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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 Hysni Gucati

Date: 7 April 2022

Language: English

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Public Redacted Version of Final Trial Brief on behalf of Hysni Gucati

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I. INTRODUCTION

1. On 3 February 2022, the Trial Panel ordered the parties to submit Final Trial Briefs by 3 March 2022[1].

II. APPLICABLE LAW

2. Rule 134 of the KSC Rules of Procedure and Evidence ("Rules")[2] provides that after the closing of the evidentiary proceedings, the Panel shall "invite … the Defence to file Final Trial Briefs" in advance of closing statements. It is clear that the submission of a Final Trial Brief is discretionary.

3. In contrast to Rule 95(5) which prescribes the matters that are to be addressed in the Defence Pre-Trial Brief, Rule 134 does not prescribe the contents of the Final Trial Brief in any way.

4. The Trial Panel, however, has set out the following parameters for the Final Trial Brief[3]:

   a. The Panel orders the Parties to address the following matters in their Final Trial Briefs:

      i. The factors relevant to the determination of sentence;

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[1] *"Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules"*, KSC-BC-2020-07/F00553, Trial Panel II, Public at paragraph 26(b)

[2] KSC Rules of Procedure and Evidence, KSC-BD-03/Rev2/2020

[3] *"Decision on the Closing of the Evidentiary Proceedings and on Submissions Pursuant to Rules 134(b), (d) and 159(6) of the Rules"*, KSC-BC-2020-07/F00553, Trial Panel II, Public at paragraphs 17, 20 and 26(b)

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ii. The gravity of the alleged offences, and any mitigating and/or aggravating circumstances to be taken into consideration as set out in Rule 163(1) of the Rules;

iii. Any proposed sentence to be imposed pursuant to Rule 163(4) of the Rules, in particular in light of any domestic or international sentencing practice that the Parties consider relevant;

iv. The relevance, if any, of Rule 165 of the Rules;

v. Any specific reason why the Panel should apply the procedure under Rules 162 and 164 of the Rules;

vi. Should the Panel decide, after receiving these submissions, that the procedure under Rules 162 and 164 of the Rules shall apply: (1) the difference between "any relevant information" that may be submitted under Rule 162(1) of the Rules and "additional evidence" that the Panel may hear under Rule 162(5) of the Rules; and (2) what additional evidence, if any, may the Parties wish to call and why such evidence was not called during the trial;

b. Written submissions in the Final Trial Brief should be focused;

c. Submissions in the Final Trial Brief should concentrate on the facts, issues and circumstances relevant to the cases of the Parties and on the aforementioned issues regarding sentencing;

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d. The Parties should avoid lengthy recitations of the procedural background and/or verbatim citations of laws or precedents;

e. Political statements, references to crimes committed during the Kosovo conflict or the "justness" of the war shall be avoided; and

f. The Parties should refer to evidence by using the exhibit numbers.

5. The Accused maintains and herein incorporates all positions as set out in the Pre-Trial Brief on Behalf of Hysni Gucati. In order to comply with the direction to ensure that the Final Trial Brief is focused, the following submissions are emphasised.

III. SUBMISSIONS

6. Hysni Gucati ("The Accused") faces six counts:

Count 1: OBSTRUCTING OFFICIAL PERSONS IN PERFORMING OFFICIAL DUTIES, by serious threat, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST PUBLIC ORDER, punishable under the Criminal Code of the Republic of Kosovo, Code No.06/L-074 (2019) ('KCC') Articles 17, 28, 31, 32(1)-(3), 33, 35, and 401(1) and (5), and Articles 15(2) and 16(3) of the Law;

Count 2: OBSTRUCTION OFFICAL PERSONS IN PERFORMING OFFICIAL DUTIES, by participating in the common action of a group between at least 7

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and 25 September 2020, a CRIMINAL OFFENCE AGAINST PUBLIC ORDER, punishable under KCC Articles 17, 28, 32(1)-(3), 33, 35, 401(2)-(3) and (5), and Articles 15(2) and 16(3) of the Law;

Count 3: INTIMIDATION DURING CRIMINAL PROCEEDINGS, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC ADMINISTRATION, punishable under KCC Articles 17,28, 31, 32(1)-(3), 33, 35, and 387, and Articles 15(2) and 16(3) of the Law;

Count 4: RETALIATION, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC ADMINISTRATION, punishable under KCC Articles 17, 28, 31, 32(1)-(2), 33, 35, and 388(1), and Articles 15(2) and 16(3) of the Law;

Count 5: VIOLATING THE SECRECY OF PROCEEDINGS, through unauthorised revelation of secret information disclosed in official proceedings, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC ADMINISTRATION, punishable under KCC Articles 17, 31, 32(1)-(2), 33, 35, and 392(1), and Articles 15(2) and 16(3) of the Law; and

Count 6: VIOLATING THE SECRECY OF PROCEEDINGS, through unauthorised revelation of the identities and personal data of protected witnesses, between at least 7 and 25 September 2020, a CRIMINAL OFFENCE AGAINST THE ADMINISTRATION OF JUSTICE AND PUBLIC

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ADMINISTRATION, punishable under KCC Articles 17, 28, 31, 32(1)-(3), 33, 35, and 392(2)-(3), and Articles 15(2) and 16(3) of the Law.

7. Under Article 2(3) of the KCC 2019,

"the definition of a criminal offense shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offense shall be interpreted in favor of the person against whom the criminal proceedings are ongoing."

<u>Count 1</u>: OBSTRUCTING OFFICIAL PERSONS IN PERFORMING OFFICIAL DUTIES

8. Article 401(1) of the KCC 2019 provides that: "whoever, by force or serious threat, obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished…"

9. Article 401(5) of the KCC 2019 provides for an aggravated form of offence: "When the offense provided for in paragraph 1 or 2 of this Article is committed against a judge, a prosecutor, an official of a court, prosecution officer or a person authorised by the court and prosecution office, a police officer, a military officer, a customs officer or a correctional officer during the exercise of their official functions".

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10. The aim of Article 401 is to protect official persons performing official duties against violent or threatening actions[4].

11. The offences created by Article 401 are 'criminal offences against *public order*' within Chapter XXXII of the KCC 2019 (emphasis added) not offences against the administration of justice and public administration under Chapter XXXI or offences of 'contempt'. The fundamental nature of the offences created by Article 401 relate to the use of force and public disorder.

12. 'Serious threat' in the context of Article 401 thus means serious threat of force[5]. Articles 401(4) and (6) accordingly provide for aggravated offences where injury is actually caused by the use of force or the threat involves a weapon.

13. In contrast with the offence under Article 387 (an offence against the administration of justice and public administration), 'any other means of compulsion' will not suffice.

14. Force is defined in Article 113(5) KCC 2019 as: "the implementation of hypnosis or other means of intoxication for the purpose of bringing a person against his or her will into a state of unconsciousness or incapacitating him or her for resistance". The definitions in Article 113 KCC 2019, including the definition of the term 'force', are stated to be comprehensive: "For the purpose of this Code the terms below have the following meanings…".

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[4] *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3; also Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1164 margin number 1-2 (translation at KSC-BC-2020-07/F00341/A01 page 11 of 18)

[5] Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1165 margin number 2-3 (translation at KSC-BC-2020-07/F00341/A01 page 12 of 18)

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15. By contrast, the definition of 'force' previously set out in the Provisional Criminal Code of Kosovo 2003 ('PCC 2003') at Article 107(10) only *included* the implementation of hypnosis or other means of intoxication for the purpose of bringing a person against his will into a state of unconsciousness or incapacitating him for resistance. Whether it can be safely inferred that 'the legislature intentionally removed this qualification' and thereby fundamentally altered the nature of 'force' for later Codes is a moot point – Article 2(3) KCC 2019 requires any ambiguity to be resolved in favour of the defence and prohibits interpretation by analogy.

16. If 'force' for the purposes of Article 401 is, nevertheless, said to include the use of some other form of physical violence (other than hypnosis or intoxication), the Defence nevertheless draws attention to the definition of force in Article 113(5) requiring the person to be brought into a state of unconsciousness or incapacitation, demonstrating the required severity of the force used or threatened[6].

17. It is submitted therefore that the offence under Article 401 relates to the actual or threatened use of serious force which has the consequences (or threatened consequences) set out in Article 113(5) (namely, unconsciousness or incapacitation).

18. It is consistent with the wording and the purpose of Article 401(1) that the offence requires the force or serious threat of force to be directed against an official person.

[6] Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1165 margin number 3 (translation at KSC-BC-2020-07/F00341/A01 page 12 of 18)

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19. Indeed, the aggravated offence under Article 401(5) specifically requires the offence to be committed *against* an official person *during* the exercise of their official functions.

20. For the purposes of Article 401, the Prosecution has to prove that the use of force or serious threat was concurrent, or simultaneous, with the official action obstructed. The use of force or serious threat must be directed at the person when they are performing official duties[7]. The Prosecution is required, accordingly, to specify the official action which the use of force or serious threat is alleged to be concurrent with and obstructed (e.g. the execution of a search warrant or the seizure of evidence). To that extent, the Prosecution are required to prove that the actions of the accused were directed against an official person performing a specific official duty[8]. The threat must be of *immediate* use of force[9].

21. In the present case, no evidence has been adduced of the use of force or serious threat against an official person. The Trial Panel has heard no complaint from an official person that they have been subject to the use of force or have received a serious threat (of force, or of any other type of threat for that matter).

22. No evidence has been adduced that an attempt was made, by the Accused or another, to use force or serious threat against an official person.

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[7] "Threat is a declaration made to warn, that is, to inform a certain person that he might suffer something bad. In the context of this criminal offence, such a declaration might be considered a threat only when it is used to inform the official person that he would be subjected to force on the spot if he refuses to give up performing his official duty" - Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1165 margin number 2, 3 & 4 (translation at KSC-BC-2020-07/F00341/A01 page 12 of 18)

[8] Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1166 margin number 5 (translation at KSC-BC-2020-07/F00341/A01 page 13 of 18)

[9] *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3

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23. No evidence has been adduced that the Accused incited another to the use of force of serious threat against an official person.

24. No evidence of an agreement to use force or serious threat against an official person has been adduced.

25. In accordance with Rules 158(2) and (3), a finding of acquittal should be entered in relation to Count 1 in relation to each applicable mode of liability accordingly.

Count 2

26. Article 401(2) of the KCC 2019 provides that an offence is committed where a person "participates in a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him of her to perform official duties".

27. As 'peaceful and lawful' activity falls outside the scope of this provision[10], some boundary is to be implied to demarcate 'peaceful and lawful' means from 'non-peaceful and unlawful' means. Consistent with the nature of Article 401 the boundary lies where common action involves the use of force or the serious threat of force.

[10] KSC-BC-2020-07/F00341, "Prosecution Submissions on the Applicable Law with one public annex", Prosecutor, 30 September 2021, Public at paragraph 14

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28. The aim of Article 401 is to protect official persons performing official duties against violent or threatening actions[11].

29. The offences created by Article 401 are 'criminal offences against *public order*' within Chapter XXXII of the KCC 2019 (emphasis added), not offences against the administration of justice and public administration under Chapter XXXI or offences of 'contempt'.

30. Article 401(2) is an aggravated form of the offence set out in Article 401(1). 'Common action', as referred to in Article 401(2) and (3), refers accordingly to common action to use force or serious threat (of force) as criminalised in Article 401(1).

31. As per Article 401(1), the common action to use force or serious threat must be directed against an official person 'in performing official duties'. Accordingly, the Prosecution has to prove that the common action to use force or serious threat was concurrent, or simultaneous, with the official action obstructed. The common action to use force or serious threat must be directed at the person when they are performing official duties[12]. The Prosecution is required, accordingly, to specify the official action which the common action to use force or serious threat is alleged to be concurrent with and obstructed (e.g. the execution of a search warrant or the seizure of evidence). To that extent, the Prosecution are required to prove that the actions of the accused

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[11] *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3; also Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1164 margin number 1-2 (translation at KSC-BC-2020-07/F00341/A01 page 11 of 18)

[12] "Threat is a declaration made to warn, that is, to inform a certain person that he might suffer something bad. In the context of this criminal offence, such a declaration might be considered a threat only when it is used to inform the official person that he would be subjected to force on the spot if he refuses to give up performing his official duty" - Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1165 margin number 2, 3 & 4 (translation at KSC-BC-2020-07/F00341/A01 page 12 of 18)

were directed against an official person performing a specific official duty[13]. The threat must be of *immediate* use of force[14].

32. The 'common actions' for the purposes of Article 401(2) must involve the use of force or threat of immediate use of force – the offence is a Chapter XXXII offence against *public order* (not an offence against the administration of justice and public administration under Chapter XXXI or an offence of 'contempt').

33. No evidence of common action to use force or serious threat (of force, or otherwise) against an official person has been adduced.

34. No evidence of attempted common action to use force or serious threat against an official person has been adduced.

35. No evidence has been adduced that the Accused incited another to the use of force of serious threat against an official person as part of a common action or otherwise.

36. No evidence of an agreement to use force or serious threat against an official person as part of a common action has been adduced.

37. In accordance with Rules 158(2) and (3), a finding of acquittal should be entered in relation to Count 2 in relation to each applicable mode of liability accordingly.

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[13] Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1166 margin number 5 (translation at KSC-BC-2020-07/F00341/A01 page 13 of 18)

[14] *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3

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Count 3

38. Article 387 provides that:

"Whoever uses force or serious threat, or any other means of compulsion, a promise of a gift or any other form of benefit to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings shall be punished…"

39. Article 387 of KCC 2019 requires force or serious threat or any other means of compulsion or promise of a gift or any other form of benefit.

40. As with Article 401, it is submitted that "serious threat" means "serious threat of force".

41. In contrast to Article 401, however, Article 387 can be committed using 'any other means of compulsion' or 'promise of a gift or any other form of benefit'.

42. "Compulsion" is to be understood in light of the definition of force (a means of compulsion) in Article 113(5) KCC 2019 – i.e. where the consequence of the means used is that a person is brought against his or her will into a state of incapacitation for resistance.

43. The offence under Article 387 requires that a person is induced to refrain from making a statement or to make a false statement or to otherwise fail to state true information. The offence requires proof of consequence.

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44. Article 387 also requires that the statement refrained from being made, the false statement made, or the information failed to be stated, to be information which relates to the obstruction of criminal proceedings.

45. Obstruction of criminal proceedings is a separate offence contrary to Article 386 of the KCC 2019.

46. Both the offence contrary to Article 386 and the offence contrary to Article 387 can be committed through force or threat, or other means of compulsion or bribery/promise of gift/benefit (see Article 386(1) and (4))[15].

47. Like Article 387, Article 386 covers acts of intimidation of witnesses, including acts of intimidation of witnesses which result in bodily injury (see Articles 386(4) and (5)).

48. Both the offences contrary to Article 386 and Article 387 require proof of consequence, namely that a person is induced to refrain from giving a statement, or to make a false statement, or to otherwise fail to state information to the police (see Article 386(1.1), (1.3) and (1.7)).

49. Unlike Article 386, however, an offence is only committed under Article 387 where a person is induced to refrain from giving a statement, or to make a false statement, or to otherwise fail to state information to the police in relation to an offence under Article 386.

50. There is no basis, neither literal or purposive, to restrict the relevance of the words "when such information relates to obstruction of criminal

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[15] Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1124 margin number 1 (translation at KSC-BC-2020-07/F00341/A01 page 4 of 18)

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proceedings" in Article 387 to 'failing to state true information to the police, a prosecutor or a judge' only[16]. Restricting the application of the words "when such information relates to obstruction of criminal proceedings" in that manner would lead to a distinction in Article 387 without any merit, namely:

(a) that inducing a witness, by any means of compulsion, to refrain from making a statement in non-obstruction proceedings is an offence under Article 387; but

(b) inducing a witness, by the same means of compulsion, to fail to state true information to the police, a prosecutor or judge, in non-obstruction proceedings is not an offence under Article 387; where

(c) what constitutes a statement of a witness for the purposes of legal proceedings is determined not by its form or the name given to it, but by its content function, purpose and source[17]; and where

(d) both 'statement' and 'information' are expected to be true.

51. Given that acts of witness intimidation, including where injury is actually caused, are ordinarily punishable under Article 386, Article 387 is properly restricted on its terms to those further aggravated offences where intimidation is employed in proceedings relating to an antecedent offence contrary to Article 386 of obstruction of criminal proceedings.

[16] As previously submitted by the Prosecution in KSC-BC-2020-07/F00341, "Prosecution Submissions on the Applicable Law with one public annex", Prosecutor, 30 September 2021, Public at paragraph 19
[17] KSC-BC-2020-07/F00334, "Decision on the Prosecution Request for Admission of Items Through the Bar Table", Trial Panel II, 29 September 2021, Public at paragraph 84

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52. In the present case, no evidence has been adduced that:

(a) Any person has been induced to refrain from making a statement relating to the obstruction of criminal proceedings (or at all);

(b) Any person has been induced to make a false statement relating to the obstruction of criminal proceedings (or at all);

(c) Any person has been induced to fail to state true information to the police, a prosecutor or a judge relating to the obstruction of criminal proceedings (or at all); and that

(d) The Accused used any of the means set out in Article 387 to induce any of the above occurrences in relation to an antecedent offence of obstruction of criminal proceedings.

53. Indeed, no evidence has been adduced that the Accused used force to induce another to refrain from making a statement, or to make a false statement, or to fail to state true information to the police.

54. No evidence has been adduced that the Accused used the promise of a gift or other form of benefit to induce another to refrain from making a statement, or to make a false statement, or to fail to state true information to the police.

55. No evidence has been adduced that the Accused used a serious threat (of force, or any other form of threat) to induce another to refrain from making a statement, or to make a false statement, or to fail to state true information to the police:

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(a) the Prosecution's case is that the Accused's actions were directed at those persons who had *already* provided a statement or information to investigators;

(b) As to use of a threat (serious or not), the Trial Panel has heard that only two anonymous persons have complained of being subjected to a threat but: (a) neither complaint is admissible as to the truth of their contents (i.e. the complaints do not amount to admissible evidence that either person was, in fact, subjected to a threat[18]); (b) one amounted to reference to a further anonymous opinion only and (c) the other could not directly be linked to the actions of the Accused in any event[19].

56. No evidence of incitement of others by the Accused, or provision of assistance to others by the Accused, to commit an offence under Article 387, as strictly construed in accordance with Article 2(3) KCC 2019, has been adduced. Nor has any evidence of an attempt to commit an offence under Article 387 been adduced.

57. In accordance with Rules 158(2) and (3), a finding of acquittal should be entered in relation to Count 3 in relation to each applicable mode of liability accordingly.

Count 4

[18] KSC-BC-2020-07/F00334, "Decision on the Prosecution Request for Admission of Items Through the Bar Table", Trial Panel II, 29 September 2021, Public at paragraphs 91, 93 and 94
[19] Transcript, 4 November 2021, at page 1833 lines 21 to page 1837 line 13

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58. Article 388(1) of KCC 2019 provides that: "Whoever takes any action harmful to any person, including interference with lawful employment or livelihood of any person, with the intent to retaliate for providing truthful information relating to the commission or possible commission of any criminal offense to police, an authorized investigator, a prosecutor or a judge, shall be fined and punished…"

59. The offence under Article 388(1) penalises retaliation (any harmful action) directed towards a person who has provided truthful information relating to the commission or possible commission of any criminal offense to the police, with the intent to retaliate against that person for providing truthful information relating to the commission or possible commission of any criminal offense to the police.

60. The offence requires that:

(a) the subject of retaliation had provided truthful information relating to the commission or possible commission of any criminal offense; and

(b) the perpetrator must believe that the information provided by the subject of retaliation was truthful.

61. If the information provided was false, or the perpetrator believes that the information provided was false, no offence is committed.

62. In the present case, no evidence has been adduced as to the truthfulness or otherwise of the information provided by the alleged subjects of retaliation. No evidence as to the contents of the information provided has been adduced at all.

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63. No evidence has been adduced to the effect that the Accused believed that information provided to investigators was truthful (so as to establish the specific intent required, namely the intention to retaliate against persons giving truthful information). On the contrary, such evidence as has been adduced in relation to the Accused is to the effect that he believed that false information had been provided.

64. Further, no evidence has been adduced that would support criminal liability for attempt, incitement, assistance, or agreement in the circumstances.

65. In accordance with Rules 158(2) and (3), a finding of acquittal should be entered in relation to Count 4 in relation to each applicable mode of liability accordingly.

Count 5

66. Article 392(1) of KCC 2019 provides that "whoever, without authorization, reveals information disclosed in any official proceeding which must not be revealed according to law or has been declared to be secret by a decision of the court or a competent authority shall be punished…"

67. Count 5 is specifically particularised as the revelation of "secret" information disclosed in official proceedings (not "information disclosed in any official proceedings which must not be revealed according to law").

68. The classification of information as 'secret' is defined in the Law on Classification of Information and Security Clearances, Law No.03/L-178 at

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Article 6.1.2 ("Secret" shall be applied to information the unauthorized disclosure of which could seriously damage security interests of the Republic of Kosovo) and is distinct from classifications of information as 'confidential' or 'restricted' or 'protected' (see, for example, the Law on Classification of Information and Security Clearances, Law No.03/L-178 at Articles 6(1.3), 6(1.4), 11(1), Article 30, Article 31, 35, 50.

69. The Prosecution must prove that any declaration, that the information was secret, was lawful. If information was declared secret by an unlawful decision of the court or the institutions of Kosovo, then the revelation of that material will not be an offence[20].

70. A declaration (or, more accurately, a claim) by an institution other than an institution of Kosovo that information is secret is not sufficient[21]. A third-party institution is not a 'competent authority' for the purposes of Article 392(1) (see Articles 2, 1.14 and 7 of Law No.03/L-178).

71. The Prosecution must prove that the declaration remains effective at the time of revelation[22].

72. No evidence has been adduced that any relevant information has been declared to be 'secret' by a decision of the court or a competent authority.

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[20] Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1142-1143 margin number 10

[21] Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1142-1143 margin number 10

[22] Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1142-1143 margin number 10); and Article 11 of Law No.03/L-178

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73. Further, Article 392(1) requires that the information declared to be secret must have been disclosed to the perpetrator in an official proceeding[23].

74. No evidence has been adduced that any relevant material was disclosed to the Accused in an official proceeding.

75. Moreover, the perpetrator must have knowledge that the relevant information had been declared to be secret by a decision of the court or a competent authority[24]. The perpetrator must know about the existence of the order (or declaration) and its content.

76. No evidence has been adduced that the Accused was aware that any relevant information had been declared to be 'secret' by a decision of the court or a competent authority.

77. Further, no evidence has been adduced that would support criminal liability for attempt, incitement, assistance, or agreement in the circumstances.

78. In accordance with Rules 158(2) and (3), a finding of acquittal should be entered in relation to Count 5 in relation to each applicable mode of liability accordingly.

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[23] Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1141 margin number 8 (translation at KSC-BC-2020-07/F00341/A01 page 8 of 18): "A condition for the existence of this criminal offence is that it concerns information and facts made known during the judicial, misdemeanour, administrative proceedings or the investigative parliamentary proceedings of Kosovo Parliament. As a rule, it is related to people who take part in a particular proceeding as procedural subjects. However, it is also related to other people, who make presentations during certain procedural acts, (court interns, scientific experts etc.)"

[24] *MZ*, PAKR336/16, Judgment, 13 December 2016 at page 7

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Count 6

79. Article 392(2) of KCC 2019 provides that: "Whoever without authorization reveals information on the identity or personal data of a person under protection in the criminal proceedings or in a special program of protection shall be punished…"

80. Article 392(3) further provides for an aggravated form of the offence "if the offense provided for in paragraph 2 of this Article results in serious consequences for the person under protection or the criminal proceedings are made impossible or severely hindered".

81. Consistent with Article 392(1), the information said to be revealed must be of a person under protection in *the* criminal proceedings, that is, the criminal proceedings in which the information was disclosed to the perpetrator; or otherwise of a person in a special program of protection.

82. There is no evidence that any relevant material was disclosed to the Accused in criminal proceedings.

83. It is not sufficient for the purposes of Article 392(1) that information has been classified as 'confidential', even if the information relates to the identity or personal data of a person featuring in criminal proceedings (for example, as a 'witness' or 'potential witness').

84. The information must be of a person under 'protection' at the time of the alleged offence, i.e. a person subject to current specific measures of protection in criminal proceedings or in a special program of protection[25].

85. Further, the perpetrator must have knowledge that the relevant information is of a person subject to specific measures of protection in criminal proceedings or in a special program of protection[26]. The perpetrator must know about the existence of the order granting protection and its content.

86. The evidence heard by the Trial Panel in relation to protective measures does not meet the above requirements.

87. Although the witness Zdenka Pumper said that [REDACTED][27]:

(a) [REDACTED][28]; and

(b) No evidence has been adduced in any event that the Accused was aware of the orders for protective measures in the cases of *Sabit Geci et al*, *Latif Gashi et al* and *Selim Krasniqi et al* and the contents of those orders.

88. Ms Pumper also said that [REDACTED][29].

[25] Commentary on the Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at page 1143 margin number 2: "[The offence contrary to Article 392(2)] is the result of new legal options in relation to the special category of the participants in the proceedings who, in conformity with the provisions of the Criminal Procedure Code and the law on witness protection, have been given a special status and, consequently, special protection."
[26] *MZ*, PAKR336/16, Judgment, 13 December 2016 at page 7
[27] Transcript, 19 October 2021 at page 1008 lines 3-5
[28] Transcript, 25 October 2021 at page 1333 lines 8-15
[29] Transcript, 19 October 2021, at page 954 line 16 to page 955 line 3

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89. [REDACTED][30].

90. [REDACTED][31].

91. Further, no evidence has been adduced that would support criminal liability for attempt, incitement, assistance, or agreement in the circumstances.

92. No evidence has been adduced that amounts to evidence of serious consequences for the person under protection or of criminal proceedings being made impossible or severely hindered.

93. In accordance with Rules 158(2) and (3), a finding of acquittal should be entered in relation to Count 1 in relation to each applicable mode of liability accordingly.

'PUBLIC INTEREST'

94. Counts 5 and 6 – the alleged offences of violating the secrecy of proceedings under Article 392(1) and (2) require any revelation to be unauthorized. If there was a legal basis for revealing the information concerned, no offence will have been committed (for example, in case of necessity)[32].

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[30] Transcript, 25 October 2021 at page 1323 lines 14-19 re *Salih Mustafa*; Transcript, 25 October 2021 at page 1325 lines 4-12 re *Thaçi et al*; Transcript, 25 October 2021 at page 1325 lines 22-24 re *Pjetër Shala*

[31] Transcript, 25 October 2021, at page 1324 lines 9-12 re *Salih Mustafa*; Transcript, 25 October 2021, at page 1326 lines 4-11 re *Pjetër Shala*

[32] Commentary on Kosovo Criminal Code 2012, *Salihu, Zhitija & Hasani*, 2014 at pages 1142-1143 margin number 10

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95. Disclosure of confidential information in the public interest, where such interest outweighs the individual interest in non-disclosure, is a legal basis under Articles 22 and 40 of the Constitution of the Republic of Kosovo (as recognised by Article 200(2) of the KCC 2019).

96. Article 200(4) of the Kosovo Criminal Code 2019 states that "public interest means the welfare of the general public outweighs the individual interest".

97. Whereas Article 200(4) continues to specify certain types of confidential information the disclosure of which will be in the public interest *per se*, it does not delimit the scope of the public interest in doing so.

98. The law cannot prohibit the revelation of information which it is in the public interest to disclose (where the welfare of the general public outweighs the individual interest in non-disclosure) – it would be absurd if the reverse proposition were true.

99. The words "which must not be revealed according to law" in Article 392(1), to the extent that they have any application in this case where Count 5 is specifically particularised as the revelation of "secret" information disclosed in official proceedings, must be interpreted in a manner which acknowledges that the law cannot prohibit the revelation of information which it is in the public interest to disclose.

100. Likewise, the Prosecution must prove that any declaration by a court or competent authority, that the information was secret, was lawful. A court or competent authority cannot lawfully declare secret information which it is in the public interest to disclose (where the welfare of the general public outweighs the individual interest in non-disclosure).

101. The Prosecution accordingly must prove beyond reasonable doubt that disclosure was not in the public interest.

102. In the present case, the Trial Panel has acknowledged that an issue of public interest would be raised by otherwise lawful cooperation between Serbia and the SITF/SPO if and where there is evidence of improprieties that would affect the independence, impartiality or integrity of the SITF/SPO's investigation(s)[33].

103. Full disclosure of the contents of Batches 1, 2 and 3 has been refused of course, depriving the Accused the opportunity to identify that evidence.

104. It falls to the Prosecution to prove beyond reasonable doubt, in those circumstances, that the material allegedly disclosed by the Accused did not contain indications of improprieties occurring in the context of the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO, which would have affected the independence, impartiality or integrity of the SITF/SPO's investigation.

105. The Prosecution has not done so.

106. It has neither produced Batches 1, 2 and 3 in full for the Trial Panel, nor undertaken any review of the material with a view to consideration of the content other than a scheduling exercise[34].

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[33] KSC-BC-2020-07, *Decision on Prosecution Requests in Relation to Proposed Defence Witnesses*, Trial Panel II, Public, 3 December 2021 at paragraphs 59-61

[34] Transcript pages 1059 lines 11-20; Transcript page 1064 lines 17-20; Transcript page 1094 line 23 to page 1099 line 22

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107. The review by Ms Pumper involved [REDACTED][35].

108. Likewise, any limit to the exercise by the Accused of his constitutional rights under Articles 22, 40, 41 and 42 of the Constitution must be strictly construed, and applied only where clearly demonstrated to be strictly necessary and in accordance with the law and Articles 22, 40, 41 and 42 themselves. Any ambiguity shall be interpreted in favour of the Accused.

109. For example, whereas Article 41 provides that the right of access to documents of public institutions and organs of state authorities can be limited by law due to security classification, any such limitation must be strictly in accordance with the law on security classification, that is, the Law on Classification of Information and Security Clearances Law No.03/L-178, 1 July 2010.

110. Whereas the Specialist Prosecutor asserts that the Accused's right of access to records of the Specialist Chambers and the Specialist Prosecutor's Office is limited by Article 62 of the Law, Article 2 of the Law makes clear that (i) the Law is subject to Article 55 of the Constitution; and (ii) any limitations on fundamental rights and freedoms shall only be imposed to the extent necessary to fulfil the interest of Kosovo as an open and democratic society.

111. Article 55 of the Constitution requires all public authorities, and in particular courts, to pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved

[35] Transcript page 1127 lines 2-16; Transcript page 1129 lines 7-12; Transcript page 1132 lines 1-21; Transcript page 1133 line 20 to page 1142 line 20; Transcript page 1144 line 1 to page 1145 line 14

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and the review of the possibility of achieving the purpose with a lesser limitation. The limitation of fundamental rights and freedoms guaranteed by the Constitution shall in no way deny the essence of the guaranteed right.

112. In the present case, the SPO has not proved beyond reasonable doubt in relation to Batches 1, 2 and 3 that any such limitation was necessary and not, for example: (i) imposed to conceal violations of law, abuse of authority, inefficiency or administrative error; or (ii) to prevent embarrassment to a person, public authority or organisation; or (iii) to prevent or delay the release of information, which is not otherwise clearly related to security considerations. The principles set out in the Law on Classification of Information and Security Clearances Law No.03/L-178 are valid.

113. Judgments of acquittal on counts 5 and 6 should be pronounced accordingly.

MISTAKE OF LAW

114. If any part of the Accused's conduct is found to be otherwise unlawful, the Accused did not know that his conduct was prohibited, and accordingly is not criminally liable under Article 26 of the KCC (Mistake of Law).

115. Article 26(1) of the KCC 2019 provides that:

> "A person who, for justifiable reasons, did not know or could not have known that an act was prohibited is not criminally liable."

116. It is sufficient for Article 26(1) to apply that the person, for justifiable reasons did not know that an act was prohibited.

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117. The Accused acted under the belief, pursuant to legal advice, that they were acting lawfully[36].

118. The Accused acted in the belief, on legal advice, that it was lawful to provide the documentation to the press and to make public the relations between officials of the SPO/SC with Serbian prosecution authorities[37].

119. The Accused has repeated his belief that he had acted entirely within the law: "We know that we haven't done anything illegal, we know that we haven't done anything that is against the law"[38].

PLEA OF INCITEMENT

120. Further, and if contrary to the above, any part of the Accused's conduct is found to be otherwise unlawful, the Accused raises the plea of incitement[39].

121. The use in criminal proceedings of evidence obtained as a result of incitement by state agents is in violation of Article 6 of the European Convention on Human Rights ('Article 6')[40].

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[36] Exhibit P00002ET; Exhibit P00028ET

[37] Exhibit P00004ET

[38] Exhibit P000028ET

[39] "Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution", *Ramanauskas v Lithuania* (74420/02), (2010) 51 EHRR 11 (2008), ECtHR Grand Chamber at paragraph 55

[40] *Teixeira de Castro v Portugal* (25829/94), (1999) 28 EHRR 101 (1998) at paragraph 36; *Khudobin v Russia* (59696/00), (2009) 48 EHRR 22 (2006) at paragraph 133; *Ramanauskas v Lithuania* (74420/01), (2010) 51 EHRR 11 (2008) at paragraphs 55 and 60; *Bannikova v Russia* (18757/06), ECtHR 4 November 2010 at paragraph 34; *Furcht v Germany* (54648/09), (2015) 61 EHRR 25 (2014) at paragraphs 47 to 48 (Note: (i) the remedies available to the Specialist Chambers in the event of a violation of Article 6 include the

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122. It is not essential to the existence of a violation of Article 6 in these circumstances that the state agent acts under the supervision or authorisation or with the knowledge of any more senior person within the state authority. It is sufficient if the state agent acts of his/her own initiative[41].

123. Indeed, the absence of supervision or authorisation or knowledge of any more senior person within the state authority is itself an important feature *pointing towards* the finding of a violation of Article 6[42]. In practice, the authorities may be prevented from discharging the burden to prove that there was no incitement by the absence of authorisation and supervision[43].

124. Accordingly, the state authority will not be excused responsibility for the actions of a state agent on the basis that the state agent acted of his/her own initiative[44].

125. Indeed, it is 'particularly important' that the authorities assume responsibility for the acts carried out by a state agent which take place in the absence of any legal framework or judicial authorisation[45]. To hold otherwise would open the way to abuses and arbitrariness by allowing the applicable principles to be circumvented through the 'privatisation' of police incitement[46].

power to stay proceedings and the exclusion of evidence – see Rule 110 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers; and (ii) In *Furcht*, ante the European Court of Human Rights rejected mitigation of sentence as an inadequate remedy where a violation of Article 6 related to police incitement has occurred – see paragraphs 68 & 69

[41] *Teixeira de Castro*, ante at paragraph 36, 47, and 31; *Ramanauskas,* ante at paragraphs 11-12 and 44; and *Furcht*, ante at paragraph 39

[42] *Teixeira de Castro,* ante at paragraphs 37 and 38 (see also paragraph 47 of the decision of the Commission)

[43] *Bannikova*, ante at paragraph 48; *Furcht*, ante at paragraph 53

[44] *Ramanauskas*, ante at paragraph 63

[45] *Ramanauskas*, ante at paragraph 63

[46] *Ramanauskas*, ante at paragraph 65

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126. Where "police incitement" occurs (incitement by those responsible for the investigation of crime or persons acting on their instructions) the Accused's right to a fair trial under Article 6(1) of the European Convention of Human Rights is violated[47].

127. Article 6 of the Convention will also be violated where the Accused is not effectively able to raise the issue of incitement during trial. Where the court does not adequately investigate the allegations of entrapment the Accused will be deprived of a fair trial under Article 6 of the Convention[48].

128. It falls to the prosecution to prove there was no police incitement, provided that the allegation is not wholly improbable[49].

129. A simple denial by the authorities that there has been any incitement is not sufficient[50]. It is the task of the judicial authorities to take the necessary steps to uncover the truth in order to determine whether there was any incitement by the authorities[51].

130. In the present case, the conduct complained of by the Specialist Prosecutor could not have occurred without the delivery to the KLA WVA HQ of Batches 1, 2 and 3.

[47] *Teixeira de Castro v Portugal* (1999) 28 EHRR 101, ECtHR Chamber at paragraph 39
[48] *Pătraşcu v Romania*, (7600/09) ECtHR Chamber 14 February 2017 at paragraph 53
[49] *Pătraşcu v Romania,* ante at paragraph 38
[50] *Ramanaukas v Lithuania*, ante at paragraph 72
[51] *Ramanauskas v Lithuania*, ante at paragraph 70

131. Those deliveries came with the express and implied incitement to make the contents thereof available to the media.

132. There can be no issue of fact as to whether (i) incitement occurred and (ii) that the conduct complained of could not have occurred without it.

133. The only issue of fact is whether an officer or officer(s) of the SPO, or persons acting on their instructions, were involved in that incitement of the Accused.

134. Such evidence as the Trial Panel has heard suggests *prima facie* that an officer or officers of the SPO, or persons acting on their instructions, were so involved (and there is no evidence relied upon by the SPO to the contrary):

   a. The material said by the SPO to be contained within Batches 1, 2 and 3 is also [REDACTED][52];

   b. The coordination of the investigation into the KLA WVA was indeed conducted by the two most senior officers – the Specialist Prosecutor and the Deputy Specialist Prosecutor[53].

   c. Despite high level supervision, although the SPO were alert to the potential of further deliveries being made after the delivery of Batch 1, and after the delivery of Batch 2, no attempts were made to physically prevent the further delivery of further Batches (such as the obvious tactic of placing the entrances to the KLA WVA HQ under observation, with

[52] Transcript page 1221-1224
[53] Transcript page 1172 lines 4-7

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officers in place to seize any further batches before delivery was effective). The inference to be drawn is that the SPO wanted the delivery of Batches 2 and 3 (and, indeed Batch 1 also) to be effective;

d. After the deliveries of Batches 1 and 2 the documents were deliberately left in the hands of the KLA WVA overnight after the press conferences on 7th and 16th September[54];

e. Whereas no attempts were made to physically prevent the further delivery of further Batches, there is evidence that officers of the KLA WVA were instead placed under surveillance between deliveries[55];

f. The delivery to the KLA WVA HQ of alleged 'internal work product' was apparently foreseen by the SPO[56] 13 days before delivery was alleged to have occurred within Batch 3, suggestive of planning on the part of the SPO. No witness has been called by the SPO to explain otherwise.

g. No check on the number plate 01-427-NT linked to the delivery of Batch 2 and provided to the SPO on 17th September 2021 was conducted until the end of November – no explanation has been provided in evidence[57].

[54] Transcript page 1954 lines 2-5; Transcript page 1951 lines 2-14
[55] Transcript page 1151 line 22 to page 1152 line 12; Transcript page 1599 line 21 to page 1600 line 1; Exhibit 1D00034
[56] Exhibit P00054
[57] Transcript page 1156-1157

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h. The documentation, in part, continues to be published by the press[58] and the SPO has shown little or no interest in recovering it from others than the Accused[59];

i. The Stroz Friedberg report [REDACTED][60];

j. The extent of the Stroz Friedberg [REDACTED][61]; and

k. A serving SPO officer, [REDACTED], [REDACTED][62]. [REDACTED][63].

135. The SPO had the motive to carry out a 'sting operation', to use the label ascribed by the SPO itself. The KLA WVA had been lawfully vocal for some time regarding their concerns about the operation of the Kosovo Specialist Chambers and the Specialist Prosecutor's Office. Indeed, the Specialist Prosecutor has publicly stated in this trial his suspicion that the Accused are part of a group including 'certain KLA leaders' which have acted in concert to 'do anything to prevent information coming to light', without subsequently adducing any evidence to support that theory[64].

136. A 'sting operation' designed to 'make it possible to establish the offence, that is, to provide evidence and institute a prosecution' against the leadership of

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[58] Exhibits 1D00010 – 1D00019

[59] Transcript page 1620 line 20 to page 1621 line 2; Transcript page 1622 line 17 to page 1623 line 17; the article Exhibit P00155 states that it "secured the complete 260-page dossier, marked confidential, from a *source in the Specialist Prosecution Office in the Hague*" – no evidence has been called by the SPO to identify that source

[60] Exhibit P1D00033

[61] Transcript page 1953 lines 13-18; Transcript page 2623 lines 22 to page 2625; Transcript page 2633 lines 14 to page 2634 lines 1-19

[62] Transcript page 2628 lines 13-14; Transcript page 2631 lines 9-14

[63] Transcript page 2625 lines 11-17

[64] Transcript pages 787 line 20 to page 788 line 7

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the KLA WVA (ensnaring, it may have been hoped 'certain KLA leaders' at the same time) is far from wholly improbable.

137. Moreover, given that (i) the evidence that a named SPO officer has been implicated as a source and (ii) the Stroz Friedberg report could not [REDACTED], it cannot be said on the evidence to be wholly improbable.

138. It falls to the prosecution in the above circumstances to prove that there was no incitement.

139. The Prosecution has failed to prove that there was no police incitement in the present case. Indeed, it has declined to attempt to.

140. Where there is a violation of Article 6 of the Convention, the court must demonstrate a capacity to deal with the violation, such as offering a substantive defence or the exclusion of evidence obtained as a result or other similar consequences.[65]

141. Accordingly, the Accused maintains that the Trial Panel must either (a) stay these proceedings on the ground that the Accused cannot have a fair trial[66]; or otherwise (b) the Prosecution evidence in its entirety must be excluded under Rule 138(2) of the Rules (as it all results from the delivery of the three Batches to the KLA WVA HQ) and a judgment of acquittal be pronounced on all counts in respect of all modes of liability.

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[65] *Ramanauskas v Lithuania*, ante at paragraph 60; *Ramanauskas v Lithuania (no 2)* (55146/14) ECtHR Chamber 20 February 2018 at paragraph 59

[66] See Rule 110 for confirmation that the Trial Panel has the power to stay proceedings in order to ensure fairness

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VERDICTS

142. Alternative convictions for several modes of liability are, in general, incompatible with the principle that a judgment has to express unambiguously the scope of the convicted person's criminal responsibility. The modes of liability may either augment or lessen the gravity of the crime[67].

143. Where alternative modes of liability relate to the same (or essentially the same) set of facts, a conviction on the lesser mode of liability is subsidiary to the situations on which the greater is not established[68].

144. The nature of the specific relationship (i.e. which is the greater and which the lesser mode of liability) between co-perpetration and incitement (of which there are three sub-modes of liability in Articles 32(1), (2) and (3)) will depend upon the rulings of the Trial Panel at trial as to the *mens rea* and *actus reus* sufficient for those different modes of liability[69].

145. The Prosecution should not be permitted to seek alternative convictions for several modes of liability in breach of the general principle set out in paragraph 12 above.

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[67] *Prosecutor v Ndindabahizi*, ICTR-01-71-A, Appeals Judgment, Appeals Chamber, 16 January 2007 at paragraph 122

[68] *Prosecutor v Dragomir Milosevic*, IT-98-29/1-A, Appeals Judgment, Appeals Chamber, 12 November 2009 at paragraph 274

[69] See, for example, Transcript at page 663 lines 2 to 6; Transcript at page 683 line 20 to page 684 line 2

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146. Article 401(1) KCC 2019 covers the situation in which there is evidence of individual specific actions of obstruction (i.e. by use of force or threat of immediate use of force) performed by the perpetrator[70]. Article 401(2) KCC 2019 covers the situation in which there is evidence that the perpetrator was in a group and took part in common actions, but it is not possible to establish the specific individual actions of obstruction committed by him/her[71]. Article 401(2) KCC 2019 is the less serious offence and is subsidiary to situations on which the greater offence is not established[72].

147. Convictions for multiple offences based on the same course of conduct are permissible only where those offences have materially distinct elements i.e. each requires proof of a fact not required by the others[73].

148. Article 32(3) KCC 2019 only applies to an offence in relation to which attracts a minimum term of five years imprisonment ("punishable by imprisonment of *at least* five years").

149. No offence charged has a minimum sentence of five years imprisonment.

150. Each offence charged is punishable by imprisonment of *less than* five years.

151. Accordingly, Article 32(3) has no application in the present case.

[70] *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3
[71] *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3
[72] *MI et al*, Kosovo Court of Appeals, PAKR 513/2013 § 6.3
[73] *Prosecutor v Bemba*, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, paragraph 748

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SUBMISSIONS RE SENTENCE IN ACCORDANCE WITH PARAGRAPH 17 OF THE DECISION ON THE CLOSING OF THE EVIDENTIARY PROCEEDINGS AND ON SUBMISSIONS PURSUANT TO RULES 134(b), (d) and 159(6) OF THE RULES

The factors relevant to the determination of sentence

152. Table of maximum sentences under the KCC 2019:

Count 1 (Obstructing Official Persons) Article 401(1) – 3 years' imprisonment
Count 1 (Obstructing Official Persons) Article 401(5) – 5 years' imprisonment
Count 2 (Obstructing Official Persons) Article 401(2) – 3 years' imprisonment
Count 2 (Obstructing Official Persons) Article 401(3) – 5 years' imprisonment
Count 2 (Obstructing Official Persons) Article 401(5) – 5 years' imprisonment
Count 3 (Intimidation) Article 387 – 10 years imprisonment
Count 4 (Retaliation) Article 388(1) – 3 years imprisonment
Count 5 (Violating the Secrecy of Proceedings) Article 392(1) – 1 year's imprisonment
Count 6 (Violating the Secrecy of Proceedings) Article 392(2) – 3 years' imprisonment
Count 6 (Violating the Secrecy of Proceedings) Article 392(3) – 5 years' imprisonment

153. In accordance with Article 44(4) of the Law on Specialist Chambers and Specialist Prosecutor's Office Law No.05/L-053 and Articles 48 and 49 of the KCC 2019 the Trial Panel may suspend any sentence of imprisonment.

154. Reference should be had to Articles 69 to 72 KCC 2019.

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155. The mode of liability, if any, is relevant to the determination of sentence. Where multiple modes of liability are alleged, as here, the Accused cannot assist further as to the effect upon sentence of any proven mode of liability in the absence of Judgment identifying any or all proven modes of liability (see above).

156. In the case of two distinct crimes arising from the same incident, care must be taken to ensure that the sentence does not doubly punish conduct in respect of the same act which is relied on as satisfying the elements common to the two crimes, but only that conduct which is relied on to satisfy the distinct elements of the relevant crimes[74].

The gravity of the alleged offences, and any mitigating and/or aggravating circumstances to be taken in consideration as set out in Rule 163(1) of the Rules

157. The Accused is of good character, with no previous convictions, and family man with strong community ties.

158. The Accused has health issues, which include disability relating to his injury suffered during the Kosovo War.

159. Account should be taken of the detention conditions in the context of a global pandemic.

[74] Prosecutor v Bemba, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, paragraph 769

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160. The Accused seeks, in the event of a finding of guilt on one or more counts, to adduced additional evidence as to his character and financial means to pay a fine (see below).

161. The Accused faces six alleged offences with multiple alternative modes of liability. The facts of the alleged offences, if any, are yet to be determined by the Trial Panel. The Accused cannot meaningfully make submissions about the 'gravity' of such allegations (and the identification of mitigating or aggravating circumstances related to the 'offence' or 'offences') without a determination by the Trial Panel as to the essential facts found.

162. The Accused submits that in the circumstances of this case, the appropriate course it to permit the Parties to make submissions about gravity and aggravating/mitigating features under Rule 162 before sentence, in the event that there is a finding(s) of guilt.

163. In general, the Accused observes that:

   a. only matters proved beyond reasonable doubt are capable of amounting to aggravating circumstances[75];

   b. Double counting is not permissible – the same element should not be assessed once as a constitutive element of the crime and a second time as an aggravating circumstance[76];

[75] *Prosecutor v Delalic*, IT-96-21-A, Appeal Judgment, 20 February 2001 at paragraph 763
[76] Archbold on International Criminal Law § 18-79

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c. The Accused had no involvement with the original leak of documentation from the SPO – the Accused is not charged with stealing the documentation[77];

d. The relevant documentation was made available to the professional press only;

e. The press conferences were broadcast by the professional media only;

f. Names mentioned in the press conferences were few in number;

g. No violence was used or threatened; and

h. No adverse consequence for any specific investigation/prosecution has been established.

<u>Any proposed sentence to be imposed pursuant to Rule 163(4) of the Rules, in particular in light of any domestic or international sentencing practice that the Parties consider relevant;</u>

164. Mr Gucati will have been in detention for 18 months by 18th March 2022. No sentence of that length has been imposed in any previous comparable (domestic or international) case.

<u>The relevance, if any, of Rule 165 of the Rules</u>

[77] Transcript page 790 lines 4-10

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165. Offences contrary to KCC 2019 Articles 387 (intimidation), 392(1) (violating the secrecy of proceedings), 401(2) (obstruction official persons in performing official duties) and 388(1) (retaliation) are punishable by fine.

<u>Any specific reasons why the Panel should apply the procedure under Rules 162 and 164 of the Rules</u>

166. The Accused faces an indictment with six counts, and multiple bases of liability alleged in the alternative for each count. The precise scope of those offences is still unclear, with submissions as to the essential legal ingredients to be determined in the Trial Judgment. It is neither practicable nor fair for the Accused, in the present case, to be required to prepare abstract submissions in mitigation in advance of any Trial Judgment identifying which count or counts, and upon which basis, or bases, the Accused falls to be sentenced (if any).

167. The Accused wishes to call additional evidence relevant to mitigation, in the event that the Accused is found guilty on one or more counts (see below). That evidence was not within the scope of admissible defence evidence at trial (see below).

<u>Should the panel decide, after receiving these submissions, that the procedure under Rules 162 and 164 of the Rules shall apply: (1) the difference between "any relevant information" that may be submitted under Rule 162(1) of the Rules and "additional evidence" that the Panel may hear under Rule 162(5) of the Rules</u>

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168. It is submitted that "any relevant information that may assist the Panel in determining an appropriate sentence" in Rule 162(1) envisages the following type of information:

    a. Information as to maximum penalties

    b. Information as to the range of sentencing options

    c. Submissions from the Parties as to the gravity of the offence(s) as found in the Trial Judgment;

    d. Submissions from the Parties as to mitigating and aggravating features of the offence(s) as found in the Trial Judgment; and

    e. The provision of sentencing authorities relevant to the offence(s) as found in the Trial Judgment.

169. "Additional evidence" under Rule 162(5) relates to evidence upon which the Trial Panel may make additional factual findings relevant to sentence and may include, for example, evidence as to the personal character of the Accused and his financial means to pay a fine.

<u>What additional evidence, if any, may the Parties wish to call and why such evidence was not called during the trial</u>

170. In the event of a finding of guilty in relation to any or all of the counts, the defence for Mr Gucati would wish to adduce additional evidence from family members, local politicians, community leaders and teachers in relation to:

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(a) his character including:

(i) His contributions to local government and the community;

(ii) The detail of his work to improve conditions for invalids and veterans; and

(iii) The detail of his work relating to education.

and

(b) His financial means to pay a fine.

171. The above evidence as to personal character and financial means will be relevant to mitigation if the Accused is found guilty of any or all of the charges (which at that hypothetical stage would no longer amount to an allegation or allegations).

172. The scope of defence evidence at trial is defined by Rules 119(2)(v) and 138(1). The combined effect of those provisions is that admissible defence evidence at trial is confined to that which is relevant and has probative value in relation to the allegations in the indictment, with specific references to charges and relevant paragraphs of the indictment.

Personal mitigation and financial means to pay a fine does not fall within the scope of Rules 119(2)(v) and 138(1).

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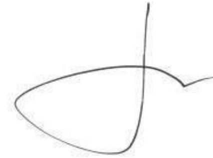

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7 April 2022

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