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SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**In:** KSC-CA-2022-01  
**Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** **Court of Appeals Panel**  
Judge Michèle Picard, Presiding Judge  
Judge Kai Ambos  
Judge Nina Jørgensen

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

**Date:** 21 September 2022

**Language:** English

**Classification:** Confidential

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**Prosecution Brief in Response to Defence Appeals**

**with two public annexes**

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## I. Introduction

1. The Appeals Panel should dismiss every ground in the GUCATI Appeal and HARADINAJ Appeal and reject the relief sought.
2. GUCATI and HARADINAJ were found guilty of five counts of obstructing official persons in performing official duties, intimidation during criminal proceedings, and violating the secrecy of proceedings. They were sentenced to four and a half years' imprisonment and a fine of EUR 100 for these grave offences which resulted, *inter alia*, in the revelation of the names and/or details of hundreds of Witnesses and Potential Witnesses.
3. During trial, the Defence resorted to every excuse imaginable in an attempt to justify the Appellants' conduct, which was caught on tape for all to see. What the Appellants did is not in dispute, only whether their conduct was unlawful in light of their claimed justifications and excuses. The Appellants were afforded a fair trial and were provided a full opportunity to test and challenge the evidence presented against them. The Trial Panel thoroughly adjudicated the charges against the Appellants, assessing their defences and fair trial claims, issuing reasoned decisions, and granting relief where appropriate. The Judgment is detailed, reasoned and based on credible, reliable evidence.

## II. Standard of review

4. An appeal is not a trial *de novo*.<sup>1</sup> The Appeals Panel only reviews errors of law which have the potential to invalidate the decision of the Trial Panel and errors of fact which have occasioned a miscarriage of justice.<sup>2</sup> The Appeals Panel has previously set out the standards of review for an alleged error of law, error of fact, or abuse of

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<sup>1</sup> Article 46(2).

<sup>2</sup> *Mladić* AJ, para.15.

discretion.<sup>3</sup> Alleged procedural errors must be so unfair or unreasonable as to constitute an abuse of the lower panel's discretion.<sup>4</sup>

5. In order for the Appeals Panel to assess a party's arguments on appeal, the party is expected to present its case clearly, logically, and exhaustively.<sup>5</sup> The appealing party is also expected to provide precise references to relevant transcript pages or paragraphs in the decision or Judgment to which the challenges are being made.<sup>6</sup> Submissions that are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies are not to be considered in detail.<sup>7</sup> In particular, the Appeals Panel should dismiss without detailed analysis:

(i) arguments that fail to identify the challenged factual findings, that misrepresent the factual findings or the evidence, or that ignore other relevant factual findings;

(ii) mere assertions that the trial panel must have failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the evidence could have reached the same conclusion as the trial panel;

(iii) challenges to factual findings on which a conviction does not rely, and arguments that are clearly irrelevant, that lend support to, or that are not inconsistent with the challenged finding;

(iv) arguments that challenge a trial panel's reliance or failure to rely on one piece of evidence, without explaining why the conviction should not stand on the basis of the remaining evidence;

(v) arguments contrary to common sense;

(vi) challenges to factual findings where the relevance of the factual finding is unclear and has not been explained by the appealing party;

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<sup>3</sup> KSC-BC-2020-07/IA001/F00005, paras.5-14, *in reference to* Article 46.

<sup>4</sup> KSC-BC-2020-07/IA001/F00005, para.14.

<sup>5</sup> *Sainović et al.* AJ, para.26; *See also* Rule 179(1).

<sup>6</sup> Article 48(1)(b) of the Practice Direction; *Mladić* AJ, para.21; *Strugar* AJ, para.20.

<sup>7</sup> *Sainović et al.* AJ, para.26.

(vii) mere repetition of arguments that were unsuccessful at trial without any demonstration that their rejection by the trial panel constituted an error warranting the intervention of the Appeals Panel;

(viii) allegations based on material not on the record;

(ix) mere assertions unsupported by any evidence, undeveloped assertions, failure to articulate an error; and

(x) mere assertions that the trial panel failed to give sufficient weight to evidence or failed to interpret evidence in a particular manner.<sup>8</sup>

### III. Submissions

6. As a preliminary matter, the HARADINAJ Defence requests an oral hearing on this appeal.<sup>9</sup> The SPO is available for any such hearing and defers to the Appeals Panel's discretion as to whether one is necessary.

7. On appeal, the Appellants largely repeat arguments unsuccessful at trial without explaining how the Trial Panel erred in such rejection and/or demonstrating that appellate intervention is warranted, merely express disagreement with Trial Panel considerations or findings, and/or fail to substantiate their assertions. These failures mean that such submissions should be rejected *in limine*.<sup>10</sup> The grounds warranting considerations on their merits should also be dismissed since the Defence fails to establish any error of law invalidating the Judgment, error of fact which occasioned a miscarriage of justice, or error in sentencing.

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<sup>8</sup> *Sainović et al.* AJ, para.27; *D.Milošević* AJ, para.17; *Strugar* AJ, paras.18-24; *Brđanin* AJ, paras 17-31.

<sup>9</sup> KSC-CA-2022-01/F00035/COR2, para.3.

<sup>10</sup> KSC-BC-2020-07/IA001/F00005, para.64; *Duch* AJ, para.20; *Ntaganda* AJ, para.48; *Stakić* AJ, para.12; *Nshogoza* AJ, para.14; *Taylor* AJ, para.31; *D.Milošević* AJ, para.17.

A. NO DISCERNIBLE ERRORS PRIOR TO THE JUDGMENT ARE IDENTIFIED<sup>11</sup>

### **HARADINAJ Ground 1<sup>12</sup>**

8. HARADINAJ's allegations of unfairness, lack of impartiality, and bias<sup>13</sup> are unfounded, repeating arguments specifically rejected by the Trial Panel without explaining how it erred in such rejection.<sup>14</sup> HARADINAJ's arguments are unsubstantiated and undeveloped, amounting to mere disagreement with Trial Panel decisions, and failing to show how the alleged unfairness affected the Judgment's reliability.<sup>15</sup> The alleged error of law has no chance of changing the outcome of the Judgment.<sup>16</sup> The Appeals Panel should dismiss this ground *in limine*.

9. A series of procedural decisions unfavourable to the Defence is not tantamount to bias.<sup>17</sup>

10. HARADINAJ fails to substantiate his blanket allegation of 'disproportionate access to the totality of evidence', failing to identify a single allegedly relevant decision or to coherently set out, let alone establish, any disadvantage.<sup>18</sup> The trial record is replete with reasoned decisions on the disclosure and admission of evidence, with the Appellant being given every opportunity to be heard before such decisions were issued, and to seek to challenge them thereafter.<sup>19</sup>

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<sup>11</sup> This section addresses Ground 2(A) of the GUCATI Appeal and Grounds 1-2, 4-6, and 10 of the HARADINAJ Appeal.

<sup>12</sup> KSC-CA-2022-01/F00035/COR2, paras.27-39.

<sup>13</sup> KSC-CA-2022-01/F00035/COR2, paras.27-39.

<sup>14</sup> KSC-BC-2020-07/IA001/F00005, para.64; *Ntaganda* AJ, para.48; *Duch* AJ, para.20.

<sup>15</sup> *Ntaganda* AJ, paras.48-49.

<sup>16</sup> KSC-BC-2020-07/IA001/F00005, para.12.

<sup>17</sup> *Khodorkovskiy and Lebedev*, para.430; *Dimitrov and others*, para.159.

<sup>18</sup> KSC-CA-2022-01/F00035/COR2, para.33, n.28 (citing to parts of the Judgment: (i) setting out the charges; (ii) concerning allegations pertaining to non-indicted individuals; and (iii) with general considerations on hearsay evidence and the right to confrontation).

<sup>19</sup> See also response to GUCATI Ground 2(A) and HARADINAJ Ground 4, below.

11. Allegations concerning restrictions to the evidence HARADINAJ sought to adduce are also unsubstantiated.

12. HARADINAJ fails to establish any inconsistency, let alone error, in relation to the treatment of evidence concerning historical events.<sup>20</sup> The Trial Panel clearly set out its reasons for its approach in relation to evidence concerning crimes in 1998-1999,<sup>21</sup> and HARADINAJ fails to identify any error therein. The two excerpts cited by HARADINAJ<sup>22</sup> offer no support to his argument; the lines of questioning pursued by the SPO and Defence in these excerpts are in no way comparable. In the first, the Presiding Judge overruled a Defence objection on relevance where the SPO was cross-examining the Appellant in relation to a prior public statement he made and seeking clarification concerning an assertion he made during testimony.<sup>23</sup> In the second, the Presiding Judge sustained an SPO objection when the Defence sought to pursue a line of questioning seeking to establish that certain Serbians committed crimes during the conflict in Kosovo.<sup>24</sup> Before sustaining this objection, Defence Counsel was given the opportunity to state his case more clearly and lay the foundation for the questions he intended to put.<sup>25</sup>

13. HARADINAJ misrepresents the trial record in alleging that ‘the TP did not allow the Defence to refer to information relating to the SPO’s collaboration with Serbia, and Serbian officials’.<sup>26</sup> The Defence was allowed to address such matters with the caveat that certain names had to be elicited in private session given that ‘[w]hether these names are protected or not is something that the Panel needs to decide at the

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<sup>20</sup> *Contra* KSC-CA-2022-01/F00035/COR2, para.34(a); *See also* paras.165-166, below.

<sup>21</sup> Judgment, paras.30-32.

<sup>22</sup> KSC-CA-2022-01/F00035/COR2, n.31.

<sup>23</sup> T.2900-04.

<sup>24</sup> T.3039-43.

<sup>25</sup> T.3040, 3042.

<sup>26</sup> KSC-CA-2022-01/F00035/COR2, para.34(b).

end of this trial'.<sup>27</sup> HARADINAJ fails to explain why this decision was prejudicial, let alone establish any error therein.

14. HARADINAJ's allegations concerning the authorised scope of the SPO's cross-examination of himself and DW1253<sup>28</sup> essentially amounts to an unfounded, unreasoned complaint about Rule 143(3). The lines of questioning pursued in the excerpts referred to by HARADINAJ<sup>29</sup> were undoubtedly relevant and HARADINAJ establishes no error in relation thereto.

15. HARADINAJ merely asserts 'the TP unduly limited' the scope of DW1252's and DW1253's testimony, without even attempting to articulate how this constituted an error.<sup>30</sup> The Trial Panel's limitations on the testimony of DW1253 were fully consistent with the relevant appellate decision.<sup>31</sup> HARADINAJ did not seek leave to appeal the decision limiting the scope of DW1252's proposed evidence.<sup>32</sup> The limits were not undue. Rather, they were clear and fairly applied to both Parties.<sup>33</sup> HARADINAJ's dissatisfaction with such decisions cannot amount to the demonstration of an error therein.

16. HARADINAJ alleges 'excessive redaction and obfuscation of evidence'<sup>34</sup> but does not cite any specific decision or item, and does not develop his argument other than by cross-referring to his Ground 4, to which the SPO responds below.

17. Finally, nothing in the manner in which the Specialist Prosecutor framed his oral submissions on sentencing following closing arguments indicates any conflict

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<sup>27</sup> T.2146-47.

<sup>28</sup> KSC-CA-2022-01/F00035/COR2, para.34(c).

<sup>29</sup> KSC-CA-2022-01/F00035/COR2, n.33.

<sup>30</sup> KSC-CA-2022-01/F00035/COR2, paras.34(d), 80-82.

<sup>31</sup> T.3203-04; KSC-BC-2020-07/IA006/F00006, paras.25, 27-30.

<sup>32</sup> KSC-BC-2020-07/F00474, paras.6-7.

<sup>33</sup> KSC-BC-2020-07/F00470, paras.98-99.

<sup>34</sup> KSC-CA-2022-01/F00035/COR2, para.34(v).

with HARADINAJ's presumption of innocence.<sup>35</sup> The Trial Panel overruled a Defence objection to such submissions, also noting the Defence could respond thereto.<sup>36</sup> It is clear from the procedural context of the submissions that the Specialist Prosecutor was setting out the SPO's position on the evidence to justify a sentence upon conviction, subject to judicial scrutiny.<sup>37</sup> The Trial Panel, composed of professional judges, was more than capable of separating a Party's submission from the evidence before it.

18. The jurisprudence cited by HARADINAJ is easily distinguishable from the circumstances of this case, concerning language used by one or more judges in cases before them,<sup>38</sup> not by a prosecutor during closing arguments. Even the EU Directive he cites, which does not directly apply at the KSC, fails to support the contention of any impropriety in this regard- it specifically notes that the provision against public references to guilt 'shall be without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person'.<sup>39</sup> HARADINAJ's additional complaint about the Specialist Prosecutor's oral sentencing submissions is similarly unfounded,<sup>40</sup> such submissions being firmly relevant to the case against the Appellants.

### **HARADINAJ Ground 2<sup>41</sup>**

19. The Law sets out a specific procedure to follow in relation to the recusal or disqualification of judges.<sup>42</sup> This procedure was followed in the present case. The Appellant filed a request for recusal or disqualification,<sup>43</sup> which the President

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<sup>35</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.35-37.

<sup>36</sup> T.3771.

<sup>37</sup> *See Shuvalov*, para.80.

<sup>38</sup> *Nešfák*, and *Vardanyan and Nanushyan*, cited at KSC-CA-2022-01/F00035/COR2, ns.38, 40.

<sup>39</sup> EU Directive 2016/343, article 4, cited at KSC-CA-2022-01/F00035/COR2, n.37.

<sup>40</sup> KSC-CA-2022-01/F00035/COR2, para.38.

<sup>41</sup> KSC-CA-2022-01/F00035/COR2, paras.40-47.

<sup>42</sup> Rule 20(3)-(6).

<sup>43</sup> KSC-BC-2020-07/F00268.

summarily dismissed pursuant to Rule 20(3).<sup>44</sup> The Appellant sought reconsideration of the latter decision,<sup>45</sup> which the President also dismissed.<sup>46</sup> Rule 20(5) indicates that the Appellant cannot seek to relitigate this matter at this stage. Accordingly, Ground 2 should be rejected *in limine*.

20. Should the Appeals Panel decide to address the merits of this ground, it should nevertheless be dismissed. The Appellant claims the error was committed by the Trial Panel,<sup>47</sup> but it is the President who issued the relevant decisions. In his appeal, the Appellant merely disagrees with the President's decisions, just as he did in the dismissed reconsideration request.<sup>48</sup>

21. The personal impartiality of a judge must be presumed until there is proof to the contrary; such presumption cannot be easily rebutted.<sup>49</sup> The Appellant has the burden of rebutting this presumption on the basis of adequate and reliable evidence.<sup>50</sup> However, the Appellant fails to even set out the reasons why the continued presence of the Presiding Judge of the Trial Panel gave rise to an actual or perceived lack of impartiality, let alone provide any proof thereof. His submissions concerning certain 'diplomatic briefings'<sup>51</sup> are unsupported and irrelevant.

22. The Appeals Panel should not entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality.<sup>52</sup>

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<sup>44</sup> KSC-BC-2020-07/F00272.

<sup>45</sup> KSC-BC-2020-07/F00274.

<sup>46</sup> KSC-BC-2020-07/F00278.

<sup>47</sup> KSC-CA-2022-01/F00035/COR2, para.40.

<sup>48</sup> KSC-BC-2020-07/F00278, para.16.

<sup>49</sup> *Kyprianou*, para.119; *Nyiramasuhuko et al. AJ*, para.95.

<sup>50</sup> *Uwinkindi Decision*, para.71; *Akayesu AJ*, para. 91.

<sup>51</sup> KSC-CA-2022-01/F00035/COR2, para.46.

<sup>52</sup> *Renzaho AJ*, para.23; *Šešelj 2013 Decision*, para.7; *Akhbar Beirut S.A.L. et Decision*, para.39.

## **GUCATI Ground 2(A)<sup>53</sup> and HARADINAJ Ground 4<sup>54</sup>**

23. The Trial Panel ensured that the rights of the Accused were fully protected, in line with ECtHR jurisprudence. The reasons why the Batches were not disclosed in their entirety at trial are unquestionable. Contrary to GUCATI's assertion that the only choices at trial were to disclose the Batches in their entirety or withdraw or confine the Indictment,<sup>55</sup> the transparent, well-reasoned, and fair path chosen by the Trial Panel was one which a reasonable trier of fact could follow.

24. The Defence argument that the Trial Panel admitted and then mis-weighed evidence which could not be confronted to the detriment of the Accused alleges an abuse of discretion. When evaluating an alleged error of fact or abuse of discretion in applying the law, the Trial Panel's assessment is to be given deference. Even if considered as alleged errors of law, the Defence arguments fail.

25. The non-disclosed pages of the Batches are not 'evidence'. The SPO did not tender them as such. Neither did the Trial Panel admit them or otherwise rely on them in any way for the purposes of the Judgment. There can be no violation of fair trial rights when a court does not rely, for any purpose, on non-disclosed information.<sup>56</sup>

26. Indeed, the Trial Panel relied on the following wide variety of evidence, equally accessible to, and subject to testing by, both Parties to establish the contents and confidentiality of the Batches:<sup>57</sup>

(i) Pages of the Batches themselves admitted into evidence.<sup>58</sup> The SPO disclosed, and the Trial Panel admitted, eleven pages from Batch 1,<sup>59</sup> seventeen

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<sup>53</sup> KSC-CA-2022-01/F00036/RED, paras.60-95.

<sup>54</sup> KSC-CA-2022-01/F00035/COR2, paras.55-67.

<sup>55</sup> KSC-CA-2022-01/F00036/RED, para.93.

<sup>56</sup> *D. and Others*, paras.113-15.

<sup>57</sup> Judgment, paras.331-458.

<sup>58</sup> Judgment, paras.339, 349, 354, 387, 391, 394, 429, 437.

<sup>59</sup> P00093-P00097, P00139-P00144; KSC-BC-2020-07/F00427, paras.16-19, 30, 33, 68(a)(c); Judgment, n.724.

pages from the first set of Batch 3 and the corresponding seventeen pages from the second set of Batch 3,<sup>60</sup> and six pages from Batch 4.<sup>61</sup> In relation to Batch 2, the Trial Panel varied, in part, the Pre-Trial Judge's decision, inviting the SPO to produce an unredacted or lesser redacted version of this item.<sup>62</sup> The SPO did so<sup>63</sup> and it was admitted as P00104, with minimal redactions to the six pages which the SPO alleges are the only ones in Batch 2 that contain confidential information.<sup>64</sup> The remaining 931 pages in this 937-page item are available to the Defence unredacted.

The disclosed pages from Batches 1, 2 and 4, contain, *inter alia*: (i) logos of the SITF and Serbian authorities, and names and signatures of persons employed by such organizations; (ii) requests for information by the SITF to the Serbian authorities, including in relation to named individuals, such as two of the persons who are now accused in *Thaçi et al.*; (iii) references to the KLA; (iv) references to confidentiality; and (v) references to the dates and locations of SITF interviews.

The disclosed pages of Batch 3 include an entire 'Executive Summary'. Even the very first page thereof provides, on its own, reliable proof as to the contents and confidential nature of this item. The very first sentence on this first page reads: '[T]his narrative sets out evidence relevant to establishing responsibility at a senior level for crimes that occurred at the core identified detention sites in 1998/1999'. The first paragraph on this page refers to five highly recognizable names: Azem SYLA, Hashim THAÇI, Jakup KRASNIQI, Kadri VESELI and Rexhep SELIMI. The first footnote refers to ten almost equally easily recognisable locations. Subsequent pages feature headers and footers clearly featuring the SPO logo and denoting confidentiality. Other pages clearly identify, by name, alleged victims of various crimes, along with references to the location and timeframe of the crime. Footnotes refer to testimony, statements and documentary evidence;

(ii) The admitted contemporaneous statements of the Appellants to the media. They reviewed the Batches.<sup>65</sup> They said that Batch 1 contained the 'names of all the witnesses' and collaboration between the SC and Serbia.<sup>66</sup>

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<sup>60</sup> P00106-P00119; KSC-BC-2020-07/F00427, paras.35-38, 68(a); Judgment, para.354.

<sup>61</sup> P00145-P00150; KSC-BC-2020-07/F00427, paras.30, 33, 68(c); Judgment, n.724.

<sup>62</sup> T.1912-14; KSC-BC-2020-07/F00427, para.29.

<sup>63</sup> Disclosure 59, 5 November 2021, 079512-080448RED2 with English translations at 080128-080128-ET Revised RED and 080130-080131-ET Revised RED.

<sup>64</sup> P00104, pp.080126-080131.

<sup>65</sup> Judgment, paras.359-61.

<sup>66</sup> Judgment, paras.362-64.

They said that Batch 2 showed further cooperation with Serbian officials.<sup>67</sup> They knew Batch 3 contained the names of suspects and mentioned the particulars of many people.<sup>68</sup> The Appellants also showed pages of the Batches on camera.<sup>69</sup> They stated their belief that the Batches were genuine and authentic,<sup>70</sup> and made several statements indicating they considered the Batches contained confidential information;<sup>71</sup>

(iii) The testimony of the Appellants during trial. GUCATI gave several specific indications of what was in the Batches, and HARADINAJ was able to differentiate between the Batches when testifying.<sup>72</sup> During testimony they tried to distance themselves from prior assertions as to the authenticity and confidential nature of the Batches, but such attempts failed;<sup>73</sup>

(iv) Media articles which reported on the KLA WVA press conferences, and provided names and specific details contained in the Batches.<sup>74</sup> There are also pages of Batch 1 in evidence which were emailed to the SPO by the media;<sup>75</sup>

(v) W04866's testimony, describing the contents of Batch 4 which he acquired from the KLA WVA. His description mirrors that of Batch 1 discussed in the other evidence;<sup>76</sup>

(vi) W04841, an SPO investigator who testified to reviewing the seized documents and was able to confirm which names belonged to (potential) witnesses. W04841 also gave detailed descriptions of the contents of the Batches, memorialised in Charts which specified the kinds of information in the Batches. She was fully cross-examined by the Defence, and also questioned by the Trial Panel. The Trial Panel did not take the SPO investigator's assertions 'for granted',<sup>77</sup> but gave a full evaluation of W04841's credibility and the evidence presented on the content, authenticity, and confidentiality of seized material.<sup>78</sup>

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<sup>67</sup> Judgment, paras.365-66.

<sup>68</sup> Judgment, paras.368-72.

<sup>69</sup> Judgment, paras.367, 370.

<sup>70</sup> Judgment, paras.398-410.

<sup>71</sup> Judgment, paras.439-47.

<sup>72</sup> Judgment, paras.374-75.

<sup>73</sup> Judgment, paras.411-20, 449-55.

<sup>74</sup> Judgment, paras.343, 351, 356.

<sup>75</sup> Judgment, para.338.

<sup>76</sup> Judgment, para.340.

<sup>77</sup> *Contra* KSC-CA-2022-01/F00036/RED, para.66.

<sup>78</sup> Judgment, paras.50-51, 331-81, 382-423, 424-58.

W04841's evidence is but one part of this broader picture. GUCATI misstates the nature of W04841's evidence on the Batches and the Charts – she did not present opinions or draw conclusions.<sup>79</sup> W04841 gave facts and evidence. The Defence did not object to W04841 being called as such, and was given full opportunity to raise admissibility objections throughout her testimony.<sup>80</sup> W04841 was competent to testify on all matters she gave evidence on.<sup>81</sup>

27. The evidence on all these points fit into a cohesive whole which informed the Trial Panel's conclusions as to the contents and confidentiality of the Batches.<sup>82</sup> All these aspects of the case were disclosed to the Defence, and they had full opportunity to challenge them. The multiple factors upon which the Trial Panel entered its findings means that even if, *arguendo*, the Charts prepared by W04841 were not to have been considered, all crimes would nevertheless have been established. The Charts provide information, tested during cross-examination, concerning, *inter alia*, the number of (potential) witnesses mentioned therein. The Trial Panel did not require (more) pages of the Batches in order to reach its findings and – for a non-disclosure determination now argued as fundamentally unfair – the Defence did not even seek leave to appeal the Pre-Trial Judge's decisions ordering non-disclosure.<sup>83</sup>

28. The entitlement to disclosure of relevant evidence is not an absolute right.<sup>84</sup> In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of

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<sup>79</sup> KSC-CA-2022-01/F00036/RED, paras.62, 64.

<sup>80</sup> KSC-BC-2020-07/F00427, para.8; KSC-BC-2020-07/F00328, para.11. GUCATI challenges the former cited paragraph with reference to Rule 138 (KSC-CA-2022-01/F00036/RED, para.79 [mistakenly citing to the Judgment instead of F00427]), but the Trial Panel's decision was taken in a context where the overall admissibility of W04841's evidence was discussed after her testimony. The question was one of timing, which is why the Defence had been found to have failed to point to any legal basis to grant the relief sought 'at this point in the proceedings'.

<sup>81</sup> Reliance on the expert decision in *Perišić* is misplaced. KSC-CA-2022-01/F00036/RED, paras.63, 72. The ICTY Trial Chamber was making a ruling on the competence of a specific investigator, not stating a general principle about investigator witnesses of the kind asserted by GUCATI. *Perišić* Decision, paras.12-15.

<sup>82</sup> Judgment, paras.379-81.

<sup>83</sup> KSC-BC-2020-07/F00141; KSC-BC-2020-07/F00171.

<sup>84</sup> *Rowe and Davis*, para.61; *Leas*, para.78; *Donohue*, para.74; *Jasper*, para.52; *See also Ambos*, p.75.

investigation of crime, which must be weighed against the rights of the accused.<sup>85</sup> 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.<sup>86</sup> However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6.<sup>87</sup> Moreover, in order to ensure that the 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.<sup>88</sup> The principles set out by the ECtHR were scrupulously adhered to in this case.

29. In *M v. Netherlands*, an interpreter with the General Intelligence and Security Service of the Netherlands ('AIVD') was prosecuted for sharing state secrets. The state secrets were redacted in the documents disclosed to the accused. The classified nature of the documents was established by AIVD statements and a confirmation by the National Public Prosecutor for Counter-terrorism.<sup>89</sup> The ECtHR found no violation of Article 6 of the ECHR in relation to the redactions and non-disclosure, noting that the 'legible information was sufficient for the defence and the Court of Appeal to make a reliable assessment of the nature of the information in the documents'.<sup>90</sup> The Trial Panel relied on similar evidence. In this regard, as the Trial Panel noted, the Defence did not challenge the evidence of HARADINAJ expert witness DW1253 that as a matter of practice, the record of ongoing criminal investigations was confidential unless validly lifted by a competent authority, and that this would include, for instance, internal work product, and all information pertaining to witnesses.<sup>91</sup>

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<sup>85</sup> *Rowe and Davis*, para.61; *Leas*, para.78; *Donohue*, para.74; *Jasper*, para.52; *See also Ambos*, p.75.

<sup>86</sup> *Rowe and Davis*, para.61; *Leas*, para.78; *Donohue*, para.74; *Jasper*, para.52.

<sup>87</sup> *Rowe and Davis*, para.61; *Leas*, para.78; *Donohue*, para.74; *Jasper*, para.52.

<sup>88</sup> *Rowe and Davis*, para.61; *Leas*, para.78; *Donohue*, para.74; *Jasper*, para.52; *See also Ambos*, p.75.

<sup>89</sup> *M v. The Netherlands*, para.70.

<sup>90</sup> *M v. The Netherlands*, paras.70-71.

<sup>91</sup> Judgment, para.426.

30. There is no indication that the Trial Panel relied on evidence which the Defence could not confront as the sole or decisive factor in convicting the Accused.<sup>92</sup> Indeed, there is no indication the Trial Panel relied *to any extent* on evidence the Defence could not confront. The Defence was fully disclosed W04841's Charts, and the Trial Panel assessed them cautiously by looking for corroboration with them in the course of its analysis. Reliance on W04841's cross-examined evidence as to numbers was a finding a reasonable Trial Panel could make, and deference must be given to the exercise of the Trial Panel's weighing of the evidence. The (full) Batches being the central evidence for proving this case is a Defence construction;<sup>93</sup> a refrain stated prior to trial that never evolved with the evidence admitted.

31. The reasons for not disclosing the Batches are unassailable. Indeed, the Appellants do not even attempt to attack such reasons. They fail to explain why, in their view, the Pre-Trial Judge erred in considering that non-disclosure of Batches 1 and 4 and the undisclosed portion of Batch 2 was necessary to ensure that ongoing or future investigations were not prejudiced, and that the security, well-being and dignity of witnesses or members of their family, and the public interest or the rights of third parties were protected.<sup>94</sup> Neither do they set out reasons to support the assertion that the Pre-Trial Judge erred in finding Batch 3 was not subject to disclosure in light of its stated content, purpose, and source.<sup>95</sup>

32. In line with ECtHR jurisprudence echoed, *inter alia*, by the KSC Specialist Chamber of the Constitutional Court and a KSC Panel of the Court of Appeals, the

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<sup>92</sup> See generally *Schatschaschwili*, paras.100-31; *Al-Khawaja*, paras.119-47; *Šmajgl*, para.61.

<sup>93</sup> KSC-CA-2022-01/F00036/RED, paras.83-95; KSC-CA-2022-01/F00035/COR2, para.58.

<sup>94</sup> KSC-BC-2020-07/F00141, para.38; KSC-BC-2020-07/F00171, para.22. The SPO provided the Pre-Trial Judge with full copies of Batches 1 (KSC-BC-2020-07/F00110/A01) and 4 (KSC-BC-2020-07/F00154/A01), and of the undisclosed portion of Batch 2 (KSC-BC-2020-07/F00110/A02), and he reviewed them prior to issuing his decisions (KSC-BC-2020-07/F00141, paras.30, 38, 41; KSC-BC-2020-07/F00171, paras.14, 22, 25). Pursuant to Rules 98(1)(b) and 175, the Trial Panel (See also KSC-BC-2020-07/F00265) and Appeals Panel respectively also had and have access thereto.

<sup>95</sup> KSC-BC-2020-07/F00141, paras.43-44.

non-disclosure was strictly necessary, *inter alia*, to preserve the fundamental rights of another individual or to safeguard an important public interest,<sup>96</sup> and any difficulty caused by the non-disclosure was sufficiently counterbalanced by the procedures followed by the Pre-Trial Judge and Trial Panel.<sup>97</sup> GUCATI and HARADINAJ fail to show any error in the relevant decisions, let alone one that invalidates the Judgment. Indeed, GUCATI and HARADINAJ merely demonstrate a refusal to accept the Judgment and the proceedings leading up to it.<sup>98</sup>

33. The interests protected by non-disclosure in this case are very real and highly important. They are the interests in the SPO and the KSC being able to fulfil their mandates, in protecting victims and witnesses in ongoing trials before this institution. The necessity of non-disclosure is similarly very real. The risks posed by disclosure of the Batches to the Accused are not speculative or even uncertain. They are in fact certain. The Accused were on trial for the very act of disseminating these Batches to the public and they repeatedly asserted, even to the Trial Panel,<sup>99</sup> that, given the opportunity, they would repeat their crimes.

34. The Defence ignore: (i) the counterbalancing measures in existence when the SPO requested non-disclosure (including W04841's declarations and the fact that W04841 would be called to testify);<sup>100</sup> and (ii) the additional counterbalancing measures ordered when non-disclosure was authorised. In particular, W04841's Charts were a judicially ordered counterbalancing measure to ensure the Defence could know the particulars of every single document contained in Batches 1 and 4 and the undisclosed pages of Batch 2, *inter alia*, descriptions, dates, and information on

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<sup>96</sup> See *Paci*, para.85; *Rowe and Davis*, para.61; KSC-CC-PR-2017-01/F00004, para.135, n.77 citing ECtHR jurisprudence; KSC-BC-2020-07/IA005/F00008, para.35.

<sup>97</sup> See *Rowe and Davis*, para.61.

<sup>98</sup> KSC-CA-2022-01/F00035/COR2, paras.58, 60, 62, 66.

<sup>99</sup> Judgment, paras.976, 1001, ns.2010, 2038.

<sup>100</sup> See KSC-BC-2020-07/F00141, para.39 and KSC-BC-2020-07/F00171, para.23

origin or authorship, along with information suggesting the confidential nature of the document and whether any names of (potential) witnesses were mentioned.<sup>101</sup> The Charts also contain excerpts from various pages of the Batches containing indicia of confidentiality.<sup>102</sup>

35. In this case, the fairness of the proceedings in relation to non-disclosure has been confirmed both by the Pre-Trial Judge, who authorised non-disclosure and ordered counter-balancing measures, and by the Trial Panel, which varied the counter-balancing measures ordered where it felt the need to do so<sup>103</sup> and, in its Judgment, reached unanimous findings as to the contents and confidentiality of the batches.

36. Ultimately, the Trial Panel found that there was not one single way to prove the charges in this case fairly.<sup>104</sup> The assessment method it selected was reasonable, and deference must be given to it. GUCATI proposes self-serving alternatives to disclosure of all pages of the Batches – such as withdrawing the indictment – which would have themselves led to a miscarriage of justice.<sup>105</sup> The Accused expressed absolutely no remorse for their actions,<sup>106</sup> and a reasonable trier of fact could conclude, as the Trial Panel did, that the merits of the case needed to be resolved in a manner which did not involve giving them protected information they swore to reveal. No error is identified.

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<sup>101</sup> KSC-BC-2020-07/F00141, paras 39, 45 and KSC-BC-2020-07/F00171, para.23, referring to what would become W04841's Charts (P00090 and P00091).

<sup>102</sup> P00090, pp.095590-095594, 095597-095599; P00091, pp.095649-095653.

<sup>103</sup> T.1912-14; KSC-BC-2020-07/F00427, para.29.

<sup>104</sup> Judgment, para.332.

<sup>105</sup> KSC-CA-2022-01/F00036/RED, paras 90-93. *See also* KSC-CA-2022-01/F00035/COR2, para.66.

<sup>106</sup> Judgment, paras.976, 1001.

## HARADINAJ Ground 5<sup>107</sup>

37. HARADINAJ merely asserts that the Trial Panel's decision to clarify or define the elements of the crimes and modes of liability in the Judgment, and not before, was erroneous.<sup>108</sup> He provides no reasoning to support any of his bald assertions and does not explain specifically how the Trial Panel's approach prejudiced him or invalidated the Judgment. Accordingly, the Appeals Panel should reject this ground *in limine*.

38. The Defence was not 'unaware of what the SPO needed to prove for each offence', and the 'particular modes of liability and *mens rea* forming the basis of charge [sic] in the Indictment' were sufficiently specified.<sup>109</sup>

39. The Parties had equal access to: (i) the Indictment, which clearly set out the charged crimes and modes of liability; (ii) the Law and the KCC containing the relevant provisions, and (iii) the Confirmation Decision, interpreting the relevant provisions.<sup>110</sup> As noted by the Trial Panel, the Defence did not raise a jurisdictional challenge based on the elements of the charged offences, reason alone to dismiss this ground,<sup>111</sup> and the elements as set out in the Confirmation Decision were relied upon by the SPO as the normative basis relevant to the presentation of its evidence.<sup>112</sup> Further, the Parties were given equal and ample opportunity to provide their views on the elements during the trial.<sup>113</sup> In its submissions on the applicable law, filed before the opening of the case, the SPO reiterated that '[t]he Confirmation Decision states the applicable law correctly'.<sup>114</sup>

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<sup>107</sup> KSC-CA-2022-01/F00035/COR2, paras.68-71.

<sup>108</sup> KSC-CA-2022-01/F00035/COR2, paras.68, 71.

<sup>109</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.68, 70.

<sup>110</sup> *See also* KSC-BC-2020-07/F00450, para.26.

<sup>111</sup> Rule 86(7); *Kayishema & Ruzindana* AJ, para.91; *Nchamihigo* Decision, paras.13-14; *Akayesu* AJ, para.361.

<sup>112</sup> KSC-BC-2020-07/F00450, para.26.

<sup>113</sup> T.647-83, 710; KSC-BC-2020-07/F00342; KSC-BC-2020-07/F00440, para.11.

<sup>114</sup> KSC-BC-2020-07/F00341, para.1 (footnote omitted).

40. As correctly set out by the Trial Panel in its Rule 130 decision, a determination of the elements of the charged offences or modes of liability is intrinsically connected to the evaluation of whether the Accused is guilty or not guilty to be made in the judgment at the end of the trial.<sup>115</sup> HARADINAJ fails to establish any error of law.

#### **HARADINAJ Ground 6<sup>116</sup>**

41. HARADINAJ's Ground 6 merely repeats arguments that failed before the Trial Panel<sup>117</sup> and/or Appeals Panel<sup>118</sup> in relation to the evidence of DW1250, DW1251, DW1252 and DW1253. He fails to set out, let alone establish, how such decisions undermined the overall fairness of the proceedings<sup>119</sup> and invalidated the Judgment. They did not. Rather, these decisions were fully consistent with Article 40(2) and Rules 116(1), 119(3) and 138(1), as well as with ECtHR jurisprudence concerning the examination of witnesses.<sup>120</sup> They were issued after the Appellant was given ample opportunity to set out his position.

42. The subject-matter of the proposed evidence of DW1250 and DW1251 bore no relevant link to this case, as patently obvious by the submissions at trial and on appeal.<sup>121</sup> This question was already resolved by an interlocutory appeal, and no justification is given for reconsidering that decision. Arguments concerning DW1252 and DW1253 are addressed in the response to HARADINAJ Ground 1.<sup>122</sup>

43. HARADINAJ points to no change in circumstance or additional factor warranting a reconsideration of the relevant decisions or any finding of error therein.

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<sup>115</sup> KSC-BC-2020-07/F00450, paras.20, 26; *Karadžić* Transcript, p.28735; *Kordić and Čerkez* Decision, para.36.

<sup>116</sup> KSC-CA-2022-01/F00035/COR2, paras.72-84.

<sup>117</sup> KSC-BC-2020-07/F00470.

<sup>118</sup> KSC-BC-2020-07/IA006/F00006, concerning DW1250, DW1251, and DW1253.

<sup>119</sup> *Abdullayev*, para.59.

<sup>120</sup> *Abdullayev*, para.59; *Huseyn and Others*, para.196; *Kapustyak*, paras.94-95; *Perna*, para.29.

<sup>121</sup> KSC-CA-2022-01/F00035/COR2, paras.74-78.

<sup>122</sup> Para.15, above.

## **HARADINAJ Ground 10<sup>123</sup>**

44. HARADINAJ's Ground 10, concerning the Trial Panel's rejection<sup>124</sup> of Defence requests<sup>125</sup> to make submissions, after the close of the case, on the disclosure of information concerning allegations by Senator Dick MARTY, once again merely repeats arguments that were unsuccessful at trial and seeks appellate intervention on an issue for which he did not seek leave to appeal and where such intervention is not warranted. The Defence failed to satisfy the requirements of Rule 136(2) and HARADINAJ now fails to even make any submissions as to how the alleged error of law invalidated the Judgment. Accordingly, HARADINAJ Ground 10 should be rejected *in limine*.

45. In its decision, the Trial Panel correctly noted there was no indication that the information requested by the Defence fell under Rule 103, and, even assuming the SPO was in possession of the information requested, such information would not fall under Rule 102(3) since it is irrelevant to the proceedings.<sup>126</sup> Further, the requested information seemed to be publicly available.<sup>127</sup> The unverified nature of the MARTY allegations was not central to the Trial Panel's decision - the unrelated nature of such allegations to the Appellant's case was.<sup>128</sup>

46. HARADINAJ's submissions are entirely speculative and hypothetical,<sup>129</sup> incapable of establishing any error.

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<sup>123</sup> KSC-CA-2022-01/F00035/COR2, paras.115-26.

<sup>124</sup> KSC-BC-2020-07/F00610.

<sup>125</sup> KSC-BC-2020-07/F00605; KSC-BC-2020-07/F00606.

<sup>126</sup> KSC-BC-2020-07/F00610, para.17.

<sup>127</sup> See KSC-BC-2020-07/F00605; KSC-BC-2020-07/F00606; KSC-BC-2020-07/F00610, para.18.

<sup>128</sup> KSC-CA-2022-01/F00035/COR2, para.120; KSC-BC-2020-07/F00610, para.16.

<sup>129</sup> KSC-CA-2022-01/F00035/COR2, paras.121-24.

B. THE TRIAL PANEL'S OVERALL METHODOLOGY WAS CORRECT<sup>130</sup>

**GUCATI Ground 16<sup>131</sup> and HARADINAJ Ground 3<sup>132</sup>**

47. Articles 3 and 12 govern the applicable law of the KSC. There is no statutory requirement to interpret this applicable law in accordance with previous Kosovo court decisions. The KSC does not operate on principles of *stare decisis* in relation to Kosovo domestic courts. All GUCATI and HARADINAJ arguments that the Trial Panel could not interpret the KCC differently than domestic courts fail on this basis.

48. Kosovo domestic court decisions are - at most - persuasive authorities to guide the interpretation of the law. The Trial Panel did consider Kosovo's domestic jurisprudence, citing to nine different Kosovo domestic cases in the course of the Judgment.<sup>133</sup>

49. The only domestic Kosovo case relied upon in the Appeals is that of *M.I. et al.*, in particular for its finding that KCC 401(2) (Count 2) is a lesser offence of KCC 401(1) (Count 1). The Trial Panel considered this judgment in detail when setting out why it considered that the cumulative convictions test applied by the international tribunals was the more appropriate test.<sup>134</sup> The Defence themselves advocated for the cumulative convictions test adopted by the Trial Panel, as also noted expressly in the Judgment.<sup>135</sup>

50. The reasoning of the *M.I. et al.* Appeals Court is also clearly distinguishable from the present case. *M.I. et al.* was applying the language from the PCCK whereby

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<sup>130</sup> This section addresses Ground 16 of the GUCATI Appeal and Grounds 3, 7, and 8 of the HARADINAJ Appeal.

<sup>131</sup> KSC-CA-2022-01/F00036/RED, paras.325-31.

<sup>132</sup> KSC-CA-2022-01/F00035/COR2, paras.48-54.

<sup>133</sup> Judgment (Annex 2), p.24.

<sup>134</sup> Judgment, paras.165-70. *In this regard, see generally* Article 3(3).

<sup>135</sup> Judgment, para.167, n.268.

the equivalent to KCC 401(1) then required there to be a serious threat *of force*.<sup>136</sup> The ‘of force’ language did not appear in the antecedent to KCC 401(2).<sup>137</sup> This distinction in the statutory scheme was in place when the *M.I. et al.* court found an ‘implicit subsidiarity’ between the two provisions.<sup>138</sup> However, the words ‘of force’ are removed in the version of KCC 401(1) applicable at the time of the offences in this case. This meaningful amendment to the statutory language makes the legal considerations in *M.I. et al.* inapposite to the questions of interpretation faced by the Trial Panel.

51. The Trial Panel was not bound by domestic Kosovo jurisprudence, but nevertheless gave it careful consideration when rendering the Judgment. The Defence’s reliance on that jurisprudence is wholly unpersuasive, and no error is identified.

#### **HARADINAJ Ground 7<sup>139</sup>**

52. HARADINAJ’s Ground 7 as phrased is a critique on the sufficiency of the Trial Panel’s judicial reasoning, arguing the Trial Panel failed to ‘set out the extent to which it relied on hearsay’ and failed to ‘specify the weight’ attributed to hearsay evidence in the Judgment.<sup>140</sup> However, HARADINAJ’s actual arguments under this ground are that the Trial Panel used hearsay evidence as a sole or decisive basis for convicting the accused.<sup>141</sup> HARADINAJ’s submissions under this ground are inherently inconsistent, arguing that the reliance on hearsay in the Judgment is both unclear and so prominent that it was weighed improperly. These arguments are contrary to common sense and should be dismissed on this basis alone.

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<sup>136</sup> Article 316(1) of the PCCK.

<sup>137</sup> Article 318(1) of the PCCK.

<sup>138</sup> *M.I. et al.*, pp.28-30.

<sup>139</sup> KSC-CA-2022-01/F00035/COR2, paras.85-99.

<sup>140</sup> KSC-CA-2022-01/F00035/COR2, para.85.

<sup>141</sup> KSC-CA-2022-01/F00035/COR2, paras.89-93.

53. Should this ground be considered on its merits, HARADINAJ's arguments misrepresent the Judgment. HARADINAJ's arguments on the limits of relying on hearsay evidence concede that such evidence is admissible during trial. What appears to be contested is the use of such evidence, namely that a conviction may not be based solely or to a decisive extent on: (a) the statement of a witness whom the Defence had no opportunity to examine or (b) the evidence of witnesses whose identity was not disclosed to the Defence.<sup>142</sup>

54. HARADINAJ fails to substantiate how hearsay evidence was used to a sole or decisive extent in his conviction. W04842 testified before the Trial Panel and was extensively cross-examined. Actions W04842 said were taken for witnesses affected in this case – such as relocation or emergency risk planning – are not out of court statements offered for the truth of their contents.<sup>143</sup> Other statements of witnesses W04842 recalled when testifying – such as people saying they felt threatened or scared – were not relied upon by the Trial Panel when assessing the consequences witnesses suffered.<sup>144</sup>

55. HARADINAJ argues that W04842's recalling of what witnesses told him amounted to decisive hearsay as to the impact of the statements of the Accused.<sup>145</sup> But HARADINAJ fails to specify how this impact was used as a sole or decisive factor in his conviction. HARADINAJ's argues that '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', but: (i) intimidation was found to not have any required consequence, such that the impact on the witnesses was not an element of the crime; (ii) the Accused was

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<sup>142</sup> Rule 140(4)(a)-(b).

<sup>143</sup> Judgment, paras.536-37.

<sup>144</sup> Judgment, paras.539, 547.

<sup>145</sup> KSC-CA-2022-01/F00035/COR2, para.92.

acquitted on the retaliation count; and (iii) the obstruction counts were proven through attempted obstruction, where no particular consequence need have occurred.

56. As HARADINAJ only reluctantly acknowledges,<sup>146</sup> the Trial Panel went to great pains to ensure that hearsay evidence was used cautiously during trial.<sup>147</sup> Most contact notes - wherein witnesses explained the consequences they suffered following the conduct of the accused - were declared inadmissible on grounds that their admission would prejudice the accused.<sup>148</sup> The Trial Panel subsequently found that the limited number of admitted contact notes could not be relied upon to establish that witnesses suffered serious consequences.<sup>149</sup>

57. HARADINAJ's assertions that the Trial Panel failed to specify the weight given to hearsay evidence are manifestly groundless, and no error is identified.

#### **HARADINAJ Ground 8<sup>150</sup>**

58. HARADINAJ argues that the Trial Panel wrongly exercised its discretion when evaluating W04841, W04842, and W04876's testimony.<sup>151</sup> But the only specific errors alleged concern: (i) W04841 identifying an incomplete sample of witnesses; (ii) W04876's limited knowledge on the chain of custody of the batches; and (iii) W04842 being unable to confirm how many witnesses expressed security concerns.<sup>152</sup> HARADINAJ fails to substantiate how these alleged errors affect specific findings in the Judgment or why the convictions would not stand on the basis of the remaining evidence. This ground should be summarily dismissed.

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<sup>146</sup> KSC-CA-2022-01/F00035/COR2, para.95.

<sup>147</sup> Judgment, paras.24-26.

<sup>148</sup> KSC-BC-2020-07/F00334, 29 September 2021, paras.78-94.

<sup>149</sup> Judgment, paras.536-41.

<sup>150</sup> KSC-CA-2022-01/F00035/COR2, paras.100-07.

<sup>151</sup> KSC-CA-2022-01/F00035/COR2, para.100.

<sup>152</sup> KSC-CA-2022-01/F00035/COR2, paras.101-04.

59. In any event, the Trial Panel gave detailed explanations for how it evaluated all three witnesses.<sup>153</sup> The Trial Panel also considered an abundance of facts beyond the evidence identified under this ground when concluding that the Batches were authentic and that protected persons were contained within them.<sup>154</sup> Deference must be given to the exercise of the Trial Panel's discretion in evaluating witnesses, and no abuse of that discretion is identified.

C. INTIMIDATION (COUNT 3)<sup>155</sup>

**GUCATI Ground 1<sup>156</sup> and HARADINAJ Ground 19<sup>157</sup>**

*GUCATI Ground 1(A) and 1(E)*

60. The inducement required by KCC 387 is for a person: (i) to refrain from making a statement; (ii) to make a false statement; or (iii) to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings. The Trial Panel correctly concluded that the phrase 'when such information relates to obstruction of criminal proceedings' qualifies only the third of these alternatives.<sup>158</sup>

61. If such information was construed as a general element across all three alternatives, as argued by GUCATI, this would lead to an absurd interpretation whereby only witnesses with information about obstruction could be intimidated. The necessary consequence of GUCATI's interpretation would be that crimes under KCC 387 could only be charged if the intimidated person had information relating to obstruction falling under KCC 386. This is not how Kosovo courts interpret KCC 387,

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<sup>153</sup> Judgment, paras.50-58, 60.

<sup>154</sup> Judgment, Section V.

<sup>155</sup> This section addresses Grounds 1, 2(B), and 3 of the GUCATI Appeal and Grounds 19 and 20 of the HARADINAJ Appeal.

<sup>156</sup> KSC-CA-2022-01/F00036/RED, paras.10-59.

<sup>157</sup> KSC-CA-2022-01/F00035/COR2, paras.178-81.

<sup>158</sup> Judgment, para.114.

as they make findings of guilt under this provision in the absence of predicate acts of obstruction.<sup>159</sup>

62. A finding on only one of these alternatives is necessary for a conviction under KCC 387. It was not necessary for the Trial Panel to make any finding that the information related to the obstruction of criminal proceedings. GUCATI's allegation that the Trial Panel did not sufficiently reason its findings under Ground 1(E) are dependent upon his incorrect legal interpretation under Ground 1(A). Both sub-grounds show no error and should be rejected.

*GUCATI Ground 1(B)*

63. As seen from the broad phrasing of KCC 387 – covering force, threats, 'any other means of compulsion', gifts, and 'any other form of benefit' - any conduct falling within the enumerated parameters can be intimidating. The serious threat in the provision need not be 'of force' – the threat in KCC 387 is only modified by the word 'serious' and appears as but one alternative in this broader list. The Trial Panel was correct in not interpreting the statutory language more narrowly than its plain language.<sup>160</sup>

*GUCATI Ground 1(C) and HARADINAJ Ground 19*

64. The 'serious threat' in KCC 387 is a legal qualification of the conduct of the Accused. The Trial Panel evaluated whether the conduct of the Accused amounted to a serious threat through consideration of: (i) the manner in which protected information was revealed; (ii) the statements of the Accused regarding some of the consequences of the revelation; (iii) the statements of the Accused regarding the

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<sup>159</sup> T.3478-79, referring to KS and RB; LT. Translations of these judgments can be found in Annex 2.

<sup>160</sup> Judgment, paras.112, 585.

names revealed; (iv) the context in which the information was revealed and the Accused's statements were made; and (v) the level of any ensuing threat.<sup>161</sup>

65. Neither GUCATI nor HARADINAJ appear to challenge the correctness of these considerations as such. They instead argue that it was insufficient to find a serious threat existed when the Accused's acts and statements merely 'cause, contribute to, augment, or amplify fears and concerns'<sup>162</sup> or go to the Accused's well-known opposition to the KSC.<sup>163</sup> These amount to nothing more than assertions that the Trial Panel failed to give sufficient weight to the evidence, and these grounds should be dismissed on this basis alone.

66. When evaluating the above considerations, the Trial Panel relied on how the Accused: (i) revealed the identity and/or personal data of hundreds of (potential) witnesses;<sup>164</sup> (ii) displayed and distributed the Batches at press conferences for all to see while publicly and repeatedly pointing out the presence of names/information of (potential) witnesses;<sup>165</sup> (iii) made a point in stating that the public now knew who the (potential) witnesses are and that the KSC/SPO was unable to guarantee their privacy and security;<sup>166</sup> (iv) described (potential) witnesses as liars, spies, traitors, collaborators, criminals, and bloodsuckers;<sup>167</sup> and (v) did all of this in the context of a climate of witness intimidation in Kosovo.<sup>168</sup> GUCATI and HARADINAJ fail to show that a reasonable Trial Panel could not have concluded that such acts and statements qualified as a 'serious threat' within the meaning of KCC 387.

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<sup>161</sup> Judgment, para.558.

<sup>162</sup> KSC-CA-2022-01/F00036/RED, paras.34, 37.

<sup>163</sup> KSC-CA-2022-01/F00035/COR2, paras.180-81.

<sup>164</sup> Judgment, para.559.

<sup>165</sup> Judgment, para.561.

<sup>166</sup> Judgment, paras.565-66.

<sup>167</sup> Judgment, paras.570-74.

<sup>168</sup> Judgment, paras.576-80.

*GUCATI Ground 1(D)*

67. The Trial Panel correctly concluded that KCC 387 requiring no proof of consequence best comports with the purpose of the provision.<sup>169</sup>

68. This interpretation is consistent with analogous interpretations of similar offences at the ICTY and ICC.<sup>170</sup> GUCATI's attempts to make an artificial distinction between the interpretations of these other courts and KCC 387, leading the Defence to an interpretation that is inconsistent with the language of the provision or the Trial Panel's teleological interpretation.

69. GUCATI's contextual reading of KCC 386 and KCC 387 also does not withstand scrutiny. As found in the paragraph of the Confirmation Decision cited by the Trial Panel,<sup>171</sup> KCC 386 (governing obstruction generally across all 'official proceedings') uses language requiring particular consequences which is not repeated in KCC 387 (governing intimidation of persons requiring broader protection under the law, specifically those with information in 'criminal proceedings').<sup>172</sup>

**GUCATI Ground 2(B)**<sup>173</sup>

70. The Trial Panel found that the acts and statements of the Accused amounted to a serious threat and would have created serious fears and concerns.<sup>174</sup> The concerns expressed by witnesses challenged by GUCATI are only used to further confirm these serious fears and concerns.<sup>175</sup> GUCATI fails to explain why the convictions under

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<sup>169</sup> Judgment, para.115.

<sup>170</sup> *Beqaj* TJ, para.21; *Haraqija and Morina* TJ, para.18; Article 70(1)(c) of the ICC Statute; *Bemba et al.* TJ, paras.43, 48; *Bemba et al.* AJ, para.737.

<sup>171</sup> Confirmation Decision, para.62, n.40, *cited in* Judgment, para.115.

<sup>172</sup> KCC 386; KCC 387.

<sup>173</sup> KSC-CA-2022-01/F00036/RED, paras.96-108.

<sup>174</sup> Judgment, para.585.

<sup>175</sup> Judgment, para.582.

Count 3 do not still stand irrespective of the challenged factual considerations. Accordingly, this sub-ground can be summarily dismissed.

71. In any event, the paragraphs of the Judgment challenged under this sub-ground also concern the efforts made by the SPO to protect witnesses. This evidence was provided by W04842, whom the Defence had an opportunity to cross-examine. When discussing the concerns of the witnesses, the Trial Panel cross-referenced to its finding on the serious consequences (potential) witnesses suffered due to the acts and conduct of the Accused.<sup>176</sup> The Trial Panel limited itself in the cross-referenced paragraph to only that evidence which the Defence had sufficient opportunity to challenge.<sup>177</sup> GUCATI misrepresents the Trial Panel's reasoning when arguing that the 'many witnesses' referenced by the Trial Panel was in reference to evidence the Defence could not effectively challenge during trial. No discernible error is identified.

#### **GUCATI Ground 3<sup>178</sup> and HARADINAJ Ground 20<sup>179</sup>**

72. Contrary to the Defence's submissions, the Trial Panel did set out the specific requirements for direct intent under Count 3 and gave a detailed analysis of why the Accused satisfied the *mens rea* requirements of the offence.<sup>180</sup> The Trial Panel also clearly found that: (i) it was the serious threat stemming from the acts and statements of the Accused that was intended to dissuade (potential) witnesses from giving (further) evidence to the SPO;<sup>181</sup> and (ii) these acts and statements formed a 'conscious and essential part' of the serious threat.<sup>182</sup>

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<sup>176</sup> Judgment, para.583, *referencing* para.547.

<sup>177</sup> Judgment, paras.536-47.

<sup>178</sup> KSC-CA-2022-01/F00036/RED, paras.109-34.

<sup>179</sup> KSC-CA-2022-01/F00035/COR2, paras.182-87.

<sup>180</sup> Judgment, paras.121-24, 588-605, *contra* KSC-CA-2022-01/F00036/RED, para.109.

<sup>181</sup> Judgment, para.603.

<sup>182</sup> Judgment, para.604.

73. GUCATI's assertions that there is an insufficiently reasoned finding on direct intent misrepresents the Trial Panel's findings.<sup>183</sup> GUCATI's arguments on the Trial Panel making no finding on the information at issue 'relating to obstruction of the proceedings' echo meritless submissions under Ground 1 of the GUCATI Appeal and conflate *actus reus* requirements with *mens rea* requirements.<sup>184</sup>

74. As to the truth of the information at issue, no finding was required on the truth/falsity of the information in question because KCC 387 criminalises inducing someone to 'refrain from making a statement'. Indeed, this was the alternative on which the Trial Panel reached its finding of direct intent.<sup>185</sup> GUCATI again makes arguments which demand that the Trial Panel make findings above and beyond what was required to enter a conviction.<sup>186</sup> Borrowing from the Trial Panel's interpretation of KCC 388(1) is entirely inapposite,<sup>187</sup> as KCC 388 was found to have an element of truthful information in its *mens rea* requirements which does not exist under KCC 387.<sup>188</sup>

75. GUCATI fails to establish that the Judgment is unreasoned on these points, or that a reasonable Trial Panel could not have reached the direct intent finding made. Because of this, any assertion of error in relation to the Trial Panel's interpretation of eventual intent should be summarily dismissed.<sup>189</sup> Even if considered on its merits, the Trial Panel majority correctly found that eventual intent applies to KCC 387 by the

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<sup>183</sup> KSC-CA-2022-01/F00036/RED, paras.114-16.

<sup>184</sup> KSC-CA-2022-01/F00036/RED, paras.117-18.

<sup>185</sup> Judgment, para.604.

<sup>186</sup> KSC-CA-2022-01/F00036/RED, paras.119-21.

<sup>187</sup> KSC-CA-2022-01/F00036/RED, para.120.

<sup>188</sup> Compare Judgment, para.114 (failing to state true information is part of one of the three alternatives for KCC 387's *actus reus*) with para.138 (awareness of the truthfulness of the information found to be part of the *mens rea* requirements for KCC 388).

<sup>189</sup> KSC-CA-2022-01/F00036/RED, paras.123-34.

plain language of KCC 21<sup>190</sup> and its findings on direct intent equally support eventual intent.<sup>191</sup>

76. Finally, HARADINAJ's assertions that the statements of the Accused show an intent different from that falling under KCC 387 are a mere disagreement with the Trial Panel's interpretation of the evidence. HARADINAJ cannot even posit his alternative interpretation without acknowledging that there is some evidence supporting the Trial Panel's interpretation<sup>192</sup> and that the Trial Panel's findings do indicate that HARADINAJ 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'.<sup>193</sup> HARADINAJ fails to establish that no reasonable Trial Panel could have reached a finding of direct intent on the evidence relied upon.

D. SECRECY OF PROCEEDINGS (COUNTS 5 AND 6)<sup>194</sup>

#### **GUCATI Ground 4<sup>195</sup> and HARADINAJ Ground 21<sup>196</sup>**

##### *GUCATI Ground 4(A)*

77. The plain language of KCC 392(1) does not require that the information be disclosed to the perpetrator in the official proceeding. Were such a requirement to exist, '[w]hoever, without authorization, reveals information disclosed in any official proceeding' in KCC 392(1) would have instead read something like '[w]hoever,

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<sup>190</sup> Judgment, paras.119-24.

<sup>191</sup> Judgment, paras.588-605.

<sup>192</sup> KSC-CA-2022-01/F00035/COR2, para.185.

<sup>193</sup> KSC-CA-2022-01/F00035/COR2, para.184.

<sup>194</sup> This section addresses Grounds 4, 6-11 of the GUCATI Appeal and Grounds 21-23 of the HARADINAJ Appeal.

<sup>195</sup> KSC-CA-2022-01/F00036/RED, paras.135-202.

<sup>196</sup> KSC-CA-2022-01/F00035/COR2, paras.188-93.

without authorization, reveals information disclosed *to him or her* in any official proceeding’.

78. GUCATI’s suggested interpretation would also allow for easy circumvention of the protected interest, for example when a third person outside of any proceeding – even on a train<sup>197</sup> - reveals protected information obtained through an accused who received it through formal disclosure.<sup>198</sup> The Trial Panel interprets KCC 392(1) correctly,<sup>199</sup> and no error is established.

#### *GUCATI Ground 4(B)*

79. GUCATI’s arguments under this ground concern whether the information has been declared secret in conformity with the Classification Law. No Kosovo law or regulation, which has not been expressly incorporated into the Law, shall apply to the functions and jurisdiction of the Specialist Chambers.<sup>200</sup> This includes the Classification Law, and GUCATI’s arguments on its applicability should be dismissed.

80. The Trial Panel’s assessment on the secrecy of the information was fully reasoned<sup>201</sup> and, moreover, revealing information declared to be secret is but one way to convict a perpetrator under KCC 392(1). The Indictment clearly also covered the other alternative in KCC 392(1) – which criminalises revealing information which ‘must not be revealed according to law’<sup>202</sup> and the Judgment made a finding on this

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<sup>197</sup> *Contra* KSC-CA-2022-01/F00036/RED, paras.136-41.

<sup>198</sup> GUCATI’s other proffered legal bases under this sub-ground do not protect the secrecy of the proceedings to a comparable degree. KCC 393 (governing contempt of court) requires the existence of a formal ruling/decision/judgment of a court which will often not exist for investigation materials generated by the prosecution. KCC 200 and Article 50 of the Classification Law are not even incorporated by reference into the KSC statutory framework.

<sup>199</sup> Judgment, para.75.

<sup>200</sup> Article 3(4).

<sup>201</sup> Judgment, paras.464-73.

<sup>202</sup> Indictment, para.33. GUCATI never challenged the clarity of the Indictment on this point, KSC-BC-2020-07/F00113/RED.

alternative.<sup>203</sup> GUCATI wilfully misconstrues the Indictment on this point<sup>204</sup> and establishes no error.

*GUCATI Ground 4(C) and 4(D)*

81. GUCATI's arguments on the inapplicability of Rule 106 or Article 62 are in the context of the first alternative of KCC 392(1) (revealing information which must not be revealed according to law). Given that the Trial Panel independently found that the information had also been declared secret within the meaning of the second alternative of KCC 392(1),<sup>205</sup> these grounds can be summarily dismissed once grounds under the second alternative are rejected.

82. GUCATI's submissions also fail on their own merits. In a paragraph of the Judgment neither identified in the Notice nor challenged in the Gucati Appeal, the Trial Panel found that the law at issue under KCC 392(1) either: (i) expressly prohibits the disclosure of that information; or (ii) categorises, classifies or describes the information in a way that implicitly prevents its disclosure.<sup>206</sup> Rule 106 is a protection of internal information held by parties or victims counsel, a protection which is clearly vitiated by an unauthorised third-party disclosure. Article 62 also specifies that SPO records are not public documents of Kosovo and there is no general right to access them. GUCATI fails to establish why these provisions used by the Trial Panel<sup>207</sup> do not fall within its (unchallenged) legal framework. These sub-grounds should be rejected.

*GUCATI Ground 4(E) and HARADINAJ Ground 21*

83. KCC 392(1) covers information 'declared secret by a decision of the court or a competent authority'. The Trial Panel provided a full statutory basis for why both KSC

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<sup>203</sup> Judgment, paras.465-76.

<sup>204</sup> KSC-CA-2022-01/F00036/RED, paras.147, 155.

<sup>205</sup> Judgment, paras.465-73.

<sup>206</sup> Judgment, para.77.

<sup>207</sup> Judgment, para.475.

panels and the SPO are competent authorities within the meaning of KCC 392(1).<sup>208</sup> The term 'secret' must be interpreted in accordance with its ordinary meaning, noting that the specialised understanding of this term in the Classification Law is not incorporated by reference into either KCC 392(1) or the KSC's statutory framework.<sup>209</sup>

84. A competent authority like the SITF/SPO marking or treating information as confidential is naturally understood as declaring this information secret by a decision within the meaning of KCC 392(1).<sup>210</sup> The Trial Panel correctly concluded that the SITF/SPO declared the Batches to be secret within the meaning of KCC 392(1),<sup>211</sup> and GUCATI and HARADINAJ's awkward and forced interpretation of this provision should not be countenanced.

#### *GUCATI Ground 4(F)*

85. GUCATI mentions no parts of the Judgment under this sub-ground, but from his Notice appears to be challenging the finding that there was no evidence that the SPO abusively or unnecessarily declared information to be secret.<sup>212</sup> In doing so, GUCATI fails to set out an error which actually invalidates the conviction because the Trial Panel found both alternatives under KCC 392(1) to be proven.

86. GUCATI points to no evidence that the Trial Panel ignored as to the SPO having unlawfully classified the protected information at issue in this case. Further, and as GUCATI acknowledges in the course of his argument,<sup>213</sup> many pages of the Batches were admitted during trial,<sup>214</sup> not to mention the variety of other evidence carefully

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<sup>208</sup> Judgment, para.78.

<sup>209</sup> *Contra* KSC-CA-2022-01/F00036/RED, paras.169-71; KSC-CA-2022-01/F00035/COR2, paras.191-93. *See also* response to GUCATI Ground 4(B) above.

<sup>210</sup> *Contra* KSC-CA-2022-01/F00036/RED, paras.173-74.

<sup>211</sup> Judgment, paras.470-73.

<sup>212</sup> Judgment, para.472.

<sup>213</sup> KSC-CA-2022-01/F00036/RED, para.183.

<sup>214</sup> Batch 1: P00093-P00097. Batch 2: P00104. Batch 3: P00106-P00119.

considered to establish their confidential contents.<sup>215</sup> Identifying an absence of contrary evidence for proven facts is not reversing the burden of proof,<sup>216</sup> and GUCATI fails to establish that no reasonable Trial Panel could have concluded that the secret information was lawfully declared as such.

*GUCATI Ground 4(G)-(H)*

87. The Trial Panel explained clearly that KCC 392(1) does not incorporate any sort of public interest as a basis for authorisation to reveal secret information.<sup>217</sup> The Trial Panel further explained that public interest would exclude criminal liability, but would not alter or disprove the *actus reus* of the offence.<sup>218</sup> This interpretation is the only way to avoid undermining the purpose of the provision, and GUCATI provides no reason to deviate from the plain language and purposive interpretation adopted by the Trial Panel.

88. As discussed further under HARADINAJ Ground 9, the Trial Panel concluded – following detailed consideration – that the Accused cannot exclude their criminal responsibility for acting in the public interest.<sup>219</sup> The Trial Panel in particular found no basis for concluding that there are any improprieties with the SITE/SPO's cooperation with Serbia. GUCATI's assertions are illogical and unsupported by the evidence. No error is identified.

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<sup>215</sup> Judgment, Section V(D).

<sup>216</sup> *Contra* KSC-CA-2022-01/F00036/RED, para.188.

<sup>217</sup> Judgment, para.487.

<sup>218</sup> Judgment, para.487.

<sup>219</sup> Judgment, paras.810-24.

### **GUCATI Ground 6<sup>220</sup>**

89. GUCATI's arguments under this ground mirror those under his Grounds 4-5, just in the context of KCC 392(2).<sup>221</sup> The responses under those grounds confirm the correctness of the Trial Panel's findings and no error is identified.

### **GUCATI Ground 7<sup>222</sup>**

90. GUCATI misrepresents the Trial Panel's findings when arguing that persons are protected solely in reference to Article 62.<sup>223</sup> The Trial Panel correctly considered Article 62 when evaluating the relevant provisions protecting persons at the KSC.<sup>224</sup> Article 62 was also one of a variety of legal bases for how persons could get protection, such that the Trial Panel's interpretation stands independently of Article 62.

91. GUCATI arguments on consent being a prerequisite to protecting persons are flawed on two levels. First, Article 392(2) sets out no such requirement for protecting persons. Second, the KSC framework sets out no such requirement for protective measures under its framework. What Article 23(1) incorporates into the KSC framework is the protective measures offered under Articles 5-13 of the Witness Protection Law. The application procedure under Article 5(3) of the Witness Protection Law is not so incorporated. The KSC provision actually governing protective measures, namely Rule 80, requires only seeking to obtain the consent of the person.<sup>225</sup> No error is established.

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<sup>220</sup> KSC-CA-2022-01/F00036/RED, paras.214-16.

<sup>221</sup> KSC-CA-2022-01/F00036/RED, paras.214-16.

<sup>222</sup> KSC-CA-2022-01/F00036/RED, paras.217-24.

<sup>223</sup> KSC-CA-2022-01/F00036/RED, paras.217-18.

<sup>224</sup> Judgment, para.95.

<sup>225</sup> Rule 80(2).

### **GUCATI Ground 8(A)<sup>226</sup>**

92. GUCATI's arguments on the definition of a witness stem from the initial misconception that the Trial Panel broadened the definition of the term 'witness' as defined in the Indictment.<sup>227</sup> As noted by the Trial Panel and as can be seen from comparing the definitions, by adopting W04841's definition of a 'witness' the Trial Panel narrowed the scope of the way this term is defined in the Indictment.<sup>228</sup>

93. The Trial Panel adopted a definition based on the evidence,<sup>229</sup> and GUCATI fails to substantiate how adopting this definition amounts to any error. The record is also replete with information that the contents of the Batches included persons with information about a crime, the perpetrator, or important circumstances relevant to SC proceedings.<sup>230</sup> No error is established.

### **GUCATI Ground 8(B)<sup>231</sup>**

94. GUCATI's arguments under this ground are premised on a logical fallacy that marking all investigative information as confidential is incompatible with taking necessary measures to ensure confidentiality under Article 35(2)(f).<sup>232</sup> It is not, and - as both SPO and Defence witnesses testified - such classification is common as a matter of practice.<sup>233</sup> The Trial Panel found that the SPO was a competent classifying authority, that these measures were put in place, and that therefore (potential) witnesses were under protection within the meaning of KCC 392(2).

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<sup>226</sup> KSC-CA-2022-01/F00036/RED, paras.225-33.

<sup>227</sup> KSC-CA-2022-01/F00036/RED, paras.225-26.

<sup>228</sup> Judgment, paras 511-12. *See also* KSC-BC-2020-07/F00281.

<sup>229</sup> Judgment, para.511.

<sup>230</sup> Judgment, Section V(B).

<sup>231</sup> KSC-CA-2022-01/F00036/RED, paras.234-43.

<sup>232</sup> KSC-CA-2022-01/F00036/RED, paras.236, 240.

<sup>233</sup> Judgment, para.426.

95. There is no requirement under KCC 392(2) that an individualised risk assessment be established for each protected person. Moreover, the Indictment does not plead any specific individual as a protected person under Count 6. The GUCATI Defence never sought leave to appeal its challenge to the Indictment on this point.<sup>234</sup> GUCATI fails to establish any error in how persons were protected or the specificity of the Trial Panel's findings.

### **GUCATI Grounds 9-11**<sup>235</sup>

#### *GUCATI Ground 9*

96. GUCATI's arguments are premised on semantics, asserting that the Trial Panel's definition of 'serious consequences' somehow diluted the requirements under KCC 392(3). The Trial Panel indicated that serious consequences 'may include substantial interference with the safety, security, well-being, privacy or dignity of protected persons or their families'.<sup>236</sup> Such an interpretation falls naturally within the meaning of the term, and the Trial Panel's findings more than establish that (potential) witnesses suffered serious consequences.<sup>237</sup> No error is established.

#### *GUCATI Ground 10*

97. GUCATI's Ground 10 is premised on four alleged factual errors: (i) W04842's evidence on relocations (Ground 10(A)); (ii) a passive acceptance of the SPO's risk assessment for two relocated individuals (Ground 10(B)); (iii) that relocated individuals are assumed to have suffered negative consequences (Ground 10(C)); and (iv) that the emergency risk management system was used for anything beyond relocations (Ground 10(D)).

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<sup>234</sup> KSC-BC-2020-07/F00169, para.5.

<sup>235</sup> KSC-CA-2022-01/F00036/RED, paras.244-78.

<sup>236</sup> Judgment, para.100.

<sup>237</sup> Judgment, paras.536-40, 547.

98. *W04842's evidence.* The email concerning W04842<sup>238</sup> was sent pursuant to the standard witness preparation procedure, and his testimony on relocations was easily reconcilable. The Trial Panel clearly explained how it did so.<sup>239</sup> GUCATI merely disagrees with this conclusion, failing to establish that no reasonable Trial Panel could have found W04842 credible on this point.

99. *Risk Assessment for Relocations.* The GUCATI Appeal fails to identify any particular finding in the Judgment on this point and fails to substantiate any error. In any event, the Trial Panel's acceptance of the SPO's risk assessments is based on the evidence, namely W04842's testimony. The Trial Panel did not simply accept the SPO's assertions, but rather evidence from a SPO staff member involved in these risk assessments. GUCATI fails to show that no reasonable Trial Panel could rely on this evidence.

100. *Negative Consequences.* W04842 gave evidence that: (i) relocation is an exceptional measure of last resort and only undertaken when the SPO does not have any other options to protect someone in Kosovo; and (ii) this measure is justified when it is assessed that there is a high level of threat to the witness.<sup>240</sup> GUCATI's arguments that relocated witnesses did not necessarily suffer negative consequences is contrary to the evidence and common sense.

101. *Emergency Risk Management System.* GUCATI misreads the evidence on this point. W04842 described 20-30 witnesses requiring security or protective measures adopted as a result of the revelation of information.<sup>241</sup> This was the basis for the emergency risk planning found by the Trial Panel as falling under KSC 392(3).<sup>242</sup>

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<sup>238</sup> KSC-CA-2022-01/F00036, paras.252-53, 258.

<sup>239</sup> Judgment, para.536.

<sup>240</sup> T.1760-61.

<sup>241</sup> T.1763.

<sup>242</sup> Judgment, paras.537, 547.

Whether all these measures were taken pursuant to emergency risk management plans is a different question,<sup>243</sup> and the Trial Panel took care to distinguish the difference.<sup>244</sup> GUCATI fails to show that no reasonable Trial Panel could rely on W04842's evidence in making its findings under KCC 392(3).

#### *GUCATI Ground 11*

102. For the witness named in paragraph 538 of the Judgment, the Trial Panel found that HARADINAJ specifically named him as being in Batch 3 and had made earlier derogatory comments about him.<sup>245</sup> The Trial Panel found that this conduct, in the context of a climate of witness intimidation in Kosovo, amounted to causing this person serious consequences.<sup>246</sup> These findings are consistent with W04842, who knew the person in question complained about the publishing of the documents but could not recall anything further.<sup>247</sup> GUCATI merely disagrees with these findings, failing to establish that no reasonable Trial Panel could reach these conclusions.

#### **HARADINAJ Ground 22<sup>248</sup>**

103. HARADINAJ's arguments under this ground are exclusively through cross-reference to HARADINAJ Ground 4. This ground has no independent content and should be summarily dismissed.

#### **HARADINAJ Ground 23<sup>249</sup>**

104. HARADINAJ's challenges under this ground are disguised challenges to the Indictment.<sup>250</sup> HARADINAJ was afforded a preliminary motion on the Indictment,

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<sup>243</sup> KSC-CA-2022-01/F00036/RED, para.272.

<sup>244</sup> Judgment, para.537, n.1115.

<sup>245</sup> Judgment, para.538.

<sup>246</sup> Judgment, paras.538, 547.

<sup>247</sup> T.1904, *cited in* KSC-CA-2022-01/F00036/RED, para.276.

<sup>248</sup> KSC-CA-2022-01/F00035/COR2, paras.194-95.

<sup>249</sup> KSC-CA-2022-01/F00035/COR2, paras.196-208.

<sup>250</sup> KSC-CA-2022-01/F00035/COR2, paras.196, 205-06.

complete with interlocutory appeal, and fails to articulate how any of the Trial Panel's findings demonstrate any latent ambiguity with the charges. To the extent HARADINAJ argues he did not receive sufficient opportunity to challenge the SPO case, this is argued and addressed more fully under other grounds.

E. OBSTRUCTION (COUNTS 1 AND 2)<sup>251</sup>

**GUCATI Ground 12<sup>252</sup> and HARADINAJ Ground 18<sup>253</sup>**

*GUCATI Ground 12(A)*

105. KCC 401(1) clearly distinguishes between (attempting to) obstruct by force and (attempting) to obstruct by serious threat.<sup>254</sup> Attempts to read in an additional requirement that the serious threat be one 'of force' have no statutory basis, as correctly found by the Trial Panel.<sup>255</sup> The ordinary meaning of a serious 'threat', without more, connotes no such limitation.<sup>256</sup> Had such an additional requirement been intended, the legislature would have required a 'threat of violence' or 'threat of an imminent danger to the life or body' as these terms are used in other KCC provisions.<sup>257</sup>

106. Notably, past criminal codes in Kosovo expressly required that the threat had to be of force.<sup>258</sup> In drafting the 2012 and 2019 KCC, the legislature intentionally removed this qualification, which is also consistent with the overall purpose of the provision to ensure undisturbed performance of official duties.

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<sup>251</sup> This section addresses Grounds 12-15 of the GUCATI Appeal and Ground 18 of the HARADINAJ Appeal.

<sup>252</sup> KSC-CA-2022-01/F00036/RED, paras.279-91.

<sup>253</sup> KSC-CA-2022-01/F00035/COR2, paras.173-77.

<sup>254</sup> KCC 401(1).

<sup>255</sup> Judgment, para.144.

<sup>256</sup> Black's Law Dictionary Online, 'Threat' ('[a] threat has been defined to be any menace of such a nature and extent as to unsettle the mind of the person on whom it operates [...]').

<sup>257</sup> E.g. KCC 227(3) and 229(2).

<sup>258</sup> PCCK 316(1).

107. GUCATI's arguments attempt to read statutory limitations into KCC 401(1) which simply are not there.

*GUCATI Ground 12(B)-(C) and HARADINAJ Ground 18*

108. In the context of discussions at trial concerning Count 1, 'concurrence' can be in reference to simultaneous elements (i.e. that the obstructing conduct occurs while official duties are being performed)<sup>259</sup> or in relation to the test for cumulative convictions.<sup>260</sup> These GUCATI sub-grounds – both as framed in his Notice and argued in the GUCATI Appeal - concern concurrence only in the context of simultaneous elements.

109. The Trial Panel found that the serious threat must be aimed at obstructing the performance of the official duties before or while they are exercised or expected to be exercised.<sup>261</sup> The Trial Panel then considered that a serious threat towards one or more witnesses could, in principle, obstruct SC/SPO Work<sup>262</sup> The Trial Panel ultimately found that the Batches pertained to the work/investigations of the SITF/SPO ongoing at the time of the offences,<sup>263</sup> ultimately concluding that the Accused attempted to obstruct this SC/SPO Work.<sup>264</sup> As the serious threats were found to be concurrent to the official duties, GUCATI fails to articulate any error.

110. The Trial Panel was also correct in its interpretation that nothing in the plain language requires the serious threat (attempting) to obstruct the official person be specifically directed at only the official person in question.<sup>265</sup> Even the commentary relied upon by the Defence admits that the threat can be addressed against other

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<sup>259</sup> Judgment, para.148. *See also* KSC-BC-2020-07/F00341, para.11.

<sup>260</sup> Judgment, paras.165-70.

<sup>261</sup> Judgment, para.148.

<sup>262</sup> Judgment, paras.638, 647.

<sup>263</sup> Judgment, paras.204, 379-81, 421.

<sup>264</sup> Judgment, para.657.

<sup>265</sup> Judgment, para.146.

persons or even objects.<sup>266</sup> GUCATI and HARADINAJ ignore basic principles of causality in being blind to how seriously threatening (potential) witnesses could obstruct SC/SPO Work.<sup>267</sup> No error is established.

### **GUCATI Ground 13<sup>268</sup>**

111. GUCATI acknowledges that the Trial Panel correctly interpreted the law as to the direct intent required under KCC 401(1).<sup>269</sup> GUCATI then argues that only direct intent suffices for attempted obstruction,<sup>270</sup> but the Trial Panel found there to be direct intent in relation to this count.<sup>271</sup> GUCATI's alleged error is not an error of law, but rather an error as to whether there were sufficient facts for the Trial Panel to apply the law to the facts as it did.

112. The Trial Panel considered that the Accused's intent to intimidate witnesses was a means to prevent the SC/SPO from prosecuting and trying ex-KLA members or undermine the effectiveness of those efforts.<sup>272</sup> The subsequent paragraphs of the Judgment then show how the acts and statements of the Accused qualified under Count 3 as serious threats demonstrate their direct intent under Count 1.<sup>273</sup> The Trial Panel did make the findings complained of as absent by GUCATI, and he manifestly fails to show that no reasonable Trial Panel could have reached the same conclusions on direct intent given these findings.

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<sup>266</sup> Salihu et al. Commentary, pp.1165-66; *Contra* KSC-CA-2022-01/F00035/COR2, para.176, n.171 (offering a contrary interpretation facially inconsistent with the cited passage as a whole).

<sup>267</sup> KSC-CA-2022-01/F00036/RED, para.289; KSC-CA-2022-01/F00035/COR2, paras.175-77.

<sup>268</sup> KSC-CA-2022-01/F00036/RED, paras.292-98.

<sup>269</sup> KSC-CA-2022-01/F00036/RED, para.292. *See also* Judgment, para.153.

<sup>270</sup> KSC-CA-2022-01/F00036/RED, para.298.

<sup>271</sup> Judgment, paras.659-71.

<sup>272</sup> Judgment, para.661.

<sup>273</sup> Judgment, paras.662-70.

#### **GUCATI Ground 14<sup>274</sup>**

113. GUCATI makes the same baseless arguments about the interpretation of KCC 401(2) as he does under KCC 401(1). The arguments made in response to GUCATI Ground 12 apply equally here, with the Trial Panel correctly interpreting that there is no force requirement<sup>275</sup> or issue with simultaneous elements.<sup>276</sup> His misplaced reliance on the *M.I. et al.* judgment in this ground is also addressed above in response to GUCATI Ground 16.

#### **GUCATI Ground 15<sup>277</sup>**

114. In his Notice, GUCATI does not correctly cite to the Judgment paragraph permitting eventual intent under Count 2.<sup>278</sup> He also did not identify the paragraph of the Judgment whereby the participation in the group was defined.<sup>279</sup> GUCATI's Notice is defective in relation to this Ground, and could be dismissed on this basis alone.

115. Even if GUCATI's arguments are considered on their merits, the plain language of KCC 21 applies to KCC 401(2) and therefore eventual intent applies to this provision. The Trial Panel clearly made the requisite findings that Faton KLINAKU was participating in the group<sup>280</sup> and himself had an intent to obstruct SC/SPO officials in SC/SPO Work.<sup>281</sup> GUCATI concedes that three persons in the group is sufficient for this count,<sup>282</sup> and fails to identify any error.

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<sup>274</sup> KSC-CA-2022-01/F00036/RED, paras.299-309.

<sup>275</sup> Judgment, para.162.

<sup>276</sup> Judgment, para.164.

<sup>277</sup> KSC-CA-2022-01/F00036/RED, paras.310-24.

<sup>278</sup> KSC-CA-2022-01/F00036/A01, n.38. The correct paragraph is Judgment, para.172.

<sup>279</sup> Judgment, para.163.

<sup>280</sup> Judgment, paras.685-90.

<sup>281</sup> Judgment, para.700.

<sup>282</sup> KSC-CA-2022-01/F00036/RED, para.317.

F. ALL GROUNDS CONCERNING DEFENCES ARE MERITLESS<sup>283</sup>

**GUCATI Ground 5<sup>284</sup>**

116. In his fifth ground of appeal, GUCATI misstates the applicable law and misrepresents the evidentiary record and the Trial Panel's findings.

117. The assertion that the SPO was required to prove that the source of the leak was not a whistle-blower<sup>285</sup> is unsupported and absurd. The Trial Panel's findings as to why the Appellants did not qualify as whistle-blowers are clear and well-reasoned.<sup>286</sup> GUCATI merely disagrees with the Trial Panel's conclusions rather than showing any erroneous reversal of burden of proof. He fails to establish any error.

118. Contrary to GUCATI's assertion, the Trial Panel did not accept that individuals associated with a whistle-blower are protected '*even if the whistle-blower is unknown to the facilitator*'.<sup>287</sup> In support of this assertion, GUCATI cites a Judgment paragraph offering no such support<sup>288</sup> and Defence expert evidence.<sup>289</sup>

119. GUCATI erroneously states that the Trial Panel 'heard evidence' that an identified serving SPO officer was implicated by a witness as a source of the leak of documents.<sup>290</sup> In support of this assertion, GUCATI cites to a question by Defence Counsel.<sup>291</sup> That is not evidence. GUCATI also cites to a transcript excerpt which only establishes that a SPO staff member heard about the interview of a certain person.<sup>292</sup>

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<sup>283</sup> This section addresses Grounds 5, 17-19 of the GUCATI Appeal and Grounds 9, 11-17 of the HARADINAJ Appeal.

<sup>284</sup> KSC-CA-2022-01/F00036/RED, paras.203-12.

<sup>285</sup> KSC-CA-2022-01/F00036/RED, para.208.

<sup>286</sup> Judgment, paras.829-30.

<sup>287</sup> KSC-CA-2022-01/F00036/RED, para.206 (emphasis in original).

<sup>288</sup> KSC-CA-2022-01/F00036/RED, n.117 *citing* Judgment, para.830.

<sup>289</sup> KSC-CA-2022-01/F00036/RED, n.117 *citing* T.3117-19, 3148-49.

<sup>290</sup> KSC-CA-2022-01/F00036/RED, para.207.

<sup>291</sup> KSC-CA-2022-01/F00036/RED, n.118 *citing* T.2628, lns.13-14.

<sup>292</sup> KSC-CA-2022-01/F00036/RED, n.118 *citing* T.2631, lns.9-14.

No evidence supporting GUCATI's allegation was admitted at trial. The Defence did not even request to interview, or call as a witness, the SPO officer referred to by Defence Counsel.<sup>293</sup>

120. The Trial Panel specifically addressed the two media articles GUCATI refers to as stating that the information they were publishing came from a source in the SPO,<sup>294</sup> correctly finding that the basis for this claim has not been established.<sup>295</sup> GUCATI does not provide any argument to show such a finding was erroneous.

121. GUCATI also ignores relevant Trial Panel findings, such as that there was no indication that the documents delivered to the Appellants on 22 September 2020 were intentionally leaked by the SPO.<sup>296</sup>

122. Critically, nothing in GUCATI's arguments undermines the Trial Panel's finding that even if the Accused were to qualify as whistle-blowers, the interference with their freedom of expression was prescribed by law, necessary, and proportionate.<sup>297</sup> In particular, the Trial Panel found that 'the actions of the Accused went well beyond a legitimate exercise of freedom of speech when they gravely interfered with other legitimate public interests protected by law'.<sup>298</sup>

123. The Trial Panel's findings were based on admitted evidence, including excerpts from the Batches and the Appellant's actions in September 2020 as caught on video. The Trial Panel correctly balanced the arguments and rights at issue, and GUCATI's assertions to the contrary are entirely speculative.<sup>299</sup>

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<sup>293</sup> Judgment, para.878.

<sup>294</sup> KSC-CA-2022-01/F00036/RED, para.207.

<sup>295</sup> Judgment, para.861.

<sup>296</sup> KSC-CA-2022-01/F00036/RED, para.207; Judgment, para.860.

<sup>297</sup> Judgment, paras.820-23, 831.

<sup>298</sup> Judgment, para.822.

<sup>299</sup> KSC-CA-2022-01/F00036/RED, paras.209-11.

## **GUCATI Ground 17<sup>300</sup>**

124. The Trial Panel was aware of, clearly set out, and applied the correct test to establish whether Article 6 of the ECHR was complied with in relation to the Entrapment Claim, including that it falls on the prosecution to prove that there was no entrapment if the accused's allegations are not wholly improbable.<sup>301</sup> GUCATI fails to establish any error of law that invalidates the Judgment.

125. The Trial Panel considered, at length, the numerous Defence arguments concerning the Entrapment Claim and ultimately found that the claim was wholly improbable.<sup>302</sup> The Defence was required to set out an allegation that was not wholly improbable. The Defence failed to do so, and GUCATI fails to establish any error in this finding.

126. GUCATI misrepresents the Trial Panel's considerations and findings. His assertion that the Trial Panel acknowledged that GUCATI alleged he was entrapped in the evidence provided at trial<sup>303</sup> ignores paragraph 857 of the Judgment, where the Trial Panel made it clear he provided inconsistent evidence in this regard, specifically noting GUCATI's claim that nobody but God could force him to call the Three Press Conferences. Further, the Trial Panel did not impliedly acknowledge that the SPO failed to prove there was no entrapment.<sup>304</sup> The Trial Panel made no such assessment.

127. In asserting, in Ground 17B of the GUCATI Notice, that the Trial Panel erred in law by finding the Defence did not clearly explain how the Accused had been entrapped, GUCATI's Notice cites to paragraph 180 of the Judgment,<sup>305</sup> which is entirely unrelated, concerning the objective elements of commission as a mode of

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<sup>300</sup> KSC-CA-2022-01/F00036/RED, paras.332-53.

<sup>301</sup> Judgment, paras.837(iv), 845, 852-53, 879, 890.

<sup>302</sup> Judgment, paras.833-90.

<sup>303</sup> KSC-CA-2022-01/F00036/RED, para.342.

<sup>304</sup> *Contra* KSC-CA-2022-01/F00036/RED, para.338.

<sup>305</sup> KSC-CA-2022-01/F00036/A01, n.45.

liability. The arguments set out in Ground 17B of the GUCATI Appeal do not repeat this allegation of error. Indeed, GUCATI asserts that '[t]he error of TPII was not in failing to understand the allegation of entrapment but how TPII had applied an inappropriate reverse burden and standard of proof [...]'.<sup>306</sup> Accordingly, GUCATI has abandoned Ground 17B as set out in his Notice. Regardless, the Trial Panel assessed the Entrapment Claim as GUCATI sets it out in his Appeal.<sup>307</sup> That the Trial Panel understood the Entrapment Claim is explicitly acknowledged in the GUCATI Appeal.<sup>308</sup>

### **GUCATI Grounds 18-19<sup>309</sup>**

128. GUCATI's Grounds 18 and 19 are founded on speculation and hypotheticals, failing to establish any error of law invalidating the Judgment or error of fact occasioning a miscarriage of justice. In particular, GUCATI fails to establish any error in the finding that the Entrapment Claim was wholly improbable.<sup>310</sup> It is only if his claims were not wholly improbable that the SPO would have to prove there was no entrapment.<sup>311</sup>

129. The Appellant's repeated attempt to rely on Defence Counsel's questions to W04842 and a transcript excerpt which only establishes that W04842 heard about the interview of a certain person as 'evidence' of an SPO officer being implicated by a witness as a source of the leak<sup>312</sup> demonstrates just how unfounded the Entrapment Claim is. The fact that W04842 said he saw an official note in which a witness implicated an SPO officer as a source of the leak of documents<sup>313</sup> does not assist

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<sup>306</sup> KSC-CA-2022-01/F00036/RED, para.351.

<sup>307</sup> Judgment, para.833-90; KSC-CA-2022-01/F00036/RED, para.341.

<sup>308</sup> KSC-CA-2022-01/F00036/RED, para.350.

<sup>309</sup> KSC-CA-2022-01/F00036/RED, paras.354-91.

<sup>310</sup> Judgment, para.890.

<sup>311</sup> Judgment, para.837; *Contra* KSC-CA-2022-01/F00036/RED, paras.362, 368.

<sup>312</sup> KSC-CA-2022-01/F00036/RED, paras.207, 360, 381, 384-385, 387, ns.118, 189, 199; *See* para.119, above.

<sup>313</sup> T.2628.

GUCATI, either. The Defence were provided with this official note and chose not to seek to admit it, not to request to interview or call the relevant SPO officer as a witness,<sup>314</sup> and not to call the individual making the claim as a witness, either. Since the Entrapment Claim was wholly improbable, there was no reason for, let alone obligation on, the SPO to seek to elicit or admit evidence concerning this unfounded allegation.<sup>315</sup>

130. At trial, GUCATI made no attempt to explore the basis of the allegations in the ‘two news articles’ he refers to.<sup>316</sup> GUCATI does not even accurately characterise this evidence. There are not ‘two news articles’.<sup>317</sup> Rather, there is one news article<sup>318</sup> and a connected audio-visual report,<sup>319</sup> both produced by the same media house and issued on the same day.

131. The Trial Panel made no specific finding that the SPO was unable to prevent further deliveries.<sup>320</sup> Rather, it noted the Defence argument inferring that the SPO wanted the three deliveries to be effective and disagreed with the proposed inference.<sup>321</sup> W04841 also did not confirm it was ‘perfectly feasible to have placed the KLA-WVA-HQ and its environs under surveillance’.<sup>322</sup> As the excerpt GUCATI cites in support of this assertion confirms, W04841 merely notes that, had she been tasked to coordinate the investigation, she would have considered surveillance ‘if feasible.’<sup>323</sup>

132. GUCATI fails to demonstrate any error in the Trial Panel findings and assertions on the basis of which he alleges that ‘[t]he approach of TPII was unjust and

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<sup>314</sup> Judgment, para.878.

<sup>315</sup> KSC-CA-2022-01/F00036/RED, paras.382-85.

<sup>316</sup> KSC-CA-2022-01/F00036/RED, paras.360(b), 368.

<sup>317</sup> KSC-CA-2022-01/F00036/RED, paras.360(b), 368.

<sup>318</sup> P00155.

<sup>319</sup> P00156.

<sup>320</sup> *Contra* KSC-CA-2022-01/F00036/RED, paras.372, 374.

<sup>321</sup> Judgment, para.871.

<sup>322</sup> *Contra* KSC-CA-2022-01/F00036/RED, para.375.

<sup>323</sup> KSC-CA-2022-01/F00036/RED, n.195 *citing* T.1151-52.

amounted to an erroneous reversal of the burden of proof'.<sup>324</sup> Neither does he attempt to explain how any alleged error in these assertions invalidated the Judgment.

#### **HARADINAJ Ground 9<sup>325</sup>**

133. HARADINAJ complains of an error of law in the determination that the public interest defence was unavailable under Kosovo law.<sup>326</sup> However, rather than seeking to support his allegation, he merely recites the Trial Panel's findings thereon.<sup>327</sup> Accordingly, this part of his appeal should be rejected *in limine* since it is unsubstantiated.

134. The Trial Panel noted that acts for the public interest are not explicitly listed as grounds excluding criminal responsibility in Rule 95(5) or any other provision of the Law or the Rules, but that it would nevertheless address this claim,<sup>328</sup> which it did at length,<sup>329</sup> ultimately opting to address it in the context of the Accused's freedom of expression and as a potential justification.<sup>330</sup> HARADINAJ establishes no error in this approach.

135. Contrary to HARADINAJ's assertion,<sup>331</sup> the Trial Panel considered Defence arguments concerning the Serbian authorities.<sup>332</sup> Accordingly, there can be no error in terms of the Trial Panel 'failing to consider' this argument.<sup>333</sup>

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<sup>324</sup> KSC-CA-2022-01/F00036/RED, paras.363, 369, 378, 390 ns.191, 193, 198, 202 *citing* Judgment, paras.870-871, 878.

<sup>325</sup> KSC-CA-2022-01/F00035/COR2, paras.108-14.

<sup>326</sup> KSC-CA-2022-01/F00035/COR2, para.108.

<sup>327</sup> KSC-CA-2022-01/F00035/COR2, paras.109, 111-13.

<sup>328</sup> Judgment, para.800.

<sup>329</sup> Judgment, paras.801-24.

<sup>330</sup> Judgment, para.806.

<sup>331</sup> KSC-CA-2022-01/F00035/COR2, paras.108, 113.

<sup>332</sup> Judgment, para.814.

<sup>333</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.108, 113.

136. HARADINAJ provides no reason why the Trial Panel should have taken into account ‘the stance that Serbia has taken over the years towards Kosovo.’<sup>334</sup> He does not even explain what this means, or what specific admitted evidence the Trial Panel should have considered in this regard.

137. The Appellant merely repeats arguments set out and dismissed, at trial, challenging the finding that there is no credible basis to conclude that the protected information revealed by the Accused contained indications of improprieties attributable to the SITF/SPO by relying on irrelevant and/or unfounded allegations, rather than by establishing any error.<sup>335</sup>

#### **HARADINAJ Ground 11**<sup>336</sup>

138. Contrary to HARADINAJ’s assertion,<sup>337</sup> the Trial Panel considered the Defence arguments concerning the allegation of impropriety in SITF/SPO cooperation with the Serbian authorities.<sup>338</sup> It naturally considered this argument in the context of the case before it. Accordingly, there can be no error in terms of the Trial Panel ‘failing to consider’ this argument.<sup>339</sup>

139. HARADINAJ’s ‘clarification’ at paragraph 131, conceding that ‘it is not that malicious and unprovoked prosecutions were necessarily imminent’ supports the Trial Panel’s findings. The argument at trial was that the Accused acted to avert an imminent and unprovoked danger to others in the form of malicious prosecution.<sup>340</sup> Absent ‘an imminent and unprovoked danger’, the requirements of KCC 13 could never be satisfied.

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<sup>334</sup> KSC-CA-2022-01/F00035/COR2, para.113.

<sup>335</sup> KSC-CA-2022-01/F00035/COR2, para.113; Judgment, paras.814, 817.

<sup>336</sup> KSC-CA-2022-01/F00035/COR2, paras.127-34.

<sup>337</sup> KSC-CA-2022-01/F00035/COR2, paras.127, 130.

<sup>338</sup> Judgment, paras.811-17, 910.

<sup>339</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.127, 130.

<sup>340</sup> KSC-BC-2020-07/F00258, para.35(b).

140. HARADINAJ now posits that what was imminent was ‘the risk of prosecution based on one-sided justice’.<sup>341</sup> The same considerations which led the Trial Panel to dismiss the claim of extreme necessity in relation to malicious prosecution apply to this new iteration. Further, HARADINAJ fails to establish that the elements of KCC 13 are satisfied in relation to this iteration or that referred to at trial. HARADINAJ’s argument that the harm created allegedly to avert the danger did not exceed the harm threatened<sup>342</sup> grossly understates the harm of his crimes, once again demonstrating a deliberate choice to ignore a plethora of Trial Panel findings which demonstrate just how grave his actions were.<sup>343</sup>

### **HARADINAJ Grounds 12 and 13<sup>344</sup>**

141. Ground 12 in the HARADINAJ Notice and that in the HARADINAJ Appeal are unrelated. The former alleged an error of law in relation to the determination that ‘the whistleblower protection that is part of the Kosovo legal framework is not directly applicable in the context of the SC proceedings’<sup>345</sup> while the latter alleges an error of 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.’<sup>346</sup> In his Appeal, HARADINAJ makes no submissions related to the subject of Ground 12 as set out in his Notice.

142. Further, since the HARADINAJ Notice makes no mention, in Ground 12 or elsewhere, of an alleged error of law due to the Trial Panel failing to investigate the source of the items made public by the Accused without authorisation,

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<sup>341</sup> KSC-CA-2022-01/F00035/COR2, para.131.

<sup>342</sup> KSC-CA-2022-01/F00035/COR2, para.133.

<sup>343</sup> *See, e.g.*, Judgment, paras.988-96, 1004.

<sup>344</sup> KSC-CA-2022-01/F00035/COR2, paras.135-44.

<sup>345</sup> KSC-CA-2022-01/F00029, para.16.

<sup>346</sup> KSC-CA-2022-01/F00035/COR2, para.135.

HARADINAJ's submissions on this issue in Grounds 12 and 13 of his Appeal<sup>347</sup> go beyond the scope of his Notice and, to that extent, should be rejected *in limine*.<sup>348</sup>

143. Finally, both Grounds 12 and 13 as set out in the HARADINAJ Notice relate to the issue of whistleblowers, as evidenced by their phrasing and citations.<sup>349</sup> However, HARADINAJ's arguments on Grounds 12 and 13 as set out in his Appeal relate exclusively to the Entrapment Claim.<sup>350</sup> Accordingly, the entirety of HARADINAJ's submissions in Grounds 12 and 13 go beyond the scope of the notice provided and the Appeals Panel should reject them in their entirety *in limine*.

144. Should the Appeals Panel decide to consider HARADINAJ's unnoticed arguments, the SPO responds as follows.

145. The Trial Panel provided the Defence with every opportunity to present arguments on the Entrapment Claim.<sup>351</sup> In line with ECtHR jurisprudence, the Appellant was effectively able to raise the issue of incitement during his trial.<sup>352</sup> Beyond expressing regret that the Trial Panel dismissed a number of his requests, HARADINAJ refers to no further steps he believes should have been taken to ensure his rights were respected.<sup>353</sup> There were no such other steps to take, and the Trial Panel fully safeguarded his rights.

146. There has been no reversal of burden.<sup>354</sup> On appeal, HARADINAJ continues to espouse unfounded and alternative theories on the provenance of the items he made

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<sup>347</sup> KSC-CA-2022-01/F00035/COR2, paras.135, 143

<sup>348</sup> *Sesay et al.* AJ, para.466, n.1198.

<sup>349</sup> KSC-CA-2022-01/F00029, paras.16-17, ns.26-27 *citing* Judgment, paras.826 and 830, respectively.

<sup>350</sup> Indeed, despite the fact that the language in GUCATI Notice Ground 5 is almost identical to that in HARADINAJ Notice Ground 13, the SPO responds to GUCATI Ground 5 separately since it actually deals with whistleblower status.

<sup>351</sup> Judgment, paras.841-849.

<sup>352</sup> *Ramanauskas 2008*, para.69.

<sup>353</sup> KSC-CA-2022-01/F00035/COR2, para.143.

<sup>354</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.135-36, 144.

public without authorisation.<sup>355</sup> The HARADINAJ Appeal itself notes that the form which the alleged entrapment took ‘is unclear.’<sup>356</sup>

147. HARADINAJ merely refutes the Trial Panel’s finding that the Entrapment Claim is ‘wholly improbable and unfounded’,<sup>357</sup> simply asserting that his claim of entrapment/incitement was *prima facie* credible and that there was evidence that the source of the leak was the SPO.<sup>358</sup> HARADINAJ’s submissions on these grounds are once again riddled with inaccuracies, misrepresenting the evidence and the Judgment.

148. His allegation of a lack of evidence that he ‘invited the leak of the documents’<sup>359</sup> ignores a plethora of evidence that he and GUCATI invited persons to provide the KLA WVA with more documents with the promise they would make them public.<sup>360</sup> The assertion that ‘no action was taken by the SPO or KSC [...] to prevent or dissuade the Appellant from disclosing any information given to him in the future’<sup>361</sup> ignores the evidence of three judicial/SPO orders.<sup>362</sup>

149. The Appellants’ requests for disclosure of items, including those related to the source of the documents made public without authorisation, were all carefully considered by the Trial Panel.<sup>363</sup> HARADINAJ’s allegation that the Trial Panel demonstrated a presumption in favour of the SPO in noting that ‘there is no indication that [Batch 3] was intentionally leaked by the SPO’<sup>364</sup> is yet another bald claim of bias with no credible basis.

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<sup>355</sup> KSC-CA-2022-01/F00035/COR2, paras.136, 138.

<sup>356</sup> KSC-CA-2022-01/F00035/COR2, para.172.

<sup>357</sup> Judgment, para.890.

<sup>358</sup> KSC-CA-2022-01/F00035/COR2, paras.135-37, 143.

<sup>359</sup> KSC-CA-2022-01/F00035/COR2, para.140(a).

<sup>360</sup> See, e.g. Judgment, paras.264, 281, 856.

<sup>361</sup> KSC-CA-2022-01/F00035/COR2, para.140(b).

<sup>362</sup> See, e.g. Judgment, paras.228-231, 256-58, 285.

<sup>363</sup> *Contra* KSC-CA-2022-01/F00035/COR2, para.140(c); See also response to GUCATI Ground 2(A) and HARADINAJ Ground 4.

<sup>364</sup> KSC-CA-2022-01/F00035/COR2, para.142; Judgment, para.860.

## HARADINAJ Grounds 14-15<sup>365</sup>

150. While the HARADINAJ Notice refers to different issues in Grounds 14 and 15,<sup>366</sup> the HARADINAJ Appeal addresses only one such issue in Grounds 14 and 15, corresponding solely to Ground 15 of his Notice. Accordingly, the SPO considers that HARADINAJ has decided not to pursue the issues referred to in Ground 14 of his Notice.

151. Prior to his appeal, HARADINAJ had never specifically made the argument that his conduct constituted an act of minor significance within the meaning of KCC 11. Such an argument was only mentioned, without elaboration, in one sentence in the *GUCATI* Pre-Trial Brief.<sup>367</sup> It did not feature at trial, being entirely absent from Defence Final Trial Briefs and oral closing arguments. Accordingly, the Appeals Panel could dismiss these grounds *in limine*.

152. Regardless, due to the minimalistic reference in the *GUCATI* Pre-Trial Brief, the Trial Panel specifically addressed, and rejected, this argument.<sup>368</sup> The Trial Panel's reliance on the fact that the offences for which the Accused were convicted incur significant sentences was a relevant factor in coming to this conclusion, but the Trial Panel also considered, *inter alia*, that the offences protected important interests, that the scope of the crimes was broad, and the manner the crimes were committed indiscriminate.<sup>369</sup> Although the Trial Panel did not explicitly refer to the argument of the information already being in the public domain in the context of its assessment of a defence under KCC 11,<sup>370</sup> it considered and dismissed this argument elsewhere in the Judgment.<sup>371</sup> Indeed, the protected nature of the documents made public is a

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<sup>365</sup> KSC-CA-2022-01/F00035/COR2, paras.145-55.

<sup>366</sup> KSC-CA-2022-01/F00029, paras.18-19.

<sup>367</sup> KSC-BC-2020-07/F00258, para.35(d).

<sup>368</sup> Judgment, paras.921-26.

<sup>369</sup> Judgment, paras.924-25; *Contra* KSC-CA-2022-01/F00035/COR2, para.147(b).

<sup>370</sup> KSC-CA-2022-01/F00035/COR2, paras.145, 149, 152; Judgment, paras.921-26.

<sup>371</sup> Judgment, paras.488-89, 524.

central element of, *inter alia*, Counts 5 and 6, under which the Appellants were convicted.

153. The Appellant cites no factual evidence to support his assertions that ‘a number of individuals said to be protected and thus “exposed” by the Appellant’s disclosures are in fact publicly known’.<sup>372</sup> In relation to one witness mentioned in Batch 3, while there is evidence that his collaboration with the SITF or SPO was publicly known,<sup>373</sup> the SPO had never confirmed whether this or any other person was a witness in its developing investigations.

154. The Appellant’s contentions concerning the number of witnesses whose data was disclosed by the Appellant, the indiscriminate nature of the Appellant’s actions, and the confidentiality of the items made public without authorisation merely challenge the Trial Panel’s findings thereon, without articulating any reasons which could establish error.<sup>374</sup> The Appellant also improperly seeks to rely on an item that was not admitted into evidence.<sup>375</sup>

#### **HARADINAJ Ground 16<sup>376</sup>**

155. HARADINAJ fails to specifically identify the material in relation to which he alleges the Trial Panel erred in authorising non-disclosure in HARADINAJ Ground 16. To the extent this relates to the official note addressed in the SPO response to GUCATI Grounds 18-19, the SPO relies on those submissions.

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<sup>372</sup> KSC-CA-2022-01/F00035/COR2, para.147(a).

<sup>373</sup> T.1315.

<sup>374</sup> KSC-CA-2022-01/F00035/COR2, paras.147(c)(d), 152-54.

<sup>375</sup> KSC-CA-2022-01/F00035/COR2, n.141.

<sup>376</sup> KSC-CA-2022-01/F00035/COR2, paras.156-61.

156. HARADINAJ also fails to refer to a single instance of the Trial Panel making ‘material determinations of fact’<sup>377</sup> on the basis of any undisclosed items. The SPO relies on its response to HARADINAJ Ground 17 in relation to this argument.

157. There is no item admitted into evidence that the Defence was barred from commenting on or challenging. As set out in the Judgment, the *ex parte* hearings referred to by HARADINAJ<sup>378</sup> were specifically held to ‘ensure that the Defence can effectively and fully raise its claim’ and explore effective counterbalancing measures should non-disclosure be ordered.<sup>379</sup> The Trial Panel specifically noted that ‘[d]uring these hearings, a primary concern of the Panel was to ensure that no prejudice or unfairness was caused to the Defence as a result of the *ex parte* nature of these sessions.’<sup>380</sup> Crucially, the purpose of such hearings and litigation was to determine if the Appellant ‘had a right to see and consider’<sup>381</sup> the items which the SPO sought non-disclosure of. Providing the Appellant with those items before the Trial Panel’s determination would have defeated the purpose of the entire process.

#### **HARADINAJ Ground 17<sup>382</sup>**

158. To the extent HARADINAJ takes issue with the fact that the Trial Panel had access (for the purposes of assessing requests for non-disclosure) to certain items that HARADINAJ did not,<sup>383</sup> this essentially constitutes a challenge to Rule 108. The procedure set out in this rule is necessary and logical, and HARADINAJ establishes no inherent unfairness therein,<sup>384</sup> or in the Trial Panel’s implementation thereof in the

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<sup>377</sup> KSC-CA-2022-01/F00035/COR2, para.156.

<sup>378</sup> KSC-CA-2022-01/F00035/COR2, paras.158-59.

<sup>379</sup> Judgment, para.844.

<sup>380</sup> Judgment, para.844. Allegations of ‘*ex parte* collaboration between the SPO and the Trial Chamber in backroom sessions’ are patently false. They are wholly unsupported even on the material cited by HARADINAJ, *Contra* KSC-CA-2022-01/F00035/COR2, para.160, n.151.

<sup>381</sup> KSC-CA-2022-01/F00035/COR2, para.159.

<sup>382</sup> KSC-CA-2022-01/F00035/COR2, paras.162-72.

<sup>383</sup> See KSC-CA-2022-01/F00035/COR2, paras.162, 167.

<sup>384</sup> See also *Ntaganda AJ*, para.122.

decisions he challenges<sup>385</sup> concerning disclosure of items related to the Entrapment Claim.<sup>386</sup>

159. Once again, HARADINAJ merely recites the procedural history and expresses dissatisfaction with the outcome,<sup>387</sup> which he did not seek to challenge further at trial. No submissions not already considered by the Trial Panel and correctly dismissed are made.

160. HARADINAJ fails to show how the information the Trial Panel authorised the SPO to redact or withhold, described in detail in the relevant decisions,<sup>388</sup> could have assisted him.

161. The Judgment transparently and fairly sets out the numerous steps undertaken by the Trial Panel to ensure that the Defence was given every opportunity to present its Entrapment Claim.<sup>389</sup> HARADINAJ fails to show that the Trial Panel acted in any way inconsistent with the ECtHR principles he sets out.<sup>390</sup> The Trial Panel did not merely accept SPO proposals on counterbalancing measures, ordering further disclosure where deemed necessary.<sup>391</sup>

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<sup>385</sup> KSC-CA-2022-01/F00035/COR2, paras.167-72.

<sup>386</sup> KSC-BC-2020-07/F00413; KSC-BC-2020-07/F00435.

<sup>387</sup> KSC-CA-2022-01/F00035/COR2, paras.167-72.

<sup>388</sup> *See, e.g.* KSC-BC-2020-07/F00435, paras.20-25.

<sup>389</sup> Judgment, paras.841-51.

<sup>390</sup> KSC-CA-2022-01/F00035/COR2, paras.164-66. *See also Paci*, para.85; *Rowe and Davis*, para.61.

<sup>391</sup> KSC-BC-2020-07/F00413, paras.67-68.

G. THE DETERMINED SENTENCE WAS A PROPER EXERCISE OF DISCRETION<sup>392</sup>

162. The Trial Panel was vested with broad discretion in determining the appropriate sentence due to its obligation to individualise the penalties to fit the circumstances and the gravity of the Appellants' crimes.<sup>393</sup>

163. The Appeals Panel should not vary or overturn the sentence since there has been no discernible error in the exercise of discretion, and the Trial Panel followed the applicable law.<sup>394</sup> In particular, the Trial Panel did not give weight to extraneous or irrelevant considerations, did not fail to give weight or sufficient weight to relevant considerations, made no clear error as to the facts upon which it exercised its discretion, and its decision was by no means unreasonable or plainly unjust.<sup>395</sup>

164. The Appellants largely fail to explain how the alleged errors in sentencing impact the sentence,<sup>396</sup> and fail to demonstrate how the Trial Panel ventured outside its discretionary framework in imposing the sentence.<sup>397</sup>

*Correctly considered the climate of witness intimidation*<sup>398</sup>

165. HARADINAJ fails to establish any error in the Trial Panel's assertion that '[t]he evidence points at the existence of a prevalent climate of witness intimidation in Kosovo'.<sup>399</sup> This assertion is supported by evidence beyond that of HARADINAJ's

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<sup>392</sup> This section addresses Ground 20 of the GUCATI Appeal and Ground 24 of the HARADINAJ Appeal.

<sup>393</sup> *Mladić* AJ, para.539; *Taylor* AJ, para.30; *Nyiramasuhuko et al.* AJ, para.3349; *Ntaganda* SAJ, para.21.

<sup>394</sup> *Mladić* AJ, para.539; *Taylor* AJ, para.30; *Nyiramasuhuko et al.* AJ, para.3349.

<sup>395</sup> *Mladić* AJ, para.539; *Sesay et al.* AJ, para.1203.

<sup>396</sup> Practice Direction, Article 48(1)(b)(3).

<sup>397</sup> *Mladić* AJ, para.539; *Kayishema and Ruzindana* AJ, para.338; *Semanza* AJ, para.312.

<sup>398</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.211-16.

<sup>399</sup> Judgment, para.577.

own expert witness,<sup>400</sup> also relying on evidence from the Appellants themselves, an SPO witness, and the findings of other courts and tribunals.<sup>401</sup>

166. The argument that such a climate did not exist in September 2020<sup>402</sup> was specifically addressed, and rejected, by the Trial Panel.<sup>403</sup> HARADINAJ adds nothing to previous submissions in this regard, and ignores the fact that the Trial Panel considered both historic and more contemporaneous evidence.<sup>404</sup> The Trial Panel's reference to SPO emergency risk management plans being put in place in the two years before September 2020<sup>405</sup> shows that witness intimidation was by no means an issue of the past. HARADINAJ misunderstands and misrepresents this reference, which demonstrates no 'prejudice'.<sup>406</sup>

167. Finally, the Trial Panel did not consider the climate of witness intimidation as an aggravating factor;<sup>407</sup> rather, it noted it in the context of its assessment of gravity.<sup>408</sup> The Trial Panel was fully entitled to do so, and the Defence fails to explain how the alleged error impacts the sentence,<sup>409</sup> let alone establish any error in this regard.

*Properly considered fundamental rights*<sup>410</sup>

168. HARADINAJ fails to refer to a single instance where the Trial Panel allegedly erroneously relied on his exercising his legitimate right to free speech and expression

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<sup>400</sup> *Contra* KSC-CA-2022-01/F00035/COR2, para.212.

<sup>401</sup> Judgment, paras.577-580, ns.1221-27, 1229-32.

<sup>402</sup> KSC-CA-2022-01/F00035/COR2, paras.212-13.

<sup>403</sup> Judgment, para.579.

<sup>404</sup> *See* Judgment, paras.569-75.

<sup>405</sup> Judgment, para.579.

<sup>406</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.214-15.

<sup>407</sup> Judgment, paras.996-97; *Contra* KSC-CA-2022-01/F00035/COR2, paras.213, 216.

<sup>408</sup> Judgment, para.993.

<sup>409</sup> Article 48(1)(b)(3) of the Practice Direction.

<sup>410</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.217-22.

in imposing its sentence,<sup>411</sup> and again fails to explain how the alleged error impacts the sentence.

169. Nothing in the Judgment suggests a finding that HARADINAJ's mere appearances on media programmes were in and of themselves criminal, or that such appearances, as opposed to certain words uttered during such appearances, were given any particular weight in sentencing.<sup>412</sup> The Trial Panel was clearly aware of the distinction between a legitimate exercise of freedom of speech and acts going beyond such exercise.<sup>413</sup> It was not obliged to list specific actions or assertions by the Appellants that it deemed *not* to be criminal in and of themselves, as HARADINAJ, without any basis, seems to imply was required.<sup>414</sup>

*Properly individualised the sentence*<sup>415</sup>

170. The Trial Panel took note of the range of sentences imposed on persons convicted of similar offences at international courts or tribunals but, having regard to the specific circumstances of this case, ultimately considered that the Appellants' sentence should take into consideration the facts and circumstances of this and no other case.<sup>416</sup> This approach is logical, in particular in view of there being no case directly comparable to the present one, and in line with established jurisprudence.<sup>417</sup> The Trial Panel committed no error in its approach.

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<sup>411</sup> KSC-CA-2022-01/F00035/COR2, p.83, sub-heading (b), paras.221-22.

<sup>412</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.220-22.

<sup>413</sup> Judgment, para.822; *Contra* KSC-CA-2022-01/F00035/COR2, para.219.

<sup>414</sup> KSC-CA-2022-01/F00035/COR2, paras.219, 221.

<sup>415</sup> *Contra* KSC-CA-2022-01/F00035/COR2, paras.223-231 and KSC-CA-2022-01/F00036/RED, paras.420-26. The Appeals Panel should reject Annex 3 to the GUCATI Appeal, a transparent attempt to circumvent the word limit.

<sup>416</sup> Judgment, paras.957, 979, 1004, n.2012.

<sup>417</sup> *Taylor* AJ, para.705; *Čelebići* AJ, para.821; *Al Khayat* Reasons, para.22; *Tabaković* SJ, para.15; *Babić* AJ, paras.32-33; *Bulatović* Appeal Decision, para.62; *D.Milošević* AJ, para.326; *2010 Šešelj Contempt* AJ, para.41.

171. Indeed, the *Lubanga* Trial Chamber, referred to by HARADINAJ,<sup>418</sup> adopted much the same approach - it referred to sentences for similar offences imposed by the SCSL, but then went on to impose a sentence not comparable to those imposed by the SCSL.<sup>419</sup> The *Lubanga* Appeals Chamber found no error in this approach.<sup>420</sup>

172. While referring to contempt cases resulting in lower sentences, the Appellants fail to make a convincing case as to why the circumstances of these cases were so similar to their own that their greater sentence was unjustified.<sup>421</sup>

173. All the cases cited by HARADINAJ as allegedly comparable to that of the Appellants<sup>422</sup> were specifically noted by the Trial Panel in the context of its considerations on sentencing.<sup>423</sup> The cases cited by HARADINAJ cannot be considered comparable to the case against the Appellants. By way of example, the number of witnesses whose identity was disclosed cannot compare to the number in this case. In *Marijačić and Rebić* and in *Jović*, the unauthorized disclosure concerned one witness, while *Al Khayat*<sup>424</sup> concerned three. The Appellants were convicted in relation to the unauthorized revelation of the names and personal details of *hundreds* of Witnesses and Potential Witnesses.<sup>425</sup> Further, in imposing the penalty in *Marijačić and Rebić* the Trial Chamber seemed to accept that at the time of the unauthorized publication at issue there was no purpose being served by the continuing protective measures.<sup>426</sup> In *Jović*, the one witness at issue had publicly acknowledged that he had provided a

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<sup>418</sup> KSC-CA-2022-01/F00035/COR2, para.225.

<sup>419</sup> *Lubanga* SJ, paras.12-15, 107.

<sup>420</sup> *Lubanga* SAJ, paras.74-79.

<sup>421</sup> *2010 Šešelj Contempt* AJ, para.41.

<sup>422</sup> KSC-CA-2022-01/F00035/COR2, paras.226-29.

<sup>423</sup> Judgment, n.2012.

<sup>424</sup> *Al Khayat* TJ, para.91. *Al Khayat* was acquitted on appeal, *Al Khayat* AJ.

<sup>425</sup> Judgment, para.1004.

<sup>426</sup> *Marijačić and Rebić* TJ, para.47.

statement and testified in a prior case, which the Trial Chamber deemed to constitute a 'significant mitigating factor'.<sup>427</sup>

174. The same can be said of other cases cited by GUCATI, whose assertion that his sentence was disproportionate in particular because his case did not, he alleges, contain a number of features present in contempt cases before other courts<sup>428</sup> is illogical, especially when one considers the facts of those cases, which are not comparable. The reasons set out by the Trial Panel in deciding to take into consideration the facts and circumstances of this and no other case<sup>429</sup> make the distinction between these cases and the futility of any exercise in comparison obvious. In particular, no cited case included, for example, unauthorised disclosure of an internal document analysing evidence and applicable law in relation to persons of interest *and* identifying information in relation to a large number of witnesses.

175. The fact that GUCATI argues, for example, that the sentence in a case where the wives and friend of the accused in a trial plead guilty to calling out one protected witness by her first name and to threatening and intimidating her on that occasion<sup>430</sup> should serve as some guidance for the Appellant's sentence defies belief.

176. Yet again, the Defence fails to explain how the alleged error impacts the sentence.<sup>431</sup>

*Properly dismissed irrelevant considerations*<sup>432</sup>

177. HARADINAJ's assertion that the 'the TP has absolved all journalists, specifically but not necessarily limited to Witness W04866, of any criminal

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<sup>427</sup> Jović TJ, para.26.

<sup>428</sup> KSC-CA-2022-01/F00036/RED, para.425.

<sup>429</sup> Judgment, para.979.

<sup>430</sup> See Brima SJ, cited at KSC-CA-2022-01/F00036/RED, para.425(a).

<sup>431</sup> Practice Direction, Article 48(1)(b)(3).

<sup>432</sup> Contra KSC-CA-2022-01/F00035/COR2, para.232.

responsibility despite acting over and above the Appellant'<sup>433</sup> completely ignores paragraph 16 of the Judgment, in which the Trial Panel explicitly noted that it refrains from making any finding as to the criminal responsibility of such individuals.

178. The fact that persons other than the Appellants were not charged is irrelevant to sentencing. It is logical that a sentence should be one that reflects the gravity of the totality of the *convicted person's* culpable conduct and the individual circumstances of the *convicted person*,<sup>434</sup> not that of anyone else. HARADINAJ fails to clearly articulate the basis for any error in relation to the fact that the Appellants, not other individuals, were charged in this case, let alone establish any such error.<sup>435</sup>

*Considered relevant factors*<sup>436</sup>

179. The Trial Panel properly assessed the gravity of the Appellants' criminal conduct, considering relevant factors and setting out several reasons for the finding that the crimes committed by the Appellants were grave, including the nature, volume and scope of the information disclosed without authorisation.<sup>437</sup> It also explicitly acknowledged certain factors which could detract from the gravity of the crimes.<sup>438</sup> GUCATI merely disagrees with the conclusions that the Trial Panel drew from the available facts or the weight it accorded to particular factors, which does not suffice to establish error.<sup>439</sup>

180. The Trial Panel correctly stated that a sentence must reflect the totality of the accused's criminal conduct and overall culpability.<sup>440</sup> It made no error in not giving

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<sup>433</sup> KSC-CA-2022-01/F00035/COR2, p.87, sub-heading (d).

<sup>434</sup> *Taylor* AJ, para.664; *Čelebići* AJ, para.717.

<sup>435</sup> KSC-CA-2022-01/F00035/COR2, para.232.

<sup>436</sup> *Contra* KSC-CA-2022-01/F00036/RED, paras.393-406.

<sup>437</sup> Judgment, paras.962-68, 987-93.

<sup>438</sup> Judgment, paras.969, 973, 994, 998.

<sup>439</sup> KSC-CA-2022-01/F00036/RED, paras.398-401; KSC-BC-2020-07/IA001/F00005, para.64.

<sup>440</sup> Judgment, para.939.

weight to extraneous considerations, such as convictions that were not entered or conduct which was not charged.<sup>441</sup>

181. GUCATI ignores several findings concerning his level of intent,<sup>442</sup> which the Trial Panel adequately reflected in its sentence. He asserts that the Trial Panel ‘did not take into account its findings that Gucati had no intention to obstruct any KSC Judge for [its] sentence’,<sup>443</sup> entirely ignoring the fact that the Trial Panel found ‘that the Accused acted with awareness of, and desire for, obstructing SC/SPO Officials in performing SC/SPO Work.’<sup>444</sup>

182. The argument that the observation that GUCATI mostly revealed protected information to the professional media ‘reduced risk and ought to have been reflected in the sentence’<sup>445</sup> ignores, *inter alia*, the finding that ‘[t]his massive amount of information was revealed in an indiscriminate manner, without any effective precaution, such as redaction of names or selective revelation of information, and a general indifference to the possible consequences of such acts.’<sup>446</sup>

183. The basis for the GUCATI conclusions as to how many persons were found to have suffered ‘substantial interference’ is unspecified and unclear.<sup>447</sup> Regardless, these submissions once again ignore numerous findings relevant to sentencing, including that the amount of information revealed indiscriminately without authorisation was ‘massive’,<sup>448</sup> that such information was broadly disseminated,<sup>449</sup> and that ‘these acts could have had the effect of preventing the SC/SPO from fulfilling its mandate and

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<sup>441</sup> Judgment, paras.970, 973.

<sup>442</sup> Compare KSC-CA-2022-01/F00036/RED, para.395, n.204 with, *e.g.*, Judgment, paras.492-500, 542, 545-47, 603-05, 659-62, 664-67, 669-71, 698-99.

<sup>443</sup> KSC-CA-2022-01/F00036/RED, para.397.

<sup>444</sup> Judgment, paras.146, 671.

<sup>445</sup> KSC-CA-2022-01/F00036/RED, para.396.

<sup>446</sup> Judgment, para.964 (footnote omitted).

<sup>447</sup> KSC-CA-2022-01/F00036/RED, para.404.

<sup>448</sup> Judgment, para.964.

<sup>449</sup> Judgment, para.967.

could have resulted in victims of crimes under SC jurisdiction being denied their right to truth and to have access to justice'.<sup>450</sup>

184. GUCATI's argument that a witness named by the Appellants made his cooperation with the SPO public should have been considered specifically in mitigation<sup>451</sup> was not argued at trial and, as such should be dismissed *in limine*. Regardless, this action would not have deprived the witness of protection.<sup>452</sup> Further, the Appellants were found to have revealed the identity and/or personal data of hundreds of Witnesses and Potential Witnesses,<sup>453</sup> not of one witness as in the *Jović* case cited by GUCATI.<sup>454</sup>

*Relied on relevant evidence in assessing gravity*<sup>455</sup>

185. For the reasons set out above,<sup>456</sup> the Trial Panel did not err in relying, *inter alia*, on W04841's and/or W04842's evidence for the purposes of sentencing.

*Properly reflected the roles of the Accused*<sup>457</sup>

186. GUCATI fails to establish any error in the sentence determined in relation to Count 3. The assertion that the Trial Panel focused on HARADINAJ in relation to this count<sup>458</sup> is inaccurate and misrepresents the relevant findings,<sup>459</sup> which include that: (i) *both* Appellants revealed the identity and/or personal data of hundreds of Witnesses and Potential Witnesses,<sup>460</sup> vowed to make public any new SC/SPO

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<sup>450</sup> Judgment, para.968.

<sup>451</sup> KSC-CA-2022-01/F00036/RED, para.406.

<sup>452</sup> T.1759-60.

<sup>453</sup> Judgment, para.559.

<sup>454</sup> KSC-CA-2022-01/F00036/RED, para.406, n.214.

<sup>455</sup> *Contra* KSC-CA-2022-01/F00036/RED, paras.407-10.

<sup>456</sup> *See* response to GUCATI Ground 2(A) and HARADINAJ Ground 4, and GUCATI Ground 2(B).

<sup>457</sup> *Contra* KSC-CA-2022-01/F00036/RED, paras.411-19; KSC-CA-2022-01/F00035/COR2, para.209.

<sup>458</sup> KSC-CA-2022-01/F00036/RED, para.413.

<sup>459</sup> *Compare, e.g.* KSC-CA-2022-01/F00036/RED, para.418 with Judgment, paras.570-75.

<sup>460</sup> Judgment, para.559.

documents received,<sup>461</sup> made repeated statements to the effect that the SC/SPO was unable to guarantee the privacy and security of those witnesses,<sup>462</sup> made repeated derogatory and disparaging remarks about witnesses,<sup>463</sup> and never took any measures to limit the revelation of names;<sup>464</sup> and (ii) GUCATI in particular, *inter alia*, described witnesses as liars, asylum seekers or tools of political parties who fabricated their evidence,<sup>465</sup> and referred to them as traitors.<sup>466</sup>

187. The Trial Panel noted that it accepted that ‘through this repeated conduct, Mr Gucati did not publicly name any witness and [...] he participated in fewer media appearances than Mr Haradinaj’ but went on to note that ‘[n]onetheless, the evidence shows that Mr Gucati repeated his acts, despite three orders to desist, with considerable determination, consistently vowing to continue publishing material received from the SC/SPO’.<sup>467</sup> Such considerations indicate that the Trial Panel properly identified and weighed the relevant factors. GUCATI’s allegations of error in this regard are unfounded and speculative.

188. Finally, the overall sentence ultimately imposed on GUCATI is that which reflects the totality of his criminal conduct and the multiple offences he committed. GUCATI fails to show how any error materially affected the sentence actually imposed so as to render it disproportionate to the overall culpability of his conduct.

189. HARADINAJ also fails to establish any error in relation to the weight given to his role. Beyond asserting that ‘the sentence failed to appropriately reflect the role of the Defendant despite recognising that he did not have a “leadership role”’,<sup>468</sup> he

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<sup>461</sup> Judgment, para.562.

<sup>462</sup> Judgment, para.566.

<sup>463</sup> Judgment, para.569.

<sup>464</sup> Judgment, para.590.

<sup>465</sup> Judgment, para.570.

<sup>466</sup> Judgment, para.574.

<sup>467</sup> Judgment, para.971.

<sup>468</sup> KSC-CA-2022-01/F00035/COR2, para.209.

makes no submissions in relation thereto. HARADINAJ's sub-ground should be dismissed *in limine*. Although the Trial Panel was not satisfied that he acted as a leader of the group, it noted HARADINAJ's significant role as a member thereof and provided a reasoned explanation as to why it imposed the same sentence on both Appellants in relation to Count 2.<sup>469</sup>

### *Conclusion*

190. The sentence adequately reflects the gravity of the crimes for which the Appellants were convicted. The Appellants fail to establish any error in the sentence imposed. Their appeals should be rejected and the sentence confirmed.

## **IV. Classification and disclosure declaration**


191. The present brief is submitted confidentially in accordance with Rule 82(4). The SPO has no objection to reclassifying this brief as public.

192. Subject to pending litigation, and in accordance with Rule 179(5), as of filing the SPO has disclosed all material in its custody or control falling under its disclosure obligations.

## **V. Relief sought**

193. For the reasons above, the relief sought in the Appeals should be rejected.

**Word count: 17,882**

  
**Jack Smith**  
**Specialist Prosecutor**

Wednesday, 21 September 2022  
At The Hague, the Netherlands.

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<sup>469</sup> Judgment, paras.709, 1007.