



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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## Contents

- I. INTRODUCTION ..... 2
- II. GENERAL EVIDENTIARY CONSIDERATIONS ..... 3
  - A. Standard of Proof ..... 3
  - B. Assessment of Evidence ..... 4
- III. STATEMENT OF FACTS ..... 6
  - A. The Accused’s Positions Prior to September 2020 ..... 6
  - B. First Press Conference and First Disclosure ..... 9
  - C. Events Following the First Press Conference ..... 15
  - D. Second Press Conference and Second Disclosure ..... 23
  - E. Events Following the Second Press Conference ..... 26
  - F. Third Press Conference and Third Disclosure ..... 36
  - G. Events Following the Third Press Conference ..... 41
  - H. Consequences of the Accused’s Actions ..... 48
- IV. ANALYSIS AND CASE THEORY ..... 51
  - A. The Testimony of SPO Witnesses ..... 51
  - B. The Testimony of the Accused ..... 53
  - C. The Testimony of Other Defence Witnesses ..... 56
  - D. The Authenticity of the Batches ..... 59
  - E. Full disclosure of the Batches is Not Required to Fairly Convict the Accused. 63
  - F. Obstructing Official Persons in Performing Official Duties ..... 65
  - G. Intimidation ..... 77
  - H. Retaliation ..... 84
  - I. Violating the Secrecy of Proceedings ..... 88
  - J. Individual Criminal Responsibility ..... 99
  - K. Defences ..... 107
  - L. Conclusion ..... 120
- V. SENTENCING ..... 121
  - A. Introduction ..... 121
  - B. Applicable Sentences ..... 123
  - C. The Crimes Committed by the Accused are Undoubtedly Grave ..... 126
  - D. There are Multiple Aggravating Factors ..... 137
  - E. There are No Mitigating Factors ..... 144
  - F. Appropriate Sentence ..... 147
  - G. There is No Need to Deviate from the Rule 159(6) Procedure ..... 153
- VI. CLASSIFICATION ..... 154
- VII. RELIEF SOUGHT ..... 154

## I. INTRODUCTION

1. Hysni Gucati and Nasim Haradinaj (collectively, the 'Accused') are responsible beyond reasonable doubt for all crimes charged in the Indictment.<sup>1</sup>
2. The factual allegations underlying the charges were not highly contested in the course of the trial as they are, in fact, unchallengeable. The Accused's criminal conduct is recorded on video, and the probative value of this evidence is compelling and unambiguous. The evidence provided by SPO witnesses complemented the evidentiary picture, only to be further reinforced by the account of Defence witnesses and - most notably - by the testimony of the Accused.
3. In this final brief,<sup>2</sup> the SPO sets out its position on general evidentiary considerations;<sup>3</sup> demonstrates how the facts proven at trial<sup>4</sup> fulfil all elements of the criminal offences under Counts 1 to 6;<sup>5</sup> and provides its submissions on the appropriate sentencing.<sup>6</sup>
4. The SPO has previously set out its position on the elements of crimes and modes of liability at the Trial Preparation Conference and two subsequent written

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<sup>1</sup> Lesser Redacted Indictment, KSC-BC-2020-07/F00251/A01/RED, 5 July 2021 (lesser redacted version notified 4 October 2021) ('Indictment').

<sup>2</sup> Filed in accordance with Rule 134(b) of the of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'); Article 45 of the Registry Practice Direction on Files and Filings before the Kosovo Specialist Chambers, KSC-BD-2015, 17 May 2019; Closing Evidence Order, KSC-BC-2020-07/F00553. Unless otherwise indicated, any subsequent reference to 'rule' or 'rules' is in reference to the Rules. For 'article' or 'articles', unless otherwise indicated these are articles of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). 'KCC article(s)' are from Code No.06/L-074 on Criminal Code of the Republic of Kosovo, 14 January 2019 ('KCC'), and 'KCPC article(s)' are from Code No.04/L-123 on Criminal Procedure Code, 13 December 2012 ('KCPC').

<sup>3</sup> Section II.

<sup>4</sup> Section III.

<sup>5</sup> Section IV.

<sup>6</sup> Section V.

submissions.<sup>7</sup> The SPO maintains its submissions – derived from the law set out in the Confirmation Decision<sup>8</sup> - in the present brief.

## II. GENERAL EVIDENTIARY CONSIDERATIONS

5. The Law and Rules, in particular Article 21(3) and Rules 139 and 140, explicitly regulate the standard of proof the Panel is to apply as well as a number of considerations in relation to the assessment of evidence for the purposes of judgement. These provisions broadly reflect the jurisprudence of other courts or tribunals which, as appropriate, constitute a relevant resource for the interpretation and application thereof.

### A. STANDARD OF PROOF

6. The guilt of the Accused must be proved beyond reasonable doubt.<sup>9</sup> Reasonable doubts must be grounded in reason.<sup>10</sup> Accordingly:

The reasonable doubt standard in criminal law cannot consist in imaginary or frivolous doubt based on empathy or prejudice. It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.<sup>11</sup>

7. The beyond reasonable doubt standard must be applied to the facts constituting the elements of the crime and of the mode of liability of the Accused as charged as well as to other facts on which the conviction depends.<sup>12</sup> The beyond

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<sup>7</sup> Prosecution submissions on the applicable law, KSC-BC-2020-07/F00341, 30 September 2021 ('Applicable Law Submissions'); Public Redacted Version of 'Prosecution consolidated response to requests to dismiss the charges', KSC-BC-2020/07/F00447, KSC-BC-2020-07/F00447/RED, 24 November 2021 (redacted version notified 10 December 2021) ('Rule 130 Submissions').

<sup>8</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED.

<sup>9</sup> See Article 21(3), Rules 140(1) and 158(3).

<sup>10</sup> *Ongwen* TJ, ICC-02/04-01/15-1762-Red, para.228.

<sup>10</sup> Rule 140(2).

<sup>11</sup> *Rutaganda* AJ, ICTR-96-3-A, para.488; See also *Ongwen* TJ, ICC-02/04-01/15-1762-Red, para.228.

<sup>11</sup> Rule 140(2).

<sup>12</sup> Rule 140(2); *Ongwen* TJ, ICC-02/04-01/15-1762-Red, para.227; *Ntaganda* AJ, ICC-01/04-02/06-2666-Red, para.37.

reasonable doubt requirement shall not be applied to individual pieces of evidence.<sup>13</sup>

8. In respect of circumstantial evidence, the standard of proof beyond reasonable doubt is only satisfied if the inference from that evidence is the only reasonable one that could be drawn from the evidence presented.<sup>14</sup> Circumstantial evidence shall be assessed with caution and reasoned findings shall be provided, in particular regarding the consistency and intrinsic coherence of such evidence, where a panel bases a conviction solely or to a decisive extent on such evidence.<sup>15</sup>

9. A conviction may not be based solely or to a decisive extent on: (a) the statement of a witness whom the Defence had no opportunity to examine; (b) the evidence of witnesses whose identity was not disclosed to the Defence; or (c) the evidence of a person under the age of 18 or a person whose judgment has been impaired, who, in the opinion of a panel, does not understand the meaning of the duty to speak the truth.<sup>16</sup> However, subject to these three instances, a panel shall not impose a legal requirement that corroboration is required in order to prove any crime or criminal conduct within the jurisdiction of the KSC.<sup>17</sup>

#### B. ASSESSMENT OF EVIDENCE

10. For the purposes of the trial judgment, the Panel cannot consider evidence declared inadmissible.<sup>18</sup> It must assess each piece of evidence in light of the entire body of evidence admitted before it at trial and carry out a holistic evaluation and weighing of all the evidence taken as a whole to establish whether or not the facts at issue have

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<sup>13</sup> Rule 140(2).

<sup>14</sup> Rule 140(3); *Ngirabatware* TJ, ICTR-99-54-T, para.60.

<sup>15</sup> Rule 139(5).

<sup>16</sup> Rule 140(4).

<sup>17</sup> Rule 139(3); *Taylor* AJ, SCSL-03-01-A, para.78.

<sup>18</sup> Rule 139(1).

been established.<sup>19</sup>

11. The means by which credibility is assessed differs according to the form and nature of the evidence before the trier of fact.<sup>20</sup> In assessing the credibility of documentary evidence, the Panel may consider, *inter alia*, the document's source, authenticity, content, and purported use.<sup>21</sup>

12. In determining the weight to be given to the testimony of a witness, a panel shall assess the credibility of the witness and the reliability of his or her testimony.<sup>22</sup>

13. The assessment of the appropriate weight and credibility to be accorded to the testimony of a witness should be made on a case-by-case basis.<sup>23</sup> In undertaking such assessment, the Panel may consider, *inter alia*: (i) the plausibility, coherence, detail and clarity of the witness' testimony; (ii) whether and to what extent the witness is, or is not, in a position to provide certain information as well as the basis of knowledge on which a particular statement is made; (iii) the individual circumstances of the witness, including his or her role in the events in question and any motivation to lie; and (iv) the witness' demeanour when testifying in court, willingness to respond to questions, spontaneity when responding, and responses during cross-examination.<sup>24</sup>

14. Inconsistencies in a piece of evidence do not *per se* require a panel to reject it as unreliable; a panel may accept parts of a piece of evidence and reject others.<sup>25</sup> Minor inconsistencies commonly occur in witness testimony without rendering the testimony unreliable; it is within the Panel's discretion to evaluate any such

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<sup>19</sup> Rule 139(2); *See also Ongwen TJ*, ICC-02/04-01/15-1762-Red, para.227; *Al Jadeed AJ*, STL-14-05/A/AP, para.56; *Ngirabatware TJ*, ICTR-99-54-T, para.50.

<sup>20</sup> *See Al Jadeed AJ*, STL-14-05/A/AP, fn.201; *Musema TJ*, ICTR-96-13-T, para.60.

<sup>21</sup> *See Musema TJ*, ICTR-96-13-T, paras 59-60, 63-67, 70-72.

<sup>22</sup> Rule 139(4).

<sup>23</sup> *Nyiramasuhuko et al. AJ*, ICTR-98-42-A, para.2971.

<sup>24</sup> *See Ongwen TJ*, ICC-02/04-01/15-1762-Red, paras 255-260; *Ngirabatware TJ*, ICTR-99-54-T, para.52; *Nyiramasuhuko et al. AJ*, ICTR-98-42-A, para.692; *Stanišić and Simatović TJ*, MICT-15-96-T, para.13.

<sup>25</sup> Rule 139(6); *See also Ngirabatware TJ*, ICTR-99-54-T, para.53.

inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.<sup>26</sup>

15. Just as for any other evidence presented, it is for the Panel to assess the reliability and probative value of expert reports and testimony.<sup>27</sup> The Panel should carefully scrutinise the sources relied upon by experts in making their conclusions.<sup>28</sup>

16. The credibility, reliability, and weight of evidence presented by an accused is to be assessed in the same manner as evidence presented by the SPO.<sup>29</sup>

17. The Panel may rely on evidence that falls outside of the temporal scope of the charges in certain circumstances, including: (i) to clarify a given context; (ii) to establish by inference the elements, in particular the *mens rea*, of criminal conduct occurring during the material period; or (iii) to demonstrate a deliberate pattern of conduct.<sup>30</sup>

### III. STATEMENT OF FACTS

18. When referring to ‘witnesses’ in the course of this brief, this term is used in the same way as defined in the Indictment.<sup>31</sup>

#### A. THE ACCUSED’S POSITIONS PRIOR TO SEPTEMBER 2020

19. Hysni Gucati (DW1240) and Nasim Haradinaj (DW1249) are former members

<sup>26</sup> *Ngirabatware* TJ, ICTR-99-54-T, para.53.

<sup>27</sup> *Nahimana et al.* AJ, ICTR-99-52-A, para.199.

<sup>28</sup> *Khieu Samphan and Nuon Chea* TJ, 002/19-09-2007/ECCC/TC, para.66.

<sup>29</sup> *Ntaganda* AJ, ICC-01/04-02/06-2666-Red, paras 13, 587.

<sup>30</sup> *Khieu Samphan and Nuon Chea* TJ, 002/19-09-2007/ECCC/TC, para.60; *Taylor* TJ, SCSL-03-01-T, para.101.

<sup>31</sup> See Indictment, KSC-BC-2020-07/F00251/A01/RED, para.4 ([a]ll references to witness(es) in this indictment should be understood to include any person(s) likely to have information about a crime, the perpetrator, or important circumstances relevant to SC Proceedings’). See also Prosecution submissions on the use of the term ‘witness’, KSC-BC-2020-07/F00281, 23 August 2021 (‘Witness Submissions’), para.3. Note that, in preparing her charts on the Batches, Zdenka Pumper (W04841) was working off a narrower understanding of the term ‘witness’ than how that term is used in the Indictment. Pumper, T.871-72, 1079-85.



of the Kosovo Liberation Army ('KLA')<sup>32</sup> and have held the position of Chairman and Vice-Chairman (and spokesperson) of the KLA War Veterans Association ('KLA WVA') since October 2017.<sup>33</sup>

20. The KLA WVA is a non-governmental organisation, aimed at supporting KLA veterans<sup>34</sup> - including by lobbying with Kosovo institutions for the adoption of measures favourable to the veterans' interests.<sup>35</sup> It counts over ten thousand members,<sup>36</sup> and it has a pyramidal structure, with local branches at the base, covering all towns and territory of Kosovo.<sup>37</sup> Representatives of local branches elect the Steering Committee, composed of 61 members,<sup>38</sup> and the Presidency, composed of six to around twenty-three members.<sup>39</sup> The Chairman, Vice-Chairmen and Secretary hold the apical positions within the KLA WVA Presidency.<sup>40</sup> Faton Klinaku is the KLA WVA Secretary.<sup>41</sup> Pren Marashi (DW1243), Metush Kryeziu (DW1244), and Cele Gashi (DW1245) are members of the KLA WVA Steering Council.<sup>42</sup>

21. Since the establishment of the KSC, the KLA WVA has challenged its legitimacy and opposed its mandate.<sup>43</sup> Prior to September 2020, both Accused publicly expressed

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<sup>32</sup> Gucati, 1D00003ET, paras 6-7; Gucati, T.2156-57; Haradinaj, 2D00001ET, paras 9-12; Haradinaj, T.2704-05.

<sup>33</sup> Gucati, 1D00003ET, para.8; Haradinaj, 2D00001ET, para.16; Haradinaj, T.2706-07; Kryeziu, 1D00008ET, para.7.

<sup>34</sup> Gucati, T.2158; Haradinaj, 2D00001ET, paras 9-12; Haradinaj, T.2969; Marashi, 1D00007ET, para.8.

<sup>35</sup> Gucati, 1D00003ET, para.9.

<sup>36</sup> Marashi, T.2528-2530.

<sup>37</sup> Kryeziu, 1D00008ET, paras 6-7; Marashi, 1D00007ET, paras 9-10; Marashi, T.2525-2526; Gucati, 1D00003ET, para.8; Gucati, T.2158. *See also*, Gucati, 1D0003ET, para.74.

<sup>38</sup> Marashi, 1D00007ET, para.9; Marashi, T.2526-2527; Cele Gashi, 1D00009ET, para.9.

<sup>39</sup> Marashi, T.2526-27, 2458, Gucati, T.2158, noting that he was elected as a member of the Presidency 2002; Kryeziu, 1D00008ET, para.7 (distinguishing between the KLA WVA 23-member Committee and the Presidency).

<sup>40</sup> Taibe Miftari, T.2472.

<sup>41</sup> Gucati, 1D00003ET, para.76; Kryeziu, 1D00008ET, para.7.

<sup>42</sup> Marashi, 1D00007ET, para.12; Cele Gashi, 1D00009ET, paras 9, 18; Kryeziu, 1D00008ET, para.7; Gucati, 1D00003ET, paras 77-78.

<sup>43</sup> Haradinaj, 2D00001ET, para.26; Haradinaj, T.2708-2709, 2715-2717; Marashi, 1D00007ET, paras 13-14; Marashi, T.2531, 2536-38; Kryeziu, 1D00008ET, para.9; P00028ET, p.2.



their opposition to the KSC/SPO and undertook initiatives to terminate or amend their mandate.<sup>44</sup> In December 2018 and January 2019, Gucati publicly called on persons not to respond to summonses by the KSC.<sup>45</sup>

22. The Accused have publicly stated, *inter alia*, that allegations that KLA members might have committed crimes in the course of the Kosovo conflict are fabrications, and that witnesses who state the contrary in trials against KLA members are liars or collaborators of Serbia.<sup>46</sup> [REDACTED], Haradinaj posted a message on his Facebook profile<sup>47</sup> [REDACTED]<sup>48</sup> - [REDACTED].<sup>49</sup> On 15 October 2019, commenting on social networks on the summons received by a witness, Gucati stated on his Facebook

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<sup>44</sup> Gucati, 1D0003ET, paras 57-58, 67-68, 70; Haradinaj, 2D00001ET, paras 17-33; Marashi, T.2538; P00037ET, pp.3-4; P00038ET, pp.1-2; P00043ET, pp.1-3, P00047ET, p.1; P00083, pp.SPOE00222205-SPOE00222207, SPOE00222236, SPOE00222243, SPOE00222251, SPOE00222288 (P00083-ET, pp. SPOE00222205-SPOE00222207-ET; SPOE00222236-ET, SPOE00222243-ET, SPOE00222251-ET, SPOE00222288-ET).

<sup>45</sup> P00040ET, p.1; P00041ET, p.1.

<sup>46</sup> P00036ET, p.1; P00037ET, p.5; P00083, pp.SPOE00222222-SPOE00222223; SPOE00222235, SPOE00222238-SPOE00222240, SPOE00222260-SPOE00222263, SPOE00222264-SPOE00222267 (P00083-ET, pp. pp.SPOE00222222-SPOE00222223-ET; SPOE00222235-ET, SPOE00222238-SPOE00222240-ET, SPOE00222260-SPOE00222263-ET, SPOE00222264-SPOE00222267-ET); P00040ET, p.2. *See also*, P00037ET, pp.1-2; Haradinaj, T.2889-90.

<sup>47</sup> *See* Haradinaj, T.2929, recognising the Facebook profile 'nasim.haradinaj' as his own. *See also* Haradinaj, T.2812 (acknowledging that he 'liked' or distributed pictures of the three disclosures which had first been published by the media) with, *e.g.*, P00061, p.SPOE00220754; P00128; P00124, pp.081917-081918 (P00124ET, pp.081917-081918); P00073; Pumper, T.1003-1004. *See also* the Facebook posts at P00084 (showing that the last update of Haradinaj's Facebook profile was on 24 September 2020, one day before his arrest); P00064, P00065, P00068, P00069, P00077, P00081 (displaying pictures of, or comments on, Haradinaj's personal life), P00060, P00066, P00067, P00070, P00072, P00074, P00075, P00078, P00079, P00080 (advertising Haradinaj's public appearances or commenting on KLA WVA events). The Facebook posts by Haradinaj and Gucati referred to in this brief were all uploaded as 'public', as denoted by the globe icon featured in such posts, which means they were publicly accessible.

<sup>48</sup> [REDACTED].

<sup>49</sup> [REDACTED].

profile<sup>50</sup> that '[n]o one can judge or smear the war of the Kosovo Liberation Army!'<sup>51</sup> The Accused referred to those who supported the KSC as anti-KLA collaborators, spies, and traitors.<sup>52</sup>

23. Both Accused have stated that they are against the KSC, based on the claims that it is 'mono-ethnic' and racist, collaborates with Serbia and the enemies of Kosovo,<sup>53</sup> and 'picked up its justice from the Milosevic apparatus'.<sup>54</sup>

#### B. FIRST PRESS CONFERENCE AND FIRST DISCLOSURE

24. On 7 September 2020, at about 09:50, a person unknown to the SPO and concealing his face delivered a box to the front office of the KLA WVA.<sup>55</sup> Speaking in the Albanian language, he told the KLA WVA receptionist, Taibe Miftari (DW1241), that the package was for the person who speaks on television, and left.<sup>56</sup> Taibe Miftari

<sup>50</sup> See Gucati, T.2286, T.2418-21, in relation to P00059, and T.2354-63, in relation to P00084, pp.SPOE00245660-63, SPOE00245664-67, recognising the Facebook profile 'hisni.gucati' as his own; Gucati, T.2434, confirming that posts on his Facebook account have been published by himself, or with his authorisation, and that he would have immediately taken down a post published without his authorisation. See also the Facebook posts at P00084, pp.SPOE00245663-65 (showing that the last update of Gucati's Facebook profile from its user was on 24 September 2020, one day before his arrest); P00083, SPOE00222274-75, SPOE00222287, P00084, p.SPOE00245666-67 (displaying pictures of, or comments on, Gucati's personal life), P00083, p.SPOE00222245-46, SPOE00222250 (commenting on KLA WVA events); P00083, p. SPOE00222247 (posting media articles relating to the facts alleged in the Indictment). See also Taibe Miftari, T.2470-2471.

<sup>51</sup> P00083, pp.SPOE00222241-SPOE00222242, (P00083ET, pp.SPOE00222241-SPOE00222242-ET).

<sup>52</sup> P00037ET, pp.4-5, 16-17; P00037, min.01:03:57-01:05:30, 01:44:49-01:45:23; P00083, pp. SPOE00222219, SPOE00222236-SPOE00222237, SPOE00222264-SPOE00222268 (P00083-ET, pp. SPOE00222219-ET, SPOE00222236-SPOE00222237-ET; SPOE00222264-SPOE00222268-ET).

<sup>53</sup> Gucati, T.2204-05, 2209-10, 2263-64; Haradinaj, 2D00001ET, paras 21, 32-33, 132-34; Haradinaj, 2735, 2815-16, 2844, 2858-64, 2875-79, 2944, 2956-57; P00083, pp.SPOE00222233-SPOE00222235, SPOE00222286 (P00083-ET, pp. SPOE00222233-SPOE00222235-ET, SPOE00222286-ET); P00037ET, pp.4-5, 16-17; P00037, min.01:03:57-01:05:30, 01:44:49-01:45:23; P00038ET, pp.1-2, P00038 min.28:21-28:58, 36:39-37:51.

<sup>54</sup> Haradinaj, T.2875-79.

<sup>55</sup> 1D00019; 1D00020; 1D00021; 1D00022; Taibe Miftari, 1D00004ET, paras 3-4; P00001ET, p.1; P00001, min.00:00:01-00:01:22.

<sup>56</sup> Taibe Miftari, 1D00004ET, paras 5-7; Taibe Miftari T.2454; Haradinaj testified to have learnt from Taibe Miftari that the unknown persons said that he would bring more documents; Haradinaj, T.2741. See also, Gucati, T.2164-65, T.2212.

informed Hysni Gucati, Nasim Haradinaj, Faton Klinaku, and Cele Gashi, who were in Gucati's office.<sup>57</sup> The Accused and other members of the KLA WVA Presidency looked at the images of the delivery on the KLA WVA CCTV.<sup>58</sup> They then brought the box into Gucati's office and opened it.<sup>59</sup>

25. The Accused and the other KLA WVA members realised that the package contained documents ('First Disclosure') and inspected them.<sup>60</sup> The Accused and the other KLA WVA members put the piles of documents on a table, compared them, and verified that they were what appeared to be four copies of documents,<sup>61</sup> of about 1000 pages each,<sup>62</sup> written in the English and Serbian languages<sup>63</sup> and featuring the 'logo of the KSC'.<sup>64</sup> The Accused, both understanding the Serbian language and some English,<sup>65</sup> reviewed the documents.<sup>66</sup> They realised that the First Disclosure contained requests for cooperation in criminal investigations addressed by the SITF to Serbian authorities, including requests to interview witnesses whose names and personal details were specified in the documents.<sup>67</sup> Haradinaj noted many materials that read 'top secret'.<sup>68</sup> He considered the arrival of these documents to be an extraordinary

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<sup>57</sup> Taibe Miftari, T.2454; Gucati, T.2165; Haradinaj, 2D00001ET, paras 47-48; Haradinaj, T.2720-22, Cele Gashi, 1D00009ET, para.10.

<sup>58</sup> Taibe Miftari, 1D00004ET, para.9; Taibe Miftari, T.2455, 2461. *But see, e.g.*, Cele Gashi, 1D00009ET, not recalling this point.

<sup>59</sup> Gucati, T.2165-66, 2168; Haradinaj, 2D00001ET, paras 49-50; Haradinaj, T.2721-23; Cele Gashi, 1D00009ET, para.11; Taibe Miftari, 1D00004ET, paras 10-12.

<sup>60</sup> Gucati, T.2172; Haradinaj, 2723-24, Cele Gashi, 1D00009ET, para.14; Cele Gashi, T.2583 (estimating to have reviewed 70 to 100 pages).

<sup>61</sup> Gucati, T.2172, 2250-51, 2254-55; Haradinaj, 2D00001ET, para.51; Haradinaj, 2723-24.

<sup>62</sup> Haradinaj, 2D00001ET, para.53; Haradinaj, T.2724.

<sup>63</sup> Gucati, T.2169. *But see* Haradinaj, T.2724, referring to the English, Serbian and Albanian languages.

<sup>64</sup> Gucati, T.2169.

<sup>65</sup> Gucati, T.2169. *See also*, Haradinaj, 2D00001ET, para.53.

<sup>66</sup> P00024ET, pp.7-8; P00024, min.00:13:22-00:13:47, 00:14:24-00:15:51; P00021ET, pp.4-5; P00021, min.00:07:17-00:11:53; Cele Gashi, 1D00009ET, para.14.

<sup>67</sup> Gucati, 1D00003ET, para.14; Gucati, T.2175, 2241-43, 2255-57, 2259, 2264-66; Haradinaj, T.2731, 2962-2963; Cele Gashi, 1D00009ET, para.13.

<sup>68</sup> Haradinaj, T.2941.

event.<sup>69</sup>

26. Gucati noted documents in Cyrillic coming from the Serbian prosecution office, and looked at the documents with a sufficient degree of attention as to recognise logos and stamps with the Serbian crests.<sup>70</sup> Gucati testified that he did not read in detail the statements of Serbian, Turkish and Roma individuals, as these were, in his opinion, 'very minor witnesses'.<sup>71</sup> In his testimony, Gucati recalled specific sentences from the documents he read.<sup>72</sup> Gucati had never seen any such documents in the public domain and considered that it was 'a dream' that KSC documents would end up in the KLA WVA offices.<sup>73</sup> Nasim Haradinaj made notes about some of the information contained in the First Disclosure.<sup>74</sup>

27. Upon reviewing the documents, Hysni Gucati, Nasim Haradinaj, Faton Klinaku and other members of the Presidency held a meeting at which they decided to call a press conference.<sup>75</sup> The Accused and Cele Gashi testified that they decided to call a press conference, *inter alia*, to inform the public of the SITF/SPO cooperation with Serbian authorities as it would undermine the KSC.<sup>76</sup> As recalled by the Accused themselves, the cooperation of the SITF and the SPO with Serbian authorities was publicly known well before 7 September 2020.<sup>77</sup>

28. Faton Klinaku convened the press conference via email and social networks,<sup>78</sup> upon Gucati's instructions.<sup>79</sup> A few hours later, the Accused held a press conference

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<sup>69</sup> Haradinaj, 2D00001ET, para.54.

<sup>70</sup> P00009; P00009ET, p.6; Gucati, T.2246-48.

<sup>71</sup> Gucati, T.2257-58. Gucati was unable to explain why they were 'very minor witnesses'; Gucati, T.2258.

<sup>72</sup> Gucati, T.2266.

<sup>73</sup> Gucati, T.2288-89.

<sup>74</sup> Haradinaj, T.2731.

<sup>75</sup> Gucati, 1D00003ET, para.17; Gucati, T.2170; Haradinaj, T.2727, 2746.

<sup>76</sup> Cele Gashi, 1D00009ET, para.15; Gucati, 1D00003ET, paras 17, 68,70; Haradinaj, 2D00001ET, para.52.

<sup>77</sup> Haradinaj, T.2711, 2713-14; P00001ET, p.4. *See also, e.g.,* C00001, p.6.

<sup>78</sup> Gucati, T.2170; Haradinaj, 2D00001ET, para.56; Haradinaj, T.2727. *See also* Berisha, T.1515-16.

<sup>79</sup> Gucati, 1D00003ET, para.18.

(‘First Press Conference’),<sup>80</sup> which was attended by about twenty persons.<sup>81</sup> The First Press Conference was broadcasted live.<sup>82</sup>

29. In the course of the First Press Conference, Gucati stated that the KLA WVA had news ‘for the media, the citizens and everybody else, including Kosovo politicians and the Kosovo Parliament’, and announced that a package arrived at the KLA WVA premises that morning with ‘around 4,000 files of the Specialist Chambers.’<sup>83</sup> Gucati suggested that those in attendance could focus their cameras on the documents<sup>84</sup> which were laid out on a table.<sup>85</sup> He then handed the floor over to Haradinaj, noting that Haradinaj had analysed the documents together with Faton Klinaku and others and would explain everything.<sup>86</sup> Faton Klinaku and Cele Gashi sat by the Accused’s side.<sup>87</sup>

30. Haradinaj stated that the KLA WVA was pleasantly surprised by the receipt of the documents because they confirmed that those who voted for the creation of the KSC were scoundrels, renegades, and the most harmful people who do not wish Kosovo well, as they legitimized ‘a mono-ethnic Court, a Court managed by foreigners’ who ‘have bitten the bait of Serbia’.<sup>88</sup> He stated that four copies of the documents, which numbered about 1,000-1,400 pages each, were being made available at the press conference.<sup>89</sup>

<sup>80</sup> P00001ET, p.1; Haradinaj, 2D00001ET, para.55. *See also* P00051; P00051ET.

<sup>81</sup> Haradinaj, 2D00001ET, para.57; Haradinaj, T.2730.

<sup>82</sup> Gucati, T.2173; Haradinaj, 2D00001ET, para.55.

<sup>83</sup> P00001ET, p.1; P00001, min.00:00:01-00:01:22.

<sup>84</sup> P00001; P00051.

<sup>85</sup> P00001; P00051; Gucati, T.2171; Haradinaj, 2D00001ET, para.57; Haradinaj, T.2732.

<sup>86</sup> P00001ET, p.1; P00001, min.00:00:01-00:06:30. P00001ET, p.1; P00001, min.00:00:01-00:06:30; *See also* P00001ET, pp.5-8; P00001, min.00:13:21-00:14:32, 00:15:53-00:15:54 where Haradinaj and Gucati also invited those in attendance to focus their cameras on the First Disclosure.

<sup>87</sup> P00001, min00:09:21; 00:14:29; Pumper, T.1005.

<sup>88</sup> P00001ET, pp.1-2; P00001, min.00:01:26-00:06:30.

<sup>89</sup> P00001ET, pp.2-3; P00001, min.00:01:26-00:06:30; *See also* P00017ET, pp.2-3; P00017, min.00:02:10-00:06:38; P00017ET, pp.6-8; P00017, min.00:14:21-00:17:28; P00060, p.SPOE00220748; P00060ET,

31. 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', noting that all the 'secret data' about the witnesses, including names and surnames of Albanians, Roma and Serbs, the date when every person was interviewed, and the interview location is included in the documents (which also contain statements).<sup>90</sup>

32. In particular, pointing to the pile of documents in front of him and reading names and details from a notebook, Haradinaj stated that: (i) the First Disclosure showed that 'Vladimir Vuckovic', [REDACTED] had cooperated with the SPO;<sup>91</sup> (ii) the First Disclosure contained a summons for [REDACTED], noting the location where [REDACTED] stated that he lives;<sup>92</sup> (iii) [REDACTED], had been contacted and had cooperated, noting the location where [REDACTED] now lived according to the First Disclosure;<sup>93</sup> (iv) there were documents referring to [REDACTED], providing his place of residence;<sup>94</sup> (v) [REDACTED] had been spoken to, providing information as to his place of employment;<sup>95</sup> and (vi) [REDACTED] had cooperated, noting his former occupation.<sup>96</sup> Haradinaj also noted that, in the First Disclosure, one could see the names of Albanians who had been summonsed.<sup>97</sup>

33. Haradinaj referred to the documents as 'confidential' and 'top secret' and asserted that the witnesses mentioned in the documents must now know 'that they are known names and that no one is unknown' because the exact location, summons, and statements given are all shown in the documents.<sup>98</sup> He further mentioned that

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p.SPOE00220748; Gucati, T.2172. But *see also*, Gucati, T.2171, recalling that the First Disclosure consisted of about 9.000 pages.

<sup>90</sup> P00001ET, p.2; P00001, min.00:01:26-00:06:30. *See also*, Gucati, T.2379-2381.

<sup>91</sup> P00001ET, p.2; P00001, min.00:01:26-00:06:30.

<sup>92</sup> P00001ET, p.2; P00001, min.00:01:26-00:06:30.

<sup>93</sup> P00001ET, p.2; P00001, min.00:01:26-00:06:30; *See also* P00086, para.10.

<sup>94</sup> P00001ET, p.2; P00001, min.00:01:26-00:06:30; *See also* P00086, para.10.

<sup>95</sup> P00001ET, p.2; P00001, min.00:01:26-00:06:30; *See also* P00086, para.10.

<sup>96</sup> P00001ET, p.2; P00001, min.00:01:26-00:06:30; *See also* P00086, para.10.

<sup>97</sup> P00001ET, pp.2-3; P00001, min.00:01:26-00:06:30.

<sup>98</sup> P00001ET, pp.3-4; P00001, min.00:06:31-00:09:09.



statements had been taken in various locations in Serbia ‘apart from those taken in other places, in the institutions of this Court’.<sup>99</sup>

34. Gucati confirmed that information on witnesses was included in the First Disclosure by pointing to one of the documents and stating that it concerned information received in 2013 ‘about witnesses, who were summoned and taken to Beograd, all of them’.<sup>100</sup> Later in the course of the First Press Conference, Haradinaj underscored once again that the First Disclosure included witness statements and personal details by pointing at the documents and observing: ‘[s]o there are statements here, there is the name, the surname of the person, the place where he lived, the place where he currently lives, telephone numbers here and there’.<sup>101</sup> Haradinaj continued: ‘[h]ow can one guarantee protection to the witnesses when everyone can read these today or how can one be sure that these are not distributed in the street by the person who brought these to us? Or we will reveal them. Why should we not reveal them? We are making these public so it is known’.<sup>102</sup> He further added that he was not bothered about ‘witnesses of The Hague’, and that he would have loved to make them all public.<sup>103</sup> Referring to himself and other members of the KLA WVA, Haradinaj stated that ‘[w]e do have a copy, though, and we will protect it in the name of God, and we will give you as many copies as you want. You can read as many names as you want in here’.<sup>104</sup>

35. Haradinaj also said that the KLA WVA would send a copy of the First Disclosure to the ‘scoundrels’ in Parliament so that their children would know what they voted for,<sup>105</sup> and urged those in attendance to take a copy of the documents,

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<sup>99</sup> P00001ET, p.3; P00001, min.00:06:31-00:09:09.

<sup>100</sup> P00001ET, pp.3-4; P00001, min.00:09:09-00:09:20.

<sup>101</sup> P00001ET, p.5; P00001, min.00:09:43-00:11:21.

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

<sup>103</sup> P00001ET, p.5; P00001, min.00:11:27-00:13:16.

<sup>104</sup> P00001ET, p.5; P00001, min.00:11:27-00:13:16.

<sup>105</sup> P00001ET, p.3; P00001, min.00:06:31-00:09:09.



noting that he would give them everything.<sup>106</sup> Both Gucati and Haradinaj showed various pages of the First Disclosure to the cameras and Haradinaj encouraged those in attendance to 'look at the names. Look at the statements!'<sup>107</sup>

36. At the end of the First Press Conference, the attendants approached the speakers, took pictures of the documents and recorded them on cameras.<sup>108</sup> Halil Berisha (W04866), a journalist from the media outlet Gazeta Infokus,<sup>109</sup> asked Gucati and Haradinaj if he could take a copy of the documents.<sup>110</sup> Haradinaj answered that Berisha could take the documents and that, as there were not enough copies for all media outlets, he should share the documents with other journalists, if asked.<sup>111</sup> Berisha took a copy of the documents, consisting of about 1000 pages.<sup>112</sup> Other media outlets took two more copies of the documents made available by the Accused.<sup>113</sup> Whoever wanted to take documents was free to do so.<sup>114</sup> The Accused undertook no steps to expunge reference to witness identities in the material they distributed,<sup>115</sup> despite Gucati's understanding that 'you need to protect the privacy of everyone',<sup>116</sup> that witness testimonies are important in criminal proceedings,<sup>117</sup> and that witness identities were to be protected.<sup>118</sup>

### C. EVENTS FOLLOWING THE FIRST PRESS CONFERENCE

37. Soon after the First Press Conference ended, certain media houses contacted

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<sup>106</sup> P00001ET, p.6; P00001, min.00:13:21-00:14:41.

<sup>107</sup> P00001ET, p.8; P00001, min.00:16:02-00:16:11.

<sup>108</sup> Berisha, T.1519-20.

<sup>109</sup> Berisha, T.1513.

<sup>110</sup> Berisha, T.1520. *See also*, Haradinaj, 2D00001ET, para.59, 64, 76; Haradinaj, T.2732.

<sup>111</sup> Berisha, T.1520-22; Haradinaj, T.2732.

<sup>112</sup> Berisha, T.1520-21.

<sup>113</sup> Gucati, T.2183, 2390-91; Haradinaj, 2732.

<sup>114</sup> Gucati, T.2370, 2382.

<sup>115</sup> Gucati, T.2373-74.

<sup>116</sup> Gucati, T.2370-72.

<sup>117</sup> Gucati, T.2373-74.

<sup>118</sup> Gucati, T.2374.

the SPO with questions concerning the First Disclosure, noting that, according to the KLA WVA, it emanated from the KSC and included names of protected witnesses.<sup>119</sup> A number of news articles and videos concerning the First Disclosure, referring extensively to its content and reproducing photographs thereof, appeared online.<sup>120</sup> These articles reported names and other personal details of at least three witnesses, all mentioned in the First Disclosure.<sup>121</sup> Haradinaj posted links to such articles and videos on his Facebook profile.<sup>122</sup>

38. During a television programme which aired hours after the First Press Conference, Gucati acknowledged that he and others had not been able to go through all the documents, but they had looked at them and had given a copy of the documents to KosovaPress and some of the media.<sup>123</sup> Gucati showed one of the requests for cooperation included in the First Disclosure and published by the press from the screen of his mobile telephone to the television camera, and reported its content.<sup>124</sup>

39. Gucati stated that a wide range of people were named in the documents, including Serbs, Roma, and Turks, and referred to the date when an interview with an Albanian witness<sup>125</sup> was held in [REDACTED], and to others interviewed in

<sup>119</sup> P00098, paras 2-5; P00101; P00089, paras 14-20.

<sup>120</sup> See P00125, pp.081364-081368 (P00125ET.2); P00125, pp.081361-081363 (P00125ET.1); P00124, pp.081915-081916 (P00124ET, pp.081915-081916); P00124, pp.081917-081918 (P00124ET, pp.081917-081918); P00124, p.081919 (P00124ET, p.081919); P00125, pp.081369-081370 (P00125ET.3); See also P00086, paras 13-18; P00123ET, p.1; P00123; Pumper, T.990-997; P00093-P00097.

<sup>121</sup> P00086, paras 16-17, referring to P00124, pp.081915-081916 (P00124ET, pp.081915-081916), pp.081917-081919 (P00124ET, pp.081917-081918); Pumper, T1001-1002; P00093, P00095, P00097. See also, P00090, Annex 1, pp.095538 (row 5), 095574 (row 4), 095572 (row 11).

<sup>122</sup> P00061, p.SPOE00220754; P00073 (P00073ET); P00128; P00124, pp.081917-081918 (P00124ET, pp.081917-081918); P00061, p.SPOE00220755; P00074 (P00074ET); P00060, p.SPOE00220729 (P00060ET, p.SPOE00220729); P00123ET, p.1; P00123; Pumper, T.989, 1003-04.

<sup>123</sup> P00009ET, pp.6-13. On 11 September 2020, during a Skype interview broadcast on a television programme, Haradinaj stated that Kosovo Press and many other media outlets took copies of the documents, P00021ET, pp.3-4; P00021, min.00:07:17-00:09:17.

<sup>124</sup> P00009ET, pp.5-6; P00009, min.00:59:42-01:01:00. See also Gucati, 1D00003ET, para.22.

<sup>125</sup> P00009ET, p.7. See, contra, Gucati, T.2259-62, misrepresenting his own recorded words in order to deny that he publicly confirmed that statements of Albanian witnesses were included in the First Disclosure.

[REDACTED] in 2015 and in [REDACTED].<sup>126</sup>

40. Gucati stated that he found it ‘surprising’ to see, in the files, that several people whom he and others trusted had collaborated with the KSC, adding that he believed that some of the witnesses did so in order to obtain asylum in the West.<sup>127</sup> Gucati labelled those identified in the First Disclosure as having cooperated with the KSC as ‘traitor[s]’ who lie, and ‘Albanian-speaker[s]’,<sup>128</sup> whom he equated with traitors.<sup>129</sup> During testimony, Gucati had no explanation why he stated that witnesses mentioned in Batch 1 are liars, other than that it is not possible that the KLA committed any crimes.<sup>130</sup>

41. During this televised programme, when he was asked whether it was a good idea for him to have published the documents, Gucati stated he believed that it was.<sup>131</sup> When the presenter noted that things could happen because the documents contained names, Gucati responded that this ‘could happen’.<sup>132</sup>

42. On 7 September 2020, Pren Marashi stated on social networks that, after the files, the KSC will work based on the statements of ‘public protected witnesses’.<sup>133</sup> On 8 September 2020, Marashi referred to SPO witnesses as spies.<sup>134</sup>

43. On 8 September 2020, pursuant to a KSC order,<sup>135</sup> the SPO seized documents forming part of the First Disclosure (‘Batch 1’).<sup>136</sup> The First Order refers, *inter alia*, to

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<sup>126</sup> P00009ET, pp.6-7; P00009, min.01:01:00-01:03:52. *See also*, Gucati, T.2179, 2210.

<sup>127</sup> P00009ET, pp.9-12; P00009, min.01:05:00-01:09:36; *See also* P00044ET, p.1; P00044 min.08:01-08:54.

<sup>128</sup> P00009ET, pp.6-7, 12-13; P00009, min.01:01:00-01:02:33, 01:09:36-01:10:49; *See also* P00044ET, p.1; P00044, min.08:01-08:54.

<sup>129</sup> P00009ET, pp.12-13; P00009, min.01:09:36-01:10:49.

<sup>130</sup> Gucati, T.2368-71.

<sup>131</sup> P00009ET, p.8; P00009, min.01:03:52-01:05:00.

<sup>132</sup> P00009ET, pp.8-9; P00009, min.01:03:52-01:05:00.

<sup>133</sup> Marashi, T.2535-37.

<sup>134</sup> Marashi, T.2538-40.

<sup>135</sup> P00052; P00052AT (‘First Order’).

<sup>136</sup> P00092; Moberg, T.1930; P00056. *See also* Marashi, 1D00007ET, paras 15-20; Taibe Miftari, T.2456.

the sensitive nature of the documents and the concrete risk that their further dissemination could compromise witness security and the integrity of investigations.<sup>137</sup> It prohibits copying and further disseminating the documents and their content.<sup>138</sup>

44. SPO Operational Security Officer Daniel Moberg (W04876) attended the KLA WVA premises in Prishtinë/Priština where he served the First Order on Faton Klinaku.<sup>139</sup> The relevant excerpts of the First Order were read out to Klinaku in English and translated into Albanian, and a copy of the First Order was provided to him.<sup>140</sup> Faton Klinaku, Cele Gashi and Marashi initially refused handing over the documents, based on a previous KLA WVA decision not to cooperate with the KSC/SPO.<sup>141</sup> Klinaku then phoned Gucati, who had left for holidays that day,<sup>142</sup> and Gucati authorized the handover.<sup>143</sup> Klinaku told Gucati that an order had arrived from the SPO to hand over the documents.<sup>144</sup> Gucati received a picture of the handover form from Klinaku.<sup>145</sup>

45. During the seizure, Klinaku noted that the documents had been received by the KLA WVA the previous day from an unknown person, and that three copies of these documents had been distributed by the KLA WVA to the media, specifically to KosovaPress, Gazeta Infokus, and T7.<sup>146</sup>

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<sup>137</sup> P00052, para.21; P00052AT, para.21.

<sup>138</sup> P00052, para.22(c); P00052AT, para.22(c).

<sup>139</sup> Moberg, T.1930; P00056. Batch 1 also contains a handwritten note in Albanian describing the handover of Batch 1 to the SPO on 8 September 2020 and referring to Faton Klinaku, Secretary, as the person who handed the documents over, P00057 (P00057ET); P00089, paras 8-10; Pumper, T.855-856.

<sup>140</sup> P00092, pp.083988-083989, paras 3-6. *See also*, Marashi, T.2534; Cele Gashi, 1D00009ET, para.21; Cele Gashi, T.2602.

<sup>141</sup> Cele Gashi, 1D00009ET, para.20; Cele Gashi, T.2602; Marashi, 1D00007ET, para.19; Marashi, T.2534.

<sup>142</sup> Gucati, 1D00003ET, para.27; Gucati, T.2181-2182. *See also*, Marashi, 1D00007ET, para.20.

<sup>143</sup> Gucati, T.2182-83; Marashi, T.2534-35.

<sup>144</sup> Gucati, T.2393-94, contradicting Gucati, T.2182.

<sup>145</sup> Gucati, T.2182.

<sup>146</sup> P00092, para.7.

46. Batch 1 includes confidential requests for assistance in criminal investigations ('Requests') addressed by the SITF to Serbian authorities between 2013 and 2015, as well as documents of the Serbian authorities, including responses to the Requests ('Serbian Documents'). Batch 1 includes internal reports and correspondence of Serbian authorities,<sup>147</sup> and both the Requests and Serbian Documents pertain to confidential SITF/SPO investigations and criminal proceedings.<sup>148</sup> All Requests included in Batch 1, with only a few exceptions, have a correspondent in the SPO internal databases.<sup>149</sup> At the time of the seizure, pages of Batch 1 did not display the SPO Evidence Registration Numbers ('ERN') found in the corresponding versions identified in the internal databases.<sup>150</sup>

47. Of the over one hundred Requests included in Batch 1, the vast majority contain annexes which are expressly indicated to be confidential.<sup>151</sup> The confidential annexes list hundreds of names of witnesses and potential witnesses who have never been publicly identified by the SITF/SPO, and in relation to whom the SITF sought to obtain from the competent Serbian authorities: (i) assistance in order to conduct witness interviews; and/or (ii) the record of previous witness statements and testimonies.<sup>152</sup>

48. Batch 1 contains thirty-five statements or parts of statements of victims and witnesses that were taken by Serbian authorities, which include personal data and detailed information about serious crimes.<sup>153</sup>

49. The names, last known addresses, and telephone numbers of [REDACTED] –

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<sup>147</sup> P00088, p.091791, para.8; P00090, paras 3-4, Annex 1.

<sup>148</sup> P00086, para.7; P00088, pp.091791-091792, paras 6-12; P00090, paras 3-4, Annex 1; Pumper, T.860-861, 1471.

<sup>149</sup> Pumper, T.869, 876-79, 1068-69; 1470.

<sup>150</sup> Pumper, T.867-69. *See also*, Pumper, T.848-49.

<sup>151</sup> P00086, paras 8-9; P00087; P00090, paras 3-4, Annexes 1-2. *See also*, Pumper, T.869-870, 1077, 1199-1200.

<sup>152</sup> P00086, paras 9-12; P00090, paras 3-4, Annex 1.

<sup>153</sup> P00088, p.091792, para.12; P00090, paras 3-4, Annex 1.

whose names were mentioned in the course of the First Press Conference - are included in confidential annexes to various Requests.<sup>154</sup>

50. Within hours of the seizure of Batch 1, Klinaku, Marashi, and Cele Gashi informed Haradinaj, who had also left for holidays,<sup>155</sup> of the seizure.<sup>156</sup> Haradinaj posted on his Facebook profile a copy of the document Klinaku signed acknowledging the seizure.<sup>157</sup> On 9 September 2020, Haradinaj posted an image of the certified copy of the First Order, then still classified as Strictly Confidential and *Ex Parte*, on his Facebook profile.<sup>158</sup>

51. During a television programme which aired on 8 September 2020, Klinaku acknowledged that he and others told SPO investigators that they handed over three copies to the media of the documents delivered by the unidentified person and added that they had told the media that they could make multiple copies so that everybody received them because, as far as he and others were concerned, the KSC does not exist and they never accepted it.<sup>159</sup>

52. On 8 September 2020, Haradinaj posted CCTV footage to his Facebook profile, indicating that the footage showed the delivery of documents to the KLA WVA and their seizure by the SPO, and commenting that the KLA WVA welcomed both sides any time;<sup>160</sup> Haradinaj's post was shared by Gucati.<sup>161</sup> In a comment beneath his own Facebook post, Haradinaj, referring to the First Disclosure, stated that 'they can no

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<sup>154</sup> P00086, para.10; P00087, p.1; Pumper, T.884-885.

<sup>155</sup> Haradinaj, 2D00001ET, para.65; Haradinaj, 2736-2738.

<sup>156</sup> Haradinaj, 2D00001, para.87; Marashi, 1D00007ET, para.20; Haradinaj, 2D00001ET, paras 66, 69; Haradinaj, T.2738, 2927-2928.

<sup>157</sup> P00078 (P00078ET); P00079 (P00079ET).

<sup>158</sup> P00083, p.SPOE00222202. *See also*, Haradinaj, T.2929.

<sup>159</sup> P00013ET, p.1; P00013, min.00:12:22-00:12:49.

<sup>160</sup> P00080 (P00080ET). *See also*, Haradinaj, T.2773, confirming that the KLA WVA published the CCTV footage.

<sup>161</sup> P00083, p.SPOE00222250 (P00083ET, p.SPOE00222250).



longer make them disappear'.<sup>162</sup> He noted that three more copies had been distributed, that those copies had been distributed to another ten places, and that it is the task of those ten places to further distribute another three copies each.<sup>163</sup>

53. On 9 September 2020, the SPO received an email from Berisha,<sup>164</sup> noting that, during the First Press Conference, Gazeta Infokus, among other media outlets, was given a copy of documents forming part of the First Disclosure.<sup>165</sup> Later that day, SPO staff members received these documents from Gazeta Infokus ('Batch 4').<sup>166</sup>

54. Batch 4 consists of 930 pages,<sup>167</sup> largely overlapping with Batch 1.<sup>168</sup> All documents included in Batch 4 are included in Batch 1 except for a few Requests and Serbian Documents which are not contained in Batch 1<sup>169</sup> and a two-page template unrelated to the other documents in Batch 4.<sup>170</sup> In certain instances, corresponding documents in Batch 1 and 4 have different printing qualities, which make one version more legible than the other.<sup>171</sup>

55. One of the emails sent by media houses to the SPO following the First Press Conference included as attachments, *inter alia*, four photographs of documents contained in Batch 1, and two photographs of documents which only appear in Batch 4.<sup>172</sup> The documents in these six attached photographs contain Requests and

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<sup>162</sup> P00080 (P00080ET).

<sup>163</sup> P00080 (P00080ET).

<sup>164</sup> P00098, paras 5-6, p.091917; P00099, p.083986, para.1.

<sup>165</sup> P00098, paras 5-6, p.091917; P00099, p.083986, para.1.

<sup>166</sup> P00099; 078569-078569; P00089, para.5. Later that day, Haradinaj became aware that the SPO obtained files from this media house, *see* P00082 (P00082ET).

<sup>167</sup> P00089, para.7.

<sup>168</sup> Pumper, T.893; P00091, Annex 1.

<sup>169</sup> P00089, paras 11-12; Pumper, T.893-95; P00091, Annex 1. *See also*, Pumper, T.895-96.

<sup>170</sup> P00089, para.13. *See also* P00089, paras 8-10; P000087, highlighting the few documents of Batch 1 that are not contained in Batch 4, including the handwritten note describing the handover of Batch 1 to the SPO on 8 September 2020 (P00057; P00057ET).

<sup>171</sup> Pumper, T.894. *See, e.g.*, P00091, Annex 1, pp.095607, row 2, 095619, row 3, row 6, 095621, rows 1-2, rows 5-8, 095625 row 2, 095648, row 2.

<sup>172</sup> P00101; P00089, paras 14-20; Pumper, T.903-04. *See also* P00102.



documents from Serbian authorities referring, *inter alia*, to witness interviews; two of the documents are marked as strictly confidential while two of the documents refer to other documents described as confidential.<sup>173</sup>

56. During a television programme which aired on 9 September 2020,<sup>174</sup> Haradinaj stated that the KLA WVA received four copies of the First Disclosure and claimed that he and others looked through the documents over a period of four hours.<sup>175</sup> He stated that he and others had provided copies of the First Disclosure to journalists who further distributed other copies to other members of the press, adding that he thought that these files could not be kept secret in Kosovo anymore.<sup>176</sup> He stated: 'we had not hidden away what we had received. We had made them public through the media', and that nobody could stop the copies of the First Disclosure from becoming public now.<sup>177</sup>

57. Haradinaj stated that among the documents in the First Disclosure was information from the '[REDACTED]'.<sup>178</sup> He noted that the First Disclosure included documents with requests to Serbia to provide the location of witnesses.<sup>179</sup>

58. In what would become a series of entreaties welcoming the delivery of future documents, Haradinaj stated that if he were to receive this kind of material again, he would make it public and that even if the KLA WVA were to violate a law, it was the KLA WVA's duty to do everything to show that the KSC is not correct because it is

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<sup>173</sup> P00089, paras 14-20 (P00091).

<sup>174</sup> Later that day, Haradinaj posted a link to this interview on his Facebook profile, *see* P00060, p.SPOE00220752 (P00060ET, p.SPOE00220752).

<sup>175</sup> P00024ET, p.7; P00024, min.00:13:10-00:13:47, 00:14:24-00:15:51; *See also* P00082 (P00082ET).

<sup>176</sup> P00024ET, pp.5-6; P00024, min.00:07:42-00:08:04, 00:08:42-00:08:58, 00:10:15-00:11:29.

<sup>177</sup> P00024ET, p.3; P00024, min.00:04:19-00:05:37.

<sup>178</sup> P00024ET, pp.7-8; P00024, min.00:14:24-00:15:51.

<sup>179</sup> P00024ET, p.8; P00024, min.00:14:24-00:15:51. For similar statements across the charged timeframe, *see also* P00006ET, p.4; P00008ET, pp.3-4; P00035ET, pp.2-3, 8; P00034ET, p.2; P00028ET, pp.12-13; P00031ET, p.2; P00007ET, pp.4-5.

racist and selective.<sup>180</sup> Haradinaj also reiterated his call to members of the press to publish the documents contained in the First Disclosure.<sup>181</sup>

59. On 11 September 2020, appearing on another television programme, Haradinaj again stated that he and others had looked through the documents over a period of four hours, during which time they came across names of witnesses and former witnesses.<sup>182</sup> He asserted that all Albanian lawyers should receive copies of the First Disclosure since it would help them to defend their clients and dismiss charges once indictments are brought before the KSC.<sup>183</sup> Haradinaj stated that whenever he and others will receive files, they will make them public because this was their duty since they do not recognise the KSC or the 'Special Prosecutor', adding that it was not the duty of the KLA WVA or anybody else to look after the KSC's or the SPO's secrets.<sup>184</sup>

#### D. SECOND PRESS CONFERENCE AND SECOND DISCLOSURE

60. On 16 September 2020, at about 15.30 hours, the Accused claimed an unknown, masked person delivered three boxes of documents at the reception of the KLA WVA without saying anything.<sup>185</sup> Taibe Miftari, Cele Gashi, and Elvir Gucati were present and did not attempt to stop the man.<sup>186</sup> Taibe Miftari went into Hysni Gucati's office and informed the Accused, Faton Klinaku, and the other KLA WVA members present.<sup>187</sup> The masked man walked up and down the corridor for several seconds,

<sup>180</sup> P00024ET, pp.7-8; P00024, min.00:13:54-00:15:51.

<sup>181</sup> P00024ET, pp.3, 10; P00024, min.00:04:44-00:05:37, 00:20:23-00:21:06.

<sup>182</sup> P00021ET, pp.4-5; P00021, min.00:07:17-00:11:53.

<sup>183</sup> P00021ET, pp.3-5; P00021, min.00:06:03-00:06:55, 00:12:27-00:14.23.

<sup>184</sup> P00021ET, pp.3-5; P00021, min.00:06:03-00:06:55, 00:09:41-00:11:53. Later that day, Haradinaj posted a link to this interview on his Facebook profile, *see* P00060, p.SPOE00220744 (P00060ET, p.SPOE00220744).

<sup>185</sup> 1D00023, 1D00024, 1D00025; 1D00026; Gucati, T.2187-2188, 2212; Taibe Miftari, 1D00004ET, para.19; Cele Gashi, 1D00004ET, para.24; Cele Gashi, T.2462.

<sup>186</sup> Cele Gashi, 1D00009ET, para.24; 1D00023, 1D00024, 1D00025; 1D00026.

<sup>187</sup> Taibe Miftari, 1D00004ET, paras 20-21; Gucati, 1D00003ET, para.34; Haradinaj, 2D00001ET, para.70.

until Faton Klinaku arrived and followed him down the stairs.<sup>188</sup>

61. The Accused, Cele Gashi, and other KLA WVA members reviewed the documents ('Second Disclosure')<sup>189</sup> and assessed that they included, *inter alia*, similar documents to those in the First Disclosure,<sup>190</sup> and in particular correspondence between SITF prosecutors and Serbian prosecutors, including requests to locate individuals to be questioned and to identify secure places in Serbia.<sup>191</sup> Gucati testified that he recognised within the Second Disclosure documents pertaining to the ICTY *Limaj et al.* and *Haradinaj et al.* cases.<sup>192</sup>

62. On the days preceding 16 September, the KLA WVA Steering Council had decided that, should new batches of materials be delivered, a press conference had to be called as soon as possible.<sup>193</sup> The Accused and other members of the Presidency, upon consultation, decided to call a press conference, which Gucati authorised.<sup>194</sup>

63. The KLA WVA held another press conference ('Second Press Conference') at which Gucati stated that the KLA WVA had received another set of documents at around 15:30 that day.<sup>195</sup> He told those who were present that they could take the documents.<sup>196</sup> Amongst the many public documents included in the Second Disclosure,<sup>197</sup> Gucati selected and showed on camera three confidential requests of

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<sup>188</sup> 1D00026, 15:32:32-15:33:20. *See also*, Taibe Miftari, 1D00004ET, para.21; Cele Gashi, 1D00009ET, paras 24-25, 27; Gucati, 1D00003ET, para.34; Haradinaj, 2D00001ET, para.71.

<sup>189</sup> P00018ET, pp.3-4; P00018, min.25:32-26:20. *See also*, Haradinaj, 2D00001ET, para.77; Cele Gashi, 1D00009ET, para.28; Cele Gashi, T.2588-2589.

<sup>190</sup> Haradinaj, 2D00001ET, paras 75-76; Cele Gashi, 1D00009ET, para.28; Cele Gashi, T.2589; Gucati, T.2190, 2267-69, T.2273. Gucati, T.2273. *See also* Gucati, T.2277-79, confirming the inaccuracy of Gucati, 1D00003ET, para.37

<sup>191</sup> Haradinaj, 2D00001ET, para.76; Haradinaj, T.2744-45.

<sup>192</sup> Gucati, T.2193, 2274-76. *See also*, Gucati, T.2267-69.

<sup>193</sup> Haradinaj, 2D00001ET, para.73; Haradinaj, T.2746; Cele Gashi, 1D00009ET, para.23; Kryeziu, 1D00008ET, para.9.

<sup>194</sup> Gucati, 1D00003ET, paras 35, 18; Gucati, T.2191, 2215-16; Cele Gashi, 1D00009ET, para.18, 29.

<sup>195</sup> P00002ET, pp.1-2; P00002, min.00:00:01-00:02:31.

<sup>196</sup> P00002ET, p.1; P00002, min.00:00:01-00:02:31.

<sup>197</sup> *See* P00104.

cooperation in criminal matters, both in English and Serbian, and noted that [REDACTED] and [REDACTED] had cooperated with Serbian Prosecutors and the KSC.<sup>198</sup> Gucati testified that, at the time he and other KLA WVA members reviewed the documents, he thought that the two public officials he mentioned could be witnesses.<sup>199</sup> He then handed the floor over to Haradinaj and remained present while Haradinaj spoke.<sup>200</sup> Faton Klinaku and Cele Gashi sat by the Accused's side.<sup>201</sup>

64. Haradinaj noted that it can be seen that Clint Williamson, former SITF Lead Prosecutor, had over 57 communications with 'Vuskovic', and that David Schwendiman, former SITF Lead Prosecutor and SPO Specialist Prosecutor, had over 130 communications with [REDACTED].<sup>202</sup> Haradinaj stated that the communications he and others saw concerned [REDACTED].<sup>203</sup> Haradinaj also noted that the Second Disclosure included 'the indictment of Ramush' and referred to the indictments of Fatmir Limaj and Ramush Haradinaj.<sup>204</sup>

65. Haradinaj told those present at the Second Press Conference to take the files, noting '[w]e present them here, whoever likes to take them.'<sup>205</sup> When a person in attendance asked whether that person could take a picture of the documents, Haradinaj responded: 'Of course. You may even take them all in your pocket'.<sup>206</sup> Haradinaj repeated his promise to make documents public whenever the KLA WVA received them.<sup>207</sup> Referring to himself and other members of the KLA WVA, Haradinaj added that they did not hold any responsibility, that this matter did not bother him,

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<sup>198</sup> P00002ET, p.1; P00002, min.00:00:01-00:02:31. *See also*, Gucati, T.2272-73.

<sup>199</sup> Gucati, T.2192. *See also*, Gucati, T.2205-2207.

<sup>200</sup> P00002ET, pp.1-4; P00002, min.00:00:01-00:09:49.

<sup>201</sup> P00002, min.00:00:00; 00:14:06; Pumper, T.1005.

<sup>202</sup> P00002ET, pp.2-3; P00002, min.00:02:40-00:09:49.

<sup>203</sup> P00002ET, p.3; P00002, min.00:02:40-00:09:49.

<sup>204</sup> P00002ET, pp.4-5; P00002, min.00:09:49-00:10:29.

<sup>205</sup> P00002ET, p.4; P00002, min.00:02:40-00:09:49.

<sup>206</sup> P00050ET, p.1; P00050, min.00:15:52-00:16:19.

<sup>207</sup> P00002ET, p.4; P00002, min.00:02:40-00:09:49.

and noted that it is their duty to discredit the KSC.<sup>208</sup> He stated that the documents might have been provided to the KLA WVA because they had the courage to make them public and they do not agree with the Court.<sup>209</sup>

66. After the end of the Second Press Conference, the Accused and their associates made available the documents of the Second Disclosure to the attendees for photographs and for collection.<sup>210</sup> Haradinaj recalls that there were three piles of documents, and that he set apart one copy.<sup>211</sup> Attendees took copies of the documents.<sup>212</sup> The Second Disclosure remained available for collection by anyone up until 17 September 2020.<sup>213</sup> The access to the KLA WVA premises is not controlled, and is open to everyone.<sup>214</sup> Most of the documents of the Second Disclosure, ‘over 70 percent of the documentation’, were taken away.<sup>215</sup>

#### E. EVENTS FOLLOWING THE SECOND PRESS CONFERENCE

67. As they did after the First Press Conference, Haradinaj and Gucati appeared on several television programmes after the Second Press Conference, ensuring that the contents of the First and Second Disclosures achieved maximum dissemination.

68. During an interview on 16 September 2020,<sup>216</sup> Haradinaj stated that he and others looked through the First Disclosure for three hours, during which time they got what they needed.<sup>217</sup> Haradinaj stated that he and others have stated publicly that they will reveal whatever material they receive that compromises the KSC and SPO, adding

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<sup>208</sup> P00002ET, pp.2-4; P00002, min.00:02:40-00:09:49.

<sup>209</sup> P00002ET, pp.6-7; P00002, min.00:12:09-00:12:45.

<sup>210</sup> Gucati, T.2282-2285; Haradinaj, T.2751; P000004, 00:02:27-00:03:57, P00004ET, p.3.

<sup>211</sup> Haradinaj, T.2753-2754.

<sup>212</sup> Haradinaj, 2D00001ET, para.79.

<sup>213</sup> Gucati, T.2282-85. *See also*, Haradinaj, T.2771.

<sup>214</sup> Haradinaj, T.2981.

<sup>215</sup> Gucati, T.2282-85; Haradinaj, 2754; P00004, 00:02:27-00:03:57, P00004ET, p.3.

<sup>216</sup> On 19 September 2020, Haradinaj posted a link to this interview on his Facebook profile, *see* P00060, p.SPOE00220735 (P00060ET, p.SPOE00220735).

<sup>217</sup> P00018ET, pp.3-4; P00018, min.25:32-26:20.

that he and others do not recognise the KSC and that this is why they will reveal this information, noting '[i]t's not our job to keep secrets.'<sup>218</sup> He further identified names in the documents, referring to 'Mr. Williamson' communicating with 'Vučković who was also a Chief Prosecutor', with '[REDACTED], with [REDACTED]'.<sup>219</sup> He further referred to '[REDACTED]', and pledged to reveal names including '[REDACTED], Vučković, [REDACTED]'.<sup>220</sup> Haradinaj openly declared, referring to the First Disclosure, that he and others released it because it was beneficial to them.<sup>221</sup> 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.<sup>222</sup>

69. During a televised programme which aired on 17 September 2020, Haradinaj stated that the KLA WVA had time to look through the documents that the unknown person had brought them.<sup>223</sup> Haradinaj stated that SPO witnesses included '[REDACTED]'.<sup>224</sup> He again called on journalists to take documents provided by the KLA WVA and to publish them,<sup>225</sup> and stated that he hoped the person who had brought the files would bring more.<sup>226</sup> Haradinaj described those who had cooperated with the SPO as '[c]hetniks, criminals'.<sup>227</sup>

70. On 17 September 2020, two SPO officers, in the presence of both Accused, Faton Klinaku, Kryeziu, Marashi, and journalist Milaim Zeka, seized documents of the

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<sup>218</sup> P00018ET, pp.1-2; P00018, min.00:27-01:10.

<sup>219</sup> P00018ET, pp.2-3; P00018, min.09:30-11:01.

<sup>220</sup> P00018ET, pp.2-3; P00018, min. 09:30-11:01, 24:45-25:32.

<sup>221</sup> P00018ET, pp.3-5; P00018, min.25:32-26:20.

<sup>222</sup> P00018ET, pp.5-6; P00018, min.28:52-29:38.

<sup>223</sup> P00033ET, p.3; P00033, min.00:05:02-00:07:52.

<sup>224</sup> P00033ET, p.2; P00033, min.00:00:19-00:03:50.

<sup>225</sup> P00033ET, p.3; P00033, min.00:05:02-00:07:52.

<sup>226</sup> P00033ET, pp.2-3; P00033, min.00:04:37-00:07:52.

<sup>227</sup> P00033ET, pp.1-2; P00033, min.00:00:19-00:03:50.



Second Disclosure that were still left at the KLA WVA ('Batch 2').<sup>228</sup> During the seizure, an SPO investigator warned Gucati, Haradinaj and others present that the KLA WVA should not make documents public, including witness names and evidence, but should rather call the SPO,<sup>229</sup> to which Gucati replied that they do not work for the KSC and should not protect such documentation.<sup>230</sup> The KLA WVA initially refused to hand over the documents, stating that they would wait for the intervention of the Kosovo Police.<sup>231</sup> The Accused consented to hand over the documents upon the arrival of lawyer Tomë Gashi.<sup>232</sup> Gucati signed the document acknowledging the seizure.<sup>233</sup>

71. A copy of the Second Order,<sup>234</sup> which referred to the sensitive, non-public nature of the documents forming part of the Second Disclosure and reiterated the order not to further disseminate this material, was handed to Gucati.<sup>235</sup> Both Accused admitted that the SPO investigator told them that the documents may be sensitive and that they should not be distributed or multiplied.<sup>236</sup>

72. Batch 2 consists of 937 pages, six of which<sup>237</sup> reproduce Requests and Serbian Documents already included in Batch 1<sup>238</sup> and Batch 4,<sup>239</sup> including references to [REDACTED].<sup>240</sup> Of these six pages, five have a correspondent in the SPO internal databases.<sup>241</sup> The page not included in the SPO databases is a document in Serbian

<sup>228</sup> P00104; Moberg, T. 1939-40; Taibe Miftari, 1D00004ET, para.27; Kryeziu, 1D00008ET, paras 10-14; Gucati, 1D00003ET, paras 38-39; T.2194-97, 2289; Haradinaj, 2D00001ET, paras 83-98; Haradinaj, 2760-65.

<sup>229</sup> Gucati, 1D00003ET, para.39; Gucati, T.2195, 2291-93.

<sup>230</sup> Gucati, 1D00003ET, para.39; Gucati, T.2195.

<sup>231</sup> Gucati, 1D00003ET, para.40; Gucati, T.2197; Haradinaj, T.2766-70.

<sup>232</sup> Gucati, 1D00003ET, para.42; Gucati, T.2198; Haradinaj, T.2770.

<sup>233</sup> P00055; Haradinaj, 2D00001ET, para.94.

<sup>234</sup> P00053; P00053AT ('Second Order').

<sup>235</sup> P00053ET; Gucati, T.2293-96; P00004ET, pp.3, 8; P00004, min.00:02:27-00:03:57, 00:16:42-00:17:19.

<sup>236</sup> Haradinaj, T.2936; Gucati, T.2292-96. *See also*, P00006, min.00:58:21-00:58:48; P00006ET, p.35.

<sup>237</sup> P00104, pp.080126-080131.

<sup>238</sup> P00139-P00144. *See also* P00086, paras 22-26; P00090, paras 5-6, Annexes 3-4; Pumper, T.915-17.

<sup>239</sup> P00145-P00150.

<sup>240</sup> P00086, paras 22-27; P00090, paras 5-6, Annex 3; Pumper, T.914-917, 1197-1210.

<sup>241</sup> Pumper, T.1200.



language, issued by the Serbian War Crimes Prosecutor to Serbian Police in order to arrange a meeting between the SITF and a witness indicated in a Request.<sup>242</sup> The remaining 931 pages are copies of public court judgments and related documents issued by Kosovo Courts and other judicial institutions, including the International Criminal Tribunal for the former Yugoslavia ('ICTY'), in relation to war crimes cases,<sup>243</sup> and, as specifically noted by Haradinaj during the Second Press Conference,<sup>244</sup> copies of indictments, including against Fatmir Limaj and others, and against Ramush Haradinaj and others.<sup>245</sup> The copies of these judgments do not bear any logo or marks typical of SITF or SPO documents.<sup>246</sup>

73. Soon after the seizure of Batch 2, Gucati and others held a press conference at the KLA WVA premises during which Gucati acknowledged that SPO staff members had served him with a copy of the Second Order and that the Second Order stated, and SPO staff members told him, that these documents could not be multiplied or distributed and that the names of witnesses could not be published.<sup>247</sup> Gucati stated that the KLA WVA told SPO staff members that any time they received documents from the KSC, they will make them public for the media.<sup>248</sup> Gucati stated that the reason why he and others will make the documents public was to prove what they had said three years ago to members of the army and to the citizens of Kosovo, so that

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<sup>242</sup> Pumper, T.1207-1210; P00086, para.26; P00091, Annex 3, p.2; P00104, p.080131.

<sup>243</sup> P00104; P00086, para.21. During a televised interview, Haradinaj acknowledged that Batch 2 also contains court judgements 'sent to them from here', P00006ET, p.30; P00006, min.00:52:33-00:53:07. News articles appeared online following the Second Press Conference, reporting, *inter alia*, that that the Second Disclosure included court judgments issued by EULEX and the ICTY, *see* P00125, pp.081371-081373 (P00125ET), which features images of two pages that also appear in Batch 2 (P00104, pp.080319, 080346) but to which redactions have been applied.

<sup>244</sup> P00002ET, pp.4-5; P00002, min.00:09:49-00:10:29.

<sup>245</sup> P00104, pp.080007-080030, 080032-080034, 080346-080441; P00002ET, pp.4-5; P00002, min.00:09:49-00:10:29.

<sup>246</sup> P00086, para.21; P00104.

<sup>247</sup> P00004ET, pp.3, 8; P00004, min.00:02:27-00:03:57, 00:15:25-00:17:19. *See also*, Gucati, T.2293-94, denying his own words, as recorded on cameras.

<sup>248</sup> P00004ET, p.3; P00004, min.00:02:27-00:03:57.

the media and citizens would be convinced that the KSC are cooperating with Serbian authorities against members of the KLA.<sup>249</sup>

74. 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 KSC, 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.'<sup>250</sup> Gucati then stated, in relation to the documents delivered to the KLA WVA, that it was in their interest to distribute them as much as possible in the media and to convince both the public and the media that the court is unacceptable, noting that he and others have always been against it.<sup>251</sup>

75. In another interview on 17 September 2020, Haradinaj thanked the person who provided the documents to the KLA WVA for his cooperation and stated that if this person could provide additional material like that which he had already provided, the KLA WVA would welcome it.<sup>252</sup> Haradinaj stated that every time the KLA WVA received such files, the SPO would not be able to stop them and that he did not recognise the court.<sup>253</sup> Haradinaj described the documents received by the KLA WVA as 'sensitive documents for The Hague Tribunal which cooperates with Serbia, but not for me [...] They're not at all sensitive to me.'<sup>254</sup> He stated that even if he and others disclosed certain names, every statement was taken under duress, was not relevant and cannot be used as the basis for an indictment - that is why they made them

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<sup>249</sup> P00004ET, p.3; P00004, min.00:02:27-00:03:57.

<sup>250</sup> P00004ET, p.8; P00004, min.00:15:25-00:17:19.

<sup>251</sup> P00004ET, p.8; P00004, min.00:17:26-00:17:40.

<sup>252</sup> P00006ET, p.4; P00006, min.00:24:24-00:25:12.

<sup>253</sup> P00006ET, p.14; P00006, min.00:34:18-00:35:13.

<sup>254</sup> P00006ET, pp.19-20; P00006, min.00:39:29-00:39:36.

public.<sup>255</sup>

76. During another interview that day, Haradinaj stated he and others were carrying out their actions in order to discredit the alleged professionalism of the court.<sup>256</sup>

77. In yet another interview on 17 September 2020,<sup>257</sup> Haradinaj stated that the documents received by the KLA WVA 'have their original seal' and that they read 'Top Secret'.<sup>258</sup> He noted that it was clear that the documents 'are originals and they are theirs', observing that '[n]o one but them would have known how to compile such documents'.<sup>259</sup> Haradinaj referred to the KSC cooperating with 'Vuckovic, [REDACTED]'.<sup>260</sup> He berated the media as 'miserable' for failing to 'unveil the truth' and for being reluctant to publish the material made public by the KLA WVA, noting that this made it necessary for Haradinaj and others to provide the documents to 'foreign media'.<sup>261</sup>

78. On 17 September 2020, Haradinaj posted a link to an article by Gazeta Newborn on his Facebook profile.<sup>262</sup> The article refers to an individual described therein as a potential KSC witness and includes pictures of illegible pages that display the layout typical of Requests.<sup>263</sup> The individual referred to in the article is mentioned in Requests included in Batch 1 amongst other witnesses and potential witnesses whom the SITF sought to interview and in relation to whom a record of previous statements was

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<sup>255</sup> P00006ET, pp.25-26; P00006, min.00:46:29-00:47:54.

<sup>256</sup> P00034ET, p.2; P00034, min.00:06:24-00:08:04.

<sup>257</sup> On 18 September 2020, Haradinaj posted a link to this interview on his Facebook profile, *see* P00060, p.SPOE00220737 (P00060ET, p.SPOE00220737ET).

<sup>258</sup> P00019ET, p.2; P00019, min.00:02:48-00:04:05.

<sup>259</sup> P00019ET, p.2; P00019, min.00:02:48-00:04:05. *See also*, Haradinaj, T2951-2954.

<sup>260</sup> P00019ET, pp.1, 3-4; P00019, min.00:00:13-00:01:49, 00:06:33-00:08:53.

<sup>261</sup> P00019ET, p.2; P00019, min.00:04:24-00:05:16.

<sup>262</sup> P00061, p.SPOE00220754; P00128; P00124, pp.081917-081918 (P00124ET, pp.081917-081918); P00073 (P00073ET); Pumper, T.1003-1004. *See also*, Haradinaj, T.2812, acknowledging that he 'liked' or distributed pictures of the three disclosures which had first been published by the media.

<sup>263</sup> P00095; P00128; P00124, pp.081917-081918 (P00124ET, pp.081917-081918); P00086, para.17.

requested.<sup>264</sup> On the same day, Haradinaj posted a link to another article by Gazeta Newborn on his Facebook profile.<sup>265</sup> This article includes an image of a document displaying the layout typical of Requests.<sup>266</sup>

79. During an interview on 18 September 2020, Haradinaj stated that the SPO members who seized material from the KLA WVA confirmed the 'sensitivity' of such material.<sup>267</sup> He stated that he hoped the person who delivered the documents to the KLA WVA would do so again and described the delivery to the KLA WVA as a 'miracle'.<sup>268</sup> Haradinaj stated that he and others told SPO representatives who seized material from the KLA WVA that they did not recognise the KSC.<sup>269</sup>

80. During the same interview, Tomë Gashi stated that the unidentified person who took the documents to the KLA WVA had done a patriotic job for the common good, especially for the benefit of those who will be accused in the KSC.<sup>270</sup> He echoed Haradinaj in saying that 'witnesses cannot be protected by Specialist Chambers which allow or enable certain persons to leak their names'.<sup>271</sup> He noted that the documents seized by the SPO had a logo and were genuine, adding that these were sensitive documents for the SPO.<sup>272</sup> He stated the documents were certainly very favourable for the KLA WVA and anyone who might have legal issues with the KSC, adding that the documents could be used to attack the credibility of the KSC and certain evidence.<sup>273</sup> The latter suggestion mirrored what one and two days earlier Haradinaj had stated

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<sup>264</sup> P00086, para.17; P00093.

<sup>265</sup> P00061, p.SPOE00220755 (P00061ET, p.SPOE00220755-ET); P00073 (P00073ET); P00074 (P00074ET); 1D00017.

<sup>266</sup> P00094; 1D00017, p.DHG0389.

<sup>267</sup> P00007ET, pp.2-3; P00007, min.00:01:20-00:01:58, 00:03:22-00:04:38; P00020. Later that day, Haradinaj posted a link to this interview on his Facebook profile, *see* P00060, p.SPOE00220739 (P00060ET, p.SPOE00220739).

<sup>268</sup> P00007ET, p.2; P00007, min.00:01:59-00:03:22.

<sup>269</sup> P00007ET, pp.2-3; P00007, min.00:03:27-00:04:38.

<sup>270</sup> P00007ET, pp.4-5; P00007, min.00:08:26-00:09:47.

<sup>271</sup> P00007ET, p.5.

<sup>272</sup> P00007ET, p.3; P00007, min.00:04:59-00:08:25.

<sup>273</sup> P00007ET, pp.3-5; P00007, min.00:04:59-00:08:25.

were his and the KLA WVA's reasons for disclosing the documents delivered to them,<sup>274</sup> and would be repeated by Tomë Gashi on another occasion.<sup>275</sup>

81. Tomë Gashi stated that the publication of the documents means that the judge must think again before deciding whether to confirm the indictment against President Thaçi and others, and that he hoped that the leaked documents would help the indictment against President Thaçi not to be confirmed.<sup>276</sup> Haradinaj agreed with Gashi that the KSC should now think twice before confirming indictments.<sup>277</sup> Tomë Gashi assessed that the theory that witnesses cannot be protected in Kosovo was being confirmed and asked whether witnesses are really being protected in The Hague.<sup>278</sup> He noted that he and others knew that the documents could be used to intimidate certain persons and that misuse of the documents constitutes a criminal offence, but this was not his business.<sup>279</sup>

82. On 18 September 2020, Gucati posted a link to an article published by Gazeta Newborn to his Facebook profile.<sup>280</sup> The article states that Gazeta Newborn obtained a document showing that [REDACTED] and [REDACTED], described as Serb officers, were contacted by the KSC to give testimony against the KLA and its members and includes two images of documents with layouts typical of the Requests.<sup>281</sup> These two individuals are named in Requests included in Batch 1.<sup>282</sup>

83. During an interview on 19 September 2020, Haradinaj referred to the files provided to, and made public by, the KLA WVA as 'a basis for the indictment against

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<sup>274</sup> P00002ET, pp.2-4; P00002, min.00:02:40-00:09:49; P00034ET, pp.1-2; P00034, min.00:06:24-00:08:04.

<sup>275</sup> P00012ET, p.2; P00012, min.00:01:31-00:04:33.

<sup>276</sup> P00007ET, pp.11, 16-17; P00007, min.00:20:00-00:20:44, 00:27:52-00:28:49, 00:29:03-00:30:22.

<sup>277</sup> P00007ET, p.12; P00007, min.00:22:22-00:22:31.

<sup>278</sup> P00007ET, p.5; P00007, min.00:09:48-00:10:22.

<sup>279</sup> P00007ET, pp.8-9; P00007, min.00:15:33-00:16:08.

<sup>280</sup> P00083, p.SPOE00222247 (P00083ET, p.SPOE00222247); P00124, pp.081915-081916 (P00124ET, pp.081915-081916).

<sup>281</sup> P00124, p.081915 (P00124ET, p.081915); 1D00016.

<sup>282</sup> P00093; P00086, para.16; P00090, p.095538 (entry corresponding to page numbers 15-16).

the boys of the war', and referred to them as confidential.<sup>283</sup> Haradinaj also noted that it was common knowledge that he and others made the Second Disclosure available to the media and that the media took copies thereof,<sup>284</sup> that he wished that the person who delivered documents to the KLA WVA would deliver more documents, that this person was welcome to do so, and that what this person had carried out was an important national duty.<sup>285</sup>

84. Haradinaj showed a certified version of the Second Order, which was classified as Strictly Confidential and *Ex Parte*, to the camera, along with an SPO document acknowledging receipt of the seized material; referring to the Second Order, he acknowledged that it included an obligation for him and others not to publish, adding 'we do not need to publish them. We've given it out to those who can publish it. It is now up to them to publish it or not.'<sup>286</sup> Haradinaj stated that the SPO took over 20 percent of the total material which was available at the KLA WVA premises and that journalists had taken the rest, noting '[t]here are no secrets left unrevealed.'<sup>287</sup> He stated that he thought that the media should not hide what the SPO's former Deputy Specialist Prosecutor had done, referring to over 130 communications with 'Vukcevic', [REDACTED] and others.<sup>288</sup>

85. Later that day, Haradinaj posted a link to this interview on his Facebook profile.<sup>289</sup> A Facebook user with username 'Xhavit Hajzeri' commented that this user and others needed to publish books with the statements made by 'these traitors, this

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<sup>283</sup> P00017ET, pp.2-3, 9; P00017, min.00:02:10-00:06:38, 00:18:58-00:19:24.

<sup>284</sup> P00017ET, pp.3-5; P00017, min.00:06:48-00:11:44.

<sup>285</sup> P00017ET, p.5; P00017, min.00:12:16-00:12:35. That Haradinaj and Gucati welcomed the delivery of the Second Disclosure is further evident from posts they uploaded on their Facebook profiles, *see* P00075 (P00075ET); P00083, p.SPOE00222248 (P00083ET, p.SPOE00222248).

<sup>286</sup> P00017ET, p.6; P00017, min.00:12:44-00:15:00; *See* P00055; P00053; P00053AT. *See also*, Haradinaj, T.2931-2933, attempting to argue that he was only informed about the existence and the contents of the Second Order moments before showing it on cameras.

<sup>287</sup> P00017ET, p.6; P00017, min.00:14:21-00:17:28.

<sup>288</sup> P00017ET, pp.7-8; P00017, min.00:14:21-00:17:28.

<sup>289</sup> P00070; P00070ET.



scum of the earth'.<sup>290</sup>

86. On 20 September 2020, during yet another appearance on a television programme, Haradinaj stated that he read the Second Disclosure as much as he could during the KLA WVA's office hours.<sup>291</sup> Haradinaj referred to the documents as having been taken from secret storage.<sup>292</sup>

87. Haradinaj stated that the KSC is 'selective' and 'racist' and that the documents he and others made public show that the court is basing charges on information provided by 'criminals, bloodsuckers'.<sup>293</sup> He also referred to such persons as spies, accused them of betraying their people, and stated that the First Disclosure was intended to make it clear to such people 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.<sup>294</sup> Haradinaj stated that the court will totally collapse because people now knew who the witnesses are.<sup>295</sup> He described the documents that the KLA WVA had made public as a 'national victory' and stated that the KLA WVA is very happy to have received the files and that people were welcome to bring more.<sup>296</sup>

88. During another television programme which aired on the same day, Haradinaj stated that he and others were going to make anything that undermines the SPO known because they do not recognise the SPO, and that he would feel proud and honoured if he were to be arrested for his actions.<sup>297</sup>

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<sup>290</sup> P00070; P00070ET.

<sup>291</sup> P00008ET, p.9.

<sup>292</sup> P00008ET, p.24.

<sup>293</sup> P00008ET, p.7.

<sup>294</sup> P00008ET, p.26.

<sup>295</sup> P00008ET, pp.30-31.

<sup>296</sup> P00008ET, pp.2-4.

<sup>297</sup> P00025ET, pp.1-2, 9-10.



89. On 20 September 2020, Haradinaj posted a link to a video published by Gazeta Newborn on his Facebook profile.<sup>298</sup> The video includes images of a document in Serbian bearing the SITF logo, [REDACTED].<sup>299</sup> A copy of this Request is included in Batch 1.<sup>300</sup>

90. On 21 September 2020 at 08:21, Gucati published a post on his Facebook profile<sup>301</sup> in which he stated that the files handed over to the KLA WVA were official documents of the KSC which included the names of the majority of witnesses; he referred to the documents as emerging from the KSC's offices and as 'very confidential and sensitive'.<sup>302</sup>

#### F. THIRD PRESS CONFERENCE AND THIRD DISCLOSURE

91. At around 10:35 on 22 September 2020, an unknown, masked man dropped some bundles of documents ('Third Disclosure') in the corridor of the KLA WVA premises in Prishtinë/Priština.<sup>303</sup> Taibe Miftari saw the man dropping the documents and asked who he was, to which the masked person responded, in the Albanian language, 'don't disturb me'.<sup>304</sup>

92. The documents were brought in Gucati's office, where the Accused and others read some pages and assessed that they constituted a 'draft indictment' against President Thaçi and other senior KLA members.<sup>305</sup> There were three copies of this

<sup>298</sup> P00060, pp.SPOE00220729-SPOE00220730 (P00060ET, pp.SPOE00220729-SPOE00220730); P00123.

<sup>299</sup> P00123ET, p.1; P00123, min.00:00:20-00:00:33.

<sup>300</sup> P00097; P00090, p.095574 (entry corresponding to page number 582); Pumper, T.989-91.

<sup>301</sup> Gucati, T.2285-86. *See also* Taibe Miftari, T.2475, corroborating that Hysni Gucati's account is managed by the Accused himself or, with his authorisation, by Elvir Gucati.

<sup>302</sup> P00059; P00059ET, pp.081983-081986.

<sup>303</sup> 1D00027; 1D00028; 1D00029; 1D00030; P00163; Taibe Miftari, 1D0004ET, paras 28-31; Gucati, T.2197-98, 2296; Haradinaj, T.2781.

<sup>304</sup> Taibe Miftari, 1D0004ET, para.32; Taibe Miftari, T.2463-64.

<sup>305</sup> Gucati, T.2200, 2297, 2299; Haradinaj, 2D00001ET, paras 106-07, 111; Haradinaj, T.2782; Cele Gashi, 1D00009ET, para.31, stating that he felt overwhelmed to see indictments against his heroes who were 'selfless in the cause'.

'draft indictment'.<sup>306</sup> German KFOR soldiers who happened to be present at the time, were shown the documents, and took pictures thereof.<sup>307</sup> Arbresh.info journalist Elmedina Ballhazhi (DW1242) arrived in the premises shortly after the delivery, was welcomed by Haradinaj, and remained in Hysni Gucati's office for about 25 minutes with the documents.<sup>308</sup> Shortly after the arrival of Ballhazhi, Arbresh.info published an article including a picture of the first page of the Third Disclosure.<sup>309</sup>

93. Gucati testified that he was aware the document contained various names that he was not authorised to disclose, because the law prohibited him from doing so.<sup>310</sup> He was aware that disclosing names of protected witness was prohibited and that it could harm witnesses and endanger their safety.<sup>311</sup>

94. In what had become, by now, a clear and consistent pattern, the Accused and their associates decided to call a press conference, which was held a few hours later ('Third Press Conference').<sup>312</sup> The Accused did not verify who the attendees were,<sup>313</sup> but recalled that foreign media were also present.<sup>314</sup> Gucati stated that someone had delivered files to the KLA WVA offices and that he and others believed these files had been leaked from the KSC or 'the Hague Court'.<sup>315</sup> Gucati invited those in attendance to move closer to have a look at the documents, which were laid on a table.<sup>316</sup> Gucati

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<sup>306</sup> Haradinaj, 2D00001ET, para.104, 111.

<sup>307</sup> Taibe Miftari, 1D0004ET, para.28; Gucati, 1D0003ET, para.46; Gucati, T.2198-99; Haradinaj, 2D00001ET, paras 103-04, 106, 108-09; Haradinaj, T.2777-78, 2782. *See also* P00035ET, p.9; P00035, min.00:20:25-00:20:41.

<sup>308</sup> P00163; P00164 (footage from 10:58-11:25:30 in the morning).

<sup>309</sup> P00125, p.081374-081375.

<sup>310</sup> Gucati, T.2300, 2302-06.

<sup>311</sup> Gucati, T.2308-09, 2374.

<sup>312</sup> Gucati, T.2200, 2215-16; Gucati, 1D0003ET, para.47; Haradinaj, T.2783; Haradinaj, 2D00001ET, para.110; The First, Second and Third Press Conferences are collectively referred to as the 'Three Press Conferences'.

<sup>313</sup> Gucati, T.2201.

<sup>314</sup> Gucati, T.2201-02.

<sup>315</sup> P00035ET, pp.1-2; P00035, min.00:03:15-00:06:04; *See also* P00003.

<sup>316</sup> P00035ET, pp.1-2; P00035, min.00:03:15-00:06:04; Gucati, T.2200-2201.

stated that Haradinaj had read the Third Disclosure for about 30 minutes.<sup>317</sup> As on previous occasions, he then handed the floor over to Haradinaj and remained present while Haradinaj spoke.<sup>318</sup> Faton Klinaku and Cele Gashi sat by the Accused's side.<sup>319</sup>

95. Haradinaj stated that the KLA WVA had two copies of the documents which were provided to them earlier that day.<sup>320</sup> He stated that he understood that the Third Disclosure concerned a 'draft indictment' in relation to five persons potentially to be accused: 'Azem Syla, Hashim Thaçi, Jakup Krasniqi, Kadri Veseli and Rexhep Selimi'.<sup>321</sup> Haradinaj testified that he mentioned the names that were indicated on the front page of the Third Disclosure.<sup>322</sup> A confirmed indictment against Thaçi, Veseli, Krasniqi, and Selimi was only made public by the KSC on 5 November 2020.<sup>323</sup>

96. Haradinaj stated that Xhavit Haliti, whose name also later featured in the public version of the indictment against Thaçi and others, was mentioned in the Third Disclosure along with other persons and locations including [REDACTED].<sup>324</sup> The SPO only publicly revealed several of these locations as crime sites through the indictment made available to the public on 5 November 2020.

97. Haradinaj noted that the particulars of many people are mentioned in the documents and that the name of [REDACTED] is mentioned, as are the names of many others.<sup>325</sup> He stated that these documents were now at the disposal of those in attendance, told them to do their job, and thanked them for being active, adding that

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<sup>317</sup> P00035ET, p.2; P00035, min.00:03:15-00:06:04.

<sup>318</sup> P00035ET, pp.1-2; P00035, min.00:03:15-00:06:51.

<sup>319</sup> P00035, min.00:01:04; Pumper, T.1005.

<sup>320</sup> P00035ET, p.2; P00035, min.00:06:54-00:10:28.

<sup>321</sup> P00035ET, p.2; P00035, min.00:06:04-00:06:51.

<sup>322</sup> Haradinaj, T.2784.

<sup>323</sup> See generally *Prosecutor v. Thaçi et al.*, Further redacted Indictment, KSC-BC-2020-06/F00045/A03, 4 November 2020 (reclassified 5 November 2020). The same public version of the indictment lists Syla as a member of the joint criminal enterprise of which the four accused in that case are alleged to have formed part.

<sup>324</sup> P00035ET, p.2; P00035, min.00:06:04-00:10:28.

<sup>325</sup> P00035ET, p.3; P00035, min.00:06:54-00:10:28.

he believed that he and they should all carry out their task together.<sup>326</sup>

98. Haradinaj noted that the documents forming part of the Third Disclosure bear the SPO's logo and are copies of originals.<sup>327</sup> Asked whether the KLA WVA had notified the five people whose names were mentioned in the documents, Haradinaj responded that the person asking that question should do it, adding: '[w]hy did we call you?'<sup>328</sup> Asked for more detail about the content of the document, Haradinaj noted the person asking him could go and have a look at the document, stating this was the reason why Haradinaj and others called them there, otherwise they would have published the documents themselves.<sup>329</sup>

99. Haradinaj said that the documents provided earlier that day were in the room and invited those present to look at the documents, to take a copy, and to take pictures of them.<sup>330</sup> Asked whether he was suggesting that the media should publish the documents, Haradinaj responded that the media should publish whatever it can.<sup>331</sup> When a person attending the press conference noted that publication of the documents is prohibited by law and carries a sentence of up to 10 years' imprisonment, Haradinaj responded: '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.'<sup>332</sup>

100. Gucati intervened to recall that media had previously published names of 'fake

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<sup>326</sup> P00035ET, p.3; P00035, min.00:06:54-00:10:28; Gucati, T.2386-87. *See also* P00027ET, p.1; P00027, min.00:06:23-00:07:10 where Haradinaj thanked the media for the work they were doing, stated he hoped the media would not ignore him and others, and asserted the media should be braver.

<sup>327</sup> P00035ET, pp.3-4; P00035, min.00:10:41-00:11:45.

<sup>328</sup> P00035ET, p.4; P00035, min.00:12:02-00:12:10.

<sup>329</sup> P00035ET, p.5; P00035, min.00:14:19-00:15:30.

<sup>330</sup> P00035ET, pp.6-7; P00035, min.00:16:57-00:17:59.

<sup>331</sup> P00035ET, p.12; P00035, min.00:23:40-00:24:06.

<sup>332</sup> P00035ET, p.13; P00035, min.00:24:44-00:25:16.

veterans' and that, in the same way, they should publish the names in the documents, adding that '[t]hey are Albanians too. 80% of the people who have given evidence there are Albanians'.<sup>333</sup> Gucati further exhorted the press to '[t]ake the same courage like you did with the veterans'.<sup>334</sup> In his testimony, Gucati recalled that the press had previously published a list of veterans' names, with their identification numbers, which he considered to be a violation of the law.<sup>335</sup>

101. Asked whether [REDACTED] was referred to in the documents, Gucati and Haradinaj noted that the person who asked this question had the document and was welcome to read it.<sup>336</sup>

102. Towards the end of the Third Press Conference, as persons approached the speakers' table where documents from the Third Disclosure were displayed, Gucati, Haradinaj, and Cele Gashi made available the copies that were on the table.<sup>337</sup> A number of persons gathered around the Third Disclosure and took photographs thereof.<sup>338</sup> Media representatives took 'a lot' of the documents, while part of them remained with the KLA WVA.<sup>339</sup>

103. Haradinaj noted that the person who provided the documents left a message saying he would bring compact discs from now on.<sup>340</sup> He stated that he and others welcomed this, that the KLA WVA would publish everything they receive, and that they bear no responsibility in relation to this.<sup>341</sup> Haradinaj stated he would not disclose

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<sup>333</sup> P00035ET, p.13; P00035, min.00:25:23-00:25:41. *See also*, Gucati, T.2304-2307, denying his own recorded words.

<sup>334</sup> P00035ET, p.14; P00035, min.00:26:03-00:26:05.

<sup>335</sup> Gucati, T.2305-06, 2308.

<sup>336</sup> [REDACTED].

<sup>337</sup> P00035ET, p.15; P00035, min.00:26:46-00:26:59.

<sup>338</sup> P00035, min.00:26:45-00:27:18.

<sup>339</sup> Gucati, T.2201; Haradinaj, 2D00001ET, para.111; Haradinaj, T.2786. *See also*, Gucati, 1D0003ET, paras 49, 51.

<sup>340</sup> P00035ET, pp.2-3; P00035, min.00:06:54-00:10:28.

<sup>341</sup> P00035ET, pp.2-3; P00035, min.00:06:54-00:10:28; *See also* P00030ET, pp.2-4; P00030, min.00:01:33-00:04:16.

the identity of the person who delivered documents to the KLA WVA even if this person did not wear a mask.<sup>342</sup>

104. Asked whether, when documents were previously seized from the KLA WVA, the SPO staff members who seized the documents had asked Haradinaj not to give documents to the media, Haradinaj responded that the SPO would not want the media to be informed about the documents.<sup>343</sup>

#### G. EVENTS FOLLOWING THE THIRD PRESS CONFERENCE

105. Within hours of the Third Press Conference, the SPO served on Haradinaj, in the presence of Gucati, Klinaku, Tomë Gashi and others, an order from the SPO instructing Gucati and/or the KLA WVA to produce all SPO documents and to refrain from recording or copying and further disseminating such documents.<sup>344</sup> Haradinaj signed a document acknowledging receipt of the order in the presence of Gucati and others.<sup>345</sup> The SPO staff members took what was left of the documents forming part of the Third Disclosure ('Batch 3').<sup>346</sup>

106. Batch 3 is comprised of two incomplete copies, counting 244 and 245 pages, of an SPO confidential document, counting 261 pages, pertaining to SPO investigations and official proceedings, which constitutes internal work product.<sup>347</sup> It includes an analysis of evidence and applicable law in relation to five persons, namely Azem Sylja, Hashim Thaçi, Jakup Krasniqi, Kadri Veseli, and Rexhep Selimi.<sup>348</sup> It also contains

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<sup>342</sup> P00035ET, p.10; P00035, min.00:21:28-00:21:38. *See also* P00083, p.SP0E0022245-46 (P00083, p.SP0E0022245-46-ET) showing that, shortly after the delivery, Haradinaj and Gucati published images of the delivery from the KLA WVA CCTV, with the caption 'Lightening 3!!'.

<sup>343</sup> P00035ET, p.6; P00035, min.00:16:18-00:16:45.

<sup>344</sup> Moberg, T.1939-40; P00054 ('Third Order'); Gucati, T.2202; Haradinaj, 2D00001ET, paras 112-115.

<sup>345</sup> Haradinaj, T.2787; P00058.

<sup>346</sup> Gucati, T.2202; 2789-90.

<sup>347</sup> P00086, para.29; P00090, paras 7-10, Annex 5; Pumper, T.926-33, 952, 1008, 1471. *See also*, P00106-P00119.

<sup>348</sup> P00086, para.29; P00090, paras 7-9; Pumper, T.931-33, 951-52; P00106, p.1; P00107, p.1.



references to approximately 150 witnesses, [REDACTED], as well as detailed references to witnesses' and suspects' statements.<sup>349</sup>

107. Nearly all of the 489 pages contained in Batch 3 display clear signs of being the internal work product of the SPO, including:<sup>350</sup>

Footer:



Header:



108. Batch 3 includes the identities of witnesses who were at the time of the Third Disclosure the subject of: (i) strictly confidential and *ex parte* non-disclosure orders in proceedings before the KSC;<sup>351</sup> and/or (ii) strictly confidential and *ex parte* non-disclosure requests pending in proceedings before the KSC.<sup>352</sup>

109. Batch 3 further includes references to the statements of witnesses and other documents and information provided to the SPO by international organisations, including the [REDACTED], subject to confidentiality and use restrictions.<sup>353</sup> These include the statements of witnesses and documents provided to the SPO subject to conditions that the materials be treated as confidential and used solely for the purpose

<sup>349</sup> P00086, para.31; P00090, paras 7-9, Pumper, 949-50, 953.

<sup>350</sup> P00086, para.35; P00090, paras 7-10, Annex 5; Pumper, T.929-30. *See also*, P00106-P00119.

<sup>351</sup> P00086, para.32; Pumper, T.953-60; P00151, paras 132-139, 140(c),(g),(e); P00152, paras 155-62, 163(c), (g), (e). *See also* P00153.

<sup>352</sup> P00086, para.32; Pumper, T.953-60; P00154, paras 54-55.

<sup>353</sup> P00086, para.34, Pumper, T.967-70.

of investigations and judicial proceedings.<sup>354</sup> Other information referenced was provided on condition of confidentiality and solely for the purpose of generating new evidence; any other use or disclosure requires provider consent.<sup>355</sup>

110. In addition, 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.<sup>356</sup>

111. As highlighted by the [REDACTED], '[REDACTED]'.<sup>357</sup> As such, any potential variation of the restrictions imposed by the [REDACTED] would result, at minimum, in the imposition of conditions of confidentiality and exclusive use for investigations and judicial proceedings before the KSC.

112. On 22 September 2020 and over the following days, contents of the Third Disclosure, including witness names and evidence, were further disseminated, including in the press and online.<sup>358</sup> Haradinaj had previously asserted that, due to the reluctance of certain media houses to publish material made available by the KLA WVA, it was necessary for Haradinaj and others to provide the documents to 'foreign media'.<sup>359</sup> Indeed, a number of articles and video clips reproducing excerpts from the Third Disclosure were published by a media house based in Albania.<sup>360</sup>

113. During a press conference with various media representatives at the KLA WVA

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<sup>354</sup> P00086, para.34, Pumper, T.967-70.

<sup>355</sup> P00086, para.34.

<sup>356</sup> P00086, para.33; P00161.

<sup>357</sup> P00126, p.1.

<sup>358</sup> P00120 (P00120ET); P00125, pp.081374-081378 (P00125ET.4); P00155 (P00155ET), including video-clip P00156 (P00156ET); P00157 (P00157ET), including video-clip P00158 (P00158ET); P00159 (P00159ET), including video-clip P00160 (P00160ET); P00120 (P00120ET); P00121 (P00121ET); P00122 (P00122ET). *See also* P00086, paras 36-74; Pumper, T.973-89. *See also* P00106-P00119.

<sup>359</sup> P00019ET, p.2; P00019, min.00:04:24-00:05:16.

<sup>360</sup> P00155 (P00155ET), including video-clip P00156 (P00156ET); P00157 (P00157ET), including video-clip P00158 (P00158ET); P00159 (P00159ET), including video-clip P00160 (P00160ET).

premises on 22 September 2020 following the handover of Batch 3 to the SPO, Gucati confirmed that the KSC collected the material and stated that this meant the material came from the KSC.<sup>361</sup> During the same press conference, Tomë Gashi acknowledged that Gucati, Haradinaj and others looked through the documents referred to during the Three Press Conferences 'for their own purposes'.<sup>362</sup> Gashi noted that members of the media had the opportunity to access the material forming part of the Third Disclosure if they so wanted, adding that the material 'is genuine' and 'seems to be of a very sensitive nature and relates to the criminal investigation of people who've been subject to investigations by the Court for many years.'<sup>363</sup>

114. Tomë Gashi noted that he believed that 'Chairman Mr. Gucati, Mr. Haradinaj and others have always maintained they will go public with whatever they receive and whoever brings them, in the sense that the Albanian public opinion at large will be informed on what is happening with The Specialist Chambers', adding that '[w]e are of the opinion that if at a later stage the indictments against the KLA members are confirmed these materials could be used to undermine the credibility of The Specialist Chambers'.<sup>364</sup> Tomë Gashi acknowledged that during the Third Press Conference Haradinaj mentioned the names and surnames of persons who were under investigation as set out in the Third Disclosure.<sup>365</sup> Gashi also asserted that the promise of the KLA WVA 'is to inform the public opinion every time they receive anything that relates to The Specialist Chambers, because we're against this Court.'<sup>366</sup>

115. During an interview on 22 September 2020, Gucati stated that the unidentified person who had brought the documents to the KLA WVA told them he would provide

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<sup>361</sup> P00012ET, pp.1-2; P00012, min.00:01:06-00:01:31.

<sup>362</sup> P00012ET, p.3; P00012, min.00:07:18-00:08:24.

<sup>363</sup> P00012ET, p.2; P00012, min.00:01:31-00:04:33.

<sup>364</sup> P00012ET, p.2; P00012, min.00:01:31-00:04:33; *See also* P00012ET, pp.2-3, P00012, min.00:04:42-00:06:21.

<sup>365</sup> P00012ET, p.3; P00012, min.00:07:18-00:08:24.

<sup>366</sup> P00012ET, p.4; P00012, min.00:09:45-00:13:18.

compact discs with some material; Gucati asserted that the KLA WVA would make such documents public to show those in Kosovo and Albanians around the world that the KSC collaborates with the Serbian authorities, adding that it was important to convince the citizens of Kosovo and to show them that this Court is worthless.<sup>367</sup>

116. During another interview that day, and in response to being accused of undermining the administration of justice, Gucati stated that these accusations were unfair and that he and others have protected every name included in the documents and made sure they were well-protected.<sup>368</sup> He stated that he and others know that they have not done anything against the law because they have not announced the name and surname of the witnesses, they only showed the documentation.<sup>369</sup>

117. Gucati stated that the documents received by the KLA WVA contained official stamps, reference numbers, signatures of international prosecutors, and stamps and the emblem of the KSC.<sup>370</sup> Gucati stated that he keeps publicising the documents because he and others wanted to show the reality and that they have been in conflict with the KSC for three years because the KSC is collaborating closely with Serbian authorities.<sup>371</sup> Gucati stated that he would make public all documents he might receive and that he and others are against the KSC because it is racist, one-sided and irrelevant, noting it was not his job to protect the documents.<sup>372</sup> Gucati stated that the documents made it to his office and his responsibility is to undermine the KSC.<sup>373</sup> He added that if he and others could, they would get rid of the KSC and disband it.<sup>374</sup>

118. Asked whether he had a responsibility in relation to what happened in view of

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<sup>367</sup> P00029ET, p.2; P00029, min.00:03:29-00:04:17.

<sup>368</sup> P00028ET, pp.1-2; P00028, min.00:00:00-00:03:08.

<sup>369</sup> P00028ET, p.2; P00028, min.00:00:00-00:03:08.

<sup>370</sup> P00028ET, p.14; P00028, min.00:17:50-00:19:36.

<sup>371</sup> P00028ET, p.2; P00028, min.00:01:36-00:03:08.

<sup>372</sup> P00028ET, pp.7-8; P00028, min.00:08:55-00:10:20.

<sup>373</sup> P00028ET, pp.8-9; P00028, min.00:10:20-00:13:16.

<sup>374</sup> P00028ET, p.11; P00028, min.00:14:47-00:16:12.

the fact that he made the documents public, Gucati claimed that he and others were not responsible because they have not made public any of the names of witnesses and made no statements about what was written in the documents.<sup>375</sup> 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.<sup>376</sup> Gucati stated that he and others do not know how the KSC could accuse them or serve them with indictments because they have not made the names of any witnesses public.<sup>377</sup>

119. During a television programme which aired on 22 September 2020, Haradinaj stated that he and others gave all the documents in the Third Disclosure to the media.<sup>378</sup> Asked by a journalist whether he had kept copies of the Third Disclosure, Haradinaj replied that he had not, and that he and others were giving the documents to those in attendance.<sup>379</sup> Asked whether copies of the Third Disclosure were being kept in KLA WVA archives, Haradinaj stated they were not because the media was the fourth power in Kosovo and the KLA WVA is counting on the media, adding that the KLA WVA gave the documents to the media who have archived them as much as they wanted and that the media could take as many documents as they wanted.<sup>380</sup> Haradinaj stated that if the media had not taken as many copies of the documents as they wanted from the KLA WVA, the media should feel ashamed,<sup>381</sup> and that he hoped the KLA WVA had not wasted all its efforts because the KLA WVA thought that by handing the documents over to the media, the media would save the documents.<sup>382</sup> Haradinaj stated that the KLA WVA are against the court, have always been against

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<sup>375</sup> P00028ET, pp.10-11; P00028, min.00:13:16-00:14:47.

<sup>376</sup> P00028ET, p.12; P00028, min.00:14:47-00:16:12.

<sup>377</sup> P00028ET, pp.12-13; P00028, min.00:16:12-00:17:50.

<sup>378</sup> P00030ET, pp.3-4; P00030, min.00:01:33-00:04:16.

<sup>379</sup> P00030ET, p.5; P00030, min.00:04:16-00:06:36.

<sup>380</sup> P00030ET, pp.5-6; P00030, min.00:05:34-00:06:36.

<sup>381</sup> P00030ET, pp.5-7; P00030, min.00:05:34-00:07:28.

<sup>382</sup> P00030ET, pp.8-9; P00030, min.00:08:22-00:09:39.

it, and will do anything to embarrass the racist, selective, political court.<sup>383</sup> He stated that what was important was that the documents provided to the KLA WVA undermine the work carried out by the court over five years.<sup>384</sup> Asked what he wanted the media to do, Haradinaj stated that he wanted the media to make the documents public as much as they dared to do so.<sup>385</sup>

120. The presenter of another television programme on which Haradinaj appeared on 22 September 2020 noted that Haradinaj had mentioned some names earlier that day, to which Haradinaj responded by stating he only mentioned one name [REDACTED].<sup>386</sup> Haradinaj stated that the material being made public suited him and others because it proved what they had always said in relation to the court cooperating with the Serbians,<sup>387</sup> and, referring to the KSC, that 'the leak of the documents, discredits them.'<sup>388</sup>

121. Addressing a journalist who stated he was not in possession of the Third Disclosure, Haradinaj stated that, at the press conference, the documents were on the table for the journalist to take and that the journalist could have taken them.<sup>389</sup>

122. During a televised programme on 24 September 2020, Klinaku referred to the KSC having a scandal on its hands due to the distribution of files which had taken place,<sup>390</sup> acknowledged that he and others had made 'Vukcevic's' name public,<sup>391</sup> and referred to the KSC as a 'sham'.<sup>392</sup>

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<sup>383</sup> P00030ET, p.15; P00030, min.00:15:02-00:18:18.

<sup>384</sup> P00030ET, pp.17-18; P00030, min.00:21:08-00:22:51.

<sup>385</sup> P00030ET, pp.20-21; P00030, min.00:24:30-00:25:41.

<sup>386</sup> P00011ET, p.30; P00011, min.00:39:20-00:39:58.

<sup>387</sup> P00011ET, pp.3-6; P00011, min.00:04:16-00:05:55.

<sup>388</sup> P00011ET, p.56; P00011, min.01:14:00-01:14:06.

<sup>389</sup> P00011ET, pp.7-8; P00011, min.00:10:54-00:12:41.

<sup>390</sup> P00023ET, p.2; P00023, min.00:07:53-00:07:56.

<sup>391</sup> P00023ET, p.6; P00023, min.00:10:04-00:10:07.

<sup>392</sup> P00023ET, p.7; P00023, min.00:10:57-00:11:04.



123. During an interview on 25 September 2020, Haradinaj stated: ‘we will be against this court as long as we live, as long as we can breathe. Full stop. We will work against this court. Full stop [...] We were handed them over by a person who delivered them to us. God willing, he will bring us more’, adding that this did not mean that it would be only Haradinaj, Gucati or Klinaku who would provide the documents to the media, since even the lowest ranked KLA member would do so, and that: ‘[w]e will disclose them to the media.’<sup>393</sup>

124. During another interview on 25 September 2020, Haradinaj stated that he will not follow the orders of the Court or recognise it, and that it was his and others’ duty to work against the court.<sup>394</sup> Clearly unrepentant, shortly before his arrest, Haradinaj stated that if he received more documents he would release them to the media.<sup>395</sup>

#### H. CONSEQUENCES OF THE ACCUSED’S ACTIONS

125. Following the publication of documents by the KLA WVA in September 2020, several SPO witnesses called SPO staff members, including then Witness Security Officer (and current Witness Security Team Leader) Miro Jukić (W04842), and expressed anger, concern, and fear about the fact that their names were published in the media in Kosovo and the region.<sup>396</sup> Such calls by witnesses to the SPO started on the same day the First Press Conference was held, with one such witness asking for a meeting that same day and Jukić then conducting the meeting.<sup>397</sup> One of the persons who contacted the SPO told Jukić that he had trusted the SPO but his name was now public and his family was in danger, noting that he knew what happened to witnesses in Kosovo, which Jukić understood as a reference to witnesses who have been

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<sup>393</sup> P00015ET, p.2; P00015, min.00:03:24-00:04:59.

<sup>394</sup> P00026ET, pp.2, 4-5; P00026, min.00:06:32-00:07:30, 00:09:29-00:10:50.

<sup>395</sup> P00026ET, pp.4-5; P00026, min.00:09:29-00:10:50.

<sup>396</sup> Jukić, T.1690, 1693, 1703-07.

<sup>397</sup> Jukić, T.1723-25; P00134.

threatened during legal proceedings in Kosovo.<sup>398</sup>

126. From 24 September 2020,<sup>399</sup> Jukić, Witness Security Officers, Prosecutors and Investigators, with the assistance of Interpreters or Language Assistants, contacted persons who had provided statements to the SPO that were named in the documents made public during the Third Press Conference.<sup>400</sup> This exercise was finalised in mid-December 2020.<sup>401</sup> These contacts were primarily made by telephone; some meetings were held in person.<sup>402</sup> The exercise of contacting persons was the highest priority for the SPO at the time, and was time-consuming.<sup>403</sup> Certain staff members who had been working remotely due to the ongoing pandemic were obliged to report to SPO offices for the purposes of conducting this exercise.<sup>404</sup>

127. Several persons who were contacted by the SPO expressed fears and felt threatened after their names were published,<sup>405</sup> and some were upset about the fact that their names were included in the documents made public by the KLA WVA and asked the SPO not to contact them anymore.<sup>406</sup> The publication of names of persons by the KLA WVA dissuaded certain persons from further engagement with the SPO.<sup>407</sup>

128. Tens of the witnesses with whom the SPO was in contact after confidential documents were made public by the KLA WVA noted that they felt worried, stressed, unsafe, threatened and/or intimidated in the wake of the publications.<sup>408</sup> There is a well-known climate of witness intimidation in Kosovo,<sup>409</sup> aggravating the impact the

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<sup>398</sup> Jukić, T.1704-05, 1758-59.

<sup>399</sup> Jukić, T.1700.

<sup>400</sup> Jukić, T.1692-95, 1697-98, 1700, 1711, 1715, 1803-05; Pumper, T.1009.

<sup>401</sup> Jukić, p.1832.

<sup>402</sup> Jukić, T.1695, 1698, 1761; Pumper, T.1009.

<sup>403</sup> Jukić, T.1700-01.

<sup>404</sup> Jukić, T.1701.

<sup>405</sup> Jukić, T.1699-1700; *See also* Jukić, T.1712, 1714-15, 1723-24, 1726, 1731-32; Pumper, T.1010.

<sup>406</sup> Jukić, T.1702-03.

<sup>407</sup> Jukić, T.1905. *See also*, Pumper, T.1012.

<sup>408</sup> Jukić, T.1719; *See also* Jukić, T.1712, 1714-15, 1722-24, 1726.

<sup>409</sup> Jukić, T.1758; Reid, T.3305-10; P00165; C00002.

Accused's conduct had on the witnesses.

129. Most of the persons contacted by the SPO during this exercise had heard about the KLA WVA having published the documents in September 2020 through the media.<sup>410</sup> Friends or family members had informed some persons contacted by the SPO that their names were featured in these documents.<sup>411</sup>

130. [REDACTED] contacted the SPO after his name had been published in the media, and the SPO also later contacted him; [REDACTED] complained about the publication of documents by the KLA WVA.<sup>412</sup>

131. Following the exercise of contacting persons named in the documents made public by the KLA WVA and as a result of the publication of such documents, the SPO undertook several measures, including providing such persons with new phone numbers and phones for safe communication because of the publication of documents by the KLA WVA, preparing emergency risk management plans, and relocation outside of Kosovo.<sup>413</sup>

132. The preparation of emergency risk management plans involved the work of several persons, including Witness Security Officers and Operational Security Officers.<sup>414</sup> The expedited preparation of emergency risk management plans was a necessary measure as a result of this leak, and was taken in relation to a limited number of witnesses whose risk level increased and who were important to the SPO.<sup>415</sup>

133. The two relocations undertaken by the SPO concerned persons who were scared and did not want to stay in their homes anymore following the publication of

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<sup>410</sup> Jukić, T.1715-16.

<sup>411</sup> Jukić, T.1715-16.

<sup>412</sup> Jukić, pp.1790-91, 1903-04.

<sup>413</sup> Jukić, T.1707-08, 1882-84.

<sup>414</sup> Jukić, T.1708.

<sup>415</sup> Jukić, T.1760-61.

documents by the KLA WVA; Jukić was involved in the decision-making process in relation to these relocations.<sup>416</sup> One relocation took place around [REDACTED] while the second took place [REDACTED].<sup>417</sup> Relocation is an exceptional measure of last resort and only undertaken when the SPO does not have any other options to protect someone in Kosovo; this measure is justified when it is assessed that there is a high level of threat to the witness.<sup>418</sup> In order to determine whether relocation is warranted, the relevant Prosecutor and Investigator are involved with Witness Security Officers who prepare a proposal concerning relocation, which is submitted to the Specialist Prosecutor himself.<sup>419</sup>

134. Security or protective measures other than relocation were undertaken in relation to between 20 and 30 witnesses.<sup>420</sup>

#### IV. ANALYSIS AND CASE THEORY

135. This section analyses select key issues. It also includes the SPO case theory section for each offence/mode of liability.

##### A. THE TESTIMONY OF SPO WITNESSES

136. All four SPO witnesses gave clear, consistent, and credible testimony.

137. *Zdenka Pumper*. Zdenka Pumper (W04841) is an SPO investigator with over 20 years of experience investigating crimes for the Austrian police and UN/EU missions.<sup>421</sup> She provided evidence of how the Batches were obtained and what they contained. The basis of her personal knowledge for the matters recounted in her

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<sup>416</sup> Jukić, T.1708-09, 1762-63, 1901-02.

<sup>417</sup> Jukić, T.1891-92.

<sup>418</sup> Jukić, T.1760-61.

<sup>419</sup> Jukić, T.1906.

<sup>420</sup> Jukić, T.1763.

<sup>421</sup> Pumper, T.832.

testimony was clearly set out, and she differentiated between matters she knew about and those she did not.<sup>422</sup> She made a point of identifying when answers would be speculative, including in response to questions from the judges.<sup>423</sup> Even cross-examining counsel appreciated her for being ‘candid’ when she did not make guesses during her testimony.<sup>424</sup>

138. *Halil Berisha*. Berisha is a former Gazeta Infokus journalist<sup>425</sup> who obtained Batch 4 from the KLA WVA and then returned it to the SPO. He was not against the cause of the KLA or the KLA WVA – to the contrary, in fact<sup>426</sup> - but rather gave a neutral account of the events he personally experienced. He was forthcoming in his answers to both the SPO and the Defence.

139. There is no reason to believe that Berisha gave incriminating testimony because he was assured he would not be prosecuted. The SPO only indicated that it was not opposed to Rule 151 assurances for this witness in response to a request from the witness’s attorney.<sup>427</sup> The SPO set out its position in court that Berisha committed no crime, but did so outside the presence of the witness before his testimony.<sup>428</sup> It is actually the Gucati Defence who first informed Berisha of the SPO’s remarks in open court.<sup>429</sup>

140. *Miro Jukić*. Jukić is the SPO Witness Security Team Leader, with 20 years of witness protection experience working in the Balkan region, including six years with the ICTY.<sup>430</sup> He gave a clear basis for his personal knowledge, distinguishing what he

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<sup>422</sup> E.g. Pumper, T.1049, 1070-71, 1217-18, 1392.

<sup>423</sup> E.g. Pumper, T.1477.

<sup>424</sup> Pumper, T.1049.

<sup>425</sup> Berisha, T.1513.

<sup>426</sup> See Berisha, T.1603-04, 1609, 1613.

<sup>427</sup> Transmission of Rule 151 request, KSC-BC-2020-07/F00327, 27 September 2021 (reclassified as public on 18 January 2022; with annex), para.2.

<sup>428</sup> Transcript, 26 October 2021, T.1506-07.

<sup>429</sup> Berisha, T.1577.

<sup>430</sup> Jukić, T.1690-92.

personally experienced and what he learned or inferred from elsewhere.<sup>431</sup> He also was clear in acknowledging when certain information did not appear in notes recording witness contacts.<sup>432</sup> He was forthright in his answers to questions, and gave additional precision when he could in response to questions from the Defence and the judges.<sup>433</sup> When confronted with inflammatory cross-examination – including being told he was lying – he remained professional and composed while firmly denying such accusations.<sup>434</sup> Jukić’s evidence on the overall fears expressed by witnesses and the threats they faced was clear and unequivocal, consistent with Pumper’s testimony<sup>435</sup> and the information in the admitted witness contact notes.

141. *Daniel Moberg*. Moberg, an SPO Operational Security Officer<sup>436</sup> who participated in the operations to seize the Batches, gave direct, clear answers throughout his account. He was also willing to admit the limits of his knowledge, which made the parts of his testimony where he was categorical all the more credible.<sup>437</sup> Moberg also differentiated between conversations he did and did not understand at the KLA WVA,<sup>438</sup> taking care not to overstate his knowledge of events even when he personally participated in them.

## B. THE TESTIMONY OF THE ACCUSED

142. Both Accused used their testimony to advance the anti-KSC agenda which motivated their criminal conduct in this case.<sup>439</sup> They were repeatedly evasive in answering questions, prone to political tangents, and spoke in the same talking points

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<sup>431</sup> E.g. Jukić, T.1719-20, 1805.

<sup>432</sup> E.g. Jukić, T.1856, 1880.

<sup>433</sup> See Jukić, T.1784-93, 1813.

<sup>434</sup> Jukić, T.1860, 1892.

<sup>435</sup> See especially Pumper, T.1009-1010, 1012.

<sup>436</sup> Moberg, T.1930.

<sup>437</sup> Moberg, T.1938-39, 1959.

<sup>438</sup> See Moberg, T.1954.

<sup>439</sup> Gucati, T.2174-75, 2179, 2205, 2412-13, 2428; Haradinaj, T.2709-12, 2715, 2815-16, 2863-65.



they used when giving interviews during the charged timeframe. Both had to be admonished by the Presiding Judge for not answering questions posed.<sup>440</sup>

143. Both Accused also transparently lied when testifying. As an illustration, Nasim Haradinaj said that Ballhazhi was not welcome at the KLA WVA headquarters, only to be shown a video of him hugging her and giving her access to Batch 3 for about 25 minutes before the Third Press Conference.<sup>441</sup> Hysni Gucati vainly attempted to distort the basic meaning of his prior statements, unwilling to acknowledge, for example, that he saw the names of Albanian witnesses in the Batches<sup>442</sup> or that he called those witnesses 'traitors'.<sup>443</sup> Gucati also stated that he did not see any of the cover letters regarding requests for information or evidence in the First Disclosure,<sup>444</sup> even though he is recorded on camera handling such requests and referring to their contents.<sup>445</sup> Similarly, he attempted to state that he was only aware of the public contents of the Second Disclosure regarding the *Limaj et al.* case.<sup>446</sup> However, he is recorded selecting and showing confidential requests on camera in the course of the Second Press Conference.<sup>447</sup>

144. Nowhere is the Accused's lack of commitment to the truth more apparent than their insistence that they never publicised witness names. Both during the charged

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<sup>440</sup> Gucati, T.2221; Haradinaj, T.2823-24, 2867-68.

<sup>441</sup> Haradinaj, T.2747-48, 3006-16; P00163; P00164; P00125, pp.14-18.

<sup>442</sup> Gucati, T.2260-63 (from 2260-61: 'Q. Later in the course of the same interview, you were referring to specific interviews and then you were asked: "Are the witnesses Serb for this one and the other one that you mentioned?" And you replied: "No, Albanian." Do you agree that you also saw that there were witnesses -- there were interviews of Albanian witnesses in the batch of documents that you shared at the press conference of 7 September 2020? A. I do not know how do you understand that, but I've said, no, I have not seen. I have not seen Albanian witnesses. So this is what I've said: No Albanian. So it's very clear in Albanian.'). The Accused's interpretation is nonsensical in the context of the interview exchange. P00009ET, pp.6-7.

<sup>443</sup> Gucati, T.2365-67, 2424-26; P00009ET, p.12.

<sup>444</sup> Gucati, 1D00003ET para.16.

<sup>445</sup> P00001ET, pp.3-4; P00001, min.00:09:09-00:09:20.

<sup>446</sup> Gucati, 1D00003ET, para.37.

<sup>447</sup> P00002ET, p.1; P00002, min.00:00:01-00:02:31.

timeframe and their testimony, the Accused stressed they were never saying witness names and directed the media to do the same.<sup>448</sup> But both acknowledged that they left documents with those names without redactions for any media member to peruse and publish as they saw fit.<sup>449</sup> Such conduct *is* a patent revelation of witness names. The Accused resort to sophistries in a denial of reality.

145. Particular caution should be exercised whenever the Accused attempted to distance themselves from their previous public statements when testifying. With the benefit of hindsight as an accused in a criminal trial, the Accused have an obvious interest in denying past statements which are highly incriminatory. But these earlier statements – said publicly, freely, repeatedly, and spontaneously – are more credible accounts of their true intentions than any calculated clawbacks attempted when testifying.

146. In contrast, and relatedly, the admissions the Accused made against their interest when testifying should be given significant weight. For the Accused to incriminate themselves during their testimony despite knowledge of the charges against them suggests those statements are particularly reflective of their true feelings. One prominent example is how both Accused were steadfast in their lack of remorse

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<sup>448</sup> Gucati, T.2175, 2206-07 (saying that he and Haradinaj did not reveal ‘Albanian or Roma or Turkish or Bosnian witness living in Kosovo’, then immediately revealing the identities of two Serbian officials which prompted redaction orders and breached the clear instructions of the Presiding Judge), 2373-74; P00028ET, pp.10-11; P00009ET, pp.6-7; P00002ET, p.4.

<sup>449</sup> Gucati, T.2173 (‘Q. Did you, in the course of that conference, reveal and distribute confidential, non-public information? A. No, it can’t be so. It’s never happened that I asked someone, “Take this document.” You can see everything in the transcript. I only said that we received a package at about 9.30 or 9.40, and that in this package there are documents from the Special Court. That was my -- what I said. That is all.’); 2281-83 (from 2281, and just before affirming his media statement that 70% of Batch 2 was taken by the media: ‘*De facto*, we did not distribute any information. What we did is that we had this press conference, and we put the documents in the desk, in the table. We didn’t tell anyone, “Just go and get the documents.”’), 2373; Haradinaj, T.2945-50 (denying the Batches were publicised, despite using the word himself in P00030ET, p.7-8); Gucati, 1D00003ET, para.19; Haradinaj, T.2731, 2821, 2830-31, 2965. *See also* P00004ET, p.3.

and their resolve to reveal more confidential materials.<sup>450</sup> Another is when Gucati refused to disavow any statements of Haradinaj from September 2020,<sup>451</sup> illustrating that they were both acting jointly throughout the charged timeframe.

### C. THE TESTIMONY OF OTHER DEFENCE WITNESSES

147. The testimony of the other Gucati Defence witnesses – namely several staff from the KLA WVA and Elmedina Ballhazhi - was marked by a pronounced pro-Accused bias. Anti-KSC statements were common, and reverence for the Accused was manifest.<sup>452</sup> The picture the Gucati Defence witnesses all took together shortly before boarding the plane to come to The Hague is emblematic of how these persons were coming as united in a common cause.<sup>453</sup> This undeniably affected their testimony, such as when Cele Gashi transparently adjusted his previous statement to better support the Defence case.<sup>454</sup> Given the biases of these witnesses, and just as with the Accused, any statements these witnesses made which actually incriminated the Accused were

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<sup>450</sup> Gucati, T.2218-19, 2221-22, 2401; Haradinaj, T.3021-24.

<sup>451</sup> Gucati, T.2374-78 (from 2375-76: 'Q: Is there anything that Nasim Haradinaj stated in the three press conferences or in other public appearances, in relation to the documents that were made available by the KLA War Veterans Association to those attending the press conferences, that you wish to disavow? A. I don't think so. I don't think I've heard a single thing, because I would have said it there and then that the -- had he made a mistake.').

<sup>452</sup> Ballhazhi, T.2503 (explaining why she called Haradinaj a 'person of omnipotent justice'), 2509; Marashi, T.2533-41; Kryeziu, 1D00008ET, para.15; Cele Gashi, T.2604-06.

<sup>453</sup> P00162; P00162ET (from Klinaku's accompanying post: '[s]eeing off comrades going to The Hague, defending the KLA, the WVA and its leaders.'). *See also* Taibe Miftari, T.2464-67.

<sup>454</sup> Cele Gashi initially estimated that the review lasted 2-3 hours (Cele Gashi, 1D00009ET, para.14), and then corrected the estimate to 30-40 minutes when led in court by the Defence Counsel (Cele Gashi, T.2584), failing to provide a credible explanation for the discrepancies, and the reason why he did not correct his statement when given an opportunity to do so (Cele Gashi, T.2591-2597, 2603-2604, 2606-2607). Similarly, Cele Gashi initially estimated that the review of the Second Disclosure lasted up to four hours (Cele Gashi, 1D00009ET, para.28), then changed the estimate to 10-20 minutes when questioned by the Defence (Cele Gashi, T.2588-2589); in cross-examination he first stated he reviewed the documents for 1.5 hours (Cele Gashi, T.2596) and then adjusted the estimate to 20-30 minutes (D1245, T.2598), failing to provide a credible explanation as to the discrepancies, and the reason why he did not correct his statement when given an opportunity to do so (D1245, T.2591-2597). In a public appearance on 16 September 2020, Haradinaj stated that he and others reviewed the documents for about three hours, P00018ET, pp.3-4; P00018, min.25:32-26:20.

particularly credible.

148. In general, the Gucati Defence witnesses did not know much of relevance to the charges beyond what the Accused said. Some also lacked command over facts clearly established by other evidence, such as Ballhazhi testifying that the SPO met with the Accused before the Second Press Conference on 16 September 2020<sup>455</sup> when: (i) every other witness, and the handover form signed for Batch 2, indicate it happened the next day on 17 September; and (ii) Ballhazhi herself recognised a 17 September 2020 press conference as the one she was recalling.<sup>456</sup>

149. As for the other Haradinaj Defence witnesses, they simply knew nothing of relevance about this case. A central tenet of former Kosovo Police General Director Rashit Qalaj (DW1246)'s anticipated evidence was that the SPO told the Kosovo Police to stop investigating, but when he testified it became immediately clear that it was the SPRK who told him so and that he never spoke with the SPO.<sup>457</sup> Anna Myers (DW1252) was a whistle-blowing expert who, by her own admission, was not informed about the law applicable to this case and provided no caselaw supporting her extremely broad interpretation of whistle-blowing.<sup>458</sup> She was reticent to classify any public disclosure as unprotected, even when presented with a hypothetical of a person revealing the names of protected witnesses in a criminal case.<sup>459</sup>

150. Haradinaj Defence investigative expert Robert Reid (DW1253)'s overall opinion that the SPO investigation was not done in accord with 'best practices' is similarly

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<sup>455</sup> Ballhazhi, T.2493-95, 2512.

<sup>456</sup> Ballhazhi, T.2500-03.

<sup>457</sup> Qalaj, T.3062-63, 3067-68, 3071-72 (from 3071: 'Q. So just to sum it up, is it correct that you never received any instruction from the SPO not to investigate the case concerning the delivery of the documents to the KLA War Veterans Association? Is this correct? A. Yes, I am repeating. In no moment, never did we receive any request by the SPO here in The Hague to investigate or not to investigate this case').

<sup>458</sup> Myers, T.3149-52, 3169-70, 3175-77.

<sup>459</sup> Myers, T.3181-83.

deeply flawed.<sup>460</sup> Reid was not given the information necessary to properly evaluate the SPO's investigation.<sup>461</sup> He did not even carefully review the information he did receive, in that he:

- i. Wrongfully claimed that the SPO did not conduct a page-by-page comparison of Batches 1 and 4;<sup>462</sup>
- ii. Was not aware that the seized documents had no ERNs;<sup>463</sup>
- iii. Struggled to recall the nature of what Batch 3 was, which affected his recommendation on whether checking the Zylab evidence database in relation to it would be helpful;<sup>464</sup> and
- iv. Did not recall that the SPO actually was able to isolate a version of Batch 3 in its internal database (eventually confirming the method chosen was effective to authenticate the document).<sup>465</sup>

151. Reid also ignored important contextual considerations, such as the reality that verifying specific pages in a document as confidential is not necessary if all records of that investigation were confidentially classified.<sup>466</sup> Nothing in Reid's testimony cast any doubt on the evidence offered by the SPO in this case, including on the authenticity of seized materials, plainly established through a variety of sources, as set forth in detail below. All told, Reid's opinion on the SPO's investigation is based on nothing more than uninformed conjecture.

152. It is further noted that Reid was unable to accurately recall details of his prior

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<sup>460</sup> Reid, T.3257-58.

<sup>461</sup> See Public Redacted Application to Authorise Advance Disclosure to Expert Witness Reid, KSC-BC-2020-07/F00524/RED, 18 January 2022 (public redacted version notified 25 January 2022), paras 23, 26; Reid, T.3350-52 (from 3352: 'Q. So when you provided your expert report, you actually were not fully informed of what was the procedure that had been carried out; is this correct? A. That's correct. I mean, as I said in -- I think in one of the first paragraphs, I outlined the documentation that I relied upon. I didn't even have the declarations of the investigator to rely').

<sup>462</sup> Reid, T.3259-63; Pumper, T.893.

<sup>463</sup> Reid, T.3264-66; Pumper, T.1476-77.

<sup>464</sup> Reid, T.3268-73.

<sup>465</sup> Reid, T.3273-77; Pumper, T.951-52.

<sup>466</sup> Reid, T.3283.

ICTY search operations, despite relying on them as guides to support his opinions.<sup>467</sup> Upon closer scrutiny, it turned out that these searches fell short of the procedural models he claimed them to be.

153. At the same time, Reid's overall investigation experiences at the ICTY gave him ample basis to speak of the general difficulties of investigating in Kosovo. This testimony was reliable and consistent with the other evidence in the case.

#### D. THE AUTHENTICITY OF THE BATCHES

154. The authenticity of the Batches is beyond question. This is true whether 'authenticity' is understood as whether the documents belonged to the SITF/SPO (or were related to SITF/SPO investigations) or whether there is sufficient evidence that the Batches discussed during trial are the Batches seized. On the former understanding of authenticity, Pumper matched items from the Batches to information in internal SPO databases.<sup>468</sup> On the latter understanding of authenticity, Pumper reviewed the official documentation of their seizure, which included information on the relevant evidence bags and the ERNs assigned, to confirm that the documents she reviewed were in fact the seized materials.<sup>469</sup> Further, as set out in more detail below, descriptions of the batches by the Accused and the media match exactly the batches seized and reviewed by Pumper.

##### 1. Batch 1

155. The Accused showed and described the contents of the First Disclosure at the

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<sup>467</sup> Reid, T.3318-22, 3332-33.

<sup>468</sup> Pumper, T.866-69, 876-79. Pumper matched every request in Batch 1 to the SPO's internal databases, but not every document in that batch (Pumper, T.1069). Nor was this necessary to do so in order for Pumper to assess the indicia of confidentiality or the names of potential witnesses on the face of the documents included in her declarations P00090 and P00091.

<sup>469</sup> Pumper, T.854, 891-93, 905-09, 914, 921-22.



First Press Conference<sup>470</sup> and acknowledged they were believed to be authentic at the time of that press conference.<sup>471</sup> Consistent with their description, Batch 1 included confidential requests for assistance with the Serbian authorities, most containing names and personal details of witnesses with any prior statements.<sup>472</sup> The Serbian Documents within the Batch contain references to these SITF Requests and/or to SITF/SPO witnesses mentioned in the Requests.<sup>473</sup> Moberg collected these materials, which were then securely transported to The Hague.<sup>474</sup> Pumper provided a page-by-page analysis of them, describing their contents in accordance with the non-disclosure counterbalancing requirements set by the Pre-Trial Judge.<sup>475</sup> Pumper was also able to match the coordination requests in this batch with documents in the SPO's internal databases.<sup>476</sup>

156. The pages of Batch 1 collected by the media were published in articles on or around 7 September 2020.<sup>477</sup> Journalists, including Berisha, made inquiries with the SPO about the materials made available by the KLA WVA on this date.<sup>478</sup> The pages of Batch 1 in those articles match the descriptions of the Accused, other Defence witnesses, and Pumper.<sup>479</sup> Moberg collected Batch 4 from Berisha, which was then securely transported to The Hague.<sup>480</sup>

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<sup>470</sup> P00001, min.00:15:53-00:16:07; P00001ET, pp.2, 4-5.

<sup>471</sup> Gucati, T.2415-16 (question from Judge Mettraux: 'But would it be correct to suggest that at the time when that conference was taking place, you believed these documents to be authentic? Is that the case? A. Yes. Based on the logo of the Court and the names that we saw there, we believed that they might belong to the Special Court').

<sup>472</sup> Pumper, T.860-67; P00086, paras 7-9; P00088.

<sup>473</sup> Pumper, T.885-887; P00090, Annex 1. *See also*, Pumper, T.886-887.

<sup>474</sup> Moberg, T.1930-37, 1940-41, 1958; P00092; P00138; P00056; P00057.

<sup>475</sup> Pumper, T.869-72, 1084-85; P00090. *See also* P00086, para.7.

<sup>476</sup> Pumper, T.866-69, 876-79; P00093; P00094; P00095; P00096; P00097.

<sup>477</sup> Berisha, 1539-41, 1559-73; Pumper, T.903-04, 989-94, 1001-04; P00123; P00124; P00128; P00129. *See also* P00092, para.7.

<sup>478</sup> Berisha, T.1524, 1526; P00089, paras 14-20; P00098; P00101; P00102.

<sup>479</sup> P00086, paras 13-18.

<sup>480</sup> Berisha, T.1535-36; P00099; P00100.

157. Further, Berisha also obtained a full copy of the First Disclosure from the KLA WVA – known in this case as Batch 4 – and described the same contents as what appeared in Batch 1.<sup>481</sup> Pumper also confirms that Batch 4 is nearly an exact match of Batch 1.<sup>482</sup>

158. The pages of Batch 1 tendered for admission through Pumper fully match the description of all the other evidence presented.<sup>483</sup>

## 2. Batch 2

159. The Accused described the contents of the Second Disclosure during and after the Second Press Conference, indicating it had some materials like the First Disclosure and other documents from old court judgments.<sup>484</sup> Though 70% of the Second Disclosure had been distributed prior to the SPO's arrival,<sup>485</sup> Batch 2 was picked up on 17 September 2020 and a handover form signed by Hysni Gucati memorialises its seizure.<sup>486</sup>

160. Pumper gave the same description of Batch 2 as the Accused. She confirmed that Batch 2 consisted of public court materials other than six pages of confidential correspondence with Serbia also found in Batch 1.<sup>487</sup>

161. The entirety of Batch 2 was tendered into evidence during trial, with redactions applied to the six pages from Batch 1.<sup>488</sup> This evidence matches the description provided by the Accused and the witnesses who testified in this case. In particular, Batch 2 matches Pumper's page-by-page analysis of Batch 2's contents, bolstering the

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<sup>481</sup> Berisha, T.1519-26, 1566-67, 1571-73, 1601-09. *See also* P00092, para.7; P00129.

<sup>482</sup> Pumper, T.893-95; P00091; P00089, paras 5-13.

<sup>483</sup> P00093; P00094; P00095; P00096; P00097.

<sup>484</sup> P00002ET, p.1; Gucati, T.2273; P00017ET, p.4.

<sup>485</sup> Gucati, T.2282-83; P00004ET, p.3.

<sup>486</sup> Gucati, T.2193-94; P00055.

<sup>487</sup> Pumper, T.914-15, 994-95; P00086, paras 19-27. *See also* P00125, pp.081371-081373.

<sup>488</sup> P00104 (especially pp.080126-31). *See also* Pumper, T.913.

reliability of her similar analyses of Batches 1, 3, and 4.<sup>489</sup>

### 3. Batch 3

162. The Accused described Batch 3 as being a 'draft indictment' against Hashim Thaçi, Kadri Veseli, Rexhep Selimi, Jakup Krasniqi, and Azem Sylja.<sup>490</sup> Though only an SPO narrative of detention sites<sup>491</sup> and not a draft indictment *per se*, an internal SPO memorandum showing these names and the names of witnesses was published by various media outlets on or around the date of the Third Press Conference.<sup>492</sup>

163. The pages in this batch show clear seals and indicia of being the internal work product of the SPO, with most pages containing a footer with the word 'Confidential' and a header with the SPO logo and the words 'CONFIDENTIAL, Internal Work Product, JCE Linkage Narrative December 2019'.<sup>493</sup>

164. As with the other batches, Pumper provided a detailed description of the contents of Batch 3 and confirmed that the pages published in the media are in the batch retrieved by the SPO.<sup>494</sup> [REDACTED].<sup>495</sup>

165. The pages of Batch 3 tendered into evidence also match the descriptions provided by the Accused, Pumper, and the pages published in the media.<sup>496</sup> The Defence's focus on marginal differences in the staple marks, highlighting, copying, and black lines between the pages in the media versus those in Batch 3 merely distract

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<sup>489</sup> P00090, Annex 3.

<sup>490</sup> P00035, pp.2, 5; Gucati, T.2297.

<sup>491</sup> Pumper, T.926.

<sup>492</sup> P00120ET; P00121ET; P00122ET; P00125ET.4; P00155ET; P00156ET; P00157ET; P00159ET; P00160ET.

<sup>493</sup> Pumper, T.929; P00086, para.35; P00090, Annex 5.

<sup>494</sup> Pumper, T.926-32, 940-46, 973-84; P00157; P00158; P00159; P00120; P00121; P00122; P00086, paras 28-74.

<sup>495</sup> [REDACTED].

<sup>496</sup> P00106; P00107; P00108; P00109; P00110; P00111; P00112; P00113; P00114; P00115; P00116; P00117; P00118; P00119.

from the essential truth that the content of the documents is exactly the same.<sup>497</sup> It is noted in this regard that the Third Disclosure consisted of (at least) three copies of the same document,<sup>498</sup> of which the SPO only retrieved two partial copies.<sup>499</sup> The internal work product indicia and level of detail provided in these pages is such that they could only have been reasonably produced by the SPO.

E. FULL DISCLOSURE OF THE BATCHES IS NOT REQUIRED TO FAIRLY CONVICT THE ACCUSED

166. This case is premised on the Accused receiving and illegally disclosing sensitive information they were never authorised to possess. Disclosing such information to the Accused in the context of these proceedings has always entailed the risk of returning the means by which the Accused committed the charged offences. This is why the Pre-Trial Judge ordered non-disclosure of the Batches, subject to countermeasures to keep the proceedings fair.<sup>500</sup> The Defence never sought leave to appeal this decision. The most prominent of these countermeasures is Pumper's tabular descriptions of the Batches which have been admitted into evidence by the Trial Panel.<sup>501</sup>

167. These counterbalancing measures have been effective and preserved the fairness of the proceedings. The Defence has been given a fair opportunity to challenge the evidence presented, most notably through being able to cross-examine Pumper and review the pages of the Batches tendered into evidence. Following the last disclosure of items in this case under Rule 102(3), the Trial Panel even permitted

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<sup>497</sup> Pumper, T.1354-77.

<sup>498</sup> See Haradinaj, 2D00001ET, para.104, 111.

<sup>499</sup> Pumper, T.951; P00086, para.29.

<sup>500</sup> Public Redacted Version of Decision on Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07/F00141/RED, 23 February 2021 (public redacted version notified 15 July 2021), paras 39, 45; Lesser Redacted Version of Decision on the Non-Disclosure of Information Requested by the Defence, KSC-BC-2020-07/F00171/CONF/RED2, 1 April 2021, Confidential (lesser redacted version notified 22 June 2021).

<sup>501</sup> P00090; P00091.

Pumper and Jukić to be re-called so the Defence had an opportunity to explore all aspects into the deliveries of the Batches they considered necessary.<sup>502</sup>

168. For all its protestations to the contrary prior to trial, at the end of the trial the authenticity of the Batches does not even appear to be highly contested. The Defence's insistence that the Accused acted as whistle-blowers in the 'public interest' presumes as a starting point that they believed they were sharing truthful information,<sup>503</sup> meaning, in this case, actual documents pertaining to SITF/SPO investigations. The Accused asserted publicly during the charged timeframe that the Batches were authentic,<sup>504</sup> retaining copies for the SPO to retrieve in order to get the confirmation that the information was genuine.<sup>505</sup>

169. Criminal charges can be proven in various ways. The SPO was not required to disclose the entirety of the Batches in order to prove what the Accused unlawfully did with them. There is voluminous evidence that the Accused had full awareness of what the Batches contained and their authenticity, and no reasonable argument can be made that the Defence have been prevented from challenging the evidence because of the non-disclosure orders issued in this case.

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<sup>502</sup> Pumper, T.2622-26; Jukić, T.2627-35.

<sup>503</sup> This is conceded on the definition provided by the Haradinaj Defence's own expert. Myers, T.3112 (defining whistle-blowing as a 'a person who exposes information that he or she reasonably believes at the time of disclosure to be true [...]'), 3130-32, 3180; Myers, 2D00006, para.34. *See also Guja*, 14277/04, para.75; ECtHR, *Heinisch*, 28274/08, para.80. Myers actually mis-quoted the Special Rapporteur's definition from which she derives her own (Myers, T.3140-41), but quoted it accurately in relation to the truth of the information in question.

<sup>504</sup> P00021ET, p.4 (Haradinaj: 'from what we have seen, the material is authentic'); P00011ET, p.47; P00019ET, p.2.

<sup>505</sup> P00002ET, p.9 (Haradinaj: 'Let them come and get the materials as they are [...] [b]ecause we want them for authenticity'); P00035ET, p.7 ('JOURNALIST: Will you hand over these files to the investigators if they come again to take them? Mr Haradinaj We want to keep them just for them to confirm their authenticity as they did with the other two lots so that there can be no speculation whether they are authentic or not'). Haradinaj tried to distance himself from this last cited remark. Haradinaj, T.2753-54, 2812-13, 2954-57.

F. OBSTRUCTING OFFICIAL PERSONS IN PERFORMING OFFICIAL DUTIES

1. **The Accused made serious threats which obstructed KSC/SPO official persons**

170. The Accused were fully aware that the Batches contained confidential information relating to KSC/SPO investigations. They revealed the Batches to the media in an effort to expose the KSC/SPO's secrets.<sup>506</sup> These revelations, coupled with their public statements, are developed further below in the Intimidation section. As confirmed by defence witness Reid, leaking of information concerning witnesses in Kosovo would make fulfilling a prosecutorial mandate very difficult:

A leak of any information is detrimental to a prosecution's case. The leak of witness information is doubly detrimental in that it not only impacts the potential of your case but it impacts on the psychology of the particular witness. And if it's found out to be -- if the witness community find out about it, it also impacts upon other witnesses.

So, you know, if ten other witnesses find out about it, there's a huge impact on your case. You don't just have one witness who you've got to be concerned about now. If it's leaked and it becomes public knowledge, then you've got ten to, say, 15 to 20 witnesses who it impacts upon.<sup>507</sup>

171. Witnesses are an essential part of any criminal investigation.<sup>508</sup> As developed further in the Intimidation sections of this brief, witnesses were scared following the revelation of the Batches<sup>509</sup> and, when called by the SPO, were very upset.<sup>510</sup> Some even said 'don't contact me anymore'.<sup>511</sup>

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<sup>506</sup> P00017ET, p.6 ('[t]here are no secrets left unrevealed').

<sup>507</sup> Reid, T.3360-61.

<sup>508</sup> Jukić, T.1702 ('for our office, witness security is top priority. We know and we learn that without witnesses we don't have cases'); Gucati, T.2374.

<sup>509</sup> Jukić, T.1693, 1703; Pumper, T.1012 ('Q. Investigator, so could you please tell what the witnesses that you contacted told you in the course of these contacts. A. So if I can repeat, one witness, this specific person was very scared, and he -- if I -- the witness explained that he had been burned -- his identity has been made due to the fact of these disclosures. He asked me to return to the court and beg them not to call him as a witness because he feared for his life and for his family's life. And he went to the degree that he asked me whether I could just simply tell the court that I couldn't find him.').

<sup>510</sup> Jukić, T.1703.

<sup>511</sup> Jukić, T.1703.

172. The conduct of the Accused qualifies as serious threats within the meaning of Article 401 of the KCC. The serious threats in question need not be threats of force.<sup>512</sup> The serious threats also need not be directed at the official persons themselves – they can be directed at other persons or even objects which have the effect of obstructing or attempting to obstruct the official person.<sup>513</sup>

173. The revelations in the Batches forced the SPO to divert resources to contact them and protect them.<sup>514</sup> In the words of Jukić, after the Third Press Conference contacting the affected witnesses became the ‘highest priority for our office’<sup>515</sup> and that he did not do any other planned work during this period.<sup>516</sup> The SPO had to provide witnesses with new phone numbers or new phone devices for safe communication.<sup>517</sup> Emergency risk management plans needed to be prepared.<sup>518</sup> Twenty to thirty witnesses had security or protective measures taken to assist them following the actions of the Accused.<sup>519</sup> Two witnesses were relocated out of Kosovo, a measure of last resort in the SPO’s efforts to protect witnesses in the face of a high level of threat.<sup>520</sup>

174. Investigating in Kosovo is self-evidently essential to the fulfilment of the SPO’s mandate,<sup>521</sup> and the Accused’s actions substantially compromised the SPO’s ability to do so.

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<sup>512</sup> Applicable Law Submissions, KSC-BC-2020-07/F00341, para.8.

<sup>513</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.68; Salihu et al., Commentary on the Criminal Code of the Republic of Kosovo (‘Salihu Commentary’), pp.1165-66 (‘[t]he threat should be addressed to the official person with the intention of obstructing the official duties. However, it might also be addressed to another person or an object’).

<sup>514</sup> Jukić, T.1694, 1698, 1761 (‘we did around 200 phone calls’), 1907; Pumper, T.1009-10.

<sup>515</sup> Jukić, T.1700.

<sup>516</sup> Jukić, T.1701, 1837. The contacting witnesses exercise was finalised in mid-December 2020. Jukić, T.1832.

<sup>517</sup> Jukić, T.1707-08.

<sup>518</sup> Jukić, T.1707-08, 1760-63.

<sup>519</sup> Jukić, T.1763.

<sup>520</sup> Jukić, T.1707-09, 1760-61, 1888-93, 1901-02 (demonstrating no inconsistency between the witness preparation note and the witness’s testimony on this point), 1905-06.

<sup>521</sup> See generally Article 35; Chapter 3 of the Rules.



## 2. The Accused intended to obstruct the official duties of the KSC/SPO

### (a) *The Accused were opposed to the KSC/SPO's mandate*

175. The Accused have been explicit that they are opposed to the KSC/SPO's mandate.<sup>522</sup> The KSC is 'mono-ethnic' and 'racist'.<sup>523</sup> It practices in 'selective justice' because it does not prosecute Serbian crimes during the Kosovo war.<sup>524</sup> It is supported by every 'traitor' and 'spy'.<sup>525</sup> It calls witnesses who are enemy 'collaborators',<sup>526</sup> and it is 'criminalising the Kosovo Liberation Army'.<sup>527</sup> Its justice is 'picked up from Milošević's apparatus'.<sup>528</sup>

176. Evidence that the Accused did not want to abrogate the KSC, but only to amend it,<sup>529</sup> does not withstand scrutiny. The Accused acknowledged that they support abrogating the KSC if it could not be amended,<sup>530</sup> while admitting that their efforts to amend the institution were ineffective.<sup>531</sup> The Accused also would not accept cooperation with Serbia unless Serbia were fundamentally different than what is

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<sup>522</sup> Gucati, T.2263-64; Gucati, 1D00003ET, para.67; P00021ET, pp.3-5; P00004ET, p.8; P00002ET, pp.3, 6-7; P00007ET, pp.2-3; P00028ET, pp.8-9; P00049ET, pp.13-14; P00039ET, p.2; P00038ET, p.2.

<sup>523</sup> Haradinaj, T.2714, 2735; P00030ET, p.15; P00021ET, p.4; P00018ET, p.2.

<sup>524</sup> Gucati, 1D00003ET, para.58; Haradinaj, 2D00001ET, paras 18, 22, 30.

<sup>525</sup> P00037ET, p.5 ('[o]n the other hand, everyone who has been against the KLA, every collaborator, every Quisling, every traitor, every spy and every family member of a spy is in favour of this tribunal, in favour of this kind of tribunal. We have declared publicly'); Haradinaj, T.2885-89.

<sup>526</sup> P00040, p.2; P00083ET, pp.59-62. *See also* Haradinaj, T.2749 ('Accusing people of taking part in the law, that you're a collaborator of the secret Serbian services, that is the -- the ultimate accusation you could level'), T.2890-93.

<sup>527</sup> Haradinaj, T.2714.

<sup>528</sup> P00018ET, pp.5-6; P00019ET, p.4; Haradinaj, T.2874-79.

<sup>529</sup> Haradinaj, T.2716, 2858-63; Haradinaj, 2D00001ET, para.17. Haradinaj's written statement is even internally inconsistent on this point. *Compare* Haradinaj, 2D00001ET, para.17 ('[t]o be clear we were not seeking the abrogation or closure of the KSC') *with* para.37 ('[o]ur intention was to try and amend existing laws relating to the KSC/SPO or to abrogate it').

<sup>530</sup> Haradinaj, T.2861 ('[i]f it would have been within my own powers, I would have abrogated it a long time ago with the way you conduct your work. It was not up -- up to me. If you'd had my own mandate for the sake of the partial justice that you're pursuing, I would have -- have abrogated you today.');

P00047ET, p.1.

<sup>531</sup> Gucati, 1D00003ET, para.67; Haradinaj, T.2715-17 (from 2716: '[t]he government of Kosovo turned a deaf ear').

today.<sup>532</sup>

177. The Accused cannot disguise their disdain for the institution.<sup>533</sup> Their willingness to acknowledge that war crimes allegations could be made against the KLA was insincere,<sup>534</sup> given their evasive answers when confronted with their past public statements that the KLA did not or could not have committed any crimes.<sup>535</sup>

178. When legal means to amend the institution failed and the Batches presented a 'dream' opportunity,<sup>536</sup> the Accused took the law into their own hands to discredit the

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<sup>532</sup> Haradinaj, T.2988-89; Haradinaj, 2D00001ET, para.32; Gucati, 1D00003ET, para.68 ('I object to the KSC/SPO collaborating with the Serbians').

<sup>533</sup> Haradinaj, T.2876-77 ('Q. My question was would you obstruct the KSC's justice all your life. Is the answer to that question yes? A. If you work on the directives of Milosevic, yes. Yes, yes. Q. And that's what you believe, isn't it? A. This is what you reflect, and this is the conviction you created in me. Your behaviour. And not only in me. And I don't want to expand here, but even if it was only on me, you've created this opinion.');

P00029ET, p.1; P00039ET, p.4; P00028ET, p.11; P00083ET, p.SPOE00222243 ('/Facebook comment/ Nasim Haradinaj This Special Court has to fall! And it will fall!!!'). See also Haradinaj Initial Appearance, T.18 ('[a]nd even if you condemn me with 500.000 years, I think you can do nothing to change my opinion and the opinion of the people about the existence of these Chambers').

<sup>534</sup> Haradinaj, T.2903-15; Gucati, 1D00003ET, para.21; Haradinaj, 2D00001ET, para.41. Haradinaj betrays his true feelings when, upon being confronted with a statement that 70% of the witnesses in Kosovo's KLA trials were 'bought up and paid', responds that the percentage was actually higher than that. Haradinaj, T.2896-98.

<sup>535</sup> P00039ET, p.4 (Haradinaj, with emphasis added: '[s]o, it was not easy to convince the international factor that they needed to intervene against a butcher who committed genocide. And there are Albanian speakers today ... who try to qualify the Serb genocide as a crime, in fact even a lesser crime that the ability of KLA to commit crimes. *Because, even if we wanted we could not commit crimes.* It is known who was capable of committing crimes - /Slobodan/ MILOŠEVIĆ's state apparatus which started four wars in the Balkans.');

P00025ET, p.10; P00049ET, p.16; Gucati, T.2369 (on how he knew the witness statements in the Batches were lies and fabrications: 'I came to the conclusion because the KLA, even theoretically speaking, would not have been capable of any massacre or of killing any citizen, Serbs or otherwise. The international forces, NATO and so on, are fully aware of this. The KLA was not capable, theoretically or practically speaking, of being able to carry that out, and that's why I have reached the conclusion that this was a simple lie.');

P00036ET, p.1 (Gucati: '[i]n the history of the KLA or in the Albanian tradition there has never been a case of murdering a child, or a woman. In none of the wars Albanians have had to fight!');

P00042ET, p.1.

<sup>536</sup> Gucati, T.2288 ('I had never, ever thought in my life that I would see these documents in my office. No, I've never seen them before 7 September. This was a dream. So when these documents came in our office, it was a real dream. And the answer to your question is no, I have never heard about these documents, and I have not seen them before 7 September'). Haradinaj similarly described Batch 3's arrival as a 'miracle'. P00030ET, p.2.

KSC/SPO.<sup>537</sup>

(b) *The Accused wanted to stop the KSC/SPO from fulfilling its mandate*

179. The Accused were and are willing to do anything to stop the KSC/SPO from fulfilling its mandate. The stated goals of revealing the Batches were to discredit the SITF/SPO's investigations to force the KSC to change or close.<sup>538</sup> In Haradinaj's own words, he predicted that the KSC will 'totally collapse, because the witnesses, too, know now that others know who they are'.<sup>539</sup> Their attempts to distance themselves from those goals<sup>540</sup> are not credible in light of the abundant evidence to the contrary.

180. The intentions of the Accused are at their most revealing during the many occasions when, during the charged timeframe, media members put it to the Accused that their conduct may be illegal.<sup>541</sup> Haradinaj in particular distorted the plain meaning

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<sup>537</sup> P00002ET, pp.2-4.

<sup>538</sup> Gucati, T.2430-32; P00007ET, p.6 (Haradinaj: 'we put this out because we want to show to the judge that the job you have done is zero'); P00002ET, p.4; P00028ET; P00007ET, pp.11-12 (emphasis added: 'ANCHOR: In this case, should all indictments filed by the Specialist Chambers be dismissed? MR. GASH I: Now the Specialist Chambers need ... the Specialist Chambers need to think again. Now it is in the hands of the pre-trial judge and I believe that after this scandal of the Specialist Chambers, not of the KLA OVL, individuals or Albanians ... ANCHOR: This is known. MR. GASHI: *They have to think once again whether to confirm those indictments or not. [...] MR. Haradinaj: Because, since the court has degenerated one cannot expect it to resort to degenerated means to file an indictment. Our lawyer said it well. I believe it should think twice now.*'); P00035ET, p.3 ('[w]e will publish everything we receive that exposes this indictment and these indictments they want to file,'); P00015ET, p.2 (Haradinaj, moments before his arrest on 25 September 2020: '[k]eep this in mind, we will be against this court as long as we live, as long as we can breathe. Full stop. We will work against this court. Full stop. It is their job to keep their secrets safe. It is not my fault that they have involved those illiterate people, that they have involved naïve people, and that they have lied to these naïve people of ours that they will protect their secrets. They should have protected their archives.');

P00018ET, pp.1-2; P00004ET, p.3; P00034ET, p.2; P00008ET, pp.26, 30-31; P00025ET, pp.1-2, 9-10; P00029ET, p.2; P00030ET, pp.17-18. *See also* P00080ET (from Haradinaj's Facebook page, welcoming the delivery of Batch 1 and commenting ('Well they can no longer make them disappear, ever ... !'); P00060ET, p.SPOE00220748.

<sup>539</sup> P00008ET, p.31.

<sup>540</sup> Gucati, T.2432-33; Haradinaj, T.2918-19.

<sup>541</sup> P00011ET, pp.38, 64-65; P00007ET, pp.8-9; P00006ET, p.15; P00018ET, pp.5-6; P00028ET, pp.1-2; P00034ET, p.3 (Haradinaj saying witnesses were not threatened by revealing Batch 1 because they gave their initial statements about the war under pressure). For a further example from the day before the arrests of the Accused, journalist Vehbi Kajtazi told Faton Klinaku on a media program that KLA WVA members should be in The Hague for distributing the files. P00023ET, p.4. As Haradinaj is being

of the points put to him to resist that he had done anything wrong,<sup>542</sup> but both Accused made it clear that even if what they did was wrong they would do it again anyway.<sup>543</sup> Gucati said he would continue to publish materials as he received them and would be willing to go to jail for five years if necessary.<sup>544</sup> Haradinaj even more categorically stated that 300 years in prison would not stop him and that they were willing to die to get information like that contained in the Batches to the public.<sup>545</sup> When asked if the KSC could legitimately prosecute a member of the KLA, Haradinaj's response is resolute: '[...] If that is your intention, that you want to pursue the path of Milosevic, I will be your opponent now and forever. If you have no shame to allow this kind of impression to be created, carry on. I will be your opponent forever'.<sup>546</sup>

181. Both Accused repeated such statements during their testimony. Neither showed any remorse for their conduct, and made it clear they would do it again if given an opportunity to do so.<sup>547</sup> The Accused consider it their mission to destabilise the KSC/SPO, and any assertions they did not intend to obstruct are betrayed by their words and actions at every turn.

182. The Accused attempted to justify convening the press conferences on grounds that they were concerned another body might publish the Batches and the KLA WVA

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arrested the next day, he can be heard saying '[w]e will see! I will meet up with Vehbi. He will be with [a named Serbian official] and Vucic. I will be on this side'. P00014ET, p.3.

<sup>542</sup> Haradinaj, T.2834-37, 2840-45, 2847-58, 2969-74.

<sup>543</sup> P00035ET, pp.12-13; P00026ET, pp.2, 4-5; P00021ET, p.4; P00024ET, pp.7-8 ('Mr Haradinaj: Violation ... even if there was to be a violation, it is our duty to do everything to show that this Court is not correct, because it is racist, it is selective, and here we have the confirmation'). *See also* Haradinaj, T.2866-73 (attempting to distance himself from the plain meaning of this cited quote).

<sup>544</sup> P00028ET, p.12.

<sup>545</sup> P00035ET, p.13.

<sup>546</sup> Haradinaj, T.2915.

<sup>547</sup> Gucati, T.2218-19, 2221-22 (from 2222: 'I am not afraid of saying anything. I'm not afraid for what I have done. I said every document that comes to my office to the detriment of my country, I will make it public. '), 2401; Haradinaj, T.3021-24 (from 3024: 'If you bring them, I will act the same, because I am convinced that I acted rightly and I did it in the interest of informing the public and for the sake of transparency. I think that, I have that conviction, that it was appropriate').

did not want to be accused of stealing or fabricating the documents.<sup>548</sup> But, if this were the true motivation, the Accused could have denied stealing or creating the Batches without publicising them. When confronted with this possibility, Gucati admitted that other interests motivated him: '[w]e thought that we -- these were facts and we wanted to convince the Kosovo public opinion'.<sup>549</sup>

### **3. The Accused were aware from the orders served upon the KLA WVA that their conduct was obstructing KSC/SPO operations**

183. The SPO's retrieval of each of the Batches was accompanied by an order authorising the seizure.<sup>550</sup> The orders made it clear that the KLA WVA was not allowed to disseminate such information and that the materials in their possession needed to be returned immediately.<sup>551</sup> It was obvious from the nature of the materials that the Accused was not permitted to share them, and these orders formalised that understanding.

184. The key terms of the orders were conveyed to the Accused.<sup>552</sup> The SPO made it clear that the materials were secret and were not to be given to the media.<sup>553</sup>

185. Despite testifying he did not remember receiving a judicial order,<sup>554</sup> in a 17

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<sup>548</sup> Gucati, T.2169-70, 2179-80, 2404-05, 2426-28; Gucati, 1D00003ET, paras 25-26; Haradinaj, T.2728; 2D00001ET, paras 45, 52 (see similarly para.135).

<sup>549</sup> Gucati, T.2405-06. *See also* P00035ET, p.8 (emphasis added: 'JOURNALIST: I am saying, if he brings something that might endanger you as an association, because he now come three times [overlapping speakers]. Mr Haradinaj: Are you saying that he is endangering us? Really? *He is putting us in danger?* [Laughter] [Overlapping speakers] No, no, no'); P00028ET, p.11 (Gucati: 'I do not believe that this has happened to be used against us or against the Kosovo Liberation Army soldiers').

<sup>550</sup> P00054 (ordering Hysni Gucati and/or the KLA WVA to '[i]mmediately produce all documents and records, including internal work product, of the Specialist Prosecutor's Office; and 2. Refrain from recording or copying in whatever form, and further disseminating, by whatever means of communication, the documents or their content.').

<sup>551</sup> P00052; P00053; P00054.

<sup>552</sup> P00092, paras 3-6; P00017ET, p.6.

<sup>553</sup> Gucati, T.2195; Gucati, 1D00003ET, para.39; Haradinaj, 2D00001ET, para.87; P00006ET, pp.18-19, 35.

<sup>554</sup> Gucati, T.2289-96.



September 2020 interview Gucati is seen showing the Second Order to media cameras.<sup>555</sup> Gucati then said that ‘they told me clearly that these documents cannot be multiplied, distributed or the names of witnesses be published, as the lawyer said. We told them that we are not interested in multiplying them.’<sup>556</sup> Gucati’s claim that he did not understand the written document he was showing to the camera while accurately summarising its contents is not credible, especially given at the same interview he further described what he had been given: ‘[t]he summons is addressed personally to my name - myself, as Chairman of the War Veterans - *through which they showed me some rules about the testimonies that have been brought to the Veterans Organisation.*’<sup>557</sup>

186. Haradinaj shared a picture of the first order on his Facebook page.<sup>558</sup> Haradinaj also showed the Second Order on camera and, though noting it was in English, indicated awareness that it contained ‘the obligations they tell us we have’.<sup>559</sup>

187. That the Accused did not understand the terms of the orders is simply not credible, given their acts/statements concerning them, their formal receipt of the Second and Third Orders,<sup>560</sup> and the high level of coordination the Accused had with Faton Klinaku – who was served the First Order - throughout the charged timeframe.<sup>561</sup>

188. These orders, and the SPO’s statements accompanying them, unambiguously

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<sup>555</sup> P00004ET, p.1.

<sup>556</sup> P00004ET, p.8.

<sup>557</sup> P00004ET, p.3 (emphasis added). *See also* Haradinaj, T.2936 (from 2936, with emphasis added: ‘Q. That’s right. It’s a question for you. You knew that the SPO did not want you to share this information. A. I’m telling this Court what I knew and what I know today. *The way we understood it was that we shouldn’t multiply, publish, and distribute it, and we didn’t do any of these things. This is what I knew then and this is what I know now*’).

<sup>558</sup> P00083, p.1. *See also* Haradinaj, T.2927-29.

<sup>559</sup> P00017, min.13:13-13:46; P00017ET, p.6. *See also* Haradinaj, T.2930-32 (giving an evasive answer as to whether he would admit to knowing the Second Order directed that the Batches should not be published).

<sup>560</sup> P00058; Gucati, T.2288-89.

<sup>561</sup> *See, e.g.*, Haradinaj, 2D00001ET, para.87.

conveyed to the Accused that what they were doing with the Batches was damaging the KSC/SPO as an institution. The Accused ignored all such orders and directions, making it plain that they would refuse to contact the SPO when these Batches arrived.<sup>562</sup> They were transparent in explaining why they did not, knowing that if the SPO were informed it would have seized the Batches before they could be released to the media.<sup>563</sup> The pattern of holding press conferences to reveal confidential information only stopped upon the arrests of the Accused.

#### 4. Case theory – Counts 1 and 2

##### (a) *Obstructing official persons by serious threat (Count 1)*

189. The Accused are responsible for Obstruction by serious threat under Article 401(1) and (5) of the KCC (Count 1). The evidence establishes that between at least 7 and 25 September 2020, the Accused obstructed or attempted to obstruct KSC/SPO officials through serious threat. These threats were made by, *inter alia*: (i) disseminating the Confidential Information,<sup>564</sup> including names and evidence of witnesses;<sup>565</sup> (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;<sup>566</sup> (iii) declaring or otherwise making clear that their purpose in disseminating the Confidential Information and related acts was to obstruct KSC proceedings;<sup>567</sup> and (iv) repeatedly threatening to continue disseminating information of confidential investigations, including witness identities, and to obstruct the mandate of the

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<sup>562</sup> P00035ET, p.6 (Haradinaj: '[t]o be honest, they would not want you to be informed at all. In fact, they asked us to hand them over to them, but we told them we will not cooperate with them. Yes, they did tell us, but we did not listen to them. We are not listening to them and we do not intend to listen to them'); P00030ET, p.9; Haradinaj, 2D00001ET, para.54.

<sup>563</sup> P00035ET, p.6; P00006ET, pp.17, 19.

<sup>564</sup> The confidential and non-public documents disseminated following the First, Second and Third Disclosures are hereafter referred to as the 'Confidential Information'

<sup>565</sup> Paras 32, 37-39, 46-49, 54-57, 63-64, 66, 68-69, 72, 78, 82, 89, 92, 94-97, 102, 106-111, 116, 120 above.

<sup>566</sup> Paras 31, 33-35, 40-41, 69, 80-81, 87, 93, 100 above.

<sup>567</sup> Paras 34-35, 52, 59, 68, 70, 74-76, 80-81, 84, 87-88, 104, 115, 117, 119-120, 123-124 above.



KSC/SPO.<sup>568</sup> By virtue of these serious threats: (i) witness security and well-being were endangered and witnesses were intimidated;<sup>569</sup> and (ii) SPO resources and time were diverted to address actual and potential consequences of the Accused's conduct, including in relation to witnesses and KSC proceedings.<sup>570</sup>

190. The SPO's ability to effectively investigate and prosecute crimes, including by obtaining relevant evidence while ensuring witness security and well-being, were severely hindered, considering, *inter alia*: (i) the necessity of witness testimonies to carry out investigations and criminal trials; (ii) the KSC/SPO interest and statutory duty to protect the security and well-being of witnesses;<sup>571</sup> and (iii) the Accused's declared purpose. 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 KSC/SPO officials from continuing to carry out investigations and criminal proceedings by threatening that, otherwise, witness security and well-being would be seriously endangered.

191. Witnesses expressed anger, concern and fear, and felt threatened and/or intimidated as a result of the Accused's actions.<sup>572</sup> Witnesses also expressed an unwillingness to continue their cooperation with the SPO,<sup>573</sup> and SPO resources and time were diverted and devoted to address actual and potential consequences, including to witnesses and KSC Proceedings.<sup>574</sup>

192. These serious threats obstructed the official duties of SPO officials, including Prosecutors, Investigators and other staff members, within the meaning of Article

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<sup>568</sup> Paras 52, 58, 65, 73, 75, 79, 83, 87-88, 99, 115, 123-124 above.

<sup>569</sup> Paras 125, 127-128, 130 above.

<sup>570</sup> Paras 125-127, 131-134 above.

<sup>571</sup> *See, e.g.*, Articles 23, 35(2)(f), 39(11), 40(6)(f), 58 and Rules 30(2)(a), 80, 81, 105, 108.

<sup>572</sup> Paras 125, 127-128, 130 above.

<sup>573</sup> Para.127 above.

<sup>574</sup> Paras 125-127, 131-134 above.

401(1) and (5) of the KCC.

193. The evidence also establishes the Accused's intent in relation to Count 1. Between 7 and 25 September 2020, the Accused publicly made their opposition to the KSC and their intention to obstruct the work of the KSC/SPO crystal clear.<sup>575</sup> The Accused stated that their actions were aimed at undermining the work of the KSC/SPO, as they consider it a racist and biased court, which they do not recognise.<sup>576</sup>

*(b) Obstructing official persons by common action*

194. The Accused and other members and representatives of the KLA WVA (collectively: 'Associates') are further responsible for Obstruction by participating in the common action of a group under Article 401(2)(3) and (5) of the KCC (Count 2). 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, Tomë 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,<sup>577</sup> Gucati and Haradinaj led 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 ongoing criminal investigations.<sup>578</sup>

195. In particular, the evidence shows that the Accused, Klinaku and others were

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<sup>575</sup> Paras 34-35, 52, 59, 68, 70, 74-76, 81, 84, 87-88, 104, 115, 117, 119-120, 123-124 above. *See, in particular*, P00001ET, pp.1-3, 6 P00004ET, pp.3, 8; P00013ET, p.1; P00021ET, pp.3-5; P00006ET, pp.25-26; P00002ET, pp.2-4, 6-7; P00007ET, pp.3-5, 16-17; P00008ET, p.7; P00029ET, p.2; P00012ET, pp.2, 4-5; P00026ET, pp.2, 4-5; P00015ET, p.2; P00018ET, pp.1-2; P00034ET, p.2; P00011ET, pp.3, 56; P00028ET, pp.2-3, 7-9, 11.

<sup>576</sup> Paras 23, 58-59, 68, 74-75, 79, 87-88, 117, 119, 124 above.

<sup>577</sup> Para.19 above.

<sup>578</sup> KCC Article 401(2) and (5).

involved in reviewing the First, Second and Third Disclosures.<sup>579</sup> 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.<sup>580</sup> 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.<sup>581</sup> One or more of the Accused, Klinaku, and Tomë Gashi, at times jointly, represented the KLA WVA at over fifteen media appearances concerning the First, Second and/or Third Disclosure,<sup>582</sup> including appearances by the Accused when the Confidential Information was disseminated further.<sup>583</sup>

196. The Accused and Tomë Gashi publicly praised the unidentified sources who provided the documents to the KLA WVA and/or welcomed future disclosures from such sources.<sup>584</sup> Further, the Accused repeatedly threatened to continue disseminating information of confidential investigations, including witness identities, and to obstruct the mandate of the KSC/SPO.<sup>585</sup> The Accused and Tomë Gashi made intimidating comments about, and/or threats in relation to, witnesses.<sup>586</sup>

197. 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;

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<sup>579</sup> Paras 25-26, 29, 38, 61, 86, 92, 94 above. *See, in particular,* P00001ET, pp.1-3; P00021ET, pp.3-5; P00008ET, p.9; P00035ET, pp.1-2; P00007ET, pp.3-5.

<sup>580</sup> Paras 27-28, 62, 94 above.

<sup>581</sup> Paras 29-35, 63-65, 95-101 above.

<sup>582</sup> Paras 38-41, 51, 56-59, 68-69, 73-77, 79-81, 83-88, 113-124 above, *in reference to* 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.

<sup>583</sup> Paras 38, 57, 68-69, 120 above. *See especially* P00009ET, pp.5-8; P00024ET, p.8; P00018ET, pp.2-3; P00033ET, pp.1-2; P00011ET, pp.29-30.

<sup>584</sup> Paras 52, 58, 75, 79, 83, 87, 115, 123 above.

<sup>585</sup> Paras 65, 73, 79, 88, 99, 114, 124 above.

<sup>586</sup> Paras 31, 33-35, 40-41, 69, 80-81, 87, 93, 100 above. *See especially* P00001ET, pp.2-6; P00009ET, pp.10-14; P00008ET, pp.7, 26; P00007ET, pp.5-6.

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. Klinaku<sup>587</sup> and Tomë Gashi<sup>588</sup> also made it clear that their intent mirrored that of the Accused.

## G. INTIMIDATION

### 1. The Accused wanted to – and did – intimidate witnesses

198. The Accused's unmistakable message to the witnesses in the Batches is that they could not be protected and were now known:

I hope that you, the media, but also those who been so much engaged in making analyses, will have now what to deal with. I think this Court should pay its price. To say that these are confidential and top secret only for the documents to be leaked -- no matter who has received them -- I think this shows that it is more than scandalous and it is shameful even to mention its name. It no longer exists. What is worse, they misled the witnesses by telling them that they would protect them. [moves the papers on the table] *These notes, these names, these surnames, they must now know that they are known names and that no one is unknown, because the exact place, the exact summon, the statement when he has given it, the next statement when he has given it are all shown here.*<sup>589</sup>

199. Even the Haradinaj Defence's own investigative expert acknowledged that such a statement could create an intimidating effect on witnesses.<sup>590</sup>

200. The Accused wanted to make the witnesses realise that speaking with the SPO was going to lead to the public revelation of their identities and that they would not be protected. This is evidenced by their terminology, whereby cooperating witnesses were called spies, traitors, collaborators, criminals, and bloodsuckers.<sup>591</sup> Gucati

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<sup>587</sup> Paras 51, 122 above.

<sup>588</sup> Paras 80-81, 113-114 above.

<sup>589</sup> P00001ET, p.3 (emphasis added). *See also* Haradinaj, T.2819 ('I stand by it, word for word'); Gucati, T.2379-81. Haradinaj says his remark was only directed at the prosecution (Haradinaj, T.2820, 2824-25), but the syntax of the emphasised portion confirms the remark is made directly at the witnesses.

<sup>590</sup> Reid, T.3310.

<sup>591</sup> P00008ET, pp.7, 26; P00025ET, p.7 ('[...] the ones that are giving false statements that are used to prepare an indictment, whoever they might be, then they are Serbian collaborators. And now, it is not our responsibility, it is the responsibility of the person that willingly accepted to be manipulated, speculated about and blackmailed'); P00037ET, p.5; P00033ET, pp.1-2; P00009ET, p.12.

accused witnesses of cooperating in order to obtain documents for asylum purposes.<sup>592</sup> As made crystal clear from Haradinaj's words, the Accused intended to send the message to witnesses that, as had happened in the past, persons who cooperated with judicial authorities would now be killed, discredited, or derided.<sup>593</sup>

201. In one particularly evasive part of Haradinaj's testimony, he tried to distance himself from referring to witnesses as 'you poor morons, you fools, you born spies, you spies' and telling them 'do not think that someone will protect you' by claiming he said these things on a humorous television show and was talking about collaborators from a historical perspective.<sup>594</sup> Such an interpretation is unpersuasive, considering: (i) the demeanour of the speakers and the topic they addressed exclude any satirical intention; and (ii) the quote is clearly in reference to the individuals in Batch 1 and not to the historical role of collaborators and spies.

202. Words of the Accused must be understood in light of the climate of witness intimidation which pervades Kosovo. Both SPO and Defence witnesses alike described this climate.<sup>595</sup> Jukić said that '[t]here was a lot of incidents [which] happen[ed] to the witnesses. And also I know from my experience that there was some incidents in -- during the UNMIK and EULEX time when some witnesses was -- were threatened'.<sup>596</sup> Reid compared being a Kosovo witness to being perceived as a 'traitor to the cause',<sup>597</sup> and affirmed his statement from a prior video-recorded interview where he said:

Witness intimidation in the trials for Kosovo, I've really never seen anything like it before. I was a policeman for 20 years and I've worked here [at the ICTY] for [what at the time of the interview was] 23 years, and I have never seen the intimidation like it. It was really quite frightening. And I'm not linking that to any individuals or any organisation. But just the fear that was engendered

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<sup>592</sup> P00009ET, pp.10-12; P00009, min.01:06:42-01:09:36; *See also* P00044ET, p.1; P00044 min.08:01-08:54.

<sup>593</sup> P00008ET, p.26; P00008, min.00:50:33-00:51:07.

<sup>594</sup> Haradinaj, T.2881-86, referring to P00008ET, p.26.

<sup>595</sup> *See also* C00002; P00165.

<sup>596</sup> Jukić, T.1758.

<sup>597</sup> Reid, T.3306-07.

in the society, I've not seen any -- even in organised crime, I've never seen anything like it.<sup>598</sup>

203. Although Gucati was unwilling to declare there is a 'climate of witness intimidation' in Kosovo, he acknowledged it was impossible for someone living in Kosovo to be unaware of the trials against KLA members.<sup>599</sup>

204. That the Accused's actions and words in such a climate would be intimidating is clear. The Intimidation count in this case is a conduct crime, meaning no specific consequence needs to be established by virtue of the actions of the Accused.<sup>600</sup> This said, witnesses did feel intimidated. These concerns were particularly acute for crime victims, who are more vulnerable and at risk to suffer some threat or harm.<sup>601</sup>

205. Witnesses were afraid and some did not want to speak with the SPO anymore after the Batches were revealed.<sup>602</sup> Jukić's professional assessment that witnesses were threatened in the wake of the publications was informed by what they told him during his contacts with them, as these examples illustrate:

- i. A witness said that he does not feel secure at all, and that anything could happen to him.<sup>603</sup>
- ii. A witness was in panic and worried about his and his family's safety. He had left Kosovo and was scared to go to work.<sup>604</sup> It calmed the witness down to learn that his name was not in the Batches,<sup>605</sup> but that these fears arose from the mere prospect of being known is revealing.
- iii. A witness had a panic attack and ended up in a hospital. He had been under huge stress because of the leaking of documents in the media.<sup>606</sup>
- iv. A witness was a little bit worried because of the general security situation and particularly because of the announcement from KLA veterans. The witness wanted to come before the

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<sup>598</sup> P00165, min.06:55-07:29; P00165ET, p.5; Reid, T.3305-10 (from 3306 'And I don't take a word back of what I just said'). *See also* P00166.

<sup>599</sup> Gucati, T.2343.

<sup>600</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.62; Applicable Law Submissions, KSC-BC-2020-07/F00341, para.20.

<sup>601</sup> Jukić, T.1759.

<sup>602</sup> Jukić, T.1703, 1706-07.

<sup>603</sup> Jukić, T.1712. *See also* P00130.

<sup>604</sup> Jukić, T.1714-15, 1721. *See also* P00131, para.4.

<sup>605</sup> P00131, para.4.

<sup>606</sup> Jukić, T.1721-22. *See also* P00132.



Court and tell the truth, but thought the SPO needed to support and help him.<sup>607</sup>

- v. During a conversation with the SPO, a witness was very upset and angry. He said that he wanted his family to be relocated out of Kosovo immediately. He repeated several times his serious concerns regarding his family, saying that they could be killed and said that he would not cooperate with the SPO if it would not relocate his family.<sup>608</sup>
- vi. A witness expressed concerns because the situation in Kosovo in general is bad, and expressed that the day when files leaked in the media he felt very bad.<sup>609</sup>
- vii. A witness stated that he was informed by friends that his name was in the confidential documents and that he immediately took measures to enhance his children's safety. He noted that he had started to feel like people were isolating him and his family and that people did not seem to differentiate between witnesses and spies, adding that he felt that his family was endangered.<sup>610</sup>
- viii. A witness said that he trusted the SPO and now his name is in public and he and his family are in danger. The witness told Jukić that 'I know very well what happened to the witnesses in Kosovo'.<sup>611</sup>

206. All of these were discussed by Jukić in court. The timing of when contact notes reflecting such experiences<sup>612</sup> were submitted into the SPO's internal evidence management system does not detract from the fears expressed to Jukić which informed his assessments on the threats faced by witnesses.

207. Other witness security officers received similar messages during their calls with witnesses.<sup>613</sup> In all, tens of witnesses informed the SPO that they felt worried, stressed, unsafe, threatened, and/or intimidated in the wake of the publications.<sup>614</sup> Two witnesses were relocated because the Accused's actions made it no longer safe for them to live in Kosovo.<sup>615</sup>

208. The Accused were fully aware that naming witnesses would harm them in

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<sup>607</sup> Jukić, T.1723-25. *See also* P00134.

<sup>608</sup> Jukić, T.1725-27. *See also* P00135, para.2.

<sup>609</sup> Jukić, T.1731. *See also* P00137.

<sup>610</sup> Jukić, T.1747-50.

<sup>611</sup> Jukić, T.1704, 1758, 1881.

<sup>612</sup> P00130; P00131; P00132; P00134; P00136; P00137.

<sup>613</sup> Jukić, T.1705, 1750-53.

<sup>614</sup> Jukić, T.1719.

<sup>615</sup> Jukić, T.1707-09, 1760-61, 1888-93, 1901-02, 1905-06.



these ways. In yet another of the many contradictions the Accused proffer in support of their conduct, the Accused simultaneously insist: (i) that the SPO is harming its witnesses by not protecting their identities;<sup>616</sup> but (ii) the Accused are not harming SPO witnesses because they did not name them. These beliefs are incompatible, as the only reason why the witness identities in the possession of the Accused were not protected is because they made them known to the media.

209. Focusing on the intentions of the Accused, these beliefs – contradictory as they are – do demonstrate that the Accused were fully aware that naming protected witnesses in the Batches would harm them. The Accused even testified they had such awareness, although they did so evasively and without acknowledging any wrongdoing on their part.<sup>617</sup> Gucati acknowledged that releasing witness names would cause them harm:

Q. And do you agree that disclosing witness names to the public would endanger the safety of a witness? Do you agree with that?

A. I'm telling you again, if a name was released by myself, by the presidency of the KLA WVA, of course then we would have harmed in a way the witnesses. But we have not disclosed any such thing. Therefore, there is no reason for them to be harmed. This is what I'm telling you. This is strictly prohibited.<sup>618</sup>

210. Haradinaj confirmed having said the following in his preliminary summary of

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<sup>616</sup> See P00001ET, pp.4-5 (from p.5: 'how can one guarantee protection to the witnesses when everyone can read these today'); P00011ET, pp.3, 37-38; Haradinaj, T.2818-20; Haradinaj, 2D00001ET, para.101 ('[t]he SPO did not even protect the witnesses who they promised protection'); Gucati, T.2180-81, 2390 ('We merely said that some documents have leaked from the Special Court which took us by surprise, because to have those documents come out of your offices -- we have a wise saying: I would think of death than of being confronted with this phenomenon. So I would have thought of dying five times than have these documents leak from your office and end up in our office.');

<sup>617</sup> See Gucati, T.2264-65, 2308-09; Haradinaj, T.2844 ('Q. Mr. Haradinaj, that doesn't answer my question. Let me ask it again. So it would be true that if names were mentioned, then it would be intimidation? Can you please answer that? A. Yes, I'm referring to the opinion of others, which I agree with and which I've repeated. It's an opinion that came from people who are much more competent than we done -- than we are, and it's an opinion that we repeated. It did not originate with us. It wasn't our -- it was not our own original opinion. It came from people who knew things better than we do.');

<sup>618</sup> Gucati, T.2309. See also Haradinaj, T.2831-33 (agreeing with the statement while trying to distance both Accused from its implications), 2845.

his evidence:

This is of great concern given that these leaked files contained witness' names. This is a major concern, as if this information were released, it could cause their death or even scare them to death because they were acting on the basis that they were protected witnesses.<sup>619</sup>

211. After originally claiming this was merely an expression of media opinion,<sup>620</sup> he belatedly acknowledged this reflected his own personal view as well.<sup>621</sup>

212. When Gucati was asked whether he had considered the consequences his words/actions would have on witnesses who provided statements to the SITF/SPO, in addition to a denial about revealing witness names he added that '[t]hose who are against my country and those who protest against the NATO bombardment against the Serbs, they are enemies of my country and that is what I've thought throughout'.<sup>622</sup> Gucati can say he did not intend to threaten witnesses,<sup>623</sup> but a statement like this reveals he also wanted to punish those who spoke to the SITF/SPO as enemies of Kosovo.<sup>624</sup>

213. Gucati's remark that 'things could happen' to witnesses when their personal information was revealed<sup>625</sup> must be understood in this broader context. In a climate of witness intimidation, it is clear that what could 'happen' would be harmful to the persons concerned. Gucati said during trial that he did not remember making this

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<sup>619</sup> Haradinaj, T.2827.

<sup>620</sup> Haradinaj, T.2828-29.

<sup>621</sup> Haradinaj, T.2844 ('Q. So in your preliminary summary, when you talked about the public opinion of witnesses being scared to death, this is a public opinion that you agree with; is that correct? A. Who wouldn't agree if it was true? If something is true, there's nothing to agree to. There's nothing to -- to -- not to agree with if people are being -- being an obstacle to the justice, Mr. Prosecutor. I am all in favour of justice.').

<sup>622</sup> Gucati, T.2371.

<sup>623</sup> Gucati, T.2372-73.

<sup>624</sup> See *similarly* P00035ET, p.2 (Gucati, in relation to Batch 3: '[w]e will show the truth that these [mentioned] here tried and are trying to discredit the KLA by all means, but they will never succeed, because all the martyrs who have fallen, all those martyrs who died for this country ... all these falsifications they have made will be in vain').

<sup>625</sup> P00009ET, p.8.

statement or that he said something different,<sup>626</sup> all after the Gucati Defence challenged the transcription and the Registry confirmed that Gucati did in fact say these words.<sup>627</sup> Gucati's words mirror his understanding of the implications of naming witnesses, and he expressed knowledge during the charged timeframe that witnesses in past KLA trials were killed.<sup>628</sup> In the course of the trial, Gucati also repeated that '[i]f we had released names, it is true that perhaps they could have felt scared'.<sup>629</sup> His attempts to distance himself from this remark should not be countenanced.

214. Once the semantic justifications of the Accused are disregarded – because the Accused did name witnesses by giving those names to the media, irrespective of whether they vocalised them or not – it is clear that they were fully aware that their conduct would lead to witnesses being intimidated. Awareness of this virtual certainty falls well within the alternative requirement that the Accused act with direct or eventual intention under the KCC.<sup>630</sup>

## 2. Case theory – Count 3

215. The evidence establishes that between at least 7 and 25 September 2020, the Accused used serious threats to induce or attempt to induce persons to refrain from making a statement or to make a false statement to the SPO and/or KSC (Count 3).

216. In particular, 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.<sup>631</sup> They referred to specific witness names, their jobs, along with other personal details and the locations of crimes they were asked about.<sup>632</sup> They

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<sup>626</sup> Gucati, 1D00003ET, para.63.

<sup>627</sup> See Memorandum on Verification of Accuracy of Transcript Excerpt, 30 July 2021, 102483-102484.

<sup>628</sup> P00083ET, p.SPOE00222264.

<sup>629</sup> Gucati, T.2309.

<sup>630</sup> KCC Article 21; Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.82.

<sup>631</sup> Paras 31-34, 38-39, 49, 59, 73, 77, 90, 93, 97, 100, 116, 118 above.

<sup>632</sup> Paras 32, 63-64, 68-69, 96-97, 120 above.

made it clear that now the public would find out who the SPO witnesses are.<sup>633</sup>

217. The Accused's public assertions that they had recognised several of the names contained in the documents<sup>634</sup> were clearly intended to put anyone who cooperated with the SITF/SPO on notice that their cooperation was now known. Both Accused made several disparaging remarks and accusations against witnesses, including Gucati referring to them as 'traitor[s]' who lie,<sup>635</sup> and Haradinaj describing them as 'criminals, bloodsuckers' and spies who betrayed their people.<sup>636</sup>

218. The Accused's conduct amounts to a serious threat, capable of inducing persons to refrain from making a statement or to make a false statement or otherwise fail to state true information to the SPO and/or KSC, as required by Article 387 of the KCC. The intimidating power of the Accused's words and actions becomes even clearer when considered in the context of history of witness intimidation in criminal proceedings against KLA members.<sup>637</sup>

219. The evidence 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 KSC. The Accused themselves expressly acknowledged the motivations behind their actions, including their will to damage the KSC/SPO judicial process.<sup>638</sup> Alternatively, the Accused were aware that, as a result of their actions, this prohibited consequence might ensue, and they acceded to the occurrence of this prohibited consequence.

## H. RETALIATION

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<sup>633</sup> Paras 31, 33, 87 above.

<sup>634</sup> Paras 40, 97, 120 above.

<sup>635</sup> Para.40 above.

<sup>636</sup> Para.87 above.

<sup>637</sup> Para.128, 202-203 above.

<sup>638</sup> Paras 34-35, 52, 59, 68, 70, 74-76, 80-81, 84, 87-88, 104, 115, 117, 119-120, 123-124 above.

## **1. The Accused took harmful actions against witnesses**

220. Revealing protected witness names qualifies as harmful action taken by the Accused within the meaning of this crime,<sup>639</sup> particularly in the climate of witness intimidation prevailing in Kosovo. As explained above under the obstruction and intimidation counts, the Accused wanted to both discourage new witnesses from speaking to the KSC/SPO and punish those who were already cooperating.

221. As for the name or relevant category of individuals falling under this count, it includes all persons defined as 'witnesses' within the meaning of the Indictment.<sup>640</sup> The witnesses retaliated against within the meaning of this count include: (i) persons who gave witness interviews to the SPO; (ii) persons who gave interviews to other law enforcement bodies and whom the SPO sought to interview; and (iii) government authorities who provided documentation establishing relevant crimes/perpetrators or facilitated contacts with those having such information.

222. What is required for retaliation is a harmful action; that the action in fact causes harm is not an element of this offence.<sup>641</sup> This said, witnesses were harmed by the conduct of the Accused. Witnesses were afraid and lost confidence that they and their families would be protected.<sup>642</sup> Some witnesses were exposed to so much danger that they required relocation.<sup>643</sup>

## **2. The Accused intended to retaliate against witnesses for providing truthful information**

223. For retaliation, the Accused was required to act with the specific intent of

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<sup>639</sup> KCC Article 388(1).

<sup>640</sup> Indictment, KSC-BC-2020-07/F00251/A01/RED, para.4; Witness Submissions, KSC-BC-2020-07/F00281, para.3.

<sup>641</sup> Applicable Law Submission, KSC-BC-2020-07/F00341, paras 23-24.

<sup>642</sup> Jukić, T.1703, 1706-07.

<sup>643</sup> Jukić, T.1707-09, 1760-61, 1888-93, 1901-02, 1905-06.

retaliating against witnesses for providing truthful information, and further with the knowledge that this information might have been true.<sup>644</sup> There is no requirement that the Accused must know the precise identity of the witness retaliated against by virtue of their conduct, noting that the provision applies to harmful action taken against 'any person'.<sup>645</sup> The same indicia showing that the Accused intended to intimidate witnesses demonstrates the specific intent required.

224. Whether or not the Accused knew the information was objectively true is not required, as the truthful information is only referenced in the context of the crime's subjective elements.<sup>646</sup> 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.

225. By attacking anyone who cooperated with the SITF/SPO, the Accused, by definition, attacked every truthful account given. The Accused referred to these witnesses as 'liars'<sup>647</sup> only to discredit and smear witnesses providing evidence about alleged crimes committed by members of the KLA. The reality is that the Accused were quite clear that they made no efforts to ascertain the truth or falsity of the information presented to them.<sup>648</sup> The Accused were aware that the information in their possession – including information formally provided by witnesses to prosecuting authorities - might have been true, noting their assertions that the Batches

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<sup>644</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 55-57, 136. *See also* Rule 130 Submissions, KSC-BC-2020-07/F00447/RED, para.49; Applicable Law Submissions, KSC-BC-2020-07/F00341, paras 25-26.

<sup>645</sup> KCC Article 388(1).

<sup>646</sup> Article 388(1) of the KCC (in relevant part, with emphasis added: '[w]hoever takes any action harmful to any person, including interference with lawful employment or livelihood of any person, *with the intent to retaliate for providing truthful information* relating to the commission or possible commission of any criminal offense').

<sup>647</sup> Gucati, T.2367-69; Gucati, 1D00003ET, paras 23, 70.

<sup>648</sup> Gucati, T.2371, 2438; Haradinaj, T.2997-98.



received were authentic at multiple points across the charged timeframe.<sup>649</sup> Defence assertions that the Accused provided this information as whistle-blowers in the public interest also pre-suppose that the information itself was believed to be true.<sup>650</sup>

### 3. Case theory – Count 4

226. Between at least 7 and 25 September 2020, 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 (Count 4).

227. The evidence shows that the Accused repeatedly disseminated the identities, personal data, and evidence of witnesses and other persons who had cooperated with the SITF/SPO, and announced these disseminations.<sup>651</sup> They repeatedly encouraged others to disseminate such information,<sup>652</sup> in an indiscriminate manner. Such conduct violated the privacy rights of the witnesses and created risks to their security and well-being.

228. The Accused did not, nor were they possibly in the position to, discern between persons who had provided truthful or untruthful information to the SITF/SPO, amongst the hundreds of identities and personal data they disseminated. As such, it is undoubted that they were aware that these accounts might be true and intended to

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<sup>649</sup> P00009ET, p.7 (Gucati saying on 22 September 2020 that the SPO gave official confirmation the Batches belonged to them); P00029ET, p.1; P00019ET, p.2 (emphasis added: 'I think that this is the mystery and evil. Otherwise, they know that the documents are theirs, there's no other way. *We had our doubts on the first occasion but no, it's clear that the documents are original and theirs. They read "Top Secret". No one but them would have known how to compile such documents.*'). Haradinaj is once again evasive when challenged on the last cited exchange, not wanting to acknowledge what he previously said. Haradinaj, T.2950-54. *See also* P00012ET, p.2.

<sup>650</sup> Myers, T.3112, 3130-32, 3180; Myers, 2D00006, para.34.

<sup>651</sup> Paras 31-34, 38-39, 49, 59, 73, 77, 90, 93, 97, 100, 116, 118 above.

<sup>652</sup> Paras 56, 58, 65, 69, 74, 77, 97-100, 119 above.

retaliate against these witnesses for giving truthful information.<sup>653</sup>

229. The Accused took harmful actions, knowing at minimum they were revealing witnesses' confidential personal data<sup>654</sup> and infringing their right to privacy. In addition, the Accused were well aware that exposing witnesses' identities would cause concerns for their security and the security of their families.<sup>655</sup> The Accused intended to cause such harm. The harmful action required by Article 388(1) of the KCC relates to the conduct itself, and the harm intended need not have occurred. Nevertheless, the evidence shows that the Accused's actions were indeed harmful to witnesses.<sup>656</sup>

## I. VIOLATING THE SECRECY OF PROCEEDINGS

### 1. The Batches were secret

230. The Batches had clear indicia of confidentiality and contained information not previously disclosed.<sup>657</sup> The Accused knew this.<sup>658</sup> In particular, their accusations that the information must have 'leaked' from the KSC/SPO similarly makes sense only if the Accused knew the information was confidential.<sup>659</sup>

231. Batch 1 consists of correspondence with Serbia and has confidential markings throughout.<sup>660</sup> Although Batch 2 consists primarily of public documents, the six pages of Serbian correspondence are also in Batch 1.<sup>661</sup> The Accused confirmed that they

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<sup>653</sup> KCC Articles 21, 388(1).

<sup>654</sup> Paras 31-34, 39, 49, 59, 73, 77, 90, 93, 97, 100, 116, 118 above.

<sup>655</sup> Paras 31-34, 41, 87, 93 above.

<sup>656</sup> Paras 125, 127-128, 130.

<sup>657</sup> Pumper, T.1058-59, 1086-87; P00086, para.12; P00088.

<sup>658</sup> Gucati, T.2418; P00019ET, p.2; P00059ET, pp.081983-081986; P00015ET, p.2.

<sup>659</sup> Gucati, T.2264, 2288, 2373; Haradinaj, 2D00001ET, para.35.

<sup>660</sup> Pumper, T.874-76, 1472-74; P00090, Annex 2.

<sup>661</sup> P00090, Annex 4; P00086, para.2; Pumper, T.915-17.

knew that pages just like those in Batch 1 were contained within Batch 2<sup>662</sup> - even showing such pages on camera during the Second Press Conference<sup>663</sup> - and had by this point received the First Order directing them not to further disseminate materials from Batch 1. Batch 3 had clear markings of being SPO internal work product on nearly every single page.<sup>664</sup>

232. The highly sensitive material in the Batches – consisting of cooperation requests with state authorities, witness statements to prosecuting authorities, and internal work product – were treated as confidential by the SITF/SPO and would never have been publicised absent the conduct of the Accused.<sup>665</sup> The confidential parts of these Batches have not been declassified or reclassified by the SITF/SPO or Serbian authorities.<sup>666</sup> The first public revelations of these pages came on the dates of the KLA WVA press conferences.<sup>667</sup> These publications are irreversible, and whether articles publishing materials from the Batches still remain online<sup>668</sup> is irrelevant to the classification of these materials or the Accused’s responsibility for unlawfully publicising them.

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<sup>662</sup> Gucati, T.2266-73 (from 2266: ‘I was interested in the first delivery which suggested that you were cooperating with the Serbian court. It is true that the second package has had documentation to suggest that you were cooperating with it’); Haradinaj, 2D00001ET, para.76.

<sup>663</sup> P00002ET, min.00:50-01:06.

<sup>664</sup> P00086, para.35; P00090, Annex 5. *See also* Pumper, T.931-32, 1059, 1062 (counsel’s questions to witness).

<sup>665</sup> *See* P00001ET, pp.4, 8 (from p.4: ‘We know one thing, every document leaked from that organization to us is here. One has to obtain this material here, from us. There is no other way’); P00006ET, p.19, (emphasis added: ‘MR Haradinaj: You wouldn’t have published them at all had I not called you. And if I had sent them to the court like you say you’d have never published them and the court would have never shown them to you. MR SHABANI: No had you not made them public had you not shown them at the press conference there wouldn’t have been a way of getting them. MR Haradinaj: That’s correct Secondly had they been taken to the court like you say you wouldn’t have seen them at all’); Haradinaj, T.2942-45; Gucati, T.2285-88; Pumper, T.1470-71, 1474.

<sup>666</sup> *See* Reid, T.3278, 3280 (investigation records and witness statements in criminal investigations are treated as confidential until the prosecution submits to its disclosure obligations), T.3285-87 (draft analyses of confidential evidence would also be confidentially classified).

<sup>667</sup> *See* Pumper, T.1475; P00024ET, p.3 (Haradinaj, referring to Batch 1: ‘[w]e had made them public through the media.’).

<sup>668</sup> 1D00010.

## 2. It is immaterial whether the Accused considered the classification of the Batches to be justified

233. At various points during this trial, the Defence and/or the Accused have suggested that information within the Batches is wrongly classified as confidential or otherwise was not secret.<sup>669</sup> These assertions are entirely immaterial.

234. Under Counts 5-6, the protected information goes beyond information disclosed in proceedings or declared secret by a Court.<sup>670</sup> It also extends to all information which 'must not be revealed according to the law', and therefore includes all information protected under the KSC statutory framework.<sup>671</sup> The SITF/SPO classifies its records of criminal investigations as confidential,<sup>672</sup> and the KSC's statutory framework confirms that such material should not be considered as public documents.<sup>673</sup>

235. These confidential classifications can be amended judicially at the KSC,<sup>674</sup> but not by the arrival of the Batches at the KLA WVA or the unilateral decision of the Accused. Were this otherwise, then the confidentiality of critical information would lose protection whenever someone subjectively decided it was not worthy of classification.

## 3. The Batches contained the identities and information on protected witnesses

236. The Accused confirmed that the materials in their possession were non-public

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<sup>669</sup> Haradinaj, T.2945; Gucati, 1D00003ET, para.72; Haradinaj, 2D00001ET, para.134 ('[t]he KSC/SPO are attempting to hide their collaboration with the Serbian Authorities, and their embarrassment of the same, by labelling certain aspects of their investigations as confidential. They should not be allowed to do this.');

<sup>670</sup> *Contra* Transcript, 8 September 2021, pp.651-52, 677.

<sup>671</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.37.

<sup>672</sup> Pumper, T.861-62.

<sup>673</sup> Article 62.

<sup>674</sup> Rule 82(5).

and included SITF/SPO witness names.<sup>675</sup> Their repeated insistence that they would not mention any witnesses' names confirms that they saw them inside the Batches they received.<sup>676</sup>

237. As early as the First Press Conference, the Accused could not have been clearer they knew that protected witnesses were in the Batches.<sup>677</sup> That the Batches included protected people was readily apparent.<sup>678</sup> Batch 3 alone contains references to approximately 150 SPO witnesses.<sup>679</sup>

238. Pumper was able to verify that these witnesses were subject to non-disclosure orders at the time – or pending requests for such orders - at the KSC<sup>680</sup> and in Kosovo.<sup>681</sup> For those made in the cases of this court, at the time of the press conferences these requests/orders had a strictly confidential and *ex parte* classification and no initial appearances had been held in those cases.<sup>682</sup> Pumper was further able to verify that Batch 3 included information from international organisations with disclosure

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<sup>675</sup> Gucati, T.2240-42, 2256-63, 2297-2303, 2417-18 (acknowledging Batch 1 was sensitive and contained witness names), 2420-21; Gucati, 1D00003ET, para.14 (in relation to Batch 1: '[w]e were looking through the documents and ascertained that the documents were from the KSC/SPO. We realised that they were official documents but there were also documents from Serbia. We realised that they were important documents and that it was in our interests to find out how the documents came out of the KSC/SPO offices'); P00035ET, p.12; P00021ET, pp.4-5; P00009ET, pp.9-12 (Gucati saw names of 'lots of people in whom we trusted', showing recognition of the names inside).

<sup>676</sup> E.g. Gucati, 2297-2303; Haradinaj, T.2758-59.

<sup>677</sup> P00001ET, p.2 ('What is worse -- and I have taken only a quick look at these, [points to the papers on the table] – in here are the names of all the witnesses who they say are under their protection. All of them. '), confirmed by Haradinaj, T.2963.

<sup>678</sup> Pumper, T.873, 884-87, 949; P00086, para.11; P00088, para.12, read with P00087, p.1 (Batch 1 contains over 35 statements or parts of statements of victims and witnesses that were taken by the Serbian authorities).

<sup>679</sup> Pumper, T.950, 1317-18, 1342; P00086, para.31.

<sup>680</sup> Pumper, T.953-59, in reference to P00152 (issued on 12 June 2020); P00151 (issued on 12 June 2020) P00154 (filed 28 May 2020). It is the original filing, not the date of its public redacted version, which informs the classification of the witness information in question.

<sup>681</sup> Pumper, T.961-64, 1007-08, 1329-33, in reference to P00161.

<sup>682</sup> The first KSC Accused to appear before the court – Salih Mustafa – was arrested on 24 September 2020. See P00031ET.

restrictions attached.<sup>683</sup>

239. The Accused need not be aware of the specific law or court order conferring protection to the witness in question; this is not an element of the offences under Counts 5 or 6. Such a requirement would be unreasonable, given that non-disclosure orders – by their very nature – would have their purpose defeated if they are written in a manner allowing for public identification of the specific information governed by them. The Accused need only be aware that the witness information in question is protected or might be so.<sup>684</sup>

240. In this respect, the mere fact that these witnesses were contained in confidential or internal SITF/SPO materials is sufficient in itself to confer these persons a protected status under the law.<sup>685</sup> The Accused made no efforts to redact any of the information they saw, revealing all pages of the Batches to the press with no alterations at all. Pumper set out in detail which pages of Batch 1 included witness information.<sup>686</sup>

241. So many witnesses are mentioned that there can be no doubt that the Accused knew protected persons were named in the Batches. Regardless of how long the Accused reviewed the Batches before the press conferences – and the KLA WVA members who testified gave diverging answers in this regard<sup>687</sup> – they had enough command to know that the Batches included cooperation requests, witness names, and witness accounts.<sup>688</sup> They wanted to reveal what they had as soon as possible.<sup>689</sup>

#### **4. The Accused named protected witnesses**

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<sup>683</sup> Pumper, T.967-70, *in reference to* 094674-094675.

<sup>684</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 47-50.

<sup>685</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.44.

<sup>686</sup> P00090, Annex. 1.

<sup>687</sup> Cele Gashi, T.2591-98; Haradinaj, 2725-26, 2744, 2782, 2785, 3003-04; P00024ET, p.7; P00082ET; P00018ET, pp.3-4; P00035ET, p.2; P00008ET, pp.20, 33.

<sup>688</sup> P00035ET, pp.2, 13; Gucati, T.2243-47; Haradinaj, T.2784; P00033ET, p.2; P00017ET, pp.2-3; P00001ET, p.2 (analysing the quality of the witness statements in Batch 1); P00006ET, p.26.

<sup>689</sup> Haradinaj, T.2727 (concerning Batch 1).



242. The Accused defend their actions by saying they did not name any witnesses, deflecting from the reality that they nevertheless revealed their protected information. But the Accused actually did name protected witnesses as well.

243. Though the Accused named a high-level Serbian official in their press conferences whose cooperation with the SPO was previously known – Vladimir Vukčević<sup>690</sup> – they named a number of other Serbian officials whose cooperation with the SPO was revealed for the first time.<sup>691</sup> These names were contained in Batch 1, in particular.<sup>692</sup> As examples, the names, last known addresses and telephone numbers of [REDACTED] – whose names were mentioned in the course of the First Press Conference<sup>693</sup> - are included in confidential annexes to various Requests, amongst other witnesses and potential witnesses whom the SITF sought to interview.<sup>694</sup>

244. These persons qualify as ‘witnesses’ in the Indictment, because they were persons who had information about crimes within the jurisdiction of the KSC.<sup>695</sup> Allegations in unsourced media articles that these officials may have committed crimes during the Kosovo war are insufficiently substantiated on the evidence and, more fundamentally, irrelevant to the charges.

245. The Accused also named Albanian witnesses whose evidence was relied upon by the SPO,<sup>696</sup> [REDACTED].<sup>697</sup> [REDACTED]’s name was mentioned in Batch 3,<sup>698</sup> and

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<sup>690</sup> C00001; Pumper, T.1089-90.

<sup>691</sup> Gucati, T.2255-56 (‘Q. So did you see statements of Serbian witnesses, Mr. Gucati? A. In those documents that I saw, I saw statements of witnesses [...]’); Gucati, 1D00003ET, para.22; P00018ET, pp.2-3; P00001ET.

<sup>692</sup> Pumper, T.881-84; P00086, para.10; P00087, p.1.

<sup>693</sup> P00001ET, p.2.

<sup>694</sup> P00086, para.10; P00087, p.1; Pumper, T.884-885.

<sup>695</sup> Witness Submissions, KSC-BC-2020-07/F00281;; Indictment, KSC-BC-2020-07/F00251/A01/RED, para.4.

<sup>696</sup> Haradinaj, T.2775-76, T.2995-97; 2D00002 (name 29).

<sup>697</sup> P00035ET, p.3; P00011ET, p.30; Gucati, T.2387-88; Haradinaj, T.2997-98.

<sup>698</sup> Pumper, T.953.

Haradinaj had a longstanding animus against him.<sup>699</sup> He was publicly known at the time,<sup>700</sup> but the SPO had never confirmed whether this or any other person was a witness in its developing investigations. Even in situations where a witness discloses to the public that he/she is a witness, this does not mean that this person loses the protection they are entitled to under either the law or the SPO's practices.<sup>701</sup>

246. That this person was named by the Accused illustrates that their interest went beyond exposing cooperation correspondence with Serbia in the 'public interest'. The only reason for sharing this name was to destabilise the SPO's investigation, to threaten the person in question, and to dissuade others from cooperating with the KSC/SPO.

**5. The SPO never told the Accused that Batch 1 could be kept for up to one month**

247. The SPO made urgent efforts to retrieve each of the three Batches. Batches 1 and 2 were recovered the day after the Accused revealed them to the media.<sup>702</sup> Batch 3 was recovered the same day as the Third Press Conference.<sup>703</sup> Moberg was unequivocal that nothing was said which could be construed as giving the KLA WVA permission to keep Batch 1 for any reason.<sup>704</sup>

248. The Defence evidence suggesting that the SPO told the KLA WVA that they could keep Batch 1 for up to one month is inconsistent and incoherent. First, the Defence witnesses are split as to whether this was said in relation to Batch 1 or Batch

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<sup>699</sup> P00083ET, p.SPOE00222241.

<sup>700</sup> Pumper, T.1315.

<sup>701</sup> Jukić, T.1759-60, 1793-95.

<sup>702</sup> Moberg, T.1943-44; Pumper, T.843, 851-52, 905; P00092.

<sup>703</sup> P00054; Gucati, T.2201.

<sup>704</sup> Moberg, T.1936-38, 1948-49, 1951 ('Q. Thank you. And I'm going to suggest to you that you did on the 8th also discuss and suggest waiting, leaving the documents in the possession of the KLA WVA for up to a month while consideration was given to the involvement or otherwise of the Kosovan police. [...] THE WITNESS: That is not correct.').

2. Cele Gashi asserted this was said in relation to Batch 1,<sup>705</sup> but the Accused – who were present in the courtroom during the exchange where Moberg categorically denied making any such statement – then testified that the remark in question was made by a different SPO staff member in relation to Batch 2.<sup>706</sup>

249. Even if the accounts of the Accused were accepted, neither actually says that the SPO allowed them to keep any documents for up to one month. The exchange with the SPO purportedly recalled by the Accused comes in the context of the KLA WVA demanding the Kosovo Police come to pick up Batch 2, with the SPO countering that they would not come and the SPO would stay there for a month if that is what it took to seize the Batches.<sup>707</sup> On their account, the SPO could not have been more resolute that the documents were wrongfully held by the KLA WVA.

## 6. Case theory – Counts 5 and 6

250. The evidence establishes that between 7 and 25 September 2020, the Accused, without authorisation by the SPO, KSC, or any other competent authority,<sup>708</sup> revealed the Confidential Information, which included, but was not limited to, Batch 1 (along with Batch 4), Batch 2, and Batch 3.<sup>709</sup>

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<sup>705</sup> Cele Gashi, T.2601-04.

<sup>706</sup> Haradinaj, T.2767-68; Gucati, 1D00003ET, para.42; Haradinaj, 2D00001ET, para.88.

<sup>707</sup> Gucati, 1D00003ET, para.42 ([t]hey wanted to collect all the files from us as they did previously. We said that we would give them the files only in the presence of the Kosovo Police. They said that we could wait there a month, but never would it become the Kosovan Police's responsibility to collect the files. They said that the files were theirs and that the Kosovan Police were not involved in the situation.'). The next sentence – 'This implied we could keep the files for a month' – simply does not follow from the previous ones. *See also* Gucati, T.2196, 2398-99.

<sup>708</sup> The immediate action taken by the KSC and SPO to stop the further dissemination of the Confidential Information makes clear that the Accused were not authorised, by the SPO, KSC, or any other competent authority, to reveal the information in the First, Second and Third Disclosures. Paras 43-44, 53, 70-71, 105. *See also* Moberg, T.1930, 1931, 1939-40, 1958; P00052 (P00052AT); P00092; P00056; P00057 (P00057ET); P00055; P00053 (P00053AT); P00004ET, p.3; P00006ET, pp.4-5, 17-18, 36; P00054; P00058; P00035ET, pp.5-6; P00007ET, pp.7, 10-11; P00099, P00100.

<sup>709</sup> Paras 29-36, 38-39, 46-49, 54, 57, 63-64, 66, 68-69, 72, 82, 89, 92, 94-97, 106-111, 120 above.

251. The Accused revealed Confidential Information by: (a) distributing confidential documents to the attendees of the First, Second, and Third Press Conferences;<sup>710</sup> (b) publicly mentioning the contents of confidential documents in the course of over fifteen public appearances or on social networks;<sup>711</sup> and (c) further disseminating the contents of the Confidential Information as published by the media.<sup>712</sup>

(a) *Revealing protected information (Count 5)*

252. The documents and information revealed by the Accused pertains to SITF/SPO confidential criminal investigations and proceedings<sup>713</sup> and are protected under the KSC statutory framework.<sup>714</sup> This information was therefore confidential within the meaning of Article 392(1) of the KCC, as it ‘must not be revealed according to the law’. 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). Batch 2 includes copies of six pages already contained in Batch 1<sup>715</sup> and was therefore subject to the First Order.

253. The Accused intended to disseminate such information being aware that it was, and precisely because it was, confidential. In particular, the evidence shows that the Accused publicly acknowledged having reviewed the documents before making them public and displayed a high degree of familiarity with the contents thereof.<sup>716</sup> Such materials unmistakably address investigations in criminal matters, which are typically confidential, and refer to the SITF/SPO, which at the time of the Accused’s conduct

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<sup>710</sup> Paras 29-30, 36, 63, 65-66, 94, 102 above.

<sup>711</sup> Paras 38-41, 56-59, 68-69, 73-77, 79-81, 83-88, 113-124 above.

<sup>712</sup> Paras 37-38, 78, 82-85, 89 above.

<sup>713</sup> Paras 46-49, 54, 72, 106-111 above. *See also* Article 376 of the KCC and Article 6(2) of the KCPC.

<sup>714</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.37.

<sup>715</sup> Para.72 above.

<sup>716</sup> Paras 25, 29-35, 61, 63-65, 92, 94-97 above.

did not yet have any ongoing public proceedings. The documents which the Accused made public contained numerous markings indicating confidentiality and/or internal work product.<sup>717</sup> 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.<sup>718</sup> Furthermore, KSC and SPO orders served at the KLA WVA on 8, 17 and 22 September 2020 notified the Accused that the information they were making public was sensitive and non-public, and should not be further disseminated.<sup>719</sup>

254. All requirements of Article 392(1) of the KCC being met, the Accused are responsible for Violation of the secrecy of proceedings through unauthorized revelation of protected information under Count 5.

*(b) Revealing protected persons (Count 6)*

255. The evidence further shows that the Accused, with the required intent, revealed, or attempted to reveal, the identities and personal data of witnesses under protection in KSC proceedings, and are therefore responsible under Article 392(2) of the KCC, as charged in Count 6.

256. In particular, 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.<sup>720</sup> Documents in Batches 1, 2, and 3 including such

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<sup>717</sup> Paras 46-49, 54, 72, 106-111 above.

<sup>718</sup> Paras 26, 31, 33, 56, 68, 73, 75, 77, 79, 83-84, 86, 90, 95, 104, 116 above.

<sup>719</sup> Paras 43-44, 50, 71, 84, 105 above. *See also* 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.

<sup>720</sup> Paras 46-49, 54, 72, 106-111 above. In relation to Batch 1, *see also* P00086, paras 9-12; P00090, paras 3-4, Annex 1; P00088, para.12; Pumper, T.860-61, 866, 870-88, Transcript, 26 October 2021, pp.1470-71, 1474. In relation to Batch 2, *see also* P00086, paras 22-27, Pumper, T.915-18; P00090, paras 5-6, Annex 3. In relation to Batch 3, *see also* P00086, paras 31-35; P00090, paras 7-9, Pumper, T.949-50.

information were marked confidential and explicitly stated they referred to confidential investigations,<sup>721</sup> whereby the SITF/SPO took measures to protect witness identities and their personal data on its own motion.<sup>722</sup> The SPO had also formally requested non-disclosure orders, pursuant to Rules 88 and 105, upon filing of confidential and *ex parte* indictments.<sup>723</sup> Furthermore, specific measures of protection were adopted by a KSC Panel in relation to certain witness identities and personal data prior to September 2020, and in particular on 12 June 2020.<sup>724</sup> In addition, the six pages of Batch 2 which were already contained in Batch 1 include personal details of witnesses, which were also protected pursuant to the First Order.<sup>725</sup>

257. 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.<sup>726</sup> 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.<sup>727</sup>

258. The evidence establishes that the Accused acted with awareness of, and desire for, revealing the identity or personal data of witnesses under protection in KSC Proceedings and prior criminal proceedings in Kosovo without authorisation, or at a minimum, were aware that this prohibited consequence might ensue, and they acceded to the occurrence of this prohibited consequence. The Accused's actions between 7 and 25 September 2020 clearly demonstrate that they repeatedly and

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<sup>721</sup> Paras 46-49, 54, 72, 106-111 above.

<sup>722</sup> Article 35(2)(f).

<sup>723</sup> Para.108 above.

<sup>724</sup> Para.108 above.

<sup>725</sup> Paras 43, 72 above.

<sup>726</sup> Para.110 above.

<sup>727</sup> Paras 109, 111 above.



persistently disseminated the Confidential Information containing - and publicly revealing - the identities and personal details of witnesses.<sup>728</sup> The Accused publicly acknowledged that the identity or personal data of witnesses protected in KSC proceedings were included in the documents that they disseminated.<sup>729</sup>

259. Furthermore, all the requirements of the aggravated form of the offence of violation of secrecy of the proceedings through revelation of the identities and personal data of protected witnesses, under Article 392(3) of the KCC, are also met. As set out above, the revelation of identities and personal data of protected witnesses resulted in serious consequences for the witnesses under protection and severely hindered criminal proceedings.<sup>730</sup> The evidence shows that the Accused intended to cause serious consequences for witnesses under protection in KSC Proceedings or at a minimum, were aware that this prohibited consequence might ensue, and they acceded to the occurrence of this prohibited consequence.<sup>731</sup>

## J. INDIVIDUAL CRIMINAL RESPONSIBILITY

### 1. **The Accused committed the charged offences directly and/or jointly with others**

260. The Accused obstructed KSC/SPO officials, intimidated/retaliated against witnesses, and violated the secrecy of proceedings both individually and jointly. Each Accused independently fulfils all the elements of the crimes charged, and as such could be convicted as individual perpetrators. For Count 2 in particular, which has an element of common action, the Accused will necessarily fulfil the elements of the offences jointly with others.

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<sup>728</sup> Paras 31-34, 39, 49, 59, 73, 77, 90, 93, 97, 100, 116, 118 above.

<sup>729</sup> Paras 31-34, 59, 90, 93, 97, 120 above.

<sup>730</sup> Paras 125-134 above.

<sup>731</sup> Paras 31-34, 41, 87, 93 above.

261. The evidence further shows that the Accused were behaving in accordance with decisions they adopted as part of, and with, the KLA WVA leadership.<sup>732</sup> When testifying, the Defence witnesses are all in accord that what the Accused did with the documents was part of a group effort by the leadership of the KLA WVA.<sup>733</sup> This included both Accused, Faton Klinaku, Pren Marashi, Metush Kryeziu, and Cele Gashi.<sup>734</sup>

262. These Accused and their Associates collectively reviewed the Batches, decided to convene the press conferences, and determined how to proceed when the SPO came to seize the materials.<sup>735</sup> After Batch 1 arrived, Haradinaj described the joint decision-making as follows:

[...] And given that he had promised to bring more, even though we didn't know whether that was the case, and also in order to try to assess on whether the decision taken by the close leadership was the right one or not, we had the wider meeting of the council. And unanimously we decided that should new documents arrive, we would not hesitate and call the media as soon as possible. The only request they made was for the media to be informed as soon as possible.<sup>736</sup>

263. The joint decision taken was exactly what happened with Batches 2 and 3. Hysni Gucati's answer as to how Batch 2 was internally discussed before the Second Press Conference is revealing of the level of coordination involved when resolving to commit the crimes charged:

Q. Did you discuss with others at the KLA WVA what to do about those documents?

A. Yes. Although I am chairman and authorised to take decisions on my own, but I never do it. *I never take decisions without taking the advice of my friends and colleagues.* So we discussed this on the second occasion as well.<sup>737</sup>

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<sup>732</sup> P00009ET, p.8; P00033ET, p.1; Gucati, 1D00003ET, paras 17, 35, 47; Kryeziu, 1D00008ET, para.9; Haradinaj, 2D00001ET, paras 52, 66, 73, 107.

<sup>733</sup> Gucati, T.2169, 2190-91, 2215-16; Haradinaj, T.2727, 2783.

<sup>734</sup> Gucati, T.2197, 2410-11; Gucati, 1D00003ET, para.17; Marashi, T.2524-27; Marashi, 1D00007ET, para.12.

<sup>735</sup> Gucati, T.2407 (discussing how Haradinaj stayed within the parameters of the organisation and the law with what he said at the press conferences); Marashi, 1D00007ET, paras 12-13, 19; Haradinaj, T.2743.

<sup>736</sup> Haradinaj, T.2746.

<sup>737</sup> Gucati, T.2190 (emphasis added).

264. Faton Klinaku and Tomë Gashi advanced the same position as the Accused whenever the Batches were discussed.<sup>738</sup>

265. In particular, during the temporal scope of the charges Klinaku, *inter alia*: (i) represented the KLA WVA, including in interactions with the SPO<sup>739</sup> and during television programmes;<sup>740</sup> (ii) participated in, and/or had knowledge of, the dissemination of, at a minimum, the First Disclosure to members of the media and the encouragement to such media to further disseminate the First Disclosure;<sup>741</sup> (iii) publicly stated that, as far as he and others were concerned, the KSC does not exist and that he and others never accepted it;<sup>742</sup> and (iv) took part in organising the Three Press Conferences.

266. Tomë Gashi, *inter alia*: (i) publicly asserted that he hoped that the leaked documents would help the indictment against President Thaçi not to be confirmed,<sup>743</sup> and that the documents could be used to attack the credibility of the KSC;<sup>744</sup> (ii) made threats to witnesses during televised appearances by stating that the theory that witnesses cannot be protected in Kosovo was being confirmed and asking whether witnesses are really being protected in The Hague, noting that he and others knew that the documents could be used to intimidate certain persons;<sup>745</sup> (iii) praised the conduct of the unidentified person who took the documents to the KLA WVA;<sup>746</sup> and (iv) publicly reiterated the intentions of the Accused and the KLA WVA to reveal any

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<sup>738</sup> P00013ET, p.1; P00007ET, pp.4-5; P00012ET, p.7; P00023ET, p.7; P00076ET; P00022ET (Klinaku interview, which Haradinaj complimented at P00077ET).

<sup>739</sup> P00092, para.7; P00089, para.10; P00057 (P00057ET).

<sup>740</sup> P00013ET; P00023ET.

<sup>741</sup> P00092, para.7; P00013ET, p.1; P00013, min.00:12:22-00:12:49; P00023ET, p.6; P00023, min.00:10:04-00:10:07.

<sup>742</sup> P00013ET, p.1; P00013, min.00:12:22-00:12:49; *See also* P00023ET, p.7; P00023, min.00:10:57-00:11:04.

<sup>743</sup> P00007ET, pp.16-17; P00007, min.00:27:52-00:28:49, 00:29:03-00:30:22; P00012ET, pp.2-3; P00012, min.00:01:31-00:04:33, 00:04:42-00:06:21.

<sup>744</sup> P00007ET, pp.3-5; P00007, min.00:04:59-00:09:47.

<sup>745</sup> P00007ET, pp.5, 8-9; P00007, min.00:09:48-00:10:22, 00:15:33-00:16:08.

<sup>746</sup> P00007ET, pp.4-5; P00007, min.00:08:26-00:09:47.

information brought to them, including because they were against the KSC.<sup>747</sup>

267. The Accused jointly committed the offences charged with their Associates, or otherwise substantially contributed to their commission within the meaning of Article 31 of the KCC. Noting that the Accused qualify as co-perpetrators on any prevailing theory of perpetration,<sup>748</sup> it is unnecessary to theoretically distinguish between principals and accessories in order to make this finding.

## 2. The Accused incited the media to commit the offences

268. It is to the credit of the Kosovo media that the damage the Accused inflicted did not spread even further.<sup>749</sup> The Accused wanted the media to publicise the Batches to the fullest.<sup>750</sup> According to the Accused, media outlets who published the material were brave.<sup>751</sup> But the Accused put pressure on the media when they did not publish the Batches, accusing them of not doing their duty when they did not publish the

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<sup>747</sup> P00012ET, pp.2-5; P00012, min.00:01:31-00:06:21, 00:09:45-00:13:18.

<sup>748</sup> See generally Salihu Commentary, Article 31, para.18.

<sup>749</sup> See generally Specialist Prosecutor's Office, Press Statement, 22 September 2020, available at <https://www.scp-ks.org/en/press-statement-0> (citing the 'commendable professionalism and ethical integrity of Kosovo's journalists and other public commentators, many of whom have spoken clearly about how such activities undermine the rule of law and the course of justice').

<sup>750</sup> P00001ET, p.5 (Haradinaj: '[w]e do have a copy, though, and we will protect it in the name of God, and we will give you as many copies as you want. You can read as many names as you want in here.');

P00024ET, pp.3, 6, 10; P00033ET, p.3; P00004ET, p.8; P00019ET, p.2; P00030ET, pp.20-21; Berisha, T.1521-22 (recounting a conversation with Nasim Haradinaj, from T.1521: 'Q. Were you told anything about making copies of the documents? A. Making copies of the documents, no. But I was told that given that there are many documents, the number of copies is small. Therefore, there are not sufficient for all the media outlets. Therefore, if another media was asking for the same documents, I was asked to collaborate with the other media outlets if it was at all possible.');

1586, 1634. Haradinaj said he disagrees that he told Berisha to make copies for other journalists (Haradinaj, T.2732-33; Haradinaj, 2D00001ET, para.60), but the quoted passage shows this is not actually what Berisha said in his testimony.

<sup>751</sup> P00024ET, pp.4-5, 10; P00035ET, pp.13-14 (Gucati: 'I wanted to give you an answer here. You have published the fake veterans by their full names [...] Take the same courage like you did with the veterans');

P00027ET.

material.<sup>752</sup> The Accused's denials to the contrary during trial<sup>753</sup> do not comport with their actual conduct during the charged timeframe.

269. The treatment by the Accused of Gazeta Infokus – Berisha's former media outlet – is particularly revealing. The Accused commended Gazeta Infokus for taking an entire copy of Batch 1 (known as Batch 4), only to say that they should 'suffer' after they returned it to the SPO.<sup>754</sup> The criticism levied by the Accused against Infokus – who reviewed the material internally, made limited parts of it available to the public with meaningful redactions, and returned everything to the SPO<sup>755</sup> – clearly illustrates how much of a false equivalence it is to compare Berisha's conduct to that of the Accused. As to these redactions especially, and in complete contradistinction to the Accused, Berisha testified that '[e]very document that we published, we tried not to have in that document anything that could identify anyone [...]'.<sup>756</sup>

270. This said, to the extent the Accused exerted psychological influence to prompt each other, Associates, and others to commit criminal acts with the Batches, they are guilty for inciting the crimes charged.<sup>757</sup> Incitement is charged across multiple variations, such that the Accused can be found guilty of inciting crimes even if they

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<sup>752</sup> P00035ET, p.5 (Haradinaj tried to evade the plain meaning of what he said - Haradinaj, T.2975-80); P00006ET, pp.11, 35; P00030ET, p.6; P00011ET, p.29; P00024ET, p.3.

<sup>753</sup> Gucati, T.2222-33; Gucati, 1D00003ET, para.62; Haradinaj, T.2813; Haradinaj, 2D00001ET, para.129.

<sup>754</sup> P00006ET, p.16 ('ANCHOR: However, *InFocus* have published something. MR Haradinaj: *InFocus*, yes. They were very good. They were the best. The best, because he agreed to take them. The others could have done the same, so he did very well. He did his duty but now he wants to stand by the others, so let him suffer for that ... because he's attacking as a group'); Haradinaj, T.2938-40 (discussing how he meant suffer more generally, despite the quoted passage was to let 'him' suffer). *See also* Berisha, 1531-32.

<sup>755</sup> Berisha, T.1525, 1528-30, 1539-41, 1561, 1620-21, 1627; P00098, p.091917 (informing the SPO: '[w]e would like to let you know that a copy of these documents were given to us from this office in that press conference, as it was shared with other media representatives as well. Knowing the importance of these documents and the content we have been careful so far and not publishing them. So, we locked the documents in the safe place and we would like to inform you about this.').

<sup>756</sup> Berisha, T.1597.

<sup>757</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 88-90.

were never committed or attempted.<sup>758</sup>

### 3. All charged modes of liability are established

271. As set out above, all elements of the crimes and modes of liability are met for direct perpetration, co-perpetration, and/or incitement. Several other alternative modes of liability are also established, should the Trial Panel characterise the criminal conduct differently.<sup>759</sup>

272. The SPO has not charged any Associates or Other Persons with committing crimes in relation to the Batches. To the extent the Panel considers that such crimes may have been committed by these persons, the Accused could then be further convicted for assisting those crimes.<sup>760</sup>

273. Because the Accused satisfy the required *mens rea* for all the crimes charged, the Accused are guilty for attempt should the Trial Panel consider that any of the objective elements of the offences are absent for any reason.<sup>761</sup>

274. Finally, for the same reasons as discussed for co-perpetration, the very agreement reached by the Accused to convene the Press Conferences and publicise the Batches is criminal. The Accused should be convicted for agreeing to commit the crimes charged even if the Trial Panel determines they were neither committed nor attempted.<sup>762</sup>

### 4. Case theory – individual criminal responsibility

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<sup>758</sup> Indictment, KSC-BC-2020-07/F00251/A01/RED, paras 41-43; KCC Article 32. Note that the version of incitement under Article 32(3) of the KCC applies only to Counts 1-3 and 6 in this case.

<sup>759</sup> Applicable Law Submissions, KSC-BC-2020-07/F00341, paras 34-37.

<sup>760</sup> See Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 91-92.

<sup>761</sup> See Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 95-97. This applies only to Counts 1-4 and 6 in this case.

<sup>762</sup> See Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 93-94.



275. For all charged modes of liability, the deliberate conduct and statements of the Accused, including dissemination of the Confidential Information,<sup>763</sup> accusations against witnesses,<sup>764</sup> indifference to witness safety,<sup>765</sup> statements acknowledging the confidential nature of the Confidential Information,<sup>766</sup> and clear purpose to obstruct the KSC/SPO,<sup>767</sup> establish that the Accused intended to commit the crimes described above and to incite and assist the commission of those crimes. When applicable for certain modes of liability, these same intentions were shared by: (i) Faton Klinaku, Tomë Gashi, and other members and representatives of the KLA WVA; and (ii) the persons who, remotely or in person, attended, observed, or were otherwise informed of the Three Press Conferences and other public statements of the Accused; and (iii) certain members of the press and persons in possession of or with access to confidential and non-public information relating to KSC Proceedings ('Other Persons').

276. In the alternative, as demonstrated by their deliberate conduct and statements, the Accused – and their Associates and Other Persons, as applicable – were aware that the crimes described above could occur as a result of their acts or omissions and acceded to their occurrence.

(a) *Commission and Attempt*

277. Through the acts, omissions, and intentions described above,<sup>768</sup> the Accused committed the crimes charged. In the alternative, for all crimes charged except Count 5, the Accused attempted to commit these crimes because these same acts/omissions

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<sup>763</sup> Paras 32, 37-39, 46-49, 54-57, 63-64, 66, 68-69, 72, 78, 82, 89, 92, 94-97, 102, 106-111, 116, 120 above.

<sup>764</sup> Paras 40, 69, 87 above.

<sup>765</sup> Paras 31-34, 41, 59, 68 above.

<sup>766</sup> Paras 31, 33, 68, 73, 75, 77, 79, 83-84, 86, 90, 95, 104, 116 above.

<sup>767</sup> Paras 34-35, 52, 59, 68, 70, 74-76, 80-81, 84, 87-88, 104, 115, 117, 119-120, 123-124 above.

<sup>768</sup> Paras 189-197, 215-219, 226-229, 250-259 above.

constitute taking action towards the commission of the offences charged.

(b) *Co-Perpetration and Agreement to Commit a Criminal Offence*

278. As demonstrated by their purpose to obstruct the KSC/SPO<sup>769</sup> and concerted acts in furtherance of this common purpose, the Accused and their Associates committed the crimes in co-perpetration and/or agreed to commit them. The Accused substantially contributed to and undertook substantial acts towards the commission of crimes in furtherance of their common purpose or agreement, including by:

- i. reviewing the Confidential Information;<sup>770</sup>
- ii. deciding or partaking in decisions about whether and how to disseminate it;<sup>771</sup>
- iii. organising and partaking in events, including press conferences and public appearances, where Confidential Information was publicly disseminated and discussed;<sup>772</sup>
- iv. disseminating the Confidential Information;<sup>773</sup>
- v. revealing the identities and personal data of witnesses, including protected witnesses;<sup>774</sup>
- vi. making accusations against and derogatory comments about witnesses;<sup>775</sup>
- vii. encouraging and advising persons with access to confidential information relating to KSC Proceedings to continue providing it to the KLA WVA, and promising to continue disseminating such confidential information;<sup>776</sup> and/or
- viii. encouraging, instructing, and advising members of the media and public

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<sup>769</sup> Paras 34-35, 52, 59, 68, 70, 74-76, 80-81, 84, 87-88, 104, 115, 117, 119-120, 123-124 above.

<sup>770</sup> Paras 25-26, 38, 61, 86, 92, 94 above.

<sup>771</sup> Paras 27, 62 above.

<sup>772</sup> Paras 27, 38-41, 56-59, 62, 68-69, 73-77, 79-81, 83-88, 94, 113-121, 123-124 above.

<sup>773</sup> Paras 32, 37-39, 46-49, 54-57, 63-64, 66, 68-69, 72, 78, 82, 89, 92, 94-97, 102, 106-111, 116, 120 above.

<sup>774</sup> Paras 31-34, 39, 49, 59, 73, 77, 90, 93, 97, 100, 116, 118 above.

<sup>775</sup> Paras 40, 69, 87 above.

<sup>776</sup> Paras 52, 58, 65, 73, 75, 79, 83, 87-88, 99, 114-115, 123-124 above.

to take or record, and further disseminate the Confidential Information.<sup>777</sup>

(c) *Incitement*

279. Through one or more of the same acts described in the Co-Perpetration/Agreement sub-section,<sup>778</sup> the Accused exerted psychological influence on one another, Associates, and Other Persons with a view to creating or strengthening the decision of that other person to commit a criminal offence. They therefore incited the commission of the crimes charged.

280. In the alternative, through one or more of these same acts, the Accused incited one another, Associates, and Other Persons to commit the crimes charged in Counts 1-6 and such crimes were attempted.

281. In addition or in the alternative, through one or more of these same acts, the Accused incited one another, Associates and Other Persons to commit the crimes charged under Counts 1-3 and 6, and such crimes were neither committed nor attempted.

(d) *Assistance*

282. Through one or more of the same acts described in the Co-Perpetration/Agreement sub-section,<sup>779</sup> the Accused provided assistance to one another, Associates, and Other Persons in the commission of the crimes described above.

K. DEFENCES

**1. There is no basis in the Law for any of the defences asserted**

283. The Defence place great weight on entrapment and public interest, generally

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<sup>777</sup> Paras 35, 56, 58, 65, 69, 74, 77, 97-100, 119 above.

<sup>778</sup> Para.278 above.

<sup>779</sup> Para.278 above.

framing them as affirmative defences.

284. They are not. The Law is clear that only those parts of the KCC which are expressly incorporated into the Law have any binding effect at the KSC.<sup>780</sup> No provision of the KCC governing ‘entrapment’ or ‘public interest’ is so cross-referenced.<sup>781</sup> Neither defence is included in the list of defences under Rule 95(5), nor have the defence provided any relevant authority for the application of either in this case.

285. In particular, assertions of human rights cannot substitute for a patent lack of a legal basis. The human right of freedom of expression in the ECHR, for example, may be subject to restrictions or penalties as are prescribed by law and are necessary in a democratic society.<sup>782</sup> An abuse of the right to freedom of expression is also not entitled to protection under the ECtHR.<sup>783</sup> Such abuses are not limited to inciting violence, but ‘vexing manifestations of irresponsibility and a frivolous attitude towards the Court’, amounting to contempt, can lead to rejection of an application as abusive before the ECtHR.<sup>784</sup>

286. The SPO is not charging the Accused with criminal speech as such. It is rather

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<sup>780</sup> Article 3(2)(c).

<sup>781</sup> The words ‘entrap’ or ‘entrapment’ appear nowhere in the KCC. Disclosure in the ‘public interest’ is a statutory defence to the unauthorised disclosure of confidential information under Article 200 of the KCC. No such language appears under any of the crimes charged in this case, most notably the violating the secrecy of the proceedings under Article 392 of the KCC. Article 200 is also not expressly incorporated into either the Law or Rules.

<sup>782</sup> Article 10(2) of the ECHR.

<sup>783</sup> Articles 17 and 35(3) of the ECHR.

<sup>784</sup> ECtHR, *Zhdanov and others v. Russia*, Judgment, 12200/08 and others, 16 July 2019, paras 81-86 (from 85: ‘[t]he Court considers that by continuing to publish insults about the Court and its judges after the warning, the applicant has shown disrespect to the very institution to which he had applied for the protection of his rights. Indeed, it is unacceptable to seek the protection of a court in which the applicant has lost all trust. His conduct constitutes “a vexing manifestation of irresponsibility and a frivolous attitude towards the Court”, amounting to contempt [...], and is therefore contrary to the purpose of the right of individual application, as provided for in Articles 34 and 35 of the Convention. It constitutes an abuse of the right of application within the meaning of Article 35 § 3 (a) of the Convention.’); ECtHR, *Petrović v. Serbia*, Admissibility Decision, 56551/11 and others, 18 October 2011.

charging under KCC provisions which prohibit the Accused from obstructing official persons, intimidating/retaliating against others, and violating the secrecy of proceedings. These offences are all explicitly cross-referenced by the Law.<sup>785</sup>

## 2. The Accused was not acting under any mistake of fact or law

287. The Defence briefly made reference to the possibility that the Accused acted under a mistake of fact or law in their Pre-Trial Briefs.<sup>786</sup> Noting that the Law expressly incorporates every Article of the KCC from 21-40 except for Articles 25-26<sup>787</sup> - which are the provisions governing mistakes of fact and law under the KCC - the drafters deliberately excluded the application of the KCC's mistake of fact/law provisions at the KSC. Even if these mistakes could be read into this case by virtue of Rule 95(5), there is no evidence that a mistake of law or fact is applicable here.

288. Ignorance of the law is generally not an excuse, and a mistake of law could only be applicable if it somehow negated the mental element of the crimes charged.<sup>788</sup> The Accused disagreeing that their actions should be classified as illegal<sup>789</sup> is not at all the same as operating under a mistake of law. The Accused were aware of the potential illegality of their conduct throughout the charged timeframe.<sup>790</sup> They were willing to accept whatever consequences were entailed by their conduct, and insisted that

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<sup>785</sup> Article 15(2).

<sup>786</sup> Public Redacted Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, KSC-BC-2020-07/F00260/RED, 12 July 2021 (redacted version notified 2 September 2021), paras 282-83.

<sup>787</sup> Article 16(3).

<sup>788</sup> See similarly *Jović* AJ, IT-95-14 & IT-95-14/2-R77-A, para.27 (where a person is subject to the International Tribunal's authority, that person must abide by its orders 'regardless of his personal view of the legality of those orders'); *Hartmann* TJ, IT-02-54-R77.5, para.65; Article 32 (2) of the ICC Statute; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007, para.315.

<sup>789</sup> Gucati, 1D00003ET, paras 59-60; Haradinaj, 2D00001ET, paras 126-31.

<sup>790</sup> P00011ET, pp.38, 64-65; P00007ET, pp.8-9; P00006ET, p.15; P00018ET, pp.5-6; P00028ET, pp.1-2. Though not applicable, Article 26(1) of the KCC only permits a mistake of law if the Accused, for justifiable reasons 'did not know or could not have known that an act was prohibited'.

nothing would stop them from publishing further materials.<sup>791</sup> Tomë Gashi's legal advice has no bearing in this regard, noting that: (i) he was not appointed until after the Second Press Conference; and (ii) whatever legal advice he gave merely endorsed what the Accused had already been doing with the materials.<sup>792</sup>

289. A mistake of fact would likewise only be relevant if it negated the mental element of the offences charged.<sup>793</sup> The Accused have the required *mens rea* for all charged offences. The points of the case where the Accused profess not to have knowledge – such as on the truth or falsity of the witness accounts in the Batches – do nothing to change that. Further, to the extent that the Accused insist they were acting throughout in the public interest, it is not clear what 'mistake of fact' the Accused could conceivably have as to the contents of the Batches.

### **3. The KSC/SPO's cooperation with Serbia was already public knowledge when the Batches arrived**

290. Batches 1 and 2 contained protected witness information in the context of the SPO's cooperation with the Republic of Serbia. By the Accused's own admission, the SPO's cooperation with Serbia was publicly known before any of the Batches arrived at the KLA WVA.<sup>794</sup>

291. The fact that the SPO corresponded with Serbia was already known, and this is a relevant factor when considering whether any revelation is in fact in the public interest.<sup>795</sup> The only new information actually revealed by the Accused's conduct was confidential investigative records and protected witnesses. Their steadfast refusal to

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<sup>791</sup> Gucati, T.2218-19, 2221-22, 2401; Haradinaj, T.3021-24; P00024ET, pp.7-8; P00026ET, pp.2, 4-5; P00021ET, p.4; P00035ET, p.12.

<sup>792</sup> Gucati, T.2389-94; Haradinaj, 2D00001ET, para.89. In this regard, *see also Jović* AJ, IT-95-14 & IT-95-14/2-R77-A, para.27 (an accused may not raise mistake of law as a defence to his knowing breach of an order of the International Tribunal on the ground that the mistake was founded on legal advice).

<sup>793</sup> *See similarly* Article 32(1) of the ICC Statute.

<sup>794</sup> Gucati, T.2174; P00059ET, p.3; P00028ET, p.10; Haradinaj, T.2709-10, 2713-14.

<sup>795</sup> Myers, T.3158-59.



redact any witness information in the Batches is indicative that it was the revealing of witness information which the Accused considered to be essential.

#### **4. There is no evidence that the KSC/SPO's cooperation with Serbia was improper**

292. The Trial Panel has already made a preliminary determination that eliciting evidence on cooperation with Serbia in the 'public interest' could only be done if there were indications that cooperation was somehow improper.<sup>796</sup> The statutory framework plainly permits the SPO to cooperate with third states such as Serbia.<sup>797</sup> The SITF/SPO requests to the Serbian authorities in Batch 1 was part of the SITF/SPO's standard investigative practices.<sup>798</sup> Even the Defence's expert on international investigative standards noted that the ICTY made efforts to cooperate with Serbia during the ICTY OTP's Kosovo investigations.<sup>799</sup>

293. Needless to say, the SPO has no influence over which officials from the Republic of Serbia will correspond with it. That these persons may be notorious in Kosovo informs why the media was attracted to publishing the SITF/SPO's interactions with them,<sup>800</sup> but this is fundamentally different from the Accused having a viable 'public interest defence' for brazenly criminal conduct. Were this otherwise, then persons could freely obstruct law enforcement and intimidate protected witnesses so long as this was of interest to the public.

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<sup>796</sup> Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, KSC-BC-2020-07/F00470, 3 December 2021, para.61 ('the claimed "public interest" in relation to which relevant evidence could be permissibly elicited is limited to evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties occurring in the context of the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO, which would have affected the independence, impartiality or integrity of the SITF/SPO's investigation').

<sup>797</sup> Article 55.

<sup>798</sup> Pumper, T.866.

<sup>799</sup> Reid, T.3361-63.

<sup>800</sup> See Berisha, T.1584.

294. The evidence is clear that the Accused consider cooperation with Serbia to be inherently illegitimate.<sup>801</sup> This is a political belief untethered from the actual (im)propriety of the cooperation in question.

## 5. The Accused cannot be understood to be whistle-blowers

295. The Defence advance whistle-blowing arguments in conjunction with assertions of 'public-interest'. Once again, there is no legal basis for such a defence in this case.<sup>802</sup> Kosovo's whistle-blowing law does not apply before the KSC and, even if it did, requires an employment relationship clearly inapplicable on the facts of the present case.<sup>803</sup> The ECtHR also considers that the status of whistle-blower necessarily implies a work-based relationship.<sup>804</sup>

296. The UN Special Rapporteur's report advocating for a broader definition of whistle-blowing<sup>805</sup> is not a substitute for a proper legal basis in a court of law. Even on the terms of this report: (i) the State can still prove that disclosure genuinely harms a specified State interest,<sup>806</sup> which is precisely what the SPO seeks to do through the crimes charged, and (ii) restrictions on the protection of confidential information sources may be implemented by judicial authorities in exceptional situations, including investigations into the most serious crimes and the protection of the lives of others.<sup>807</sup>

297. The Haradinaj Defence's whistle-blowing expert – Anna Myers – was forthright in admitting that she has no knowledge of the relevant law or evidence applicable to

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<sup>801</sup> See Haradinaj, T.2988-89; Haradinaj, 2D00001ET, para.32; Gucati, 1D00003ET, para.68.

<sup>802</sup> Articles 3(2)(c), 15(2), and 16(3). See also Myers, T.3142-48.

<sup>803</sup> 2D00010, art.3(1)(1.1). See also Myers, T.3149-52. Myers was also unable to name a single case, either domestically or internationally, adopting a definition of a whistle-blower which applied to persons outside a workplace relationship. Myers, T.3169-70, 3175-77.

<sup>804</sup> *Guja*, 14277/04, para.70.

<sup>805</sup> 2D00011, paras 28-31.

<sup>806</sup> 2D00011, para.58.

<sup>807</sup> 2D00011, paras 21, 62.

this case.<sup>808</sup> Myers' legal advocacy for a broader definition of legally protected whistle-blowing is a far cry from any statutory defence to the crimes charged.

298. Even on Myers' own evidence, the conduct of the Accused falls short of permissible whistle-blowing. Releasing the identities of witnesses or police informants does not generally qualify as whistle-blowing.<sup>809</sup> Whistle-blowers must take steps to avoid unnecessary harm in their disclosures,<sup>810</sup> but the Accused took no such steps when making the Batches available to the media.<sup>811</sup> Whistle-blowers are generally required to inform appropriate authorities prior to making public disclosures,<sup>812</sup> but the Accused did not directly contact the SPO prior to disclosing the Batches.<sup>813</sup> Even if the Accused assumed the SPO would not change its ways had it been contacted, the Accused likewise did not inform the Kosovo police, the KSC,<sup>814</sup> or any other domestic legal or judicial authority before going straight to what Myers called the 'nuclear option' of full public disclosure.<sup>815</sup>

299. It is uncontested that whistle-blowers can perform a valuable public service. But comparing these Accused to legitimate whistle-blowers is meritless. The only public interest to be guarded in this case is that of protecting witnesses and preserving the confidentiality of ongoing criminal investigations into war crimes and crimes against humanity.<sup>816</sup>

## 6. There is no evidence the SPO entrapped the Accused

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<sup>808</sup> Myers, T.3142-45 (from 3142: 'I apologise for not knowing exactly what is enforceable before this court'), 3151.

<sup>809</sup> Myers, T.3173.

<sup>810</sup> Myers, T.3161-63. *See also Guja*, 14277/04, para.77.

<sup>811</sup> Haradinaj, T.2966-69.

<sup>812</sup> Myers, T.3160-61. *See also Guja*, 14277/04, para.73.

<sup>813</sup> Haradinaj, T.2990-92; Haradinaj, 2D00001ET, para.54; P00030ET, p.9.

<sup>814</sup> The Accused have been quick to distinguish the KSC from the SPO in this trial. *See Haradinaj*, T.2729.

<sup>815</sup> Myers, T.3120, 3160. *See also Haradinaj*, T.2995; Qalaj, T.3076-77.

<sup>816</sup> *See Myers*, T.3172. *See also Guja*, 14277/04, para.76.

300. There is no entrapment defence available under the Law. Even if there were, nothing supports it and the evidence provided by the Accused themselves conclusively forecloses it.

301. The ECtHR makes a distinction between a substantive test for entrapment and a procedural test for entrapment.<sup>817</sup> The procedural aspects have been addressed in the course of trial, where the Trial Panel has afforded the Defence every opportunity to advance an entrapment defence. All information which could have had any bearing on SPO involvement in the delivery of the Batches was disclosed to the Accused.<sup>818</sup> Of the materials provided which were actually tendered by the Defence, there is: (i) a report that, *inter alia*, 'uncovered no evidence that members of the SPO staff deliberately leaked [Batch 3]';<sup>819</sup> and (ii) various items relating to alleged surveillance<sup>820</sup> for which no connection to the SPO can be made from the evidence record.

302. As to the substantive test for entrapment, and on any commonly accepted definition, entrapment involves an official person influencing the Accused to commit an offence.<sup>821</sup> It must be determined as a first step whether the offence would have been committed without the authorities' intervention.<sup>822</sup>

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<sup>817</sup> *Yakhymovych*, 23746/15, paras 33-45; *Bannikova*, 18757/06, paras 37-61; *Matanović*, 2742/12, paras 122-130; ECtHR, *Tchokhoniidze v Georgia*, 31536/07, 28 September 2018, para.44; ECtHR, *Lagutin and others v. Russia*, 6228/09, 19123/09, 19678/07, 52340/08 and 7451/09, 24 July 2014, paras 107-123; *Kuzmina and others*, 66152/14 and 8 others, paras 87-94; ECtHR, *Akbay and others v. Germany*, 40495/15 and 2 others, 15 January 2021, paras 111-124; ECtHR, *Furcht v. Germany*, 54648/09, 23 January 2015, paras 48-53.

<sup>818</sup> See Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, KSC-BC-2020-07/F00413/RED, 3 November 2021 (redacted version notified 16 December 2021).

<sup>819</sup> 1D00033, p.3.

<sup>820</sup> 1D00031; 1D00032; 1D00034.

<sup>821</sup> *Ramanauskas*, 74420/01, para.55. See also ECtHR, *Teixeira de Castro v Portugal*, 25829/94, 9 June 1998, para.38; ECtHR, *Malininas v Lithuania*, 10071/04, 1 October 2008, para.35; ECtHR, *Eurofinacom v. France*, 58753/00, 24 June 2003, p.15.

<sup>822</sup> *Yakhymovych*, 23746/15, para.33; *Kuzmina and others*, 66152/14 and 8 others, para.87; *Matanović*, 2742/12, para.123; *Bannikova*, 18757/06, para.37.

303. There is no evidence of an official person entrapping the Accused, be they a ‘rogue agent’ or otherwise. The evidence is clear that the Accused did not know who delivered the Batches to the Accused,<sup>823</sup> nor is there any indication that anyone from the SPO met, contacted, interacted, or was otherwise associated with anyone delivering the Batches.<sup>824</sup> There is likewise no indication the SPO had any advance indication of when the Batches would arrive at the KLA WVA.<sup>825</sup> For Batches 1 and 2, not all their pages were even in the SPO’s possession to provide to another person.<sup>826</sup>

304. There is also no evidence that the Accused were influenced by the SPO, or anyone else, in the actions they took. Gucati’s testimony is revealing in this regard:

Q. And nobody forced you into calling the press conferences and sharing the documents with the media; is this correct?

A. Only God can force me to do something. I’m the chairman of that organisation, and not a single person can force me to hold a press conference on certain issue. Only God can order me to do that, if you believe in God.<sup>827</sup>

305. The lack of any possible entrapment is vividly illustrated by the way the KLA WVA members reacted when the Batches arrived. There was great concern that Batch 1 was a bomb when it first arrived,<sup>828</sup> traumatising the KLA WVA receptionist Taibe Miftari.<sup>829</sup>

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<sup>823</sup> Haradinaj, T.2726 (‘And it came to us as a shock, anyway. It was quite unexpected as far as we were concerned’); Gucati, T.2165-66, 2187-88, 2197-99, 2211-13, 2215; Gucati, 1D00003ET, paras 13, 34, 46. *See also* Taibe Miftari, T.2462-64.

<sup>824</sup> Pumper, T.1478; Moberg, T.1953, 1957-58; Berisha, T.1574; Jukić, T.1899. *Contra* Gucati, 1D00003ET, para.73.

<sup>825</sup> Haradinaj suggested that he saw Pumper outside the KLA WVA before Batch 3 arrived on 22 September (Haradinaj, T.2779, 3016-19; Haradinaj, 2D00001ET, para.102), but: (i) he had, at that point, never seen her before; (ii) he saw the woman in passing from a distance; (iii) the woman was wearing a mask; and (iv) Haradinaj himself was not certain it was Pumper who he saw. Pumper confirmed that she was not present at the KLA WVA on 22 September 2020. Pumper, T.1211. Haradinaj’s identification is simply not reliable, and no evidence shows that Pumper had any advance indication the Batches were arriving.

<sup>826</sup> *See* Pumper, T.1208.

<sup>827</sup> Gucati, T.2216.

<sup>828</sup> Taibe Miftari, T.2461; Gucati, T.2165-66; Haradinaj, T.2721-23.

<sup>829</sup> 1D00004ET, paras 6, 12, 25, 30, 39; Cele Gashi, T.2588.

306. Any SPO obligation to disprove entrapment is dependent upon the allegations of the Accused being not wholly improbable.<sup>830</sup> That initial threshold has never been met in this case, and in any event has been disproven.

307. The Accused required the Batches to commit the crimes charged, and whoever delivered them to the KLA WVA allegedly wanted the Accused to make them publicly available. But there is no evidence the SPO had any involvement in the delivery of the Batches.

308. The Gucati Defence could not point to any evidence to the contrary prior to or during trial, and certainly not now. The Gucati Defence's 13 indicia of entrapment advanced before the Trial Preparation conference<sup>831</sup> reveal the absurdity of the proposed inference. The SPO's press statement of 24 June 2020 was judicially authorised in a now publicly available decision<sup>832</sup> – asserting that this is proof of the SPO tactically leaking information is simple error.<sup>833</sup> The SPO never said that the KLA WVA could keep Batch 1 for up to one month.<sup>834</sup> Evidence that the Accused was under SPO surveillance or that Ballhazhi had meaningful information to share with the SPO beyond her publicly available video is not borne out by the evidence heard at trial.<sup>835</sup>

309. The Gucati Defence argues that the following part of the Third Order suggests

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<sup>830</sup> Public Redacted Version of Decision on the Appeals Against Disclosure Decision, KSC-BC-2020-07/IA005/F00008/RED, 29 July 2021, para.52, citing *Ramanauskas*, 74420/01, para.70.

<sup>831</sup> Public Redacted Version of Written Submissions on behalf of Hysni Gucati for the Trial Preparation Conference and Related Matters with Confidential Annexes 1 and 2, KSC-BC-2020-07/F00288/RED, 27 August 2021 (redacted version notified 2 September 2021) ('Gucati Trial Preparation Submissions'), para.20.

<sup>832</sup> *Prosecutor v. Thaçi et al.*, Decision on Specialist Prosecutor's Urgent Request, KSC-BC-2020-06/F00009, 23 June 2020 (reclassified 20 November 2020).

<sup>833</sup> *Contra* Gucati Trial Preparation Submissions, KSC-BC-2020-07/F00288/RED, para.20(c)(i).

<sup>834</sup> Moberg, T.1936-38, 1948-49, 1951. *Contra* Gucati Trial Preparation Submissions, KSC-BC-2020-07/F00288/RED, para.20(c)(iv).

<sup>835</sup> See especially Ballhazhi, T.2509 ('Q. And when you say you think that the documents come from the Specialist Prosecutor, what evidence do you have for that assertion, if any? A. This is my opinion as a journalist. Q. What facts are behind that opinion, if any? A. This is my free opinion as journalist'). *Contra* Gucati Trial Preparation Submissions, KSC-BC-2020-07/F00288/RED, para.20(c)(vi), (ix)-(x).



that the SPO knew Batch 3 was coming as early as 9 September 2020:<sup>836</sup>

22 The date changed  
The Hague 9 September 2020

310. That an SPO investigator correcting a typo is portrayed as proof of some advance knowledge of Batch 3's arrival is an inference so fanciful that it reflects the desperation of the Defence's position.

311. That the Batches contained confidential information held by the SPO is the premise for the criminal charges in this case and demonstrates nothing about entrapment in and of itself.<sup>837</sup> That the deliverers of the Batches are unknown only explains why further criminal charges have not been brought.<sup>838</sup> The SPO allegedly not accepting investigative steps proposed by the Accused is overstated<sup>839</sup> and, even when accurate, is clearly within the prerogative of an independent investigator.<sup>840</sup> And, finally, any assertion that the SPO had some incentive to leak this material is baseless and entirely contradicted by the obstruction evidence presented.<sup>841</sup>

312. On the Defence's arguments throughout the trial, a lack of evidence establishing entrapment demonstrates a lack of SPO diligence in finding that evidence, thus creating a reasonable doubt that entrapment occurred. In other words, entrapment would be established regardless of whether evidence supporting it exists or not. Accepting this premise would make entrapment an inescapable defence in

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<sup>836</sup> Gucati Trial Preparation Submissions, KSC-BC-2020-07/F00288/RED, para.20(c)(xi), *in reference to* P00054.

<sup>837</sup> *Contra* Gucati Trial Preparation Submissions, KSC-BC-2020-07/F00288/RED, para.20(c)(ii).

<sup>838</sup> SPO Opening Statement, 7 October 2021, T.790. *Contra* Gucati Trial Preparation Submissions, KSC-BC-2020-07/F00288/RED, para.20(c)(iii).

<sup>839</sup> *See* Moberg, T.1933-34; P00092, para.8 (confirming the SPO did want to view the KLA WVA CCTV footage when seizing Batch 1); Gucati, 1D00003ET, para.41 (concerning Batch 2); Haradinaj, 2D00001ET, para.116 (concerning Batch 3).

<sup>840</sup> *Contra* Gucati Trial Preparation Submissions, KSC-BC-2020-07/F00288/RED, para.20(c)(v), (viii).

<sup>841</sup> *Contra* Gucati Trial Preparation Submissions, KSC-BC-2020-07/F00288/RED, para.20(c)(xii)-(xiii).

every case. This logical fallacy should not be entertained.

313. The Gucati Defence promised before the beginning of its evidence presentation that 'there will be clear evidence of incitement'.<sup>842</sup> There was never such evidence, and it never arrived. This defence was false and unsupported from beginning to end, and is groundless in both fact and law.

## **7. The conduct of SPO investigations has no bearing on entrapment**

314. The SPO's efforts to retrieve the Batches were swift and effective. All three Batches of material were quickly recovered, as was the case with Batch 4. The SPO operated professionally and in accordance with its mandate throughout the charged timeframe.<sup>843</sup> Pumper also explained in detail the care taken by the SPO in the 25 September 2020 search of the KLA WVA in response to questions by the Defence.<sup>844</sup> It is further noted that the only material taken during this 25 September search which was tendered into evidence in this case is uncontested CCTV footage.<sup>845</sup>

315. This investigation has conclusively established the individual criminal responsibility of the Accused. There is no evidence that the SPO somehow under-investigated the delivery of the Batches in a manner suggesting entrapment or anything else which could alleviate the responsibility of the Accused. All Defence arguments in this regard focus on a broader investigation other than the one which

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<sup>842</sup> Transcript of Hearing, 27 October 2021, T.1641.

<sup>843</sup> Gucati, T.2251 (complimenting the SPO investigator who seized Batches 2 and 3).

<sup>844</sup> Pumper, T.1391-1407, 1485 (from T.1485: '[s]o I would like to state that Mr. Klinaku, he was the representative of the War Veterans Association in the absence of Mr. Gucati, and he made a point of telling me personally that I conducted myself and the search very well. And Mr. Tome Gashi, who was the legal representative for the War Veterans Association, at one point even told me, "Stop making such a fuss. We know you're doing this correctly," but that I'm overdoing it. And I responded to him, "This is a search. This needs to be done squeaky clean to the legal requirements," and this is how we progressed. So I would be very surprised if we heard otherwise.').

<sup>845</sup> 1D00019; 1D00020; 1D00021; 1D00022; 1D00023; 1D00024; 1D00025; 1D00026; 1D00027; 1D00028; 1D00029; 1D00030; P00163; P00164.

led to the crimes charged.

316. SPO investigative policy depends upon investigative priorities and available resources.<sup>846</sup> Investigative choices also depend upon the individual circumstances,<sup>847</sup> and the broader investigative decisions taken to find out who delivered the Batches go to matters beyond the case and its evidence record.<sup>848</sup>

317. Haradinaj Defence expert Reid opined that the SPO did not collect evidence in accordance with best practices, but he himself acknowledges that there are numerous ways of authenticating documents.<sup>849</sup> Detailing the 'chain of custody' is one such tool to reach the goal of authenticating a document.<sup>850</sup> And the authenticity of the Batches in this case is clear, given, *inter alia*: (i) Pumper's description of the materials seized; (ii) the evidence from Moberg on how Batch 1 in particular was taken; (iii) evidence of the Accused and others as to how the Batches were given to the SPO; (iv) the description of the Batches' contents given by the Accused on video, which mirror both contemporaneous media articles and the pages of the Batches in evidence. Reid only reviewed a fraction of this evidence, meaning that he is in no position to conclude what impact the SPO's investigation has on the admitted evidence.

318. The SPO's investigation into the Accused yielded evidence definitively establishing their guilt. There are no defects in the collection of the admitted evidence which could cast its reliability into question, particularly as concerns the open source

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<sup>846</sup> See generally Pumper, T.1157, 1446.

<sup>847</sup> See Reid, T.3324-42.

<sup>848</sup> As one prominent example, Defence counsel for Gucati argued in its Pre-Trial Brief that an SPO interview concerning the broader investigation into the delivery of the Batches was a 'sham'. Public Redacted Version of Defence Pre-Trial Brief on behalf of Hysni Gucati, KSC-BC-2020-07/F00258/RED, 12 July 2021 (redacted version notified 2 September 2021), para.135. The Gucati Defence counsel then decided to read this interview to Pumper across four transcript pages, even though she had never seen it before. Pumper, T.1173-77. But whatever the Gucati Defence was attempting to convey by this display has since been rendered meaningless - the interview was tendered without any effort to comply with the statutory requirements for such a statement, and admission was denied.

<sup>849</sup> Reid, 2D00012, para.22; Reid, T.3263-64.

<sup>850</sup> Reid, T.3287-92.

video evidence at the heart of this case.

#### L. CONCLUSION

319. As developed above in this section, read in conjunction with the statement of facts and how those facts are legally characterised, the Accused should be found guilty of all six counts charged.

320. On the commonly accepted test for cumulative convictions developed by the ICTY/ICTR,<sup>851</sup> convictions should be entered for all counts charged. This test requires only an abstract comparison of the legal elements of the charged crimes – the particular circumstances of the case, such as all six counts arising from the same overall course of conduct, is not to be considered at the stage of whether to enter cumulative convictions.<sup>852</sup>

321. Each of the six counts reflects distinct protected interests and has elements materially distinct from each other. In particular: (i) Count 1 requires obstruction through ‘serious threat’ not required in Count 2, whereas Count 2 has a requirement of ‘common action’ not required in Count 1; and (ii) Count 5 requires an unauthorised revelation of any protected ‘information disclosed in any official proceeding’ not required in Count 6, whereas Count 6 requires an unauthorised revelation of the ‘identity or personal data of a person under protection in the criminal proceedings or in a special program of protection’ which is not a required element under Count 5.

322. Convictions on all six counts are necessary to reflect the full culpability of the Accused, and the modes of liability applied to reach these convictions should do

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<sup>851</sup> *Strugar* AJ, IT-01-42-A, paras 322-24; *Nahimana et al.* AJ, ICTR-99-52-A, para.1019; ICTY, *Prosecutor v. Delalić et al.* Judgement, IT-96-21-A, 20 February 2001, paras 412-13. *See also* ICC, *Prosecutor v. Ntaganda*, Public redacted version of Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’, ICC-01/04-02/06-2667-Red, 30 March 2021, para.131 (summarising the evolution of the ICTY caselaw on this point).

<sup>852</sup> *Strugar* AJ, IT-01-42-A, paras 323-32.

likewise.<sup>853</sup> It is requested that the Trial Panel make findings on all charged modes of liability, even though they are charged in the alternative, to ensure the record on this point is clear for purposes of any appellate proceedings.<sup>854</sup> When the same conduct can be characterised under all modes of liability, the Accused should be convicted on whichever form of principal liability (commission or co-perpetration) the Trial Panel considers as best reflecting the individual criminal responsibility of the Accused.<sup>855</sup>

## V. SENTENCING

### A. INTRODUCTION

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.<sup>856</sup>

323. This is but one of numerous defiant statements by Haradinaj in the presence of his co-Accused which leave no doubt that, given the opportunity, Haradinaj, Gucati, and other like-minded individuals will commit further crimes of the same nature as those the Accused have been charged with.

324. It would be unreasonable to expect otherwise. Not when the Accused have publicly and brazenly described the KSC as 'non-existent'<sup>857</sup> and irrelevant,<sup>858</sup> stated it is their responsibility to undermine it<sup>859</sup> and that, given the opportunity, they would disband it,<sup>860</sup> threatened that it should pay its price,<sup>861</sup> and pledged to do anything to

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<sup>853</sup> Applicable Law Submissions, KSC-BC-2020-07/F00341, paras 34-37.

<sup>854</sup> Applicable Law Submissions, KSC-BC-2020-07/F00341, para.34.

<sup>855</sup> See similarly ICC, *Prosecutor v. Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, paras 57-60.

<sup>856</sup> P00035ET, p.13.

<sup>857</sup> P00001ET, pp.3, 6.

<sup>858</sup> P00028ET, pp.7-8.

<sup>859</sup> P00028ET, pp.8-9.

<sup>860</sup> P00028ET, p.11.

<sup>861</sup> P00001ET, p.3.

embarrass it.<sup>862</sup> Not when Haradinaj stated that every time the KLA WVA received documents such as those received by the KLA WVA, the SPO would not be able to stop them.<sup>863</sup> Not when mere days before their arrests Gucati stated he would not have any regrets about publishing the documents received by the KLA WVA if he were to be imprisoned for five years<sup>864</sup> while Haradinaj stated that he would feel proud and honoured if he were to be arrested for his actions.<sup>865</sup> Not when the Accused continue to hold the very same positions within the 10,000-strong KLA WVA<sup>866</sup> they did prior to their arrest,<sup>867</sup> continue to oppose this institution,<sup>868</sup> and asserted, in open court, that they would repeat the actions which led to this trial all over again.<sup>869</sup>

325. The KSC/SPO still have important mandates and obligations to fulfil, including to ensure secure, independent, impartial, fair and efficient criminal proceedings in relation to allegations of grave trans-boundary and international crimes.<sup>870</sup> The KSC and SPO must continue to protect victims and witnesses including their safety, physical and psychological well-being, dignity and privacy.<sup>871</sup> The need for this is particularly acute given the multiple cases before the KSC at both trial and pre-trial stages.

326. Several witnesses who testified in the ongoing *Mustafa* case were, for the first time in their lives, able to tell the Court and the world about the traumatic events they experienced over twenty years ago. Such testimony is crucial to the pursuit of justice and is only possible when the Court is able to adequately protect victims and

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<sup>862</sup> P00030ET, p.15.

<sup>863</sup> P00006ET, p.14.

<sup>864</sup> P00028ET, p.12.

<sup>865</sup> P00025ET, pp.1-2, 9-10.

<sup>866</sup> Marashi, T.2528-30.

<sup>867</sup> Haradinaj, T.2707.

<sup>868</sup> Gucati, T.2204, 2412-3; Haradinaj, T.2876-9, 2915; *See also* Gucati, T.2272.

<sup>869</sup> Haradinaj, T.3024, 3046-47; Gucati, T. 2221-22, 2401; *See also* Gucati, T.2219-20.

<sup>870</sup> Article 1(2).

<sup>871</sup> *See, e.g.*, Articles 23(1), 39(11), 40(6), Rules 30(2), 80.



witnesses, including from crimes such as those undertaken by the Accused.

327. While the *Mustafa* case is at trial, the Court also has two cases in the pre-trial stage. Among the latter is the *Thaçi et al.* case which, given the scope of the confirmed indictment and the current stage of those proceedings, can reasonably be expected to go on for some time. Extensive evidence will be adduced in this case and, consequently, maintaining the integrity of the proceedings will be of paramount concern.

328. The Panel must not allow the Court to fail as the Accused and certain others would like it to. It can and should preclude this from happening. There is only one way to do so in the context of this trial - imposing a lengthy term of imprisonment on the Accused, reflecting both the gravity of the crimes they committed and deterring them and others from once again jeopardising the future of the KSC and SPO. If the Panel does this, witnesses will continue to co-operate with this Court, their rights and dignity will be respected, and the KSC and SPO will be able to fulfil their mandates.

329. Below, in view of Article 44(5) and the Panel's Order,<sup>872</sup> the SPO addresses, *inter alia*, the sentences which the Panel may impose on the Accused, the gravity of the Accused's crimes and the far-reaching consequences thereof, the presence of multiple aggravating factors, the lack of any mitigating factors, and the importance of deterrence and sentences of a custodial nature before asking the Panel to impose, on each Accused, a sentence of six years' imprisonment and a symbolic fine of 100 Euros.

#### B. APPLICABLE SENTENCES

330. Pursuant to Rule 163(4), the Trial Panel shall determine a sentence in respect of each charge in the indictment under which the Accused has been convicted and shall impose a single sentence reflecting the totality of the criminal conduct of the Accused.

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<sup>872</sup> Closing Evidence Order, KSC-BC-2020-07/F00553, para.17.

The single sentence shall not be less than the highest individual sentence determined in respect of each charge.<sup>873</sup> In imposing a sentence of imprisonment, the Panel shall deduct the time, if any, during which the Accused was detained.<sup>874</sup>

331. Pursuant to Article 44(4), the punishment imposed on persons adjudged guilty of crimes under Article 15(2) shall be in line with the punishments for those crimes set out in the 2019 KCC.<sup>875</sup>

332. The evidence set out above establishes the Accused's guilt beyond reasonable doubt in relation to all charged crimes. Accordingly, the applicable sentences are as follows.

333. In relation to Count 1, obstructing official persons in performing official duties by serious threat, KCC Article 401(1) provides that the Accused shall be punished by imprisonment of three months to three years. However, given that such obstruction was committed against a judge, a prosecutor, an official of a court or prosecution officer during the exercise of their official functions,<sup>876</sup> pursuant to Article 401(5) the Panel must impose a punishment of imprisonment of between one and five years.

334. In relation to Count 2, obstructing official persons in performing official duties by common action of a group, KCC Article 401(2) provides that the Accused shall be punished by a fine or by imprisonment of up to three years. However, given that such obstruction was committed: (i) by the leader or organiser of the group which commits this offense;<sup>877</sup> and/or (ii) against a judge, a prosecutor, an official of a court or

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<sup>873</sup> Rule 163(4).

<sup>874</sup> Rule 163(6).

<sup>875</sup> While the Law refers to the 2012 KCC, the 2019 KCC renumbered provisions listed in the Law including those upon which the charges against the Accused are based, *see* Decision on Defence Challenges, KSC-BC-2020-07/F00057, 27 October 2020 para.24; Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 13-14. The corresponding provisions are identical in terms of the sentencing ranges applicable to the charged crimes.

<sup>876</sup> *See* paras 170-174, 189-197 above.

<sup>877</sup> *See* paras 19-20, 260-267 above.

prosecution officer during the exercise of their official functions,<sup>878</sup> pursuant to Articles 401(3) and/or (5) the Panel must impose a punishment of imprisonment of between one and five years.

335. In relation to Count 3, intimidation during criminal proceedings pursuant to KCC Article 387, the Panel shall punish the Accused by imposing a fine of up to 125,000 Euros and by imprisonment of two to ten years.

336. In relation to Count 4, retaliation pursuant to KCC Article 388(1), the Accused shall be fined and punished by imprisonment of up to three years.

337. In relation to Count 5, violating the secrecy of proceedings through unauthorised revelation of protected information pursuant to KCC Article 392(1), the Panel must sentence the Accused by imposing a fine or by imprisonment of up to one year.

338. In relation to Count 6, violating the secrecy of proceedings through unauthorised revelation of the identity and/or personal data of protected persons pursuant to KCC Article 392(2), the Panel must sentence the Accused by imposing a sentence of imprisonment of up to three years. However, since this offence resulted in serious consequences for the persons under protection or the criminal proceedings were made impossible or severely hindered,<sup>879</sup> pursuant to KCC Article 392(3) the Panel must sentence the Accused to a term of imprisonment of six months to five years.

339. The Accused have been charged on the basis of multiple modes of liability. The KCC provisions concerning such modes stipulate that each co-perpetrator shall be punished as prescribed for the criminal offense.<sup>880</sup> The same applies in relation to

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<sup>878</sup> See paras 170-174, 189-197 above.

<sup>879</sup> See paras 125-134, 173, 190-191, 205, 207, 259 above.

<sup>880</sup> KCC Article 31.

persons who agree to commit a criminal offense,<sup>881</sup> and persons who attempt to commit a criminal offense.<sup>882</sup> While the KCC provides that the punishment may be reduced in the case of attempt,<sup>883</sup> no such provision is made in relation to co-perpetration or agreement to commit an offense.

340. Persons guilty of incitement shall be punished as if they committed the offence if such offence is committed or attempted but not committed.<sup>884</sup> Should the Trial Panel find that the Accused incited any of the offences charged under Counts 1-3 or 6 and such offence(s) is/are not even attempted, the Accused shall be punished for the attempt.<sup>885</sup> Should the Panel find that the Accused assisted in the commission of a criminal offence, they shall be punished more leniently than the perpetrator of the offence.<sup>886</sup>

C. THE CRIMES COMMITTED BY THE ACCUSED ARE UNDOUBTEDLY GRAVE

341. The criminalisation of actions of the nature of those undertaken by the Accused during the temporal scope of the charges is intended to prevent frustration of the administration of justice.<sup>887</sup> Such criminalisation is critical to protect the integrity of KSC proceedings, in particular since such actions may impede the discovery of the truth, the victims' right to justice and, ultimately, the Court's ability to fulfil its mandate. Since criminal conduct such as that of the Accused constitutes a direct challenge to the integrity of the trial process, the offences they have committed are undoubtedly grave.<sup>888</sup>

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<sup>881</sup> KCC Article 35(1).

<sup>882</sup> KCC Article 28(3).

<sup>883</sup> KCC Article 28(3).

<sup>884</sup> KCC Article 32(1) and (2).

<sup>885</sup> KCC Article 32(3).

<sup>886</sup> KCC Article 33(1).

<sup>887</sup> See *Pećanac* TJ, IT-05-88/2-R77.2, para.39.

<sup>888</sup> See *Nzabonimpa et al.* TJ, MICT-18-116-T, para.397; *Nshogoza* TJ, ICTR-07-91-T, para.218.

342. The Trial Panel is vested with broad discretion in determining the appropriate sentence to be imposed on the Accused due to its obligation to individualise the penalty to fit the Accused's circumstances and the gravity of their crimes.<sup>889</sup>

343. In this context, gravity does not refer only to a crime's objective gravity, but also to the particular circumstances surrounding the case and the form and degree of the Accused's participation in the crimes.<sup>890</sup> The consequences of the Accused's actions, including the potentially adverse impact the Accused's conduct may have upon the work of the court and the potential and actual personal and psychological consequences for the victims of the crimes, is another relevant factor in assessing gravity.<sup>891</sup>

**1. The Accused's participation in the crimes was direct, systematic, persistent, deliberate and enthusiastic**

344. Among the factors relevant to the assessment of the Accused's participation in the crimes are the specific role of the Accused in the commission thereof,<sup>892</sup> the deliberate way in which the crimes were undertaken,<sup>893</sup> and the systematicity of the Accused's actions.<sup>894</sup>

345. As set out above,<sup>895</sup> the Accused participated in the crimes by, *inter alia*,

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<sup>889</sup> See Jokić AJ, IT-05-88-R77.1-A, para.40; Marijačić and Rebić TJ, IT-95-14-R77.2, para.46; Nzabonimpa et al. TJ, MICT-18-116-T, para.397; Akhbar Beirut SJ, STL-14-06/S/CJ, para.15; 2012 Šešelj Contempt TJ, IT-03-67-R77.4, para.52; Tupajić TJ, IT-95-5/18-R77.2, para.31; Pećanac TJ, IT-05-88/2-R77.2, para.39; Margetić TJ, IT-95-14-R77.6, para.84.

<sup>890</sup> ICTR, *Prosecutor v. Nshogoza*, Judgement, ICTR-07-91-A, 15 March 2010, para.98.

<sup>891</sup> See Margetić TJ, IT-95-14-R77.6, paras 86-87; 2011 Šešelj Contempt TJ, IT-03-67-R77.3, para.80; Hartmann TJ, IT-02-54-R77.5, para.80; Nshogoza TJ, ICTR-07-91-T, para.219; Bemba et al. Second Sentencing Decision, ICC-01/05-01/13-2312, paras 76-79, 93-96, 111-114.

<sup>892</sup> Nzabonimpa et al. TJ, MICT-18-116-T, para.399.

<sup>893</sup> 2011 Šešelj Contempt TJ, IT-03-67-R77.3, para.78.

<sup>894</sup> Bemba et al., Second Sentencing Decision, ICC-01/05-01/13-2312, paras 76-79, 93-96, 111-114; Akhbar Beirut SJ, STL-14-06/S/CJ, para.17; See also Rašić SJ, IT-98-32/1-R77.2, para.18; 2012 Šešelj Contempt TJ, IT-03-67-R77.4, paras 54, 57; Nshogoza TJ, ICTR-07-91-T, para.222; Senessie SJ, SCSL-2011-01-T, paras 18, 22; Jović TJ, IT-95-14 & IT-95-14/2-R77, para.26.

<sup>895</sup> See paras 277-278 above.

reviewing the confidential and non-public information, partaking in decisions as to whether and how to disseminate it, and organising and participating in related events, including press conferences and public appearances, where they made accusations against, and intimidating remarks about, witnesses, repeatedly disseminating their identities, personal data, and evidence, and repeatedly encouraging others to disseminate such information.

346. The participation of each Accused in the commission of the crimes is therefore direct, having, *inter alia*, personally partaken in every decision leading to the commission of the crimes, appeared in person and spoken at each of the Three Press Conferences and multiple televised appearances, and furthered their agenda through social media posts uploaded to their personal social media accounts.

347. The direct nature of the Accused's participation in the crimes is immediately apparent even from the events which took place on the first of the nineteen days covered by the Indictment. During the First Press Conference, Haradinaj asserted that the persons referred to in the First Disclosure must now know 'that they are known names and that no one is unknown' because the exact location, summons, and statements given are all shown in the First Disclosure,<sup>896</sup> adding, rhetorically, '[h]ow can one guarantee protection to the witnesses when everyone can read these today',<sup>897</sup> and noting 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.<sup>898</sup> Gucati testified that he supported everything Haradinaj said during the Three Press Conferences.<sup>899</sup>

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<sup>896</sup> P00001ET, pp.3-4.

<sup>897</sup> P00001ET, pp.4-5.

<sup>898</sup> P00008ET, p.26.

<sup>899</sup> Gucati, T.2374-75.



348. Mere hours later, when the presenter of a programme on which Gucati appeared noted that things could happen because the documents contained names, Gucati, unfazed, responded that this could happen.<sup>900</sup>

349. The direct nature of the participation in the crimes is also evidenced by the intimidating remarks about SPO witnesses that the Accused themselves made in public throughout the temporal scope of the charges, with Gucati referring to such witnesses as ‘Albanian-speaker[s]’ or ‘traitor[s]’ who lie,<sup>901</sup> and Haradinaj describing them as ‘illiterate’ and ‘naïve’<sup>902</sup>, ‘[c]hetniks, criminals’,<sup>903</sup> ‘criminals, bloodsuckers’,<sup>904</sup> and spies who betrayed their people.<sup>905</sup> Their intimidating remarks were echoed by their supporters.<sup>906</sup>

350. The systematic, persistent, deliberate and enthusiastic nature of the Accused’s participation in committing the charged crimes is borne out, *inter alia*, by the fact that they repeated the same cycle of criminal conduct. After each of the three deliveries at the KLA WVA, the Accused reviewed the documents delivered to them, held press conferences during which they revealed and distributed confidential and non-public information contained in the documents received, and made similar revelations during several subsequent televised appearances. The Accused’s *modus operandi* shows, *inter alia*, that nothing but their arrests sufficed to halt their criminal conduct, in particular considering that the orders served at the KLA WVA on 8, 17 and 22 September 2020 did not reach the same result.

351. The Accused’s own words leave no doubt about the deliberate nature of their

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<sup>900</sup> P00009ET, p.8.

<sup>901</sup> P00009ET, pp.6-7, 12-13.

<sup>902</sup> P00015ET, p.2.

<sup>903</sup> P00033ET, pp.1-2.

<sup>904</sup> P00008ET, p.7.

<sup>905</sup> P00008ET, p.26.

<sup>906</sup> See P00070 (P00070ET).

roles in the crimes. By way of example, during the First Press Conference, Haradinaj acknowledged that it had been the decision of himself, Gucati, and Associates to make the confidential documents public, stating: ‘had we wanted, we would not have made these public at all.’<sup>907</sup>

352. The Accused’s own words also further demonstrate their enthusiasm, in particular the repeated expressions of gratitude for the receipt of the documents at the KLA WVA, urging of the person(s) who delivered such documents to do so again,<sup>908</sup> and stated intention to make anything else received by the KLA WVA public.<sup>909</sup>

353. The Accused’s persistence is also evidenced by the fact that they undertook their actions despite the orders served at the KLA WVA on 8, 17 and 22 September 2020, which specifically stated that the information the Accused were making public was sensitive and non-public and should not be further disseminated. Indeed, following the seizure of Batch 2, Gucati acknowledged that SPO staff members had served him with a copy of the Second Order and that the staff members told him that the documents they were seizing could not be multiplied or distributed and the names of witnesses could not be published.<sup>910</sup> Haradinaj acknowledged that during the seizure of Batch 2, SPO representatives confirmed the sensitivity of the seized material and acknowledged that the Second Order included an obligation for Haradinaj and others not to publish.<sup>911</sup>

## **2. Obstructing the work of an entire judicial institution renders the Accused’s conduct particularly grievous**

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<sup>907</sup> P00001ET, p.8.

<sup>908</sup> P00001ET, pp.1-2; P00080 (P00080ET); P00083, p.SPOE00222250 (P00083ET, p.SPOE00222250); P00006ET, p.4; P00017ET, p.5; P00075 (P00075ET); P00083, p.SPOE00222248 (P00083ET, p.SPOE00222248); P00033ET, pp.2-3; P00007ET, p.2; P00008ET, pp.2-4.

<sup>909</sup> See paras 385-390 below.

<sup>910</sup> P00004ET, pp.3, 8.

<sup>911</sup> P00033ET, p.1; P00017ET, pp.1, 4-6; P00020; P00007ET, p.3.

354. Each case must be assessed individually and on the basis of the legal framework applicable, tailoring the penalty to fit the gravity of the crime and the individual circumstances of the convicted person.<sup>912</sup>

355. This case is not one of an Accused, or someone related thereto, interfering with an individual trial for personal motives. The Accused are engaged in a sustained effort to attack the KSC as a whole. Their conduct affects every present and future case of this court, and the entire witness community the SPO depends upon to prosecute cases. The particular circumstances surrounding the case against the Accused, including the combination of the following factors, render the Accused's conduct particularly grievous. This must be reflected in the sentence to be imposed.

356. *The timing of the crimes.* The crimes were committed before the contents of a single indictment against any accused person had been made public, with the first arrest of an indictee, Salih Mustafa, taking place just one day prior to that of the Accused. At the time of the offences, not a single witness had ever testified before this Court in any proceedings. Salih Mustafa had not even made his first appearance in court yet.

357. The only publicly available information in terms of the progress of cases before the KSC was that the SPO had filed indictments against Hashim Thaçi, Kadri Veseli and unnamed others. The Accused were well aware of this,<sup>913</sup> with Gucati characterising the indictments he had yet to see as politically motivated<sup>914</sup> and Haradinaj dismissing them as 'just a pamphlet of the court' and 'blackmail'.<sup>915</sup> Reflecting the Accused's intent, Tomë Gashi stated that the publication of the documents by the KLA WVA meant that the judge must think again before deciding

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<sup>912</sup> See *Jokić* AJ, IT-05-88-R77.1-A, para.40; *Bulatović* Appeal Decision, IT-02-54-A-R77.4, para.62.

<sup>913</sup> P00037ET, pp.1-4.

<sup>914</sup> P00037ET, pp.1-2.

<sup>915</sup> P00039ET, p.2.

whether to confirm the indictment against President Thaçi and others, and that he hoped that the leaked documents would help the indictment against President Thaçi not to be confirmed.<sup>916</sup>

358. This means that the crimes took place at a particularly sensitive time since the Court was only just starting formal judicial proceedings. The eyes of witnesses and victims across all investigations and cases were understandably on the KSC and SPO, hoping these institutions would be able to protect their interests. Therefore, the Accused undertook their conduct at a particularly fragile juncture of this Court's existence and risked damaging the judicial process from the outset, which the Accused admitted is what they wanted.<sup>917</sup>

359. *The goals sought to be accomplished by the Accused.* The Accused's intent was to obstruct the work of the KSC/SPO generally, rather than in relation to any specific witness, investigation or trial.<sup>918</sup> Haradinaj stated he and others are carrying out their actions in order to discredit the alleged professionalism of the Court,<sup>919</sup> that the documents they were making public could be used to attack the credibility of the KSC,<sup>920</sup> and that what was important was that the documents provided to the KLA WVA undermine the work carried out by the Court.<sup>921</sup> Gucati stated that he and others 'are interested in unmasking the Special Chambers',<sup>922</sup> highlighted the importance of showing the Court is worthless,<sup>923</sup> described the undermining of the KSC as his responsibility,<sup>924</sup> and expressed a desire to get rid of the KSC and disband it.<sup>925</sup> This

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<sup>916</sup> P00007ET, pp.16-17.

<sup>917</sup> See, e.g., P00018ET, pp.5-6.

<sup>918</sup> See Section IV.F.2 above.

<sup>919</sup> P00034ET, p.2; P00011ET, p.56.

<sup>920</sup> P00007ET, pp.3-5.

<sup>921</sup> P00030ET, p.18.

<sup>922</sup> P00004ET, p.8.

<sup>923</sup> P00029ET, p.2.

<sup>924</sup> P00028ET, pp.8-9.

<sup>925</sup> P00028ET, p.11.

intent indicates the degree of harm the Accused wanted to inflict by their actions. Their ultimate goal was to have this court cease operation.

360. *The nature and extent of information made public by the Accused.* This included: (i) over one hundred coordination requests and general requests for assistance in criminal matters which formed part of, and pertained to, SITF and SPO investigations;<sup>926</sup> (ii) internal reports and correspondence of Serbian authorities;<sup>927</sup> (iii) thirty-five statements or parts of statements of victims and witnesses that were taken by Serbian authorities, including personal data and detailed information about serious crimes;<sup>928</sup> and (iv) a SPO confidential document analysing certain available evidence and applicable law in relation to five individuals, and containing references to approximately 150 witnesses as well as detailed references to their statements.<sup>929</sup> By making this material available to the public, the Accused disclosed the identities and personal data of hundreds of witnesses classified and protected as confidential by the SPO.<sup>930</sup>

361. In addition to making this information public by providing it to members of the media, the Accused themselves uttered the names and/or personal details of multiple witnesses<sup>931</sup> and, through their own words, made it clear, *inter alia*, that the SPO: (i) had pursued and/or was pursuing investigative activities concerning numerous locations, including [REDACTED];<sup>932</sup> (ii) considered Azem Sylja, Jakup

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<sup>926</sup> Pumper, T.1470-1; P00086, paras 7-9; P00088, paras 6-12; P00090, paras 3-4, Annex 1; P00139-P00150.

<sup>927</sup> P00088, para.8; P00090, paras 3-4, Annex 1; Pumper, T.860-61.

<sup>928</sup> P00088, para.12; P00090, paras 3-4, Annex 1; P00087, para.4; Pumper, T.885-87.

<sup>929</sup> P00086, paras 29, 31; P00090, paras 7-10, Annex 5; P00035ET, p.3; P00011ET, p.30; Pumper, T.949-961, 1471.

<sup>930</sup> *See*, in relation to Batch 1, P00086, paras 9-12; P00090, paras 3-4, Annex 1; P00088, para.12; Pumper, T.860-61, 866, 870-88, 1470-71, 1474. *See*, in relation to Batch 2, P00086, paras 22-27, Pumper, T.915-18; P00090, paras 5-6, Annex 3; *See*, in relation to Batch 3, P00086, para.31; P00090, paras 7-9, Pumper, T.949-50.

<sup>931</sup> *See* paras 32, 63-64, 68, 97, 120 above.

<sup>932</sup> P00035ET, p.2; P00002ET, p.3.

Krasniqi and Rexhep Selimi as persons of interest;<sup>933</sup> and (iii) had looked into several other KLA members.<sup>934</sup> The SPO had not made any of this information public at the time.<sup>935</sup>

362. The Accused's revelations concerning the locations in which the SPO had pursued and/or was pursuing investigative activities created the risk that the safety and security of persons who were known to have been victims of crimes at such locations or have relevant information thereon may have been compromised. This holds true especially in view of previous public trials concerning such locations and/or the notoriety of crimes committed there. The revelation of these locations also threatened the SPO's ability to conduct necessary investigations in relation thereto.

363. The detrimental impact of the Accused's public revelation of information cannot be overstated given its potential to jeopardize witness and third-party cooperation in particular. Indeed, over the years, modern international criminal tribunals have learned the hard way that crimes of the same nature as those committed by the Accused can easily undermine the work of a court.

364. This court should learn from the experiences of prior tribunals and consider, in this regard, whether the sentences handed down in prior interference with justice cases have been sufficient to reflect the gravity of the conduct and deter it in the future. That being said, the circumstances of this case, including those set out above in relation to timing, goals sought and nature and extent of information, differ materially from those of contempt cases before other international courts and tribunals and Kosovo domestic courts. As such, little guidance on the appropriate sentence can be

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<sup>933</sup> P00035ET, p.2.

<sup>934</sup> P00009ET, pp.5-6.

<sup>935</sup> See Pumper, T.931-32 (private session).



drawn from these cases.<sup>936</sup>

365. Indeed, '[d]ifferences between cases are often more significant than similarities and different mitigating and aggravating circumstances might dictate different results.'<sup>937</sup> Even where similar cases do exist, such cases do not provide a legally binding tariff of sentences, in particular in view of the fact that each case contains a multitude of variables.<sup>938</sup> Further, there is no requirement obliging the Panel to consider whether the same sentence has been given for a more or less serious contempt charge in another case.<sup>939</sup>

### 3. The Accused's crimes have far-reaching consequences for witnesses

366. The Accused's conduct amounts to a serious interference with the administration of justice since it created a real risk, *inter alia*, that confidence in the KSC's ability to grant effective protective measures would be undermined and that witnesses (as well as states and other entities facilitating contacts with witnesses) would be dissuaded from co-operating with the SPO and the Court, necessarily impacting upon the Court's ability to exercise jurisdiction to prosecute and punish serious violations of humanitarian law as prescribed by its mandate.<sup>940</sup> The protection of witnesses, including through protective measures, is critical to the Court's

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<sup>936</sup> See STL, *Case against Al Khayat* Reasons for Sentencing Judgment, STL-14-05/S/CJ, 6 October 2016, para.22; ICTY, *Prosecutor v. Tabaković*, Sentencing Judgement, IT-98-32/1-R77.1, 18 March 2010, para.15; See also *Bulatović* Appeal Decision, IT-02-54-A-R77.4, para.62.

<sup>937</sup> *Dragomir Milošević* AJ, Case No. IT-98-29/1-A, para.326; *2010 Šešelj Contempt* AJ, IT-03-67-R77.2-A, para.41.

<sup>938</sup> *Dragomir Milošević* AJ, Case No. IT-98-29/1-A, para.326; *2010 Šešelj Contempt* AJ, IT-03-67-R77.2-A, para.41.

<sup>939</sup> See *Bulatović* Appeal Decision, IT-02-54-A-R77.4, para.62.

<sup>940</sup> See *Marijačić and Rebić* TJ, IT-95-14-R77.2, para.50; *2011 Šešelj Contempt* TJ, IT-03-67-R77.3, para.80; *Nshogoza* TJ, ICTR-07-91-T, para.218; *Haxhiu* TJ, IT-04-84-R77.5, para.34; *Hartmann* TJ, IT-02-54-R77.5, para.80.

success,<sup>941</sup> as is public confidence in the effectiveness of such measures.<sup>942</sup>

367. As a result of the Accused's actions, witnesses expressed anger, concern and fear, and felt threatened and/or intimidated.<sup>943</sup> One of the persons who contacted the SPO told Jukić that he had trusted the SPO but his name was now public and his family was in danger, noting that he knew what happened to witnesses in Kosovo, which Jukić understood as a reference to witnesses who had been threatened during legal proceedings in Kosovo.<sup>944</sup>

368. The Accused's actions also led witnesses to express an unwillingness to continue their cooperation with the SPO.<sup>945</sup> In particular, one witness was so scared for his and his family's safety and so determined not to co-operate further that he asked the SPO whether it could inform the KSC that he could not be found.<sup>946</sup>

369. Further, the Accused's actions necessitated the taking of security or protective measures in relation to numerous witnesses,<sup>947</sup> including providing witnesses with new phone numbers and phones for safe communication, preparing emergency risk management plans, and relocation outside of Kosovo.<sup>948</sup> The preparation of emergency risk management plans and relocation were exceptional measures undertaken in relation to a limited number of witnesses. They required an assessment that there was a high level of threat to the witness.<sup>949</sup>

370. Another relevant consideration in terms of the consequences of the Accused's

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<sup>941</sup> See *Nshogoza* TJ, ICTR-07-91-T, para.218; *Haxhiu* TJ, IT-04-84-R77.5, para.34; *Nzabonimpa et al.* TJ, MICT-18-116-T, para.399; See also Reid, T.3360-61.

<sup>942</sup> See *2011 Šešelj Contempt* TJ, IT-03-67-R77.3, para.80; *Hartmann* TJ, IT-02-54-R77.5, para.80; *Marijačić and Rebić* TJ, IT-95-14-R77.2, para.50.

<sup>943</sup> Jukić, T.1693, 1699-1700, 1703-07, 1719; See also Jukić, T.1712, 1714-15, 1722-24, 1726, 1731-32.

<sup>944</sup> Jukić, T.1704-05, 1758-59.

<sup>945</sup> Jukić, T.1702-03, 1905; Pumper, T.1012.

<sup>946</sup> Pumper, T.1009-10, 1012.

<sup>947</sup> Jukić, T.1763.

<sup>948</sup> Jukić, T.1707-09, 1762-63, 1882-84, 1891-92, 1901-02.

<sup>949</sup> Jukić, T.1760-61; See also Jukić, T.1708, 1906.

actions is that the high media turnout at the KLA WVA press conferences,<sup>950</sup> which was a result of the Accused's decisions to invite them to attend,<sup>951</sup> led to wide public knowledge about these events<sup>952</sup> and to the contents of confidential SITF/SPO documents, including witness names and evidence, being made widely available in the press and online.<sup>953</sup> The fact that the material made available by the Accused foreseeably ended up being posted online 'infinitely expanded the dissemination of the information' at issue, increasing the scope of the unauthorised disclosure and adding to the gravity of the crimes.<sup>954</sup>

#### D. THERE ARE MULTIPLE AGGRAVATING FACTORS

371. Pursuant to Article 44(5) and Rule 163(1)(b), in determining the Accused's sentence, the Panel shall take into account, as appropriate, aggravating circumstances where applicable. The list of aggravating circumstances set out in Rule 163(1)(b) is not exhaustive. The Trial Panel has wide discretion in determining what constitutes aggravating circumstances, which need to be proven beyond reasonable doubt, and the weight to be accorded thereto.<sup>955</sup>

##### 1. The Accused abused their power or official capacity to commit the crimes

372. The abuse of power or official capacity is an aggravating circumstance specifically referred to in Rule 163(1)(b)(ii).

373. Gucati had been involved with the KLA WVA for almost twenty years at the time of his arrest, having been elected Chairman of the KLA WVA in 2017 when

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<sup>950</sup> P00012ET, p.7; Berisha, T.1516-17; Gucati, T.2170, 2199-2201; Haradinaj, T.2730, 2783; Haradinaj, 2D00001ET, paras 57-58, 110.

<sup>951</sup> See paras 27-28, 62, 94 above.

<sup>952</sup> Jukić, T.1715-16; See also Marashi, T.2537.

<sup>953</sup> See paras 37, 78, 82, 92, 112, 156, 165 above.

<sup>954</sup> 2011 Šešelj Contempt TJ, IT-03-67-R77.3, para.78; Hartmann TJ, IT-02-54-R77.5, para.82.

<sup>955</sup> Nshogoza TJ, ICTR-07-91-T, para.220; Jokić AJ, IT-05-88-R77.1-A, para.40; Pećanac TJ, IT-05-88/2-R77.2, para.39; Beqaj TJ, IT-03-66-T-R77, para.61.

Haradinaj was elected Deputy Chairman and Spokesperson.<sup>956</sup> As Chairman, by Gucati's own accord, he had a lot of responsibilities.<sup>957</sup> He was in charge of the day-to-day management of the KLA WVA, including finances, and was 'responsible for protecting the interests of the veterans of the organisation'.<sup>958</sup> He attended high-level meetings, and lobbied members of parliament in relation to the drafting of legislation concerning veterans.<sup>959</sup>

374. The confidential SITF/SPO documents were delivered to the KLA WVA. This means that, but for the Accused's involvement in that organisation, they would not even have had access to such documents. Their decision to make the documents public was one taken in the context of their specific powers and official capacities.<sup>960</sup>

375. The Accused also abused their power or position to garner as much media and public attention as possible in relation to the documents they were making public without authorisation, aiming at the infliction of maximum damage. Further, as part of their KLA WVA roles, they appeared on television programmes and used those opportunities to further disseminate the Confidential Information. Gucati's testimony that 'Mr. Haradinaj cannot speak on his own behalf, given he's a deputy chairman. So if he has ever given a statement, he's given it on our behalf',<sup>961</sup> is significant in this regard.

376. To the extent the Trial Panel does not find that the Accused *abused* their power or official capacities within the KLA WVA, the fact that they *took advantage* thereof

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<sup>956</sup> Gucati, T.2158-59; Gucati, 1D00003ET, paras 8, 74; Haradinaj, 2D00001ET, para.16; Haradinaj, T.2723, 2730, 2750, 2935; *See also* P00001ET, pp.7-8; P00002ET, pp.1-2; P00004ET, p.2.

<sup>957</sup> Gucati, 1D00003ET, para.9.

<sup>958</sup> Gucati, T.2159-60; Gucati, 1D00003ET, para.9.

<sup>959</sup> Gucati, T.2159-60; Gucati, 1D00003ET, para.9.

<sup>960</sup> *See* paras 27, 62, 94 above.

<sup>961</sup> Gucati, T.2430.

should nevertheless be considered and reflected in their sentence.<sup>962</sup>

## **2. The victims of the Accused's crimes were particularly vulnerable or defenceless**

377. The commission or participation in the commission of the crime where the victim is particularly vulnerable or defenceless is an aggravating circumstance specifically referred to in Rule 163(1)(b)(iii).<sup>963</sup> The witnesses whose personal data and/or evidence the Accused made publicly available without authorisation were among the victims of their crimes; these witnesses were both vulnerable and defenceless.

378. The witnesses were vulnerable, *inter alia*, in view of the climate of witness intimidation which persists in Kosovo.<sup>964</sup> The witnesses whose personal data and/or evidence the Accused made available to the public without authorisation included some subject to court-ordered protective measures. Such measures also indicate a particular vulnerability in relation to the relevant witnesses given that measures of that nature are ordered to protect, *inter alia*, the safety, physical and psychological well-being, dignity and privacy of witnesses.<sup>965</sup>

379. The vulnerability of certain witnesses is also illustrated by the need to relocate two such witnesses and to prepare emergency risk management plans in relation to others.<sup>966</sup>

380. The witnesses were defenceless since they were given no say in the conscious

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<sup>962</sup> See ICC, *Prosecutor v. Bemba et al.* Public Redacted Judgement on the appeals of the Prosecutor, Mr. Jean-Pierre Bemba Gombo, Mr. Fidèle Babala Wandu and Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/05-01/13-2276-Red, 8 March 2018, paras 121-30.

<sup>963</sup> See also *Beqaj* TJ, IT-03-66-T-R77, para.62.

<sup>964</sup> See paras 202-203 above.

<sup>965</sup> See, e.g., Rule 80.

<sup>966</sup> Jukić, T.1707-09, 1762-63, 1882-84, 1891-92, 1901-02.

decision taken by the Accused to disclose their information without authorisation.

### **3. The Accused's crimes had multiple victims**

381. The commission or participation in the commission of the crime where there were multiple victims is an aggravating circumstance specifically referred to in Rule 163(1)(b)(iv).

382. Through their actions during the temporal scope of the charges, the Accused disclosed the identities and personal data of hundreds of witnesses classified and protected as confidential by the SPO.<sup>967</sup> Batch 1 alone contained thirty-five statements or parts of statements of victims and witnesses, including personal data and detailed information about serious crimes.<sup>968</sup> Batch 3 contained references to approximately 150 witnesses as well as detailed references to their statements.<sup>969</sup>

383. The fact that so many witnesses were implicated by the Accused's conduct should be considered as an aggravating circumstance.<sup>970</sup>

### **4. The Accused have clearly indicated their intent to commit further crimes of the same nature**

384. The Accused did not merely express their gratitude for the receipt of the documents at the KLA WVA and urge the person/s who delivered such documents to do so again.<sup>971</sup> Both during the temporal scope of the charges and while on the stand,

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<sup>967</sup> See, in relation to Batch 1, P00086, paras 9-12; P00090, paras 3-4, Annex 1; P00088, para.12; Pumper, T.860-61, 866, 870-88, 1470-71, 1474. See, in relation to Batch 2, P00086, paras 22-27, Pumper, T.915-18; P00090, paras 5-6, Annex 3; See, in relation to Batch 3, P00086, para.31; P00090, paras 7-9, Pumper, T.949-50.

<sup>968</sup> P00088, para.12; P00090, paras 3-4, Annex 1; P00087, para.4; Pumper, T.885-87.

<sup>969</sup> P00086, paras 29, 31; P00090, paras 7-10, Annex 5; P00035ET, p.3; P00035, min.00:06:54-00:10:28; P00011ET, p.30; P00011, min.00:39:20-00:39:58; Pumper, T.1471, 949-61.

<sup>970</sup> See *Senessie* SJ, SCSL-2011-01-T, paras 15, 18; See also *Margetić* TJ, IT-95-14-R77.6, para.86.

<sup>971</sup> P00001ET, pp.1-2; P00001, min.00:01:26-00:06:30; P00080 (P00080ET); P00083, pp.SPOE00222248, SPOE00222250 (P00083ET, pp.SPOE00222248, SPOE00222250); P00006ET, p.4; P00017ET, p.5; P00075 (P00075ET); P00033ET, pp.2-3; P00007ET, p.2; P00008ET, pp.2-4.



the Accused made what they would do upon receipt of such documents at any future time abundantly clear.

385. On 9 September 2020, Haradinaj stated that if he was to receive material of the same kind as the First Disclosure again, he would make it public even if the KLA WVA were to violate a law by doing so.<sup>972</sup> Two days later, Haradinaj stated that whenever he and others will receive files, they will make them public.<sup>973</sup>

386. During the Second Press Conference, Haradinaj repeated his promise to make documents public whenever the KLA WVA received them.<sup>974</sup> During an interview that same day, Haradinaj recalled that he and others have publicly stated that they will reveal whatever material they receive that compromises the KSC and SPO.<sup>975</sup> The following day, Gucati stated that the KLA WVA told SPO staff members that any time they received documents from the KSC, they will make them public.<sup>976</sup> On 20 September 2020, Haradinaj stated that he and others are going to make anything that undermines the SPO known because they do not recognise the SPO.<sup>977</sup>

387. During the Third Press Conference, Haradinaj noted that the person who provided the documents left a message saying he would bring compact discs from now on.<sup>978</sup> Haradinaj stated that he and others welcomed this and that the KLA WVA would publish everything they receive.<sup>979</sup> Later that day, Gucati echoed Haradinaj's words, stating that the unidentified person who had brought the documents to the KLA WVA told them he would provide compact discs with some material; Gucati also

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<sup>972</sup> P00024ET, pp.7-8.

<sup>973</sup> P00021ET, pp.3-5.

<sup>974</sup> P00002ET, p.4.

<sup>975</sup> P00018ET, pp.1-2.

<sup>976</sup> P00004ET, p.3.

<sup>977</sup> P00025ET, pp.9-10.

<sup>978</sup> P00035ET, pp.2-3.

<sup>979</sup> P00035ET, pp.2-3; *See also* P00030ET, pp.2-4.

asserted that the KLA WVA would make such documents public.<sup>980</sup> During another interview that same day, Gucati stated that he would make public all documents he might receive.<sup>981</sup>

388. There is no reason to doubt Haradinaj's statement that he and others in the KLA WVA 'will be against this court as long as we live, as long as we can breathe' and that '[w]e will work against this court. Full stop'.<sup>982</sup> During another interview that day, Haradinaj stated that he will not follow the orders of the Court or recognise it, and that it was his and others' duty to work against the court.<sup>983</sup> Shortly before his arrest, Haradinaj stated that if he received more documents he would release them to the media.<sup>984</sup>

389. During testimony, Gucati acknowledged having made, between 7 and 22 September 2020, public statements to the press that he would make any documents delivered to the KLA WVA public, adding 'I'm not afraid for what I have done'.<sup>985</sup> Asked whether he would undertake his actions all over again, Gucati testified: 'I said it earlier as well yesterday and the day before. I'm not a guardian of anyone, so of this institution or of the offices here in The Hague. I look after the work for which I'm paid. So please do not provoke me with questions regarding this documentation.'<sup>986</sup> The latter is far from surprising considering several other excerpts from his testimony where he stated: 'I am against this Court and I remain against it',<sup>987</sup> that he has 'lost [his] trust in this Court'<sup>988</sup> and that: '[e]ven if I lived 100 more years, I have declared

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<sup>980</sup> P00029ET, p.2.

<sup>981</sup> P00028ET, pp.7-8.

<sup>982</sup> P00015ET, p.2; P00015, min.00:03:24-00:04:59.

<sup>983</sup> P00026ET, pp.2, 4-5.

<sup>984</sup> P00026ET, pp.4-5.

<sup>985</sup> Gucati, T.2221-22; *See also* Gucati, T.2219-20.

<sup>986</sup> Gucati, T.2401.

<sup>987</sup> Gucati, T.2412-13; *See also* Gucati, T.2272.

<sup>988</sup> Gucati, T.2181.

and declared that I won't support this Court'.<sup>989</sup>

390. Haradinaj's testimony echoed that of Gucati in this regard. He testified that if documents were provided to him: 'I will act the same, because I am convinced that I acted rightly'.<sup>990</sup> Haradinaj stated that if he was provided with material that he considered to be in the public interest, he would make such material public again<sup>991</sup> and that unless there were an amendment to the KSC, he would always be against it,<sup>992</sup> later adding he would be the SPO's 'opponent forever'.<sup>993</sup>

391. That, given the opportunity, the Accused will again commit crimes of the same nature as those they have been charged with is also evidenced by their absolute unwillingness to adhere to judicial orders and defiance thereof during trial.

392. On 6 December 2021, the Presiding Judge cautioned the Defence to refrain from mentioning, in open session, all names which appear in the documents seized from the KLA WVA bar the name of Vladimir Vukčević.<sup>994</sup> Shortly thereafter, Gucati violated this order, uttering a prohibited name in open session and adding, defiantly, 'I am not afraid to mention his name [...] I cannot protect that person'.<sup>995</sup> The Presiding Judge repeated his earlier ruling and Gucati confirmed he understood he was not to mention names unless he was specifically asked to.<sup>996</sup> Nevertheless, Gucati used the same person's name in open session multiple times thereafter.<sup>997</sup> Haradinaj also subsequently referred to the same person's name in open session.<sup>998</sup>

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<sup>989</sup> Gucati, T.2204.

<sup>990</sup> Haradinaj, T.3024.

<sup>991</sup> Haradinaj, T.3046-47.

<sup>992</sup> Haradinaj, T.2876-79.

<sup>993</sup> Haradinaj, T.2915.

<sup>994</sup> Gucati, T.2146.

<sup>995</sup> Gucati, T.2175-77.

<sup>996</sup> Gucati, T.2176-77.

<sup>997</sup> Gucati, T.2262-63, 2350, 2436.

<sup>998</sup> Haradinaj, T.2811.

393. Gucati also named an SPO staff member in open session<sup>999</sup> in clear violation of the Panel's orders,<sup>1000</sup> adding: '[t]here is no way – there is no need for this person's name to be kept secret.'<sup>1001</sup> Gucati did so on multiple other occasions<sup>1002</sup> despite the Presiding Judge's repeated reminders not to do so.<sup>1003</sup> When the SPO examining lawyer reminded Gucati not to use this name in open session he remarked: 'I think there is nothing wrong with mentioning his name'.<sup>1004</sup>

394. Lack of remorse<sup>1005</sup> coupled with the indication of an intention to undertake further criminal acts of the same nature as those an accused has been charged with has been considered relevant to the sentence to be imposed<sup>1006</sup> and should be considered as a highly aggravating circumstance in the case against the Accused.

395. To the extent the Trial Panel does not consider the clear indication that the Accused intend to keep committing crimes of the same nature as those they have been charged with to constitute an aggravating factor, this should nevertheless be given due weight in their sentence, in particular considering the need for deterrence.

#### E. THERE ARE NO MITIGATING FACTORS

396. The Panel has wide discretion in determining what constitute mitigating circumstances, which must be established on a balance of probabilities, and the weight to be accorded thereto.<sup>1007</sup>

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<sup>999</sup> Gucati, T.2166.

<sup>1000</sup> See e.g. Decision on the Classification and Public Redacted Versions of Exhibits Admitted Through the Bar Table, KSC-BC-2020-07/F00350, 5 October 2021; Pumper, T.1168-69. See also Transcript, 30 March 2021, T.213-14.

<sup>1001</sup> Gucati, T.2166.

<sup>1002</sup> Gucati, T. 2167-68, 2199, 2251.

<sup>1003</sup> Gucati, T. 2167-68, 2199, 2251.

<sup>1004</sup> Gucati, T.2251.

<sup>1005</sup> See para.400 below.

<sup>1006</sup> 2011 *Šešelj Contempt* TJ, IT-03-67-R77.3, para.79.

<sup>1007</sup> *Nshogoza* TJ, ICTR-07-91-T, para.220; *Jokić* AJ, IT-05-88-R77.1-A, para.40; *Pećanac* TJ, IT-05-88/2-R77.2, para.39; *Beqaj* TJ, IT-03-66-T-R77, para.63.

397. There are no circumstances which could mitigate the sentence to be imposed on the Accused. In particular, there are no circumstances falling short of constituting grounds excluding criminal responsibility.<sup>1008</sup> The Accused did not voluntarily surrender, and did not co-operate with the SPO and KSC.<sup>1009</sup> Rather, the Accused gave every indication they would never cooperate with this Court, which they do not recognise<sup>1010</sup> and which Haradinaj considers non-existent<sup>1011</sup> and Gucati irrelevant.<sup>1012</sup> Indeed, Gucati stated that he sees it as his responsibility to undermine the Court<sup>1013</sup> and that, given the opportunity, he and others would disband it,<sup>1014</sup> while Haradinaj pledged to do anything to embarrass it.<sup>1015</sup> Haradinaj also stated he would not disclose the identity of the person who delivered documents to the KLA WVA even if this person did not wear a mask.<sup>1016</sup>

398. The Accused were in no way provoked to commit the crimes. Their role in the commission of the crimes was far from minor, with both partaking as principal perpetrators. There have been no guilty pleas, or any attempts to rectify wrongdoings and/or mitigate the effects thereof.

399. For remorse to constitute a mitigating factor, it must be genuine and sincere.<sup>1017</sup> An accused can express sincere regrets even without admitting participation in a crime.<sup>1018</sup> In such circumstances, remorse nonetheless requires acceptance of some measure of moral blameworthiness for personal wrongdoing, falling short of the

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<sup>1008</sup> See Rule 163(1)(a)(i) and Rule 95(5); See also Section IV.K above.

<sup>1009</sup> See Rule 163(1)(a)(ii).

<sup>1010</sup> P00021ET, pp.3-5; P00018ET, pp.1-2; P00006ET, p.14; P00007ET, pp.2-3; P00025ET, pp.1-2, 9-10; P00026ET, pp.2, 4-5.

<sup>1011</sup> P00001ET, pp.3, 6.

<sup>1012</sup> P00028ET, pp.7-8.

<sup>1013</sup> P00028ET, pp.8-9.

<sup>1014</sup> P00028ET, p.11.

<sup>1015</sup> P00030ET, p.15.

<sup>1016</sup> P00035ET, p.10.

<sup>1017</sup> *Strugar* AJ, IT-01-42-A, para.365.

<sup>1018</sup> *Strugar* AJ, IT-01-42-A, para.365.

admission of criminal responsibility or guilt.<sup>1019</sup> Beyond such expressions of remorse, an accused might also express sympathy, compassion or sorrow for the victims of the charged crimes; while this does not amount to remorse as such, it may be considered in mitigation.<sup>1020</sup>

400. In this case, there have been no genuine expressions of remorse or indications of sympathy, compassion or sorrow. Rather, Gucati showed no remorse or regret whatsoever in relation to the actions he is on trial for.<sup>1021</sup> He testified: 'There is no need for me to apologise for anything [...] There is absolutely no reason for me to apologise because I have not caused harm to anyone'<sup>1022</sup> and that '[e]ven 50 packages, should they have arrived, I would have displayed exactly the same thing.'<sup>1023</sup> Haradinaj also testified that he feels no remorse for his actions.<sup>1024</sup>

401. This lack of any remorse is highly relevant, including because it indicates that there is absolutely no guarantee the Accused would not undertake conduct of the same nature in the future. To the contrary, there is every indication that they would commit such crimes again.<sup>1025</sup> This stunning lack of remorse also makes it crystal clear that the Accused's conduct was far from an aberration.

402. Any submissions as to the good character of the Accused should also not be given any weight. Good character may be an indicator of a lower risk of recidivism in some cases, but not where – as is the case here – the Accused are resolute in their intention to commit further offences.

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<sup>1019</sup> *Strugar* AJ, IT-01-42-A, para.365.

<sup>1020</sup> *Strugar* AJ, IT-01-42-A, para.366.

<sup>1021</sup> Gucati, T.2401; *See also* Gucati, T.2205, 2208.

<sup>1022</sup> Gucati, T.2401.

<sup>1023</sup> Gucati, T.2266.

<sup>1024</sup> Haradinaj, T.3021.

<sup>1025</sup> *See* paras 384-393 above.



403. Gucati was born in 1967<sup>1026</sup> while Haradinaj was born in 1963.<sup>1027</sup> As such, they are not of an advanced age and there is no reason to consider their age as a mitigating factor. Their children are of age<sup>1028</sup> and as such, there should be no mitigation due to any need to financially support their family. Ill-health should be considered in mitigation only in exceptional circumstances or 'rare' cases.<sup>1029</sup> There is no evidence indicating this high threshold can be met in relation to either of the Accused, both of whom have attended the vast majority of the proceedings in person.

404. The justness of the Kosovo war is not relevant in this case, and any alleged crimes committed during that war are not sufficiently linked to the offences at issue to justify any mitigation.

405. Finally, the Trial Panel should attach no weight, in mitigation, to any claim that the Accused's conduct was motivated by a desire to pursue the truth or any particular moral or social value considering the means they chose to use amounted to an elaborate criminal scheme.<sup>1030</sup>

## F. APPROPRIATE SENTENCE

### 1. Deterrence is a key factor in sentencing the Accused

406. The purpose of punishing crimes of the nature of those committed by the Accused is dual:

First, the punishment is retributive in that it punishes conduct that is found to obstruct, prejudice, or abuse the administration of justice. Second, the punishment has a deterrent effect which ensures to protect the interests of justice by preventing such action from occurring again in the

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<sup>1026</sup> Gucati, T.2151.

<sup>1027</sup> Haradinaj, 2D00001ET, para.1.

<sup>1028</sup> Gucati, T.2152; Haradinaj, 2D00001ET, paras 8, 65.

<sup>1029</sup> Rašić SJ, IT-98-32/1-R77.2, para.30.

<sup>1030</sup> *Nzabonimpa et al.* TJ, MICT-18-116-T, para.404; *Akhbar Beirut* SJ, STL-14-06/S/CJ, para.18; *See also Kabashi* SJ, IT-04-84-R77.1, para.13.

future.<sup>1031</sup>

407. In relation to deterrence,

Both special and general deterrence are important purposes of sentencing in criminal law. The *rationale* of special deterrence is to dissuade the wrongdoer from recidivism in the future, whereas general deterrence aims at discouraging others from committing similar crimes.<sup>1032</sup>

408. Therefore, the sentence imposed on the Accused must both adequately reflect the gravity of the crimes committed by the Accused and deter the Accused themselves and others from repeating similar conduct in the future.<sup>1033</sup>

(a) *Special deterrence*

409. In this case, the need for special deterrence is borne out, *inter alia*, by the numerous public assertions by the Accused, both during the temporal scope of the charges and their own testimony, that, given the opportunity, they would undertake the same actions for which they stand trial.<sup>1034</sup>

410. The Accused still occupy the same positions within the KLA WVA which they held during the temporal scope of the charges, with persons in Kosovo currently only acting in such positions.<sup>1035</sup> Accordingly, upon release, it is possible that they will continue their functions within the KLA WVA, giving them every opportunity and unique means to continue to obstruct the work of this institution.

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<sup>1031</sup> *Tupajić* TJ, IT-95-5/18-R77.2, para.31; *See also Kabashi* SJ, IT-04-84-R77.1, para.11; *Margetić* TJ, IT-95-14-R77.6, para.84; *Akhbar Beirut* SJ, STL-14-06/S/CJ, para.15; *Bemba et al.* Second Sentencing Decision, ICC-01/05-01/13-2312, para.18(i). Rehabilitation is also considered to be a relevant, though less important, purpose of sentencing, *see Kabashi* SJ, IT-04-84-R77.1, para.11.

<sup>1032</sup> *Kabashi* SJ, IT-04-84-R77.1, para.11; *See also Bemba et al.* Second Sentencing Decision, ICC-01/05-01/13-2312, para.18(i).

<sup>1033</sup> *See Marijačić and Rebić* TJ, IT-95-14-R77.2, paras 46, 51; *Nzabonimpa et al.* TJ, MICT-18-116-T, para.397; *Akhbar Beirut* SJ, STL-14-06/S/CJ, para.15; 2012 *Šešelj Contempt*, IT-03-67-R77.4, para.52; *Tupajić* TJ, IT-95-5/18-R77.2, para.31; *Pećanac* TJ, IT-05-88/2-R77.2, para.39; *Kabashi* SJ, IT-04-84-R77.1, para.11; 2009 *Šešelj Contempt*, IT-03-67-R77.2, para.37; *Margetić* TJ, IT-95-14-R77.6, para.84.

<sup>1034</sup> *See* paras 384-390 above.

<sup>1035</sup> Haradinaj, T.2707.

411. Further, the Accused have now received extensive confidential information from the SPO pursuant to its disclosure obligations, giving the Accused additional ammunition to use in their attack against the KSC/SPO.

(b) *General deterrence*

412. Given that maintaining the integrity of the administration of justice is particularly important where courts hear cases involving serious criminal offences, it is crucial that general deterrence and denunciation be given high importance in sentencing of crimes such as those committed by the Accused.<sup>1036</sup>

413. The need for general deterrence in this case is acute. The KLA WVA has over 10,000 members<sup>1037</sup> within an organised, hierarchical, structure extending across Kosovo.<sup>1038</sup> The decision to make any documents received at the KLA WVA public was a unanimous one made by the 23-member leadership of the KLA WVA.<sup>1039</sup> As Haradinaj stated, 'the whole presidium' of the KLA WVA is ready to face 300 years' imprisonment for the sake of disclosing confidential and non-public SITF/SPO documents; they 'are ready to die' for their cause.<sup>1040</sup>

414. The KLA WVA has been able to mobilise mass support in previous attempts to abolish or amend this institution. Haradinaj stated that 115,000 signatures were collected by KLA WVA members following a call to abolish the KSC<sup>1041</sup> and that the KLA WVA collected 11,700 signatures requesting that the Assembly of Kosovo amend the law on the KSC.<sup>1042</sup>

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<sup>1036</sup> See GAA TJ, ICTR-07-90-R77-I, para.10; *Nzabonimpa et al.* TJ, MICT-18-116-T, para.397; *Nshogoza* TJ, ICTR-07-91-T, para.218.

<sup>1037</sup> Marashi, T.2528-30.

<sup>1038</sup> Marashi, T.2524-27; Gucati, T.2158-59, 2217.

<sup>1039</sup> Haradinaj, T.2746; Haradinaj, 2D00001ET, para.73.

<sup>1040</sup> P00035ET, p.13; P00035, min.00:24:44-00:25:16.

<sup>1041</sup> Haradinaj, T.2708-09.

<sup>1042</sup> Haradinaj, 2D00001ET, para.17; *See also* P00042ET, p.1.

415. During an interview on 25 September 2020, Haradinaj stated: 'we will be against this court as long as we live, as long as we can breathe. Full stop. We will work against this court. Full stop', adding that it would not only be Haradinaj, Gucati or Klinaku who would provide the documents to the media, since even the lowest ranked KLA member would do so, and that: '[w]e will disclose them to the media.'<sup>1043</sup> Indeed, the evidence in this case establishes that other KLA WVA members or persons affiliated therewith share the same objectives as the Accused when it comes to this institution. Asked whether he was happy that statements of protected witnesses had been made public, Marashi, a member of the KLA WVA steering council, responded: 'I remain happy to this day.'<sup>1044</sup> Klinaku has publicly promised to distribute the KSC's confidential information given the opportunity.<sup>1045</sup>

416. Accordingly, it is imperative that the Panel take whatever steps it can to attempt to ensure that there is no repetition of crimes of the same nature as those of the Accused.<sup>1046</sup> The most relevant and effective step would be to sentence the Accused to a long term of imprisonment.

417. The need for deterrence through the sentence to be imposed on the Accused cannot be overstated, especially given the stage of various proceedings before this court. In particular, in the *Thaçi et al.* case, which is at pre-trial, four of the most senior KLA members, one of whom is a former president of Kosovo, stand trial for charges of crimes against humanity and war crimes over a period of more than one and a half years in locations across Kosovo and parts of Albania. The temptation to obstruct such proceedings by the Accused and their supporters will only grow as that case and others progress. The Panel must ensure that such temptation is not allowed to lead to

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<sup>1043</sup> P00015ET, p.2.

<sup>1044</sup> Marashi, T.2537.

<sup>1045</sup> See Annex 1 to Prosecution consolidated submissions for review of detention, KSC-BC-2020-07/F00273/A01, 10 August 2021; Annex 1 to Prosecution consolidated submissions for review of detention, KSC-BC-2020-07/F00228/A01, 11 June 2021.

<sup>1046</sup> See *Margetić* TJ, IT-95-14-R77.6, para.87.

further criminal action which could jeopardise this institution.

## 2. The sentences imposed should be primarily custodial

418. The only type of sentence which the Panel may impose on the Accused in relation to Counts 1-2 and 6 given the specific circumstances of this case is a custodial one.<sup>1047</sup> However, the Trial Panel must impose a fine in addition to a term of imprisonment in relation to Counts 3 and 4<sup>1048</sup> and may impose either a fine or a term of imprisonment in relation to Count 5.<sup>1049</sup>

419. In matters of contempt, it is the gravity of the crime and the purpose for which punishment is imposed that other courts have considered most determinative in deciding whether to impose a sentence of imprisonment and/or a fine.<sup>1050</sup> Fines are a less restrictive penalty on a convicted person than imprisonment<sup>1051</sup> and must also take the means of the accused into account.<sup>1052</sup>

420. In considering whether to impose a fine, whether the Accused themselves would be the ones paying such fine from their own pocket and whether the payment thereof would deter them, or others, from engaging in similar criminal conduct in the future are key factors.<sup>1053</sup>

421. In this regard, the fact that the KLA WVA has over 10,000 members<sup>1054</sup> and the indication that the KLA WVA is at least partly reliant on government funding<sup>1055</sup> implies that the Accused could easily accumulate sufficient funds to pay any fine from

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<sup>1047</sup> See KCC Articles 401(1)(3)(5) and 392(3).

<sup>1048</sup> See KCC Articles 387 and 388(1).

<sup>1049</sup> See KCC Article 392(1).

<sup>1050</sup> See *GAA TJ*, ICTR-07-90-R77-I, para.10; *Beqaj TJ*, IT-03-66-T-R77, paras 66-67; *Margetić TJ*, IT-95-14-R77.6, para.93; *Nshogoza TJ*, ICTR-07-91-T, para.219; *Bangura et al. SJ*, SCSL-2011-02-T, para.89; *Senessie SJ*, SCSL-2011-01-T, para.22.

<sup>1051</sup> See *Bemba et al.* Second Sentencing Decision, ICC-01/05-01/13-2312, para.133.

<sup>1052</sup> *Bemba et al.* Second Sentencing Decision, ICC-01/05-01/13-2312, para.134.

<sup>1053</sup> *Bangura et al. SJ*, SCSL-2011-02-T, para.89.

<sup>1054</sup> *Marashi*, T.2528-30.

<sup>1055</sup> *Gucati*, T.2159-60.

supporters and like-minded individuals. As such, a fine would have little retributive or deterrent effect. Rather it would set a monetary value on the commission of crimes such as those the Accused have been charged with. There is every indication that the Accused and numerous others are willing and able to incur any such financial cost in order to obstruct the work of this institution in the future.

422. Accordingly, in order to appropriately reflect the gravity of the Accused's crimes and deter them and others from defying this institution's authority a custodial sentence is appropriate.<sup>1056</sup>

### 3. Requested sentence

423. The same sentences should be imposed on each Accused given that their participation in the crimes was equal. Further, the same aggravating circumstances apply in respect of each Accused, and no mitigating factors exist in relation to either of them.

424. Having considered the applicable sentencing ranges and the factors set out above (in particular the utmost gravity of the Accused's conduct, the numerous aggravating circumstances, the lack of any mitigating circumstances, the crucial importance of deterrence and the need for a custodial sentence), and given that pursuant to Rule 163(4) the Panel must first determine a sentence in respect of each charge in the indictment, the SPO requests the Panel to impose the following sentences on each Accused:

- a. Count 1: Five years' imprisonment;
- b. Count 2: Five years' imprisonment;
- c. Count 3: Six years' imprisonment and a fine of 100 Euros;

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<sup>1056</sup> See *Nshogoza TJ*, ICTR-07-91-T, para.219.



- d. Count 4: Three years' imprisonment and a fine of 100 Euros;
- e. Count 5: One year's imprisonment; and
- f. Count 6: Five years' imprisonment.

425. Rule 163(4) requires the Panel to impose a single sentence reflecting the totality of the criminal conduct of the Accused, with a single sentence that shall not be less than the highest individual sentence determined in respect of each charge. It remains open to the Panel to sentence the Accused to the terms of imprisonment set out in relation to Counts 1-6 cumulatively, or to a higher sentence of imprisonment than that set out in relation to any specific Count.

426. In order to reflect the totality of the criminal conduct of the Accused, the SPO requests a single sentence for each Accused of six years' imprisonment and a fine of 100 Euros. The fine should be payable to the Registrar as a lump sum within one month. Failure to pay such fine within this term should result in an extension of imprisonment of one month.

#### G. THERE IS NO NEED TO DEVIATE FROM THE RULE 159(6) PROCEDURE

427. The language in Rules 159(6), 162(1), and 164(1) makes it clear that the determination of the sentence together with the pronouncement of the trial judgement as envisioned in Rule 159(6) is the default position; the provisions of Rules 162 and 164 are exceptions thereto. In view of the particular circumstances of this case, there is no need to deviate from the Rule 159(6) procedure and the Panel can and should determine the sentence to be imposed on the Accused in the Trial Judgement. Proceeding otherwise would unnecessarily prolong this case and constitute an inefficient use of judicial and party resources.

428. Should the Panel determine that the procedure under Rules 162 and 164 of the Rules shall apply, upon further reflection and given the evidence already available to

the Panel, the SPO would not seek to rely on any additional information or evidence for sentencing purposes and makes the following submissions pursuant to the Panel's Order.<sup>1057</sup>

429. Pursuant to Rule 162(1), both Parties may submit 'any relevant information that may assist the Panel in determining an appropriate sentence'. The explicit reference to 'information' rather than 'evidence' indicates that the information need not meet the requirements for admission of evidence.

430. While Rule 162(5) refers to the Panel relying 'on the evidence presented' and notes it may 'hear additional evidence', this could not reasonably be interpreted as precluding the Panel from considering any 'information' submitted pursuant to Rule 162(1), as this interpretation would render Rule 162(1) entirely redundant. What Rule 162(5) requires is that the evidence admitted to date must be relied on at sentencing and 'if necessary' the Panel may also hear additional evidence, in this case referring to evidence meeting the standards for formal admission, prior to sentencing the Accused.

## VI. CLASSIFICATION

431. The present submission is filed confidentially in order to protect SPO investigations and the interests of witnesses and third parties. A public redacted version will be filed.

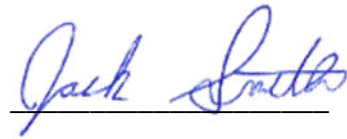
## VII. RELIEF SOUGHT

432. For the foregoing reasons, the Accused should be convicted of all counts in the Indictment and sentenced to 6 years' imprisonment, plus a fine of 100 Euros, for their crimes.

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<sup>1057</sup> Closing Evidence Order, KSC-BC-2020-07/F00553, para.17.

**Word count: 48,986**



**Jack Smith**

**Specialist Prosecutor**

Friday, 4 March 2022

At The Hague, the Netherlands