In:	**KSC-CA-2022-01**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**A Panel of the Court of Appeals Chamber**
	Judge Michèle Picard
	Judge Kai Ambos
	Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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Further Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj

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I. INTRODUCTION

1. Further to Art.32 of the Constitution of the Republic of Kosovo ("Kosovo Constitution"), Art.46 of the Law on Specialist Chambers and Specialist Prosecutor Office Law No 05/L-053 ("Law"), and Rule 179 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers KSC-BD-03/Rev3/2020 ("Rules"), and the Appellant's Refiled Notice of Appeal,[1] the Defence for Mr. Nasim Haradinaj ("Defence") files this Appeal Brief against the decision of Trial Panel II ("TP") of 18 May 2022 ("Trial Judgment")[2] to convict Mr. Haradinaj ("Appellant") on Counts 1, 2, 3, 5, and 6 of the indictment ("Indictment")[3] and to sentence him to a four and half year custodial sentence (with credit for time served) and a fine of EUR 100.

2. This Appeal is brought pursuant to Arts.46(1)(a), (b) and (c) of the Law, and Rules 176 and 179 of the Rules.

3. In light of the decision of the Panel of the Court of Appeals Chamber ("CA") on the variation of the word limit for the appeal brief,[4] the Appellant requests

[1] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00029, Haradinaj Defence Refiled Notice of Appeal of Trial Judgment, 8 July 2022.

[2] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00611RED, Trial Judgement, 18 May 2022 ("Trial Judgment") and Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07, Dissenting Opinion of Judge Barthe, 18 May 2022 ("Barthe Dissenting Judgment").

[3] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00251-A01RED, Indictment, 14 December 2020.

[4] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-CA-2022-01/F00022, Decision on Gucati's Request for Variation of Word Limit to File Appeal Brief, 5 August 2022.

that the CA fixes, within the timeframe envisaged under Rules 179 and 180, an oral hearing for the appeal.

II. STANDARD OF REVIEW

4. Art.46(1) of the Law provides that the CA shall hear appeals from convicted persons or from the Specialist Prosecutor's Office ("SPO") on the following grounds:

a) an error on a question of law invalidating the judgment;

b) an error of fact which has occasioned a miscarriage of justice; or

c) an error in sentencing.

5. Although an appeal is not a trial *de novo* (Art.46(2) of the Law), Art.46(4) of the Law sets out that:

> *"When the Court of Appeals Panel determines that a Trial Panel has made an error of law in a judgement arising from the application of an incorrect legal standard, the Court of Appeals Chamber shall articulate the correct legal standard and apply that standard to the evidence contained in the trial record to determine whether to sustain, enter or overturn a finding of guilty on appeal. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals Panel may return the case*

to the Trial Panel to review its findings and the evidence based on the correct legal standard."

6. In determining an appeal against conviction, appellate courts must consider whether a conviction is safe;[5] it is thus not the Appellant's guilt or innocence, but the integrity of the criminal process that requires their important consideration. The safety of a conviction does not simply depend on the strength of the evidence but also on the observance of due process.

7. It is submitted that a consideration of the facts and circumstances in the proceedings reveals numerous material procedural irregularities and defects in the conduct of the proceedings that defy rational explanation, established domestic and international legal principles, and thus render the convictions, in their entirety, unsafe.

8. In this regard, the Appellant seeks to argue that the twenty-three (23) grounds of appeal[6] against conviction and one (1) consolidated ground of appeal against sentence, independently or cumulatively, undermine the fairness of the trial and the safety of the conviction and that the TP's findings with respect to each required element of each conviction are fatally flawed, and it has resulted in a clearly erroneous verdict in relation to each count. The trial

[5] R v. Hickey and Ors. [1997] EWCA, unreported.

[6] Grounds 12 and 13 have been merged, as the content is similar.

judgment has been marred by these fundamental errors with respect to each count, which should now be corrected.

9. It is respectfully submitted that the conviction of the Appellant is 'unsafe'.

III. FACTS

10. The case against the Appellant may be summarised as follows. He was found by the TP to have made publicly available three sets of documents that the SPO maintain are confidential and/or non-public, but which the Defence were not entitled to examine nor scrutinise, in which no proper chain of custody was produced, nor any admissible evidence at trial from the investigator(s) who purport to have seized the material to establish the chain of custody.

11. The Prosecution case was that there were allegations of witnesses being intimidated or placed in a state of fear, although no witnesses were produced at trial nor were the defence given the opportunity to cross-examine, nor were the TP able to observe or question any such witness. The entire prosecution case was presented by the evidence of three members of the SPO's own staff,[7] much of which amounted to hearsay statements, and one Kosovar journalist[8] who had published extracts of the first batch. During the trial, the Defence

[7] Witness W04841 (Zdenka PUMPER), Witness W0842 (Miro JUKIĆ); Witness W04876 (Daniel MOBERG).

[8] Witness W04866 (Halil BERISHA).

objected that critical aspects would be conducted in closed session and much of the material in the possession of the SPO would not be disclosed to the defence, or the TP. Such a process is not in accordance with the fundamental right to have a fair trial, in public, by an independent and impartial tribunal of law.

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

13. The Defence were unable at trial to comment on the contents of those documents, or even confirm whether they were 'confidential' and/or 'non-public' on the basis that disclosure was denied. The position of the SPO, quite improperly stated, was that to provide the Defence with the purportedly seized documents would be to "*provide the Defendants with the tools with which they committed the offences*".[9] Regrettably, the rather obstinate position adopted

[9] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00260RED, Public Redacted Submission of Interim Pre-Trial Brief on Behalf of the Defence of Nasim Haradinaj, 12 July 2021, public ("PTB") para.19.

by the SPO in this regard meant that the Defence was unable to establish whether there was in fact a weapon or whether it was in fact loaded. The SPO, due to serious failings in its investigation, was not even able to further prove, and the TP could not be sure, whether the "weapon", if it existed, was put in the hands of the Appellant by the SPO's own staff or some other person. What is clear, as stated by the SPO in its opening statement,[10] the Appellant was not believed to have been involved in the leak or misappropriation of any documents.

14. The Appellant was found by the TP, by virtue of the manner in which he was said to have disclosed those documents, to have threatened[11] and/or intimidated individuals,[12] and/or sought to retaliate against certain individuals.[13]

15. The disclosures were found to have taken place during three (3) separate press conferences called, and various appearances through various media outlets at which, the leaks were discussed, during September 2020.[14]

[10] KSC-BC-2020-07, Opening Statements, 7 October 2021, p.726, paras 15-21.

[11] KSC-BC-2020-07, Transcript 18 May 2022, p. 3867, ll.2-3; p. 3869, ll.5-13.

[12] *Ibid*, p.3866, ll.17-18.

[13] *Ibid*, p.3876, l.21.

[14] *Ibid*, p.3859, ll.13-22.

16. The SPO called no evidence to demonstrate that the Appellant had contacted any witness and in fact it was not the prosecution case that he had made contact with any witness.

17. The SPO has not at any stage identified 'who' the Appellant is said to have retaliated against.

18. Further, the SPO did not call any evidence of fact to support the allegations contained within the indictment, including failing to call any actual witnesses of fact other than the three members of its investigative team[15] and one journalist.[16]

19. Rather than rely on any evidence of fact, or the live testimony of victims, the SPO relied almost entirely on the submission of 'hearsay' evidence, despite there being no evidence that the witnesses of fact were not available or who had refused to testify.

20. In terms of the leaked documents themselves, it is still not known 'who' leaked those documents as the identity of the individual responsible for the initial disclosure remains unknown.

[15] Trial Judgment, paras 302-329; Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00566RED, Publicly Redacted Final Trial Brief on Behalf of Nasim Haradinaj, 11 March 2022 ("FTB"), paras 137, 140, 141.

[16] FTB, para.138

21. Further, it has not been confirmed 'how' the three batches of documents came to be leaked.

22. Still further, it has not been confirmed whether or to what extent any investigation has identified 'how' those documents came to be leaked and by 'whom'. That is a cause for some concern that the TP failed to consider as a relevant factor in the determination of the charges against the Appellant and any defence raised.

23. It is however clear, that a number of investigative opportunities into the leak(s) and the identity of the individual(s) responsible were not pursued, and further, no reason or justification has been provided as to why there has been such a failure.

24. Accordingly, it was part of the defence case, that there has been a complete investigative failure on the part of the SPO, a fact that would appear to be a common theme running throughout the entirety of the proceedings, and one that extends throughout, from the initial investigation to the arrest and detention of the Appellant, to the manner in which the proceedings have been pursued by the SPO at each and every stage.

IV. SUBMISSIONS

25. The grounds of appeal concern errors on questions of law invalidating the trial judgment, errors of fact which have occasioned a miscarriage of justice and errors of sentencing.[17]

26. The following Grounds, unless otherwise stated, are brought against conviction on all counts in the trial judgment. Ground 24 deals with the sentence imposed.

Ground 1

27. **The TP erred in law by failing to uphold basic tenets of a fair and impartial trial by demonstrating excessive bias in favour of the SPO throughout the conduct of the proceedings including: (a) the admission and assessment of SPO evidence; (b) censuring reference to Serbian officials in public session and/or material already in the public domain; (c) the failure to uphold the presumption of innocence of the Appellant; and (d) other aspects of the failure to maintain equality of arms.**

[17] Art.46(1) of the Law.

28. A basic tenet of any fair trial is the principle of equality of arms,[18] to which the TP accepts that it is bound.[19]

29. At a minimum, this principle "*obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case*" with regards to procedural equity."[20] However, these "*minimum guarantees [...] must be generously interpreted so as to ensure the defence is placed in so far as possible on equal footing with prosecution*."[21]

30. Concretely, therefore, this principle entails that each party is given equal opportunity to present their case; and that the trial is adversarial, granting both parties knowledge of and the ability to challenge the case of the other.[22]

31. Overall, doing so requires that a "*basic proportionality*" [23] or "*fair balance*"[24] be struck between the parties. Despite some flexibility in the measures needed to achieve this,[25] limitations can only be imposed where 'strictly necessary' e.g.,

[18] Art.31 Kosovo Constitution; Arts.1(2) and 40(2) of the Law; RPE Rule 72(2); Art.6 European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

[19] KSC-BC-2020-07, Transcript 18 May 2022, p.3858, ll.21-25.

[20] Prosecutor v. Dusko Tadic, IT-94-1-A, Appeal Judgment, 15 July 1999, paras 44, 48, 50, 52.

[21] Prosecutor v. Dominic Lubanga, ICC-01/04-01/06-1901, Decision on Defence Requests to Obtain Simultaneous French Transcripts , 14 December 2007, para.18.

[22] Prosecutor v. Nahimana, ICTR-99-52-A, Appeal Judgment, 28 November 2007, para.181.

[23] Prosecutor v. Naser Oric, IT-03-68-AR73.2, Interlocutory Decision on Length of Defence case, 20 July 2005, para.7.

[24] Feldbrugge v The Netherlands, ECHR, Judgment, Application No. 8562/79, para.44.

[25] Prosecutor v. Banda Jerbo, Decision on the Defence Request for Temporary Stay of Proceedings, ICC-02/05-03/09, 26 October 2012, para.36

"in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person."[26] Thus, measures permitting substantive procedural advantages of one party over another will be an abuse of an accused's fair trial rights.[27]

32. It is respectfully submitted that the TP failed to adhere to these requirements of 'strict necessity' when imposing arbitrary and unjustified limitations upon the Appellant's presentation of his case.

33. First, as a result of the TP's decisions, the Prosecution was afforded disproportionate access to the totality of evidence, which the Defence were not.[28] Irrespective of the classification of the documents as confidential,[29] the result was to effectively deny the Appellant the ability to access, and therefore challenge, critical evidence, disproportionately disadvantaging him vis-à-vis the Prosecution, in violation of his fair trial right(s).

34. Second, the proceedings were replete with instances of unjustifiable and unnecessary restrictions as regards the evidence which the Appellant was allowed to adduce in comparison to the SPO, despite the fact that such

[26] A. and Others v. the United Kingdom, ECHR, Judgment, Application No. 3455/05, para.205.

[27] Bulut v. Austria, ECHR, Judgment, (Application no. 17358/90), para.49.

[28] Trial Judgment, paras 7-10, 14-15, 22-25,.

[29] Matyjek v. Poland, ECHR, Judgment, Application No. 38184/03, para.63.

restrictions were only where strictly necessary and justified in light of strong countervailing factors. Specifically:

a. the TP took an inconsistent approach on the admission of evidence by the SPO and the Defence in regard to historical events,[30] *inter alia* permitting the SPO to refer to the historical context of the Kosovo conflict during cross examination whilst the Defence was explicitly prevented from doing so;[31]

b. the TP did not allow the Defence to refer to information relating to the SPO's collaboration with Serbia, and Serbian officials, some of whom who are subject to international arrest warrants for crimes committed during the conflict,[32] despite Defence arguments that this was essential to establish the Appellant's position as a 'whistle-blower' and/or to substantiate his 'public-interest' defence. It is stressed in this regard that the information itself is within the public domain and thus cannot be said to have been secret and/or confidential. As such, preventing its admission and/or restricting the extent of the

[30] Trial Judgment, paras 30-31, 64, 577-578.

[31] *See* Transcript, 12 January 2022, p.2903 ll.11-25, p.2904 ll.1-7; Transcript, 14 January 2022, pp.3039-3043.

[32] The Defence was repeatedly prevented during the proceedings from mentioning the names of these individuals in public session – see, e.g., KSC-BC-2020-07, Transcript 26 October 2021, p.1425, l.13-18; KSC-BC-2020-07, Transcript 06 December 2021, p.2179, l.2-3; KSC-BC-2020-07, Transcript 08 December 2021, p.2350, ll.1-25.

Appellant's evidence in this regard served no purpose other than to prejudice his defence;

c. the SPO was allowed to exceed the scope of the examination in chief in their cross examination of both the Appellant and Expert Witness DW1253 (Robert REID);[33]

d. the TP unduly limited on expert evidence sought to be adduced by the Appellant,[34] *inter alia* limiting the extent to which Expert Witness DW1252 (Anna MYERS) could opine on whether the Appellant was a whistleblower,[35] and restricting the testimony of Expert Witness DW1253 (Robert REID) regarding the consistency of the investigative procedures adopted by the SPO with international best practices on investigative standards and chain of custody;[36]

v) the TP permitted the excessive redaction and obfuscation of evidence central to its case, such that factors relevant to the elements of crimes

[33] *See* Transcript, 12 January 2022, p.2903 ll.11-25, p.2904 ll.1-7; Transcript, 24 January 2022, pp.3304-3313.

[34] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/ F00470, Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 03 December 2021, public ("Decision on Defence Witnesses").

[35] *Ibid*, paras 32-37.

[36] *Ibid*.

underpinning the charges against the Appellant were not adequately put before the Court or the Defence (see further, Ground 4).

35. Third, the TP erred in law by failing to uphold and enforce internationally accepted standards with regards to the presumption of innocence, which clearly prohibit public authorities from making statements referring to a person as guilty unless or until guilt is proven according to law.[37] This includes the authority involved in the criminal proceedings in question, such as judicial authorities, police and other law enforcement authorities, or other such authorities, such as ministers and other public officials should respect the presumption of innocence of an accused who has not been convicted.[38]

36. Specifically, it is noted that on 17 March 2022, the Specialist Prosecutor stated in open court, before any finding of the court about the liability of the Appellant that:

> *"the evidence (…) referred to is relevant not only to the guilt of the accused,* ***which has been established****, but now to the question before this Court, which is what is the appropriate sentence in this case."*[39]

[37] *See, e.g.*, Art. 4 EU Directive (EU) 2016/343 of 9 March 2016 on the Strengthening of Certain Aspects of the Presumption of Innocence.

[38] Nešťák v Slovakia, ECHR, Application No. 65559/01, para.88.

[39] KSC-BC-2020-07, Transcript 17 March 2022, p.3771, ll.17-22.

37. This was plainly inappropriate prior to any independent finding of guilt by the TP,[40] yet was apparent readily accepted and not refuted by the TP, raising concerns as to the actual or apparent impartiality of the Judges[41] in their approach to determining what should have been at that time the accused's guilt or innocence.

38. Finally, and relatedly, it is submitted that the TP allowed the SPO to make lengthy, *quasi* political speeches that were unsupported by relevant evidence and essentially amounted to a warning to future would-be indictees.[42] In allowing this approach, the TP again raised serious concerns as to the equality between the SPO and Defence, particularly when referencing its aforementioned arbitrary restriction(s) on what the Appellant was and was not allowed to refer to, despite the position being made clear at all stages of the process, including within the Pre-Trial Brief.[43]

39. Considered individually and holistically, these restrictions and inequalities resulted in serious and systemic violations of the Appellant's rights to equality of arms and the presumption of his innocence. In adopting this

[40] Vardanyan and Nanushyan v. Armenia, ECHR, Judgment, Application No. 8001/07, para.82.

[41] Ramos Nunes de Carvalho e Sá v. Portugal, ECHR, Judgment, Applications nos. 55391/13, 57728/13 and 74041/13, para.145

[42] KSC-BC-2020-07, Transcript 17 March 2022, pp.3771-3783.

[43] PTB, para.179.

approach, the TP is therefore said to have erred in law and undermined the safety of the conviction(s) imposed on the Appellant.

Ground 2

40. **The TP erred in law by failing to disqualify Presiding Judge Charles Smith III from the proceedings in light of allegations that are of relevance to the fairness of the Appellant's trial, and in permitting his personal involvement in ruling on the admissibility of witness testimony relevant to those allegations.**

41. Impartiality is essential to the fair trial rights of the Defence under Art.31 of the Kosovo Constitution, Art.21, Art.27 (1) of the Law and Art.6 of the ECHR.[44]

42. The Appellant raised concerns in respect of Presiding Judge Charles Smith III at an early stage, and made the appropriate application to the President of the KSC, Judge Ekaterina Trendafilova.[45]

[44] Guðmundur Andri Ástráðsson v. Iceland, ECHR, Judgment, Application No. 26374/18, para.234.

[45] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00268CORRED, Publicly Redacted Version of the Corrected Version of Application for the Recusal of the President of the Specialist Chambers, Judge Ekaterina Trendifilova, and the Vice President, Judge Charles L. Smith III, Presiding Judge of Trial Panel II, public with confidential annexes, 23 August 2021 ("Recusal Application").

43. In support of this application, the Appellant submitted the testimony of a direct witness present at the time of alleged incident,[46] Witness DW1250 (Judge Malcom SIMMONS)[47] given before a parliamentary subcommittee of the National Assembly of the Republic of Kosovo,[48] and a series of e-mail communications.[49]

44. Despite this evidential base, however, the allegations of bias made within it were summarily dismissed,[50] primarily on the basis that "*the Defence's submissions concern unsubstantiated allegations*"[51] and were "*entirely lacking in substance*".[52]

45. The Appellant maintains that this finding amounted to an error of law, as it was one which no reasonable trier of law or fact, in discharging the relevant standard of caution, could have reached without substantively analysing the substance of the allegations *inter alia* through hearing relevant witness

[46] Recusal Application, Annex 5.

[47] Recusal Application, para.73.

[48] Recusal Application, Annex 5.

[49] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00274, Request for Reconsideration of the Decision on Recusal or Disqualification, 12 August 2021, para.30.

[50] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021, public.

[51] *Ibid,* para.34

[52] *Ibid.*

testimony and other available evidence, as set against the well-established caselaw of the ECHR.[53]

46. This position must be further considered within the context that the President of the KSC, and members of the SPO have been involved in diplomatic briefings[54] that have referred to a trial date despite one not being set, to convictions, despite none being entered at that time, and potential sentences to be imposed despite no conviction having been entered.

47. Read in conjunction with the first ground concerning the pervasive decisions of the TP showing a disproportionate favouritism towards the SPO, as opposed to the Defence, and considered within the wider context of the submissions above, the continued presence of the Presiding Judge on the TP gave rise to an actual or perceived[55] lack of impartiality that pervaded the entirety of the Appellant's trial. The decision to permit that continued presence thus amounted to an error of law and undermined the safety of the totality of the conviction(s) imposed.

[53] Cosmos Maritime Trading and Shipping Agency v. Ukraine, ECHR, Judgment, Application No. 53427/09, paras 78-82.

[54] Recusal Application, para.24.

[55] Micalleg v. Malta, ECHR, Judgment, Application No. 17056/06, para. 98; Castillo Algar v. Spain, ECHR, Judgment, Application No. 79/1997/863/1074, para.43.

Ground 3

48. **The TP erred in law in seeking to interpret domestic jurisprudence without having any recourse to the same Kosovan courts despite such recourse being readily available.**

49. Pursuant to Art.6(2) of the Law, the KSC shall have jurisdiction over the offences set forth in the Criminal Code of the Republic of Kosovo ("KCC"),[56] under which the Appellant was indicted. Decisions of courts do not establish legally binding precedent in Kosovo as they do in common law jurisdictions, but they have persuasive force, meaning that the jurisprudence of the courts of Kosovo is relevant to the interpretation of the KCC.

50. However, a serious and significant tendency not to give this jurisprudence due weight is discernible in the Trial Judgment; this is perhaps best exemplified by the position of the TP on the relationship between Arts. 401(1) and 401(2) of the KCC.

51. In its consideration of these provisions, the TP referred to the judgment in *M.I. et al.*,[57] in which the Kosovo Court of Appeals found that punishment for both the criminal offences that were the equivalent of Arts. 401(1) and 401(2) "*would*

[56] Code No. 06/L-074, Criminal Code of the Republic of Kosovo, Official Gazette of the Republic of Kosovo No. 2/14 January 2019.

[57] Trial Judgment, paras 165-166.

not be admissible because they are not in a relation of real concurrence."[58] This would imply that the Appellant could not be convicted under both Counts 1 and 2.

52. However, the TP rejected this position[59] despite its coherent presentation by the Court of Appeals as following from a doctrine in the civil law tradition (of which the Kosovo legal system is part), preferring instead the 'cumulative convictions' test developed in international criminal tribunals (despite the fact that the KSC is not an international criminal tribunal nor a court based on the common law), thus finding that a perpetrator could be held responsible under both Arts.401(1) and 401(2).[60]

53. It is incorrect to give weight to the jurisprudence of the international criminal tribunals in preference to that of domestic courts in the interpretation of the provisions of the KCC that do not concern international crimes, such as these provisions. In doing so, the TP therefore erred in law.

54. Relatedly, it is noted that similar errors were made in respect of the TP's interpretation of the charge of 'Violating Secrecy of Proceedings' in Arts.392(1) and 392(2) KCC on the basis of a Judgment of the International

[58] Trial Judgment, para.165.

[59] Trial Judgment, para.166.

[60] Trial Judgment, paras 167-170.

Criminal Tribunal for the former Yugoslavia ("ICTY"),[61] which of course did not apply to the KCC in determining guilt. The tendency not to take account of the jurisprudence of the domestic courts of Kosovo is such that it undermines the legal validity of the convictions and fails to take account of the fact that the KSC is a judicial organ of the Republic of Kosovo.

Ground 4

55. **The TP erred in law by allowing the SPO to withhold material allegedly unlawfully disclosed by the Appellant, meaning that neither the TP nor the Defence were able to determine whether the protected assignment of each document was appropriately imposed.**

56. A Trial Panel must "*hear, assess and weigh the evidence adduced by parties at [a] hearing*."[62] In doing so, they enjoy discretion as to the "*particular items of evidence or to findings or assessments submitted to them for consideration*."[63] Nonetheless, admissibility issues remain separate from "*whether the evidence*

[61] The TP cites paras 43 and 46 of the ICTY Hartmann Trial Judgement in support of its finding that to regard any prior unauthorised revelation of the Protected Information as having the effect of lifting its protected status would defeat or undermine the purpose of Art.392(1) - Trial Judgment, para.488. In relation to Art.392(2) the Panel cited the same paragraphs of the Hartmann Judgment in order to justify its assertion that the authority and responsibility of the SPO and the SC to maintain the protected status of a person does not cease because that status has become known in some manner not authorised by the SC legal framework - Trial Judgment, para.524.

[62] Prosecutor v. Kayishema and Ruzindana, IT-95-1-A, Appeal Judgment, 04 December 2001, para.115.

[63] Aytullah Ay v. Turkey, Judgment, ECHR, Applications Nos. 29084/07 and 1191/08, para.124.

produced for or against the defendant was presented in such a way as to ensure a fair trial"[64], which thus cannot be waived as a simple matter of judicial discretion.

57. Here, the case against the Appellant centres on a chain of events that led to there being a 'leak' of three separate supposedly confidential batches of documents said to have been held by the SPO.[65]

58. However, even post-conviction, it cannot be said with any certainty that the Documents which the SPO suggest to be contained within the 'Batches' were, in fact, confidential or even contained within them, as the SPO, unchallenged by the TP, refused to disclose the entirety of their contents.

59. Even on appeal, therefore, neither the Appellant, his legal team, nor the Pre-Trial Judge or TP have ever seen the contents or classification level of the Documents said to be confidential in their entirety.

60. This is a significant omission; not only because the supposed confidentiality of the information said to have been released by the Appellant was and is an intrinsic element of crimes associated with his conviction(s),[66] but also because there was on numerous occasions a disjuncture between what the SPO and its

[64] *Ibid*, para.125.

[65] PTB, para.18

[66] Trial Judgment, para.67.

witnesses said was the case, and what was subsequently shown to be so (*see*, Appeal Ground 8).

61. It is accepted in this regard that the TP did make a determination on some of the credibility issues arising from the evidential inconsistencies present in the SPO's case,[67] the propriety of which is dealt with more fully in later Grounds.

62. However, regardless of the propriety of those determinations, it is maintained that the existence of real issues between the parties requiring such a determination in respect of the evidence that was before the TP and the Defence reasonably supports the possibility, or probability, that similarly serious issues would have existed between the parties in respect of that which was not before the TP or the Defence, *i.e.*, the information said to be confidential.

63. Without seeing this evidence, or being invited to do so by the TP, however, the Appellant was deprived of the opportunity to raise these issues so as to permit him to make representations/present evidence in such a way as to ensure a fair trial.

64. In addition, it is noted in this regard that per Rule 108(4), the TP had the discretion to order that appropriate counterbalancing measures be taken to

[67] *Ibid*, paras 54-58, 109-125, 577.

offset (what is maintained to be) the serious prejudice caused by his inability to examine or confront this information.[68]

65. It also bears stressing that per Rule 108(4), if the TP had been of the opinion that no measures would ensure the Appellant's right to a fair trial in light of the non-disclosure, it was obliged to give the SPO the option of either disclosing the information, or amending or withdrawing the charges to which the information relates.

66. However, no such measures were implemented, and no such choice put to the SPO, leaving the Appellant to instead face evidence and be convicted of charges that were and continue to be shrouded in secrecy, with no steps being taken to challenge these issues. This fundamentally undermines the fairness of the proceedings.

67. On this basis, it is therefore submitted that in convicting the Appellant, the TP erred in law by:

a. failing to appreciate (accurately or at all) the serious prejudice caused to him by the SPO's non-disclosure and/or excessive redaction (contrary to, *inter alia*, Art.21(2) of the Law and Rule 108(4)); and/or

[68] An elementary step in this regard would have been to order that the TP, as an independent arbiter of law, review the evidence so as to ensure that all of the material said to underpin the allegations against the Defendant was, in fact, subject to restrictions limiting its dissemination.

b. failing to ensure that counterbalancing factors were put in place to counter this prejudice (contrary to Rule 108(4)), including by ordering that the Appellant be able to review and make representations on the evidence said to be central to the case against him (contrary to Art.21(4)(c) of the Law), or at the very least that the TP itself had sight of that evidence so as to satisfy itself of the Appellant's guilt beyond a reasonable doubt (contrary to its obligation to do per Art.21(3) of the Law).

Ground 5

68. **The TP erred in law by refusing to grant requests to define the 'modes of liability and elements of crime' until after the conclusion of the Trial, thereby failing to require the SPO to identify with sufficient specificity the particular modes of liability and *mens rea* forming the basis of charge in the Indictment.**

69. At the Trial Preparation Hearing of 8 September 2021, the TP ordered the Defence to file submissions on the elements of crime and modes of liability,[69] which the Defence did on 30 September 2021.[70] No clarifications as to the

[69] KSC-BC-2020-07, Transcript, 8 September 2021, p.710, ll.9-19

[70] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/ F00342, Defence Submissions on Elements of Crimes and Modes of Liability, 30 September 2021, public.

elements of crime or *mens rea* was forthcoming following the adoption of this position.

70. It is submitted that the TP erred in law by directing the parties to make submissions on the elements and modes of liability and then choosing to defer any decision until final judgment as, in doing so, it ensured that Defence were unaware of what the SPO needed to prove for each offence, which negatively prejudiced the Appellant in the fair, informed, and strategic preparation of his defence.

71. This misdirection in law was therefore antithetical to the fairness of the proceedings the TP's actual and perceived respect for fair trial guarantees such as the equality of arms. Consequently, it serves to undermine the safety of the conviction.

Ground 6

72. **The TP erred by refusing to hear the testimony of Defence Witnesses DW1250 (Judge Malcolm SIMMONS) and DW1251 (Maria BAMIEH), and by unduly restricting the expert evidence of DW1252 (Anna MYERS) and DW1253 (Robert REID).**

73. A central tenet of the Appellant's defence was that his disclosures were justified by the public interest in information regarding what he maintains to

be the discriminatory, politically motivated, and non-independent *modus operandi* of the SPO/KSC .[71]

74. For this reason, the Appellant sought to adduce the testimony of Witness DW1250 (Malcolm SIMMONS), a former EULEX Judge willing to testify to the politicisation of institutions and individuals linked to the KSC, including, in particular through his account of political pressures previously brought to bear on him and his colleagues by the now KSC Vice President and the Presiding Judge during the Proceedings.[72]

75. Relatedly, the Appellant also sought to rely upon Witness DW1251 (Maria BAMIEH), a former EULEX prosecutor who would again provide evidence of politicisation, giving testimony as to the non-renewal of her EULEX contract following her disclosure of evidence of corruption in senior judicial/prosecutorial EULEX ranks.[73]

76. Whilst neither Witness DW1250 or DW1251 were employed by the SPO, or its precursor, the EU Special Investigative Task Force ("SITF"), it is maintained that by virtue of their prior professional positions, each was nonetheless able to testify as to the existence of political interference, widespread corruption,

[71] KSC-BC-2020-07, Transcript 28 October 2021, p.1762, ll.1-3; Trial Judgment, para.391.

[72] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00263, Decision Assigning TP II, 15 July 2021, public; Recusal Application, Annex, para.42(c).

[73] *See*, Decision on Defence Witnesses.

and collaboration with Serbian authorities amongst the European External Action Service ("EEAS"), which were the appointing authorities for EULEX and the SITF/SPO. Witness DW1250 was also in a position to provide specific evidence regarding judicial partiality and impropriety on behalf of the Presiding Judge in the Appellant's trial, which was directly relevant to the Appellant's honestly held beliefs regarding the politicisation and bias inherent at the SPO/KSC that ultimately underpinned his disclosure(s).

77. Each witness was thus able to offer an account that was and is intrinsically relevant to the Appellant's case that his disclosures were made in the public interest, and permitting the presentation of those facts was essential to his ability to prepare and develop a full and proper defence.

78. Nonetheless, on 2 December 2021 the TP decided not to hear those witnesses, apparently on the grounds that they were unable to offer testimony of 'direct' relevance to the issues in the case,[74] a decision that was upheld on appeal despite the Appellant's extensive representations to the contrary.[75]

[74] Decision on Defence Witnesses, paras 80-81.

[75] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/ IA006-F00006, Decision on Nasim Haradinaj's Appeal Against Decision on Prosecution Requests in Relation to Proposed Defence Witnesses, 07 January 2022, public, paras 18-21.

79. Further to wholly preventing his reliance on certain witnesses, the TP also unduly restricted key parts of testimony that it did permit.[76]

80. For example, Witness DW1252 (Anna MYERS) is a recognised expert on 'whistleblowing' and 'public interest', whom the Appellant sought to rely upon on the grounds that her expertise was directly relevant to his defence of whistleblowing and its application to the facts of his case, in particular her assessment, on the evidence, as to whether he met the requirements of being a 'whistleblower' and whether his disclosures were justified in the 'public interest'.

81. However, whilst the TP was willing to hear general testimony from Witness DW1252 in relation to whistleblowing/public interest issues, it expressly prevented her admission of evidence in relation to, or cross examination on, applied whistleblowing issues apparent in the Appellant's case, apparently because any such specialist testimony fell within the exclusive competence of the TP itself.[77]

82. Similar issues were also seen in relation to Witness DW1253, a leading international criminal investigator upon whom the Appellant sought to rely regarding issues relevant to the SPO's chain of custody over the Documents

[76] Decision on Defence Witnesses, paras 98–99.

[77] Decision on Defence Witnesses, paras 98-99.

and adherence to investigative standards. Despite this expertise, however, the TP deemed itself to share his 30 years' of expertise developed in this area (despite being experienced adjudicators, rather than investigators) and concluded that there was no precedent for expert evidence in relation to the 'general nature of facts' (despite the fact that no precedent had previously been required), and refused to admit it.[78] Whilst reversed on appeal, Witness DW1253's testimony remained subject to similarly restrictive constraints as those faced by Witness DW1252,[79] in that he was only permitted to speak in general terms.[80]

83. The Appellant maintains that these findings were at best ignorant to the reality of his case, or at worst an attempt to silence evidence directly relevant to the allegations of partiality, political interference, procedural impropriety, and unfairness levelled by the Appellant against the SPO/KSC. This is particularly so given the double standards apparent in the manner in which evidence was treated by the TP, for example in its willingness to accept the relevance and probity of generalised and outdated comments on the 'climate of intimidation in Kosovo' in existence over 20 years earlier,[81] whilst

[78] Decision on Defence Witnesses, para.111.

[79] Decision on Defence Witnesses, paras 29-30.

[80] Decision on Defence Witnesses, paras 102, 106–110.

[81] Trial Judgment, para.577.

simultaneously denying the relevance and probity of first-hand accounts of the bias and partiality of SPO/KSC linked institutions and individuals, some of whom sat on the TP responsible for decisions not to hear evidence directly against them, or the relevance of the Appellant's own experiences under several decades of persecution under Serbian occupation.[82]

84. Regardless of the motivation for doing so, the result of those findings was a steady erosion of the Appellant's ability to effectively present evidence capable of supporting his defence and meaningfully testing the SPO's allegations. This, it is submitted, is an eventual outcome based on conclusions that no reasonable trier of fact or law could have abided by or come to, and directly contravened the Appellant's right to call evidence reasonably relevant and necessary to the presentation of his defence. The undue refusal and curtailment of that evidence thus amounted to an error of law.

Ground 7

85. **The TP erred by failing to set out the extent to which it relied on hearsay evidence admitted by the SPO or to specify the weight attributed to each item in determining the guilt of the Appellant.**

[82] Recusal Application, para.73.

86. The KSC is bound by the standards of fair trial recognised in the Law, the Kosovo Constitution, and (customary-) IHRL.[83]

87. Within this legal framework, there is a presumption against the use of hearsay evidence,[84] the acceptability of which is dependent upon whether reliance upon it is subject to safeguards protecting a defendant's right to challenge evidence against them.[85] This is particularly so in respect of anonymous hearsay, which is to be used with caution (even as a means of corroboration) given the inability to test its credibility or probity.[86]

88. For this reason, the admission of anonymous hearsay requires a TP to examine whether there was a good reason for admitting the evidence, bearing in mind that all reasonable efforts should be made to secure a witness's attendance.[87]

89. The TP must also determine whether that evidence was the sole/decisive basis for a defendant's conviction, mindful that a conviction solely/mainly based on evidence provided by untested witnesses will generally amount to an undue

[83] Law, Arts 2-3.

[84] Thomas v. United Kingdom, Judgment, ECHR, Application No. 19354/02, p.13.

[85] *See*, Dimović v. Serbia, Judgment, ECHR, Application No. 24463/11, paras 37-40.

[86] *See*, Prosecutor v. Bahr Idriss Abu Garda, ICC-02/06-02/09, Decision on the Confirmation of Charges, 8 February 2010, para.52; Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/1, Decision on the Confirmation of Charges, 23 January 2012, para.78.

[87] Dimović v. Serbia, para.37.

restriction on fair trial rights, unless supported by other incriminating evidence.[88]

90. Where evidence is decisive (i.e., of such significance or importance as is likely to be determinative of the outcome of the case)[89], a TP must assess the adequacy of safeguards in compensating any handicap to the defence: the more important the evidence, the weightier those safeguards must be for proceedings to be fair.[90]

91. During the Trial, the evidence given by those allegedly affected by the Appellant's statements was presented by a single member of SPO staff,[91] whose evidence was distinctly lacking in any credibility, through the presentation of anonymous hearsay statements, often in closed session, on behalf of individuals that neither the Defence nor the TP were able to identify, cross-examine, or otherwise question.[92]

92. This evidence could not be described as anything other than 'decisive', given that it related specifically to the likely/reasonable impact (intended or not) of the Appellant's statements, and was thus centrally important to a

[88] *Ibid*, para.38.

[89] Al Khawaja v. United Kingdom, Judgment, ECHR, Application Nos. 26766/05 and 22228/06, para. 116.

[90] Dimović v. Serbia, para.39.

[91] Witness W04842.

[92] Trial Judgment, paras 15, 33, 383, 518.

determination of the reasonableness/likelihood that those statements would or could have led to intimidation, retaliation, or obstruction (in the Appellant's mind or otherwise). This remained so despite the limited *viva voce* presentation of third-party witnesses on this issue, who presented only outdated and general information as to their perception of the previous 'climate of witness intimidation' in Kosovo,[93] and who were not therefore in a position (as an alleged contemporaneous victim would have been) to justify what might have been the perception of the Appellant's statements.

93. In this case, then, the TP was confronted with a set of circumstances in which the decisive evidence supporting the charges against the Appellant in respect of the intimidation, retaliation, or obstruction was presented solely or mainly through the use of anonymous hearsay statements, with only outdated and limited circumstantial evidence used in support.

94. Extreme caution was therefore owed in respect of the evidence required to prove those charges.

95. It is accepted in this respect that the TP did make broad reference to steps taken to exclude some hearsay evidence "*where it unfairly interfered with the*

[93] DW1253 (Robert REID), Transcript, 24 January 2022, p.3307-33313. *See* for discussion, Trial Judgment, paras 251, 577.

Accused's right to confrontation",[94] and its awareness as to the weight to be afforded to anonymous hearsay evidence generally.[95]

96. Despite these issues, however, no confirmation was given as to whether the Panel conducted an assessment as to why all of the testimony of the alleged victim group had to be adduced via anonymous hearsay, which would appear elementary given that: (a) the SPO remained able to apply for all of witness protection measures contained in Rule 80; and (b) in light of those measures, good reasons were required for the non-attendance of each individual witnesses, it being insufficient to simply rely on blanket assumptions as their group vulnerability.

97. More concerningly, outside of general reassurances regarding the more limited weight given to 'hearsay' generally, the TP also failed to specify the precise weight that had been attributed to each statement. The result is that those statements, in addition to being untested during the Proceedings, appear to have been treated the same during deliberation, regardless of the potential for individual variations in credibility and probative value.

98. The result is that the Appellant has been convicted for charges in respect of which the decisive evidence has been mainly, if not solely presented via

[94] Trial Judgment, para.25.

[95] *Ibid*, para.42.

untested anonymous hearsay, against which the TP failed to identify and implement (adequately or at all), the very weighty counterbalancing factors required to remedy the handicap to his ability to defend allegations put to him, in violation of his right to do so as part of his right to a fair trial.

99. In convicting the Appellant on this basis, it is therefore submitted that the TP erred in law.

Ground 8

100. **The TP wrongfully exercised its discretion with regards to: (a) the significant inconsistencies in the evidence provided by Witness W04841 (Zdenka PUMPER) and Witness W04842 (Miro JUKIĆ); and (b) the limited recollection of the W04876 (Daniel MOBERG), when assessing the reliability and weight to be attributed to these witnesses.**

101. During the proceedings, Witness W04841 (Zdenka PUMPER), an experienced investigations coordinator, revealed that her analysis of the witness lists seized in the set of documents was done by way of sampling, sometimes of just one witness on the list, meaning that each witness on the list had been neither comprehensively reviewed nor even confirmed in terms of their status

as a witness. She also confirmed that the process of authentication of the material was ceased before completion; no details were given as to why.[96]

102. These evidential concerns fed into a broader context of concern regarding serious and systematic deficiencies in the SPO's chain of custody records over the seized documents,[97] which were only further confirmed by the limited recollection of Witness W04876 (Daniel MOBERG), an Operational Security Officer who could not confirm that those documents were placed in sealed bags upon seizure.[98] Consequently, it remains impossible to verify that any of the documents presented as evidence of the Appellant's disclosure(s) are tamper-free, meaning that there is no basis on which to identify precisely what he or any other KLA WVA member is said to have handled or disclosed, and in what state.

103. The extent of the SPO's evidential mismanagement and the uncertainty caused by it became even clearer during the examination of Witness W0842 (Miro JUKIĆ), an SPO Witness Liaison Officer, in respect of his involvement with the collation of witness evidence. During questioning, Witness W0842 demonstrated himself and his knowledge of the case to be unreliable and of questionable credibility, not least following his suggestion that over '100'

[96] KSC-BC-2020-07, Transcript 5 November 2021, pp.1068-1070.

[97] FTB paras 264-301.

[98] KSC-BC-2020-07, Transcript 05 November 2021, p.1940; Trial Judgment, para.270.

witnesses contacted by the SPO expressed safety concerns, despite the fact that there is no evidence showing even close to 100 examples of this concern, nor contact notes of 100 witnesses even having been contacted.[99]

104. It is therefore the case that: (a) the investigations coordinator employed by the SPO reviewed an incomplete data set of witness samples supposedly supporting the charges against the Appellant; (b) Operational Security Officers involved in the seizure of the evidence could not confirm in what state the evidence was received or how it was kept safe following receipt; and (c) SPO Witness Liaison Officers could not confirm how many witnesses they had come across, instead giving vastly incorrect approximations.

105. These omissions were significant and reasonably undermined the reliability and credibility of the very heart of the evidence supporting the case against the Appellant.

106. Despite this, however, the TP were willing to roundly excuse and justify these deficiencies.[100] In doing so, it is submitted that the TP reached conclusions that were counter intuitive, counter factual, counter evidential, and thus which no reasonable decision maker could have come to.

[99] KSC-BC-2020-07, Transcript 28 October 2021, p.1762, ll.1-3; Trial Judgment, paras 137-142, 237.

[100] Trial Judgment, paras 54-58, 109-125, 577.

107. The TP is thus submitted to have erred in law in respect of its exercise of discretion with regards to Witnesses W04841, W04842, and W04876.

Ground 9

108. **TP erred in law in determining that the public interest defence was unavailable under Kosovo law, and erred in law and fact by failing to consider the involvement of SITF/SPO Serbian sources in the globally condemned criminal Milošević regime.**

109. The TP stated that no "*provision of the Law or the Rules explicitly lists acts for the public interest as grounds excluding criminal responsibility.*"[101] Equally, it acknowledged that:

> "*both the Law and the Constitution demand that the SC abide by and apply internationally recognised human rights standards, including those laid out in the ECHR*"[102] and "*that Art.40 of the Constitution and Art. 10 ECHR guarantee the freedom of expression, and that the European Court of Human Rights ("ECtHR") has determined that the exercise of the freedom of expression in pursuit of a public interest warrants particular protection*".[103]

[101] Trial Judgment, para.800.

[102] *Ibid*, para.806.

[103] *Ibid*.

110. Though the TP does not quite put it in these terms, it follows that acts which would otherwise be criminal will not be so if they are compatible with the right to freedom of expression which is guaranteed by the Constitution and the ECHR.

111. The TP addressed the Defence's claim of public interest in the context of the Accused's freedom of expression and "*as a potential justification that may affect their criminal responsibility*".[104]

112. The TP defined the notion of public interest in the context of SITF/SPO cooperation with Serbia as follows:

> "*[T]he claimed public interest in relation to which relevant evidence could be permissibly elicited is limited to evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties occurring in the context of the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO, which would have affected the independence, impartiality or integrity of the SITF/SPO's investigation.*"[105]

[104] *Ibid*, paras 806, 810-824.

[105] *Ibid*, para.808.

113. It found that there was no credible basis to conclude that the allegedly protected information revealed by the Appellant contained indications of improprieties attributable to the SITF/SPO.[106] However, in reaching this conclusion, it took no account of the stance that Serbia has taken over the years towards Kosovo. As the Appellant testified, even today Serbia refuses to recognise Kosovo as an independent state, continuing to refer to it as Kosovo and Metohija,[107] and denies atrocity crimes committed during the conflict with Kosovo.[108] The Appellant also affirmed that those with whom SITF/SPO was collaborating had official positions during the Milošević regime[109] and at least one was implicated in atrocities committed in Kosovo during the conflict.[110] In addition, Witness W04866 (Halil BERISHA) testified that given the past of the people of Kosovo and the conflict he had lived through, it was of public interest that the system of evidence collection by SITF mostly took the form of requests to collect evidence given by former Serbian police officers and Serbian chiefs of police stations.[111] The sheer volume of the contacts with

[106] *Ibid*, para.817.

[107] KSC-BC-2020-07, Transcript, 11 January 2021, p.2712, ll.3-4; Cf. KSC-BC-2020-07, Transcript, 27 October 2021, p.1608 l.12-1609 l.13.

[108] KSC-BC-2020-07, Transcript, 11 January 2022, p.2712, ll. 1-4.

[109] KSC-BC-2020-07, Transcript 12 January 2022, p.2876 ll.1-10.

[110] KSC-BC-2020-07, Transcript 11 January 2021, p.2713, ll. 7-l.15

[111] KSC-BC-2020-07, Transcript 27 October 2021, pp.1603, ll.13-1604 l.6 (commenting on P00129, p. 15); KSC-BC-2020-07, Transcript 11 January 2022, pp.2711 ll.21- 2712 l.1.

Serbian officials,[112] especially those with murky pasts, called into question the independence, impartiality or integrity of the SITF/SPO's investigation.

114. The error of the TP in finding that there was no credible basis to conclude that the protected information revealed by the Appellant contained indications of improprieties attributable to the SITF/SPO[113] removes one of the principal bases for its conclusion that the criminal responsibility of the Appellant cannot be excluded by considerations of public interest.[114] For these reasons the conviction of the Appellant on Counts 1, 2, 3, 5 and 6 should be reversed.

Ground 10

115. **The TP erred in law by refusing defence requests to make submissions relating to the SPO's disclosure obligations regarding any material concerning Senator Dick Marty's allegations that Serbian state authorities were responsible for a plot to threaten his life with the aim of falsely implicating Kosovan Albanians.**

[112] *See,* Annex 1 of P00090.

[113] Trial Judgment, para.817.

[114] *Ibid*, para.824.

116. Following closure of the case, the Gucati Defence filed a Request on 12 May 2022[115] seeking permission to make further submissions regarding disclosure pursuant to Rule 136(2), which provides that after the declaration that a case is closed "*no further submissions may be made to the Panel, unless in exceptional circumstances and on showing of good cause*."

117. The Gucati Defence submitted that on the face of press reports, the information regarding Dick Marty's allegations shared two features relevant to the defence case: (a) a deliberate attempt by a state agency to create the circumstances in which to implicate Kosovan Albanians; and (b) the allegation that Serbian state authorities were engaged in impropriety with a view to the fabrication and manipulation of evidence (such that collaboration by the SPO with Serbian state agencies jeopardised the independence, impartiality and fairness of any investigation).[116] In a filing on the same day, the Appellant sought to join the Gucati Request.[117]

[115] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/ F00605, Gucati Request to Make Further Submissions re. Disclosure, 12 March 2022, confidential.

[116] *Ibid*, para.4.

[117] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/ F00606, Haradinaj Request for Permission to Make Further Submissions re: Disclosure, 12 March 2022, confidential, para.1.2.

118. The TP found that the Defence had not demonstrated any link between what had been reported and the facts underlying its case in the current proceedings.[118] It held that what had been reported:

> *"[entailed] unverified allegations of impropriety on the part of Serbian authorities, which appear unrelated to the SPO's cooperation with such authorities or any claims of SPO impropriety raised by the Defence in the current proceedings*".[119]

119. The Panel stated that for this reason, it was not satisfied that what had been reported was relevant to the case.[120] It concluded that the Defence had failed to establish that the publication amounted to exceptional circumstances, and it had failed to establish good cause which would warrant consideration of the Gucati Request despite the closing of the case.[121] As a result, the TP denied the Gucati Request and the Appellant's Joinder.[122]

120. First, it should be noted that the fact that the allegations are "*unverified*" has no bearing on whether they are material to the preparation of the defence.

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[118] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/ F00610, Decision on the Defence Requests for Permission to Make Further Submissions on Disclosure, 17 May 2022 ("Decision on Further Submissions"), para.16.

[119] Decision on Further Submissions, para.16.

[120] Decision on Further Submissions, para.16.

[121] *Ibid*, para.19.

[122] *Ibid*, para.22.

121. Second, if true, what has been alleged would be an instance in which the Serbian authorities aimed to manipulate evidence to discredit Kosovo Albanians, which, if found to be replicated in the instant case, would substantially undermine the findings of guilt.

122. In light of this, the TP erred in failing to find that what had been reported was relevant to the present case. This is particularly so given that the relevance of those reports is increased by the complete lack of any finding, and the dearth of evidence as to, the chain of events from the removal of the documents from the SPO to their delivery to the KLA WVA, which thus cannot be used to exclude the involvement of Serbian authorities in these matters.

123. Material on a comparable alleged plot in the case of Dick Marty would therefore be relevant to a determination of whether something similar took place in the present case. It was a central part of the Appellant's case it was a reasonable inference that the data leak was as the result of a sophisticated action by a State Agency to penetrate the secure evidence management systems and that the Serbian State Intelligence had the means and the motive to do so.

124. Moreover, irrespective of whether the alleged plot has been replicated, evidence relating to it would show that the Serbian authorities were prepared to take action to criminally implicate Kosovo Albanians. The significance of

this in the instant case would depend on the nature of the evidence and, for example, on whether it implicated any of the agencies that the SITF/SPO had been dealing with. If it revealed evidence of criminal actions on the part of any of those agencies, the SPO's cooperation with them might undermine the confidence accorded to it. This would be relevant to an assessment of whether the SPO had violated Art.31(c) of the Code of Professional Conduct – for Counsel and Prosecutors before the KSC, which obliges prosecutors to:

> "*[refrain] from any activity which is incompatible with their functions or the mandate of the Specialist Prosecutor's Office or which is likely to negatively affect confidence in its independence and integrity*."

125. Disclosure of what the SPO holds would enable the critical questions raised here to be addressed. Ultimately, however, any such assessment was prevented by the TP's summary dismissal of the evidence in question, echoing its earlier summary dismissals of evidence critical of the bench in the trial.[123]

126. For these reasons the TP erred in law in failing to find that what was reported was relevant to the case and, therefore, in concluding that the threshold for disclosure had not been reached.

[123] Recusal Application, para.73.

Ground 11

127. **The TP erred in law and fact by failing to consider the SPO's collusion with the Serbian Authorities in the context of the mono-ethnic nature of the court in reaching its conclusion with regards to the defence of necessity.**

128. Art.13 KCC provides in relevant part:

a. an act committed in extreme necessity is not a criminal offence; and

b. an act is committed in extreme necessity when a person commits the act to avert an imminent and unprovoked danger from himself, herself or another person which could not have otherwise been averted, provided that the harm created to avert the danger does not exceed the harm threatened.

129. The TP found that the allegedly protected information revealed by the Appellant contained no indications of impropriety in SITF/SPO cooperation with Serbian authorities (despite not having had sight of the entire contents of it); that there was no imminent and unprovoked danger of malicious prosecution;[124] that even if a risk of malicious prosecution had existed, there was no basis to claim that the disclosures would have effectively helped avert the danger of such prosecution; and that the harm thus created would not

[124] Trial Judgment, para.910.

have exceeded the harm threatened.[125] It therefore concluded that the Appellant's criminal responsibility cannot be excluded by a defence of extreme necessity within the meaning of Art.13 KCC.[126]

130. However, in coming to this conclusion, the TP did not give proper attention to the complex context of the activities of the SITF/SPO, in particular the lack of transparency of the extensive contacts of the SITF/SPO with the Serbian authorities despite their long-standing hostility to Kosovo Albanians (see Ground 9) and the mono-ethnic nature of the court (it being noted in this regard that Witness W04841 confirmed that none of the present investigations or cases relate to any Serbian Accused).[127]

131. Further, the nature of this imminent and unprovoked danger deserves clarification: it is not that malicious and unprovoked prosecutions were necessarily imminent; however, the risk of prosecution based on one-sided justice was, and imminent and drastic action was required to prevent it.

132. In the present case, that action took the form of disclosing information which revealed that the SPO was collaborating extensively with the Serbian authorities in investigations in which there were no Serb suspects.

[125] *Ibid*, para.911.

[126] *Ibid*, para.912.

[127] KSC-BC-2020-07, Transcript 26 October 2021, pp.1425, ll.13-25.

133. Exposing this inherently unjust state of affairs with a view to its termination outweighs the relatively minor degree of harm resulting from the disclosure of the allegedly protected information, not least because (as found by the TP) that disclosure did not make impossible or severely hinder SPO investigations within the meaning of Arts.392(3) KCC[128] and resulted in serious consequences within the meaning of Art.392(3) for only a handful of witnesses.[129]

134. On this basis, it is submitted that reasonable trier of fact and law should not have reached the conclusions in fact drawn by the TP, and thus that it erred in fact and law by doing so.

Grounds 12 and 13

135. **Ground 12: The TP erred in law by failing to investigate (adequately or at all) the source of the leak and essentially reversing the burden to the Appellant to support his *prima facie* credible claims of entrapment/incitement.**

136. **Ground 13: The TP erred in law and fact that: (a) the finding that there was no evidence that the leak of information was the result of the actions of a**

[128] Trial Judgment, para.551.

[129] *Ibid*, para.547. In Ground 23, the Defence challenge the evidential basis for this finding.

Whistleblower from the SPO/Serbian authorities amounted to a reversal of the burden of proof; and (b) where there was evidence that the source of the leak was the SPO.

137. Where an accused raises credible issues of incitement, and the information provided by the prosecution does not enable a court to conclude whether or not this was the case, it must carefully examine the procedure whereby the plea of incitement was determined to ensure that the rights of the defence are protected, in particular the right to adversarial proceedings and equality of arms.[130] In doing so, it must ensure that all evidence obtained as a result of entrapment is eradicated before proceeding to rule on the substance of the matter.[131]

138. During the proceedings, it was and remains the Appellant's case that it is overwhelmingly likely that the documents he leaked in the public interest were provided to him by an individual from the SPO or other linked institution; that conclusion being logically deduced from the fact that those files could only have been in the possession of the SPO or an individual or entity working with it at that time. The other alternative theory is that the

[130] Ramanauskas v. Lithuania, Judgment, ECHR, Application No. 74420/01, para.61.

[131] Khudobin v. Russia, Judgment, ECHR, Application No. 59696/00, para.133.

documents were as a result of a sophisticated action by Serbian State Intelligence to penetrate the secure evidence management systems.

139. The source of the Documents does not change the Appellant's ultimate case, i.e., that the information that came into his possession was of such overwhelming public interest that he was compelled to disclose it. It is, however, relevant to the issue of incitement, for which there would be a good case if it was established that the information unlawfully provided to him was conveyed by the very authority now responsible for his prosecution.

140. In bears stressing in this regard that in attempting to decipher the source of the leak, the Appellant has explored all avenues available to him. Ultimately, however, he is not the SPO or the TP, and does have the resources or access that those bodies have. Nonetheless, the circumstantial evidence is stark, and includes the fact that:

a. there is no evidence that the Appellant invited the leak of the documents;

b. the Appellant nonetheless received documents and disclosed them publicly on three separate occasions. Despite this, no action was taken by the SPO or KSC to monitor the KLA WVA premises, to prevent or dissuade the Appellant from disclosing any information given to him

in the future, or to seize CCTV from buildings surrounding the KLA WVA;[132]

c. since the Appellant's arrest, no further documents have been delivered to the KLA WVA, and the SPO has refused to disclose any documents which may assist him in conducting his own investigations, including, *inter alia*, those said to be the subject of the Indictment or evidence from those who say that they have information concerning the leaks.[133]

141. The Appellant could do no more than raise these serious and reasonable circumstantial concerns, in the hope that the TP would discharge its duty to see that they were sensitively and accurately dealt with.

142. Ultimately, however, in the absence of any relevant evidence, the TP felt unable to make conclusions as to the source of the documents, yet nonetheless demonstrated a presumption in favour of the SPO, stating, for example that "*there is no indication that it was intentionally leaked by the SPO*."[134] The TP also

[132] Trial Judgment, paras 31, 421.

[133] FTB, para.31.

[134] Trial Judgment, para.860.

referred on several occasions to the failure of the Defence to 'set out' the entrapment defence.[135]

143. Whilst these findings are not accepted, it is submitted that in doing so the TP erred in law, as, in the absence of any direct evidence rebutting the circumstantial support for an entrapment defence, the default position was not to assume that no such entrapment took place, but to take steps to investigate further so as to ensure that the Appellant's fair trial rights had not been unduly affected.

144. It is therefore submitted that the TP erred in law by failing to discharge its responsibility to investigate credible claims of entrapment fully and impartially, and instead placing the burden to prove this defence solely on the Appellant, with no appreciation for the differences in investigative capacities between the parties.

Ground 14

145. **The TP erred in law and fact in not considering that the information was already in the public domain following the leak from the SPO office when reaching its conclusion with regards to Art.11 KCC.**

[135] *Ibid*, para.850.

146. Per Art.11 KCC, acts of minor significance will not constitute a criminal offence, significance being defined in relation to: the nature or gravity of the act; the absence or insignificance of intended consequences; the circumstances in which the act was committed; the low degree of criminal liability of the perpetrator; or the personal circumstances of the perpetrator.[136]

147. The TP erred in fact and law when assessing these criteria and determining that the Appellant's actions were not in fact insignificant, *inter alia* in that:

a. a number of individuals said to be protected and thus 'exposed' by the Appellant's disclosures are in fact publicly known within Kosovo to be witnesses or potential witnesses. Certain of those individuals have even publicly gone on record as to this status, meaning that any release of their details, which already exist in the public domain, cannot be deemed as being of anything other than minor significance;[137]

b. the TP assessed gravity in relation to the fact that the charges against the Appellant carried significant custodial sentences,[138] and thus

[136] *Ibid*, para.922.

[137] FTB, para.386.

[138] Trial Judgment, para.924.

assessed the legal gravity of the offence(s), rather than the factual gravity of the Appellant's actions;

c. the TP found that the Appellant disclosed the data of 'hundreds of witnesses',[139] despite the plain issues with assessing the actual number and status of those individuals as a result of the deficiencies discussed in Ground 8, the result being that the TP could not have been sure of the actual number, status, or vulnerability of those supposedly 'exposed' by the Appellant's disclosure, which may therefore have been materially different than that represented by the limited evidence presented by the SPO;

d. the TP found that the Appellant released information 'indiscriminately'[140] despite the fact that he made express efforts to warn journalists not to publish any data that may risk endangering lives;[141] and

e. the Panel took into consideration that the offence(s) for which the Appellant was convicted were intended, at least in part, to maintain public confidence in KSC proceedings,[142] yet failed to reference the

[139] *Ibid*, para.925.

[140] *Ibid*.

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

[142] Trial Judgment, para.924.

arguably greater impact that the leak of the SPO documents and the content of them had (and, given the public interest in them, perhaps should have had) on that public confidence.

148. Taking this into account, it is maintained that the TP erred in fact and law by making findings on the gravity and culpability of the Appellant's acts that were not supported on the basis of the appropriate legal considerations or evidence put before it by the parties.

Ground 15

149. **The TP erred in law and fact in not considering that the information was already in the public domain following the leak from the SPO office when reaching its conclusion with regards to Art.11 KCC.**

150. Art.11 KCC provides:

> *"An act shall not constitute a criminal offense even though it has the characteristics of a criminal offense as defined by law if it is an act of minor significance. The act shall be deemed to be of minor significance when the danger involved is insignificant due to the nature or gravity of the act; the absence or insignificance of intended consequences; the circumstances in which the act was committed; the low degree of criminal liability of the perpetrator; or, the personal circumstances of the perpetrator."*

151. The TP did not accept that the Appellant's conduct fell under Art.11.[143] In making this finding, it pointed out the importance of the protected interests underlying the offences for which he was found criminally responsible[144] and what it considered to be the indiscriminate disclosure of the identity and/or personal data of hundreds of witnesses and protected witnesses.[145]

152. The disclosure of the four Batches was essential to the finding of guilt of the Appellant on Counts 1, 2, 3, 5 and 6. However, in arriving at its conclusion regarding the inapplicability of Art.11, the TP did not give weight to the fact that the confidentiality of the information contained in these Batches had been compromised prior to their delivery to the KLA WVA.

153. The Panel considered that that any prior unauthorised revelation of the protected information would not have had the effect of lifting its protected status and thereby rendering further revelations "*authorised*" within the meaning of Art.392(1) KCC and that such an interpretation would defeat or undermine the very purpose of this provision.[146]

154. However, this is not at issue here. For the purposes of this Ground, it is submitted that even if the Appellant had committed the criminal offences of

[143] *Ibid*, para.923.

[144] *Ibid*, para.924.

[145] *Ibid*, para.925.

[146] *Ibid*, para.488.

which he was found guilty, they would have been of minor significance because the confidentiality of the protected information had been violated before it reached him. Further, much of that information was in any case within the public sphere already, and, even assuming that the factual basis of the charges against him contain all the elements of the offences of which he was found guilty, the TP was willing to accept that those actions did, for the most part, cause a minor degree of harm.[147]

155. It is therefore respectfully submitted that the TP erred in law and fact by rejecting submissions that the actions of the Appellant, if proved, caused only a minor degree of harm.

Ground 16

156. **In the alternative to Grounds 12 and 13, if it is that the TP's investigation into claims of entrapment were sufficient to discharge its burden in relation to the Appellant's claims of entrapment, any steps taken nonetheless amounted to an error of law because the TP failed to disclose and made material determinations of fact on the basis of material relevant to this**

[147] *See*, Ground 11 above (referring to Trial Judgment, paras.547, 551).

defence without disclosing that material to the Appellant, in breach of the Appellant's right to a fair trial.

157. The right to a fair, adversarial hearing encompasses the right for all parties to have knowledge of and comment upon all evidence adduced or observations filed with a view to influencing the court's decision.[148] As a rule, it is not for a court but the relevant party to judge whether or not a document calls for a comment on his part, and the failure to permit this opportunity can breach that parties right to a fair trial even in the absence of demonstrable prejudice.[149]

158. In seeking to defend its investigations into the existence of an entrapment defence, the TP accepted that it held *ex parte* hearings with the SPO, without the attendance of the Defence, to consider available material and assess what, if anything, needed to be disclosed to the Appellant to allow him to fully and properly raise that defence.[150]

159. In doing so, the TP kept documents from the Appellant that he had a right to see and consider as part of elementary fair trial guarantees afforded to him. Whilst it is not accepted that this did not cause prejudice, the existence of any

[148] Brandstetter v. Austria, Judgment, ECHR, Application Nos. 11170/84; 12876/87; 13468/87, para.67.

[149] Bajić v. North Macedonia, Judgment, ECHR, Application No. 2833/13, para.59.

[150] Trial Judgment, para.844.

such prejudice is in any case not determinative of whether this one sided and exclusionary approach had the effect of breaching those fair trial guarantees, which, it is submitted, it did.

160. It is noted in this regard that although a several pieces of vital information were kept from the TP and the Defence by the SPO, this failure is particularly concerning, not only because the Appellant was the only party in the proceedings kept from this information, but also because his entrapment defence was contingent upon allegations of procedural and political impropriety and partiality by the SPO/KSC, and even members of the TP.[151]

161. It was therefore entirely inappropriate, unfair, and unlawful for any evidence (of entrapment or otherwise) to be put to the Panel without permitting the Defence an opportunity to apprehend and comment upon it, particularly in this case, and particularly in relation to this issue. In permitting those hearings to go ahead in the Appellant's absence, the TP therefore erred in law and served only to ensure that the Proceedings became shrouded in an even further lawyer of secrecy, in breach of his right to a fair trial.

[151] Further concerns can also be raised as to the fact that the Appellant had previously raised serious concerns about the *ex parte* collaboration between the SPO and the Trial Chamber in backroom sessions whereby issues pertinent to his case had been discussed without the knowledge or presence of any Defence representatives – Recusal Application, Annex, para.42(c).

Ground 17

162. **The TP erred in law in failing to disclose material relevant to the defence of entrapment, that it had seen, in breach of Art.6(1) ECHR, in that it made a determination of facts on matters not seen by the Defence.**

163. Art.3(2)(e) of the Law provides that the KSC shall adjudicate and function in accordance with, *inter alia*, the ECHR, as given superiority over domestic law by Art.22 of the Kosovo Constitution. As the TP recognised, Art.6(1) ECHR sets out procedural requirements for courts and prosecuting authorities to adopt to guarantee the fairness of proceedings in cases involving entrapment claims.[152]

164. Art.6(1) ECHR requires prosecution authorities to disclose to the defence all material evidence in their possession for or against an accused.[153]

165. Of course, the entitlement to disclosure of relevant evidence is not an absolute right,[154] and in some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.[155]

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[152] Trial Judgment, paras.835-839.

[153] *See, e.g.*, Jasper v. the United Kingdom [GC], Application No. 27052/95, 16 February 2000, para.51.

[154] *Ibid*, para.52.

[155] *Ibid*.

166. However, such measures restricting the rights of the defence are only permitted when strictly necessary.[156] To ensure that an accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[157] In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of an appellate court to decide whether or not such non-disclosure was strictly necessary.[158] Rather, those courts must scrutinise the decision-making procedure to ensure, as far as possible, compliance with the requirements of adversarial, equal, and procedurally fair proceedings.[159]

167. During the Trial, the TP decided not to order the disclosure of certain materials held by the SPO after proceedings from which the Defence was excluded, considering that information was material under Rule 102(3) in the context of the entrapment allegations only if:

> *"(i) the information could assist for the Defence claim or its investigations of entrapment (without assessing the weight, reliability or credibility of that information); or (ii) the information, interpreted in the relevant context,*

[156] *Ibid*.

[157] *Ibid*.

[158] *Ibid*, para.53.

[159] *Ibid*.

suggested that the SPO failed to take adequate investigative steps to exclude the possibility that a member of its staff or someone under its control entrapped the Accused by disclosing the impugned information".[160]

168. The TP determined that the following items held by the SPO were material but that their full disclosure would prejudice ongoing SPO investigations:

a. Item 191, which directly bore upon the investigative steps that the SPO took to exclude the possibility that entrapment occurred and contained what the SPO knew and did not know about how Batch 3 was leaked;[161]

b. Items 195-200, which were call data records;[162] and

c. Item 201 and two related documents, which contained information: (a) provided by a witness regarding his opinion as to the possible involvement of an SPO staff-member in the disclosure of confidential

[160] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00413RED, Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, 3 November 2021, para.56 ("3 November Disclosure Decision")

[161] 3 November Disclosure Decision, paras 64, 66.

[162] 3 November Disclosure Decision, paras 71, 72.

materials; and (b) the steps taken by the SPO to verify the source of this information.[163]

169. The TP ordered the SPO to provide only specified extracts of Item 191. It noted that the rest of Item 191, which was not disclosed to the Defence, contained no further incriminating or exculpatory evidence, and did not relate to any existing issue and did not raise any new issue in the proceedings.[164]

170. With regard to Items 195-200, the TP considered that it would be sufficient for the SPO disclose a summary of the steps and verifications taken by the SPO to exclude the possibility that the call data records contained indications that current or former SPO staff or any person acting under the SPO's instruction or control voluntarily disclosed the impugned information to the Appellant.[165] In the opinion of the TP, the summary provided relevant context to demonstrate the nature and scope of the investigative steps taken by the SPO to exclude the possibility that entrapment occurred.[166]

[163] Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07/F00435RED, Public Redacted Version of Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201, 15 November 2021, ("15 November Disclosure Decision") paras 19, 24.

[164] 3 November Disclosure Decision, para.68.

[165] 3 November Disclosure Decision, paras 73, 74.

[166] 3 November Disclosure Decision, para.73.

171. The TP ordered the disclosure to the Defence of Item 201 and two related documents subject to redactions covering information which it considered to be unrelated to the present case, including the Entrapment Allegations.[167]

172. The lack of evidence and the uncertainty regarding the origin of the documents delivered to the KLA WVA, as evident in the TP's own findings,[168] make entrapment a real possibility, though the form that it may have taken is unclear. Despite the counterbalancing measures described, the failure to disclose in their entirety Items 191, 195-200, 201 and the two related documents, even though they are material to the Defence case, is especially damaging because, in view of the circumstantial nature of the evidence for entrapment, the significance of some of what was not disclosed may not have been readily apparent and consequently the failure to disclose it could have significantly reduced the fairness of the trial.[169] This danger was increased by the quantity and variety of what was not disclosed. It follows that the counterbalancing measures that the Panel took when it decided not to order the full disclosure of items that were material to the Defence case did not

[167] 15 November Disclosure Decision, paras 19, 24.

[168] Trial Judgment, paras 859-862.

[169] For example, the redacted version of Item 191, which was admitted as 1D00033, is an expert report on the source of the leakage of Batch 3. Redacted passages plainly contain technical information which could be relevant to an evaluation and indeed a complete understanding of the report. Their redaction disadvantages the Defence.

sufficiently safeguard the rights of the Accused to a fair trial. Therefore, it erred in law by acting in breach of Art.6(1) of the ECHR.

Ground 18

173. **The TP erred in law in concluding that a serious threat against third parties could be sufficient to meet the *actus reus* and intent for the crime of obstructing official persons.**

174. Count 5 charges the Appellant under Art.401(1) of the KCC by which:

> "*whoever, by force or serious threat, obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties*" commits a crime.

175. The TP noted that nothing in the wording of Art.401 requires that force or serious threat be directed against the official person only and that restricting the application of the offence in this way "*would be inconsistent with the ratio of the offence – which seeks to ensure that official duties are not obstructed, directly or indirectly*".[170]

[170] Trial Judgment, para.146.

176. The TP cites authorities in support of its interpretation, but they do not provide reasoning in the case of serious threat.[171] Moreover, the text of the Article contains no language to suggest that its purpose is to prevent *indirect* as well as direct obstruction of official duties. If someone obstructs another person by force or serious threat, it is natural to understand the force or threat to be directed at the person obstructed. It follows that if the Article had been intended to have a broader scope this would have been expressed in its formulation.

177. Therefore, the TP erred in law in concluding that a "*serious threat*" may be directed against an official person, another person, or an object.[172]

Ground 19

178. **The TP erred in fact in finding that the SPO proved that the Appellant used serious threats to induce or attempt to induce any person under Count 3 and**

[171] Trial Judgment, fn.239 (citing *Salihu et al.*). In fact, what is written in the *Salihu et. al.*, commentary could be understood differently. The relevant passage is as follows: "*The threat should be addressed to the official person with the intention of obstructing the official duties. However it might also be addressed to another person or object*." The second sentence could simply mean that a threat might be directed not only at the official person but also at others at the same time. For example, a perpetrator might inform a police officer and his family that serious harm will come to them all unless the police officer acts in a particular way in violation of his official duties. This is different from what the TP has found here, namely that a serious threat directed exclusively at persons who are not official persons may be an element of the offence under Art.401(1).

[172] Trial Judgment, para.146.

by inferring that the Appellant used or intended to use serious threats to induce any person to act as set forth in Art. 387.

179. In coming to their conclusion as to the 'threats' allegedly made by the Appellant, the TP referenced several passages from the Appellant's comments at the time of the disclosure, from which it inferred the existence of those threats.[173]

180. It is respectfully submitted, however, that none of the passages quoted display an express or inferred threat as, in actuality, the more reasonable inference drawn from those passages are that they go to the Appellant's well-accepted and public opposition to the *modus operandi* of the SPO and KSC. Holding and espousing these beliefs is not a criminal offence and does not and should not be taken to automatically fulfil the requirements of inducement set forth in Art. 387.

181. It is therefore submitted that the TP distorted the Appellant's words beyond the most immediate and reasonable inference to be drawn from them, thereby erring in fact in respect of Count 3 and by inferring that the Appellant used or intended to use serious threat to induce any person to act as set forth in Art. 387.

[173] *Ibid*, paras 587-605.

Ground 20

182. **The TP erred in fact by finding that the SPO proved that the Appellant used serious threats to induce or attempt to induce any person under Count 3 and by inferring that the Appellant used or intended to use a serious threat to induce any person to act as set forth in Art.387.**

183. With regard to *mens rea* alleged in Count 3, the TP concluded 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*".[174] It reached this conclusion on the basis of the following findings:

a. the acts of the Appellate allegedly showed that they wanted to achieve the widest possible distribution of the Three Sets.[175]

b. they wanted to send the following messages to the Witnesses and Potential Witnesses they identified in the Protected Information: "we know who you are and many others know who you are"[176] and "now that everyone knows who you are, no one can protect you".[177]

[174] *Ibid*, para.605.

[175] *Ibid*, para.589.

[176] *Ibid*, para.590.

[177] *Ibid*, paras 591-592.

c. they made disparaging remarks about Witnesses and Protected Witnesses.[178]

d. they were aware of past instances of witness intimidation in the prosecution of KLA members.[179]

e. they disregarded the possible harm to those who "collaborated" with the SPO/KSC.[180]

f. they were concerned to protect KLA WVA members from what they considered to be the injustice of being brought to trial and convicted.[181]

g. they were opposed to the SPO/KSC and pursued its collapse.[182]

184. These findings indicate that the Appellant was hostile to witnesses and potential witnesses, that he realised that harm could come to them and that he sought the collapse of the SPO/KSC and the protection of KLA WVA members from conviction. There is, however, nothing in these findings that reveals *a desire to change* what witnesses and potential witnesses may say to

[178] *Ibid*, paras 593-594.

[179] *Ibid*, para.595.

[180] *Ibid*, para.596.

[181] *Ibid*, paras 597-598.

[182] *Ibid*, paras 599-603.

the KSC and/or SPO. The statements of the Appellant could be meant only to point out the SPO/KSC's failures and incompetence and thus discredit it and undermine its legitimacy.[183] No reasonable TP could go a step further and infer these findings manifest the purpose of inducing witnesses and potential witnesses to act as alleged in Count 3, that is, to refrain from giving (further) evidence to the SC/SPO.

185. The only piece of evidence that could at first sight be viewed as supporting the proposition that the Appellant had the requisite intention is the following remark in an interview on 20 September 2020:

> *"[The SC/SPO] will totally collapse. From what I read ... the testimony on which it has been built. It will totally collapse, because the witnesses, too, know now that others know who they are, that they have…."*[184]

186. However, he does not complete what he is saying, and he goes on to focus principally on witnesses being pressured by <u>others</u> to give false testimony. Also, there is no indication that the disclosures of September 2020 are the reason why Appellant says that "*witnesses, too, know now that others know who they are*" or that this will lead them to change what they say to the SPO/KSC.

[183] The TP does not accept that the intention of the Accused was limited to this - Trial Judgment, para.604.

[184] P00008 pp 31-32, cited in Trial Judgment, para.601.

Therefore, no reasonable tribunal could infer from this in conjunction with the other evidence outlined that the Appellant had an intention to deter persons from giving accurate testimony.

187. It follows that the TP erred in fact in finding that the Appellant had the *mens rea* in respect of Count 3.

Ground 21

188. **The TP erred in law in finding that the treatment by SITF/SPO of certain documents as "confidential" amounted to the information contained in them being declared "secret" under Art.392(1) and failing to take account of the domestic law definition of "secret information".**

189. Count 5 of the Indictment charges the Appellant with the Violation of the Secrecy of Proceedings through unauthorised revelation of secret information disclosed in official proceedings, punishable under KCC Arts. 17, 31, 32(1)-(2), 33, 35, and 392(1), and Arts.15(2) and 16(3) of the Law."[185]

190. Art.392(1) KCC provides:

[185] Indictment, para.48.

> *"Whoever, without authorization, reveals information disclosed in any official proceeding which must not be revealed according to law or has been declared to be secret by a decision of the court or a competent authority shall be punished by a fine or by imprisonment of up to one (1) year."*

191. The Appellant is charged in the Indictment in connection with "secret" information and not "information which must not be revealed according to law."[186] "Secret" information is defined in Art.6(1)(2) of the Law on the Classification of Information and Security Clearances as "*information the unauthorised disclosure of which could seriously damage security interests of the Republic of Kosovo*" and it is therefore distinct from the classification of information as "confidential" or "restricted" or "protected".[187]

192. The Law on the Classification of Information and Security Clearances does not fall under any of the laws or legal norms in accordance with which the KSC must adjudicate and function pursuant to Art.3(2) of the Law; however, the interpretation of the KCC should be based on the totality of the applicable law of Kosovo. Thus, since the Law Classification of Information and Security Clearances defines "secret" information, it should be applied to Art.392(1) KCC.

[186] FTB, para.67.

[187] FTB, para.68.

193. The TP erred in law in not interpreting "secret information" in the Indictment in the highly specific sense set forth in Art.6(1)(2). Instead, it determined that "*[t]he term "secret" is used here in its generic sense, meaning that the information cannot be disclosed to unauthorised persons*."[188] The Indictment is the definitive statement of what an accused is charged with at trial;[189] and the Prosecution may amend it as necessary. Its meaning should therefore not be adapted to cover what the Prosecution may have wished to cover if this is not what it states unambiguously. No evidence has been presented that the information that the Appellant was found to have disclosed contained "secret" information, as defined in Art.6(1)(2) of the Law on the Classification of Information and Security Clearances.

Ground 22

194. **The TP erred in law in finding that a "person under protection criminal proceedings" under Article 392(2) KCC was "any person in relation to whom there is a legal requirement, an order or a measure of protection issued or implemented in criminal proceedings" and can be "a person**

[188] Trial Judgment, para.78.

[189] Law, Arts.38(4), 39(5).

whose identity or personal data appears in SC or SPO documents or records the disclosure of which has not been authorised". [190]

195. Argumentation relevant to this issue is found in Appeal Ground 4 and is not repeated here.

Ground 23

196. **The TP erred in fact in finding that the SPO has met the burden of proof in demonstrating that the information disclosed was protected since it has: (a) failed to particularise all of the protected individuals concerned; (b) the decisions that provide them with this alleged legal status; (c) the date on which such a status was provided; (d) the time frame for which such a protection was granted; (e) the risk it was granted to manage; and vi) the legal basis of proceedings to which each of the protected individuals relate to, thereby failing in law to provide to the Defence the ability to challenge the SPO's case. In doing so, the TP also erred in fact by applying the aggravated form of Art.392(1) KCC.**

[190] Trial Judgment, paras. 95, 509.

197. The TP, nor the Defence, has heard, or been given the opportunity to consider evidence, that details exactly who is said to enjoy the status of a 'protected individual'.[191]

198. Rather, as is submitted to be the position with much of the SPO case, the TP is being asked to accept the SPOs 'word' in terms of the evidence and content of documents.

199. Further, the SPO has summarily failed to demonstrate and/or prove the identities of individuals it says are 'protected', and further, that those same individuals are indeed protected.

200. In this context, the SPO has failed to prove its case to the required standard.

201. The TP at para.95 of its Trial Judgment summarises the position in terms of individuals 'under protection' in that it outlines the circumstances where such an individual may be said to enjoy such a status.

202. The Appellant does not necessarily disagree with this summary in terms of the outlined circumstances.

203. Further, at para.98 of its Judgment, the TP seeks to differentiate between 'identity' as an individual, and 'identity' as a witness, and that it is the status

[191] Further, see submissions in respect of Ground 7, 10, 16, 17, 21, 22 in the context of a failure to disclosure relevant and essential information.

as a witness/victim etc that is important in terms of the 'protected' information.

204. It is respectfully submitted to be a false distinction within the context of the instant case, as this distinction is in effect, the second step to be taken.

205. The first step is for the SPO to establish identity *per se*, in that which specific individuals do the SPO refer to when referring to protected persons. It is submitted to not be sufficient to simply say the details of protected individuals were disclosed, when those individuals are not particularised. The SPO have therefore failed to satisfy this first step.

206. The second step as per the aforesaid deals with the 'protection' itself i.e. upon what basis such an individual is said to be protected, this step being broken down into the elements as per the Ground of Appeal in that:

a. the SPO have not adduced evidence of the decisions or circumstance that lead to individuals being defined as having the aforesaid status;

b. the SPO have not adduced evidence to demonstrate on which date or alternatively at what stage, individuals were deemed to be so defined;

c. the SPO have not adduced evidence to confirm for what period of time any relevant individual was to be deemed as having such status be it limited or *ad infinitum*;

d. the SPO have not adduced evidence to establish what risk was sought to be managed; and

e. the SPO have not adduced evidence as to the specific legal basis of proceedings to which each individual who is said to enjoy such status refers to.[192]

207. As a consequence of the above, and in furtherance to those other grounds of appeal cited and argued, the Appellant has in effect, been prevented from challenging the SPO's case, as any challenge is in the abstract, in the absence of the specifics as noted above.

208. Accordingly, without prejudice to the aforesaid in terms of the SPO's failure to prove their case to the required standard, the Appellant has in any event been prevented from challenging the case brought as key elements of that case either remain entirely unknown, or are at best ambiguous, such a position leading to clear prejudice to the Appellant.

Ground 24

209. **The TP, taking into account all the circumstances, erred in fact and reached a manifestly excessive sentence considering that: i) it erroneously found**

[192] Trial Judgment, paras 512-516.

that there was a "*climate of witness intimidation*" and thus viewed as an aggravating feature, having heard evidence that was restricted to an alleged position some 20 years previously,[193] ii) the sentence failed to appropriately reflect the role of the Defendant despite recognising that he did not have a 'leadership role';[194] iii) it wrongly subscribed instances of the Appellant exercising his legitimate right to free speech and expression[195] as an aggravating factor; iv) it failed to take account of previous and established sentencing jurisprudence from other international tribunals, and further, erred in seeking to justify why it need not consider that same jurisprudence;[196] v) it failed to account for the fact that the Appellant has been accused and tried despite the fact that the TP has absolved all journalists, specifically but not necessarily limited to Witness W04866, of any criminal responsibility despite acting over and above the Appellant.

210. In light of the above Grounds of Appeal, those relevant in respect of the sentence against the Appellant now pursues four distinct issues.

[193] *Ibid*, para 1004.

[194] *Ibid*, paras 705, 707, 708, and 709.

[195] *Ibid*, para 996.

[196] *Ibid*, paras 979, 1004.

(a) That the TP erroneously found that there was a "climate of witness intimidation" and thus viewed as an aggravating feature, having heard evidence that was restricted to an alleged position some 20 years previously

211. The TP at para. 577 of the Trial Judgment conclude that "*[t]he evidence points at the existence of a prevalent climate of witness intimidation in Kosovo*", however, the TP erred in taking an inference as being fact.

212. It is of note that the use of 'climate' in describing the position in Kosovo appears on some thirteen occasions within the Trial Judgment,[197] yet there has been no evidence to establish that such a climate exists, as the only evidence put before the TP was that of Expert Witness DW1253 (Robert REID) in relation to his experience some two decades previously, which cannot be said to reflect the present given the elapsing period of time, and who was not asked to comment, nor could he, on present day conditions.

213. It was therefore erroneous to take that evidence as conclusive as to the existence of that climate at the time of the allegations against the Appellant, and/or to use that evidence as an aggravating feature to increase the sentence against him.

[197] *Ibid*, paras 541, 554, 577, 581, 593, 616, 641, 646, 968, 979, 993, 1004.

214. These errors were repeated at para. 579 of the Trial Judgment, where the TP makes reference to the existence of "*two or three emergency risk managements plans*" put in place in 2018, each of which were therefore again historical and not imposed through any act or omission of the Appellant.

215. It is of concern in this regard that the TP at para. 579 went on to note that the plans in question were "*apparently unrelated to the conduct of the accused*": there is no 'apparently', the plans were not related to the conduct of the accused, nor has it been alleged that they were. It is therefore of significant concern that the TP has approached this fact with a degree of hesitancy, if not scepticism, and thus the inference is that they have allowed their own position and/or prejudice to reflect their findings.

216. In considering the above, it is submitted that the TP failed to acknowledge that no actual evidence of any witness intimidation was adduced by the SPO, it simply being inferred from the conduct and the anger of witnesses that the same were intimidated by that which is said to have occurred, and thus reliance on this position as an aggravating feature was erroneous, the so-called 'climate' of witness intimidation, and therefore a pervasive position, not having been proved beyond all reasonable doubt by the SPO.

(b) That the sentence wrongly subscribed instances of the Appellant exercising his legitimate right to free speech and expression as an aggravating factor

217. The Appellant argued at trial that he has merely exercised his right to free speech and ought not to be criminalised for the same.

218. Without further arguing the basis of the conviction within this section, the principle is still relevant in terms of sentence.

219. The TP have failed to differentiate that which it deems to be 'criminal' and that which can be deemed an exercise of the right to free speech, despite there being a clear distinction between the two.

220. For instance, the fact that Mr. Haradinaj appeared on media programmes is not of itself criminal, nor can it be deemed an aggravating feature as it is a fundamental tenant of democracy that an individual be allowed to voice an opinion, a fact noted by the Specialist Prosecutor in his opening remarks before the TP,[198] and further, a fact recognised by the TP at paragraph 822 "*The Accused were permitted to exercise freedom of speech, inter alia, when questioning the legitimacy of the SC, criticising its actions, challenging the SITF/SPO's cooperation*

[198] KSC-BC-2020-07, Transcript 7 October 2021, p.786, ll.21-24; pp.787, ll.3-6

with Serbia and claiming that the SC was ethnically biased and calling for it to be closed down".

221. The Trial Judgment does not however differentiate between that which has been taken into account in terms of 'criminal' and that which is accepted as 'free speech', again noting the apparent distaste with which both the SPO and the TP have viewed the Appellant's media appearances, leading to an inference at the very least, that such actions have been taken into account on sentence.

222. Accordingly, it would appear clear that the TP have taken into account information and or facts that it was not open to so take, when determining sentence, leading to the sentence being excessive.

(c) That the Sentence failed to take account of previous and established sentencing jurisprudence from other international tribunals;

223. The Appellant accepts that the TP is not 'bound' to accept similar offences and therefore sentences, from other international tribunals as precedent, however, similarly, it is submitted to not be open to the TP to simply discount previous sentences for like offences.

224. This being particularly relevant when the TP, as in the instant case, is being asked to sentence an individual for offences that it has not hitherto convicted and/or sentenced.

225. An analogous position arose before the ICC Trial Chamber in *Lubanga* where consideration was given to the sentencing practices of the Special Court for Sierra Leone when imposing sentence on Lubanga, on account of the SCSL having returned to the only other conviction in an international court for the recruitment or use of child soldiers,[199] the tribunal noting in particular

> "*Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the ad hoc tribunals are in a comparable position to the Court in the context of sentencing*".

226. Within the context of the instant case, it would appear that the TP have discounted the relevance of the circumstances and sentences imposed in *Marijačić & Rebić*,[200] wherein both were found guilty of deliberately disclosing the identity of protected witnesses, statements and transcripts of the witness, and the fact that the witness had testified in non-public proceedings before the tribunal, despite knowing that the above was subject to protection orders

[199] Prosecutor v. Lubanga, ICC-01/04-01/06, Trial Judgment I, 10 July 2012, para.12

[200] Prosecutor v. Ivica Marijačić and Markica Rebić, IT-95-14-R77.2, Judgment, 10 Mar 2006.

issued by the tribunal. Accordingly, an analogous position to the Appellant, a fact furthered by the fact that the accused's behaviour was noted as being linked to diminishing the authority of the Trial Chamber and weakening the confidence in the Tribunal's ability to grant effective protective measures, and further that the behaviour amounts to serious interference with the administration of justice.

227. Both were sentenced to a financial penalty.

228. In *Jović*,[201] wherein again, confidential information was published in ignorance of an order, a further financial penalty was imposed.

229. The TP in the instant case have further ignored previous analogous cases before the STL, noting the judgment in *Al Jadeed S.A.L. & Ms Khayat*,[202] which again involved the publication and dissemination of confidential information and again resulted in a financial penalty being imposed.

230. As noted at the outset, it is accepted that the TP is not 'bound' to follow the decisions of previous Tribunals, however, the TP has not merely ignored those previous analogous cases, but has passed a sentence that is incomparable to

[201] Prosecutor v. Josip Jović, IT-95-14 and IT-95-14/2-R77, Trial Judgment, 30 August 2006, para. 26.

[202] Prosecutor v. Al Jadeed S.A.L. & Ms Khayat, STL-14-05, Trial Judgment, 18 September 2015.

that which has been imposed previously, without any justification or explanation for the departure.

231. The reasons given above, the TP have erred in both law and/or fact in passing sentence, and having regard to those errors, have passed a sentence that is in the circumstances excessive and beyond that which can be justified.

(d) **It failed to account for the fact that the Appellant has been accused and tried despite the fact that the TP has absolved all journalists, specifically but not necessarily limited to Witness W04866, of any criminal responsibility despite acting over and above the Appellant.**

232. Finally, it is submitted that, for the purposes of sentencing, it is important to highlight that the SPO was clear in its position that it did not consider W04866, or any other journalist, to have committed a criminal offence by publishing or making public documents, and therefore it naturally follows that the SPO do not deem these documents to be secret, or the information contained therein to be secret, else otherwise, such individuals would naturally face criminal charges. No criticism is made of Witness W04866 who published certain documents, the justification given by that witness being that it "*was in the*

public interest" to do so.[203] It is submitted that this is a relevant consideration as far as whatever sentence is ultimately passed.

V. RELIEF SOUGHT

233. The Appellant submits that the errors identified under the Grounds above, either individually or in combination, invalidate and/or have occasioned a miscarriage of justice with respect to the totality of the convictions imposed on the Appellant.

234. It is respectfully submitted that the convictions on Counts 1, 2, 3, 5, and 6 should be reversed and an acquittal directed and that consequently the sentence imposed quashed.

235. In the alternative, where the CA dismisses the appeal against conviction on one or more of the counts, the Appellant seeks a reduction in sentence to one that:

a. Is commensurate to the offences for which he has been convicted;

b. Appropriately weighs the factors raised in Ground 24 above; and

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

c. Takes account of sentences imposed for like offences by other international tribunals.

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FURTHER EXPLANATORY NOTE

1. Footnote 32 deleted duplication of "see e.g"

2. Footnotes 45 spelling of Judge Ekaterina corrected.

3. Paragraph 194 of Ground 22 was corrected to reflect the text from the Refiled Notice of Appeal as previously an erroneous duplication of the text of Ground 23 was included and a corresponding Footnote 190 added.

4. Paragraph 185 – date corrected to 20 September 2020.