PUBLIC
Date original: 22/08/2022 14:42:00
Date public redacted version: 22/08/2022 15:50:00

In: **KSC-CA-2022-01**

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **A Panel of the Court of Appeals Chamber**

Judge Michéle Picard

Judge Kai Ambos

Judge Nina Jørgensen

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hysni Gucati

Date: 19 August 2022

Language: English

Classification: **Public**

Public Redacted Version of Gucati Appeal Brief

Pursuant to

Rule 179(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules")

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I. INTRODUCTION

1. On 07/10/2021 and 17/03/2022, Gucati was tried by TPII on a six count indictment ("Indictment")[1].

2. On 18/05/2022, TPII found Gucati guilty of counts 1,2,3,5 and 6 and sentenced him to a term of imprisonment of 4 ½ years less time spent in detention[2]. TPII acquitted Gucati of count 4.

3. On 24/05/2022, the President of the KSC assigned the present KSCCAP[3].

4. On 17/06/2022, Gucati filed a Notice of Appeal[4].

5. On 11/07/2022, Gucati filed his Re-Filed Notice of Appeal ("Notice of Appeal")[5] pursuant to the directions of the KSCCAP[6].

6. Gucati appeals:

(i) the Judgment on Counts 1,2,3,5 and 6, on the basis that TPII made errors on questions of law which invalidate the Judgment and/or errors of fact which occasioned a miscarriage of justice; and

(ii) the sentence, on the basis that TPII made errors in sentencing.

7. Gucati seeks:

(a) the reversal[7] of convictions on counts 1,2,3,5 and 6, to be replaced with:

[1] F00251/A01
[2] F00611 "Judgment"; a detailed chronology of the procedural history up to the pronouncement of Judgment is set out in F00611/A01
[3] CA/F00002
[4] F00009
[5] F00030
[6] CA/F00021 at Para.14 and Transcript_05/07/2022_p.13_(lines2-7)
[7] Art.46(4) LawNo.05/L-53: "overturn a finding of guilty"; Rule 182(3) KSC-Rules: "reverse…the Judgments by the Trial Panel"

(i) acquittals on each count; or

(ii) an order returning the case to TPII; or

(b) if any/all convictions are affirmed, a reduction in sentence.

8. Footnote references are to paragraphs in the Judgment, unless otherwise stated.

9. The grounds of appeal as set out in the Notice of Appeal are reproduced for convenience in Annex 1.

II. SUBMISSIONS

A. COUNT 3

Ground-1-(1A)

10. The purpose of the offence under Art.387 KCC is not to criminalise the use of force or serious threat etc. to induce a person to refrain from making a statement *of any kind and to any person*, or to make a false statement *of any kind and to any person*, or to otherwise fail to state true information *of any kind and to any person*.

11. Instead, Art.387 KCC is specifically restricted to the use of force or serious threat etc. to induce a person:

(a) to refrain from making a statement *to the police, a prosecutor or a judge*; or

(b) to make a false statement *to the police, a prosecutor or a judge*; or

(c) to otherwise fail to state true information *to the police, a prosecutor or a judge*.

12. Just as the words, "to the police, a prosecutor or a judge" limit the application of the entire provision, so do the words, "when such information relates to the obstruction of criminal proceedings".

13. The information which is the subject of the statement refrained from being made, or the false statement, or the true information otherwise failed to be stated *must relate to the obstruction of criminal proceedings* (i.e. an offence relating to the obstruction of proceedings that are criminal contrary to Art.386 KCC).

14. TPII appeared to accept that the words "when such information relates to organized crime" in Art.310 PCCK limited the application of that entire provision[8].

15. Art.387 KCC is drafted in exactly the same way albeit the words "organized crime" have been replaced with the words "obstruction of criminal proceedings".

16. The "placement and formulation" of the qualifier in Art.387 KCC is modelled upon the "placement and formulation" of the qualifier in Art.301 PCCK which limited the application of the entire provision[9].

17. The title of Art.387 KCC is of limited assistance. It refers after all to intimidation, which neither appears as a term within Art.387 KCC nor is necessary in substance (the offence being capable of commission through the promise of a gift or any other form of benefit).

18. There is no basis, literal or purposive, to restrict the relevance of the words "when such information relates to obstruction of criminal proceedings" in Art.387 KCC to "failing to state true information to the police, a prosecutor or a judge" only[10]. Restricting the application of the words "when such information relates to obstruction of criminal proceedings" in that manner would lead to a distinction in Art.387 without any merit, namely:

> (a) that inducing a witness, by any means of compulsion, to refrain from making a statement to the police, a prosecutor or judge, in non-obstruction proceedings is an offence under Art.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 Art.387; where

[8] Fn.186
[9] Para.114
[10] As previously submitted by the Prosecution in F00341 at para.19

(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[11]; and where

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

19. TPII found that the *actus reus* of the Art.387 KCC required the following material elements[12]:

(a) The use of force, serious threat, any other means of compulsion, a promise of a gift or any other form of benefit

(b) against any person making or likely to make a statement or provide information to the police, a prosecutor or a judge".

20. In so finding, however, TPII simply ignored the qualifier that the information must relate to the obstruction of criminal proceedings entirely.

21. In the present case, there was no evidence of the use of serious threat against:

(a) any person making or likely to make a statement to the police, a prosecutor or a judge in relation to the obstruction of criminal proceedings; and

(b) any person likely to provide information to the police, a prosecutor, or a judge in relation to the obstruction of criminal proceedings.

22. On TPII's own findings, it could only say that the acts and statements of the Accused would have created "serious fears and concerns" for "persons who gave evidence to the SC/SPO or were likely to do so, thereby constituting a strong

[11] F00334 at para.84
[12] Para.109,557

disincentive for such persons to provide (further) information about *any crimes under SC jurisdiction*"[13].

23. The essential ingredient of Art.387, that such (further) information related to obstruction of criminal proceedings, was absent and the *actus reus* not made out accordingly.

24. Setting aside for present purposes the further grounds of appeal below, the approach of TPII was more closely aligned with a conviction for an offence under Art.386(1) KCC (with the lower maximum penalty of 5 years) but:

(a) Gucati was not charged under Art.386(1) KCC; and

(b) The Prosecution made no application to amend the indictment, despite the fact that Gucati raised this point prior to the trial.

25. The error of TPII invalidates its findings on the *actus reus* for count 3. The conviction on count 3 should be overturned and acquittal entered.

***Ground-1*-(1B)**

26. The words "serious threat" for the purposes of Art.387 KCC are to be read in the context of Art.387. They are immediately preceded by the words "use of force", which supply context to the words "serious threat".

27. Each of the examples provided by TPII of the use of the term "threat" in other provisions of the KCC[14] involve the use of force, violence or harm to the person or to property (save in relation to rape and sexual assault)[15].

[13] Para.558
[14] Para.144; Fn.233,234
[15] Annex 2

28. In relation to rape and sexual assault, whatever the words "serious threat" mean in that context, they certainly do not extend to the overly broad definition adopted by TPII (compare Art.227(2) and Art.227(3)(3.1) KCC: a threat "to reveal a fact that would seriously harm the honor or reputation of a person" might well satisfy *TPII's* definition of "serious threat", which includes a threat to inflict serious harm on the well-being or privacy of a person, but such a threat cannot amount to a "serious threat" for the purposes of Art.227(3)(3.1) otherwise there can be no distinction between the offence created by Art.227(2) and the offence created by Art.227(3)(3.1)).

29. Nowhere in the KCC is threat used to encompass, as TPII held, threat to inflict harm on such a broad and ill-defined set of interests as 'well-being, safety, security, or privacy'.

30. There was no finding, and no evidence, of the use of force, the use of serious threat of force, or the use of threat to inflict serious harm on the health of any person in this case.

31. It is conceded that a threat to inflict serious harm on the 'well-being, safety, security or privacy of a person', other than through the use or serious threat of force, *might* amount to another means of compulsion but (i) TPII did not consider 'any other means of compulsion' as an alternative element[16] and, specifically, the question whether what was done amounted to "compulsion" which "refers to an act of constraining or coercing a person"[17]. TPII did describe the acts and statements of the Accused as amounting to, at its highest, 'a strong disincentive' for persons to provide information about crimes under SC jurisdiction[18] but a 'strong disincentive' is not equivalent to coercion (it is lesser). Coercion and constraint, of course, both imply the use of force (or a level of interference with personal autonomy equivalent to the use of force).

[16] Para.557
[17] Para.112; Fn.182
[18] Para.585

32. As TPII did not find serious threat to use force or another means of compulsion, the *actus reus* of Art.387 was not satisfied and cannot be satisfied on the evidence. The conviction should be overturned and an acquittal entered.

***Ground-1-*(1C)**

33. On TPII's own analysis, "threat" involves a threat to '*inflict*' serious harm[19].

34. It is not sufficient to establish the use of threat that the acts and statements of an accused cause, contribute to, augment, or amplify fears and concerns[20].

35. Nor, for that matter, is it sufficient to establish the use of a threat that the acts and statements of an accused actually inflicted serious harm upon another.

36. Although the offence under Art.387 KCC can be committed when a consequence is established, that is, when force is actually used, when 'threat' is alleged, it is not sufficient to demonstrate that the acts and statements of an accused resulted in the consequence of serious harm – *threat* involves a representation that the perpetrator will cause or *inflict* harm in the future (in the case of Art.387, 'serious harm').

37. The findings of TPII that the Accused's acts and statements caused, contributed to, augmented, or amplified fears and concerns[21] did not satisfy the Panel's own definition of a serious threat, in that the element of a threat to inflict serious harm (in the future) was absent from their findings.

38. It was insufficient for TPII to add that serious threats 'stemmed' from the Accused's acts and statements[22].

[19] Para.112; Fn.182
[20] Para.560,564,568,575,581,586
[21] Para.560,564,568,575,581,586
[22] Para.582,586

39. TPII gave no explanation as to what was meant by serious threats 'stemming' from the Accused's acts and statements. If TPII meant something other than that fears and concerns were caused, contributed to, augmented or amplified by the Accused's acts and statements (erroneously equating the causation of fear and concern with the specific use of a threat) TPII did not say how.

40. TPII had already concluded that the acts and statements of the Accused themselves amounted to a 'serious threat' without anything further[23] (albeit in the absence of a finding of a threat to inflict serious harm in the future).

41. There was no evidence of the use by the Accused of a threat to inflict serious harm, which explains the absence of such a finding by TPII.

42. Accordingly, the *actus reus* of the offence contrary to Art.387 KCC was not made out. The conviction should be overturned and replaced with an acquittal.

***Ground-1*-(1D)**

43. The words 'whoever uses force or serious threat to induce' require that a person was induced by force or serious threat used for that purpose[24].

44. The purpose of Art.387 KCC, "to protect the information of witnesses and other information providers and, more generally, the integrity of proceedings by penalising the perpetrator who intends to influence a witness", as TPII put it, is equally shared by Art.386 KCC, which a requires proof of consequence, namely, that the perpetrator induced a person to decline to give a statement, make a false statement or conceal a material fact[25].

[23] Para.585
[24] See Para.113 in which the Trial Panel acknowledged that Art.387 requires another person "to be induced"
[25] Para.115; F00074 at para.62 and fn.40; F00341 at para.20

45. There is no meaningful distinction to be drawn between the words 'induces' and 'to induce'.

46. The KCC, in Art.386 and Art.387, has taken a different approach to the approach taken by the ICTY and the ICC in relation to offences of contempt, by requiring proof of consequence.

47. Indeed, TPII itself held that it was the consequence of a person being induced 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 that is prohibited by Art.387 KCC[26].

48. By contrast, neither the offence interfering with a witness contrary to Rule 77(A)(iv) ICTY-Rules) nor the offence of corruptly influencing a witness contrary to Art.70(1)(c) Rome Statute involves expressly, or by implication, any prohibited consequence.

49. By stipulating that "corruptly influencing" a witness amounts to an offence, without mentioning any result of this conduct, Art.70(1)(c) Rome Statute places the emphasis on the criminal conduct[27].

50. By referring to the result of the use of serious threat etc., namely, 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, Art.387 KCC by contrast places the emphasis on the consequence of the conduct.

51. TPII did not find (and there was no evidence upon which TPII could reasonably find[28]) that any person was induced 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

[26] Para.121-122
[27] *Bemba* at para.737
[28] Para.550

or a judge. Accordingly, the *actus reus* of Art.387 KCC was not made out. The conviction should be overturned and replaced by an acquittal.

***Ground-1-*(1E)**

52. Even on TPII's narrow analysis, the phrase "when such information relates to obstruction of criminal proceedings" qualifies the third alternative in Art.387 KCC, i.e. the person failing to "state true information to the police, a prosecutor or a judge"[29].

53. Yet when it came to consideration of count 3, TPII simply ignored that qualification entirely.

54. The Panel stated that it would 'assess…whether the Accused used serious threat against any person making or likely to make a statement or provide information to the police, a prosecutor or a judge', with no reference to the qualification in Art.387 that the information must relate to obstruction of criminal proceedings[30].

55. Indeed in its conclusion on count 3, TPII appeared satisfied that the *actus reus* was made out if serious threat was used against any person likely to "provide (further) information about *any* crimes under SC jurisdiction"[31].

56. TPII made no finding that any serious threat was used specifically against a person making or likely to make a "statement" (and it was not alleged that the Accused used serious threat to induce any person to make a false statement).

57. Instead, TPII used the terms "evidence" (which does not appear in Art.387 KCC) and "information" interchangeably[32].

[29] Para.114
[30] Para.557
[31] Para.585
[32] e.g.Para.581,585

58. It was insufficient, even on TPII's analysis of Art.387 KCC, to find that serious threat was used against any person likely to provide information about *any* crimes under SC jurisdiction. Only information which related to the obstruction of criminal proceedings was sufficient. There was no finding of the same, nor any evidence upon which TPII could have found that the Accused used a serious threat to induce another person to fail to state information relating to the obstruction of criminal proceedings.

59. As the *actus reus* was not satisfied, the conviction should be overturned and replaced with an acquittal.

Ground-2-(2A)

60. TPII erred in refusing to exclude the evidence of W04841, in so far as it related to the contents of parts of Batches 1-4 that were neither disclosed nor exhibited[33].

61. Rule 138(1) KSC-Rules provides a route for the Accused to challenge the admissibility of evidence where its probative value is outweighed by its prejudicial effect: "Unless challenged or *proprio motu* excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect".

62. An investigator of the prosecuting party is not entitled to present opinions or draw conclusions on the contents and interpretation of documents with which he familiarised himself/herself only by virtue of having reviewed them in the context of his employment with that party[34].

63. Where the investigator has only become familiarised with documents by virtue of having reviewed them in the context of his employment with the prosecuting party, the investigator may testify as a fact witness only in relation to provenance and

[33] Transcript_28/10/21 p.1673(line_13) to p.1678(line_5); Transcript_05/11/2021 p.1912-1913
[34] *Perisic* at para.12

chain of custody of the documents he has obtained in the context of his employment with that party, as no other relation between the investigator and the documents has been established[35].

64. The summarising of the contents of collections of documents and individual documents necessarily entails the giving of opinions and conclusions on the contents of the documents in question[36].

65. It was the duty of TPII itself to thoroughly analyse the evidence (the documents themselves) and familiarise itself with it[37].

66. In the absence of the documents upon which the investigator's report was prepared, that task was impossible - TPII simply took for granted, and accepted without question, the assertions of the investigator of the prosecuting party, W04841, as to the contents of the documents[38].

67. Where, as in the present case, the material summarised is controversial and the summary is prepared by an employee of the party who seeks to rely upon it:

> (a) A summary of that material should not be regarded as reliable unless the material itself is in evidence so that the Trial Chamber may make its own assessment of the material; and
>
> (b) Were the Trial Chamber to rely upon the summary without having the opportunity to make its own assessment of its reliability, the public perception of a verdict based upon that summary would be that the verdict is unsafe[39].

[35] *Perisic* at para.15
[36] *Perisic* at para.12
[37] *Perisic* at para.15
[38] *Bizimungu* at p.31(lines 8-14)
[39] *Milosevic (Appeal)* at para.23

68. The above caution applies, even where the documents summarised are available to the accused and to the Trial Chamber itself to check the reliability of the summary[40].

69. In the present case, the undisclosed documents in Batches 1-4 were neither made available to the Accused nor to TPII to check the reliability of the summary[41].

70. The assessment of an investigator of a prosecuting party, W04841, was not an independent assessment[42].

71. The relationship between the documents reviewed and W04841 was one where she was said to have become familiarised with documents by virtue of only having reviewed them in the context of her employment with the SPO (her duties being said to include 'analyzing and reporting on evidence'[43]).

72. In those circumstances, W04841 should properly only have been permitted to testify as a fact witness in relation to provenance and chain of custody of the documents as no other relation between W04841 and the documents was established[44].

73. TPII considered that "the absence of the material from the record made the determination of the content, authenticity and confidentiality of the Batches a more complex exercise" and underscored that "disclosure of the impugned material at the core of the charges (if necessary, with limited redactions) is the most effective and sometimes the only way in which a case can be determined"[45].

74. In the present case, disclosure of the impugned material at the core of the charges was the only *fair* way to determine the case.

[40] *Milosevic (Appeal)* at para.24
[41] Paras.331,339,354
[42] *Milosevic (Appeal)* at para.3(c) per the Trial Chamber
[43] P86 at para.3
[44] *Perisic* at para.15
[45] Para.332

75. The issue of the contents of the material allegedly contained within Batches 1, 2, 3 and 4 was both highly controversial[46] and at the very heart of the case against the Accused.

76. The documents themselves ought to have been produced in evidence so that TPII could reach its own conclusions on the content thereof (rather than be asked to take for granted the assertions of W04841).

77. The testimony, declarations and annexes prepared by W04841, a member of staff of the office of the Prosecutor, describing the contents of the non-exhibited and non-disclosed parts of Batches 1-4 had no more probative value than the assertions that Prosecution counsel made[47].

78. Their prejudicial effect (being assertions that could not be tested against the actual documents, which were withheld by the Prosecution) grossly outweighed the probative value of such assertions and they should have been excluded accordingly.

79. TPII claimed that that the Defence had not "pointed to any legal basis authorising the Panel to grant the relief sought"[48]. That was simply wrong. TPII had been repeatedly invited to consider Rule 138(1)-(3) KSC-Rules[49] which provided a legal basis authorising the Panel to exclude relevant evidence the probative value of which is outweighed by its prejudicial effect. TPII appears to have misunderstood the true effect of Rule 138, claiming that the exclusionary scope of Rule 138(1)-(3) was limited to that which was irrelevant or repetitive[50].

80. For the purposes of her review of the undisclosed parts of Batches 1-4, W04841 had to undertake an assessment and use her judgment. She formulated her own test

[46] e.g. F00258 at para.51-53,77-79,81,194,111,138,155,168,177,201,245,247-250,25-255,257-258,264-275,278-288,302,351
[47] *Milosevic (Trial)* at p.5932(line_19) to p.5933(line_1)
[48] Para.8
[49] e.g. Transcript_28/10/2021 p.1673(lines13-20)
[50] F00328 at para.23

of 'witness' and 'potential witness'[51], and applying that test she expressed the opinion *inter alia* that "the confidential annexes of the SITF Requests [in Batch 1] listed 'hundreds of names of witnesses and potential witnesses'"[52] and that Batch 3 "contained references to: (i) names and evidence provided by witnesses, potential witnesses and suspects; and (ii) "approximately 150 (potential) witnesses". TPII adopted entirely these assertions[53].

81. There was no other evidence, oral or documentary, independent of W04841 to the effect that there were "hundreds of names of witnesses and potential witnesses" contained within Batch 1, and approximately 150 (potential) witnesses named in Batch 3; and W04841's charts provided no means to check those assertions[54].

82. Only 6 individuals were actually identified as "witnesses"/"potential witnesses"[55]:

(a) [REDACTED]
(b) [REDACTED]
(c) [REDACTED]
(d) [REDACTED]
(e) [REDACTED]
(f) [REDACTED]

83. TPII adopted both the assertion of W04841 as to numbers and the test she used to calculate those numbers, despite (i) the error apparent with that test (see below); and (ii) no way of testing or challenging W04841's accuracy as to the application of that test to any individual, or the total numbers alleged therein.

[51] Para.344
[52] Para.345,355
[53] Para.379,381; Transcript_20/10/2021, p.1137(lines10-13)
[54] P90 re Batch 1
[55] Para.345,355

84. TPII then used those assertions to find the *actus reus* of Count 3 made out[56].

85. TPII stated, whilst underscoring its view that the offence under Art.387 KCC does not require proof that the impugned conduct had any particular effect on the person, that any such effect, if established, can inform the level and seriousness of a threat[57]. That much is non-controversial.

86. TPII, however, went further and appears to have considered that any such effect can inform not just the level and seriousness of a threat, but whether or not the impugned conduct actually amounts to a threat to inflict harm in the first instance (see above).

87. In order to evaluate whether the conduct of the Accused amounted to or involved a serious threat within the meaning of Art.387 KCC, the Panel considered the scope of revelation[58].

88. To the extent to which the 'scope of revelation' can properly inform whether or not a threat was made (and not just the level and seriousness of a threat), consideration of the scope of the revelation ought to have been restricted to the 6 identified "witnesses" and/or "potential witnesses" in the material: four Serbian officials, in relation to whom there was no evidence of complaint[59]; another in relation to which there was no evidence of complaint[60]; and one other who did not express fear, who had made it very public, for a number of years, dating back at least to 2012, that he had been cooperating with prosecutors investigating alleged offences committed by the KLA and in relation to whom the SPO took no measure to protect[61].

89. On that basis, TPII could not reasonably have concluded that "the sheer number of revealed identities" would have "caused fears and concerns for many of those who

[56] Para.559,564
[57] Para.582
[58] Para.558,559
[59] Para.345,514; Transcript,_04/11/2021 p.1784(line15) to p.1785(line 5)
[60] [REDACTED]
[61] Transcript_04/11/2021 p.1790(lines13-16), p.1791(lines20-24), p.1904(lines1-25)

gave evidence to the SC/SPO or had been likely to do so" and TPII's corresponding conclusion on the *actus reus* at paragraph 585 of the Judgment is unsustainable accordingly.

90. In relation to W04841's summary of the contents of undisclosed parts of the Batches, it is accepted that it fell within the discretion of the SPO not to present the entirety of the Batches as exhibits.

91. It also fell within the SPO's discretion to apply for an order withholding disclosure of parts of the Batches under Rule 108.

92. It did not, however, fall within the discretion of the SPO to choose not to present the entirety of the Batches as exhibits, withhold disclosure thereof at the same time, and then call an SPO investigator to make assertions as to the contents of the undisclosed material in evidence which Gucati could not verify by comparison with the Batches themselves.

93. It remained within the SPO's discretion: (i) to apply to withdraw the indictment against the Accused; or otherwise (ii) to confine the Prosecution case to those 'pages of the Batches' that the Prosecution presented in evidence. It chose not to do so.

94. Such choices made by the SPO impacted on the fairness of the trial and TPII should have intervened.

95. For the reasons set out, the testimony of W04841, making assertions about the contents of undisclosed parts of the 'Batches' which could not be tested in cross-examination against the actual documents as they were withheld by the Prosecution, was grossly prejudicial and its probative value far outweighed.

***Ground 2* (2B)**

96. TPII heard no evidence from any witness that they had serious fears and concerns which were engendered by the Accused's acts and statements, let alone *many*.

97. The SPO opted not to call any such person to testify about the consequences of the Accused's actions upon them and the basis on which they formed their views regarding those consequences[62].

98. As TPII held, the Defence had no opportunity during the trial effectively to test the accounts of any witnesses whose concerns were apparently recorded in Contact Notes[63].

99. TPII rightly stated that it would refrain from making findings in relation to any such witness accordingly[64].

100. It was unreasonable thereafter for TPII to use that evidence to find that the many persons were caused serious fears and concerns[65].

101. The evidence regarding protective measures that the SPO had to adopt could not reasonably support that conclusion alone. TPII heard evidence that the SPO had to carry out 1 or 2 relocations, and a small number of emergency risk assessments[66] only.

102. It is clear that TPII regarded fear and concern as capable of amounting to "serious consequences" (for the purposes of Count 5)[67]. Yet, only one witness was found to have suffered fear and concern which could be described as "substantial interference with the safety, security, well-being, privacy or dignity of protected persons or their families"[68].

[62] Para.541
[63] Para.541
[64] Para.541,583
[65] Para.582,584
[66] See below
[67] Para.538
[68] Para.100,541

103. It was not reasonably open to TPII to conclude for the purposes of Count 3 that many witnesses were caused serious fears and concerns in those circumstances.

104. TPII had not found on the basis of the scope of the revelation[69], the publicity and wide distribution[70], and the statements of the Accused[71] alone that serious fears and concerns had been caused for *many*.

105. It was unfair of TPII to rely upon the "concerns expressed by Witnesses as a result of the revelation", despite its stated position that it would not do so, when assessing whether any threat was serious for the purposes of Art.387.

106. TPII was informed as to the level and seriousness of the threat by any effect, *if established*[72]. The only effect 'established' was that a small number of persons had suffered substantial interference with their safety, security, well-being, privacy or dignity of protected persons or their families, including by way of fear and concern.

107. Paragraph 88 above applies *mutatis mutandis*.

108. On that basis, TPII could not reasonably have concluded that "the sheer number of revealed identities" would have "caused fears and concerns for many of those who gave evidence to the SC/SPO or had been likely to do so" and TPII's corresponding conclusion on the *actus reus* at paragraph 585 of the Judgment is unsustainable accordingly.

Ground-3-(3A)

[69] Para.560
[70] Para.564
[71] Para.568,575
[72] Para.582

109. In contrast with the Judgment in relation to Counts 1, 2, 5 and 6[73], TPII did not set out the specific requirements of direct intent for the purposes of Count 3, as it found them to be.

110. TPII did:

> (a) state that it would assess whether "the Accused used serious threats against any person making or likely to make a statement or provide information to the police, a prosecutor or a judge with the direct … intent of inducing that person to refrain from making a statement or to make a false statement or to otherwise fail to state true information"[74]; and
>
> (b) conclude that "the Accused acted with awareness of, and desire for, inducing Witnesses and Potential Witnesses who were identified in the Protected Information to refrain from giving (further) evidence to the SC/SPO"[75].

111. Art.21 KCC provides that a person acts with direct intent when he or she is aware of his or her act and desires its commission.

112. For the purposes of Art.387 KCC, therefore, a person acts with direct intent when he is aware that he uses serious threat 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, and he desires the commission of that offence.

113. It is not enough that an accused intends to dissuade a witness from giving (further) evidence to the SC/SPO[76]. By itself, that intention may be perfectly legitimate.

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[73] Para.85,105,153,176
[74] Para.588
[75] Para.605
[76] Para.603

114. Nowhere in the Judgment did TPII find that the Accused was aware that his actions and statements amounted to a serious threat (that is, a threat to inflict serious harm on another), and desired that that be so. The approach taken by TPII to the question of direct intent for Count 3 simply ignored that requirement.

115. Nor did TPII find that the Accused acted with awareness of, and desire for, inducing a person specifically to refrain from making a "statement" (it was not alleged that the Accused did so to induce another person to make a false statement).

116. TPII did find that the Accused acted with awareness of, and desire for, inducing Witnesses and Potential Witnesses who were identified in the Protected Information to refrain from giving (further) *evidence* to the SC/SPO, but TPII used the terms "evidence" (which does not appear in Art.387) and "information" interchangeably (see above re the conclusions of TPII on the *actus reus*[77]).

117. Even on TPII's analysis the words "when such information relates to obstruction of criminal proceedings" limited the third alternative, namely where a person is induced to refrain from giving (further) information (or evidence).

118. TPII simply ignored those qualifying words for the purposes of consideration of the *mens rea* and did not find that Gucati acted with awareness of, and desire for, inducing "Witnesses and Potential Witnesses who were identified in the Protected Information" to refrain from giving (further) information/evidence to the SC/SPO *which related to obstruction of criminal proceedings*. There was, of course, no evidence from which that finding could be made.

119. Further, whilst TPII referred to the fact that Art.387 is concerned with 'true' information when setting out how it would assess *mens rea* for the purposes of Count 3[78], when it came to its conclusions on *mens rea* it once again simply ignored a requirement of Art.387 KCC. TPII did not find, nor could it on the evidence

[77] Para.585
[78] Para.588

before it, that the Accused acted with awareness of, and desire for, inducing "Witnesses and Potential Witnesses who were identified in the Protected Information" to refrain from giving *true* information/evidence to the SC/SPO.

120. As TPII held, albeit in relation to Art.388(1) KCC, "establishing that the Accused knew that the information might be true or that they were indifferent as to the truth of the information is not enough"[79].

121. The SPO adduced no evidence to show that the Accused were aware that (i) "the information of the Witnesses" previously given to the SC/SPO, was, at least to a certain extent, truthful[80], nor (ii) further information of the Witnesses which the Accused intended to dissuade Witnesses and Potential Witnesses from giving to the SC/SPO.

122. Accordingly, direct intent for the purposes of count 3 was not established. The conviction should be overturned and replaced with an acquittal.

Ground-3-(3B)

123. In the event that the Court of Appeals Panel agrees that TPII erred in relation to direct intent as submitted above, eventual intent is not sufficient for the offence under Art.387 KCC as an alternative basis upon which to sustain the conviction (under Art.46(4) LawNo.05/L-53).

124. The use of the words "to induce" in Art.387 indicates a specific purpose or goal-orientated activity, namely that the purpose or goal of the use of force or serious threat etc. was *to induce* another person to refrain from making a statement or to make a false

[79] Para.621
[80] Para.623

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[81].

125. In contrast with the Judgment in relation to Counts 1, 2, 5 and 6[82], TPII did not set out in Section III of the Judgment the specific requirements of eventual intent for the purposes of Count 3, as it found them to be.

126. TPII stated that "the phrase 'to induce' indicates either the desire of the perpetrator under Art.21(2) KCC or the accepted prohibited consequence of his or her actions, under Art.21(3) KCC"[83].

127. TPII did not, however, identify what the 'prohibited consequence' was under Art.387 KCC. Indeed, TPII had found that Art.387 does not prohibit any consequence[84] (the offence can be committed, according to TPII, without any consequence occurring).

128. The examples given by TPII at footnote 203 of the Judgment are simply further examples where it is arguable the said offences can be committed by direct intent only (and do not confirm the analysis of TPII in paragraph 121).

129. The observation by TPII that "to hold [that direct intent only was sufficient], would mean that any perpetrator who intentionally uses force or serious threat against witnesses in a criminal trial with accepted, but not necessarily desired, consequence that witnesses would refrain from testifying, would go unpunished" is simply incorrect. Such a perpetrator may be convicted of assault contrary to Art.184, 185 or 186 KCC or threat contrary to Art.181.

130. Moreover it is not the intention of Art.387 KCC to prevent and punish acts of intimidation during criminal proceedings, as TPII held. Art.387 KCC also prohibits

[81] *Separate Opinion of Judge Barthe* at para.2
[82] Para.86,106,154,177
[83] Para.121
[84] Para.121

the promise of a gift or any other form of benefit being made to a witness/potential witness - but only where the *purpose* of the same is to induce that person to refrain from making a statement, to make a false statement or otherwise fail to state true information to a police, prosecutor or judge, when such information relates to obstruction of proceedings.

131. There may be many legitimate reasons why a person (e.g. an employer) may wish to offer a benefit (such as a genuine job offer of a full-time position in Australia) to another person (an employee), who happens also to be a witness in criminal proceedings (which are entirely unrelated and of no interest to the employer), when the person making the offer (employer) foresees that one of the (many) undesired consequences of the offer might be that the other (employee) does not testify at trial (because the employee may no longer be available to attend the trial, having moved to Australia for a full-time position). There is no indication that the legislator intended an employer who made a job offer to an employee in the circumstances above to be punished under Art.387 KCC.

132. Remarkably, TPII's analysis (which did not require proof of consequence) suggests that they would regard that the employer in the above example would commit an offence under Art.387, even if the employee actually went on to testify because (i) he refused the job offer or (ii) he accepted the job offer in Australia but a video-link facility was available and granted by the court.

133. Instead, the offence under Art.387 KCC is properly restricted to those cases where the specified means are used with the specific purpose of inducing another to refrain from making a statement etc.

134. As Judge Barthe held in his dissenting opinion, direct intent only is sufficient.

B. COUNT 5

Ground-4-(4A)

135. Art.392(1) KCC requires that the information declared to be secret must have been disclosed to the perpetrator in an official proceeding[85]. Contrary to TPII' findings, that interpretation, is consistent with the plain meaning of the provision which requires that the information revealed was "disclosed in an official proceeding".

136. By contrast, protected information overheard, for example, on a train by a third party is not information 'disclosed in any official proceedings' – the disclosure in that example takes place on a train[86].

137. The target of the offence is quite properly "the initial recipient of the information" (i.e. the person who having been made privy to the protected information by authorization, then discloses it publicly without authorization e.g. on a train in the above example), not the person who 'overhears' it.

138. Such a person who 'overhears' is not necessarily 'beyond the reach of the law' in the event that, as submitted, the offence of Violating the Secrecy of Proceedings contrary to Art.392 KCC does not apply to him.

139. A person who overhears, or accidentally comes into possession of, information which is subject to a non-disclosure decision of the court may commit the offence of contempt of court pursuant to Art.393 KCC if he fails to comply with that decision.

[85] *Salihu et al Commentary* at p.1141 margin number 8: "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.)"
[86] Consider the example in Para.75

140. If that person is made subject to a non-dissemination order of the material which they have accidentally come into possession of, they may commit an offence of contempt of court contrary to Art.393 KCC if they fail to obey[87].

141. As the KCC and the criminal law of Kosovo is not the preserve of the KSC, there are other offences that may apply also[88] (e.g. Art.200 KCC and Art.50 LawNo.03/L-178).

142. The offence contrary to Art.392(1) KCC acts to bind those who are given lawful access to secret material, so as not to abuse that privilege – i.e. to prevent those participating in the proceedings from "violating" the secrecy of the proceedings to which they are privy.

143. Consistently with the above approach to Art.392(1) KCC, Art.392(2) continues that 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.

144. The exchange of information within the SITF/SPO for the purposes of investigation and prosecution as well as shared between the SITF/SPO and its counterparts in the course of cooperation for investigative purposes may qualify as 'disclosure' for the purposes of Art.392(1) KCC only where the alleged perpetrator falls within one of those categories (SITF/SPO or its counterparts). Where the perpetrator does not fall into either category, and has not been made privy to the information, the information cannot properly be said to have been "disclosed in an official proceeding".

[87] e.g. F00005 at para.21; F00007 at para.21; and F00017/A01 in relation to the Accused

[88] e.g. see Art.199(1) KCC (formerly Art.202) and Art.236 KCPC in relation to violating the privacy of documents (including specifically an order for secrecy with respect to factual allegations contained in a declaration of a person as a co-operative witness); Art.200 KCC; Art.50 LawNo.03/L-178

145. The Accused did not fail into either category. There was no "disclosure in any official proceeding" of the information that he revealed (on the contrary, the SPO's case was that the information was never officially disclosed).

146. Accordingly, the *actus reus* was not satisfied. The conviction should be overturned and replaced with an acquittal.

Ground-4-(4B)

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

148. The KCC, which is not the preserve of the KSC, is to be interpreted in accordance with the law of Kosovo.

149. The classification of information as 'secret' is defined by LawNo.03/L-178, which establishes a "uniform system for classifying and safeguarding information"[89].

150. LawNo.03/L-178 applies to all public authorities in Kosovo exercising executive and judicial competences, including the police and the courts[90].

151. LawNo.03/L-178 provides for the classification of information which falls *inter alia* into the category of "law enforcement activities"[91], including "sources" (witnesses or potential witnesses), where disadvantage or damage might be caused by unauthorized disclosure of information[92].

152. In accordance with Art.6 LawNo.03/L-178, the classification "secret" shall be applied to such information only where unauthorized disclosure could cause *serious*

[89] Art.1 LawNo.03/L-178
[90] Art.2(1) LawNo.03/L-178
[91] Art.3(1.15) and 4(1.3) LawNo.03/L-178
[92] Art.3(1.15), 4(1.3) and 6 LawNo.03/L-178

damage and it is distinct from classifications of information as 'confidential' or 'restricted' or 'protected'.

153. Art.392(1) KCC specifically refers to information which 'has been declared to be secret' (i.e. classified), and not merely to information which is treated as secret, or 'kept secret' or 'held in secret'[93].

154. In accordance with the uniform system for classifying and safeguarding information related to law enforcement activities including sources (i.e. witnesses/potential witnesses) established by LawNo.03/L-178, (i) such information could only be declared secret where unauthorized disclosure thereof could cause *serious* damage to the interests of law enforcement activities, including sources; and (ii) a declaration that the information was merely 'confidential', 'restricted' or 'protected' was insufficient to satisfy the requirement in Art.392(1) KCC that "information had been declared to be secret by a decision of the court or a competent authority".

155. There was no evidence in the present case of any impugned information having been specifically declared to be "secret" by the SPO/SITF. The *actus reus* of count 5, as particularised, was not satisfied. The conviction should be overturned and replaced with an acquittal.

Ground-4-(4C)

156. The revelation of internal work product of the SPO is not expressly prohibited by Rule 106 KSC-Rules.

157. Rule 106 provides that "*subject to Rule 103*, and unless otherwise ordered by a Panel, reports, memoranda or other internal documents prepared by a Party…in

[93] In contrast to Art.85(1)-(2), 95(2) and 236(2)-(4) KCPC; Art.473(1) KCPC refers to the wholly different context of the conduct of deliberation and voting sessions by a trial panel

connection with the investigation or preparation of a case are not subject to disclosure or notification *under these Rules*".

158. Contrary to an express prohibition on revelation, Rule 106 specifically provides that internal work product of the SPO is *not exempt* from the requirement under Rule 103 that the SP shall immediately disclose to the Defence any information as soon as it is in his or her custody, control or actual knowledge, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the SP's evidence.

159. Moreover, Rule 106 does not prohibit the SPO from making voluntary disclosure of any internal work product.

160. Nor does Rule 106 prohibit the revelation of internal work product of the SPO on any lawful basis which might exist *outside of the Rules*, such as under the Constitution or international human rights law (see Art.3(2)(a)and (3) LawNo.05/L-53).

161. Indeed, Rule 106 contains no prohibition at all, and only exempts the SPO from some of the obligations to disclose in relation to internal work product of the SPO that are otherwise provided for in the Rules.

162. TPII's finding that the "Protected Information also qualifies as information which must not be revealed according to the law, within the meaning of Article 392(1) of the KCC" was based upon the erroneous view that Rule 106 expressly prohibits the revelation of internal work product of the SPO (together with the error identified in Ground-4D below). As such, TPII's finding is invalidated. It was not established that the impugned information was information which must not be revealed according to the law. The *actus reus* of count 3, whether as particularised or not, was not established. The conviction should be overturned and replaced by an acquittal.

Ground-4-(4D)

163. Art.62(1) LawNo.05/L-53 provides no prohibition on the revelation of SPO records, let alone a general prohibition. Art.62(1) does not prohibit, for example, the SPO from providing voluntary access to its records, and it states nothing about what a third party once in possession of those records may or may not do with them.

164. Art.62(2) further provides that where a third party is granted access to SPO records on application, the recipient is required to protect and maintain only such confidentiality and protections *granted* to any person by the SC/SPO. There is no general prohibition on revelation which arises out of either Art.62(1) or 62(2) LawNo.05/L-53.

165. Nor does Art.62 LawNo.05/L-53 prohibit revelation on any otherwise lawful basis that might arise, for example, under the Constitution or international human rights law (see Art.3(2)(a) and (3) LawNo.05/L-53).

166. TPII's finding that the "Protected Information also qualifies as information which must not be revealed according to the law, within the meaning of Article 392(1) of the KCC" was based upon the erroneous view that Art.62(1) LawNo.05/L-53 expressly prohibits the revelation of internal work product of the SPO (together with the error identified in Ground-4C above). As such, TPII's finding is invalidated. It was not established that the impugned information was information which must not be revealed according to the law. The *actus reus* of count 3, whether as particularised or not, was not established. The conviction should be overturned and replaced by an acquittal.

Ground-4-(4E)

167. The terms of Art.392(1) KCC require a *decision* followed by a *declaration*. Merely treating information as secret requires neither decision nor declaration. Marking information as secret may amount to a declaration, but it is not proof of a decision if all documentation is marked secret as a matter of routine.

168. In accordance with the uniform system for classifying and safeguarding information related to law enforcement activities including sources (i.e. witnesses/potential witnesses) established by LawNo.03/L-178, a classification decision shall be in writing and attached to the document which contains classified information[94]. A classification authority must not routinely mark all documentation as secret – a classification authority shall avoid "over-classification of information and shall assign to information only such classification level that is necessary"[95].

169. Art.l0(1) LawNo.03/L-178 provides that documents containing classified information shall on their face have the following marking: classification level, date of classification, name and position title of the classification authority, public authority of origin, distribution list, if any and declassification information.

170. Moreover, Art.10(2) LawNo.03/L-178 provides specific requirements as to the application of classification markings of CONFIDENTIAL and SECRET.

171. There was no evidence in this case of the markings complying with Art.10 LawNo.03/L-178.

172. The KSC-Rules and the KSC-PDFilings have similar provisions, the effect of which is to require a specific procedure for the making of decisions and declarations of classification, in accordance with LawNo.03/L-178 - consider, for example:

> (a) Rule 82(1) which identifies the classification level and corresponding distribution list;

[94] Art.8(2) LawNo.03/L-178
[95] Art.8(3) LawNo.03/L-178

(b) Rule 82(3) which requires that "any filing classified as confidential or strictly confidential shall state the reasons for such classification, and whether and when it may be reclassified (declassified);

(c) Rule 82(5) which requires that where the basis for classification no longer exists (i.e. classification is no longer necessary), whoever submitted the original filing must seek reclassification; and

(d) Art.29(2) KSC-PDFilings which requires the submitting Participant, date of submission, classification and participants to which the Submission is to be distributed to be identified on the cover page of filings.

173. TPII's finding that "the SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 and the documents in Batch 3 qualified as information declared secret by a competent authority, within the meaning of Article 392(1) of the KCC"[96] was based on, and invalidated by, its erroneous view that it was sufficient that the SPO simply treated or marked information as confidential.

174. In doing so, TPII ignored the requirements for a *decision* followed by a *declaration*, and the requirements of form and substance that apply to both stages of classification.

175. In so doing, TPII found erroneously that:

(a) Documents which bore no classification marking at all qualified as "information declared secret"[97]; and

[96] Para.473
[97] Transcript_20/10/2021 p.1077(lines15-17); Para.366,473

(b) Documents which bore the marking "confidential" qualified as "information declared secret", in the absence of evidence of any classification decision preceding the marking.

176. There was no evidence as to who marked any such documents: it was not the case that all SPO/SITF officers had the authority to classify documents as 'confidential'[98] and there was no evidence as to who did have the authority[99]. There was no evidence as to process for the consideration of confidentiality[100] and no evidence as to any documentation recording reasons for designation of another document as confidential[101].

177. Moreover, there was no evidence of any document marked as 'secret'.

178. The Prosecution were required to prove that any decision and declaration that information was secret was a lawful decision and declaration. If information was declared secret by an unlawful decision and/or declaration, then the revelation of that material is not an offence[102].

179. In the present case, the error of TPII to proceed simply on the basis that it was sufficient that the SITF/SPO simply marked or even treated information as confidential invalidates TPII's finding on the *actus reus* of count 3, as particularised. The conviction should be overturned and replaced by an acquittal.

Ground-4-(4F)

180. The Prosecution were required to prove that any decision and declaration that information was secret was a lawful decision and declaration. If information was

[98] Transcript_20/10/2021 p.1058(lines8-10)
[99] Transcript_20/10/2021 p.1070(lines20-22)
[100] Transcript_20/10/2021 p.1071(lines1-20)
[101] Transcript_20/10/2021 p.1072(lines3-20)
[102] *Salihu et al Commentary* at p.1142-1143 margin number 10

declared secret by an unlawful decision and/or declaration, then the revelation of that material is not an offence[103].

181. As TPII appears to have recognised, information shall not be classified unless it is necessary[104] and classification shall not be used to conceal violations of law, abuse of authority, inefficiency, administrative error or to prevent embarrassment to a person, public authority or organization[105].

182. It was for the SPO to prove according to Art.21(3) LawNo.05/L-53 that the impugned information had been classified in accordance with law, i.e. that it was necessary to classify the impugned information as protected or confidential and that that classification had not been carried out abusively.

183. In the present case, the SPO disclosed and exhibited only a fraction of the impugned material at the core of the charges[106]. Save for 6 identified "witnesses/potential witnesses", the SPO called no evidence as to the identities of the persons the SPO sought to obtain information from. The SPO adduced no evidence as to what information the SPO sought from the "witnesses/potential witnesses", nor the reasons why.

184. Accordingly, TPII was unable to consider the content of the impugned material and ascertain for itself whether it was necessary to classify the impugned information therein and whether or not any classification (if marking/treating information as confidential was sufficient) had been carried out abusively (e.g. to conceal violations of law, abuse of authority, inefficiency, administrative error or to prevent embarrassment to a person, public authority or organization).

[103] *Salihu et al Commentary* at p.1142-1143 margin number 10
[104] Art.8(3) LawNo.03/L-178 (see also Art.40(6)(d) LawNo.05/L-53 which provides that prior to or during the course of a trial, the Trial Panel may provide for the protection of confidential information *as necessary*)
[105] Art.5(1) LawNo.03/L-178
[106] Para.331-333

185. Nor could the evidence of W04841 assist in this regard.

186. W04841 was not tasked to, and did not, consider (i) whether there was proper authority to classify any particular impugned document as confidential, (ii) whether the process of classification was lawful, (iii) whether the classification of confidentiality was necessary or (iv) whether it was being used abusively[107]. W04841 was unable to give any assistance on the procedure for classification and had never seen (or at least, could not recall having seen) any document recording the reasons for designation of another document as classified[108].

187. In the absence of the impugned material being exhibited in full, TPII was thus unable to conclude positively that the SITF/SPO had lawfully (i.e. necessarily and non-abusively) marked or treated the SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 and the documents in Batch 3 as confidential.

188. It was wrong as a matter of law, invalidating TPII's findings on the *actus reus* of count 5, to reverse the burden proof in those circumstances to assert, as TPII did, that "the Panel has received no evidence that the SITF or SPO has done so abusively or unnecessarily in respect of any of the information relevant to these proceedings" and for that reason find that the SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 and the documents in Batch 3 qualified as information declared secret by a competent authority. It was especially unfair in circumstances where the documents themselves had not been disclosed to the Accused to permit the Accused to review and thereafter produce evidence from the impugned documents as part of his own case.

189. As the *actus reus* of count 5 as particularised (including the requirement that information had been lawfully declared secret by a competent authority) was not established, the conviction should be overturned and replaced with an acquittal.

[107] Transcript_20/10/2021 p.1059(lines11-20)
[108] Transcript_20/10/2021 p.1070(line19) to p.1072(line20)

Ground-4-(4G)

190. TPII held that revelation of information is "without authorization" if it is not permitted by law[109]. It follows that if the revelation of information is permitted by law then it is with authorization and no offence is committed.

191. Disclosure of confidential information in the public interest, where such interest outweighs the individual interest in non-disclosure, is permitted by law under Art.22 and 40 of the Constitution (as recognised by Art.200(2) KCC[110]).

192. The Prosecution accordingly were required to prove that there was no legal basis for revealing the information concerned, including that disclosure was not in the public interest.

193. 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.

194. The words "which must not be revealed according to law" in Art.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.

195. Likewise, the Prosecution must prove that any declaration by a court or competent authority, that the information was secret, was lawful. A court or

[109] Para.73,486

[110] Art.200(4) KCC states that "public interest means the welfare of the general public outweighs the individual interest". Whereas Art.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.

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).

196. The Prosecution accordingly were required to prove beyond reasonable doubt that disclosure was not in the public interest. There was no such finding, and for the reasons set out below under Ground-4H, there could be no such finding on the evidence before TPII. The *actus reus* of count 5 was not established. The conviction should be overturned and replaced by an acquittal.

Ground-4-(4H)

197. TPII acknowledged (i) 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)[111]; and (ii) accepted that there was a legitimate public interest in exposing any serious improprieties in the manner in which the SITF and SPO may have conducted their investigations[112].

198. It fell 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.

199. Full disclosure of the contents of Batches 1-4 had been refused, of course, depriving the Accused the opportunity to identify that evidence.

[111] F00470 at para.59-61
[112] Para.812

200. The Prosecution neither produced Batches 1-4 in full for TPII, nor undertook any review of the material with a view to consideration of the content other than a scheduling exercise[113].

201. The review by Ms Pumper involved identifying 'names' – she did not consider the content of the documentation further, what actions those 'names' may have undertaken in the context of cooperation between the Republic of Serbia and the SITF/SPO or how they may have affected the independence, impartiality or integrity of the SITF/SPO's investigation[114].

202. The finding that there was no credible basis to conclude that the information revealed by the Accused contained indications of improprieties attributable to the SITF/SPO amounted to a reversal of the burden of proof, when the Prosecution were required to prove beyond reasonable doubt that disclosure was not in the public interest. There was no finding that the Prosecution had proved that disclosure was not in the public interest and given that TPII were not made aware of the full contents of the impugned information the *actus reus* of count 5 was not established. The conviction should be overturned and replaced by an acquittal.

Ground-5

203. The Prosecution were required to prove that there was no legal basis for revealing the information concerned.

[113] Transcript_20/10/2021 p.1059(lines11-20); Transcript_20/10/2021 p.1064(lines17-20; Transcript_20/10/2021 p.1094(line23) to p.1099(line22)
[114] Transcript_20/10/2021 p.1127(lines2-16); Transcript_20/10/2021 p.1129(lines7-12); Transcript_20/10/2021 p.1132(lines1-21); Transcript_20/10/21 p.1133(line20) to p.1142(line20); Transcript_20/10/2021 p.1144(line1) to p.1145(line14)

204. TPII accepted that the lawful right of a whistle-blower to make disclosure is protected under the Constitution, Kosovo law, the ECHR and accordingly the SC legal framework[115]. Whistle-blowing is permitted by law.

205. TPII held that revelation of information is "without authorization" if it is not permitted by law[116]. It follows that if the revelation of information is permitted by law, such as revelation of information by a whistle-blower, then it is with authorization and no offence is committed.

206. Whilst the Accused was not in a work or employment relationship with the SPO/Serbia, TPII accepted that such a person is entitled to whistle-blowing protection if he facilitates onward disclosure (as the Accused was alleged to have done with the impugned information) by a whistle-blower source who is in a work or employment relationship, *even if the whistle-blower is unknown to the facilitator*[117].

207. In the present case, TPII heard evidence that an identified serving SPO officer was implicated by a witness as a source of the leak of documents[118]. Two media articles admitted in evidence stated that the information they were publishing came from a source in the SPO[119]. Information contained in Batch 3 suggested the Third Set (at least) must have come from SPO records[120].

208. As part of the requirement to prove that there was no legal basis for revealing the information concerned, the SPO were required in the present case to prove that the source of the leak was not a whistle-blower. The SPO was uniquely placed to do so, yet it did not.

[115] Para.825,832
[116] Para.73,486
[117] Para.830; Transcript_21/01/22 p.3117-3119 (p.3118(lines12-15) in particular), p.3148-3149
[118] Transcript_15/12/2021 p.2628(lines13-14), p.2631(lines9-14)
[119] P155, P156
[120] Para.860

209. The SPO exhibited only a fraction of the impugned information that was leaked, such that no assessment could properly be made of its contents and whether it contained indications of improprieties attributable to the SITF/SPO.

210. The SPO adduced no evidence as to the motives of the source of the leak and whether they were acting in good faith or bad.

211. The balancing exercise undertaken by TPII[121] was invalidated by the fact that TPII was ignorant of the full contents of the impugned information revealed by the Accused.

212. The reversal of the burden of proof which occurred when TPII found that there was no evidence that the leak of information was the result of the actions of a whistle-blower from the SPO/Serbian authorities, ignoring evidence that the source of the leak was within the SPO, invalidates the finding of TPII on the *actus reus* of count 213. It was for the SPO to prove that revelation of the impugned information was not permitted by law, including under whistle-blowing rights. The SPO failed to prove the same. The conviction should be overturned and replaced by an acquittal.

C. COUNT 6

Ground-6

214. TPII held that the decision to treat as confidential the SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 and the documents in Batch 3 was also a measure that it adopted pursuant to Art.35(2)(f) LawNo.05/L-53 and Rule 30(2)(a)

[121] Para.822,831

KSC-Rules to place witnesses and potential witnesses under SITF/SPO protection within the meaning of Art.392(2) KCC[122].

215. Like Art.392(1), Art.392(2) KCC provides that an offence is committed only where revelation of information of the identity or personal data of a person under protection in criminal proceedings occurs *without authorization*.

216. Accordingly, the submissions above in relation to (i) classification of the SITF Requests and WCPO Responses as confidential and (ii) lawful bases for the revelation of the impugned material in relation to count 5 apply *mutatis mutandis* to count 6.

Ground-7

217. Art.62(1) LawNo.05/L-53 says nothing about persons under protection in criminal proceedings, let alone establishing that any person whose identity or personal data appears in SC/SPO documents or records the disclosure of which has not been authorised, is a person "under protection in the criminal proceedings" for the purposes of Art.392(2) KCC.

218. On the contrary, rather than providing for the sweeping protection asserted by TPII, Art.62(2) LawNo.05/L-53 specifically refers to protections *granted* to any person by the SC/SPO. Protection for a person does not follow without anything further, simply because an individual is named in an SC/SPO document the disclosure of which is not authorised. Protection for a person must be *granted*.

219. Mr Vukčević is an example of a person whose identity or personal data appears in SC/SPO documents (SITF Requests and WCPO Responses) the disclosure of which

[122] Para.515

are said not to have been authorised, but he is not a person "under protection in the criminal proceedings"[123].

220. The issue of a person's status as protected or not is separate to and distinct from the classification and status of a document in which a person's identity may appear. Art.62(2) LawNo.05/L-53 makes that clear: protections granted to any person by the SPO/SC are to be maintained even if disclosure of the document is authorised.

221. Moreover, protection measures can be implemented only with the consent of the endangered person (Art.5(3) LawNo.04/L-015, as expressly incorporated by Art.23(1) LawNo.05/L-53). Proposals for applying protective measures are to be made taking into account specific circumstances and the opinion of the endangered person (Art.5(3) LawNo.04/L-015, as expressly incorporated by Art.23(1) LawNo.04/L-015).

222. Blanket protection for persons as envisaged by TPII is incompatible with the principle of consent.

223. TPII erroneously proceeded on the basis that every 'witness' or 'potential witness' identified in an SITF Request or WCPO Response that was treated by the SITF/SPO as confidential was a person under protection, invalidating TPII's finding on the *actus reus* for count 6.

224. TPII heard no evidence of consent, or the consideration of specific circumstances relating to, and the opinion of, any person alleged to be protected within the impugned information in present case. The *actus reus* of count 6 was not established accordingly. The conviction should be overturned and replaced by an acquittal.

Ground-8-(8A)

[123] Para.514

225. The SPO put their case on the basis that the Count 6 was restricted to "any person(s) likely to have information about a crime, the perpetrator, or important circumstances relevant to SC proceedings"[124].

226. TPII, however, extended the scope of Count 6 to any person whom the SITF/SPO had met and had obtained information from, or from whom the SPO was seeking to obtain, including through other organisations, information[125] (removing the qualifier that the information must relate to information about a crime, the perpetrator, or important circumstances relevant to SC proceedings). It was unfair to do so.

227. There was no evidence adduced by SPO as to (i) the nature of the information that alleged 'witnesses/potential witnesses' were *likely* to have (whether it related to a crime, or the perpetrator or other *important* circumstances relevant to SC proceedings) or (ii) indeed any grounds to believe that they were likely to have such information.

228. Contrary to the assertion of TPII[126], the definition adopted by TPII was *not* comparable to the definition of the Pre-Trial Judge which restricted an "information provider" to a person providing information to the SITF/SPO *about any crimes or offences falling under SC jurisdiction* and a "potential information provider" as any person likely to provide information to the SITF/SPO/SC *about any crimes or offences falling under SC jurisdiction.*

229. Nor was the definition adopted by TPII consonant with the definition of "witnesses" set out in LawNo.04/L-015 which provides at Art.3(1.3):

> "Protected Person – the person to whom the protection measures are applied and who in the position of witness or damaged party *shall notify or witness on the facts and circumstances, that comprise an object of relevant proof in*

[124] Para.510-511
[125] Para.511
[126] Para.511

> *a criminal procedure, for criminal offences*…and due to these notifications or proofs, is in a serious risk situation…"

230. Likewise, the definition of witness in CERWP/Appendix/Section_1 which provides that a "'witness' means any person who *possesses information relevant to criminal proceedings about which he or she has given and/or is able to give testimony*…".

231. As stated above, there was no evidence adduced by SPO as to (i) the nature of the information that alleged 'witnesses/potential witnesses' had or were likely to have (whether it related to a crime, or the perpetrator or other *important* circumstances relevant to SC proceedings, or none of the above) or (ii) indeed any grounds to believe that they were likely to have such information.

232. The definition of 'witness' and 'potential witness' adopted by TPII in the Judgment was erroneous in law and, without warning and unfairly, permitted the SPO to avoid proving to the criminal standard that any person alleged to be a witness or potential witness: (i) had provided or (ii) was likely to be able to provide information that related to a crime or other *important* circumstances relevant to SC proceedings. The SPO was not able to so prove on the trial record.

233. The conviction for count 6 should be overturned and replaced by an acquittal.

Ground-8-(8B)

234. Art.35(2)(f) LawNo.05/L-53 provides that the authorities and responsibilities of the SP include "taking necessary measures, or requesting that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence".

235. In the first instance, it follows therefrom that measures for the protection of a person are specifically required to be *taken*.

236. TPII's sweeping analysis that all SITF/SPO documents are *ipso facto* confidential and all persons named within are *ipso facto* protected, would render the requirement in Art.35(2)(f) LawNo.05/L-53 for the Prosecution to take necessary measures obsolete.

237. Secondly, only such measures that are "necessary" fall within the authorities and responsibilities of the SP. Measures that are unnecessary are unauthorised.

238. TPII's sweeping analysis that all SITF/SPO documents are *ipso facto* confidential, all persons named within are *ipso facto* protected, and that no specific consideration is required in relation to any protective measure, is incompatible with the specific authorisation in Art.35(2)(f) LawNo.05/L-53 only for such protective measures that are *necessary*.

239. Rule 30(2)(a) KSC-Rules provides that during an investigation, the SP shall ensure the safety and protection of victims, witnesses and other persons *at risk on account of information provided to or cooperation with the SP*.

240. Protection is not extended thereby to any person who has provided information to, or cooperation with, the SP but only to those specifically at risk on account of having done so.

241. The effect of Art.35(2)(f) LawNo.05/L-53 and Rule 30(2)(a) KSC-Rules is to require an assessment of (i) the risk to any individual from having provided information to, or cooperation with the SP and (ii) the necessity of any protective measure in relation to that individual.

242. In the present case, TPII heard no evidence as to any individual assessment of risk and necessity of protective measure in relation to any alleged 'Witness' or 'Potential Witness' said to be identified in the SITF Requests and WCPO Responses[127] (until *after* the indictment period, at least, when one of the

[127] Transcript_20/10/2021 p.1071-1072 to the effect that W04841 was not aware of any process to consider the same and had never seen any document setting out reasons for classification

'Witnesses', [REDACTED], was specifically assessed to not require any protective measure[128]).

243. It was both wrong in law and unfair for TPII to proceed on the basis that treating a document as confidential amounted at the same time to taking a protective measure in relation to any person named therein, without anything further. The *actus reus* of count 6, and the requirement to identify a 'person under protection in criminal proceedings' was not established. The conviction should be overturned and replaced by an acquittal.

Ground-9

244. Art.392(3) KCC provides for an aggravated form of the offence provided for in Art.392(2) where the offence results in "serious consequences" for the person under protection.

245. TPII held that the test for "serious consequences" was satisfied by a finding of "substantial interference with the safety, security, well-being, privacy or dignity of protected persons or their families"[129].

246. Put simply, there was no proper basis to dilute the test in Art.393(3) KCC from "serious" to "substantial" in that way.

247. TPII's findings as to "serious consequences"[130] are invalidated by their equation of "serious consequences" with "substantial interference". They are patently not one and the same.

248. For the reasons set out below under Ground-10, the SPO had not demonstrated *serious* consequences. The *actus reus* under Art.392(3) KCC was not established. The

[128] Transcript_04/11/2021, p.1904(line22) to p.1905(line1)
[129] Para.100
[130] Para.547

conviction on count 6 under Art.392(2) and (3) KCC should be overturned and replaced by an acquittal.

Ground-10-(10A)

249. W04842 provided two declarations before the trial in October 2020 and January 2021[131].

250. The purpose of those declarations was to set out the alleged consequences of the Accused's actions.

251. Neither declaration referred to any relocation or any relocated witness[132], despite W04842 asserting at trial that relocations occurred before his declarations were completed (although he was vague about the dates)[133].

252. The first mention of any relocation occurred in email dated 14/10/2021 containing information from James Pace, SPO prosecutor[134] which provided that:

> "the witness provided the following new information: 1. Following the distribution of the Batches, SPO Witness Security took measures in the field. Such measures included one relocation, moving someone to a safehouse, and referring persons to witness protection."

253. That email clearly referred to "*one relocation*", that is, "moving someone to a safehouse".

254. W04842 confirmed in evidence that a "relocation" and "moving someone to a safehouse" was the same thing and that he was not distinguishing between them[135].

[131] Transcript_28/10/2021 p.1692(lines12-14)
[132] Transcript_04/11/2021 p.1889(lines11-18)
[133] Transcript_04/11/2021 p.1891(lines12-23)
[134] Transcript_04/11/2021 p.1901(line21) to p.1902(line5)
[135] Transcript_04/11/2021 p.1902(lines10-13)

W04842 said that the "person" (singular) "was extracted from their home to the safe house, and afterwards extracted out of Kosovo"[136].

255. TPII's finding that "it is apparent from Mr Jukic's evidence that the two individuals concerned were relocated under different procedures, but Mr Jukic considered both measures to amount to relocation"[137] was directly at odds with the witness' evidence above.

256. TPII clearly understood that email (and the witness' evidence) to refer to a single relocation during the course of the witness' direct examination; indeed Judge Mettraux put to W04842 that he was indicating at that stage only *one individual* was relocated and the witness did not demur[138].

257. The evidence of W04842 only became two relocations of two persons following a subsequent exchange with Judge Barthe in which the witness was invited to re-visit the number of persons he was saying was relocated[139].

258. The evidence demonstrated that W04842's account developed each time he was asked to revisit it and the alleged consequences of the Accused's actions: (i) when he was spoken to by James Pace before he gave evidence and he mentioned, for the first time, one relocation; and (ii) when he was asked to revisit the number of persons and relocations by Judge Barthe.

259. The fact that the witness gave inherently contradictory answers at different times[140] provided no proper basis to select one version as reliable in isolation and ignore that which was contradictory (as TPII appeared to do at paragraph 536 of the Judgment).

[136] Transcript_04/11/2021 p.1902(lines18-21)
[137] Para.536
[138] Transcript_28/10/2021 p.1760
[139] Transcript_28/10/2021 p.1762(lines15-25); Transcript_04/11/2021 p.1888(lines9-11)
[140] e.g. Compare the answers at Transcript_04/11/2021 p.1902(lines6-9) and at p.1902(lines10-21)

260. No reasonable tribunal, faced with the evidence above, could have reached the finding that there was *no* credible indication that W04842 exaggerated/lied about the number of relocated witnesses.

261. Indeed, in the absence of any records exhibited (or disclosed) to confirm any relocation, whether redacted or not, and the reasons for any relocation decision (despite their request[141] and no plausible excuse for failing to produce the same from the witness and the SPO, if such records existed), no reasonable tribunal could say that they were satisfied beyond reasonable doubt that any relocation occurred as a consequence of Gucati's actions based upon the inherently contradictory and unsatisfactory evidence of W04842 alone.

262. Together with the matters identified below, TPII's error of fact in placing undue reliance upon the assertion by W04842 of two relocations as a consequence of Gucati's actions was unjust and serious consequences were not properly established by the Prosecution for the purposes of count 6. The conviction under Art.392(3) should be overturned and replaced by an acquittal.

Ground-10-(10B)

263. The 'individualised assessment of a high level of risk posed' allegedly to the two persons who were said to have been relocated was made by the SPO alone. It was not an assessment made, or scrutinised, by TPII itself as no evidence was called as to the individual circumstances which supported that assessment.

264. Moreover, the aggravated form of offence under Art.392(3) relates to those examples which do not involve risk but where serious consequences actually result.

[141] Disclosure requested in email dated 26 Oct 2011 at 19:28; Transcript_04/11/2021 p.1884(lines15-22)

265. The mere assertion of risk could not properly amount to serious consequences for the purposes of Art.392(3) without anything further.

266. Together with the matters identified above and below, TPII's error of fact in placing undue reliance upon the assessment of risk by the SPO as amounting to serious consequences was unjust. Serious consequences were not properly established by the Prosecution for the purposes of count 6. The conviction under Art.392(3) should be overturned and replaced by an acquittal.

Ground-10-(10C)

267. There was no evidence that any such negative consequences actually resulted in relation to the two persons alleged to have been relocated.

268. In particular, there was no evidence as to whether any person relocated lost 'access to their home'. Indeed, as consent is required, any person relocated must remain free to leave and return home. Although in some cases, a witness may consent to relocation reluctantly, in other cases they may welcome relocation and/or feel unafraid of coming and going from their home, whatever the assessment of risk by the authorities. No witness was called in this case to say that they gave their consent to relocation only reluctantly and did not feel able to return to their home. No evidence was adduced as to whether any person relocated was part of a community that they lost access to.

269. In relation to family, the evidence TPII heard was that where a witness to be relocated has family, the family will be relocated with the witness, although as only two persons are suggested to have been relocated in two separate relocations, family does not appear to have been an issue in the present case[142].

[142] Transcript_28/10/2021 p.1708(lines5-7); Transcript_04/11/2021 p.1905(lines24-25)

270. Together with the matters identified above and below, the finding that negative consequences associated with relocation amounted to serious consequences for two persons within the meaning of Art.392(3) KCC was not supported by evidence, was speculative and unjust. Serious consequences were not properly established by the Prosecution for the purposes of count 6. The conviction under Art.392(3) should be overturned and replaced by an acquittal.

Ground-10-(10D)

271. In contrast to relocation which requires consent[143], there was no evidence of any involvement of a witness with emergency risk planning by the SPO (specifically witness security officers and operational security officers)[144].

272. Other than the two persons alleged to be relocated, the emergency risk management plans were never actually deployed[145].

273. Together with the matters identified above and below, the finding that the "ensuing awareness" of persons, subject to emergency risk planning by the SPO, that they were at risk of harm/imminent relocation amounted to serious consequences was not supported by evidence, it was speculative and unjust. Serious consequences were not properly established by the Prosecution for the purposes of count 6. The conviction under Art.392(3) should be overturned and replaced by an acquittal.

Ground-11

[143] Transcript_04/11/2021 p.1905(lines24-25), p.1905(line 1)
[144] Transcript_28/10/2021 p.1708(lines11-12)
[145] Transcript_28/10/2021 p.1708(lines5-6), witness explaining that an emergency risk management plan is a plan to extract a witness and their family from their home to the safe place in the SPO office in an emergency situation

274. TPII heard evidence that [REDACTED] was somebody who had made it very public, for a number of years, dating back at least to 2012, that he had been cooperating with investigators and prosecutors investigating alleged offences committed by the KLA[146].

275. There was simply no evidence that [REDACTED] was afraid of being publicly named as a witness.

276. W04842 was specifically asked by Judge Mettraux whether [REDACTED] had complained in relation to any concern for his security or about any threat. W04842 couldn't recall exactly what he said but could put it no higher than that [REDACTED] had "complained about publishing of the leaked documents"[147].

277. That exchange provided no basis to find 'fear and concern' on the part of [REDACTED] that amounted to *serious consequences*, and, as W04842 confirmed, the SPO took no protective measure in relation to him[148]. Further, Gucati had no opportunity to test [REDACTED] about the nature of his complaint 'about publishing of the leaked documents' during the trial, as the SPO opted not to call any 'Witness' to testify about the consequences of the Accused's actions upon them and the basis on which they formed their views regarding those consequences. At paragraph 541 of the Judgment, TPII properly ruled that it would refrain from making findings in respect of both '*individual Witnesses*' or 'categories of Witnesses' in those circumstances: the finding in relation to [REDACTED] was an incongruity and inconsistent with TPII's own ruling.

278. Together with the matters identified above and below, the finding that 'the fear and concern resulting from being publicly named as a Witness' amounted to serious

[146] Transcript_04/11/2021 p.1791(lines20-24)
[147] Transcript_04/11/2021 p.1904(lines11-14)
[148] Transcript_04/11/2021 p.1904(line25)

consequences for [REDACTED] was not supported by evidence, it was speculative and unjust. Serious consequences were not properly established by the Prosecution for the purposes of count 6. The conviction under Art.392(3) should be overturned and replaced by an acquittal.

D. COUNT 1

Ground-12-(12A)

279. The words "serious threat" for the purposes of Art.401(1) KCC are to be read in the context of Art.401. They are immediately preceded by the words "by force", which supply context to the words "serious threat".

280. 'Serious threat' in the context of Art.401 thus means serious threat of force[149]. Art. 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.

281. The development from Art.316(1) PCCK to Art.401(1) KCC amounts only to an added emphasis from the legislator that the threat has to be *serious* (a requirement of a level of threat which was absent from Art.316(1) PCCK).

282. If, contrary to the above, Art.401(1) KCC was intended by the legislator to widen the type of threat which would satisfy the offence and to use the term "threat" to describe harmful action other than the use of force, it begs the question what type of harmful action.

283. The submissions in paragraphs 27-29 above apply *mutatis mutandis*.

[149] *Salihu et al Commentary* at page 1165 margin number 2-3

284. The offences created by Art.401 are 'criminal offences against *public order*' within Chapter XXXII KCC not offences against the administration of justice and public administration under Chapter XXXI or offences of 'contempt'.

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

286. In the present case, there was no finding by TPII, and no evidence to support such a finding, of the use of force, the use of serious threat of force, or the use of threat to inflict serious harm on the health of any person in this case. The *actus reus* of count 1 was not established (and could not be established on the evidence). The conviction should be overturned and an acquittal entered.

Ground-12-(12B) and (12C)

287. The terms of Art.401(1) refers to obstruction while an official person is in the act of performance of his official duties. The use of force or serious threat must be concurrent, or simultaneous, with the official action obstructed. 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) and the official person in the act of performance. 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[150].

288. The aim of Art.401 is to protect official persons performing official duties against violent or threatening actions[151]. The aim of Art.401 is not, as asserted by TPII, to

[150] *Salihu et al Commentary* at page 1166 margin number 5
[151] *MI et al* § 6.3; *Salihu et al Commentary* at pages 1142-1164 margin number 1

ensure that official duties are not obstructed[152], as the offence can be committed when violent or threatening means are used to compel an official to perform their official duties.

289. The use of force or serious threat must be directed at the person when they are performing official duties ("on the spot")[153] and the threat must be of *immediate* application[154].

290. It is consistent with the above submissions that Art.401(5) specifically states that the offence can only be committed *against* a judge, a prosecutor, a police officer etc. *during* the exercise of his official functions.

291. There was no finding, nor could there be on the evidence, of the use of force or serious threat directed at an official person when performing official duties. The *actus reus* of count 1 was not established. The conviction should be overturned and an acquittal entered.

Ground-13

292. TPII correctly found that for direct intent for the purposes of Art.401(1) and (5), the "perpetrator must have acted with awareness of, and desire for, using force or serious threat in order to obstruct an official person in performing official duties"[155].

293. TPII found that 'the Accused acted with awareness of, and desire for, obstructing SC/SPO Officials in performing SC/SPO work' and equated that finding with direct intent[156].

[152] Para.146
[153] *Salihu et al Commentary* at pages 1165 margin number 2, 3 & 4
[154] *MI et al* § 6.3
[155] Para.15
[156] Para.960

294. Yet, that finding was insufficient to amount to a finding of direct intent, as it did not include a finding that Gucati acted *with awareness of, and desire for, using force or serious threat in order to* obstruct an official person in performing official duties.

295. Nowhere in the Judgment did TPII find that Gucati was aware that his actions and statements amounted to a serious threat (that is, a threat to inflict serious harm on another), and desired that that be so.

296. That the offence under Art.401(1) and (5) KCC is complete when obstruction is attempted (even if not achieved, as TPII found here) reinforces the requirement for the pursuit of the purpose (i.e. awareness and desire for the obstruction of an official person performing official duties). A person does not attempt to obstruct an official by an act which he foresees *might* cause an obstruction but he does not desire it and hopes that it will not occur (even if he accedes to it occurring in the event). The term "attempt" indicates a "specific purpose" or "goal-orientated activity" which requires direct intent[157].

297. Nowhere in the Judgment did TPII find that the Accused was aware and desired that his actions and statements amounted to a serious threat (that is, a threat to inflict serious harm on another) used by him to obstruct an official person in performing official duties. TPII did not so find because there was no evidence from which they could so find.

298. Only direct intent for attempted obstruction was sufficient. The *mens rea* of count 1 was not established. The conviction should be overturned and an acquittal entered.

E. COUNT 2

Ground-14-(14A)

[157] *Separate Opinion of Judge Barthe* at para.2

299. TPII properly recognised that there must be a boundary to the type of activity which might amount to "common action" for the purposes of Art.401(2) KCC, TPII recognising that Art.401(2) *impliedly* requires that the activity must be "criminal"[158].

300. Where that boundary is to lie is properly drawn by Art.401(1) KCC, which criminalises the use of force or serious threat to obstruct, attempt to obstruct or compel an official person to perform official duties.

301. Whereas TPII observed that 'nothing in the language of Art.401(2) KCC suggests that 'common action' must denote force or serious threat", TPII neglected to look at Art.401(2) in the context of Art.401 as a whole (the language of the whole does indeed suggest that "common action" must denote force or serious threat).

302. In *M.I. et al*, the Court of Appeals of Kosovo held that such offences are in a relationship of subsidiarity: the offences of (i) *obstructing official persons in performing official duties* ("individual offence") and (ii) *participation in a group obstructing official persons in performing official duties* ("group offence") differ only in that the individual offence applies where there is evidence of individual specific actions (force or threat) performed by the perpetrator, whereas the group offence applies where there is evidence that the perpetrator was in the group and took part in the common actions, but it is not possible to establish the specific individual actions of obstruction.

303. The elements of Art.401(2) KCC are indistinct from those under Art.401(1) KCC in the sense that the action contemplated by both Art. 401(1) and (2) is the use of force or threat; the elements are only distinct, as the Court of Appeal held in *M.I. et al*, in the sense that Art.401(1) KCC deals with individual acts of force/threat and Art.401(2) KCC deals with participation in group acts of force/threat.

[158] Para.162

304. As stated above, the offences created by Art.401 are 'criminal offences against *public order*' within Chapter XXXII KCC, not offences against the administration of justice and public administration under Chapter XXXI.

305. There was no finding of common action to use force or serious threat, and there could not have been on the evidence. The *actus reus* of count 2 was not established. The conviction should be overturned and an acquittal entered.

Ground-14-(14B) and (C)

308. As regards the direction and timing of obstruction for the purposes of Art.401(2) KCC, paragraphs 287-291 above apply *mutatis mutandis*.

309. There was no finding of common action to use force or serious threat *directed against* an official person *when performing official duties*, and there could not have been on the evidence. The *actus reus* of count 2 was not established. The conviction should be overturned and an acquittal entered.

Ground-15

310. TPII found that "common action" for the purposes of Art.401(2) KCC covers "any type of collective criminal activity that *pursues* the relevant obstructive *purpose*"[159].

311. As TPII recognised, the words "common action" require the pursuit of a shared purpose.

[159] Para.162

312. Participation in that common action requires the pursuit of a shared purpose. It is the collective pursuit of the obstructive purpose which makes the action of the group "common"[160].

313. The pursuit of that shared purpose is reflected in direct intent (awareness and desire for the obstruction of an official person performing official duties) but is absent in eventual intent.

314. That the offence is complete when obstruction is attempted (even if not achieved) reinforces the requirement for the pursuit of the purpose (i.e. awareness and desire for the obstruction of an official person performing official duties). A person does not attempt to obstruct an official by an act which he foresees *might* cause an obstruction but he does not desire it and hopes that it will not occur.

315. The terms "attempt" and "common action" indicate a "specific purpose" or "goal-orientated activity" which require direct intent[161].

316. In the absence of direct intent, an individual does not participate in the common action.

317. The effect of Art.113(12) and 401(2) KCC is to require at least three persons to use common action to attempt to obstruct an official person in performing official duties[162].

318. Participation in that common action requires the pursuit of a shared purpose. A person who does not pursue the shared purpose does not participate in common action.

319. Shared purpose is absent from eventual intent.

[160] Para.178
[161] *Separate Opinion of Judge Barthe* at para.2
[162] Para.161

320. The 'third person' that TPII held was sufficient to form a group for the purposes of Art.401(1) KCC was Faton Klinaku[163].

321. However, unlike Gucati and the co-Accused, TPII was not satisfied that Faton Klinaku acted with direct intent.

322. TPII was satisfied only that "he acted with the awareness that, as a result of his participation in a group with the two Accused, the obstruction by common action of SC/SPO Officials performing SC/SPO Work could occur, and acceded to that occurrence"[164].

323. Klinaku did not share with Gucati and the co-Accused the purpose of the common action - the desire for the obstruction of an official person performing official duties - and did not accordingly participate in it with them.

324. On TPII's findings, only two persons - insufficient to form a 'group' for the purposes of count 2 - pursued the shared purpose of obstruction of an official person performing official duties. TPII ought to have acquitted on count 2 accordingly. The conviction should be overturned and an acquittal entered.

Ground-16

325. Art.3(1) LawNo.05/L-53 provides that the KSC is attached to the court system in Kosovo.

326. In accordance with Art.3(1), TPII was attached to the Basic Court of Pristina and was asked to pass judgment on the Accused's conduct under Kosovo domestic law, as incorporated into the Law[165].

[163] Para.690
[164] Para.700
[165] *Separate Opinion of Judge Barthe* at para.5

327. TPII, as a first instance tribunal of the court system in Kosovo, was required to follow decisions of the Court of Appeals of Kosovo (to which KSCCAP is attached).

328. In *M.I. et al*, the Court of Appeals held that the offences of obstructing official persons in performing official duties and participation in a group obstructing official persons in performing official duties are in a relationship of subsidiarity. The lesser offence is subsidiary to the situations on which the greater offence is not established. Punishment for both criminal offences is not admissible.

329. It was not open to TPII as a matter of law to disregard that decision of law by the Court of Appeals, and to decide the law as it saw fit.

330. KSCCAP is similarly bound by a previous decision of the Kosovo Court of Appeals to which it is attached under Art.3(1) LawNo.05/L-53 (unlike the Supreme Court).

331. Accordingly, the conviction on count 2 should be overturned and an acquittal entered.

F. ALL COUNTS - ENTRAPMENT

Ground-17-(17A)

332. As TPII acknowledged[166], it falls to the prosecution to prove there was no entrapment ("police incitement"), provided only that the allegation is not wholly improbable[167].

[166] Para.837(iv)
[167] *Ramanauskas* at para.70; *Pătraşcu* at para.38

333. All that is required to raise the issue is the making of an 'allegation' of incitement which is not 'wholly improbable'.

334. Neither the making of an 'allegation' nor meeting the assessment of that allegation as other than 'wholly improbable' requires *prima facie* evidence.

335. The formula "not *wholly* improbable" is an absolutist formula. The 'formalistic, arithmetic-scented adverb "wholly"' requires complete improbability, or the probability that equals zero. The "not wholly improbable" clause is to be taken exactly for what it literally says, and the accused raising the allegation is entitled to benefit, from virtually any doubt, however meagre, unless the latter is absolutely unnatural. Even an assessment that the allegation of entrapment is a "pragmatically reasonable impossibility" or "factually inconceivable from the angle of shared human experience, or the knowledge of how things normally are in life" is insufficient to prevent the burden of proof falling upon the Prosecution to disprove the allegation[168].

336. Neither reference at footnote 1748 of the Judgment provides support for TPII's importation of a requirement for *prima facie* evidence of entrapment. Nor was it appropriate to import requirements upon Gucati to adduce evidence which 'compelled' the inference that Gucati was entrapped[169], or to establish a reasonable basis to conclude/infer that there was entrapment[170]. The finding of TPII that the Entrapment Claim was wholly improbable was invalidated by the improper standard that TPII applied to that assessment[171].

337. The only burden upon Gucati was to raise an allegation of incitement that was not wholly improbable. In the circumstances set out below, that low threshold was

[168] *Ramanauskas (No.2)*, Concurring Opinion of Judge Kūris at para.11
[169] Paras.870,871
[170] Paras.180,860,861,864,877,878,889-890
[171] Para.890

properly crossed. TPII, itself, conceded that a deliberate leak by an SPO staff member could not be excluded[172].

338. It then fell upon the Prosecution to prove that there was no entrapment. The Prosecution failed to do so, as TPII impliedly acknowledged[173]. Where the Prosecution fails to do so, a violation of Art.6 ECHR will be established requiring evidence obtained as a result of entrapment to be excluded or a procedure with similar consequences applies[174].

339. In the present case, the Prosecution evidence in its entirety resulted from the delivery of the three Batches to the KLA-WVA-HQ (it could not have occurred without it) and, given the failure of the Prosecution to prove that those deliveries did not occur in circumstances amounting to entrapment, ought to have been excluded under Rule 138(2) KSC-Rules.

340. The convictions on all counts should be overturned and replaced by acquittals.

Ground-17-(17B)

341. TPII understood that the Defence alleged that Gucati was entrapped by KSC/SPO Officials to commit the charged offences[175].

342. As TPII acknowledged, Gucati alleged that he was entrapped in evidence during the trial[176].

343. The allegation was in essence straightforward. As Gucati stated[177]:

[172] Para.877
[173] Para.889: "… the SPO showed reluctance to engage fully with the Entrapment Claim…"
[174] Para.837
[175] Para.833, referring *inter alia* to Transcript_16/03/2022 p.3666-3676; F00567 at para.120-141; F00258 at para.36-50; Transcript_01/09/2022 p.446-452,457-488;
[176] 1DET para.73; Transcript_06/12/2021 p.2180
[177] 1DET para.73

> "If LS1, LS2 and LS3 had not delivered the documents to the KLA-WVA encouraging us to make the material available to the public, we would not have called the Press Conferences. After all we would not have had any material to discuss at the press conferences. The events of September 2020 only occurred because someone at the KSC/SPO provided the material to us, and encouraged us to present it to the media."

344. The conduct behind counts 1, 2, 3, and 5 simply could not have occurred without the delivery to the KLA-WVA-HQ of the First, Second and Third Sets.

345. Those deliveries came with the express and implied incitement to make the contents thereof available to the media ("have the information further publicised", as TPII put it)[178]. The act of further publicization of the information delivered was at the core of each of counts 1, 2, 3 and 5.

346. In reality, there was no issue of fact as to (i) whether acts of incitement occurred and (ii) that the conduct complained of could not have occurred without them: whoever was behind those deliveries exerted such influence on the Accused as to incite the commission of (alleged) offences that would otherwise have not been committed (by providing them with the means and encouragement)[179].

347. The only issue of fact was whether an officer or officer(s) of the SPO, or external agents acting on their instructions or in concert with them, were involved in that incitement of the Accused .

348. Gucati alleged that an officer of the SPO was involved, although he could not prove it[180].

349. He did not have to: it fell for the SPO to prove that no such officer was involved, or, if such an officer was, that the motivation of the officer was not to make

[178] Para.208,883
[179] *Ramanauskas* at para.55
[180] 1DET para.26,62,63,73

it possible to establish the offence, that is to provide evidence and institute a prosecution (to 'trap' the Accused, as Gucati said in evidence he believed he had been[181]).

350. That allegation was clearly set out both before and during the trial[182]. No reasonable tribunal could have found otherwise. Indeed, it is perfectly clear from TPII's detailed, albeit erroneous, analysis of the 'Entrapment Claim' at pages 297 to 309 of the Judgment that it understood full well how the Entrapment Claim had been advanced.

351. The error of TPII was not in failing to understand the allegation of entrapment but how TPII had applied an inappropriate reverse burden and standard of proof which required the Accused to prove that he was entrapped.

352. Paragraphs 338-339 above *mutatis mutandis*.

353. The convictions on all counts should be overturned and replaced by an acquittal.

Ground-18-(18A)

354. The very nature of the First and Second Sets provided an indication (albeit not conclusive) that they came from the SITF/SPO.

355. The First Set contained requests made by the SITF and responses to those requests from the WCPO.

356. W04841 confirmed that the SPO were already in possession of copies of almost every page of the documents in the First and Second Sets, including all bar one of the

[181] Transcript_06/12/2021 p.2180(line_18)
[182] Para.833, referring *inter alia* to Transcript_16/03/2022 p.3666-3676; F00567 at para.120-141; F00258 at para.36-50; Transcript_01/09/2022 p.446-452,457-488

'Serbian Documents', and retained copies of documents that were both 'stamped' as received and 'not stamped'[183].

357. In relation to the one document from the Serbian authorities that W04841 stated she could not find in the SPO records, no conclusion could properly be drawn from that fact, W04841 stated[184]. Where a page could not be found that might be explained simply by a failure to submit it to the SPO system by an individual officer[185].

358. The SPO retained hard copy documents, both evidential and non-evidential, that were not stamped with an ERN[186]. Again, no conclusion could properly be drawn as to the potential origin of the leak from the presence or absence of ERNs, W04841 stated[187].

359. Moreover, the delivery of the Third Set, which TPII accepted *must* have come from the SPO[188] was a further indication that the First and Second sets had also come from the SPO. The three deliveries were clearly part of a pattern, in which one of the deliveries *must* have come from the SPO and the other two may have – a pattern which pointed towards the SPO.

360. Added to the above, TPII heard evidence that:

(a) A named serving SPO officer had been implicated by a witness as a source of the leak[189]; and

[183] Transcript_18/10/2021 p.866, p.876(lines15-21), p.877(lines10-14), p.878(lines12-14), p.879(lines12-15); Transcript_21/10/2021 p.1199(lines22-24), p.1200(lines11-15), p.1205(line25) to p.1206(line24), p.1208-1209
[184] Transcript_26/10/2021 p.1477(lines13-25)
[185] Transcript_21/10/2021 p.1208(lines19-23)
[186] Transcript_20/10/2021 p.1048(lines20-25), p.1055(lines11-17)
[187] Transcript_26/10/2021 p.1477(lines8-12)
[188] Para.860
[189] Transcript_15/12/2021 p.2628(lines13-14), p.2631(lines9-14)

(b) Two news articles admitted in evidence referred to obtaining similar information to the impugned information from "a source in the Specialist Prosecution Office in the Hague"[190].

361. No reasonable tribunal could have found in these circumstances that there was *no* indication at all that the First and Second Sets had come from the SITF/SPO.

362. Where, as here, there were indications that the Three Sets came from the SITF/SPO it fell to the SPO to prove to the criminal standard either (i) that the Three Sets did not come from the SITF/SPO; or (ii) if the leak did come from the SITF/SPO, that it was the not the result of an intentional plan to entrap the Accused, rather than the result of a security breach or malicious act. The SPO failed to prove either alternative.

363. The approach of TPII[191] was unjust and amounted to an erroneous reversal of the burden of proof.

364. Paragraphs 338-339 above apply *mutatis mutandis.*

365. The convictions should be overturned and replaced by an acquittal.

Ground-18-(18B)

366. As regards sub ground-18B, Gucati refers to the submissions above in relation to sub ground-18A.

Ground-18-(18C)

[190] P155,P156
[191] Para.870

367. As regards sub ground-18C, Gucati refers to the submissions above in relation to sub ground-18A and below in relation to sub ground-19A.

368. In relation to the two news articles admitted in evidence which stated unequivocally that the information published therein, which was similar to the impugned information in the Third Set, had come from a source in the SPO in the Hague, it was for the Prosecution to disprove the truth of those statements[192]. The Prosecution were aware of the identity of the journalist making those statements but called no evidence to challenge or undermine them.

369. The approach of TPII[193] was unjust and amounted to an erroneous reversal of the burden of proof.

370. Paragraphs 338-339 above apply *mutatis mutandis.*

371. The convictions should be overturned and replaced by an acquittal.

Ground-18-(18D)

372. There was simply no evidence upon which TPII could have found that the SPO was unable to prevent further deliveries.

373. As the Defence argued, and TPII did not challenge, the SPO made no attempt to prevent further deliveries[194].

374. Certainly, TPII identified no evidence of any attempt by the SPO to prevent further deliveries which justified the conclusion that it was unable to prevent them.

[192] P155,P156
[193] Para.861
[194] Para.871

375. On the contrary, W04841 confirmed that it was perfectly feasible to have placed the KLA-WVA-HQ and its environs under surveillance to stop any further deliveries after 07/09/2020, although she was not aware of the SPO having made any such attempt[195].

376. The assumption in favour of the SPO of an 'inability' to prevent further deliveries was wholly speculative, contrary to the evidence and unfair to Gucati.

377. The fact that the SPO appeared to have taken no steps to prevent any further deliveries may not "compel the inference that it wanted, let alone orchestrated, them", but it is *consistent* with the inference that the SPO wanted, indeed orchestrated, the further deliveries[196] (likewise, the unexplained decision of the SPO to refrain from taking steps to obtain the material which it knew media outlets possessed and/or to seek to remove from the public domain press articles said to contain references to the leaked material[197]).

378. The approach of TPII[198] was unjust and amounted to an erroneous reversal of the burden of proof.

379. Paragraphs 338-339 above apply *mutatis mutandis*.

380. The convictions should be overturned and replaced by an acquittal.

Ground-19-(19A)

381. TPII heard evidence that on two separate occasions a witness implicated a named SPO officer, [REDACTED], as a source of the leak of documents[199].

[195] Transcript_20/10/2021 p.1151(line10) to p.1152(lines1-12)
[196] Para.870
[197] Para.871
[198] Para.871
[199] Transcript_15/12/2021 p.2628(lines13-14), p.2631(lines9-14)

382. No other evidence was adduced during the trial in relation to that witness, the circumstances in which he implicated that SPO officer as a source of the leak of documents, or the detail of his account implicating the SPO officer.

383. It was open to the SPO to have adduced evidence to challenge the evidence the implication of that named SPO officer as a source of the leak of documents. The SPO did not.

384. TPII did hear evidence that the named SPO officer was still serving with the SPO (as of 15/12/2021) when W04841 and W04842 were recalled to give further evidence. Indeed, TPII heard that the named SPO officer was seen by W04841 on 14/12/2021 in the Hague – only the day before W04841 and W04842 were scheduled to be recalled. It was open to the SPO to have adduced evidence from, or about, that named SPO officer to challenge the evidence of his implication as the source of the leak of documents. The SPO did not.

385. The finding that the evidence that an SPO staff member was implicated as a source of the leak was "highly speculative and had been credibly challenged" was incomprehensible when: the evidence on the trial record was that a witness twice implicated a named SPO officer as a source of the leak; the SPO did not challenge that allegation with any evidence on the record at all; and when TPII heard no evidence on the record as to the circumstances of that allegation from which the conclusion could be drawn that it was speculative.

386. Quite properly, TPII asserted elsewhere that it relied solely on the evidence on the record for the purpose of findings regarding the charged offences[200]. It would, of course, have been quite wrong for TPII, in determining the issues in the trial, to have considered material which may have been available to it, but which was not in evidence[201].

[200] Para.330
[201] *Milosevic (Appeal)* at para.24

387. In the present case, the evidence on the record in relation to this matter was that a named SPO officer who was still serving was implicated on two occasions by a witness as a source of the leaks. There was no evidence which challenged that statement or from which the conclusion could be drawn that it was speculative.

388. TPII's rejection of that evidence in favour of the SPO as "highly speculative" and "credibly challenged" was itself wholly speculative, unsupported by evidence and unfair to Gucati.

389. The approach of TPII[202] was unjust and amounted to an erroneous reversal of the burden of proof.

390. Paragraphs 338-339 above apply *mutatis mutandis*.

391. The convictions should be overturned and replaced by an acquittal.

Ground-19-(19B)

392. As regards sub ground-19B, Gucati refers to the submissions above in relation to sub ground-17A.

G. SENTENCE

Ground-20

[202] Para.878

393. The TPII made discernible errors in sentencing when assessing gravity in failing to appropriately reflect the features set out in Ground 20(a).

394. It was not alleged that Gucati used force. Moreover, there was no finding that he used the serious threat of force. It follows from TPII's ruling that serious threat was not confined to serious threat of force that a finding of serious threat of force cannot be implied from a finding that the acts and statements of the Accused amounted to serious threat[203].

395. The highest that TPII put Gucati's intent was that he "disregarded, or was indifferent to, the possibility that harm could in fact occur"[204]. Gucati did not desire that actual harm be caused to any witness/potential witness.

396. TPII also found that Gucati mostly revealed to the professional media only[205]. That measure reduced risk and ought to have been reflected in the sentence.

397. TPII noted, when sentencing, that "Mr Gucati did not directly threaten any SPO official"[206]. However, TPII did not take into account its findings that Gucati had no intention to obstruct any KSC Judge for sentence.

398. Importantly, TPII found that no inability or concrete difficulties to collect evidence, preserve the security of proceedings or ensure the safety of witnesses, or the significant diversion of resources to address such consequences resulted from Gucati's conduct[207].

399. No person was found to have been induced to refrain from making a statement, or to provide a false statement, or to otherwise fail to state true information to the police, a prosecutor or a judge.

[203] Para.585
[204] Para.543,596
[205] Para.499
[206] Para.973
[207] Para.100

400. TPII said that it took into account its finding that, ultimately, the SPO failed to establish that its ability to effectively investigate or prosecute crimes was actually obstructed, but the weight it gave that factor was clearly insufficient.

401. As harm is a primary indicator of gravity, the absence of any actual harm caused to investigations ought to have weighted heavily and a sentence of 4 ½ years (out of reasonable proportion of the range of sentences imposed for similar offences at other international courts/tribunals) is inconsistent with that finding.

402. No persons suffered injury or harm to health.

403. TPII heard that the events of 07/09/2020 and 16/09/2020 did not create a high priority for witness security and handling[208] and no specific action was taken by the witness security and handling team after either 07/09/2020 or 16/09/2020 press conferences.[209]

404. In the event, few persons were found by TPII to have actually suffered consequences which amounted to 'substantial interference':

(a) [REDACTED];

(b) Two unidentified relocated persons; and

(c) Between 20-30 persons subject to other security measures (some of whom were subject to emergency risk planning by the SPO, which amounted to substantial interference, and others provided with new phone numbers or devices which did not amount to substantial interference).[210]

405. In relation to that limited number who the SPO assessed at risk, the risk was assessed below the highest level[211].

[208] Transcript_04/11/2021 p.1798_(lines9-12)
[209] Transcript_04/11/2021 p.1795_(lines15-19); p.1796_(lines1-4)
[210] Transcript_28/10/2021 p.1707_(lines9-16); p.1763_(lines3-6)
[211] Transcript_28/10/2021 p.1761_(lines7-8); Transcript_04/11/2021 p.1886_(lines13-23)

406. [REDACTED] was not one of those who the SPO assessed as at risk[212]. The fact that [REDACTED] had previously made his cooperation, with prosecutors investigating alleged KLA crimes, public[213] was a mitigating factor[214] that was not taken into account.

407. The TPII made discernible errors in sentencing when assessing gravity, when relying upon the matters impugned in sub-Ground-2A(a) and (b) above.

408. TPII sentenced on the basis that "the offences entail the revelation of … the names and personal details of hundreds of Witnesses and Potential Witnesses", relying upon the matters impugned in sub-Ground-2A(a) and (b)[215].

409. Only six "Witnesses" were actually identified in evidence[216], each of whom were publicly well-known previously, none of whom had been assessed by the SPO as at risk and none of whom had complained of 'fear and concern'.

410. For the reasons set out above under the sub-heading Ground-2A(a) and (b), TPII ought to have excluded evidence in relation to the non-exhibited parts of Batches 1-4. It was unfair to sentence on the basis that the offences entail the revelation of the names and personal details of hundreds of Witnesses and Potential Witnesses when Gucati had no means of challenging that assertion, and only six individuals had in fact been confirmed.

411. The TPII also made a discernible error in sentencing when failing to appropriately reflect the relative roles of the two Accused on count 3.

412. TPII imposed the same punishment – a fine of 100 EUR and four years' imprisonment – in relation to Count 3 for both Accused.

[212] Transcript_04/11/2021 p.1904_(lines22-25)
[213] Transcript_04/11/2021 p.1791_(lines20-24)
[214] *Jović* at para.26
[215] Para.964 (Fn.1988 referring to Para.335-355), 966, 979
[216] Para.505,520,572

413. The focus of TPII's judgment on Count 3, however, fell upon the co-Accused who was "especially vocal"[217].

414. The reviews of the contents of Batches 1-3 by the Accused were more 'superficial' than that of his co-Accused[218], and his knowledge more limited[219].

415. The co-Accused was found to have publicly named at least five Witnesses or Potential Witnesses[220], in contrast to Gucati who named none.

416. TPII found that public references to the content of the impugned documents were more detailed on the part of the co-Accused[221].

417. The co-Accused participated in 19 media appearances[222] compared to only 5 by Gucati[223].

418. Gucati's focus was found to be on questioning the veracity of the information provided by Witnesses[224].

419. TPII accepted that "Mr Gucati did not publicly name any witness and that he participated in fewer media appearances than Mr Haradinaj" but imposed the same penalty for count 3[225]. They were wrong to do so.

420. The TPII further erred when refusing to take into consideration the range of sentences imposed on persons convicted of similar offences at other international courts/tribunals[226].

[217] Para.563,567; Fn.1193,572,573,593
[218] Para.359-361
[219] Para.377
[220] Para.589
[221] Para.481(iv)
[222] Para.482 and in approximate chronological order:
P24,P21,P18,P33,P4,P6,P19,P7,P17,P8,P25,P12,P30,P11,P16,P15,P27,P26,P32
[223] Para.482 and in approximate chronological order: P9,P12,P28,P29,P31
[224] Para.570
[225] Para.971
[226] Para.979

421. TPII stated that they would take into account "no other case" when considering sentence. They were wrong to do so.

422. Consistency in sentencing is important. A sentencing tribunal is not required to look for a case on "all fours" with the case before it, nor to reject assistance from any other case in the absence of an identical set of facts, but to consider the range of sentences previously imposed in relation to the type of case before it, and consider where the present set of facts sits in relation to that sentencing practice[227].

423. Disparity between an impugned sentence and another sentence rendered in a like case will constitute an error if the former is out of reasonable proportion with the latter. This disparity gives rise to an inference that the Trial Chamber must have failed to exercise its discretion properly in applying the law on sentencing[228].

424. A review of the sentencing range for 'witness interference' cases was recently conducted in the Partially Dissenting Opinion of Judge Alphons Ories in *Ngirabatware*:

> "A review of the sentencing practice...demonstrates that convictions for contempt generally attract a sentence of imprisonment that is considerably less than two years and often well under one year. Particularly in relation to charges of contempt based on witness interference, sentences imposed in previous cases generally vary between a fine and three to ten months imprisonment. Before the *ad hoc* tribunals, the highest sentence ever imposed on an accused with respect to charges of contempt based on witness interference has been 12 months' imprisonment…In the *Šešelj* case, the accused was sentenced to two years of imprisonment…"

[227] *Strugar* at para.348
[228] *Strugar* at para.349

425. As was submitted to TPII[229], a sentence of 18 months to 2 years fell at or near the top of that range[230]. Even allowing for differences between Gucati's case and previous cases, imposing a sentence more than double the sentences imposed at the top of that range was grossly disproportionate and unjustifiable, particularly given that Gucati's case was *absent* the following features:

(a) Direct contact with a protected witness - contrast with:

Brima

Morina

Beqaj

Nshogoza

Rasić

Gombo

Kamara

Ngirabatware

(b) Direct publication of a protected witness' identity by the defendant personally - contrast with:

Marijačić

Jović

Al Amin

Šešelj (No.1)

Šešelj (No.2)

Šešelj (No.3)

(c) A person suffering established direct harm - contrast with:

Al Amin - loss of business

Nshogoza - victim induced to commit an offence and convicted

[229] Transcript_17/03/2022 p.3816-3819, p.3822-3823
[230] Annex 3

Rasić - victim induced to an commit and offence and convicted

(d) A position of trust – contrast with:

Nshogoza

Rasić

Gombo

(e) Interference with a particularly vulnerable or particularly important witness – contrast with:

Beqaj

Kamara

Ngirabatware

(f) A person actually induced to refrain from giving a statement/evidence or to give a false statement/evidence – contrast with:

Tabaković

Nshogoza

Rasić

Gombo

Ngirabatware

(g) Offending over a prolonged period – contrast with:

Šešelj (No.3)

Gombo

Ngirabatware

(h) Planning/sophistication – contrast with:

Rasić

Gombo

Ngirabatware

(i) Previous convictions – contrast with:

Šešelj (No.2)

Šešelj (No.3)

426. The imposition of a sentence of 4½ years' imprisonment was out of all reasonable proportion with the above range of sentences, demonstrating that TPII had failed to give sufficient weight, or any weight at all, to the matters set out above in relation to Ground-20. The sentence of 4½ years' imprisonment was capricious and manifestly excessive in all the circumstances[231]. The sentence should be reduced accordingly.

427.Finally, in the event that the appeals against conviction are successful in part, the sentence should be altered to reflect the same.

III. CLASSIFICATION

428. This appeal brief bears the same classification as the Judgment to which it relates in accordance with Rule 82(4) KSC-Rules.

[231] *Strugar* at para.349 referring to *Jelisić*: "a sentence should not be capricious or excessive"

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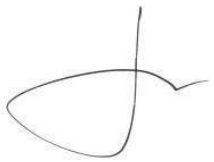

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19 August 2022

Cardiff, UK