00220752 (P00060ET, p.SPOE00220752), P00024ET, p.8, P00024, min.00:14:24-00:15:51; and (ii) P00060, p.SPOE00220731 (P00060ET, p.SPOE00220731), P00017ET, pp.2-3; P00017, min.00:02:10-00:06:38.

¹⁵² Transcript, 5 November 2021, pp.1930, 1931, 1958, 1939-40; P00052 (P00052AT); P00092; P00056; P00057 (P00057ET); P00055; P00053 (P00053AT); P00004ET, p.3; P00004, min.00:02:27-00:03:57; P00006ET, pp.4-5, 17-18, 36; P00006, min.00:25:13-00:26:15, 00:37:33-00:38:23, 00:59:46-00:59:54; P00054; P00058; P00035ET, pp.5-6; P00035, min.00:15:41-00:16:18; P00007ET, pp.7, 10-11; P00007, min. 00:13:57-00:14:20, 00:18:22-00:19:40; P00099, P00100.

¹⁵³ *See* paras 20-28.

59. The evidence establishes that between at least 7 and 25 September 2020, the Accused and Associates, including KLINAKU, without authorisation by the SPO, SC, or any other competent authority, revealed or attempted to reveal, the identities and personal data of witnesses under protection in SC Proceedings and prior criminal proceedings in Kosovo.

60. Article 392(2)-(3) of the KCC should be interpreted consistently with Article 392(1) of the KCC,¹⁵⁴ but consistency can only be found in an interpretation whereby neither of the crimes in Counts 5 or 6 require disclosure to the perpetrator in a criminal proceeding.¹⁵⁵ The 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. Equally, that it may be publicly known that a certain individual was summonsed for interview at a certain point would not change that person's subsequent protected status under the law.¹⁵⁶

61. There is also no statutory requirement of proving 'specific'/'formal' measures of protection¹⁵⁷ or a protection order¹⁵⁸ for those under protection in the criminal proceedings. Any person protected under the law in the criminal proceedings qualifies,¹⁵⁹ and a commentary setting out which Kosovo laws can confer protection will naturally be incomplete on this point if the book pre-dates the SC's establishment.¹⁶⁰ When the SITF/SPO is in confidential correspondence with third parties in relation to criminal investigations, persons whose identity and/or personal

¹⁵⁴ See Gucati Request, para.86.

¹⁵⁵ *Contra* Gucati Request, para.86.

¹⁵⁶ *Contra* Haradinaj Request, para.167.

¹⁵⁷ *Contra* Gucati Request, para.88; Haradinaj Request, para.41.

¹⁵⁸ *Contra* Gucati Request, para.90.

¹⁵⁹ Confirmation Decision, para.44(a)(b) and (c).

¹⁶⁰ *Contra* Gucati Request, para.86, n.30 (citing to a 2014 commentary).

data appear in those materials fall within the meaning of the Law¹⁶¹ and, consequently, Article 392(2)-(3) of the KCC.

62. Either direct or eventual intent suffices as to the awareness required of the protected person's status.

63. The evidence shows 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 SITF/SPO.¹⁶² Documents in Batches 1, 2, and 3 including 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.¹⁶³

64. The evidence further shows that, beyond adopting measures of protection of witness identities and personal data of its own motion,¹⁶⁴ the SPO had also formally requested non-disclosure orders, pursuant to Rules 88 and 105, upon filing of confidential and *ex parte* indictments.¹⁶⁵ Furthermore, specific measures of protection were adopted by a SC Panel in relation to certain witness identities and personal data prior to September 2020, and in particular on 12 June 2020.¹⁶⁶ The Defence's submissions to the contrary appear to be based on an erroneous understanding of the effects of a judicial order pursuant to Rule 105.¹⁶⁷

¹⁶¹ Confirmation Decision, para.44(a)(b) and (c). *See also*, e.g., W04841, Transcript, 18 October 2021, pp.860-861, Transcript, 26 October 2021, pp.1470-1471, 1474.

¹⁶² *See*, in relation to Batch 1, P00086, paras 9-12; P00090, paras 3-4, Annex 1; P00088, para.12; W04841, Transcript, 18 October 2021, pp.860-861, 866, 870-888, Transcript, 26 October 2021, pp.1470-1471, 1474. *See*, in relation to Batch 2, P00086, paras 22-27, W04841, Transcript, 18 October 2021, pp. 915-918; P00090, paras 5-6, Annex 3; *See*, in relation to Batch 3, P00086, para.31; P00090, paras 7-9, W04841, Transcript, 19 October 2021, pp.949-950.

¹⁶³ *Id.* *See also* para.53; W04841, Transcript, 26 October 2021, pp.1470-1471, 1474.

¹⁶⁴ Confirmation Decision, para.44(b). *See also* para.63.

¹⁶⁵ P00151, paras 8-9; P00152, paras 7-8; P00154, paras 54-55; P00086, para.32; W04841, Transcript, 19 October 2021, pp.953-960.

¹⁶⁶ P00151, paras 132-139, 140(c),(g),(e); P00152, paras 155-162,163(c),(g),(e); P00086, p.084020, para.32; W04841, Transcript, 19 October 2021, pp.953-960.

¹⁶⁷ *See* Gucati Request, para.94.

65. Batch 3 also includes references to the names, pseudonyms and evidence of witnesses whose identities were subject to prior Kosovo court-ordered protective measures, including the non-disclosure of the witness identities, the assignment of pseudonyms, and the non-disclosure of witness records.¹⁶⁸ Batch 3 further includes references to the statements of witnesses and other documents and information provided to the SPO by international organisations and other entities subject to confidentiality and use restrictions.¹⁶⁹

66. In addition, the First Order, *inter alia*, recognised the confidential and non-public nature of the First Disclosure (and Batch 1) and prohibited the further dissemination of the contents of the First Disclosure (and Batch 1), including personal details of witnesses included in the First Disclosure (and Batch 1).¹⁷⁰ Batch 2 includes copies of six pages, which include the identities of witnesses, already contained in Batch 1¹⁷¹ and therefore subject to the First Order.

67. As set out above,¹⁷² the revelation of identities and personal data of protected persons resulted in serious consequences for the persons under protection, or the criminal proceedings were severely hindered.

68. The evidence¹⁷³ establishes that the Accused acted with awareness of, and desire for, revealing the identity or personal data of witnesses under protection in SC Proceedings and prior criminal proceedings in Kosovo without authorization, or at a minimum, were aware that this prohibited consequence might ensue, and they acceded to the occurrence of this prohibited consequence. The same evidence also establishes that the Accused must have known or had reason to know they were

¹⁶⁸ P00086, para.33; [REDACTED].

¹⁶⁹ P00086, para.34; P00126.

¹⁷⁰ P00052; P00052AT.

¹⁷¹ P00086, paras 22-26; P00090, paras 5-6, Annexes 3-4; W04841, Transcript, 18 October 2021, pp.915-917.

¹⁷² See para.18.

¹⁷³ See paras 20-28.

revealing the identity or personal data of witnesses under protection in SC Proceedings and prior criminal proceedings in Kosovo.

F. MODES OF LIABILITY

69. Neither of the Requests substantiate challenges to the modes of liability as such and, for the reasons set out above, there is sufficient evidence under Rule 130 to conclude that the Accused directly committed crimes under all six counts charged. Noting that only one mode of liability is sufficient for the evidence to be capable of supporting a conviction,¹⁷⁴ if the charges are sustainable on direct commission then the Rule 130 Motions must be rejected on this basis. Should consideration of further modes of liability be considered necessary, the evidence, including that cited above, could support all pleaded modes of liability.¹⁷⁵

III. CONFIDENTIALITY

70. Pursuant to Rule 82(4), this filing is confidential in line with the classification of the Rule 130 Motions.

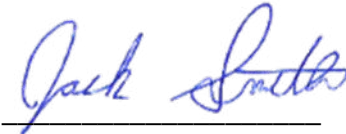
IV. RELIEF REQUESTED

71. For the foregoing reasons, the Rule 130 Motions should be dismissed.

Word count: **8589**

¹⁷⁴ See para.7.

¹⁷⁵ *Contra* Gucati Request, paras 30-32, 42-44, 64, 72, 82, 96.



Jack Smith

Specialist Prosecutor

Friday, 10 December 2021

At The Hague, the Netherlands