PUBLIC
Date original: 03/03/2022 21:34:00
Date public redacted version: 11/03/2022 18:27:00

In:	**KSC-BC-2020-07**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**Trial Panel II**
	Judge Charles L. Smith, III, Presiding Judge
	Judge Christoph Barthe
	Judge Guénaël Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
Date:	11 March 2022
Language:	English
Classification:	**Public**

Publicly Redacted Final Trial Brief on Behalf of Nasim Haradinaj

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I. INTRODUCTION

1. On 1 February 2022, the Defence for Mr. Haradinaj ("the Defence") submitted its notice that the Defence had closed its case.[1]

2. On 3 February 2022, the Trial Panel issued its 'Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules'.[2]

3. At paragraph 26(b) of that decision, the parties were ordered to submit, by 3 March 2022, their respective Final Trial Briefs.

4. The Defence now submits its Final Trial Brief, in accordance with the directions of the Trial Panel, per paragraph(s) 17 and 20 of the aforesaid order.[3]

II. PRELIMINARY

5. In seeking to address this element of the Brief, the comments of the Trial Panel at paragraph 20 of the aforesaid order[4] in that "*Political statements, references to crimes committed during the Kosovo conflict or the 'justness' of the war shall be*

[1] KSC-BC-2020-07/F00550, Defence Notice of the Closing of its Case, 1 February 2022.

[2] KSC-BC-2020-07/F00553, Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules, 3 February 2022.

[3] *Ibid.*

[4] *Ibid.*, para.20.

avoided" are noted and the objections as raised during the trial are maintained that there is no proper justification for such a direction that is aimed at limiting the presentation of facts that are directly relevant to matters at issue and directly relevant to the state of mind of the Defendant at the material time.

6. However, despite the refusal of the Trial Panel to allow evidence concerning relevant incidents occurring during the conflict to be adduced by the Defence[5] to the detriment of the Defendant and the case he sought to advance, there are certain issues concerning the conflict, the aftermath of that conflict, and which have arisen since the conflict and the development of the Kosovo Specialist Chambers ("KSC" or "Specialist Chambers") as an institution that are wholly relevant to this case and will be raised and addressed.

7. It is of further import that such issues where relevant are addressed within this Trial Brief when we take into account that the Defence were explicitly prevented from raising such issues either in the cross-examination of Prosecution witnesses, or in the Examination-in-Chief and/or Re-examination of the Defendant, and yet the SPO were granted the freedom to cross-examine the Defendant on his actions during the conflict itself, and, therefore, the Trial Panel allowed cross-examination on not merely issues that the Defence were explicitly ordered not to address, but further, cross-examined on issues that

[5] KSC-BC-2020-07, Transcript 12 January 2022, p.2904, l.3-7, p.2909, l.9-17.

were not raised in Examination-in-Chief, and, therefore, the Trial Panel allowed a line(s) of questioning that *prima facie* was prevented by Rule 143(3) that reads:

> "*Cross-examination shall be limited to the subject-matter of the direct examination and matters affecting the credibility of the witness.*"[6]

8. The Defendant, therefore, has been placed at a significant disadvantage vis-a-vis the prosecution, given the approach taken by the Trial Panel to the presentation of the defence, as measured against the approach taken to the presentation of the prosecution case. Such an inconsistent approach undoubtedly impacts the fairness of proceedings.

9. In any event, and as aforementioned, there are certain issues that are wholly relevant and form part and parcel of the defence(s) advanced by the Defendant and, therefore, such issues will be raised and addressed herein.

III. THE INDICTMENT

10. The Defendant is charged with six (6) counts on the Indictment namely:

[6] Rules of Procedure and Evidence, Rule 143(3).

a. Count 1 – Obstructing Official persons in Performing Official Duties, by serious threat;

b. Count 2 – Obstructing Official persons in performing Official Duties, by participating in the common action of a group;

c. Count 3 – Intimidation During Criminal Proceedings;

d. Count 4 – Retaliation;

e. Count 5 – Violating Secrecy of Proceedings, through unauthorised revelation of secret information disclosed in official proceedings; and

f. Count 6 – Violating Secrecy of Proceedings, through the unauthorised revelation of the identities and personal data of protected witnesses.

11. At the hearing of 8 January 2021, a plea of not guilty was entered on behalf of the Defendant in respect of each of the six counts in the Indictment.[7]

12. The Defence reiterates its submissions within its 'Interim Pre-Trial Brief'[8] in that in terms of a summary of the allegations, the case against the Defendant is as follows.

[7] KSC-BC-2020-07, Transcript 8 January 2021, p.90, l.22-25.

[8] KSC-BC-2020-07/F00260, Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, 12 July 2021, p.7-11.

13. The Defendant is alleged to have leaked three (3) sets of documents that the Specialist Prosecutor's Office ("SPO") alleges are confidential, but which the Defence is not entitled to examine or scrutinise, in which no effective chain of custody has been produced, nor any statement of the investigator(s) who purports to have seized the material and the procedures adopted.[9]

14. There are further allegations of witnesses being intimidated or placed in a state of fear, and yet no such witnesses were called to give evidence, nor first-hand evidence adduced in its stead, and thus the Defence were explicitly prevented from examining or challenging such evidence and assertions. In such circumstances, it cannot be established that the allegations have been proven.

15. The entirety of the Prosecution case has been presented by four (4) witnesses, three (3) of which are SPO staff members, and all three of whom presented hearsay statements preventing the Defence from examining and/or challenging those that offered certain elements of the evidence.

[9] It is accepted that SPO witnesses gave evidence in terms of a search and a seizure, however, this does not change the position that the SPO have not advanced any evidence in terms of the remaining seizures merely that such seizures occurred and thus the Defence have again been explicitly prevented from challenging or testing this evidence. No justification has been given for this apparent reluctance on the part of the SPO and therefore we must make our own decision as to why such evidence has not been adduced and the opacity concerning the investigation and the process as a whole has been entrenched further. Such issues will be subject to further submissions within the body of this Brief at later chapters.

16. Further, the SPO refused to disclose the documents it maintains were secret, confidential and/or otherwise, the product of the SPO and, therefore, protected, that refusal extending to both the Pre-Trial Judge, and the Trial Panel, and, therefore, the entirety of the SPO case is based on the SPO demanding that the Trial Panel accept its case, not on the evidence, but on its say so. Such an approach is truly unprecedented and following the, at best, cavalier approach of the SPO to its disclosure obligations throughout the trial process, should not be tolerated.

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

18. To be clear, the leak of the documents from the SPO represents an unprecedented breach of security, the likes of which have never been seen before. There is no reasonable interpretation of the evidence that is consistent with the documents having been dumped on the Kosovo Liberation Army War Veterans Association ("KLA WVA") in an effort to help any accused. They were - quite obviously, or at least very probably, obtained and dumped at the KLA WVA by either a current or former employee of the SPO, or at the

very least with the involvement of a current or previous employee, in attempt to seek to discredit the Defendant, the KLA WVA and silence any opposition to its perceived exercise of a political mandate, or by an individual or agency hostile to the KLA accused.

19. The second key point is that all the evidence points inexorably to the conclusion that the SPO's evidence management systems were insecure and subject to penetration. The SPO made promises of confidentiality, integrity and fair and independent investigation, which were just not true. There could be no greater public interest than exposing what was at the core of an international prosecutor's office, to expose the fact that the SPO was pretending to run a secure and safe environment when in fact the organisation was leaking vital secrets.

20. The Prosecution had promised a safe and secure environment and had promised to protect the physical integrity of its witnesses. It had promised that to its donors and its constituent, the people of Kosovo. It had failed.

21. It did so by collaborating with the very same persons and institutions that had orchestrated a campaign of oppression against the people of Kosovo by creating a vassal state and a subjugated people. Those that had operated under the genocidal regime of Slobodan Milošević.

22. Thirdly, it is crucial to point out that there is no evidence before the Court to suggest that this leak was the result of an external hack into the SPO's computer system. Even if it had been, it's entirely reasonable to infer that it would require the sophistication of a State Intelligence Service to penetrate secure evidence management systems. Certainly, the SPO has produced no evidence to the defence or even to the Trial Panel to establish that this was not the action of a State Intelligence Service.

23. This begs the question: which State or States might have the technical capability and the motive for harming the defence, and throwing unwarranted suspicion on the accused or potentially accused members of the KLA.

24. The most likely candidate, we submit, is the Serbian RDB or its sister organisation in the Russian Federation, the FSB.

25. What we can say for sure is this: The obvious inference from the facts is that a state agency was responsible for this staggering breach of security. So it must follow that one way or another, a State that is hostile to the accused has penetrated the Specialist Prosecutor's Office responsible for this leak.

26. The most likely inference from these facts is that the Serbian Intelligence Service, or one or its allies, has fully penetrated the SPO, had access to its most

confidential information, and has deliberately manipulated the situation by leaking it in a way that was calculated to damage the KLA.

27. To those who suggest this is speculation, we would submit this: if it is not true that the SPO has been penetrated by Serbian intelligence or its agents, then it is in the perfect position to prove otherwise. The Prosecutor is said to have investigated the leak very thoroughly for many months. Certainly, staff members were dismissed. It was put to prosecution witnesses that twenty-five (25) members of staff were dismissed including senior staff members responsible for evidence and data collection.

28. The Specialist Prosecutor himself has stated previously in public interviews that the leaks did not come from his office and declared in his opening speech that it was the subject of a theft. To be sure of such conviction, the Specialist Prosecutor must have an idea as to how the document dump occurred and yet, they have provided the Court with no evidence whatsoever to disprove the obvious inference of a foreign state intelligence penetration of their office. One must enquire as to why. The way this leak happened, and which agent or agency was responsible is a matter of the very utmost international public concern. Not only should it have been disclosed to the Court and the Defence, in the public interest and to restore confidence in this institution - the results of the investigation ought to be disclosed to the public.

29. It certainly shows that the Defendant had every reason to be concerned that there was something very wrong with the process.

30. To again rehearse the position of the Defence Interim Pre-Trial Brief,[10] the Defence are not able to establish whether there was a weapon, much less whether that weapon was loaded. Further, the SPO, due to serious and obvious failings in its investigation, is not able to prove to the required standard, that being 'beyond all reasonable doubt', whether the 'weapon' in the context of the current case even existed, and whether the same was placed in the hands of the Defendant by its own staff or some other person.

31. The issue will be developed further within this Brief; however, it is notable at this stage, that the SPO has explicitly maintained that there is no evidence of any SPO staff member being involved in the leak(s), however, they have adopted the obstinate position of refusing to disclose the evidence offered by those who have reported information concerning the leak and who is responsible, and further, they have refused to disclose any information that may have come to light following their purported investigation into the leak(s), a position re-enforced by the Trial Panel in their refusal to order the disclosure of such information when the same has been requested.

[10] KSC-BC-2020-07/F00260, Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, 12 July 2021, p.8.

Accordingly, the opacity of the investigation and proceedings as a whole has only been entrenched further, with the overt approval of the Trial Panel.

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

33. Again, an issue to be explored further within this Brief; however, it is of note at the outset that the SPO has, at no stage, identified a single witness that it states has been intimidated and/or threatened by the alleged actions of the Defendant, instead seeking to rely on the hearsay evidence of Witness W04842 (Miro JUKIĆ), a witness who contradicted himself at length before the Trial Panel and demonstrated himself to lack any credibility to the extent that his evidence ought to be ignored in its entirety it not being capable of being assessed as reliable.

34. In any event, the position remains that no direct evidence of such intimidation and/or threats, has been adduced by the SPO, and that evidence that has been adduced, given the manner in which it was presented has been offered in circumstances where the Defence is prevented from offering any form of meaningful challenge to the same, again, on account of the opacity of the SPO case.

35. Further, and in conjunction with the above, the SPO has not at any stage identified 'who' the Defendant is said to have retaliated against, relying on the purported public dissemination of the material, as the sole basis.[11]

36. In terms of the documents themselves, the position at the closure of the evidentiary element of proceedings remains the same as it did when the Indictment was confirmed, in that it is not known 'who' leaked the documents, 'how' the documents came to be leaked, and further, whether the apparent investigation into the same has revealed any answers to these questions. The SPO maintained throughout the proceedings, somewhat ludicrously, that these were not matters that were relevant to the current proceedings.

37. The plethora of investigative opportunities that were apparent have still not been pursued and thus the majority of which would be now meaningless, and further, no reason or justification has been provided for this abject failure.

38. It is anticipated that the investigative failures concerning the leaks themselves are likely to be considered to be irrelevant, as repeatedly argued by the SPO; however, the same are indicative of a common theme running throughout the entirety of these proceedings, and one that extends throughout, from the

[11] KSC-BC-2020-07/F00251/A01, Indictment, Annex 1 to corrected Indictment, 5 July 2021, p.10, para.31-32; KSC-BC-2020-07/F00181/A01, Specialist Prosecutor's Pre-Trial Brief in the case against Hysni Gucati and Nasim Haradinaj, 9 April 2021, p.67-70, para.186-192.

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

39. At each and every stage of the proceedings the SPO have had to be challenged and subjected to formal applications before the Pre-Trial judge, the Trial Panel, and the Panel of the Appeals Chamber just to enable the defence to obtain the most basic of disclosure.

40. This is not demonstrative of a transparent process, but rather, one that is shrouded in a thin cloak of secrecy with a view to obtaining convictions at all costs.

41. The reference by the SPO in its opening that "truth is the foundation of justice", [12] is therefore correct; however, it is not the defence that need to be reminded of the importance of truth, as it is not the defence that has failed to disclose, failed to engage, and failed to acknowledge.

[12] KSC-BC-2020-07, Transcript 7 October 2021, p.787, l.15-16.

IV. INDIVIDUAL CRIMINAL RESPONSIBILITY

42. The Defence would seek to reference Part 3 of the Defence Interim Pre-Trial Brief, namely 'Applicable Legal Standards', as a pre-cursor to this section as the same are equally relevant to this stage of proceedings.[13]

43. The Defence would remind the Trial Panel that it is an entrenched and irrevocable principle, that the 'Burden' of proving the allegations in the entirety, namely each and every element of those allegations, falls upon the SPO, the Defendant is not required to prove anything or utter a single word.

44. Further, it is a similarly entrenched principle that the allegations faced by the Defendant must be proved by the SPO '*beyond all reasonable doubt*', and given the at best, 'cavalier' approach taken by the SPO at each and every stage of these proceedings, a reminder of that standard of proof is perhaps warranted.

45. Notably, it is not simply the question of guilt that is subject to the standard, but also the underlying facts, noting *Kupreškić*:[14]

> *"On appeal, the Prosecution argues that it was not incumbent upon the Trial Chamber to apply the standard of "beyond reasonable doubt" in evaluating the evidence of Witness H. rather, it contends, the Trial Chamber was at*

[13] KSC-BC-2020-07/F00260, Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, 12 July 2021, p.11-16, para.33-46.

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

> *liberty to simply assess the evidence of Witness H by reference to the standard of probative value applicable to evidence generally. In particular argues the Prosecution, the evidence of Witness H "…forms nothing more than a constituent in the entire composition of evidence against the Appellant for count [persecution]" the Appeal Chamber disagrees."*[15]

46. Further, and of particular relevance to the instant case given the manner in which this case has been presented, the dicta in *Blagojević and Jokić* must be borne in mind, namely that:

> *"[t]he standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt."*[16] (emphasis added)

47. Accordingly, and finally,[17] the SPO must demonstrate, and the Trial Panel must find, so as to be capable of returning a guilty verdict against the Defendant, that:

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[15] *Ibid.*, para.226. See also ICTY, *Prosecutor v. Halilović*, IT-01-48-A, Appeal Judgment, 16 October 2007, para.111-125.

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

[17] Reliance in placed upon the pre-trial brief for the remainder of issues concerning the burden and standard of proof given the limited word count, and thus the Trial Panel's attention is draw to paragraphs 33-46 of that Brief. See KSC-BC-2020-07/F00260, Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, 12 July 2021, p.11-16, para.33-46.

a. Each element of the indicted crimes has been proven beyond all reasonable doubt;

b. Each element of any indicted mode of liability has been proven beyond all reasonable doubt;[18] and

c. That any fact which is indispensable to or aimed at obtaining a conviction, must also be proven beyond all reasonable doubt.

48. The SPO has summarily failed to discharge this most fundamental obligation.

Modes of Liability

49. The position of the SPO, as per its Pre-Trial Brief,[19] and the manner in which it has presented its case is, to minimise the position, confused, the SPO appearing to suggest that every mode of liability is present, adopting a scattergun approach, in the hope that one of them 'sticks', rather than focussing upon precisely what its case actually is according to the evidence.

50. For instance, the Defendant cannot have incited himself to commit an offence, and yet this is the manner in which the Indictment is drafted, the SPO appears

[18] SCSL, *Prosecutor v. Brima et al*, SCSL-04-15-T, Trial Judgment, 20 June 2007, para.98.

[19] KSC-BC-2020-07/F00181/A01, Specialist Prosecutor's Pre-Trial Brief in the case against Hysni GUCATI and Nasim HARADINAJ, 9 April 2021, p.75-82.

to confuse direct perpetration, co-perpetration, and forms of inchoate liability, and to again reference the Defence Interim Pre-Trial Brief,[20] the approach is one of desperation, rather than one focussed on the evidence and the specific allegations against the Defendant.

V. SUBMISSIONS ON COUNTS

51. This section of the Brief will follow the counts in the Indictment, dealing with the evidence adduced by the SPO, and that of the Defence where relevant, analysing how the SPO have summarily failed to prove their case, both in terms of the relevant elements of the crime, the cited modes of liability and the burden and standard of proof.

Counts 1 and 2 - Obstruction

52. Given the significant degree of overlap between Counts 1 and 2, both will be dealt with under the same sub-heading so as to save a significant degree of repetition.

53. In terms of Count 1, the Defendant is alleged to have 'Obstructed Official Persons in the Performance of their Official Duties by Way of Serious Threat'.

[20] KSC-BC-2020-07/F00260, Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, 12 July 2021, p.87-89, para.267-270.

54. Count 2 refers to the 'participation in the common action of a group'.

55. It is essential to highlight at the outset, that at no time has any evidence been adduced that any threat was made by the Defendant, serious or otherwise, and therefore, no official person, or unofficial person was subject to any threat by the Defendant. Quite on the contrary, the Defendant had at all times cooperated with the SPO during the investigation.[21]

56. Further, the offence itself must be read in conjunction with the Defendant's right to free speech and free expression, per Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Reference is made to the opening statement of Specialist Prosecutor, Mr. Jack Smith, at the outset of the proceedings, wherein he confirmed:

> *"…I want to be very clear, vigorous debate on important public issues is a sign of a healthy society. Rather than be suppressed, of course, it should be fostered.*
>
> *"There are people in Kosovo who believe strongly in this institution. They see it as a sign of Kosovo's commitment to the rule of law and a place that*

[21] KSC-BC-2020-07-094543-094543 RED, SPO Official Note, 23 March 2021; KSC-BC-2020-07, Transcript 6 December 2021, p.2196, l.9-24; KSC-BC-2020-07-101129-101131 RED, Scan of Notebook with handwriting, 17 September 2020; KSC-BC-2020-07, Transcript 18 October 2021, p.853, l.1-4, p.912, l.11-18, p.914 l.5-19; KSC-BC-2020-07, Transcript 26 October 2021, p.1447, l.7- 21, p.1448, l.3-25, p.1149 l.2-24, p.1450, l.10-24.

will give justice to many victims. Others do not yet trust this Court and that is okay. It is okay to question aspects of this Court. It is okay to say what you do not like about this Court, and it is okay to say why you do not like this Court. That is all part of a free society."

57. The Trial Panel are therefore again reminded that they must caution against the criminalisation of free speech.

58. The Defendant has merely exercised his rights, he has criticised the Specialist Chambers and the Specialist Prosecutor, and he has said why.[22] This is not an offence, nor can it ever be an offence.

59. As per paragraphs 25-28 of the 'Indictment',[23] the SPO alleges, and therefore must prove, that the Defendant 'by serious threat and/or common action, obstructed or attempted to obstruct SC Proceedings'.

60. Further, the SPO seek to allege that the Defendants "*organised and coordinated the group committing such acts*".[24]

[22] KSC-BC-2020-07/F00509, Annex 2 to Submission of Statement of Nasim Haradinaj (ENG), 28 December 2021, p.4-13, paras17-45; KSC-BC-2020-07-089185-12-TRET Translation – T7 / Frontal – Nasim Haradinaj - Partial Transcription; KSC-BC-2020-07-081358-01-TR-ET Revised, English Translation of Albanian News Broadcast 081358-01-TR-ET Revised, p.6; KSC-BC-2020-07-082014-082016 SPO – Official Note, 22 September 2020, para.15-16; KSC-BC-2020-07-082010-082013 RED SPO – Official Note, 17 September 2020, para.11; KSC-BC-2020-07-SPOE00220771- SPOE00220771-ET REVISED, Facebook P.- Nasim Haradinaj.

[23] KSC-BC-2020-07/F00251/A01, Indictment, Annex 1 to corrected Indictment, 5 July 2021.

[24] *Ibid.* para.25.

61. There is no evidence of this.

62. In substantiating this first Count, the SPO states that the Defendant(s) disseminated Confidential Information, accused witnesses identified in that information of being liars, spies, and traitors, and declared that their purpose was to obstruct the SC proceedings. In order to understand the meaning of the Defendant's words, one must listen to the entirety of what he said on each occasion.

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

64. Regardless of the SPO rhetoric, the offence itself, is 'Obstruction' by way of 'Serious Threat', and thus the process of determining guilt in respect of this first count focusses solely on whether the actions of the Defendant(s) amount to '[Obstructing] Official Persons by Serious Threat'.

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

66. If the SPO has not proven that those three essential elements of the crime have been satisfied, the offence has not been proven beyond all reasonable doubt and therefore Count 1 on the Indictment must be found to have not been proved and the Defendant must be acquitted of that Count.

67. In a similar vein to that submitted above in respect of Count 1 on the Indictment, the actions of the Defendant are immaterial if it is that those actions do not satisfy the individual elements of the Count on the Indictment, in terms of Count 2, that being that firstly, an official person was obstructed, secondly, in performance of their official duties, and thirdly, by common group action of a group.

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

69. The Trial Panel has heard no evidence that either, official persons were 'obstructed', or where they were obstructed (which is not accepted), that that obstruction was brought about by way of serious threat.

70. In respect of the issue of 'Obstruction', the evidence that the Trial Panel has heard, suggests that somewhere in the region of 200 telephone calls were made following the leaks, with the Witness W04842 giving evidence that he

made approximately thirty (30) calls, with each call lasting approximately 15 minutes.[25] In this regard it is noted that these calls were all instigated by the SPO.[26]

71. The witness went on to dispute that these thirty calls took longer than one day to make, despite it being clear that on such a basis it would have taken under 8 hours to make those calls, and the witness noting that 'a day' is considered to be 12 hours.[27]

72. Regardless of Witness W04842's inability to remain consistent in his evidence, the stark fact remains, that at no stage did he adduce evidence as to how he, or any other SPO staff member, had been obstructed.

73. Further, and it is noted within the submissions concerning Count 3 below, the issue was not even deemed to be a priority until the third leak,[28] accordingly, it is difficult to ascertain on what basis the SPO deem the Count of Obstruction to have been satisfied when even on the evidence of their own witness, the issue wasn't deemed to be a priority and therefore was given little attention.

[25] KSC-BC-2020-07, Transcript 4 November 2021, p.1824, l.11.

[26] *Ibid.*, l.13-22.

[27] *Ibid.*, l.4.

[28] *Ibid.*, p.1798, l.9-12.

74. Further, the Trial Panel are requested to exercise caution not to confuse the breach of security at the SPO offices and the alleged actions of the Defendant.

75. To be clear, and as per the comments of the Specialist Prosecutor in his opening, the Defendant is not alleged to have been involved in the security breach that gave rise to the leak, nor is he alleged to have been involved in the procurement of those documents, or indeed the process by which the documents left the SPO office and arrived at the offices of the KLA WVA, his opening speech confirming:

> "*Disseminating confidential documents, the documents in question in this case, disseminating them to the public represents one group of crimes. Stealing those same documents in the first place represents another crime.*
>
> *"The accused are charged with illegally disseminating these documents, not with actually stealing them."*[29](emphasis added)

76. With this in mind, the SPO has summarily failed to prove how the three press conferences have obstructed its work, much less where the 'serious threats' were made that aggravated this obstruction, noting that such allegations centre on the press conferences, not the leaks themselves.

[29] KSC-BC-2020-07, Transcript 7 October 2021, p.790, l.2-9

77. It is accepted that investigating how the documents came to be leaked may have resulted in resources being diverted; however, as the Defendant has been specifically ruled out of this act, it is, for the purposes of the Indictment, wholly irrelevant. Further, it is part and parcel of the SPO's core investigative mandate, to investigate allegations of criminal conduct.

78. Focussing on the evidence that has been adduced in terms of Counts 1 and 2, Witness W04842 is not an investigator, and therefore it is arguable that the work he undertook was in accordance with his job description and core mandate. In any event, as noted above, no evidence was adduced as to how he was prevented from undertaking alternative tasks or work as a consequence, and therefore, Witness W04842 was not obstructed.

79. Witness W04841 (Zdenda PUMPER) *is* an investigator, however, similarly to W04842, no evidence was adduced as to how the incident in question led to her being obstructed and/or being unable to focus on other tasks. In fact, WO4841 confirmed in evidence that she was engaged in other investigations and that her role in the present case was limited to a document review process.[30]

80. It is accepted that the cause of the leaks would fall to be investigated, and this investigation is not one that was anticipated, however, it is clear, both from

[30] KSC-BC-2020-07, Transcript 21 October 2021, p.1169-1170, l.25-3, p.1177, l.21-23, p.1237, l.3-13.

the way in which the SPO presented its case, and the opening statement of the Specialist Prosecutor, that the Defendant(s) are not alleged to be involved in the procurement of the documents, or of the leaks themselves, and therefore any obstruction caused by the leak is not the responsibility of the Defendant(s) nor can they be held responsible for the subsequent investigation ensuing.

81. The Trial Panel has not, however, heard any evidence to demonstrate how this resulted in there being obstruction "*of an official person in performing official duties*".[31]

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

83. As per the decision of the Pre-Trial Judge, 'force or serious threat' is not defined explicitly.[32] Accordingly reference is drawn to Article 387 of the Criminal Code of the Republic of Kosovo ("KCC").[33] Even taking into account that the definition is not delimited, no evidence has been adduced of threats to the health, well-being, safety, security, or privacy of an individual.

[31] KSC-BC-2020-07/F00074, Decision on the Confirmation of the Indictment, 11 December 2020, p.22, para.67.

[32] *Ibid.*, para.68.

[33] *Ibid.*, para.60.

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

85. The Trial Panel is respectfully reminded that the question, when determining the strength of the SPO case on this count, is not whether the 'leak' itself obstructed an official person,[34] but whether the specific actions of the Defendant(s) did so.

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

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

87. At its highest, the SPO has adduced evidence of documents needing to be seized from the KLA WVA offices, which would have fallen to be done even if the KLA WVA simply left the bundles of documents where they had been delivered in the reception area of the premises. Again reminding ourselves that the Defendant was not involved in this element, it cannot be argued that this forms part of the Obstruction.

88. Second, Witness W04842 gives evidence as to how a number of phone calls needed to be made, each one taking up to 15 minutes, and therefore a day of work to contact individuals, although W04842 denies this timeframe seeking

[34] Noting the instant Defendant's submissions para.63.

to suggest that it was considerably longer. In any event, it is respectfully submitted that in the absence of any evidence to demonstrate how those calls delayed or hindered the ongoing work of the SPO, the offence cannot be said to have been proven.

89. An alternative position advanced by the SPO is that the Defendant was intent on undermining the work of the SPO and/or obstructing the work of the SPO however, there is no evidence that this occurred.

90. In any event, the SPO has been selective in the evidence it has sought to adduce and sought to construct a narrative that neglects to deal with the relevant issues.

91. Certain comments taken in isolation, would imply that the Defendant fails to recognise the Specialist Chambers and seeks its abolition.[35] However, the reality, both as per the evidence adduced, and the evidence of the Defendant, is much more nuanced.

92. The Defendant is not against the Specialist Chambers, i.e. the Court, *per se*, he is however strong in his criticism of the selective investigative and prosecutorial policies adopted.[36]

[35] KSC-BC-2020-07-083985-03TRET A2, p.2-3

[36] KSC-BC-2020-07-082014-082016 SOI – Official Note, 22 September 2020, para.15-16.

93. On numerous occasions highlighting that the SPO is only investigating and or prosecuting veterans of the KLA, and therefore adopting a wholly biased approach when it is clear and publicly accepted that Serbian forces were responsible for the majority of the atrocities and numerous massacres were committed by Serbian military and paramilitary forces, just one example being an individual said to be responsible for the '*Meja Massacre*' has been actively assisting the SPO with their investigations and yet miraculously is not considered to be a suspect.[37]

94. The position does however go even further when we consider the fact that the SPO has engaged and sought the assistance from individuals that are subject to an INTERPOL Red Notice for their involvement in the commission of War Crimes and/or Crimes Against Humanity in Kosovo, and either knew or ought to have known of the existence of INTERPOL requests, and yet took no steps to inform INTERPOL of their whereabouts. Such a position is in the Defence's submission not just worthy of criticism and concern, but is in fact information that is in the interests of all. It fundamentally undermines the legitimacy of the investigations.

[37] KSC-BC-2020-07-SPOE00220771-SPOE00220771-ET.

95. Witness W04841 confirmed that no investigation was being undertaken to her knowledge into any individual that wasn't a member of the KLA.[38] Against this background, is the Defendant not correct to express his concern, does this criticism not fall within the ambit of that which was explicitly referred to by the Specialist Prosecutor in his opening speech as being appropriate, moreover, does such criticism not fall squarely within the ambit of the Defendant's rights pursuant to Article 10 of the ECHR.

96. The Defendant has exercised his democratic right to criticise a prosecutorial and investigatory process that purports to be domestic in its nature.

97. This is not obstruction; this is legitimate comment – legitimate concern.

98. Further, the Defendant has been clear in his position that people should cooperate with the KSC and the SPO should they be asked to do so,[39] further undermining the allegation of obstruction.

99. In terms of Count 2, the aforesaid submissions are re-affirmed and thus there is no explicit need to rehearse the submissions, or re-reference those parts of the evidence, the same being equally as applicable for Count 2, the central

[38] KSC-BC-2020-07, Transcript 20 October 2021, p.1153, l.2-19 and l.21-25, p.1156, l.7-11; p.1157, l.20-24; KSC-BC-2020-07, Transcript 21 October 2021, p.1167–1177.

[39] KSC-BC-2020-07-SPOE00234632-SPOE00234632-ET.

issue being one of obstruction. The Defence would however make the following further submissions.

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

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

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

103. Having regard to the Pre-Trial Judge's decision,[40] for 'group' to be satisfied there must be three (3) or more persons. It is of note that only two Defendants have been indicted, and therefore, the SPO are suggesting that at least one other individual was involved in the offence, and that that one, or more individuals, is not subject to Indictment.

[40] KSC-BC-2020-07/F00074, Decision on the Confirmation of the Indictment, 11 December 2020, para.75.

104. The SPO in the amended Indictment appears to seek to suggest that the 'group' comprises the Defendant(s), [REDACTED], [REDACTED], and "*other members and representative of the KLA WVA*".[41]

105. The SPO has not however, adduced evidence as to how those individuals not indicted were part of the group committing criminal offences.

106. The SPO has not adduced any evidence that would suggest that the two unindicted individuals took any action over and above being present on the relevant dates.

107. Three issues or potential 'groups' therefore fall to be considered when determining whether the elements of the crime have been satisfied, having regard to the evidence adduced, and not the outline as provided within the Indictment.

108. Firstly, and as already referred to, there is no allegation that the Defendant(s) were involved in the procurement of the Batches of evidence from the SPO, the Specialist Prosecutor being clear in his opening statement that "*The accused are charged with illegally disseminating these documents, not with actually stealing them*".[42]

[41] KSC-BC-2020-07/F00251/A01, Indictment, Annex 1 to corrected Indictment, 5 July 2021, p.5,para.6.

[42] KSC-BC-2020-07, Transcript 7 October 2021 p.790, l.8-9.

109. It is accepted that this point is being repeated, but it is essential that the press-conferences are viewed in isolation from the leaks themselves, particularly as it would appear trite that it was the leak(s) from the SPO offices that may have created obstruction and not the press conferences, particularly taking into account the demands of the Defendant that witness names not be published as to do so might endanger them.[43]

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

111. Secondly, as much as [REDACTED] and [REDACTED] are cited in the Indictment as being 'involved' in the offences and therefore presumably, alleged to be part of 'the group', those two individuals have not been charged with any alleged offence, have never been questioned in relation to any alleged offence and therefore it is impossible to precisely ascertain their alleged role.

[43] KSC-BC-2020-07, Transcript 6 December 2021, p.2206, l.18-25; p.2207, l.1-14; p.2309, l.2-25; KSC-BC-2020-07-081358-01-TR-ET Revised, English Translation of Albanian News Broadcast 081358-01-TR-ET Revised ; KSC-BC-2020-07-084032-084033 RED SPO – Official Note, 29 October 2020, para. 3; KSC-BC-2020-07-082010-082013 RED SPO – Official Note, 17 September 2020, para.9; KSC-BC-2020-07-082136-01-TRET, Kosova press - Full Transcription - Uploaded By "Gazeta Jeta Në Kosovë", 22 September 2020, p.13; KSC-BC-2020-07-081979-07-TRET Kanal 10 - Prime Time – Partial Transcription, p.3; KSC-BC-2020-07-089919-089927, Information Extracted From SPO Internal Document Dated 21October 2020 - Seizure of Documents From KLA War Weteran's Association, para.9; KSC-BC-2020-07-090144-090144 Information Extracted From SPO Internal Document, 29 October 2020, para.1; KSC-BC-2020-07-SPOE00220813- SPOE00220813-ET, Screenshot of Facebook Page The Specialist Investigators "Disembark" at Infokus, They Take Away The Files That Somebody Left In Front Of The KLA WVA /War Veterans'Association/ Headquarters.

112. In terms of the evidence adduced at trial, both individuals were present, at different times, when the offices of the KLA WVA were searched, and provided assistance to those officers in attendance. In terms of the video evidence that was shown,[44] it is clear that both [REDACTED] and [REDACTED] facilitated parts of the search and seizure of items, and therefore their actions were the polar opposite of 'obstruction'. Certainly, no evidence was adduced that would suggest their involvement was to the alternative.

113. Accordingly, there is no evidence that has been adduced at trial, recalling that the text of the Indictment is not evidence, that would suggest that either individual was part of a group that was involved in offences of obstruction, those individuals just happen to be members of the KLA WVA, and further, present on the relevant dates. Neither of these two facts however point towards criminal responsibility.

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

[44] ERN 104414-01(P163), from 10.00 to 11.00 a.m. ERN 104414-02(P164) from 11.00 to 12.00. See also KSC-BC-2020-07-080449-080449 RED SPO, Delivery of Document, 8 September 2020.

115. The only identifiable group who, supported by evidence, who was involved in the commission of criminal offences, are those involved in the procurement and/or theft of the 'Batches' of documents, an event(s) that the Defendant(s) have been explicitly said not to be alleged of having any involvement.

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

117. There is a complete absence of any evidence in this regard.

118. As mentioned, the other individuals named within the Indictment are not alleged to have engaged in behaviour that can be characterised as 'obstructive', within the meaning of the elements of the crime or otherwise; in

fact, those individuals actually assisted and facilitated, as per the evidence given at trial,[45] and the video evidence presented by the SPO.[46]

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

120. The reality is that any purported obstruction has been caused by the actions and/or inaction of the SPO and its staff rather than the Defendant:

a. It is not the Defendant who removed documents from the SPO;

b. It is not the Defendant that procured such documents;

c. It is not the Defendant that released media stories;

[45] KSC-BC-2020-07, Transcript 6 December 2021, p.2206 l.18-25; p.2207 l.1-14; p.2309, l.2-25; KSC-BC-2020-07-081358-01-TR-ET Revised, English Translation of Albanian News Broadcast 081358-01-TR-ET Revised ; KSC-BC-2020-07-084032-084033 RED SPO – Official Note, 29 October 2020, para. 3; KSC-BC-2020-07-082010-082013 RED SPO – Official Note, 17 September 2020, para.9; KSC-BC-2020-07-082136-01-TRET, Kosova press - Full Transcription - Uploaded By "Gazeta Jeta Në Kosovë", 22 September 2020, p.13; KSC-BC-2020-07-081979-07-TRET Kanal 10 - Prime Time – Partial Transcription, p.3; KSC-BC-2020-07-089919-089927, Information Extracted From SPO Internal Document Dated 21October 2020 - Seizure Of Documents From KLA War Weteran's Association, para.9; KSC-BC-2020-07-090144-090144 Information Extracted From SPO Internal Document, 29 October 2020, para.1; KSC-BC-2020-07-SPOE00220813- SPOE00220813-ET, Screenshot Of Facebook Page, The Specialist Investigators "Disembark" at Infokus, They Take Away The Files That Somebody Left In Front of The KLA WVA /War Veterans'Association/ Headquarters; KSC-BC-2020-07-080449-080449 RED SPO, Delivery of Document, 8 September 2020.

[46] ERN 104414-01(P163), from 10.00 to 11.00 a.m. ERN 104414-02(P164) from 11.00 to 12.00.

d. It is the SPO that took no steps to prevent the press-conferences;

e. It is the SPO that took no action to seize the documents, preferring to leave them with the KLA WVA for a period of time as per the SPO's own witness evidence; [47]

f. It is the SPO that has taken no action to remove that information that still exists within the public domain and is still available on various media websites;[48]

g. It is the SPO that refused to comment or take action when enquiries were made regarding the information.

121. Conversely:

a. The Defendant made clear that he would not be releasing names and gave the reasons why; [49]

[47] KSC-BC-2020-07, Transcript 5 November 2021, p.1951, l.2-14.

[48] KSC-BC-2020-07, Transcript 20 October 2021, p.1103, l.24-25; p.1104, l.2-6.

[49] KSC-BC-2020-07, Transcript 6 December 2021, p.2206, l.18-25; p.2207 l.1-14; p.2309, l.2-25; KSC-BC-2020-07-081358-01-TR-ET Revised, English Translation of Albanian News Broadcast 081358-01-TR-ET Revised ; KSC-BC-2020-07-084032-084033 RED SPO – Official Note, 29 October 2020, para. 3; KSC-BC-2020-07-082010-082013 RED SPO – Official Note, 17 September 2020, para. 9; KSC-BC-2020-07-082136-01-TRET, Kosova press - Full Transcription - Uploaded By "Gazeta Jeta Në Kosovë", 22 September 2020, p.13; KSC-BC-2020-07-081979-07-TRET Kanal 10 - Prime Time – Partial Transcription, p.3.

b. It is the Defendant who made demands of the media that they did not release the names of individuals;[50]

c. The Defendant co-operated at every stage of the process;

d. The Defendant has criticised the concerning policies of the SPO;

e. The Defendant has merely shone a light on the opacity of the SPO procedures;

f. The Defendant has acted precisely how the Specialist Prosecutor has confirmed is his right to do so;

g. The Defendant has merely exercised his right to free speech fundamental in any democratic society;

h. The Defendant has merely acted in accordance with his rights under Article 10 of the ECHR.

122. It is most unfortunate that the SPO is seeking to use the trial process to strike fear into the hearts of those that do not support the KSC, its detractors, its critics.

[50] KSC-BC-2020-07-090144-090144 Information Extracted From SPO Internal Document, 29 October 2020, para. 1; KSC-BC-2020-07-SPOE00220813- SPOE00220813-ET, Screenshot of Facebook Page, The Specialist Investigators "Disembark" at Infokus, They Take Away The Files That Somebody Left In Front of The KLA WVA /War Veterans'Association/ Headquarters; KSC-BC-2020-07-089919-089927, Information Extracted From SPO Internal Document Dated 21October 2020 - Seizure Of Documents From KLA War Weteran's Association, para.9.

123. Further, the SPO is using this Indictment in an effort to deflect from its own embarrassment that several thousand pages of documents that are said to be secret and confidential have somehow been allowed to have been removed from their offices.

Count 3 - Intimidation

124. The Defendant is charged with witness intimidation, the allegation being that between at least 7 and 25 September 2020, Hysni Gucati, the Defendant, and other associated persons, "*used serious threats to induce or attempt to induce witnesses to refrain from making a statement or to make a false statement or otherwise fail to state true information to the SPO and SC*".

125. The SPO have not, at any level, proven this to be the case.

126. In terms of witnesses called, of the four (4) prosecution witnesses who testified, the two witnesses of relevance to this allegation are W04866 (Halil Berisha), a journalist and at the time, editor for Gazeta InFokus, and, WO4842 (Miro Jukić), a witness security officer employed by the SPO and special advisor to the Deputy Specialist Prosecutor.

127. W04866 offers no evidence in terms of an allegation of witness intimidation, however, his evidence is still pertinent in that he did no less than the Defendant, arguably, by circulating documents within the print media, he did more, and yet, he was explicitly told in evidence, by the SPO, that it did

consider that he had done anything wrong in the way that he acted, specifically:

> *"The SPO's position throughout is that W04866 is a witness and is not a suspect. He was interviewed as a witness and Mr. Koci is present today at the request of the witness. I wanted to make it clear on the record, and on the authority of the Specialist Prosecutor himself, that we will not be prosecuting this witness for anything he did in relation to this case. From the nature of the conduct to the limited scope of what he published to, most notably, his intentions throughout and effective actions to protect and return confidential information, no crimes were committed in our assessment. And to repeat, the Specialist prosecutor has stated that he will not be prosecuted."*[51]

128. Further, it was explicitly confirmed that at no stage was the witness deemed to be a suspect, noting again, that W04866 did, on multiple occasions, publish those same documents that are said to be confidential and secret, and that form part of the basis for the Indictment against the Defendant.

129. There has been no explanation offered for this clear, illogical and wholly inconsistent double standard being adopted by the SPO.

[51] KSC-BC-2020-07, Transcript 26 October 2021, p.1507, l.3-14.

130. W04866's evidence is further pertinent, given that at no stage does he suggest that the Defendant threatened any individual or group of individuals.

131. Still further, and of specific and particular importance given the defence(s) raised by the Defendant, on numerous occasions during his evidence, W04866 confirms that the reason he took the actions that he did, namely taking the documents and printing certain of those documents, was because 'it was in the public interest to do so'.[52]

132. This position was not challenged at any time by the SPO, either in direct examination, or in re-examination, it is unclear therefore as to whether the SPO accepts that the witness was indeed acting in the public interest, but, there is a clear inference to this extent given the lack of challenge, and further, the lack of investigation into the actions of W04866 and/or any other journalist, reminding the Trial Panel that their actions were no different than those of the Defendant and if anything, were more pronounced in terms of the publication of documents or otherwise.

133. It is anticipated that much will be made of the actions of the Defendant in terms of criticism of the media for not publicising certain documents and/or evidence; however, this does not amount to intimidation and in any event,

[52] KSC-BC-2020-07, Transcript 27 October 2021, p.1604, l.19-22; p.1605, l.25; p.1606, l.1-4; p.1613, l.16-19; p.1626, l.18-24, p.1632, l.12-15.

W04866 noted in his evidence[53] that the use by the media of the word "*attack*" does not mean what is ordinarily understood by the definition of the word, and further, highlighted the fact that the word 'attack' is in inverted commas so as to suggest a meaning other than which might ordinarily be understood.

134. The reality of the position is that W04866 gave no evidence that could, on any level of analysis suggest that the Defendant has, or has sought, to intimidate any individual.

135. On 28 October 2021, W04842 (Miro Jukić), a witness security officer gave evidence. It is submitted at the outset, that his evidence has been discredited to the extent that no reliance can properly be placed upon it.

136. W04842 demonstrated himself to be unable to give a coherent and consistent version of events, offering explanations for certain events that were wholly implausible, and in respect of certain issues, outright untruthful, including his suggestion that there was no SPO office in Prishtinë. A contention that is just untrue, as confirmed by SPO witness W04876 (Daniel Moberg), who on two separate occasions refers to the SPO office in Prishtinë[54] and thus any suggestion that W04842 was unaware of such an office being fanciful in the extreme. Witness W04842 was in reality simply providing misleading

[53] KSC-BC-2020-07, Transcript 27 October 2021, p.1568, l.1-9

[54] KSC-BC-2020-07, Transcript 5 November 2021, p.1931, l.4-8; p.1941, l.13-15.

testimony in an effort to place a veil over his own inadequacies, fundamental as they were, however, this now taints everything that he offered by way of evidence as it cannot be safely relied upon as being accurate.

137. W04842 confirms that:

> "*after the leak, the document leak, we received several phone calls from the witnesses who were concerned, scared about the fact that their name is published in the—in the media in the Kosovo, in the region. We decided to call some of them to inform them that their name is in the leak, in the public document, and all my knowledge and all written in the declaration was about the contact with those people.*"[55]

138. As much as this may have occurred, this tells us a number of things immediately.

139. In the first instance, it is suggestive of the SPO not being proactive, in that the SPO knew that documents had been leaked prior to any press conference or media article and yet took no steps to deal with the issue.

140. Secondly, as much as it may, without prejudice, be capable of acceptance that individuals may have been concerned that their details were published, not one individual at this stage stated that the Defendant, or the actions of the

[55] KSC-BC-2020-07, Transcript 28 October 2021, p.1693, l.5-11.

Defendant, or the actions of those with whom the Defendant associated, had intimidated them.

141. Further, and more will be submitted on this point below, W04842 does not provide details of any one individual who was specifically intimidated, or alleged to have been, and further, the SPO has adduced not one shred of evidence from an individual and therefore any comment from any such individual has not been tested, has not been subject to scrutiny, and thus the Defendant has been precluded from advancing any defence to such comments.

142. Significant caution must therefore be exercised by the Trial Panel when considering evidence that has not actually been seen, but rather admitted as hearsay, and further, that evidence has not been subjected to challenge and/or scrutiny.

143. W04842 sought to suggest that "there was a lot of people who expressed their fears and a lot of people who felt threatened after the publishing of the documents and their names".[56] However, he was unable to point to any such individuals, and further, his evidence, including in cross-examination, undermines this position.

[56] KSC-BC-2020-07, Transcript 28 October 2021, p.1699, l.22-25.

144. In evidence, W04842 sought to suggest that witnesses started to 'scream' down the phone, such was the severity of their concern.[57] However, under cross-examination, he adopted the position that 'he did not recall' when the fact that no witness contact notes recorded a single witness screaming, or being heard to scream at any time.[58]

145. This position of not knowing was maintained when it was put to the witness that in thirty-seven (37) of the notes, no concern of any sort was expressed,[59] and/or the contrary position in that they positively advanced that they had no concern in seventy-seven (77) of those notes.

146. W04842 was questioned further on the issue of threats and was asked "*how many of these persons told you that they had received threats in or after September 2020?*"[60] W04842 replied initially that he could not recall, but then went on to state that he could recall and it was in fact 'the majority', although he could not provide any numbers.

147. W04842 was then questioned further, and changed his answer to "*very few*", and then further to "*By my knowledge, two*".[61]

[57] KSC-BC-2020-07, Transcript 28 October 2021, p.1702, l.24-25; p.1703, l.104.

[58] KSC-BC-2020-07, Transcript 4 November 2021, p.1833, l.5-8.

[59] KSC-BC-2020-07, Transcript 4 November 2021, p.1833, l.13-16.

[60] KSC-BC-2020-07, Transcript 4 November 2021, p.1834, l.2-10.

[61] KSC-BC-2020-07, Transcript 4 November 2021, p.1834, l.3-19.

148. This line of questioning, like others is demonstrative of a number of points to be considered by the Trial Panel that goes directly to his credibility.

149. Firstly, W04842 could not provide a consistent version of events, continually changing his position subject to who asked the question.

150. Secondly, W04842 is a wholly unreliable witness and further, has deliberately attempted to suggest that the position was much worse than it actually was e.g. suggesting the majority of individuals had received threats and then changing this to just two. This goes directly to whether his evidence is considered reliable. It is submitted that the entirety of his evidence was simply untrue.

151. Thirdly, regardless of which of the various versions of events given by W04842 is correct, or whether an entirely alternative version of events is plausible, the evidence cannot be tested. If it is two individuals who had received threats, we do no not know who they are, who made the threat, in what context the threat was made, whether the threat actually was a threat, or whether it was made at all.

152. The SPO by failing to call <u>any</u> evidence on this point have deprived both the Defendant from challenging evidence and therefore critically prejudiced the case against him, and further, deprived the Trial Panel from hearing

153. In his answer to questions posed by Judge Barthe, W04842 asserted that approximately 200 individuals had been contacted as a consequence of the leak, and further, that a 'big majority' had expressed concerns.[62] There is no independent evidence to support this.

154. A majority in terms of 200 is anything over 100, a big majority as suggested, is significantly more than 100. However, upon being asked how many individuals had suggested that they had received threats W04842 changed his position replying "*yeah I don't know. Received the threats, direct. Very few […] That they received threats. Not many […] yes less than a hundred*".

155. Further, he was asked whether he could be more precise, and he responded, "*not at this moment*".[63]

156. The witness has therefore entirely undermined his own evidence, the reality being he, and therefore the SPO had, and remains as having, no idea as to whether any individual was threatened and if so, by whom.

157. Further, as much as the SPO exhibited a declaration from W04842 suggesting that "*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,*

[62] KSC-BC-2020-07, Transcript 28 October 2021, p.1761, l.16-25.

[63] KSC-BC-2020-07, Transcript 28 October 2021, p.1762, l.4-14.

unsafe, threatened and/or intimidated in the wake of the publications",[64] the evidence is in the abstract in the extreme.

158. Not one individual has given evidence that they were affected.

159. Further, W04842 confirms that his declaration provides *"non-exhaustive examples of information provided by such witnesses*",[65] and therefore they lack the specificity to amount to evidence that can be safely relied upon.

160. Further, W04842 goes on to confirm that not all of these comments were those that he himself heard but "*because I reviewed some notes, are also from other colleagues*".[66]

161. Those colleagues have not given evidence for reasons best known to the SPO, and further, the individuals subject to these comments have themselves not given evidence and therefore again, the Trial Panel are being asked to simply accept the evidence is what the SPO says it is, and again, this is with the background of that evidence being given by a witness who cannot maintain a consistent version of events and at some stages of his evidence has

[64] Exhibit 084008-084010 para.6, KSC-BC-2020-07, Transcript 28 October 2021, p.1719, l.7-11.

[65] KSC-BC-2020-07, Transcript 28 October 2021, p.1719, l.16-18.

[66] KSC-BC-2020-07, Transcript 28 October 2021, p.1719, l.22-25; P.1720, l.1-3.

demonstrated himself to be, in the absence of any explanation, economical with the facts at best, and at worst, simply untruthful.[67]

162. A further contact note[68] at paragraph 1, refers to an 'individual' advising that he felt 'stressed' given the information in the media.

163. A further note adduced[69] at paragraphs 2 and 3 confirmed that the 'individual' referenced confirmed that he was not worried about the leaks and does not have any concerns. Further, W04842 went on to confirm that there were a number of others who adopted a similar position,[70] including a witness who specifically noted that he did not feel threatened at all but he was concerned by the fact that the SPO had allowed such documents to be leaked.[71]

164. The stark reality is that the elements of the crime have not been satisfied on the evidence.

165. No SPO witness can point, or give evidence to the effect that they have been directly threatened or otherwise intimidated by the Defendant, further reminding the Trial Panel that not one individual said to have been directly

[67] KSC-BC-2020-07, Transcript 28 October 2021 p.1749, l.17-24 and p.1750, l.17-24, where the witness suggests he was participating in a meeting and yet the note of the meeting does not state that he was present.

[68] Exhibit 089886-089886RED.

[69] Exhibit 089908-089908RED.

[70] KSC-BC-2020-07, Transcript 28 October 2021, p..1722, l.16-25, p.1723 l.1-7

[71] Exhibit 093388-093388RED.

affected by the leak(s) has given evidence, nor has the SPO submitted any sworn statement by any such individual instead relying on 'contact notes' which were written by SPO staff, again, the majority of which were not called to give evidence, but in any event, they do not necessarily reflect the exact words of the individual, but rather, another individual's interpretation of what was said, possibly through translation, and therefore information that cannot be tested.

166. During the examination of W04842, the SPO referenced a call note[72] which appears to be suggestive of a number in that at paragraphs 7 and 8 it notes that a colleague of W04842 reported that an individual had said that 'people looked at him and his family differently, that his business had lost customers, and that he was experiencing a difficult financial situation'.

167. Being looked at differently does not constitute intimidation, the fact that individuals may have decided to take their business elsewhere does not constitute intimidation. If such actions had been coupled with a demand that the individual change their evidence whatever that may have been, or that they should refuse to co-operate, then it is possible that this might go some way to approaching what is required to be proven; however, the reality is that

[72] Item 085880-085883.

no such evidence has been placed before the Trial Panel, that can be properly considered as probative.

168. A further individual is said to have advised[73] that "*because of the confidential information being made public, the pool of people who could potentially harm his family has been broadened*". The important word is 'could'. No harm had come to this individual's family, nor had there been any threats, it is entirely hypothetical, and therefore not enough to satisfy the offence as indicted.

169. Further, and again, the words are not the words of the individual subject to the contact, but rather, the words of the SPO staff member, and therefore not that individual's evidence in any event.

170. Under cross-examination by Judge Barthe, W04842 confirmed that 'two' individuals had been relocated as a consequence of the leak;[74] however, the specifics of the reasons were not given *i.e.* evidence was not given as to whether the two individuals had been threatened, if so by whom, and under what circumstances. It is not clear whether it bore any relation to the present case.

[73] KSC-BC-2020-07, Transcript 28 October 2021, p.1751, l.23-25; p.1752, l.1-5.

[74] KSC-BC-2020-07, Transcript 28 October 2021, p.1762, l.15-25; p.1763, l.1-2.

171. Accordingly, as much as it might be capable of acceptance that these two individuals were re-located as a consequence of the SPO leaks, this of itself, is not enough to demonstrate that the Defendant is guilty of intimidation.

172. However, we must adopt an enhanced degree of scrutiny and scepticism in terms of this position, noting that the SPO has not adduced any evidence other than the witness Jukic to confirm this position.

173. Prior to answer Judge Barthe's question, W04842 had already confirmed that just one (1) individual had been relocated.

174. Further, in his declaration of 27 October 2020, W04842 neglected to mention anywhere that any witness fell to be re-located as a result of the alleged events. Still further, he failed to mention any relocations in his 27 January 2021 declaration.[75]

175. It is wholly impossible to ascertain which version of events given by W04842 is correct, or whether any of them are correct, such is the frequency with which he changed his evidence.

176. The same can be said for those others that were made subject to 'other security or protective measures',[76] no specific basis was given for why there was cause

[75] KSC-BC-2020-07, Transcript 4 November 2021, p.1889, l.11-18.

[76] KSC-BC-2020-07, Transcript 28 October 2021, p.1763, l.3-6.

to take such measures other than the fact that information had been leaked from the SPO.

177. Against the above background, significant concern must be expressed in terms of the inaction of the SPO, noting the evidence of witness W04866 who confirmed that upon taking the documents, he contacted the SPO whose position was "*We cannot comment on these issues*".[77] If the issue was so serious, if the concern for safety was so great, why is it that the SPO took precisely no action in the first instance.

178. The position is even more stark however when consideration is given to the evidence of witness W04842, who confirms that no action was taken by witness security and handling until after the third press conference.[78]

179. Witness W04842 confirmed that the press-conferences of 7 and 16 September did not create a high priority.[79] If the leaks did not create such a high priority, the SPO evidently had 'limited concern' in respect of its consequences for witnesses, an issue that negates the suggestion that the alleged actions of the Defendant threatened and/or otherwise intimidated witnesses.

[77] KSC-BC-2020-07, Transcript 27 October 2021, p.1635, l.19-23; p.1636, l.1-3.

[78] KSC-BC-2020-07, Transcript 4 November 2021, p.1795, l.9-19; p.1796, l.1-4.

[79] *Ibid.*, p.1798, l.9-12.

180. The immediate position is that the SPO have not proven the relevant elements of the crime in respect of the count of intimidation on the Indictment, and therefore there is no need to consider the relevant modes of liability. However, and without prejudice to this submission, where it is found that the elements have been satisfied, the Defence would submit the following.

181. In terms of those relevant elements of the crime, the Defence would submit that the offence that requires proof of consequence, in that given the wording of the offence, an individual must, or at least there must have been an intention, to induce an individual from making a statement or giving evidence. No evidence has been adduced to this effect, or that this has been the result of any of the Defendant's alleged actions.

182. The position is perhaps even more stark however, when we take into account the evidence adduced by the SPO which demonstrates how the Defendant was clear that he was not going to release names of individuals other than those that were already in the public domain. Further, the Defendant was clear that he would not release the names of other witnesses as he acknowledged the harm that may be caused to such individuals.[80] Given the

[80] KSC-BC-2020-07, Transcript 6 December 2021, p.2206, l.18-25; KSC-BC-2020-07, Transcript 6 December 2021, KSC-BC-2020-07, Transcript 7 December 2021, p.2207, l.1-14; KSC-BC-2020-07, Transcript 7 December 2021, p.2309, l.3-25. See also KSC-BC-2020-07-081358-01-TR-ET

intentionally refusal of the Defendant to disclose the names of witnesses, it simply cannot be argued that there was an intention to intimidate any witness.

183. The position of the Defendant goes much further than his own intention not to release names however, in that he did, on a number of occasions explicitly request that the media not publish the names of individuals.[81] On at least one occasion the Defendant was seen to warn journalists that they must not publish names as this would endanger the safety of individuals.[82]

184. Of equal importance to the fact that the Defendant adopted this position, is the fact that the SPO did not at any stage attempt to prevent the press-conferences from taking place, a position confirmed by SPO Witness W04876 (Daniel Moberg),[83] and further, the SPO have still not taken any steps to have that information that remains in the public domain, including in easily and readily accessible media publications, removed.[84]

185. The SPO are therefore seeking to suggest that the actions of the Defendant were devastating to both the working of the SPO, and specifically to witnesses, and yet that same SPO took precisely no steps to either prevent it from happening, or having that information removed after the event,

[81] KSC-BC-2020-07-084032-084033 RED SPO, Official note, 29 October 2020; KSC-BC-2020-07-082010-082013 RED SPO-Official Note 17 September 2020; KSC-BC-2020-07-081979-07-TRET.

[82] KSC-BC-2020-07-089919-089927; KSC-BC-2020-07-090144-090144.

[83] KSC-BC-2020-07, Transcript 5 November 2021, p.1951, l.2-14.

[84] KSC-BC-2020-07, Transcript 20 October 2021, p.1103, l.24-25 and p.1104, l.2-6.

information that remains there today and information that the SPO knows remains there today.

186. The Trial Panel is respectfully reminded that the offence is one that is defined within Article 387 of the KCC,[85] that offence requiring that the information – which was to be provided, and was not, as a result, of the force or serious threat – relates to the obstruction of criminal proceedings.

187. Article 387 does not prohibit, as the Pre-Trial Judge found, any conduct that may have or is expected by the perpetrator to have an impact or influence on the statement or information to be given by the person. The Defence submits that Article 387 only prohibits the use of force or serious threat or any other means of compulsion, a promise of a gift or any other form of benefit, and, as previously submitted, that it requires another person to be induced to refrain from making a statement or to otherwise fail to state true information.

188. Again to reference the domestic law, Article 113 KCC[86] defines force as that which involves physical violence or the threat of the same, hence the mirrored position of 'serious threat' in the absence of an actual use of force of violence. No evidence has been adduced of any such use of threat, even taking the SPO

[85] Law 06/L-074.

[86] Law 06/L-074

case at its absolute highest, this element cannot be said to have been satisfied at any stage.

189. The Trial Panel is again reminded that at no stage has the SPO adduced any evidence that there has been any particular effect on a specified individual *i.e.*, that such an individual was induced to refrain from the making of a statement or giving evidence, or alternatively that such an individual has decided to change his position in terms of co-operation.

190. Where an individual has expressed concern about ongoing collaboration with the SPO it must be highlighted that at no stage has this been suggested to be on account of the alleged actions of the Defendant, but rather, specific reference has been made in terms of trust of the SPO and therefore it is the fact that a leak occurred that has potentially created the issue in the mind of the witness, rather than the alleged actions of the Defendant. This is no mere semantical difference, but essential in terms of liability.

191. In terms of the modes of liability, the SPO have, as previously alluded to, adopted what is in effect, a scatter-gun approach to liability, including each and every mode that it can think of rather than seeking to attribute a specific mode of liability to the actions of which it seeks to suggest that the Defendant is guilty.

192. The result is a wholly confused Indictment that in part makes little, if any, sense and fails to set out the elements of the crime in a coherent manner, much less supported by any evidence.

193. The Defence maintains its position that the offence is one of specific intent, that is to say that there must be evidence of 'purpose or desire', that there must be evidence of specific or direct intent to induce a person to refrain from making a statement or providing evidence, to suggest otherwise simply does not accord with the definition of the offence in any comparable jurisdiction.

194. Further, Article 387 KCC makes it clear that it is an offence of specific intent, the use of force or serious to induce being specific wording so as to demonstrate the purpose of those actions is to 'induce'. The wording therefore imports a specific or direct intent only.

195. It is not open to the Trial Panel to inappropriately widen the ambit of liability which to read other than specific or direct intent would be the result.

Count 4 - Retaliation

196. The SPO has failed to adduce any evidence that would in any way demonstrate that the elements of the crime for 'Retaliation' have been satisfied.

197. Having regard to paragraph 53 of the decision on confirmation of the Indictment,[87] and Article 388(1) of the KCC, it is accepted that there is no delimiting of scope, however, in the same vein, some form of 'harmful action' such as violence, serious threats, or interference with individual safety must be demonstrated.

198. Further, in terms of the mental element, and the decision of the Pre-Trial Judge on this point, there must be evidence of direct intent of causing harmful action, or further,[88] eventual intent that the Defendant had 'awareness' of possible retaliation.

199. The evidence heard simply does not support this offence.

200. In fact, the evidence points to the contrary position, in that the Defendant, in his own words, and those of journalists, was clear that the names of witnesses ought not be published given the potential for retaliation against those same witnesses.[89]

[87] KSC-BC-2020-07/F00074, Decision on the Confirmation of the Indictment, 11 December 2020, paragraphs 51-57

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

[89] KSC-BC-2020-07-084032-084033 RED SPO, Official note, 29 October 2020; KSC-BC-2020-07-082010-082013 RED SPO-Official Note 17 September 2020; KSC-BC-2020-07-081979-07-TRET.

201. If the position is, as alleged by the SPO, and as per the Indictment,[90] and if there was an intention to retaliate against an individual, why would the Defendant on numerous occasions make clear that the names of those individuals within the documents should not be published.

202. The allegations simply do not support the facts nor the evidence, the facts and evidence explicitly undermining the allegations made.

203. To take the submission a step further, to satisfy the elements of the crime, it is submitted that there must be evidence of the Defendant(s) conduct either intending to retaliate, or awareness of that possible retaliation.

204. The SPO provided no evidence of this fact.

205. Finally, and again as per the confirmation decision, the SPO must prove that the apparent 'victim' of the retaliation was targeted on account of that person "*providing truthful information relating to the commission or possible commission of any criminal offence…*"[91]

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

[90] KSC-BC-2020-07/F00251/A01, Indictment, Annex 1 to corrected Indictment, 5 July 2021, para 31-32.

[91] KSC-BC-2020-07/F00074, Decision on the Confirmation of the Indictment, 11 December 2020, para.52.

otherwise, concerning the commission of, or possible commission of a criminal offence.

207. Per the Indictment at paragraphs 31 and 32 it is alleged:[92]

> *"31. Between at least 7 and 25 September 2020,* ***Hysni GUCATI, Nasim HARADINAJ****, and Associates 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.*
>
> *32. In particular, the acts and omissions described in paragraph 30 above infringed the witnesses' fundamental rights as guaranteed in the Constitution of the Republic of Kosovo and the ECHR. Witnesses and/or their family members were intimidated. Their safety, privacy, reputations, and livelihoods were threatened. "*

208. In terms of paragraph 31, there is no evidence of these apparent harmful actions, again reiterating the point that the SPO has failed to adduce any witness of fact that would testify to the direct effect of what is being alleged.

209. To re-emphasise the point, a contact note that contains the contemporaneous interpretation of an SPO staff member in terms of the words used is not

[92] KSC-BC-2020-07/F00251/A01, Indictment, Annex 1 to corrected Indictment, 5 July 2021, para 31-32.

evidence. Further, it is an even poorer substitute for actual evidence when the individual subject to that note is known, is contactable, and is able to attend Court to give evidence.

210. The Defence would argue that each and every contact note ought to be dismissed or ignored in terms of evidential value given the deliberate attempts to circumvent the adversarial trial process on the part of the SPO who have demonstrated a wilful refusal to call actual evidence that be subject to challenge by the Defence.

211. The SPO refused to call any witnesses who it says were directly affected by the actions of the Defendant(s), instead seeking to rely upon the evidence of three SPO employees, none of whom can give that evidence, but merely recount what they were told.

212. Even if it is accepted by the Trial Panel, that the evidence provided does constitute evidence of retaliation, regard must be had to the fact that, as noted above, the SPO consistently refused to call any direct victim or witness and therefore there has been no opportunity for the Defendant(s) to challenge that evidence.

213. The SPO are asking the Trial panel to simply accept the evidence as being accurate without it being tested or challenge, and thus the veil of opacity with which these proceedings have been brought are allowed to proliferate.

214. Witness W04842 is arguably the most relevant for the purposes of this offence, however, his evidence in the first instance does not assist in satisfying the elements of the crime, and secondly, was so inconsistent and undermined to the extent that it cannot be rendered credible and therefore ought to be dismissed by the Trial Panel.

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

216. The use of the words 'a lot', is with respect, meaningless. Who are these individuals, what exactly is their evidence, were the complaints recorded contemporaneously, has this evidence been called.

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

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

219. Firstly, the same questions posed above again cannot be answered because no evidence has been called. Further, of that evidence that has been called, namely the 'contact notes' of which this witness was the author, not one witness is described as screaming, and therefore it is either other SPO officials who witnessed the screaming, or, it simply did not happen. In any event, no

evidence has been called to substantiate this allegation and therefore the Trial Panel is simply being asked to accept the witness's word for it, a witness who has shown to be wholly unreliable.

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

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

222. At page 1706 and line 23, Witness W04842 states "*all the persons contacted me, they were scared and upset*". With respect, this simply is not true as there are contact notes where the witness does not express any such emotion and suggests that they are not concerned at all. The Witness has therefore given demonstrable inaccurate evidence.

223. Shortly after this comment, W04842 states "*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*", and upon being asked the following "*Mr. Witness, is that accurate according to your recollections based on the contacts that you had and other contacts you were aware of at the time?*", he responds "*This is accurate to my contacts, and this is written by me*".[93]

224. This is different to other versions he has given however, wherein it started at a large majority, to under a hundred, to tens. The reality of the matter is that W04842 is wholly unreliable witness and cannot keep to one version of events.

225. It is accepted that two (2) witnesses may have been relocated following the leaks, and the justification being that those two (2) witnesses felt scared, however, this is not enough to demonstrate retaliation, as the justification was the leak itself, not the Defendant(s) alleged conduct. It is not even established that the relocation was due to any acts of the Defendant.

226. Further, there is wholly insufficient detail provided by the witness, who mentions it in his evidence almost in passing, to enable the Trial Panel to make a determination as to the basis for that relocation other than it being on account of the leaks *i.e.* there can be no analysis of the extent to which the

[93] KSC-BC-2020-07, Transcript 28 October 2021, p.1719, l.7-15.

alleged actions of the Defendant impacted upon the request by the witnesses, or indeed the impact the actions of W04866 (Halil Berisha) or any other journalist, in comparison with the fact that it was the SPO who allowed the leak in the first instance either through lax security protocols or failure to appropriately vet staff so as to prevent such a leak.

227. Accordingly therefore, on the basis that the Defendant(s) are not alleged at any time to have procured the leak, this being explicitly ruled out by the SPO,[94] the leak is down to others and/or the SPO's acts or omissions, and therefore if these others who are responsible and whose actions gave rise to the action taken to relocate these two witnesses.

228. It is noted that there is no evidence to establish definitively that the three batches of purportedly confidential material delivered to the KLA WVA was the only leaked material. The SPO claims to be oblivious to how the material was leaked, therefore it cannot be certain as to how much material was subject to a massive security breach.

229. Further and/or in the alternative, it is of note that information appeared in a number of media releases, and yet not one of these media houses or journalists have been investigated. The question must be asked therefore why the SPO

[94] KSC-BC-2020-07, Transcript 7 October 2021, p.790, l.8.

has deemed such individuals to not be worthy of investigation, yet the Defendant(s) are.

230. It is of import to highlight that W04866 (Halil Berisha) called by the SPO, a journalist, justified his actions on the basis of 'public interest', this was not challenged by the SPO and therefore appears by that lack of challenge, to have been accepted. The position therefore must be the same as the Defendant(s) having regard to the long held and advanced position that any actions taken were justified given the public interest in the information.

231. At page 1719 of the transcript,[95] Witness W04842 (Miro Jukić) is questioned in respect of his declaration exhibit 084008 onwards, in which the witness described "*tens of witnesses*" as feeling worried, unsafe etc.

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

233. Further, it is of note that the significant majority, if not all witnesses, taking the case at its highest, learned of the disclosure through the media or through the SPO calls, not one individual received a direct threat by the Defendant(s) and therefore the question to be asked is as per the test, taking into account that none of the evidence can be challenged given the fact that those witnesses

[95] KSC-BC-2020-07, Transcript 28 October 2021, p.1719, l.3-15.

were not called to give evidence, and further, the evidence is at best second or third hand hearsay, can the Trial Panel safely convict the Defendant(s) of the offence, on the evidential basis submitted.

234. It would appear to be clear, and therefore is respectfully submitted, that the SPO has not proven its case beyond all reasonable doubt and therefore the offence ought to be dismissed.

235. The Trial Panel must make a determination as to whether they believe W04842 to be a truthful witness; having regard to his evidence, it is difficult to see how this question can be answered in the positive.

236. At page 1749 of the transcript,[96] the witness seeks to suggest that he was present in a meeting as an observer despite there being no record of him ever having attended that meeting, and all other parties being named. It is of note that the SPO have not sought to call any other witness who may confirm his presence or otherwise.

237. At page 1762,[97] the witness seeks to suggest that over 100 of those witnesses contacted expressed concern, and yet we have not seen over 100 examples of this concern in evidence, or contact notes of 100 witnesses having been contacted.

[96] KSC-BC-2020-07, Transcript 28 October 2021, p.1749, l.17-21

[97]KSC-BC-2020-07, Transcript 28 October 2021, p.1762, l.1-3.

238. Further, at page 1762,[98] the witness notes under questioning from Judge Barthe that "*very few*" witnesses received direct threats, and yet again, we do not see this in evidence, save for W04842's say so, and further, not something that he volunteered in direct examination, but under judicial questioning, and therefore the statement is at best an afterthought.

239. Under cross-examination, his evidence is so littered with inconsistencies that it can be said to be no longer credible and ought to be disregarded.

240. We would draw the Trial Panel's attention to the entirety of evidence given on 4 November 2021,[99] but would seek to highlight certain points for context and the sheer audacity of the evidence given.

241. As noted previously, in order to demonstrate the lack of any credibility of the witness, at page 1777, line 10,[100] the witness states that the SPO does not have an office in Prishtinë. This is simply wrong and a clear example of an inaccurate, or at worst, an untruthful witness,[101] and contradicted by W04876 (Daniel Moberg). The question is why would he lie about such an inconsequential matter.

[98] *Ibid*., l.8-9.

[99] KSC-BC-2020-07, Transcript 4 November 2021, p.1765-1906.

[100] KSC-BC-2020-07, Transcript 4 November 2021, p.1777, l.10.

[101] See evidence of Witness 4, KSC-BC-2020-07, Transcript 5 November 2021, p.1941.

242. We would further draw reference to pages 1780-1793 of the transcript[102] and the witness's evidence in terms of whether the evidence being given is credible or whether the position being adopted by the witness is simply at best, convenient.

243. Again, in terms of credibility, attention is drawn to pages 1818-1825,[103] wherein again, the witness struggles to justify his answers when challenged in cross-examination, offering a version of events that simply does not add up.

244. At page 1834[104] the witness again gives an inconsistent version of events changing the amount of witnesses who were threatened to his knowledge from "*very few*" in direct examination, to a "*majority*" under cross-examination. This is not a small change or correction; this is an entirely different position being adopted and one that fundamentally undermines his credibility.

245. The Defence could highlight every single point on which the witness is either inconsistent, or in the alternative, offers a wholly improbable version of events, however, to do so is beyond the scope of this brief.

[102] KSC-BC-2020-07, Transcript 4 November 2021, p.1780-1793.

[103] *Ibid*., p.1818-1825.

[104] *Ibid*., p.1834.

246. The reality is that the witness cannot, on any objective assessment be deemed as credible and therefore his evidence, even where it is his evidence rather than rehearsing hearsay, is of minor, if any, probative value.

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

248. The evidence of the Defendant is telling, in that upon being asked "*did you retaliate against anyone for giving evidence*?" he responded "*No one has harmed to-to the extent that I have to-to ask them to-to explain their behaviour*".[105] Nothing in cross-examination caused him to depart from this position, and further, no evidence put to him or any other witness would suggest an alternative position.

249. There was no intention, desire, attempt, or alternative mode of liability, to retaliate against any individual and further, there simply was no retaliation in the context of the offence indicted or any other.

250. It is anticipated that the SPO will seek to reply upon the historical position advanced in terms of witness security in Kosovo; however, the evidence it

[105] KSC-BC-2020-07, Transcript 12 January 2022, p.2810, l.21-25.

sought to adduce was some 20 years old, with no relationship to the current position, and therefore of no relevance at all.

251. The questioning of Defence Witness DW1253 (Robert Reid), from page 3304 onwards is of no relevance to the current proceedings.[106]

252. The information related to a different era, 20 years ago, different individuals, a different climate, and a different tribunal.

253. If it is that the Trial Panel seek to draw a parallel between proceedings before the International Criminal Tribunal for the former Yugoslavia ("ICTY") 20 years ago, the position in Kosovo 20 years ago, and the current position today, then it ought to also consider the position in Serbia so as to ascertain whether the treatment of witnesses and individuals was comparable.

254. It is of note that the Defendant is not suggested as having been involved in any act occurring 20 years ago that would be subject to legitimate investigation or consideration.

255. The Defence note the thinly veiled ploy of the SPO to raise the *Ramush Haradinaj*[107] case that was heard before the ICTY. Of all cases heard by the ICTY it was this that was chosen to be raised. It is of no relevance, but merely

[106] KSC-BC-2020-07, Transcript 24 January 2022, p.3304.

[107] The SPO failing to highlight that Ramush Haradinaj was acquitted of all charges.

an attempt to draw a parallel to the Defendant on the basis of his family connection.

256. Notably, the Defence were precluded from adducing evidence concerning allegations of corruption and political interference within the EU Rule of Law Mission ("EULEX") and the Special Investigative Task Force ("SITF") framework operating prior to the development of the KSC and its SPO on the basis of relevance, despite the fact that it shared a number of staff, and yet the SPO can adduce evidence that is blatantly irrelevant. Furthermore, the Defence were prevented from putting questions to Witness W04841 concerning fellow SPO investigators, [REDACTED], who were employed by the Special Tribunal for Lebanon at the time of a similar massive security breach.

257. This is yet another example of the disparity in approach taken to the differing parties, and further evidence of how the principle of 'Equality of Arms' and therefore Article 6 of the ECHR has been violated throughout these proceedings.

Count 5 – Violating the Secrecy of Proceedings – Protected Information

258. The central issue that's falls to be considered, is whether the information said to have been disclosed by the Defendant(s) is protected with the definition of

the law, and further, that the Defendant(s) intended in that they acted in awareness of, and desire firm revealing protected information.

259. In the alternative, the Defendant(s) must have acted with the awareness that the protected information might be revealed.[108]

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

261. However, given the manner in which the SPO investigation, search and seizure, and presentation of case, has been undertaken by the SPO, there are serious and significant questions that remain unresolved, and have not been resolved by way of evidence adduced at trial.

262. To generalise initially, it cannot be said with any certainty that the documents that the SPO say are contained within the 'Batches' are actually contained within the same, as the SPO have refused to disclose the entirety of their contents.

[108] KSC-BC-2020-07/F00074, Decision on the Confirmation of the Indictment, 11 December 2020, para. 34-40.

263. Further, the SPO have refused to disclose their contents to the Pre-Trial Judge and/or the Trial Panel, and therefore, the Court is being asked to accept the documents are what they are said to be, entirely on the word of the SPO.

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

265. Secondly, it is of note that the documents seized from the KLA WVA offices were indexed in terms of what the documents contained. Accordingly, there are again serious questions that have not been answered in terms of exactly what was delivered to the KLA WVA offices, and further, what was actually seized. No one knows and no evidence in the form of an exhibits list or similar, has ever been adduced, accordingly, that question cannot now be answered.

266. Thirdly, in terms of that which was seized, and that which was delivered to the SPO offices after that seizure, again, there is no way to validate that which was seized was in fact that which was considered at the SPO office given the abject absence of any form of chain of custody or exhibits list.

267. Further, as much as there has been reference to 'evidence bags', the same have not been exhibited, nor has there been any evidence adduced that they were sealed at the time of seizure,[109] who sealed them, who re-opened them, when they were further sealed.

268. At this juncture, all we have is the SPO's say so for an event, an issue that would appear to be a common theme running throughout these proceedings in that the Trial Panel are simply being asked to take the SPO's word for something, rather than the SPO seeing to discharge its evidential burden by adducing actual evidence of what it states is a fact.

269. Fourthly, the SPO are not in a position to confirm that the documents considered at the SPO office (leaving aside whether they were the same documents seized) were indeed legitimately taken from the SPO records. No forensic account has been exhibited.

270. The evidence of the Witness W04841 (Zdenka PUMPER) is replete with acceptance of not undertaking checks both in terms of whether information was in the public domain prior to the 'Batches' being delivered, whether the names of individuals were already in the public domain,[110] and further, whether the documents said to have been seized were indeed from the SPO.

[109] KSC-BC-2020-07, Transcript 5 November 2021, p.1940.

[110] The Defence have deliberately chosen not to name those individuals given the orders of the Court already in place and the fact that such individuals were referred to in private session during the trial.

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

272. No evidence was given as to why the process stopped, and further, no evidence was given as to what documents were considered, what documents were not considered, and whether all of those documents considered were validated as being from the SPO.

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

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

275. It seems appropriate to consider the SPO case advanced in terms of the specific 'Batches' of documents.

Batch 1

It is therefore assumed that the Trial Panel are aware of the individuals obliquely referred to and issue will not be taken with this submission as being fact and accurate. If it is that the SPO takes issue with this approach, the same can be addressed in supplemental oral submissions.

276. SPO witness, W04876 (Daniel MOBERG), an Operational Security Officer provided an account of how the documents came to be seized from the KLA WVA premises on 8 September 2020.[111]

277. That evidence states that after the seizure, they were taken to the SPO Offices in Prishtinë,[112] where colleagues scanned them in order to send directly to The Hague.[113]

278. The witness testified that he could not say for sure that the bags were sealed at the time of being placed in storage, but they would have been sealed when they were taken back to The Hague.[114] It is not clear from the evidence whether they were in fact sealed.

279. SPO Witness W04841 (Zdenka PUMPER) testified that she could verify on the basis of SPO official records that the evidence bag containing the documents that were seized on 8 September 2020 was delivered to the SPO Case and Evidence Management Unit and that the documents were submitted into evidence and attributed an ERN number.[115] She was also able to confirm that

[111] Exhibit P00092.

[112] It is worth of re-affirming the point that SPO Witness Jukic denied that any such office existed.

[113] KSC-BC-2020-07, Transcript 5 November 2021, p.1931, l.4-8; Exhibit P00092, para. 11.

[114] *Ibid*., p.1932, l.4-7.

[115] KSC-BC-2020-07, Transcript 18 October 2021, p.908, l.2-10.

the documents that she reviewed had the same ERN number as the one that was given to the documents that were seized.[116]

280. However, the position is not so straightforward or conclusive as this and there are gaping holes in the accounts given by the prosecution witnesses and the account advanced by the SPO in terms of the veracity and credibility of the evidence given.

281. The record of the documents seized at the KLA WVA premises on 8 September 2020 is wholly inadequate. The information contained within the SPO delivery document on what was seized is lacking in the extreme, in that its specification is limited to "*Documents delivered to the KLA WVA*" and their content is described as "*1 stack of documents printed*".[117] The delivery document provides no information on the number of pages, the size of the stack or the content of the documents[118] and it makes no reference to a numbered evidence bag.[119]

282. There is no way of knowing what the documents referred to are, and therefore, as has already been highlighted and will be highlighted further, we cannot say with any degree of certainty, limited or otherwise, what

[116] *Ibid*., p.908, l.17-21.

[117] Exhibit P00056.

[118]KSC-BC-2020-07, Transcript 20 October 2021, p.1052, l.11-16.

[119] *Ibid*., p.1052, l.17-23.

documents were seized, whether those same documents were in the 'bags' and whether those same documents were the documents transported and thereafter considered. The Defence and the Trial Panel are simply being asked to accept the documents are what the SPO say they are. This does not satisfy the evidential threshold which deals with fact, not trust.

Batch 2

283. An SPO Delivery Document dated 17 September 2020 purports to describe the content of the documents seized at the KLA WVA premises as "Documents brought to WVA by unknown man, 16.09.2020".[120] Witness W04876 was present when the documents were seized at the KLA WVA premises on both 17 and 22 September 2020, he did however have difficulty in differentiating between these two events.[121]

284. He believed that documents were served on both occasions, but, he did say that he could not really differentiate between the two, and therefore a question still remains to be answered, though he did state that on both occasions documents were seized.[122] He transported the documents to his line-manager for a 'quick review'.[123]

[120] Exhibit P00055.

[121] KSC-BC-2020-07, Transcript 5 November 2021, p.1938, l.16-22.

[122] *Ibid*., p.1939, l.14-20

[123] *Ibid*., p.1940, l.6-8.

285. The documents were said to have been taken in evidence bags,[124] again no confirmation that they were sealed. The documents that had been seized are said to have then been scanned and sent to the SPO Office in The Hague.[125]

286. Witness W04841 testified that she followed the same procedure as for Batch 1 in determining that the documents in Batch 2 that she reviewed had been seized at the KLA War Veterans Association on 17 September 2020, in that she reviewed the Official Note on how the officers who were involved described how they seized the batch of documents, how it was handled and deposited with the Case and Evidence Management Unit (CEMU) as well as reviewing the delivery document.[126]

287. On the basis of the SPO Official Note[127] and conversations with the author, W04841 was able to find out about the seizure of Batch 2 from the KLA WVA premises.[128] She testified that she could read that the documents that were seized were eventually placed in evidence bags and she could verify, based on the SPO official records, whether these evidence bags were delivered to the CEMU. She could also verify the submission into evidence of the documents contained in these evidence bags and which ERN numbers were attributed to

[124] *Ibid*., p.1940, l.20-23

[125] *Ibid*., p.1941, l.4-9

[126] KSC-BC-2020-07, Transcript 18 October 2021, p.905, l.15-25.

[127] Exhibit P00103.

[128]KSC-BC-2020-07, Transcript 18 October 2021, page. 911, l.7-20.

them and that the ERN numbers of the documents that she reviewed were the same as those attributed to the documents that were seized on 17 September 2020.[129]

288. However, as much as the above is said, or at least inferred by the SPO, to be the 'Chain of Custody', it is not, as it is all based on what a witness states, it is not with the relevant documentary evidence that would demonstrate each individual step.

289. Further, as per the position with Batch 1, and thus furthering the fundamental and fatal flaw with the entire seizure and evidence presentation process, the SPO Delivery Document of 17 September 2020[130] offers no further description or detail as to the content of the documents said to have been seized, other than a one-line entry. Further, the exhibit does not specify the number of documents seized nor the number of the evidence bag.[131]

290. Again therefore, the Trial Panel is being asked to take the position on trust that the documents are what the SPO say they are, and what was seized is what was transported and thereafter considered.

[129] *Ibid*., p.906 l.10-25.

[130] Exhibit P00055.

[131] KSC-BC-2020-07, Transcript 20 October 2021, p.1148, l.17-25.

291. Batch 2 is not evidentially sound in terms of what is being presented by the SPO.

Batch 3

292. The summary provided above in respect of the account of Witness W04876, and the seizure and processing of Batch 2 applies *mutatis mutandis* to Batch 3.

293. Further, neither the Order of the Specialist Prosecutor dated 22 September 2020 addressed to Hysni Gucati and/or the KLA WVA to produce documents[132] nor the Acknowledgement of Delivery Form for the Order of the same date[133] records which documents were in fact seized or produced or indeed whether any were.[134] Neither document states whether any documents seized were placed in an evidence bag nor what evidence bag they were placed in.[135]

294. The fatal evidential flaw therefore remains, and is applicable to Batch 3 as it was applicable to Batches 1 and 2.

[132] Exhibit P00054.

[133] Exhibit P00058.

[134] KSC-BC-2020-07, Transcript 21 October 2021, p.1212, l.22-25, p.1213, l.20-22.

[135] *Ibid*., p.1213, l.25, p.1214, l.1-4.

295. The above evidence, and the flaws in both its seizure, consideration, and presentation, was considered by Defence Witness DW1253, an expert in investigations and efficacy of the same.

296. In the first instance, DW1253 testified that in his opinion, both in terms of 20 years' experience as a Police Officer in Australia, and further, 26 years as an officer involved in international investigations, including at the ICTY,[136] delivery notes, as per those produced for the operations of 8 and 17 September, were wholly insufficient when seizing material of this nature.[137]

297. Specifically, he said:

> *"You know, absent an inventory, I mean, all that is basically is that, you know, we've taken some documents from you and a signature, but you don't know what documents has been taken. In fact, you don't even know how many pages have been taken. And you don't know what's happened to them, where they've gone or anything like that. It just looks like a receipt to me."*[138]

298. In terms of a 'chain of custody', he described it thus:

[136] Exhibit 2D12, para. 5.

[137] KSC-BC-2020-07, Transcript 24 January 2022, p.3249, l.1-6.

[138] *Ibid*., p.3249, l.6-11.

> *"A chain of custody is pretty basic and simple. It's that the minute the document comes into your possession, you must know where it is 24 hours a day, seven days a week, even when it's in your evidence unit."*[139]

299. In his opinion, the effects of not having a chain of custody being as follows:

> *"Then you're leaving yourself open to criticism. You're leaving yourself open, more importantly, that when you get to court, which is the whole reason why you're seizing documentation, is when you get to court the integrity of the document collection is being called into question. Whereas if you follow these guidelines and these chain of custody guidelines, then, yeah, you'll still probably be called on it, but you can prove the integrity of the collection*."[140]

300. The SPO has presented evidence, of sorts, in respect of the three Batches, their transfer to the Hague, and verification to an extent, although not the full verification, by W04841, however, it has not provided any documentation supported by testimony, that establishes an unbroken chain of custody throughout this period, and thus again, it cannot be determined to any acceptable standard that the documents are what they are purported to be,

[139] *Ibid*., p.3223, l.9-12.

[140] *Ibid*., p.3238, l.13-19.

particularly given the fact that no-one other than the SPO has considered the same.

301. The position, therefore, is that given the clear and obvious deficiencies in recording what was seized, and in the chain of custody, significant doubt is cast on the authenticity of the documents that the SPO says were seized at the offices of the KLA WVA.

302. Further to the authenticity of the documents said to have been seized, and given the nature of the wording of Count 5, the SPO are further obliged to prove beyond all reasonable doubt that those same documents contain 'secret information disclosed in official proceedings'.

303. Again, each Batch will be considered in isolation in terms of the evidence offered.

Batch 1

304. SPO Witness W04841, gave evidence to the effect that she had identified indicia of confidentiality on the documents in Batch 1.[141] The indicia are shown in Annex 2 of Exhibit P00090.[142]

[141] KSC-BC-2020-07, Transcript 18 October 2021, page. 869, l.19-25; Exhibit P00090, Annex 1.

[142] KSC-BC-2020-07, Transcript 18 October 2021, page. 875, l.3-7.

305. Batch 1 contained over 100 coordination requests,[143] which are SITF requests for assistance in criminal matters.[144] As of 8 September 2020, they were to W04841's knowledge not publicly disclosed and SPO staff-members were not entitled to disclose them.[145] Some coordination requests included lists of witnesses.[146] In some instances names, last known addresses and telephone numbers and last known professional functions of witnesses and potential witnesses were included in confidential annexes to requests.[147]

306. Some Serbian documents that were included contained names of SITF, SPO witnesses or potential witnesses and statements provided by them.[148]

307. However, the position is not so straight forward or as clear as the evidence at first glance would suggest.

308. W04841 acknowledges that the SITF address, email address, and website, which she suggested to be an indicia of confidentiality, were in fact publicly known.[149]

[143] *Ibid*., page. 862, l.5-10.

[144] *Ibid*., page. 861, l.2-4.

[145] *Ibid*., page. 861, l.5-25, p.862, l.1-4.

[146] *Ibid*., page. 873, l.6-9.

[147] *Ibid*., page. 884, l.2-25, p.885, l.1-6. Exhibit P00086, para. 10.

[148] *Ibid*., page. 886, l.5-25, p.887, l.1-7.

[149] KSC-BC-2020-07, Transcript 20 October 2021, page. 1075, l.2-19; Exhibit P00090, Annex 2.

309. Further, the samples of "Indicia suggesting Confidentiality" in Batch 1 shown in Annex 2 of W04841's Declaration of 7 May 2021[150] do not on their face establish that the document concerned was confidential except where the word "confidential" appears on them. The majority of the cover letters in Batch 1 were not marked as confidential.[151] In any event, the fact that 'confidential' is written on a document does not necessarily mean that it holds this classification, nor does it mean that it is authentic.

310. It appears not to have been considered for example, where the word 'confidential' was purported to be attached to a document, whether there was proper authority to classify the document as confidential or whether the process of classification, was lawful or whether the classification of confidentiality was necessary.[152] W04841 did not check whether persons who had designated Serbian documents as confidential had the authority to do so.[153]

Batch 2

[150] Exhibit P00090, Annex 2.

[151] KSC-BC-2020-07, Transcript 20 October 2021, p.1077, l.15-17.

[152] *Ibid*., p.1059, l.11-18.

[153] *Ibid*., p.1062, l.5-19.

311. All but six pages in Batch 2 consist in the main, of Court judgments which do not bear any logo or marks typical of SITF or SPO documents.[154]

312. The SPO has not provided any evidence that would suggest that these pages are "*secret information disclosed in official proceedings*". Accordingly, the SPO has failed to discharge their obligation to prove their case beyond all reasonable doubt.

313. The remaining 6 pages also appear within Batch 1[155] and therefore, the submissions in respect of Batch 1 above apply *mutatis mutandis*.

Batch 3

314. Batch 3 consists of two incomplete copies of a purported SPO internal work product.[156] Most of the pages are marked "confidential" on the top right corner and on the bottom left corner.[157] Batch 3 includes references to witness interviews carried out by SITF or SPO which generally include witness names.[158] Witness W04841 identified references to approximately 150 witnesses or potential witnesses in both sets.[159]

[154] Exhibit P00086, para. 21; Exhibit P00104.

[155] Exhibit P00086, para. 22.

[156] *Ibid*., para. 29.

[157] KSC-BC-2020-07, Transcript 18 October 2021,p.928, l.12-14; Exhibit P00090, paras. 8(iii) and 9(iii).

[158]KSC-BC-2020-07, Transcript 19 October 2021,page. 949, l.1-8.

[159] *Ibid*., page. 950, l.10-25.

315. As of 22 September 2020, the names of witnesses, potential witnesses, other individuals and related information and evidence included in Batch 3 were not publicly disclosed in the framework of SITF/SPO investigations or proceedings of the Specialist Chambers.[160]

316. However, when asked to name those witnesses, W04841 refused to do so, and the objection raised by the SPO sustained.[161] However, the SPO case remains that revealing the names of witnesses constitutes an act falling within the auspices of Count 5 and therefore is trite law that the Count can only be established beyond all reasonable doubt if the witnesses are identified; otherwise, no-one knows who the witnesses are being referred to, and therefore an assessment cannot be made as to whether the relevant names were to remain confidential or otherwise.

317. Certain questions were allowed in cross-examination by Counsel for Hysni Gucati.

318. Of the names offered, W04841 was only able to provide information on a [REDACTED], and an [REDACTED],[162] confirming that [REDACTED] was included within Batch 3.[163]

[160] Exhibit P00086, para. 30.

[161] KSC-BC-2020-07, Transcript 25 October 2021,p.1310, l.18-25, p.1311, l.1

[162] *Ibid*., p.1317-1321.

[163] KSC-BC-2020-07, Transcript 19 October 2021,p.953, l.21-22; Exhibit P00086, para. 31.

319. However, this does not account for the fact that [REDACTED] was already publicly known to have engaged with those investigating matters within the mandate of the SITF and the SPO by his own public admission.[164]

320. Further, W04841 confirmed that she had not checked whether his status as a witness or potential witness had already been publicly disclosed.[165]

321. Further, W04841 confirmed that [REDACTED] also featured in Batch 3,[166] [REDACTED] confirmed his status as a witness or potential witness in SITF/SPO proceedings in an interview with RTK.[167] Again W04841 did not check whether his status was publicly disclosed.[168]

322. In relation to the other publicly known witnesses or potential witnesses, W04841 was not able to say whether they appeared in the Batches, but she did not make any checks on whether witnesses or potential witnesses had made their status publicly known.[169]

323. Again in terms of Batch 3, W04841 gave evidence that the documents contained within included the identities of witnesses who are the subject of strictly confidential and *ex parte* non-disclosure orders in proceedings before

[164] Exhibit DHG0067-DHG0067.

[165] KSC-BC-2020-07, Transcript 25 October 2021,p.1315, l.15-18.

[166] *Ibid*., p.1317, l.15, p.1318, l.1.

[167] *Ibid*., p.1317, l.15, p.1318, l.1.

[168] *Ibid*., p.1318, l.10-12.

[169] *Ibid*., p.1317, l.1-11.

the Specialist Chambers and/or strictly confidential and *ex parte* non-disclosure requests pending in proceedings before the Specialist Chambers.[170] In two cases the Specialist Chambers had ordered that identities contained in an Indictment not be disclosed and in a case in which the Indictment had not been confirmed there was a request by the SPO for non-disclosure.[171]

324. However, the two orders of the Specialist Chambers were not made public until after the seizure of Batch 3;[172] and further, the request for interim non-disclosure was still pending at that time.[173] Witness W04841 did not conduct research into whether the names of those who were the subject of the orders and the request had already been public disclosed.[174]

325. Witness W04841 goes on to give evidence that Batch 3 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.[175]

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[170] Exhibit P00086, para. 32; KSC-BC-2020-07, Transcript 19 October 2021, p.953, l.3 to p.954, l.4.

[171] KSC-BC-2020-07, Transcript 19 October 2021, p.954, l.5-25, p.955, l.1-5.

[172] KSC-BC-2020-07, Transcript 25 October 2021, p.1322, l.12-25, p.1323, l.1-25, p.1324, l.1-121, p.1325, l.1-13, p.1326, l.1-11.

[173] *Ibid*., p.1324:, l.14-25, p.1325, l.1-12.

[174] *Ibid*., p.1326, l.12-24.

[175] Exhibit P00086, para. 33; KSC-BC-2020-07, Transcript 19 October 2021, p.961, l.10 to p.964, l.4, p.965 l.24 to p.960, l.12.

326. However, W04841 did not check whether any of the orders for protective measures had been rescinded or amended pursuant to Article 222(a) of the 2013 KCC,[176] and therefore the position at the time of the said disclosures was not, and has not been, confirmed.

327. Witness W04841 went on to state that Batch 3 included 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, that they included 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 of investigations and judicial proceedings and that other information referenced was provided on condition of confidentiality and solely for the purpose of generating new evidence with any other use or disclosure requiring provider consent.[177]

328. However, and again like the aforesaid, W04841 did not check whether any of the letters in which materials were provided subject to confidentiality and use conditions had subsequently been subject to amendment or waiver by the international organisations or entities concerned.[178] Accordingly the position

[176] KSC-BC-2020-07, Transcript 25 October 2021, p.1333, l.8-15.

[177] Exhibit P00086, para. 34; KSC-BC-2020-07, Transcript 19 October 2021, p.967 l.9 to p.970, l.25.

[178] KSC-BC-2020-07, Transcript 25 October 2021, page. 1339, l.21-25.

at the time was not and has not been confirmed and thus a further deficiency undermining the SPO case is identified.

329. Further, the third witness called by the SPO, W04866 (Halil Berisha), was a journalist who published certain documents, the justification given by that witness being that it "*was in the public interest*" to do so.[179] No criticism of the witness is made for the actions taken; however, the actions of the SPO thereafter are a cause for significant concern in respect of an apparent inconsistent, even double standard, being adopted.

330. The SPO has been clear in its position that it does not consider this witness, or any other journalist at this stage, to have committed a relevant criminal offence by publishing or making public documents, and therefore it naturally follows that the SPO do not deem these documents to be secret, or the information contained therein to be secret, else otherwise, such individuals would naturally face criminal charges.

331. In the alternative, the SPO might tacitly accept that the action of publication by the witness was indeed in the public interest.

332. The question, therefore, is how the two events are separated in terms of criminality i.e. if the alleged actions of the Defendants are mirrored by those

[179] KSC-BC-2020-07, Transcript 27 October 2021, p.1584, l.6, p.1589, l.4, p.1601, l.6, p.1603, l.20, p.1604, l.5 and l.19-22, p.1605, l.9-15, p.1609, l.11-13, p.1612, l.1-14, p.1613, l.16-25, p.1628-1629.

of W04866, and/or any other journalist, why is it that the actions of the Defendant(s) are deemed to be criminal in nature.

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

334. The above, coupled with the fact that in respect of the majority of the documents, the SPO has provided no firm evidence that they were even subject to any restriction on disclosure.

335. As to the remainder, whilst the SPO may in some instances have been able to establish that limitations were imposed on the distribution of the information that they contain, either it has not shown that they were in force at the time that the Defendant is said to have made the disclosures, or, the SPO has not taken account of that which is already within the public domain.

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

Count 6 – Violating the Secrecy of Proceedings – Protected Persons

337. Count 6 is specific in terms of the allegations of violating the secrecy of proceedings in terms of the addition of the 'unauthorised revelation of the identities and personal data of protected witnesses.

338. It ought to be noted that Count 6 relates to revealing the identities and personal data of 'protected witnesses', and although consistent with Article 392(2) of the KCC which refers to "*a person under protection*", it is a narrower set of individuals that all those regarded by the SPO as witnesses or potential witnesses, and the details that it might routinely treat as confidential.

339. This is the position in accordance with the law, despite the erroneous and inappropriate attempt by the SPO to broaden the interpretation of the law per paragraph 198 of its Pre-Trial Brief,[180] which is, on a proper construction of the relevant law, demonstrably incorrect and therefore ought to be dismissed.

340. In terms of the evidence adduced, and as has been highlighted in respect of Count 5 above, Batch 1 is said to have included documents designated or to be treated as, confidential.

[180] KSC-BC-2020-07/F00181/A01, Specialist Prosecutor's Pre-Trial Brief in the case against Hysni Gucati and Nasim Haradinaj, 9 April 2021, para 198.

341. Witness W04841 sought to suggest that the leak contained 'over 100 coordination requests,[181] notably, SITF requests made of others for assistance in ongoing or anticipated matters.[182]

342. W04841 goes on to suggest that as of 8 September 2020, they were not, to her knowledge, publicly disclosed previously, nor were SPO staff-members entitled to disclose the same.[183]

343. W04841 went on to give evidence, that some documents included a list of witnesses,[184] and further, in some instances, the names, last known addresses and telephone numbers, the last known professional functions of witnesses and potential witnesses were included in the confidential annexes to those same request being made of third parties.[185]

344. Further, some Serbian documents that were included are said to have contained the names of SITF, SPO witnesses or potential witnesses, and the statements provided by some of these individuals.[186]

345. As has been submitted on numerous occasions, and will continue to be referred to where relevant, it must be borne in mind that in the main, there is

[181] KSC-BC-2020-07, Transcript 18 October 2021, p.862, l.5-10.

[182] *Ibid*., p.861, l.2-4.

[183] *Ibid*., p.861 l.5 to p.862, l.4.

[184] *Ibid*., p.873, l.6-9.

[185] *Ibid*., p.884, l.2 to p.885 to l.6, Exhibit P00086, para. 10

[186] *Ibid*., p.886, l.5 to p.887, l.7.

no evidence of the witnesses only the SPO's 'say so' for what those documents contained as there has been no process of verification either by the Defence, the Pre-Trial Judge, or the Trial Panel.

346. Again, the Defence are not prepared to take the submissions in respect of the 'content' of the batches on trust, but, without prejudice to this position, a position that is submitted to be a fundamental and fatal flaw to the SPO case, it is submitted that the evidence adduced by the Prosecution in relation to Batch 1 purports to demonstrate that it includes information as to the identities and personal of witnesses and potential witnesses, however, that same evidence has not, nor does it, establish that any of the witnesses contained within that Batch were in fact 'protected witnesses' within the meaning of the statutory framework.

347. In terms of Batch 2, it would appear that the only document that includes the names and personal data of an individual is a page of a Serbian document which also appears in Batch 1[187] and thus the submissions above are reaffirmed in respect of Batch 2.

348. W04841's evidence in respect of Batch 3 suggests that the leaked documents contained the identities and personal data of two groups of witnesses who are to be regarded as being 'protected.

[187] Exhibit P00086, para. 27.

349. In the first instance, those subject to protective measures ordered by the domestic Courts in Kosovo, and those subject to non-disclosure orders or requests before the Specialist Chambers itself.

350. W04841 expands her evidence, and suggests that the documents within Batch 3 include 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 witness identities, the assignment of pseudonyms, and the non-disclosure of witness records.[188]

351. Again however, the SPO case is flawed, as no checks had or have been undertaken to confirm whether any of the orders had been rescinded or amended pursuant to Article 222(a) of the KCC.[189]

352. Further, W04841 went on to state that Batch 3 included the identities of witnesses who were already subject to strictly confidential and *ex parte* non-disclosure orders in proceedings before the Specialist Chambers and/or strictly confidential and *ex parte* non-disclosure requests pending proceedings before the Specialist Chambers.[190]

[188] Exhibit P00086, para. 33; KSC-BC-2020-07, Transcript 19 October 2021, p.961, l.10 to p.964, l.4, p.965, l.24 to p.960, l.12.

[189] KSC-BC-2020-07, Transcript 25 October 2021, p.1333, l.8-15.

[190] Exhibit P00086, para. 32; KSC-BC-2020-07, Transcript 19 October 2021, ,p.953, l.23 to p.954, l.4.

353. In two such instances, the Specialist Chambers had ordered that identities contained in an Indictment were not to be publicly disclosed, and further, in a case in which the Indictment had not been confirmed there was a request made by the SPO for non-disclosure.[191]

354. The position is however not so straight forward as the case advanced by the SPO, a narrative that ignores the inconvenient facts that only arise upon further analysis, and facts that the Defence submit add a further fundamental and fatal flaw to the case being advanced by the SPO.

355. In the first instance, the two Specialist Chambers orders referred to above, were not made public until after the seizure of Batch 3;[192] further, the request for interim non-disclosure was still pending.[193]

356. In addition, and as per the position with other Batches, and for that matter, a common theme in terms of the efficacy of the SPO investigations more generally, W04841 did no conduct any research, it would seem, into whether the names of those who were the subject of the orders and the request, had already been publicly disclosed, and therefore, were already within the public domain at the relevant time.[194]

[191] KSC-BC-2020-07, Transcript 19 October 2021, p.954, l.5 to p.955, l.5.

[192] KSC-BC-2020-07, Transcript 25 October 2021, p.1322, l.12 to p.1324, l.12, p.1325, l.13 to p.1326, l.11.

[193] *Ibid*., pages 1324, l.14 to p.1325, l.12.

[194] *Ibid*., p.1326, l.12-24.

357. Moving through the evidence further, W04841 advances that Batch 3 contained further information on witnesses or potential witnesses, in addition to these two groups of protected witnesses but this information did not imply that the persons concerned were protected witnesses.

358. Witness W04841 stated that Batch 3 included references to the statements of witnesses and other documents and information provided to the SPO by international organisations and other relevant entities subject to confidentiality and use restrictions, however, she failed to state or further, imply, that the witnesses were protected in the sense as defined in the aforementioned statutory framework.[195]

359. The same can be said for W04841's evidence wherein she states that she identified references to approximately 150 witnesses or potential witnesses,[196] but again, there is no indication, or evidence advanced that any, apart from the two groups previously mentioned above were protected.

360. The simple position is that Count 6 is limited to the disclosure of personal information on 'protected witnesses', and therefore, the SPO case can only be based on the two groups referred to in Batch 3. However, as much as this may be the case, there are clear grounds, for the aforesaid reasons, for doubting

[195] Exhibit P00086, para. 34; KSC-BC-2020-07, Transcript 19 October 2021, p.967, l.9 to p.970, l.25.

[196] KSC-BC-2020-07, Transcript 19 October 2021,p.950, l.10-25.

whether in fact the orders made in relation to those individuals within the 2 groups, were in fact binding on the Accused at the relevant times.

361. The second element of Count 6 relates to Article 392(3) of the KCC which provides for the imposition of more severe penalties if the offence as provided for within Article 392(2) results in *either* serious consequences for the person under protection *or* the criminal proceedings being made impossible or severely hindered. It is simplistically therefore, the aggravated form, which, it is submitted, must be fact specific.

362. The SPO maintains that from 24 September 2020, the SPO implemented a plan to contact those whose names were mentioned in the leaked documents,[197] reminding ourselves that following the first and second leak no action was taken.

363. SPO Witness W04842 (Miro JUKIĆ) gave evidence to the effect that those he contacted were very upset, and as noted, 'screaming', with "*some saying 'don't contact me anymore'*".[198]

[197] KSC-BC-2020-07, Transcript 28 October 2021, p.1694, l.2-19, p.1700. l.7-14.

[198] *Ibid*., p.1702, l.24 to p.1703, l.4.

364. W04842 goes on to say that in response, the SPO provided new "*phone numbers and new phone devices and prepared emergency risk plans and relocated some people from Kosovo*".[199]

365. Before this exercise commences, the SPO maintain that a number of people had been in contact with the SPO and expressed concern regarding the disclosures.[200]

366. However, and again at the risk of repeating submissions made in previous sections of this Brief, W04842 only reported what he says unnamed individuals told him regarding the apparent reactions to the disclosure of their identities. No such individual has ever provided a statement, given evidence, or been subject to cross-examination on what has been reported on their behalf, and thus any and all evidence of this nature is unchallengeable hearsay. This reduces the evidential value considerably, particularly given the obvious prejudice caused to the Defendant who has been precluded from challenging that evidence.[201]

[199] *Ibid*., p.1707, l.5-16. – This comment must be balanced with the answer to the question asked by Judge Barthe, with W04842 confirming that only two were relocated, without providing any details as to the specifics as to why.

[200] KSC-BC-2020-07, Transcript 28 October 2021, p.1704, l.17 to p.1705, l.3, p.1714 (Exhibit P00131), p.1723, l.15 to p.1724, l.12 (Exhibit P00134).

[201] KSC-BC-2020-07/F00334, Decision on the Prosecution Request for Admission of Items through the Bar Table, 29 September 2021, para.93.

367. In determining the question of whether the disclosure of information on the identities and personal data of protected witnesses had the consequences set forth within Article 392(3) of the KCC, where it is found that such disclosure occurred, the Defendant not accepting that it did, the Trial Panel are being asked to determine the answer to that question entirely on the testimony of W04842, a witness who has already shown himself to be wholly unreliable, and further, economical with the facts.

368. His credibility has been undermined to such an extent that he ought to be dismissed, but for the sake of clarity we would again draw attention to the salient points in his evidence that deal with credibility.

369. On 28 October 2021, when asked how many people had told him that they had received threats in or after September 2020, at first, he suggested that he could not recall, but upon being subjected to further questioning, he said 'very few'.[202]

370. However, on 4 November 2021 he changed the position again referring to "*I can recall majority but not numbers*".

371. A similar position arose in terms of the number of witnesses who fell to be relocated, purportedly on account of the disclosures. He initially suggested

[202] KSC-BC-2020-07, Transcript 28 October 2021, p.1762, l.4-14.

that it was 'more than one', however, upon being pushed, he changed this to "*two*".[203]

372. Of course, two is more than one, by a factor of one, however, the tone of the evidence and the reluctance to give exact numbers initially was a clear ploy, a tactic on the part of the witness in the hope that an inference would be drawn that the number of was significant. The change from one to two, undoes this desired inference, and thus the ploy is laid bare for all to see.

373. Counsel for Gucati subjected W04842 to lengthy cross-examination, and in doing so, revealed numerous inconsistencies and implausibilities in his explanations for why the dates on the Official Notes that he wrote concerning the contacts made with those who had allegedly had their names disclosed, bore no relation to either the date of contact nor the date of them being uploaded to the SPO evidence/document processing software.[204]

374. To come back to the comments of the witnesses, one potential witness is suggested as stating, upon being told that their name had been disclosed "*Don't contact me anymore*",[205] with a further witness said to have told that he

[203] KSC-BC-2020-07, Transcript 4 November 2021, p.1833, l.21 to p.1834, l.19.

[204] KSC-BC-2020-07, Transcript 4 November 2021, p.1841-1860, p.1864-1869.

[205] KSC-BC-2020-07, Transcript 28 October 2021, p.1702, l.24 to p.1703, l.4.

would refuse to continue to cooperate with the SPO unless his family were re-located.[206]

375. Again, the suggested reactions could not be tested in cross-examination and accordingly, are wholly insufficient on their own to establish that the disclosure made the criminal proceedings impossible or severely hindered them. At its most base level, the SPO have not even submitted any evidence to demonstrate that a relevant individual was so essential to an investigation and/or prosecution, that the absence of that witness would make such proceedings impossible or severely hinder the same.

376. In reply to a question from Judge Mettraux, W04842 stated that in his experience as a witness protection officer, disclosure of a witness's name or personal details was a potential cause for dissuading such an individual from further engagement with investigation or prosecution; he went on to say that this had happened in relation to the leak of information in September 2020.[207]

377. The Defence do not seek to question the experience of W04842 in working on security and the protection of witnesses as his experience is clearly extensive in terms of positions that he has held.[208]

[206] Exhibit P00135.

[207] KSC-BC-2020-07, Transcript 4 November 2021, p.1905, l.9-17.

[208] KSC-BC-2020-07, Transcript 28 October 2021, p.1690, l.1 to p.1692, l.11.

378. However, his assertions and propositions are entirely unspecific and simply a generalised position of what 'could' happen.

379. As a consequence, and taken at its highest, it merely suggests that an individual or individuals, may have been dissuaded from further engagement with the investigation and/or prosecution.

380. Of itself, this falls short of the level of harm to criminal proceedings required under Article 392(3) as there has been no evidence adduced as to the consequences to any such investigation and/or prosecution.

381. No evidence has been given as to the importance to any such investigation and/or prosecution that such a witness was.

382. Again to rehearse a position, the SPO case for 'aggravated disclosure' of the identities or personal data, pursuant to Article 392(3) rests on those reports of W04842, concerning his apparent conversations with unnamed individuals. It was and remains wholly unclear as to whether of the individuals subject to such calls were protected witnesses in the requisite sense at the time of the disclosures.

383. To conclude, the case for the aggravated form of the offence alleged, depends wholly on the credibility of W04842, a witness who initially maintained that the SPO had no office in Prishtinë, a wholly implausible suggestion, and whose evidence was wholly in the main, unreliable. Even where his

testimony can be deemed to be untainted, it remains untested hearsay and therefore of limited, if any, evidential value.

384. Having considered the evidence advanced by the SPO, we must consider the evidence of the Defendant, it being essential, both for the elements of the crime themselves, and the submitted modes of liability, that the position of the Defendant is noted as per interviews given, for example:

> "*I do not think that it is a criminal offence to reveal the names of the officials. I mean,* [REDACTED] *[sic], these. These are official people. We are not talking about individuals here. We have never given names"*[209]
>
> and
>
> "*…not mentioning names other than prosecutors*"[210]
>
> and
>
> "*NH repeats that warned journalists not to publish names of witnesses and stated that he is aware publishing their names would peril their lives*"[211]
>
> and

[209] KSC-BC-2020-07 081344-02-TR-ET, p.7.

[210] *Ibid.*, p.13.

[211] KSC-BC-2020-07 089919-089927, p.9.

> *"and we are not responsible for anything, as long as no names are revealed. We do not want to disclose any names…but willing to disclose names of SPO officials"*[212]
>
> *"I won't talk about the Albanian, or Serbian and Roma witnesses…We won't talk about them and we won't mention their names."*[213]

385. Further in the statement of an SPO member[214] dated 17 September 2020:

> *"Nasim Haradinaj said at the press conference he warned journalists not to publish names and said he was aware that publishing the witnesses' names would peril their lives."*[215]

386. Secondly, the Trial Panel must take account of the fact that a number of individuals who are said to be protected are in fact publicly known within Kosovo to be witnesses or potential witnesses. Further, certain of those individuals have publicly gone on record as to their status and therefore, any release of an individual's name is moot when that name is already within the public domain.[216]

[212] KSC-BC-2020-07 081979-07-TR-ET, p.3.

[213] *Ibid*.

[214] Respecting the order of the Trial Panel the witness is not named here.

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

[216] KSC-BC-2020-07, Transcript 25 October 2021, p.1313-1321.

387. Again therefore, could the Trial Panel be satisfied beyond all reasonable doubt that the Defendant is guilty of this count on the Indictment. It is respectfully submitted that the answer must be in the negative and the Trial Panel is invited to acquit the Defendant of this Count.

VI. DEFENCE CASE

388. The Defence case can be split into three limbs, all of which can read in isolation or in conjunction with each other. The net result is the same however, that being the SPO have summarily failed to prove their case beyond all reasonable doubt in respect of each and every count on the Indictment and thus the Defendant must be acquitted.

389. The first limb relates specifically to the inadequacy of the SPO case, and its failure to prove and therefore satisfy the elements of the crime. There is no intention to address this limb further within this section, it being considered in the previous sections with reference to the evidence presented.

390. The second limb of the Defence raises the issue of 'Entrapment' or 'Police Incitement', which although not being capable of amounting to a complete 'Defence' to allegations, where Entrapment is found, it does result in evidence having to be excluded and thus the proceedings would amount to an Abuse of Process which again, must result in the Defendant being acquitted.

391. The Third and final limb of the Defence case, is that where the Defendant is found to have taken certain actions or acted in a particular way, any such actions were on the basis of acting in the 'Public Interest' and thus his actions were justified, again leading to the position that he must be acquitted.

Entrapment

392. The legal position in terms of 'Entrapment' and whether the same is available, has been the subject of submissions invited by the Trial Panel on a previous occasion, however, the position also falls to be repeated here.

393. To reaffirm the legal position, the Defence maintains that as much as the Kosovan Criminal Procedure Code does not explicitly refer to 'Entrapment' as a defence to a criminal charge, this is not fatal, nor is it even relevant for the purposes of the instant proceedings, given that the issue is referred to within the Rules albeit not explicitly defined as such.

394. Further, and of equal, if not more importance, is that the European Court of Human Rights has explicitly recognised 'Entrapment' as a legitimate defence and therefore, with both Kosovo and the Specialist Chambers being explicitly bound by the principles of the ECHR and the jurisprudence that flows therein, Entrapment can be legitimately raised for the purposes of proceedings before the Specialist Chambers, there being no legal or procedural bar to doing so.

395. In terms of the domestic position, it is perhaps a question of terminology.

396. At Article 14 of the KCC,[217] recognition is given to circumstances where an offence may be committed under the influence of 'violence or threat'.

397. Further, at Article 15, recognition is given to 'Acts committed under coercion'.

398. It is submitted that 'Entrapment', 'Coercion', 'Incitement', and 'Influence', in the instant case are interchangeable terms in the context of whether there is a basis in the domestic law to raise such a Defence. It is of course accepted that there are differences in terms of elements to be satisfied, however, that is the factual basis, rather than the legal basis that demonstrates such a defence exists.

399. Further, the point should also be read in the context of the Defence not necessarily seeking to suggest that in raising 'Entrapment', that a complete Defence to the indicted offences can be raised, but rather, that the issue goes to the admissibility of evidence and the availability of a fair trial.

400. Article 249 of the Criminal Procedure Code of the Republic of Kosovo,[218] dealing with 'Objections to Evidence' notes as follows:

> *1. Prior to the second hearing, the defendant may file objections to the evidence listed in the indictment, based upon the following grounds:*

[217] Law No. 04/L-129.

[218] Law No. 04/L-123.

> *1.1. the evidence was not lawfully obtained by the police, state prosecutor, or other government entity;*
>
> *1.2. the evidence violates the rules in Chapter XVI of the present Code;*
>
> *1.3. there is an articulable ground for the court to find the evidence intrinsically unreliable.*
>
> *2. The state prosecutor shall be given an opportunity to respond to the objection verbally or in writing.*
>
> *3. For all evidence where an objection has been filed, the single trial judge or presiding trial judge shall issue a written decision with reasoning that permits or excludes the evidence.* (emphasis added)

401. There is therefore as basis upon which evidence can be rendered inadmissible if it has not been lawfully obtained, the Defence submitting that the circumstances being advanced would constitute a situation where purported evidence of the commission of a crime has not been lawfully obtained on the basis that the crime itself was committed at the instigation and/or with the coercion of a State Agent.

402. It is therefore respectfully submitted to be clear that there is a basis to raise the issue of Entrapment as a Defence, albeit that the Defence is not referred to explicitly in the Statutory authority, its principles and consequences are

recognised and thus the defence is legitimate and one that has appropriate legal character for the purposes of these proceedings.

403. In terms of the second issue referred to above, it is respectfully submitted that the question of a legal basis and/or authority domestically is not one that needs to be considered, because of the position of the ECHR and the jurisprudence of the European Court.

404. The European Court recognises 'Entrapment' and/or 'Incitement', and accordingly, that recognition ought to extend to the Specialist Chambers, having regard to the Law on Specialist Chambers and Specialist Prosecutor's Office[219] at Article 3(2)(e):

> *"2. The Specialist Chambers shall adjudicate and function in accordance with.*
>
> > *(e) international human rights law which sets criminal justice standards including the European Convention Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, as given superiority over domestic laws by Article 22 of the Constitution.*(emphasis added)

[219] Law No.05/L-53.

405. The basis for the Defence being capable of being raised is therefore respectfully submitted to be settled law.

406. Reference has previously been made in the Pre-Trial Briefs of both Defendants and supplanted by oral submissions, to the case of *Ramanauskas v. Lithuania [GC]*,[220] where tests were developed, in terms of what constitutes Entrapment and/or Incitement, noting in particular that it was deemed to fall to the prosecution to prove that there was no incitement, provided that the Defendant's allegations are not wholly improbable.

407. Further, where there is *prima facie* evidence of entrapment, the judicial authorities must examine the facts of the case and take the necessary steps investigate the issue and determine whether there was any incitement.

408. The SPO in both written and oral submissions have suggested that there is no such *prima facie* evidence and therefore the defence cannot be brought.

409. The position of the SPO is not the arbiter of whether there is evidence or otherwise. The SPO are of course able to refute an allegation made, just as the Defendant can, however, to go beyond this is beyond the mandate of the SPO.

410. Such a position is one that has plagued these proceedings from start to finish, in that the SPO have adopted the position that the only evidence the Defence

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

are allowed to see and consider is that which it deems appropriate. It has played fast and loose with disclosure rules and seemingly adopting the position akin to that of the Trial Panel when seeking to determine what is relevant or otherwise.

411. The SPO has from the very beginning fought to prevent the Defence from being able to scrutinise the evidence:

a. refusing to disclose the documents subject of the Indictment;

b. refusing to disclose statements of individuals said to be affected;

c. refusing to disclosure the statements of SPO staff who have purported to give evidence of the consequences of the SPO leaks;[221]

d. refused to call witnesses and instead attempted to have their evidence adduced in circumvention of any and all rules of evidence;

e. refused to disclose evidence from those who have said they have information concerning the leaks.[222]

[221] KSC-BC-2020-07/F00442 and KSC-BC-2020-07/F00479; KSC-BC-2020-07/F00517, 520, and KSC-BC-2020-07/F00533; KSC-BC-2020-07/F00534 and KSC-BC-2020-07/F00541.

[222] *Ibid*.

412. The reality, and despite the protestations of the SPO, these issues have had a direct effect on the fairness of the trial proceedings, to the extent that the Defendant has not been afforded a fair trial.

413. The issues concerning the Defence of Entrapment fall into this category.

414. Countless disclosure requests have been made in an effort to inform the defence and to enable it to scrutinise the evidence. These have been refused.

415. Accordingly, there is no basis upon which the SPO can submit, or for that matter, the Trial Panel find, that the Defence has not raised a *prima facie* case of Entrapment when it is entirely down to the belligerence of the SPO that has prevented evidence over and above that which has been adduced, from being considered.

416. It is wholly inappropriate to rule that the Defence has not been established when it is the SPO that has prevented the same on the basis of its legally unsustainable position.

417. In conjunction with the issues surrounding disclosure and the lack thereof, it is also appropriate to consider the actions taken by the SPO following the 'leaks' as it is the lack of action that is relevant, and further, raises significant questions as to the intention of the SPO.

418. It would appear clear that at no stage was any positive action taken by the SPO following the three leaks despite the SPO being well aware that further disclosures had been promised, and further, the domestic police of Kosovo had been explicitly ordered not to investigate or involve themselves in any investigation.[223]

419. Serious questions must be asked of the SPO as to why this position was taken.

420. Why were no individuals of note interviewed as to what occurred following each leak?

421. Why was the CCTV from surrounding stores and buildings not seized?

422. Why were the offices not put under surveillance?

423. As the Defendant advances in his evidence:

> *"Your Honour, they could have apprehended the person who brought them any time they wanted. They could have brought people there to apprehend that person, and that why I have suspicions that you never wanted that."*[224]

424. The Defendant is correct in posing these questions, and it is notable that the SPO have not at any time answered for this failure.

[223] KSC-BC-2020-07, Transcript 14 January 2022, p.3062, l.16-23; See also DHG0181, para.10.

[224] KSC-BC-2020-07, Transcript 13 January 2022, p.2956 to p.2957.

425. Further, the Defendant asks "*Why didn't you follow him? Why didn't you guard the building?*"[225]

426. Again, the questions are wholly relevant and raise a suspicion that no action was taken as it suited the SPO not to take any action, the leaks conveniently stopping upon the arrest of the Defendant and his co-defendant.

427. In any event, and as has been submitted in previous filings,

428. In sum, the ECtHR recognises Entrapment and/or Incitement, and that where this is demonstrated, it may constitute a violation of Article 6(1), accordingly, the legal basis for advancing the defence is established.

429. In *Khudobin v. Russia*[226] the Court found that:

> "*where an accused asserts that he was incited to commit an offence, the criminal courts must carry out a careful examination of the material in the file, since for the trial to be fair within the meaning of Article 6(1) of the Convention, all evidence obtained as a result of police incitement must be excluded.*"[227]

430. Further in *Ramanauskas*,[228] the Court ruled:

[225] *Ibid.*

[226] *Khudobin v. Russia*, no. 59696/00, 26 October 2006, para.135.

[227] *Ramanauskas v. Lithuania*, no. 74420/01, 5 February 2008, para.60.

[228] *Ibid.*

> *"where the information disclosed by the prosecution authorities does not enable the Court to conclude whether the applicant was subjected to police incitement, it is essential that the Court examine the procedure whereby the plea of incitement was determined in each case in order to ensure that the rights of the defence were adequately protected, in particular the right to adversarial proceedings to equality of arms."*[229]

431. It is abundantly clear in the instant case that there has been a failure to undertake such an examination, careful or otherwise, instead the Trial Panel has preferred to rely upon the SPO's assessment of the evidence and not taken the required added step of considering that evidence itself so as to make a determination.

432. The reality of the position, therefore, is that the entire proceedings are fundamentally flawed and have not been undertaken in accordance or adherence to the Defendant's rights per Article 6 of the ECHR.

433. To again reference *Ramanauskas*:

> *"Article 6 of the Convention will be complied with only if the applicant was effectively able to raise the issue of incitement during his trial, whether by*

[229] See *Edwards and Lewis v. the United Kingdom* [GC], nos. 39647/98 and 40461/98, §§ 46-48, ECHR 2004-X, and, mutatis mutandis, Jasper v. the United Kingdom [GC], no. 27052/95, §§ 50 and 58, 16 February 2000.

> *means of an objection or otherwise. It is therefore not sufficient for these purposes, contrary to what the Government maintained, that general safeguards should have been observed, such as equality of arms or the rights of the defence.*"[230]

434. The question therefore is whether the Defendant has "*effectively*" been able to raise the issue.

435. The Defendant would submit that on account of the position taken towards disclosure and the abject failure of the SPO to disclose either the evidence requested, or any details (redacted if necessary) concerning the investigation into those responsible for the leaks, and further, the complete refusal to answer any and all legitimate questions concerning the leaks themselves, that the Defendant has been precluded from effectively raising the issue over and above merely stating that it forms part of the Defence.

436. Further, this must also be read with the fact that the Trial Panel has not examined the entire case file, as per aforementioned submissions, instead being content to accept the position of the SPO in terms of content, relevance, and effect. In short, the obligations of the SPO and the Trial Panel in respect of this issue and the Defendant's fair trial rights have not been properly discharged.

[230] *Ramanauskas v. Lithuania,* no. 74420/01, 5 February 2008, para.69.

437. Finally:

> "*It falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any such incitement*".[231]

438. The position of the SPO has steadfastly been that there is no evidence of such incitement, however, the same steadfast position has been that the SPO has made this determination and that the Defence are not entitled to review any evidence so as to make its own decision.

439. The position of the SPO can be rejected at this point, and therefore, it is the Trial Panel who are obliged to consider all evidence available, in accordance with paragraph 284 above and *Khudobin v. Russia*,[232] something that thus far it has refused to. Accordingly, it is submitted that there can be no finding at this stage that the plea is one that is '*wholly improbable*', and thus again without meaning to advance a circular argument, it is now for the SPO to prove that there was no such incitement/entrapment; something which it has singularly failed to do.

[231] I*bid*., para.70.

[232] *Khudobin v. Russia*, no. 59696/00, 26 October 2006, para.135.

440. In ignoring the issue beyond its belligerence, the SPO has failed to disprove the position of the Defence, and thus it is submitted that in accordance with *Ramanauskas et seq.*, all evidence stemming from the same must be ruled inadmissible, the entirety of proceedings amounting to an abuse of process if the evidence is admitted and considered.

Public Interest Defence

441. The third limb of the Defence case, is that any action(s) that are found to have been taken by the Defendant, were done so in the context of the 'Public Interest' and were therefore fully justified as protected disclosures.

442. The Defendant argued that his actions, if proven, were in the public interest in order to demonstrate that the prosecution was rotten to the very core. In this regard, there is one issue on which reasonable people cannot differ, and that is the importance of the role of responsible media, and whistleblowers, in exposing questions of public interest.

443. Like those before him, the Defendant's defence is that he was acting to prevent a greater wrong – the attempt to rewrite history to the bellicose will of Serbia. There can be no doubt that the Defendant's revelations concern matters of international public interest. The claims made that the Defendant has obstructed or otherwise interfered with the administration of justice need to be subjected to penetrating scrutiny. As part of this trial, the Defence has

sought a far more detailed explanation than the Prosecutor has given as part of its case.

444. If the SPO wish to pursue an agenda of unqualified secrecy, then it is swimming against the international tide. It must justify some of the claims it has made as part of its case, and publicly, because, as matters stand, we have seen nothing in the Prosecution Case that could be construed as an interference with the administration of justice.

445. The Defendant has at all stages of proceedings, maintained the position that he sought to shine a light on the opacity of the KSC and the SPO, highlighting the mono-ethnic nature of its investigations, its discriminatory practices, and how numerous credible massacres were being ignored purely on the basis that there was evidence that Serbian forces were responsible.

446. It is on this basis that 'public interest' is advanced.

447. The Defendant's position in respect of 'public interest' cannot however be viewed in isolation, the starting point being the SPO case, and the evidence of SPO witness W04866, the journalist at Gazeta InFokus, and the journalist that published numerous stories regarding the leaks, took possession of the documents said to have been leaked, and published copies of those documents in articles he wrote.

448. On 27 October 2021, W04866 was questioned by lead counsel for Hysni Gucati, co-accused to the Defendant.

449. The witness was asked what his interest was in attending the press conference(s). He responded that:

> "*As a media outlet, as an editorial team, they have just one aim and that is the interest of the public, of the citizens, so that they are informed of what is going on. A part of that public interest is the Special Court and the KLA war veterans. So this was an issue that concerned both the Special Court and the KLA WVA, and that is why it was of public interest and of the interest of the citizens of Kosovo.*"[233]

450. This premise was not challenged by the SPO, and in any event, it would appear trite that the Court, and the KLA, are issues of public interest.

451. The witness went further in response to questioning stating "*as I explained earlier…we looked at the public interest, and it was in the public interest to report on these issues.*"[234]

452. Again, this premise was not challenged by the SPO and again, it would appear trite that such an issue would fall within the public interest.

[233] KSC-BC-2020-07, Transcript 27 October 2021, p.1583, l.24-25; p.1584, l.1-9.

[234] *Ibid.,* p.1588, l.1-2.

453. W04866, in dealing with the specifics, in commenting on exhibit ERN 102780-ET, stated that amongst other matters, it was determined that the public would be interested to learn that the system adopted by the SPO was mostly seeking to obtain information through requests made of former Serbian police officers and Serbian Chiefs of Police to collect evidence. The position was adopted that the public had a right to know given the history between Kosovo and Serbia.[235]

454. This issue was specifically addressed in an article W04866 wrote '*How did the cooperation between the Task Force and Serbian Authorities work*?". He wrote "*we learn from the correspondence of these letters that a key role was played virtually the Serbian entire state structures who set up working groups to collect facts about alleged crimes to supply the Task Force*".[236]

455. W04866 was asked specifically about one element of that article, the lines "*The Task Force was principally in contact with Vladimir Vukčević, former chief War Crimes Prosecutor, but also* [REDACTED],". He responded that it was in the public interest to do so because they were "*high Serbian officers and were the persons that a part of the people in Kosovo know due to their statements*, and further

[235] *Ibid.,* p.1603, l.13-21.

[236] *Ibid.,* p.1604, l.7-22.

"*so these were not private persons. Since they were mentioned in these documents, so we deemed it necessary to publish them, their identity*".[237]

456. W04866 had the firmly held belief that in publishing information and documents, he was acted in the public interest, a fact not challenged by the SPO, and a fact that the SPO in confirming that the witness 'had done nothing wrong' evidently and explicitly approves of his actions.

457. Further, W04866 in writing those articles went much further than the case that is being alleged against the Defendant, and therefore, how can the Defendant have committed an offence whereas W04866 has not, and vice versa, such a position would appear to be both hypocritical and contradictory, again, a common theme that has run throughout these entire proceedings, and always to the detriment of the Defendant.

458. On a number of occasions, W04866 made contact with the SPO office in an attempt to validate the authenticity of the documents, and further, to make the SPO aware that he had those documents.[238]

459. On each and every occasion the SPO replied advising that it would not comment.[239]

[237] *Ibid.*, l.24-25; p.1605, l.1-25.

[238] P98.1, ERN 091909-091917, KSC-BC-2020-07, Transcript 27 October 2021, p.1616, l.3-9.

[239] KSC-BC-2020-07, Transcript 27 October 2021, p.1617, l.3-20, l.21-25; p.1618, l.104.

460. Further, as well as refusing to comment, the SPO at no stage asked and/or ordered W04866 or any other media outlet for that matter to return the documents, or indeed not to publish any of those documents.

461. Further, even after the first article was published, no order was given, nor request made that there should be no further publication of these documents. A failure on the part of the SPO that would appear strange given the apparent importance of the issue, and purported seriousness of the issue.

462. An issue of such seriousness that the SPO took precisely no action, before the first press conference, or immediately after it. In fact, no action, as confirmed by SPO Witness W04842, was taken until the third press conference. The SPO omission is staggering, unless that omission was for a reason.

463. The simplified position, therefore, can be said to be as follows:

a. Firstly, that an SPO witness published the evidence/information subject to these proceedings on the basis that he held an honest belief that it was in the public interest to do so;

b. Secondly, the SPO have at no stage sought to challenge this evidence, including when questioning that witness in either Examination in Chief or in Re-Examination, the public interest argument raised by

W04866 was left to stand without being contradicted by the SPO, and thus it must be deemed to be at least tacit acceptance of this fact it being a trite rule that there is an obligation to 'put your case', something that the SPO would appear to have failed to do if it is that they are to maintain that there was no public interest in publication;

c. Thirdly, W04866, in writing articles and publishing the same, including copies of documents went much further than the purported actions of the Defendant, and yet W04866 has been deemed to have behaved in an acceptable and legal manner whereas the Defendant is alleged to be criminally liable, and thus the staggering hypocrisy and bias of the SPO has been demonstrated;

d. Fourthly, the SPO took no steps to prevent any story from being published despite being aware that the documents were being held by media outlets; and

e. Fifthly, to date, the SPO have taken no steps to have those stories still readily and publicly accessible, removed from the internet, and thus the suggestion of apparent damage caused by the Defendant is wholly undermined, however, the failure to have those documents removed does suggest that there is a public interest in the information being known.

464. As part of his case, the Defendant adduced the evidence of DW1252 (Anna MYERS), on 21 January 2022, the expert witness being a recognised expert on 'Whistleblowing' and 'public interest', noting that her credentials and status as a recognised expert was accepted by both the Trial Panel and the SPO.

465. In her evidence, she refers to the definition given by Mr. David Kaye, the former UN Special Rapporteur on Freedom of Expression and Opinion, that definition being:

> *"a person who exposes information that he or she reasonably believes at the time of disclosure to be true or to constitute a threat or harm to a specified public interest, such as a violation of national, international law, abuse of authority, waste, fraud, or harm to the environment, public health, or public safety."*[240]

466. The position already alluded in respect of the involvement of journalists generally, and in the instant case specifically is considered in the abstract by DW1252, but even in the abstract, it emphasises and is in accordance with the actions said to have been taken by the Defendants.

467. DW1252 was asked:

[240] KSC-BC-2020-07, Transcript 21 January 2022, p.3112, l.13-23.

> *"if an individual has sought to raise concerns with those organisations, […] and there has been no response, then going public would be an acceptable route for them to take?"*

468. DW1252 responded:

> *"you can go to a journalist and provide it to journalists who then have their own due diligence and ethics around how they will publish the information, and that is one way in which whistle-blowers or individuals will get their information out…".*[241]

469. Further, DW1252 was asked whether an individual could still appropriately claim the status of a whistle-blower where the disclosure was being facilitated by a 'third-party' and the first party, the whistle-blower, was not known to them, DW1252 confirmed that this could be the case,[242] the salient issue for the purpose and justification for whistle-blowers being *"to ensure the free flow of information for institutional accountability and, therefore, if there are blocks where the information is not able to get to where it needs to go, and ultimately the public has a right to understand what is happening that could affect them…"*[243]

[241] *Ibid.,* p.3117, l.8-16 and l.20-21.

[242] KSC-BC-2020-07, Transcript 21 January 2022, p.3118, l.12-14.

[243] *Ibid.,* p.3120, l.9-15.

470. This position would appear to accord with the position adopted by W04866 in terms of his justification for publication i.e. the public had a right to know. Again, accepting that it is further repetition, the position adopted by W04866 has not been challenged by the SPO, nor has W04866 nor any other journalist, been subjected to any form of sanction for their actions.

471. In considering whether an individual can enjoy the status of a whistle-blower, DW1252 drew the Trial Panel's attention to the 'six principles'.[244]

472. Principle 1, and whether there was an alternative avenue, DW1252 was posed with the question "*if I had taken this to the state authorities and no action had been taken, or, as you said, if I had been attacked or criticised for taking certain action, then the public disclosure would then be protected and justified*", DW1252 confirmed that this would be the case,[245] and therefore, *prima facie*, the defendant had no alternative route given his concerns that were previously raised and been rebuffed and/or ignored, "*is there they haven't heard. So they have used it and nothing has happened. They have used it and were found – you know, that the information was…was dismissed, or – and this is where I will compare it to the workplace, but I think these are general principles – where you've seen others use*

[244] *Ibid.,* p.3126, l.17.

[245] *Ibid.,* p.3127, l.10-15.

those…those same routes and again nothing has happened or they have been attacked for using them or retaliated against in some way".[246]

473. In terms of national institutions, and the independence or otherwise of a competent authority, DW1252 referenced the jurisprudence of the European Court of Human Rights suggesting that where there are concerns about how such institutions conduct their business, including the judicial system itself and prosecutorial authorities, protections for public disclosure can be triggered on the basis that the issues are central to institutions that are in effect part of the very foundations upon which democracy is built.[247]

474. Specifically, DW1252 was asked whether if, an individual held a reasonable belief that a particular institution lacked judicial independence or that there were concerns as to the independence of a prosecutorial authority, that making a public disclosure in respect of those concerns would fall within that principle. DW1252 confirmed that this could be the case.[248]

475. Again with specific relevance to the instant case, DW1252 was asked whether "*if the objection was over a prosecutorial policy that the individual held a reasonable belief that that policy unlawful, exposing that, could that be protected*". DW1252 confirmed that it could, and further, having been asked "*so either if it was*

[246] *Ibid.*, p.3127, l.20-25; p.3128, l.1-2.

[247] *Ibid.*, p.3129, l.17-25; p.3130, l.1-9.

[248] *Ibid.*, p.3130, l.10-15.

unlawful or improper policy, that could fall within the protection", confirmed that this falls within the definition of public interest information.[249]

476. Still further, DW1252 was asked whether the issue of 'impropriety' was subject to the test of reasonable belief or something else, again, it was confirmed that it was further the individual making the disclosure 'held a reasonable belief'.[250]

477. The simple reality of the position therefore is that despite being explicitly prevented by the Trial Panel from offering an opinion as to whether the Defendant enjoyed the status of a whistle-blower, and therefore restricting the opinion given by an expert in her capacity as such an expert, DW1252 has given evidence that allows us to draw the inevitable conclusion that the Defendant, if he had attempted to address the issue through other avenues, held a reasonable belief in the impropriety, and held a reasonable belief that the actions he took were in the public interest, was acting in the capacity as a whistle-blower, or alternatively, was acting in the public interest.

478. It is accepted that such a suggestion will, and has, given the nature of the questioning by the SPO and the Trial Panel, caused much concern and

[249] *Ibid.,* p.3167, l.19-25; l.1-2.

[250] *Ibid.,* p.3168, l.17-20.

consternation, however, the protection of democracy and its fundamental tenants remain paramount.

479. It is these principles that the Defendant states caused him to act in the manner he describes in his evidence, not that he sought to obstruct the Specialist Chambers or the SPO, not that he sought to frustrate the work of the Court, not that he sought the demise of the institution, but rather, he sought a fair and transparent process that did not favour one group or ethnicity over another, and thus the Defendant favoured a central principle of the Rule of Law, that 'Justice is Blind'.

480. The Defendant confirms his position early in his evidence and directly contradicts the misleading narrative that has been woven by the SPO, the Defendant's position from the outset, was that he was concerned as to the operation of the SPO and not the institution itself:

> *"it was said that this court was going to be a court of Kosovo, and it was in the interests of the public, it was in the interest of the transparency to explain what the truth was. And what the war veterans organisation was stating publicly was not favourable for the government, for circles that were in favour of Serbia. So we became the only target, as if we were saying something that was not true while, in fact, we were telling the truth, but*

nobody wanted to know. As I said, when we were addressing criticism at them, they would continue with even bigger scandals."[251]

481. Upon being asked why issue was taken with co-operation with Serbia, the Defendant stated:

"If Serbia did not have the same approach as during the Milosevic regime, we would have nothing against it. But Serbia still has the same approach…the public needs to know the truth whatever that is. So why shouldn't we say the truth?...and the basis for democracy is transparency and public interest, and in my knowledge, these are the two basic principles of democracy" Transparency and public interest. Vukcevic is known as a prosecutor who would prosecute Albanians. So that name is very known to everybody. And look now, he is coordinator here, and this is something that is of concern for the Kosovan public. And it should be concerning also for this Prosecution here to have this person as a point of reference. How can you have as your coordinator a well-known criminal? And its not that I'm saying he's a criminal, but it is well-known that he is one."[252]

482. As was highlighted at the outset of this submission, despite there being an attempt to portray and therefore prosecute this case in isolation, it cannot be

[251] KSC-BC-2020-07, Transcript 11 January 2022, p.2711-2712.

[252] *Ibid.,* p.2712-3.

viewed in some form of vacuum, as like it or not, the circumstances of this case are directly relevant to the historical context, and both the past and current geopolitical position.

483. It must be recalled that the people of Kosovo suffered decades of oppression at the hands of a dictatorial and genocidal regime and the apparatus of the regime is in some form, still in existence today.

484. Serbia even today refuses to recognise Kosovo as an independent state, continuing to refer to it as Kosovo and Metohija, it still refuses to acknowledge the autonomy of the Kosovar people, and it still protects those subject to credible and real allegations of atrocity crimes committed either during the conflict with Bosnia and Herzegovina, or that with Kosovo.

485. Neither the Defendant, nor his legal team, seek to make any comment about the 'justness of the war' as it has been phrased quite inappropriately by the Trial Panel, but the actions of States in its aftermath, continuing today, is very relevant as that is the background to which the SPO and the KSC undertake its work. The period of occupation, the period of the conflict, the continued oppression post-conflict, are all relevant considerations to the Defendant's state of mind and evidence should be quite rightly be heard on those matters.

486. The cooperation with Serbia during investigations undertaken by the SPO are not, in and of themselves, improper; however, the opacity of the work and the

apparent commitment to justice and accountability when it is focussed on the people of Kosovo, and yet ignored when those of other nationalities are considered is inappropriate, the Defendant, when asked what his 'concerns' were regarding the SPO stating "*the mono-ethnic and arbitrary approach criminalising just one element of the war in Kosovo*".[253]

487. Such a position does undermine the Rule of Law, and casts a cloud on any such institution:

> *"Why? Even if there were crimes committed, was it only Albanians who committed that crime? Was it necessary for you to be a KLA member to commit a crime? Of course Albanians also committed crimes. Even some who were dressed – Albanians who were dressed in uniforms, Serbian uniforms committed crimes. They are also Kosovans. I am talking about Kosovan Serbs who are still hiding in Serbia and wanted by Interpol. So this is what I don't understand and what we as an organisation do not understand. We want every crime to be revealed, uncovered, but not through selection."*[254]

[253] *Ibid.*, p.2714.

[254] *Ibid.*

488. Is the Defendant wrong in seeking justice for all, seeking investigation and prosecution for all those individuals alleged to have committed crimes. The fact that this has not, and currently is not happening is a legitimate concern.

489. There may be a refusal to acknowledge the fact, but the approach being taken by the SPO is a threat to the rule of law, it is a threat to the faith people have in criminal justice institutions, and is a threat to democracy. Bias, and selectivity on the basis of affiliation, has no place in any prosecutorial or investigative authority.

490. To quote the Chief Prosecutor at Nuremberg, Justice Robert Jackson, in his opening speech:

> "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice."

491. The Defendant had the firmly held belief that he was acting in the course of the public interest, acting in the course of transparency and democratic principles, in his own words:

> *"This is the essence of why I wanted to be transparent in front of the public, because it was in the interests of the public to know that this court was selective, arbitrary…"*[255]

492. Again reference is drawn to the evidence of W04841, who confirms that not one single investigation is currently open into any Serbian national, or further, any individual who did not support or act in affiliation with the KLA. This is *prima facie* evidence of bias, selectivity, and discrimination.

493. The action undertaken by the Defendant was not the first occasion that he had sought to highlight his, and the concerns of others, his actions were those of a last resort, other avenues being pursued previously, noting that Defendant's evidence, evidence that was not rebutted:

> *"When this court was established, there was an end date envisaged which was in August 2020. So we made a request for the amendment of the relevant law for that to include to prosecute all groups for war crimes…we wanted with that request to introduce that amendments to include all crimes committed in Kosovo whoever committed them, not only by the KLA. Because not everybody in Kosovo was a member of the KLA."*[256]

[255] *Ibid.,* p.2715.

[256] *Ibid.,* p.2716.

494. The steps undertaken and requests made did not result in any action being taken however:

> *"The government of Kosovo turned a deaf ear…We sent a request to the President, Hashim Thaci at the time, to the speaker of the Parliament, Vjosa Osmani, and to all parliamentary groups, including the Serbian parliamentary groups. The request included the points that we wanted to discuss, and, as I said, that request for the matter to be taken into consideration. However, the session was never convened."*[257]

495. In drawing guidance from the evidence of DW1252 and the relevant criteria,[258] the Defendant took his concerns to the Government, and sought to address those issues through official channels, and yet he was ignored.

496. Witness W04866 felt that there was a 'public interest' in such information being reported upon, and the SPO did not, and have not challenged this fact.

497. The only conclusion to be drawn therefore is that there was such a public interest and that the Defendant, where found to have disclosed documents, did so in accordance with his belief in the same.

498. Further, it must also be noted, as referenced above, that the Defendant took steps to ensure that individuals would not be harmed, that names would not

[257] *Ibid.*, p.2716-7.

[258] KSC-BC-2020-07, Transcript 21 January 2022, p.3127, l.10-15.

be released, and therefore sought to mitigate the consequences of the leak, and thus credence of the public interest belief is furthered.

499. The position of the Defendant therefore is a direct counter to the narrative being advanced by the SPO that it was his intention to 'bring down' the KSC, this has never been the intention of the Defendant, his intention has only ever been fairness and transparency on the part of the SPO.

500. The Defendant was directly asked whether his concerns were directed at the KSC as an institution:

> *"No, no, I mean the Prosecutors. Each time I mention it, I mean the—I mean the SPO. Not with the Chambers. I believe—I believe that they are the administrators of justice. So I—I certainly think that the—the countries they come—where they come from, that is what they do. I've translated in various courts and I know—I know that that is, you know, how they do their job impartially. I've got absolutely nothing against the Chambers. But there, the term used is the Specialist Chambers. When we mention 'Specialist Chambers' we mean the Specialist Prosecutor."*[259]

501. Further, when again asked whether it was his intention 'to shut down the institution', the Defendant confirms:

[259] KSC-BC-2020-07, Transcript 11 January 2022, p.2728-9.

> *"Maybe it suits the Prosecutors to say so. They can continue to do so. There is a process of justice which is unveiling everything. But the truth is that we—we have asked all along, and I'm reasserting here in front of the Honours, for the Prosecution to change its direction because, first and foremost, they would—they would benefit from it. It would be an honour for a Prosecutor to uncover a crime and to punish it. But what they are trying to do is replacing crime with something else."*[260]

502. Further, under cross-examination by the SPO who again sought to advance the wholly incorrect narrative that the intention was to bring about the end of the KSC:

> *"Even to this day I want it to become legal so that this court pursues all crimes and not targets them in a mono-ethnic version, not to cooperate with those who used to be the executors and the—those who gave orders. And whilst you refuse to cooperate with a single official from the—from Kosovo. Not with us but with the people who are the official representatives of Kosovo…So to this day, I want it amended—I want the mandate amended to include all crimes regardless of the perpetrators. Is there anything wrong here?".*[261]

[260] KSC-BC-2020-07, Transcript 12 January 2022, p.2815.

[261] *Ibid.,* p.2860.

503. The SPO however goes on, and still seeks to change the reality of the position, as despite the above answer, and those answers given previously, the Defendant was then asked "*So what I understand from your evidence is that you are not seeking the abrogation or closure of the KSC, but you would abrogate it today; is that right?*" respectfully, the question makes no sense and is negated by the previous answer, the Defendant correctly identifying the position in his response:

> "*You—you are taking what you want from my speech. And let me repeat it. If you are admitting that you are mono-ethnic, like you are, and in favour of—in favour—not in favour of investigating all-all crimes, yes, I'm in favour of abrogation. If that is the case—if that—if that is the case, I will stop answering questions here and now. You want me to go against my own country. I am not in—on favour of your work if you're mono-ethnic, selective, and if you do not want to bring the real criminals here…*"[262]

504. The SPO goes on to show itself incapable of accepting a point as it then goes on to state "*You want the KSC to fall, don't you*'?" The Defendant has not once suggested that this is his intention, comments cannot be taken in isolation, in a vacuum, as much as the SPO would evidently prefer this to be the case. The Defendant again reasserts his position:

[262] KSC-BC-2020-07, Transcript 12 January 2022, p.2863.

> *"You are trying to portray it like that. We want the KSC to improve its work so that it—it—would prosecute all crimes…That's why I'm telling you simply I am against every selective court wherever it is, in whichever state, not only in my country."*[263]

505. The issue would appear to clear, it is one of transparency, and it is one of fairness. Ignoring the various legislative instruments that seek to guarantee such fairness, the principles is one of the most basic; it is a fundamental tenant in terms of the Rule of Law, and it one of the very foundations upon which any accountability mechanism ought to be based.

506. The SPO's own witnesses have confirmed that there is a selective approach to investigation and prosecution by clearly stating that no-one other than Kosovar nationals are being investigated.

507. Further, despite the SPO and KSC being purported to be a domestic institution of Kosovo, not one Kosovar national is employed by either the SPO or the Specialist Chambers, and further, citizens are explicitly precluded from being considered for any position that may arise.

508. Still further, the approach taken by the SPO ought to be read in tandem with the evidence of the SPO witness W04866 who maintained the position that <u>all</u> of the information published being the public interest, and at risk of repeating

[263] *Ibid.,* p.2863 and p.2877.

the position, a fact that was not challenged by the SPO during that evidence or otherwise.

509. In this instance the balance of public interest is clear.

510. When it comes to assessing the balance that must be struck between the administration of justice and exposing information in the public interest there are often borderline cases. This is not one.

VII. CONCLUSION

511. The salient question for the Trial Panel to answer, is whether, the SPO have proved the Defendant's guilt in respect of each count on the Indictment, beyond all reasonable doubt, there is no other standard, and there can be no derogation from this fact.

512. The simplistic answer to the question, is that the SPO has not satisfied this high burden, and thus the Defendant must be acquitted of all counts in the Indictment.

513. The SPO has demonstrated that its investigation has been found lacking, in that it has deliberately or otherwise, ignored numerous lines of inquiry into the leaks, and contrary to their maintained position, the means by which the documents were leaked to the KLA WVA is wholly relevant, as it is these

means that inform the defence of Entrapment or otherwise, a defence that although raised from the very outset, has been actively prevented from being explored in full owing to the belligerence of the SPO, supported by the Trial Panel in its decisions that fundamentally undermine the ability of the Defence to investigate and thereafter advance its case.

514. Further, the SPO have owing to its cavalier approach to the 'chain of custody' cannot demonstrate with any certainty that the documents it says were held by the KLA WVA are those same documents that were seized, and further, are the same documents that were transported to the SPO offices. There is no written record of what was taken, there is no inventory, in short, the Trial Panel is in effect being asked to 'take the SPO's word for it'.

515. Further, the documents were not analysed in full, there is no confirmation that all of those documents were legitimately SPO held documents prior to the leak, SPO Witness W04841 confirming that she did not undertake a full analysis and 'stopped' the validation process.

516. Still further, not one person other than the SPO has seen the entirety of these documents. There was a refusal to disclose the same to the Pre-Trial Judge, there was a refusal to disclose to the Defence, and there was a refusal to disclose to the Trial Panel. Accordingly, and again, we are being asked to 'take the SPO's word for it'.

517. This is not appropriate evidentially speaking and calls into question the legitimacy of the entire process.

518. With this background we must then consider the refusal of the SPO to call witnesses of fact and instead seeking to rely primarily on hearsay evidence; specifically, not one witness who was said to have been intimidated has been called to give evidence, instead the SPO sought to advance that evidence through a wholly discredited witness who demonstrated himself to be wholly unreliable, and on certain occasions, questionable in terms of the facts of the case.

519. The SPO are therefore asking the Trial Panel to convict the Defendant of 'Intimidation' and/or 'Retaliation', despite having heard no testimony from any individual said to have suffered the same.

520. The issue goes even further however, in that as much as the SPO have not adduced any direct evidence, they have as a consequence, prevented the Defence from challenging any such evidence, or advancing a defence to those counts on the Indictment, and thus undermined the ability of the Defendant to present his case causing significant prejudice.

521. In terms of Counts 1, no evidence of any threat has been offered, and at even more fundamental level, no evidence has been adduced as to the 'Obstruction' that has been caused by the alleged actions of the Defendant.

522. At best, a number of phone-calls had to be made to witnesses, however, this of itself does not demonstrate obstruction as no evidence has been adduced as to how this impacted on going work and/or investigations into other matters, whether resources had to be diverted, or whether any other work was delayed and/or hampered.

523. In conjunction with the aforesaid, the Trial Panel must also take into account that as per the evidence of SPO witness Jukic, no action was taken until the third press-conference in any event.

524. In terms of actions taken 'after the event', again, the SPO have not taken any steps to either prevent or mitigate that which it said had occurred. Various stories were published by various media outlets, those stories and/or articles remain available to any and all. If the issue was as serious as the SPO would maintain, if there was obstruction, if the alleged actions amounted to retaliation and resulted in intimidation as alleged, why have no steps been taken to either prevent publication, or remove those stories and articles already published.

525. Count One has not been proven to the required standard of beyond all reasonable doubt.

526. Similarly, within the context of Count Two, the Defence reaffirms its submissions in terms of the lack of obstruction, and further, the failure on the

part of the SPO to demonstrate that this obstruction was as a consequence of 'group action'.

527. Regarding Count 3, Intimidation During Criminal Proceedings, it is submitted that no evidence has been submitted to substantiate the charge.

528. Count Four appears to have been forgotten by the SPO in that no evidence of how the alleged actions amount to retaliation has been adduced, and in any event, even taking the SPO's case at its highest, it simply cannot amount to Retaliation the elements of the crime being clear, just as much as it is as clear that they have not been satisfied.

529. Counts Five and Six are again lacking in terms of the evidential basis adduced before the Trial Panel.

530. This case cannot be determined on what the SPO says has happened, it can only be judged on the evidence that has been placed before the Trial Panel and it is here that the SPO has been found wanting, regardless of the Defence's being advanced by the Defendant.

531. There is in reality no need to consider the Defendant's position as the SPO have not demonstrated that there is a case to answer.

532. To the extent that such a case has been raised, the Trial Panel are reminded that Entrapment has been advanced, and further, given the position adopted

in terms of disclosure it cannot be said to be implausible, improbable, or fanciful both for reason of case itself, and the fact that much of the evidence that would ordinarily fall to be considered has been intentionally withheld.

533. Further, in terms of the Public Interest in the disclosure of information, even prior to the Defendant raising this in evidence, the SPO's own witness confirmed that his actions were taken as he believed it to be in the public interest to do so, a statement and position that the SPO did not challenge, but rather, approved of given its lack of challenge to this proposition.

534. As a consequence, this raises the question of why the Defendant is said to be criminally liable for his alleged actions when the actions of others, which went further than those said to have been undertaken by the Defendant, are said to have been justified, and explicitly noted as not subject to criminal investigation or sanction.

535. Such a conflict in position, such a contradictory approach can only be down to bias as there would appear to be no other reason for one individuals right to free speech being supported and encouraged at the expense of another's.

536. The Defendant is innocent of all Counts within the Indictment.

537. There is simply no basis upon which a conviction can be returned in respect of any of the six counts.

538. The Defendant must be acquitted of all counts.

Word Count: [29506] words

Toby Cadman **Carl Buckley**