KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-CA-2022-01**
	Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Kai Ambos Judge Nina Jørgensen
Registrar:	Fidelma Donlon
Date:	2 February 2023
Original language:	English
Classification:	**Public**

Appeal Judgment

Specialist Prosecutor's Office:
Alex Whiting

Counsel for Hysni Gucati:
Jonathan Elystan Rees

Counsel for Nasim Haradinaj:
Toby Cadman

CONTENTS

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel", "Appeals Panel" or "Panel" and "Specialist Chambers", respectively)[1] acting pursuant to Articles 33(1)(c) and 46 of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 172, 176 and 183 of the Rules of Procedure and Evidence ("Rules") is seised of appeals by Mr Hysni Gucati ("Gucati") and Mr Nasim Haradinaj ("Haradinaj") (collectively, "the Accused", who are appellants in this case) against the Trial Judgment in the case of the *Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj*, KSC-BC-2020-07 ("Trial Judgment") which was pronounced and filed in writing on 18 May 2022 in accordance with Rule 159 of the Rules. The Appeals Panel hereby issues the present Judgment, together with Annex 1, detailing the procedural history of this case, and Annex 2, detailing the abbreviations used in this Judgment.

I. INTRODUCTION

A. TRIAL BACKGROUND

1. The trial in this case opened on 7 October 2021 and closed on 17 March 2022. Between 18 October 2021 and 28 January 2022, the Trial Panel heard or received the evidence of 15 witnesses. During the trial proceedings, the Trial Panel admitted 238 exhibits into evidence.[2]

2. The Trial Panel found that, during the Indictment period, the Accused received, from unknown sources, three sets of documents containing confidential and non-public information related to the work and investigations of the SITF and the SPO. This material was delivered to the premises of the KLA WVA on 7 September 2020, 16 September 2020 and 22 September 2020.[3] After each delivery, the Accused called

[1] Decision on Assignment.
[2] Trial Judgment, para. 2.
[3] Trial Judgment, para. 204.

and hosted a press conference where they discussed and made available to journalists each of the Three Sets.[4] During the same period, the Accused, individually or jointly, gave a number of media interviews regarding this material. They also commented on the material and re-published articles on social media regarding the same.[5] What was left from the Three Sets was subsequently handed over to the SPO and identified as Batches 1, 2, 3 and 4.[6]

3. On 18 May 2022, the Trial Panel delivered the Trial Judgment, convicting each of the Accused for Criminal Offences Against Public Order and Criminal Offences Against the Administration of Justice and Public Administration. The Accused were found guilty on five counts of the Indictment (Counts 1, 2, 3, 5, 6) and not guilty on one count (Count 4).[7] The Trial Panel sentenced each of the Accused to a single sentence of four and a half years of imprisonment, with credit for the time served, and a fine of 100 euros.[8]

B. THE APPEALS

4. On 25 May 2022, pursuant to a request by Haradinaj, the Appeals Panel ordered any notices of appeal against the Trial Judgment to be filed within the time limit prescribed by Rule 176(2) of the Rules, namely by 17 June 2022.[9] On 15 June 2022, at Haradinaj's request, the Panel authorised an extension of 800 words for both Gucati's and Haradinaj's notices of appeal.[10]

[4] Trial Judgment, para. 205.
[5] Trial Judgment, para. 206. See also Trial Judgment, "IV. The events at issue", paras 204-296.
[6] Trial Judgment, paras 236, 300.
[7] Trial Judgment, paras 794, 1012-1016.
[8] Trial Judgment, paras 1014, 1017.
[9] Haradinaj Request for Appeal Timescale Clarification; Appeal Decision Clarifying Appeal Timescale, paras 6, 8.
[10] Haradinaj Application for Notice of Appeal Word Limit Variation; Appeal Decision on Variation of Notice of Appeal Word Limit, para. 8.

5. On 17 June 2022, the Accused filed notices of appeal against the Trial Judgment. That same day, the SPO informed the Panel that it did not intend to appeal the Trial Judgment.[11]

6. On 1 July 2022, the Appeals Panel denied Haradinaj's request for an extension of the word limit for filing his appeal brief against the Trial Judgment.[12] The Panel further granted the SPO's request that Haradinaj's notice of appeal be rejected for failing to comply with the requirements of Article 47(1) of the Practice Direction on Filings.[13] The Panel further ordered both Accused to refile their notices of appeal in compliance with the instructions provided in the above-mentioned decision.[14]

7. On 5 July 2022, the Presiding Judge of the Appeals Panel held a pre-appeal conference on behalf of the Panel.[15] That same day, the Panel denied Gucati's request for an extension of the word limit to refile his notice of appeal.[16]

8. On 10 and 11 July 2022, Haradinaj and Gucati refiled their respective notices of appeal of the Trial Judgment.[17]

9. On 5 August 2022, the Appeals Panel granted in part Gucati's request for an extension of the word limit for filing his appeal brief against the Trial Judgment,

[11] Gucati Notice of Appeal (F00009); Haradinaj Notice of Appeal (F00008); SPO Notification on Appeal, para. 1.
[12] Haradinaj Application for Appeal Brief Word Limit Extension; Appeal Decision on Appeal Brief and Notice of Appeal, para. 14.
[13] SPO Request on Haradinaj Notice of Appeal.
[14] Appeal Decision on Appeal Brief and Notice of Appeal, para. 14.
[15] Scheduling Order for Pre-Appeal Conference, paras 6, 11; Transcript, 5 July 2022.
[16] Gucati Application for Notice of Appeal Word Limit Extension; Appeal Decision on Gucati Request for Notice of Appeal Word Limit Variation, para. 8.
[17] For the purposes of the present Judgment, the notice of appeal refiled by Gucati on 11 July 2022 is referred to as "Gucati Notice of Appeal", the notice of appeal refiled by Haradinaj on 10 July 2022 is referred to as "Haradinaj Notice of Appeal".

authorising both of the Accused and the SPO to file appeal and response briefs, respectively, not exceeding 18,000 words each.[18]

10. On 19 August 2022, Gucati and Haradinaj each filed their appeal briefs. On 31 August 2022, Haradinaj filed a corrected version of his appeal brief, and on 2 September 2022, a further corrected version.[19]

11. On 21 September 2022, the SPO filed its response brief.[20]

12. On 6 October 2022, the Panel denied the Accused's applications for a formal decision that the SPO failed to file a response brief which complies with Rule 179(5) of the Rules.[21]

13. On 7 October 2022, the Accused filed their reply briefs and, at the same time, requested an extension of the word limit applicable to these briefs.[22] On 12 October 2022, the Panel rejected the Accused's requests for an extension of the word limit and ordered them to refile their reply briefs in compliance with the 4,000-word limit, as per the Practice Direction on Filings.[23]

14. On 13 October 2022, the Panel rejected the Accused's applications to vary the grounds of their notices of appeal further to the disclosure of the interviews of

[18] Gucati Application for Appeal Brief Word Limit Extension; Appeal Decision on Gucati Request for Appeal Brief Word Limit Variation, paras 11, 13.
[19] For the purposes of the present Judgment, the appeal brief filed by Gucati on 19 August 2022 is referred to as "Gucati Appeal Brief", the further corrected version of the appeal brief filed by Haradinaj on 2 September 2022 is referred to as "Haradinaj Appeal Brief".
[20] SPO Response Brief.
[21] Gucati Application on SPO Failure to Comply with Rule 179, para. 23; Haradinaj Application on SPO Failure to Comply with Rule 179, para. 26; Appeal Decision on Defence Applications on SPO Failure to Comply with Rule 179, para. 16.
[22] Gucati Application for Reply Brief Word Limit Extension. Haradinaj did not file a separate application, but included his request in his Reply Brief. See Haradinaj Reply Brief (F00062), para. 4.
[23] Appeal Decision on Defence Requests for Variation of Word Limit of Reply Briefs, paras 7, 10.

Witness W04730 and the notification of Item 206,[24] and, on 3 November 2022, denied their applications for reconsideration of this decision.[25]

15. On 16 and 17 October 2022, respectively, Haradinaj and Gucati refiled their reply briefs.[26]

16. In accordance with the Scheduling Order for Appeal Judgment dated 16 January 2023, the Panel decided to issue the Appeal Judgment on Thursday, 2 February 2023.[27]

C. ORAL ARGUMENTS

17. In accordance with Rule 72(3) of the Rules, an appeal against a trial judgment rendered pursuant to Article 15(2) of the Law "may be determined entirely on the basis of written submissions". However, Rule 180 of the Rules provides that, "[a]fter the expiry of the time limits for the filing of the briefs provided for in Rule 179, the Court of Appeals Panel may set the date of an appeal hearing, if necessary."

18. On 20 October 2022, the Panel was satisfied that an appeal hearing was necessary and ordered such a hearing to address the Accused's grounds of appeal.[28] On 7 November 2022, the Appeals Panel dismissed the further requests by the Accused for an oral hearing on appeal to address the alleged consequences of the SPO's late disclosure on the grounds of appeal and ordered the Parties to comply with

[24] Gucati Request to Amend Notice of Appeal; Haradinaj Request to Amend Notice of Appeal; Appeal Decision on Defence Requests to Amend their Notices of Appeal, paras 16, 19.
[25] Gucati Application for Reconsideration of Decision F00064; Haradinaj Application for Reconsideration of Decision F00064; Appeal Decision on Defence Requests for Reconsideration of Decision F00064.
[26] For the purposes of the present Judgment, the reply brief refiled by Gucati on 17 October 2022 is referred to as "Gucati Reply Brief", and the reply brief refiled by Haradinaj on 16 October 2022 is referred to as "Haradinaj Reply Brief".
[27] Scheduling Order for Appeal Judgment, paras 3, 5.
[28] Scheduling Order for Appeal Hearing, paras 2-3, 5.

the hearing schedule set out in the same order.[29] On 28 November 2022, the Appeals Panel denied Haradinaj's request for adjournment.[30]

19. In accordance with the Scheduling Order for Appeal Hearing issued on 20 October 2022, the Appeal Hearing in this case took place on Thursday, 1 December 2022 and Friday, 2 December 2022.[31]

II. STANDARD OF REVIEW

20. Article 46 of the Law sets out the standard of review for appeals against trial judgments and makes no distinction between judgments concerning crimes under Articles 13-14 of the Law and those under Article 15 of the Law, respectively. The Panel therefore finds that the same standard of review applies in both instances.[32]

21. Under Article 46 of the Law, the Appeals Panel may affirm, reverse or revise the Trial Judgment, and take any other appropriate action, on the following grounds: (i) "an error on a question of law invalidating the judgement"; (ii) "an error of fact which has occasioned a miscarriage of justice"; or (iii) "an error in sentencing".[33] According to Article 46(2) of the Law, an appeal is not a trial *de novo*.

[29] Order for the Preparation of the Appeal Hearing.
[30] Appeal Decision on Defence Requests to Interview Witnesses, paras 30-31. See Haradinaj Application to Adjourn the Oral Appeal Hearing.
[31] In an oral order at the beginning of the hearing, the Appeals Panel rejected a request from Counsel for Haradinaj to adjourn the hearing. See Oral Order on Haradinaj Request for Adjournment of Appeal Hearing.
[32] See, on the one hand, *Fatuma et al.* Appeal Judgement, para. 13; *Šešelj* Appeal Judgement, para. 24; *Nshogoza* Appeal Judgement, para. 12. On the other hand, for a statutory application *mutatis mutandis* of the rules governing appeals in cases dealing with international crimes to cases dealing with offences against the administration of justice, see ICC Rules, Rule 163(1); *Bemba et al.* Appeal Judgment, para. 89; Eckelmans, F., in *Ambos* Rome Statute Commentary, Article 81, mn. 30; and STL Rules, Rule 60 *bis* (H); *Al Jadeed and Al Khayat* Appeal Judgment, para. 11, fn. 44.
[33] Article 46(1)(a)-(c), (3) of the Law.

22. The party alleging an error of law must identify it, present arguments in support of its claim and explain how the error invalidates the decision.[34] In addition, when a party alleges an error of law on the basis of a lack of a reasoned opinion, it must identify the specific issues, factual findings or arguments which the Trial Panel is alleged to have omitted, and must explain why this omission invalidates the decision.[35] The Appeals Panel considers that an alleged error of law which has no prospect of changing the outcome of the decision may be rejected on that basis.[36] However, even if a party's arguments are insufficient to support the contention of an error, the Panel may find an error of law based on other reasons.[37] The Appeals Panel will review the Trial Panel's findings of law to determine whether they are correct.[38]

23. Moreover, Article 46(4) of the Law specifies that:

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

---

[34] See e.g. *Fatuma et al.* Appeal Judgement, para. 14; *Al Jadeed and Al Khayat* Appeal Judgment, para. 12; *Šešelj* Appeal Judgement, para. 25; *Nshogoza* Appeal Judgement, para. 13. See also Appeal Decision on Gucati's Arrest and Detention, para. 12.

[35] *Al Jadeed and Al Khayat* Appeal Judgment, para. 12. See also *Stanišić and Simatović* Appeal Judgement, para. 16; *Nyiramasuhuko et al*. Appeal Judgement, para. 30; *Ngirabatware* Appeal Judgement, para. 8; *Taylor* Appeal Judgment, para. 25; *Selimi* Appeal Decision on Interim Release, para. 60.

[36] See e.g. *Fatuma et al.* Appeal Judgement, para. 14; *Šešelj* Appeal Judgement, para. 25. See also Appeal Decision on Gucati's Arrest and Detention, para. 12. The Appeals Panel notes that the ICC case law adopted a different interpretation, as can be seen in *Bemba et al.* Appeal Judgment, paras 90, 110 (applying the "materially affected" test). See also Eckelmans, F., in *Ambos* Rome Statute Commentary, Article 81, mn. 19, analysing how the international criminal tribunals incorporated the formulation and approach of the ICTY's legal framework, and mn. 42, for the test applied by the ICC.

[37] *Fatuma et al.* Appeal Judgement, para. 14. See also *Mladić* Appeal Judgement, para. 16; Appeal Decision on Gucati's Arrest and Detention, para. 12.

[38] See e.g. *Bemba et al.* Appeal Judgment, para. 90; *Al Jadeed and Al Khayat* Appeal Judgment, para. 14; *Šešelj* Appeal Judgement, para. 25; *Nshogoza* Appeal Judgement, para. 13.

24. In case the Appeals Panel itself applies the correct legal standard to the evidence contained in the trial record and determines whether it is satisfied as to the requisite standard of proof of the challenged factual finding,[39] it will only take into account evidence referenced in the Trial Judgment, evidence contained in the trial record to which the parties refer, and, where applicable, additional evidence admitted on appeal.[40]

25. On errors of fact, Article 46(5) of the Law states that:

> In reviewing the factual findings of the Trial Panel, the Court of Appeals Panel shall only substitute its own findings for that of the Trial Panel where the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact, or where the evaluation of the evidence is wholly erroneous.

26. The same standard applies to alleged errors of fact regardless of whether the impugned finding was based on direct or circumstantial evidence.[41] The Panel will only overturn a Trial Panel decision where an error of fact occasioned a miscarriage of justice[42] and will not lightly overturn the Trial Panel's factual findings, as it is primarily the latter's task to hear, assess and weigh the evidence presented at trial.[43]

[39] See e.g. *Fatuma et al.* Appeal Judgement, para. 15; *Bemba et al.* Appeal Judgment, para. 96; *Al Jadeed and Al Khayat* Appeal Judgment, para. 14.
[40] See e.g. *Fatuma et al.* Appeal Judgement, para. 15; *Al Jadeed and Al Khayat* Appeal Judgment, para. 14.
[41] See e.g. *Fatuma et al.* Appeal Judgement, para. 16; *Al Jadeed and Al Khayat* Appeal Judgment, para. 16.
[42] Article 46(1)(b) of the Law.
[43] See e.g. *Fatuma et al.* Appeal Judgement, para. 16; *Bemba et al.* Appeal Judgment, paras 91-95; *Al Jadeed and Al Khayat* Appeal Judgment, para. 15; *Šešelj* Appeal Judgement, para. 26; *Nshogoza* Appeal Judgement, para. 13. See also Appeal Decision on Gucati's Arrest and Detention, para. 13; Eckelmans, F., in *Ambos* Rome Statute Commentary, Article 81, mn. 85.

III. GENERAL CONSIDERATIONS

27. In adjudicating this appeal, the Panel acknowledges that the Trial Panel applied, by virtue of Articles 6(2), 15(2), 16(3) and 64 of the Law, Articles 17, 28, 31, 32, 33, 35, 387, 388, 392 and 401 of the KCC.[44]

28. The Panel recalls that the Law clearly states that Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the ICC and other criminal courts.[45] These subsidiary sources can guide the Judges' reflection in instances where primary sources do not provide guidance on a specific matter.[46] The Panel has also referred to relevant decisions of Kosovo courts, and has further taken into consideration the *Salihu et al.* Commentary as an informative, but not necessarily persuasive, source of interpretation in all relevant respects.[47]

A. FORMAL REQUIREMENTS ON APPEAL AND SUMMARY DISMISSAL

29. The Panel notes that its ability to assess a party's arguments depends on the latter presenting its case clearly, logically and exhaustively.[48] The appealing party is required to provide precise references to relevant paragraphs in the impugned judgment, or transcript pages, to which a challenge is being made, and to the jurisprudence cited in support thereof.[49] The Appeals Panel will not consider a party's

[44] See Trial Judgment, para. 65, referring to Articles 6(2), 15(2) and 16(3) of the Law which refer to the 2012 KCC. The offences under Articles 387, 388, 392 and 401 of the KCC are analogous to the corresponding offences under Articles 395, 396, 400 and 409 of the 2012 KCC.
[45] Article 3(3) of the Law.
[46] See Appeal Decision on Gucati's Arrest and Detention, para. 11.
[47] The Trial Panel took this same approach to the *Salihu et al.* Commentary. See Trial Judgment, para. 67.
[48] *Al Jadeed and Al Khayat* Appeal Judgment, para. 17. See also *Stanišić and Simatović* Appeal Judgement, para. 21; First Appeal Decision on Haradinaj's Detention, para. 28; Appeal Decision on Preliminary Motions, para. 14; *Shala* Appeal Decision on Provisional Release, para. 7.
[49] Practice Direction on Filings, Articles 32(2), 47(1)(b)(2)-(3), 48(1)(b)(1)-(2). See also Practice Direction on Filings, Article 49(1)(b)(1)-(2). See also e.g. First Appeal Decision on Haradinaj's Detention, para. 29; Appeal Decision on Preliminary Motions, para. 15; *Bemba et al.* Appeal Judgment, para. 109; *Al Jadeed and Al Khayat* Appeal Judgment, para. 17; *Šešelj* Appeal Judgement, para. 28.

submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[50] A party cannot merely repeat arguments that did not succeed at trial, unless it can demonstrate that the Trial Panel's rejection of those arguments constituted an error warranting the Appeals Panel's intervention.[51]

30. The Appeals Panel may decline to discuss issues raised in the appeals which were not contained in the notices of appeal.[52] In the appeal brief, the grounds of appeal and the arguments shall be set out and numbered in the same order as in the appellant's notice of appeal, unless otherwise varied with leave of the Appeals Panel.[53] Failure to do so warrants summary dismissal in principle.

31. Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Panel and need not be considered on the merits.[54] The Appeals Panel has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[55]

32. In particular, the Appeals Panel notes that the following types of arguments may be summarily dismissed:

> (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;

---

[50] See e.g. *Al Jadeed and Al Khayat* Appeal Judgment, para. 17; *Šešelj* Appeal Judgement, para. 28. See also First Appeal Decision on Haradinaj's Detention, para. 28; Appeal Decision on Preliminary Motions, para. 14; *Shala* Appeal Decision on Provisional Release, para. 7.
[51] See e.g. *Fatuma et al.* Appeal Judgement, para. 18; *Bemba et al.* Appeal Judgment, para. 111; *Al Jadeed and Al Khayat* Appeal Judgment, para. 17; *Šešelj* Appeal Judgement, para. 27; *Nshogoza* Appeal Judgement, para. 14. See also *Thaçi* Appeal Decision on Interim Release, para. 60.
[52] See e.g. *Marijačić and Rebić* Appeal Judgement, para. 18.
[53] Practice Direction on Filings, Article 48(2). See also *Boskoški and Tarčulovski* Decision on Notice of Appeal, para. 19.
[54] See e.g. *Fatuma et al.* Appeal Judgement, para. 18; *Bemba et al.* Appeal Judgment, para. 110; *Al Jadeed and Al Khayat* Appeal Judgment, para. 18; *Šešelj* Appeal Judgement, para. 27; *Nshogoza* Appeal Judgement, para. 14.
[55] See e.g. *Al Jadeed and Al Khayat* Appeal Judgment, para. 18; *Šešelj* Appeal Judgement, para. 29; *Nshogoza* Appeal Judgement, para. 14.

(ii) mere assertions that the trial chamber 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 chamber;

(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 chamber'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;

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

(viii) allegations based on material not on the trial 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.[56]

[56] See e.g. *Al Jadeed and Al Khayat* Appeal Judgment, para. 19; *Stanišić and Simatović* Appeal Judgement, para. 21; *Nyiramasuhuko et al*. Appeal Judgement, para. 35; *Ngirabatware* Appeal Judgement, para. 12. See also First Appeal Decision on Haradinaj's Detention, para. 29; Appeal Decision on Preliminary Motions, para. 15; *Shala* Appeal Decision on Provisional Release, para. 8; *Thaçi et al.* Appeal Decision on Jurisdiction, para. 46; *Selimi* Appeal Decision on Review of Detention, para. 21; Appeal Decision on Haradinaj Appeals on Review of Detention, paras 18, 27.

B. LIMITED GROUNDS FOR APPELLATE INTERVENTION

1. Trial Panel's Reasoned Opinion

33. The Panel notes that, in order to fulfil its obligation to provide a reasoned opinion, the Trial Panel is not required to address all of the arguments raised by the Parties, or every item of evidence relevant to a particular finding, provided that it indicated with sufficient clarity the basis for its decision.[57] It is presumed that the Trial Panel evaluated all of the evidence before it, as long as there is no indication that it completely disregarded any particular piece of evidence; this presumption may be rebutted when evidence which is clearly relevant to the findings is not addressed by the Trial Panel's reasoning.[58]

2. Trial Panel's Discretion

34. The Appeals Panel recalls that decisions on disclosure are discretionary decisions to which it must accord deference.[59]

35. The Panel furthermore recalls that a decision on whether to admit or exclude evidence pursuant to Rule 138(1) of the Rules is one within the Trial Panel's discretion in its assessment of the relevance, authenticity and probative value of the submitted evidence.[60] The Trial Panel may refuse to admit evidence where no reasonable showing of relevance has been made.[61] For the purposes of deciding on the admissibility of evidence, relevance is assessed on the basis of whether the proposed evidence relates to elements of the offence(s) or mode(s) of liability pleaded in the

---

[57] *Bemba et al.* Appeal Judgment, para. 105. See also *Veseli* Appeal Decision on Interim Release, para. 72; *Thaçi et al.* Appeal Decision on Jurisdiction, para. 154.
[58] *Bemba et al.* Appeal Judgment, para. 105.
[59] Appeal Decision on Disclosure, para. 36.
[60] Appeal Decision on Defence Witnesses, para. 14.
[61] Appeal Decision on Defence Witnesses, para. 20, referring to Decision on Defence Witnesses, paras 42-43; Bar Table Decision, para. 11, citing *inter alia Prlić et al.* Appeal Decision on Admission of Evidence, para. 17; *Bagosora et al*. Decision on Admission of Binder, para. 7; Rules 137(1) and 138(1) of the Rules.

indictment, or to other facts or circumstances material to the parties' case.[62] Moreover, according to well-established jurisprudence of international criminal tribunals, appellate intervention in decisions relating to the admission of evidence is warranted only in very limited circumstances.[63]

36. The Panel also recalls that it is incumbent on the Trial Panel to assess the credibility of a witness, as well as the reliability of the evidence given by the Parties.[64] There is no general requirement that the testimony of a witness be corroborated if deemed otherwise credible.[65]

C. LEGAL CERTAINTY AND PREDICTABILITY

37. The Panel notes that, in the interests of legal certainty and predictability, an appeals panel is expected to follow its previous decisions and should depart from them only for cogent reasons in the interests of justice.[66] This principle also applies in relation to interlocutory appeal decisions, which are binding during the appeal proceedings of the same case as to all issues decided by those decisions, with the purpose of preventing parties from "endlessly relitigating" the same issues.[67]

---

[62] Appeal Decision on Defence Witnesses, para. 20, referring to Decision on Defence Witnesses, paras 40-41, referring in turn to Bar Table Decision, paras 11-12. See also e.g. *Prlić et al.* Appeal Decision on Admission of Evidence, para. 17; *Ruto et al.* Confirmation Decision, para. 66; *Katanga and Ngudjolo* Bar Table Decision, para. 16.

[63] Appeal Decision on Defence Witnesses, para. 14, referring to *Simba* Appeal Judgement, para. 19; *Halilović* Appeal Judgement, para. 39; *Bagosora et al.* Appeal Decision on Exclusion of Evidence, para. 11.

[64] *Popović et al.* Appeal Judgement, paras 131, 1228.

[65] *Ntaganda* Appeal Judgment, para. 782; *Milošević* Appeal Judgement, para. 215; *Ntawukulilyayo* Appeal Judgement, para. 21.

[66] *Shala* Appeal Decision on Jurisdiction, para. 15 and jurisprudence cited therein.

[67] *Nyiramasuhuko et al*. Appeal Judgement, para. 127; *Mladić* Appeal Decision on Provisional Release, p. 2; *Kajelijeli* Appeal Judgement, paras 202-203. According to this jurisprudence, this approach also fulfils the purpose of permitting interlocutory appeals, which is to allow certain issues to be finally resolved before proceedings continue. It also establishes that the Panel's inherent power to reconsider its decisions upon showing of a clear error is an exception to the general principle.

IV. DISCUSSION

A. ALLEGED ERRORS CONCERNING FAIR TRIAL AND EVIDENTIAL ISSUES

1. Alleged Errors Regarding the Trial Panel's Failure to Disqualify the Presiding Judge of the Trial Panel (Haradinaj Ground 2)

(a) Submissions of the Parties

38. Haradinaj submits that the Trial Panel erred in law by failing to disqualify the Presiding Judge of the Trial Panel, Charles L. Smith III ("Judge Smith"), from the proceedings for bias.[68] He argues that the Application for Disqualification of Judge Smith, which he submitted before the President of the Specialist Chambers ("President"), was wrongly summarily dismissed,[69] although it was properly substantiated.[70]

39. Haradinaj submits that the President's decisions to allow Judge Smith's continued presence at trial led to an actual or perceived lack of impartiality, amounted to an error of law and undermined the safety of the totality of Haradinaj's conviction(s).[71]

40. The SPO responds that the procedure for the recusal or disqualification of Judges is clearly set out under the Rules[72] and it was followed accordingly by the President, who twice summarily dismissed the Accused's request pursuant to Rule 20(3) of the Rules.[73] The SPO further argues that, according to Rule 20(5) of the

---

[68] Haradinaj Appeal Brief, paras 40-47. See also Haradinaj Reply Brief, paras 9-10.
[69] Haradinaj Appeal Brief, paras 42-44, referring to Application for Disqualification. See also Disqualification Decision, paras 34-36. See also Transcript, 1 December 2022, p. 73.
[70] In that regard, Haradinaj refers to the testimony of Witness DW1250. See Application for Disqualification, para. 73; Statement of Witness DW1250 on Disqualification. Haradinaj further refers to a series of emails from at least two other former EULEX judges raising concerns about Judge Smith. See Application for Disqualification, para. 73. See also Request for Reconsideration on Disqualification, para. 30.
[71] Haradinaj Appeal Brief, paras 46-47. See also Haradinaj Reply Brief, para. 10.
[72] Rule 20(3)-(6) of the Rules.
[73] SPO Response Brief, para. 19.

Rules, an appellant can no longer seek to relitigate this matter at the appeal stage, and therefore Haradinaj's Ground 2 should be rejected *in limine*.[74] In addition, should the Panel decide to address the merits of this ground, it should be dismissed.[75]

41. Haradinaj replies that he does not seek to relitigate matters that have already been determined, as the Disqualification Decision was taken prior to the Trial Judgment and was thus based on a *risk of* bias.[76] Haradinaj argues that he is now seeking the intervention of the Panel because such a risk materialised.[77]

(b) Assessment of the Court of Appeals Panel

42. The Panel is confronted with a request to further review an administrative decision issued by the President, rather than an appeal against an alleged error committed by the Trial Panel in issuing the Trial Judgment. Therefore, Ground 2 of Haradinaj's Appeal Brief falls outside of the Panel's scope of review.

43. In addition, the Panel notes that Haradinaj filed his Application for Disqualification before the President under Rule 20(3) of the Rules,[78] and that the President decided to dismiss it.[79] As underlined by the SPO, Rule 20(5) of the Rules does not allow for a review of a decision issued under Rule 20(3) of the Rules, in this case by the President. Nonetheless, Haradinaj filed a Request for Reconsideration of the Disqualification Decision, which was also dismissed by the President.[80] The Panel understands that Haradinaj tries, in his Reply Brief, to justify his attempt to further challenge the Disqualification Decision. However, this matter has already been fully litigated and is not, in any event, within the Panel's jurisdiction. Accordingly, the Panel dismisses Haradinaj's Ground 2.

[74] SPO Response Brief, para. 19.
[75] SPO Response Brief, paras 20-22.
[76] Haradinaj Reply Brief, para. 9, referring to Disqualification Decision, para. 16.
[77] Haradinaj Reply Brief, para. 10.
[78] Application for Disqualification, paras 6, 30, 101(c). See also Transcript, 1 December 2022, p. 73.
[79] Disqualification Decision, paras 34-36.
[80] See Decision on Reconsideration of Decision on Disqualification, paras 21-22.

2. Alleged Errors Regarding Conduct of the Proceedings and Presumption of Innocence (Haradinaj Ground 1 in part)

44. At the outset, the Panel notes that Haradinaj submits that the Trial Panel erred in law by failing to uphold basic principles of a fair and impartial trial, including the principle of equality of arms, by excessively favouring the SPO throughout the proceedings.[81] In particular, Haradinaj claims that the Trial Panel violated the principle of equality of arms when "imposing arbitrary and unjustified limitations" upon the presentation of his case.[82] The SPO responds that Haradinaj's arguments should be dismissed.[83]

45. The Panel observes that, under a general section alleging fair trial rights violations, Haradinaj challenges matters related to the Trial Judgment, prior decisions of the Trial Panel or the general conduct of the proceedings in a fragmented manner, without demonstrating any error of law or fact.[84] For this reason, most of Haradinaj's Ground 1 warrants summary dismissal. The Panel has nonetheless decided to address Haradinaj's Ground 1 out of fairness to the Accused.

46. The Panel notes that some arguments raised by Haradinaj are related to, or repetitive of, other grounds of appeal and have therefore been addressed elsewhere in the present Judgment. This is the case regarding Haradinaj's allegations that: (i) the SPO was afforded disproportionate access to the totality of the evidence;[85] (ii) the Trial

[81] Haradinaj Appeal Brief, para. 27. See also Transcript, 1 December 2022, pp. 72, 74-75, 77.
[82] Haradinaj Appeal Brief, paras 28-39. See also Haradinaj Reply Brief, paras 5-8. See also Transcript, 1 December 2022, p. 104.
[83] SPO Response Brief, paras 8-18.
[84] The Panel notes in that regard that Haradinaj concedes that: "Ground 1 is an *overarching ground* of appeal that considers the overall fairness of the proceedings, the equality of arms, the disclosure failings and the disproportionate and wholly unnecessary restrictions placed on the defence in the presentation of its case." See Haradinaj Reply Brief, para. 5 (emphasis added).
[85] Haradinaj Appeal Brief, paras 33, 34(v). See below, paras 65-73. The Panel, however, finds that fn. 28 attached to para. 33 of Haradinaj Appeal Brief does not seem to support the allegation that the SPO was afforded disproportionate access to the totality of evidence. See Haradinaj Appeal Brief, para. 33, fn. 28 (referring to Trial Judgment, paras 7-10 on counts and modes of liability, paras 14-15 on allegations pertaining to non-indicted individuals, and paras 22-25 on admission of evidence).

Panel did not allow him to refer to information related to the SPO's collaboration with Serbia, although this information was essential to his defences of whistle-blowing and public interest;[86] and (iii) the Trial Panel unduly limited expert evidence sought to be adduced by him.[87]

47. The Panel will conduct its assessment of the remaining arguments as follows: (i) challenges to the Trial Panel's approach regarding evidence adduced by the Parties;[88] and (ii) alleged violation of the presumption of innocence by the SPO.[89]

(a) Challenges to the Trial Panel's Approach Regarding Evidence Adduced by the Parties

(i) Submissions of the Parties

48. Haradinaj argues that the Trial Panel failed to uphold the principle of equality of arms by imposing arbitrary and unjustified limitations upon the Accused's presentation of his case.[90] In support of his assertion, Haradinaj argues that the Trial Panel erred in: (i) taking an inconsistent approach to the admission of evidence tendered by the Parties with respect to historical events, by allowing the SPO to make references to the historical context of the Kosovo conflict, while the Defence could not;[91] (ii) allowing the SPO to exceed the scope of the examination-in-chief in its cross-examination of the Accused and of Witness Mr Robert Reid (Witness DW1253) ("Mr Reid");[92] and (iii) allowing the SPO to make "*quasi* political speeches" unsupported by relevant evidence, while Haradinaj faced restrictions on what he was allowed to refer to.[93]

[86] Haradinaj Appeal Brief, para. 34(b). See below, paras 321-340, 347-349. See also below, paras 379-382.
[87] Haradinaj Appeal Brief, para. 34(d). See below, paras 93-97.
[88] Haradinaj Appeal Brief, paras 28-33, 34(a), (c), 38-39.
[89] Haradinaj Appeal Brief, paras 35-37.
[90] Haradinaj Appeal Brief, paras 28-33.
[91] Haradinaj Appeal Brief, para. 34(a).
[92] Haradinaj Appeal Brief, para. 34(c).
[93] Haradinaj Appeal Brief, para. 38.

49. The SPO responds that Haradinaj's Ground 1 should be dismissed *in limine*.[94] The SPO submits that Haradinaj fails to identify any inconsistency or error in the Trial Panel's approach regarding the treatment of evidence concerning historical events.[95] According to the SPO, the Trial Panel clearly set out how it addressed evidence on the commission of crimes in the 1998-1999 war.[96] The SPO further submits that its cross-examination of the Accused and of Mr Reid were relevant, and Haradinaj's arguments amount to an unfounded and unreasoned complaint about Rule 143(3) of the Rules.[97]

(ii) Assessment of the Court of Appeals Panel

50. The right to a fair trial guaranteed by Article 21 of the Law covers the principle of equality of arms between the prosecutor and accused in a criminal trial, which goes to the heart of the fair trial guarantees. This principle embodies the obligation to ensure that neither of the parties is put at a disadvantage when presenting their case.[98] The Panel observes that, under the ECtHR's jurisprudence, this principle has been described as "impl[ying] that each party must be afforded a reasonable opportunity to present [its] case – including [its] evidence – under conditions that do not place [it] at a substantial disadvantage vis-à-vis [its] opponent".[99]

51. Turning to evidence concerning historical events, the Trial Panel explained its approach in allowing the eliciting or tendering of evidence related to the commission of crimes during the 1998-1999 war.[100] Nothing in either of the transcripts referred to by Haradinaj in support of his allegations suggests that he was put at a disadvantage

[94] SPO Response Brief, paras 8-10.
[95] SPO Response Brief, para. 12. See Trial Judgment, paras 30-32. See also Transcript, 2 December 2022, pp. 157-158.
[96] SPO Response Brief, para. 12.
[97] SPO Response Brief, para. 14.
[98] *Tadić* Appeal Judgement, paras 44, 48, 50, 52. See also Haradinaj Appeal Brief, paras 28-30; *Kordić and Čerkez* Appeal Judgement, para. 175; *Kayishema and Ruzindana* Appeal Judgment, para. 69.
[99] *Dombo Beheer B.V.* Judgment, para. 33. The Panel notes that although this was a civil proceeding, the ECtHR was considering whether the equality of arms recognised in criminal proceedings should also apply to civil proceedings. See also *Kaufman* Decision, p. 115; *Delcourt* Judgment, para. 34.
[100] Trial Judgment, paras 30-32.

vis-à-vis the SPO in relation to the treatment of such evidence.[101] As pointed out by the SPO, the lines of questioning pursued by the SPO and the Defence in the two transcripts referred to by Haradinaj are not comparable.[102] The Panel also notes that, following objections being raised, Defence Counsel had the opportunity to clarify his line of questioning.[103]

52. In relation to the cross-examination of Haradinaj and Mr Reid, the Accused failed to demonstrate that the SPO was "allowed to exceed the scope of the examination in chief".[104] The Panel notes that, in the absence of any explanation in support of Haradinaj's allegation, and of any attempt to demonstrate any error in the conduct of the proceedings by the Trial Panel, the purpose of the transcript references provided by Haradinaj is unclear.[105]

53. Accordingly, this part of Haradinaj's Ground 1 is dismissed.

---

[101] KSC-BC-2020-07, Transcript, 12 January 2022, p. 2903, lines 11-25, p. 2904, lines 1-7; KSC-BC-2020-07, Transcript, 14 January 2022, pp. 3039-3043.

[102] *Compare* KSC-BC-2020-07, Transcript, 12 January 2022, p. 2903, lines 11-25, p. 2904, lines 1-7 (where the Presiding Judge overruled a Defence objection on relevance during the cross-examination of the Accused by the SPO regarding an assertion made during his testimony with respect to crimes committed by KLA members during the 1998-1999 war) *with* KSC-BC-2020-07, Transcript, 14 January 2022, pp. 3039-3043 (where the Presiding Judge sustained a SPO objection when the Defence sought to pursue a line of questioning seeking to establish that certain Serbs committed crimes during the conflict in Kosovo – an issue on re-examination which went beyond the scope of cross-examination). See also SPO Response Brief, para. 12.

[103] KSC-BC-2020-07, Transcript, 14 January 2022, pp. 3040-3042. See also SPO Response Brief, para. 12.

[104] Haradinaj Appeal Brief, para. 34(c).

[105] Haradinaj Appeal Brief, para. 34(c), fn. 33, referring to KSC-BC-2020-07, Transcript, 12 January 2022, p. 2903, lines 11-25, p. 2904, lines 1-7; KSC-BC-2020-07, Transcript, 24 January 2022, pp. 3304-3313. In the first transcript (see above, fn. 102), the Presiding Judge of the Trial Panel overruled an objection raised by Haradinaj's Counsel on the relevance of the SPO line of questioning regarding an assertion Haradinaj made during his testimony with respect to crimes committed by KLA members during the 1998-1999 war. In the second transcript, Haradinaj's Counsel repeatedly objected to the SPO's line of questioning of the expert witness regarding his experience about Kosovo cases and witness intimidation in these cases as falling outside the scope of the Indictment. The Presiding Judge of the Trial Panel overruled Haradinaj's objections and deemed the SPO's line of questioning in relation to witness intimidation central to this case.

(b) Alleged Violations of the Presumption of Innocence by the SPO

(i) Submissions of the Parties

54. Haradinaj submits that the Trial Panel erred in law by failing to uphold and enforce internationally accepted standards with regards to the presumption of innocence, which prohibit public authorities from making statements referring to a person as guilty unless or until guilt is proved according to law.[106] Haradinaj is specifically referring to a statement of the SPO in open court, in which the latter stated that the guilt of the Accused had "been established".[107]

55. The SPO responds that nothing in the manner in which it framed its oral submissions on sentencing indicates any conflict with Haradinaj's presumption of innocence, and recalls that the Trial Panel overruled a Defence objection to such submissions.[108]

(ii) Assessment of the Court of Appeals Panel

56. The Panel finds that the presumption of innocence does not oblige the SPO to refrain from expressing, at least within court proceedings, an opinion on the evidence available in support of the guilt or innocence of an accused.[109] In addition, the presumption of innocence does not prevent the SPO from informing the public about criminal investigations in progress, but requires it to refrain from prejudging the

[106] Haradinaj Appeal Brief, para. 35, referring to EU Directive on Presumption of Innocence, Article 4. See also Haradinaj Appeal Brief, paras 36-37, 39; Haradinaj Reply Brief, para. 4.
[107] Haradinaj Appeal Brief, paras 36-37, referring to KSC-BC-2020-07, Transcript, 17 March 2022, p. 3771; *Ramos Nunes de Carvalho e Sá* Judgment, para. 145. See also Haradinaj Appeal Brief, paras 28-30; Transcript, 2 December 2022, p. 210.
[108] SPO Response Brief, para. 17, referring to KSC-BC-2020-07, Transcript, 17 March 2022, p. 3771. The SPO also submits that the jurisprudence referred to by Haradinaj is "easily distinguishable" from the circumstances in the present proceedings and that the EU Directive on Presumption of Innocence is not applicable before the Specialist Chambers and does not support his assertion. See SPO Response Brief, para. 18.
[109] *Gaddafi and Al-Senussi* Decision on Disqualification, para. 25.

outcome of a trial in its public statements.[110] In this respect, the ECtHR distinguishes between statements which describe allegations of suspicions and declarations of guilt.[111] Further, when considering whether a public SPO statement is in breach of the principle of the presumption of innocence, the latter must be determined "in the context of the particular circumstances in which the impugned statement was made".[112]

57. In that regard, the Panel finds that Haradinaj misrepresents the quoted SPO statements. During the closing statements hearing of 17 March 2022, the SPO addressed the Panel in relation to what it considered as an appropriate sentence for the Accused in that case.[113] It was then, when referring back to the SPO's efforts to establish the Accused's guilt throughout the trial proceedings – with the submission and presentation of evidence – that the SPO made the contested statement in relation to the evidence presented during trial.[114]

58. The Panel therefore finds that Haradinaj fails to demonstrate that the Trial Panel erred in law with respect to the presumption of innocence. Accordingly, this part of Haradinaj's Ground 1 is dismissed.

---

[110] The Panel moreover notes that the codes of conduct or prosecution standards of international tribunals, state that a prosecutor should refrain from expressing any opinion on the innocence or guilt of the accused, while outside of court proceedings. See *Gaddafi and Al-Senussi* Decision on Disqualification, para. 28, citing, *inter alia*, SCSL Code of Professional Conduct for Counsel, Article 24(A); *Sesay* Decision on Counsel Code of Conduct, paras 31-33 (finding the SCSL Code of Professional Conduct for Counsel applicable to the Prosecutor); ICTY and ICTR Code of Professional Conduct for Prosecution Counsel, para. 2(k).

[111] See *Gaddafi and Al-Senussi* Decision on Disqualification, paras 26-28, citing, *inter alia*, *Allenet de Ribemont* Judgment, paras 38-41; *Butkevičius* Judgment, paras 26-30, 49-54; *Fatullayev* Judgment, paras 36-37, 157-163.

[112] *Daktaras* Judgment, para. 43; *Butkevičius* Judgment, para. 49; *Karakaş and Yeşilırmak* Judgment, para. 51; *Fatullayev* Judgment, para. 160; *Filat* Judgment, para. 46; *Gaddafi and Al-Senussi* Decision on Disqualification, para. 28.

[113] See KSC-BC-2020-07, Transcript, 17 March 2022, p. 3751, lines 14-18.

[114] See KSC-BC-2020-07, Transcript, 17 March 2022, p. 3771, lines 17-20.

3. Alleged Errors Regarding the Trial Panel's Decisions on Non-Disclosure and/or Redactions (Gucati Grounds 2(A) in part, 4(H) in part; Haradinaj Grounds 1 in part, 4, 10, 16, 17)

59. Gucati and Haradinaj challenge the Trial Panel's decision not to disclose and/or to redact some of the material contained in the Batches.[115] In addition, Haradinaj challenges the Trial Panel's decision: (i) not to disclose and/or to redact material relevant for his entrapment claims;[116] and (ii) not to disclose material regarding the allegations of Mr Dick Marty ("Mr Marty") that Serbian authorities were responsible for threats to his life with the aim to falsely implicate Kosovo Albanians.[117] The SPO responds that the Accused's relevant grounds of appeal should be dismissed.[118]

(a) Content of the Batches (Gucati Grounds 2(A) in part, 4(H) in part; Haradinaj Grounds 1 in part, 4)

(i) Submissions of the Parties

60. The Accused submit that the Trial Panel erred by allowing the SPO to withhold some of the material contained in the Batches, so that neither the Trial Panel nor the Defence were able to determine whether the confidential classification of each document was appropriately imposed.[119] They further argue that, contrary to the Law and the Rules, the Trial Panel failed to appreciate the serious prejudice caused to them by the SPO's non-disclosure and/or excessive redaction and to ensure that

[115] Gucati Appeal Brief, paras 60-79, 90-95, 199-200, 202; Haradinaj Appeal Brief, paras 27-30, 33, 34(v), 39, 55-67; Gucati Reply Brief, paras 3-5; Haradinaj Reply Brief, paras 3-8, 12-14.
[116] Haradinaj Appeal Brief, paras 156-161, 162-172; Haradinaj Reply Brief, paras 40-45.
[117] Haradinaj Appeal Brief, paras 115-126; Haradinaj Reply Brief, paras 30-31.
[118] SPO Response Brief, paras 8-10, 16, 23-36, 44-46, 155-161.
[119] Gucati Appeal Brief, paras 73, 75-76, 199-200; Haradinaj Appeal Brief, paras 33, 34(v), 55, 57-59, 62; Transcript, 1 December 2022, pp. 52, 77-78, 80-81, 103-104. See also Transcript, 1 December 2022, pp. 47, 79 (submitting that the main part of Batches 1 and 3 and the only part of Batch 2 that was considered were not disclosed to the Defence); Transcript, 2 December 2022, p. 198. According to Haradinaj, this omission was significant not only because the alleged confidentiality of the information was an intrinsic element of crimes associated with the convictions, but also because of the numerous occasions where there was a disjuncture between what the SPO witnesses said and what was subsequently shown to be. See Haradinaj Appeal Brief, paras 60-61.

counterbalancing factors were put in place to address this prejudice, or at the very least that the Trial Panel itself had sight of that evidence.[120] According to the Accused, this approach deprived them of the opportunity to make representations and present evidence in such a way as to ensure a fair trial.[121] Both Accused also argue that if no measures would ensure a fair trial in light of the non-disclosure, the SPO should have withdrawn the Indictment or confined its case to the part of the Batches that had been admitted into evidence.[122]

61. Further, Gucati submits that the Trial Panel erred by refusing to exclude the evidence of Ms Zdenka Pumper (Witness W04841) ("Ms Pumper") on the contents of the Batches that were withheld by the SPO.[123] Gucati argues that an investigator of the prosecuting party, such as Ms Pumper, is not entitled to "present opinions or draw conclusions" about or summarise the contents of documents which he or she has reviewed in the context of their employment with that party, and that, in these circumstances, he or she can only testify as a fact witness in relation to the provenance and chain of custody of the documents.[124] Gucati also submits that the Trial Panel erred in relying on Ms Pumper's summary of the relevant material without having the possibility for an independent assessment.[125] According to Gucati, the Trial Panel should have excluded Ms Pumper's "grossly prejudicial" evidence on the basis of Rule 138(1)-(3) of the Rules, which authorises the Panel to

[120] Gucati Appeal Brief, para. 78; Haradinaj Appeal Brief, paras 64, 67; Transcript, 1 December 2022, pp. 52, 75-76, 80.
[121] Gucati Appeal Brief, para. 74; Haradinaj Appeal Brief, paras 56, 63-64, 66; Transcript, 1 December 2022, pp. 77, 79; Transcript, 2 December 2022, pp. 177-179, 195, 197. See also Gucati Appeal Brief, para. 94; Haradinaj Appeal Brief, paras 27-30, 39.
[122] Gucati Appeal Brief, para. 93; Haradinaj Appeal Brief, para. 65; Transcript, 2 December 2022, p. 179.
[123] Gucati Appeal Brief, para. 60. See also Gucati Appeal Brief, paras 90-92.
[124] Gucati Appeal Brief, paras 62-64, 70-72; Transcript, 1 December 2022, pp. 51-52.
[125] Gucati Appeal Brief, paras 65-68, 70, 76-77. See also Transcript, 1 December 2022, pp. 49-51.

exclude relevant evidence where its probative value is outweighed by its prejudicial effect.[126]

62. The SPO responds that the Trial Panel did not admit the non-disclosed parts of the Batches into evidence or otherwise rely on them and, as such, there can be no violation of fair trial rights.[127] The SPO further submits that the reasons for not fully disclosing the Batches are unassailable and consistent with the jurisprudence of the ECtHR and the Specialist Chamber of the Constitutional Court.[128] The SPO also submits that the Trial Panel did not require (more) pages of the Batches in order to reach its findings, and points out that the Defence did not even seek leave to appeal the Pre-Trial Judge's decisions ordering non-disclosure.[129] According to the SPO, the Accused fail to show any error and their arguments amount to a mere disagreement with the Trial Panel's findings.[130] The SPO argues that it is the alternatives proposed by the Accused which would have led to a miscarriage of justice.[131] The SPO further submits that the Trial Panel relied on a wide variety of evidence, accessible to and tested by both Parties, to establish the contents and confidentiality of the Batches, including Ms Pumper's charts, which provide

[126] Gucati Appeal Brief, paras 61, 77-79, 95. See also Gucati Reply Brief, para. 4; Transcript, 2 December 2022, p. 184. The Panel notes that in paragraph 79, footnote 48 of his Appeal Brief, Gucati fails to mention which decision he is specifically referring to, namely the Decision on Admissibility of Deferred Exhibits.

[127] SPO Response Brief, paras 25-26, 30; Transcript, 2 December 2022, p. 158. See also SPO Response Brief, para. 24 (arguing that the Defence arguments amount essentially to an allegation of abuse of discretion in relation to which the Trial Panel's assessment is to be given deference).

[128] SPO Response Brief, paras 23, 28-29, 31-33, referring *inter alia* to *M. v. The Netherlands* Judgment, paras 70-71; Transcript, 2 December 2022, pp. 125, 162, 164.

[129] SPO Response Brief, para. 27; Transcript, 2 December 2022, p. 161. See also Transcript, 2 December 2022, pp. 125-126 (submitting that the issue regarding the content of the Batches is whether they (i) pertain to SPO investigations, (ii) were confidential, and (iii) contain the names of protected witnesses, and these facts can be established on the basis of the disclosed pages) and pp. 159-160 (submitting that the entirety of Batch 2 was disclosed with minimal redactions and that a certain number of pages of the remaining Batches was disclosed as well).

[130] SPO Response Brief, paras 8, 10, 16, 32, 36. See also SPO Response Brief, paras 9, 35 (arguing that a series of procedural decisions unfavourable to the Defence is not tantamount to bias and that the fairness of the proceedings with respect to non-disclosure was confirmed by the Pre-Trial Judge and the Trial Panel).

[131] SPO Response Brief, paras 23, 36.

information tested during cross-examination and were themselves one of the judicially ordered measures counterbalancing the non-disclosure.[132]

63. Gucati replies that the ECtHR case to which the SPO refers as supporting the partial disclosure of the Batches is distinguishable from the present case, *inter alia*, because the complaint in that case related in part to the non-disclosure of material that was not in the possession of the prosecution and the redacted information could have been of no assistance to the defence while, in the present case, the impugned documents fell to be disclosed under Rules 102(3) or 103 of the Rules.[133] Gucati also submits that he did not seek leave to appeal the Pre-Trial Judge's decisions on non-disclosure as the unfairness arose not from the non-disclosure, but from the Trial Panel's decision to allow the SPO to adduce evidence about the contents of the undisclosed material.[134]

64. Haradinaj replies that the SPO mischaracterises his submissions and fails to address their substance, as the mere existence of procedures and guarantees does not ensure that those procedures are carried out fairly.[135] Haradinaj submits that, even if the Batches were not evidence, they are central to the charges and the substance of their contents was relied upon for each Count.[136]

(ii) Assessment of the Court of Appeals Panel

65. The Panel observes that the non-disclosure forming the basis for these grounds of appeal against the Trial Judgment was ordered by the Pre-Trial Judge during the pre-trial phase of the proceedings. In this context, the Panel notes the Pre-Trial Judge's finding that the undisclosed pages of Batches 1 and 2 do not fall under

[132] SPO Response Brief, paras 26-27, 34. See also SPO Response Brief, para. 30; Transcript, 2 December 2022, pp. 158-161.
[133] Gucati Reply Brief, para. 5, referring to *M. v. The Netherlands* Judgment, paras 3, 68-70.
[134] Gucati Reply Brief, para. 3.
[135] Haradinaj Reply Brief, paras 4-7.
[136] Haradinaj Reply Brief, paras 12-14.

Rule 102(1)(b)(iii) of the Rules, since the SPO did not intend to present them at trial, but are subject to disclosure under Rules 102(3) and/or 103 of the Rules.[137] The Pre-Trial Judge similarly found that the undisclosed pages of Batch 4, which overlaps to a certain extent with the content of Batch 1, were subject to disclosure under Rules 102(3) and/or 103 of the Rules.[138] The Panel further notes that the Pre-Trial Judge reviewed the undisclosed contents of Batches 1, 2 and 4,[139] and decided that the non-disclosure of the undisclosed contents thereof was strictly necessary on the basis that: (i) there is a risk, in view of the Accused's statements, that they may attempt to disseminate it, thereby prejudicing ongoing or future investigations and causing grave risk to the security of (potential) witnesses or members of their family; (ii) any prejudice caused to ongoing or future investigations would be contrary to the public interest in the Specialist Chambers fulfilling their mandate through, *inter alia*, effective investigations and the prosecution of crimes and offences under its jurisdiction; and (iii) their unauthorised dissemination would be contrary to the rights of third parties.[140] With respect to Batch 3, the Pre-Trial Judge found that it is not subject to disclosure, since it: (i) does not fall under Rule 102(1)(b)(iii) of the Rules; (ii) constitutes SPO internal work product, and therefore falls under Rule 106 of the Rules; and (iii) is not subject to disclosure pursuant to Rule 103 of the Rules.[141]

66. The Panel further notes that the Pre-Trial Judge found that Ms Pumper's declarations and testimony were adequate counterbalancing measures to the non-disclosure of Batches 1, 2 and 4,[142] and that no counterbalancing measures were necessary in relation to Batch 3.[143] Nevertheless, the Pre-Trial Judge ordered, as a counterbalancing measure to the non-disclosure of certain parts of all of the Batches,

[137] Decision on Batches 1-3, paras 29, 31.
[138] Decision on Non-Disclosure, paras 14, 16-17.
[139] Decision on Batches 1-3, para. 30; Decision on Non-Disclosure, para. 14.
[140] Decision on Batches 1-3, paras 34-36, 38; Decision on Non-Disclosure, paras 20-22.
[141] Decision on Batches 1-3, paras 43-44.
[142] Decision on Batches 1-3, para. 39; Decision on Non-Disclosure, para. 23.
[143] Decision on Batches 1-3, para. 45.

that the SPO produce charts containing, *inter alia*, indicia suggesting the confidential nature of the documents, including where possible screenshots thereof, and whether they contain the names of (potential) witnesses.[144] After having heard Ms Pumper's testimony, the Trial Panel found admissible under Rule 138(1) of the Rules, *inter alia*, Ms Pumper's declarations,[145] as well as excerpts of the Batches she authenticated.[146]

67. According to Rule 108(1) of the Rules, the SPO may apply confidentially and *ex parte* to the Panel to withhold information in whole or in part where this information in its custody, control or actual knowledge is subject to disclosure under Rule 102 or Rule 103 of the Rules, but such disclosure may prejudice ongoing or future investigations, cause grave risk to the security of a witness, victim participating in the proceedings or members of his or her family, or be contrary for any other reason to the public interest or the rights of third parties. Moreover, Rule 108(4) of the Rules provides that a panel may order that appropriate counterbalancing measures be taken and that if, in its opinion, no measures would ensure the Accused's right to a fair trial, the SPO shall be given the option of either disclosing the information, or amending or withdrawing the charges to which the information relates.

68. While the Panel acknowledges that the documents contained in the Batches form the basis for the facts underlying the charges against the Accused, they are not relevant for their content, but rather exclusively for their confidential nature.[147] For the purposes of the charges against the Accused, it is sufficient that at least one document contained in the Batches was found to be confidential, and the Trial Panel did not need to establish that all of the documents contained in the Batches were confidential for this purpose. The Panel notes in this regard the Trial Panel's finding that the Accused

[144] Decision on Batches 1-3, paras 39-40, 45; Decision on Non-Disclosure, paras 23-24.
[145] Decision on Admissibility of Deferred Exhibits, para. 14. The Trial Panel also found these documents admissible under Rule 154 of the Rules.
[146] Decision on Admissibility of Deferred Exhibits, paras 19, 33, 38.
[147] See Decision on Batches 1-3, para. 30. See also Trial Judgment, para. 424.

distributed the documents as widely as possible, without protecting documents even though they were aware of their confidentiality.[148] Moreover, as confirmed by Ms Pumper and Mr Reid, as a matter of practice, all material that is part of ongoing criminal investigations is considered confidential.[149] Since the documents contained in the Batches formed part of ongoing SPO investigations and were relevant to the present case only due to this feature, the Panel finds that ordering that a SPO investigator confirm the confidential status of the documents was a reasonable measure counterbalancing the non-disclosure of parts of the Batches, especially since in several instances she provided screenshots of the indicia demonstrating the confidential nature of the undisclosed documents.

69. With respect to Gucati's challenges to the non-exclusion of Ms Pumper's evidence,[150] the Panel recalls the discretion afforded to trial panels regarding the admission of evidence.[151] Rule 138(1) of the Rules also affords discretion to a trial panel in its assessment of the relevance, authenticity and probative value of tendered evidence.[152] In addition, the Panel notes that a trial panel may refuse to admit evidence, including witness testimony, where its probative value is outweighed by its prejudicial effect.[153]

70. The Appeals Panel notes that, during the trial, Gucati himself indicated that he did not object to Ms Pumper "being called to give evidence *per se*".[154] However, the

[148] See e.g. Trial Judgment, paras 562-564.
[149] Trial Judgment, para. 426, referring to KSC-BC-2020-07, Transcript (Witness W04841, Zdenka Pumper), 18 October 2021, p. 861 and KSC-BC-2020-07, Transcript (Witness DW1253, Robert Reid), 24 January 2022, pp. 3277-3279, 3281-3283.
[150] See Gucati Appeal Brief, paras 60, 79, referring to Oral Order on Admission of Exhibits Tendered Through W04841; Decision on Admissibility of Deferred Exhibits, para. 8; Order on Rule 117 Defence Motions, para. 23.
[151] See above, para. 35.
[152] Appeal Decision on Defence Witnesses, para. 14.
[153] Rule 138(1) of the Rules. See also e.g. ICTY Rules, Rule 89(D); *Milutinović et al.* Appeal Decision on Witness Evidence, paras 16-19; *Martić* Appeal Decision on Witness Evidence, paras 14-15.
[154] Gucati Reply to SPO Response to Defence Admissibility Challenge, para. 40. See also Order on Rule 117 Defence Motions, para. 11.

Panel also observes that, contrary to the Trial Panel's finding that Gucati did not "[point] to any legal basis authorising the Panel to grant the relief sought at this point in the proceedings",[155] Gucati objected, pursuant to Rule 138(1) of the Rules, to Ms Pumper giving evidence as to the content of undisclosed parts of the Batches, on the basis that such anticipated testimony "is grossly prejudicial and outweighs whatever probative value is claimed".[156] Accordingly, the Trial Panel erred in finding otherwise.[157] Nevertheless, the Appeals Panel considers that, despite this error, the Trial Panel ultimately considered that the Defence had an opportunity to confront the witness, to challenge the probative value and reliability of exhibits tendered through her, and to object to the admissibility of exhibits during her testimony.[158] In the Panel's view, this assessment includes weighing whether Ms Pumper's evidence would be prejudicial to the Defence.

71. Furthermore, the Appeals Panel notes that there is no rule before the Specialist Chambers prohibiting or limiting the testimony of a SPO investigator.[159] The Appeals Panel also notes that an investigator can testify, in particular, as to the product of their own work,[160] and as to matters which they personally saw, heard, or experienced.[161]

[155] Decision on Admissibility of Deferred Exhibits, para. 8. See also Decision on Admissibility of Deferred Exhibits, para. 9.
[156] Gucati Reply to SPO Response to Defence Admissibility Challenge, paras 36, 39, 41. See also KSC-BC-2020-07, Transcript, 28 October 2021, pp. 1673-1676; Gucati Motion on Admissibility Challenge, paras 40-41 (arguing that Ms Pumper could in principle only testify as a fact witness in relation to the provenance and chain of custody of the documents and that since she did not participate in the seizure of any of the Batches, she could not provide such evidence).
[157] Order on Rule 117 Defence Motions, para. 11; Decision on Reconsideration of Order on Rule 117 Defence Motions, paras 23-25. See also Decision on Admissibility of Deferred Exhibits, paras 8-9.
[158] Decision on Admissibility of Deferred Exhibits, para. 8. See also Decision on Admissibility of Deferred Exhibits, para. 9.
[159] See also *Perišić* Decision on Witness Testimony, para. 13; *Milošević* Appeal Decision on Admissibility, para. 21; *Popović et al.* Decision on Admissibility of Testimony, pp. 2-3.
[160] *Kanyarukiga* Decision on OTP Witness List, para. 18; *Milutinović et al.* Decision on Certification of Appeal of Decision on Admission of Expert Witness, para. 11; *Nyiramasuhuko et al.* Oral Decision on Defence Expert Witness, paras 6-7, 10; *Katanga and Ngudjolo* Decision on Postponement of Hearings, para. 17.
[161] *Karemera et al*. Decision on Witness Withdrawal, para. 4; *Ndindiliyimana et al*. Decision on Defence Witness Testimony, para. 9.

The Panel does not consider that the case law referred to by Gucati supports his arguments,[162] as it concerns substantially different circumstances, where prosecution investigators called to testify were expected to summarise a "voluminous amount" of documents by selecting excerpts relevant for the judges[163] or written statements given to prosecution investigators by prospective witnesses,[164] or to prepare a report containing their opinion on certain events without having direct knowledge of them.[165] In the present case, the evidence provided by Ms Pumper on the basis of her review of the Batches and the charts she produced was limited to: (i) the factual information contained therein, including whether it is confidential and/or contains the names of witnesses; and (ii) their authenticity.[166] In particular with respect to the charts, the factual information provided by Ms Pumper was limited to providing that which was requested by the Pre-Trial Judge.[167] In the Panel's view, this limited framework did not leave room for personal opinions and does not compare to summarising documents, where the choice of which information to include inherently involves the exercise of one's own judgment.

72. The Panel further observes that the Defence had the opportunity to cross-examine Ms Pumper and to challenge her credibility and the reliability of her testimony,[168] as well as to challenge the admissibility of her declarations and other

---

[162] See Gucati Appeal Brief, paras 62-72, referring to *Perišić* Decision on Witness Testimony, paras 12, 15; *Milošević* Appeal Decision on Admissibility, paras 3(c), 23-24 and *Bizimungu et al.* Transcript, p. 31.
[163] *Perišić* Decision on Witness Testimony, paras 12, 15 (the ICTY Trial Chamber recognised, however, that a prosecution investigator may testify as a fact witness only in relation to provenance and chain of custody of these documents).
[164] *Milošević* Appeal Decision on Admissibility, paras 15, 18-22.
[165] *Bizimungu et al.* Transcript, pp. 4-5, 21.
[166] See P00086; P00088; P00089; P00090; P000091; KSC-BC-2020-07, Transcripts (Witness W04841, Zdenka Pumper), 18-21, 25-26 October 2021.
[167] P00090; P00091.
[168] KSC-BC-2020-07, Transcript, 19 October 2021, pp. 1015-1032; KSC-BC-2020-07, Transcript, 20 October 2021, pp. 1040-1091, 1092-1099 (private session), 1100-1158; KSC-BC-2020-07, Transcript, 21 October 2021, pp. 1165-1168, 1169 (private session), 1170-1215, 1216 (private session), 1217-1218, 1219-1244 (private session), 1246-1251; KSC-BC-2020-07, Transcript, 25 October 2021, pp. 1304-1315, 1316-1339 (private session), 1340-1342, 1343-1344 (private session), 1345-1347, 1348 (private session), 1349, 1350-1351 (private session), 1352-1364, 1365-1366 (private session), 1367-1385, 1386-1390 (private session),

exhibits tendered through her testimony.[169] Ms Pumper was also questioned by the Trial Panel, which engaged in a comprehensive evaluation of her credibility and the reliability of her evidence with respect to the content, authenticity, and confidentiality of the seized material.[170] In order to establish the confidential nature of the Batches, the Trial Panel considered not only Ms Pumper's evidence, but also: (i) the pages of the Batches admitted into evidence;[171] (ii) contemporaneous statements and evidence of the Accused acknowledging the type of documents included in the Batches, and indicating an acceptance of both the authenticity of the documents and their confidential nature; (iii) media reports; and (iv) the evidence of Mr Halil Berisha (Witness W04866) ("Mr Berisha") regarding Batch 4, which is relevant for Batch 1.[172] The Appeals Panel is therefore satisfied that the admission of Ms Pumper's evidence did not cause any prejudice to the Defence that would justify its exclusion under Rule 138(1) of the Rules.

73. In light of the above, the Appeals Panel finds that Gucati and Haradinaj fail to demonstrate an error in the Trial Panel's consideration of undisclosed and/or redacted documents contained in the Batches. Accordingly, the Appeals Panel dismisses

1391-1392, 1393-1407 (private session); KSC-BC-2020-07, Transcript, 26 October 2021, pp. 1414-1427, 1428-1429 (private session), 1430-1434, 1435 (private session), 1436-1438, 1439 (private session), 1440-1466, 1467-1469 (private session), 1489-1490. The Trial Panel also allowed the Defence to further cross-examine Ms Pumper on the basis that certain items were disclosed to the Defence after the close of the SPO case and therefore could not have been used by the Defence during the initial cross-examination. See Oral Order on Request for Further Cross-Examination of W04841 and W04842; KSC-BC-2020-07, Transcript, 15 December 2021, pp. 2622-2626 (private session). See also above, para. 70.

[169] See in particular, concerning admissibility, KSC-BC-2020-07, Transcript, 28 October 2021, pp. 1654-1686. See also Decision on Admissibility of Deferred Exhibits.

[170] Trial Judgment, paras 50-51, 331-381 (concerning the content of the Batches), 382-423 (concerning the authenticity of the Batches), 424-458 (concerning the confidentiality of the information contained in the Batches). See KSC-BC-2020-07, Transcript, 26 October 2021, pp. 1472-1488.

[171] See Trial Judgment, paras 339, 349, 354, 387, 391, 394, 429, 437. The Trial Panel admitted eleven pages from Batch 1 (P00093-P00097, P00139-P00144), the entirety of Batch 2, namely 937 pages with redactions on six pages (P00104), seventeen pages from Batch 3 (P00106-P00119), and six pages from Batch 4 (P00145-P00150).

[172] Trial Judgment, paras 333-334, 340, 343, 357-378, 383, 397-422, 425, 439-445, 449-457. See also Trial Judgment, paras 300-301 (referring to the Accused indicating that they had given 70-80% of the material contained in the Batches to media and that the SPO seized the remainders).

Gucati's Grounds 2(A) in relevant part[173] and 4(H) in relevant part,[174] and Haradinaj's Grounds 1 in relevant part and 4.

(b) Material Regarding Entrapment Claims (Haradinaj Grounds 16, 17)[175]

(i) Submissions of the Parties

74. Haradinaj submits that the Trial Panel made material determinations of fact on the basis of material which was not disclosed to the Accused, thereby breaching their right to a fair trial, even in the absence of demonstrable prejudice.[176] According to Haradinaj, while the Trial Panel held hearings *ex parte* the Defence to assess what needed to be disclosed to it, the right to a fair adversarial hearing encompasses the right of all parties to have knowledge of and comment upon all evidence adduced or observations filed with a view to influencing a court's decision, and that it is for the relevant party and not a court to judge whether a document calls for comments.[177]

75. Further, Haradinaj argues that the Trial Panel's failure to disclose material relevant to his entrapment defence breached Article 6(1) of the ECHR, which requires prosecution authorities to disclose to the defence all material evidence in their possession for or against an accused.[178] Haradinaj also submits that any measures restricting these rights of the Defence must be strictly necessary and sufficiently

[173] The Panel has addressed the remainder of the challenges in Gucati's Ground 2(A) in the section on the *actus reus* of the offence under Count 3. See below, paras 239-250.
[174] The Panel has addressed the remainder of the challenges in Gucati's Ground 4(H) in the section on Public Interest. See below, paras 321-340.
[175] The Panel observes that Haradinaj's arguments under Grounds 16 and 17 are made in the alternative to Grounds 12 and 13, which allege errors by the Trial Panel in its investigation into claims of entrapment. See Haradinaj Appeal Brief, para. 156. In view of the Panel's findings in relation to Haradinaj's Grounds 12 and 13 (see below, paras 361-374), the Panel will address these grounds of appeal as part of the Accused's challenges to fair trial.
[176] Haradinaj Appeal Brief, paras 156-157, 159, 161; Haradinaj Reply Brief, para. 43. See also Haradinaj Appeal Brief, para. 160 (submitting that this failure is particularly concerning because of *inter alia* the fact that his entrapment defence was contingent upon allegations of procedural and political impropriety and partiality by the SPO/Specialist Chambers, including members of the Trial Panel).
[177] Haradinaj Appeal Brief, paras 157-159, 161.
[178] Haradinaj Appeal Brief, paras 162-164, 172. See also Transcript, 2 December 2022, pp. 123-124.

counterbalanced,[179] and that the Trial Panel's decision to order counterbalancing measures for certain items that were material to the Defence case did not sufficiently safeguard the Accused's fair trial rights.[180]

76. The SPO responds that Haradinaj fails to identify both: (i) the material in relation to which he alleges an error on the part of the Trial Panel for not authorising disclosure despite its relevance for his entrapment claims; and (ii) an instance where the Trial Panel made a material determination of fact on the basis of any undisclosed items.[181] According to the SPO, he also fails to identify how the redacted or withheld material could have assisted him.[182] The SPO also argues that the Defence was not barred from challenging all of the items admitted into evidence and that any hearings *ex parte* the Defence were specifically aimed at exploring effective counterbalancing measures that would allow the Defence to fully raise its claim.[183] The SPO further submits that Haradinaj's arguments as to the fact that the Trial Panel had access to certain items to which he did not amounts to a challenge under Rule 108 of the Rules, and that Haradinaj establishes no inherent unfairness in the procedure under this Rule or the Trial Panel's implementation thereof.[184]

77. In reply, Haradinaj submits that his arguments are not undermined by the absence of reference to specific determinations made by the Trial Panel during the *ex parte* hearings, and that his fair trial rights were violated by his non-participation in these hearings, irrespective of whether he was barred from commenting on all of the items admitted into evidence.[185] Haradinaj finally submits that he is not at fault for

[179] Haradinaj Appeal Brief, paras 165-166.
[180] Haradinaj Appeal Brief, paras 167-172.
[181] SPO Response Brief, paras 155-156.
[182] SPO Response Brief, para. 160.
[183] SPO Response Brief, paras 157, 161; Transcript, 2 December 2022, pp. 122, 164.
[184] SPO Response Brief, paras 158, 161; Transcript, 2 December 2022, p. 164. See also SPO Response Brief, para. 159.
[185] Haradinaj Reply Brief, paras 40, 42. Haradinaj clarifies that he is willing to accept that discussions during the *ex parte* hearings may not have concerned material determinations of fact, but may have been relevant to material determinations of law. See Haradinaj Reply Brief, para. 41.

being unable to show how the information that was redacted or withheld could have assisted him, as it is precisely because of these redactions/reservations that his ability to show this was limited.[186]

(ii) Assessment of the Court of Appeals Panel

78. The Panel notes that, in both of the ECtHR cases to which Haradinaj refers in support of his argument that all parties have the right to know of and comment on all of the evidence adduced or observations filed,[187] the submissions withheld from the accused related to the merits of the matter before the competent courts.[188] In the Panel's view, a situation where the prosecution makes submissions on disclosure issues *ex parte* the defence is different. As Haradinaj acknowledges, the ECtHR accepts that 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, such as in cases where national security, the need to protect witnesses who are at risk of reprisals, or the need to keep secret the methods used by the police to investigate crimes are at stake.[189]

79. *Ex parte* hearings in such circumstances are a standard procedure, especially in situations like the present one, where it is clear from the material in question that, from a practical point of view, any submissions made in relation to the contents of the documents would be impossible without disclosing the very information which the prosecution seeks not to disclose.[190] This is also consistent with the Specialist Chambers' legal framework, since Rule 108(1) of the Rules provides for the possibility

[186] Haradinaj Reply Brief, para. 45. See also Haradinaj Reply Brief, para. 44.
[187] See Haradinaj Appeal Brief, para. 157, referring to *Brandstetter* Judgment, para. 67; *Bajić* Judgment, para. 59.
[188] *Brandstetter* Judgment, paras 34, 64-69; *Bajić* Judgment, paras 56-60.
[189] *Paci* Judgment, paras 84-85; *Rowe and Davis* Judgment, paras 60-61. See also *Jasper* Judgment, para. 52, cited in Haradinaj Appeal Brief, para. 165.
[190] *Brđanin and Talić* Decision on Oral Hearing, para. 4. See also *Ntaganda* Appeal Judgment, para. 122 (wherein the ICC Appeals Chamber held that a ruling authorising non-disclosure of material to the defence in an *ex parte* procedure does not mean that prejudice automatically results therefrom).

of the SPO applying confidentially and *ex parte* to a panel to withhold information subject to disclosure under Rules 102 and 103 of the Rules, where such disclosure may, *inter alia*, prejudice ongoing or future investigations or cause grave risk to the security of a witness, victim or members of his or her family.[191]

80. The Panel notes that in fact the Trial Panel held *ex parte* hearings in order to request additional information from the SPO on: (i) steps to ensure that the Defence can effectively and fully raise its entrapment claims; and (ii) the effective counterbalancing measures that could be adopted if non-disclosure was considered.[192] The Trial Panel also noted that ensuring that no prejudice or unfairness was caused to the Defence as a result of the *ex parte* nature of these sessions was a primary concern during its assessment.[193] Moreover, the Trial Panel conducted a thorough and informed assessment of all items subject to Rule 102(3) of the Rules and ordered the SPO, on several occasions against the SPO's objections, *inter alia*, to: (i) disclose to the Defence material identified as relevant to the entrapment claims, having considered all pertinent issues; or (ii) provide detailed, redacted or updated notices to the Defence of material that appeared *prima facie* relevant.[194] The Trial Panel also provided the SPO with strict instructions in relation to what material fell under Rule 102(3) of the Rules.[195] The Panel considers that this procedure, whereby it was the Trial Panel who

[191] See also Constitutional Court Judgment on Referral of Rules, paras 168, 183 (not having any comments on a potential incompatibility of this Rule with the Kosovo Constitution). See also Constitutional Court Judgment on Referral of Rules, paras 135-138, 177-178, 180 (wherein the Specialist Chamber of the Constitutional Court accepted, *inter alia*, that the entitlement to disclosure of relevant evidence is not an absolute right).
[192] See Trial Judgment, para. 844.
[193] Trial Judgment, para. 844.
[194] Trial Judgment, paras 843-844.
[195] See e.g. Decision on Updated Rule 102(3) Disclosure, paras 42, 48; Order on Updated Rule 102(3) Notice, para. 14.

assessed the material's relevance to the case for the purposes of disclosure, is in line with ECtHR case law.[196]

81. Regarding Haradinaj's challenges to redactions applied to specific items,[197] the Panel notes its finding that the procedure followed by the Trial Panel when assessing SPO requests under Rule 108 of the Rules met fair trial standards,[198] and that the Trial Panel applied the same fair trial considerations when assessing these specific items.[199] Moreover, the Trial Panel ordered counterbalancing measures with respect to these items, having found that their full disclosure would prejudice the ongoing SPO investigations.[200] The Panel notes in this regard that the Trial Panel has a discretion in assessing whether and which counterbalancing measures are appropriate to ensure the Accused's right to a fair trial.[201] Accordingly, the Panel considers that the Trial

[196] See *Jasper* Judgment, para. 56 (wherein the ECtHR held that the fact that the need for disclosure was at all times under assessment by the national trial judge provided an important safeguard). The Panel notes that Haradinaj's argument that his entrapment defence was also contingent upon allegations of impropriety and partiality of members of the Trial Panel (see Haradinaj Appeal Brief, para. 160) was never raised at trial and, accordingly, warrants summary dismissal (see Appeal Decision on Preliminary Motions, para. 15). In any event, his arguments regarding the disqualification of the Presiding Judge of the Trial Panel have been dismissed. See above, paras 42-43.
[197] Haradinaj Appeal Brief, paras 168-172, referring to items 191, 195-201.
[198] See above, paras 78-80.
[199] In particular, the Trial Panel ordered the disclosure of parts of item 191 even though it constituted internal work product under Rule 106 of the Rules and despite the fact that it contained no clear information that could assist the Defence claim or its investigations of entrapment, and ordered counterbalancing measures going further than those proposed by the SPO. See Decision on Updated Rule 102(3) Disclosure, paras 64, 67-68. Concerning items 195-200, the Trial Panel found that although they did not, in themselves, assist the Defence in its claim or investigation of entrapment and, in their raw format, were not informative as to the investigative steps the SPO took to exclude the possibility of an intentional leak, it nevertheless decided to disclose summaries thereof, being mindful that the Defence could commission its own analysis and reach its own findings regarding any investigative steps taken by the SPO to exclude the possibility that entrapment occurred. See Decision on Updated Rule 102(3) Disclosure, paras 71-74. Regarding item 201, the Trial Panel, acknowledging that the Defence did not have access to the material and therefore was not in a position to make informed submissions on materiality and proposed redactions, exercised particular caution in reviewing the material in order to preserve the effectiveness of the rights of the Accused in this matter. See Decision on Notice Item 201, paras 14, 24.
[200] Decision on Updated Rule 102(3) Disclosure, paras 66-68, 72-74, 76-78, 95(b)-(c); Decision on Notice Item 201, paras 24, 26.
[201] See Rule 108(4) of the Rules (providing that a panel may order that appropriate counterbalancing measures be taken and that if, in the opinion of the panel, no measures would ensure the accused's

Panel's approach to the disclosure of these items adequately safeguarded the Accused's fair trial rights.

82. In light of the above, the Appeals Panel finds that Haradinaj fails to demonstrate an error in the Trial Panel's decisions granting non-disclosure or redaction of material allegedly relevant for the Accused's entrapment claims. Accordingly, the Appeals Panel dismisses Haradinaj's Grounds 16 and 17.

(c) Material Regarding Mr Marty's Allegations (Haradinaj Ground 10)

(i) Submissions of the Parties

83. Haradinaj argues that the Trial Panel erred in law by refusing Defence requests to make submissions pursuant to Rule 136(2) of the Rules regarding Mr Marty's allegations that Serbian authorities were responsible for the fabrication and manipulation of evidence implicating Kosovo Albanians, on the basis that they were not relevant and, therefore, concluding that the threshold for disclosure had not been reached.[202] According to Haradinaj, an instance of Serbian authorities manipulating evidence to discredit Kosovo Albanians, if found to be replicated in this case, would substantially undermine findings of guilt, particularly in light of the dearth of evidence as to the chain of events from the removal of the documents from the SPO to their delivery at the KLA WVA, or would at least be relevant to an assessment of whether the SPO violated its obligation to refrain from any activity which is likely to negatively affect confidence in its independence and integrity.[203] Haradinaj also

right to a fair trial, the SPO shall be given the option of either disclosing the information, or amending or withdrawing the charges to which the information relates).

[202] Haradinaj Appeal Brief, paras 115-119, 122, 125-126, referring to Decision on Defence Requests for Further Submissions, paras 16, 19, 22.

[203] Haradinaj Appeal Brief, paras 121-124. See also Haradinaj Reply Brief, para. 30 (arguing that the SPO also fails to consider the parallel between these allegations and the present case).

submits that whether these allegations are unverified has no bearing on whether they are material to the preparation of the defence.[204]

84. The SPO responds that Haradinaj merely repeats arguments that were unsuccessful at trial and which are incapable of establishing an error that can invalidate the Trial Judgment.[205] Further, the SPO submits that the Defence failed to satisfy the requirements of Rule 136(2) of the Rules, that the information seemed to be publicly available and that the Trial Panel correctly found that such information was irrelevant to the case without the unverified nature of the allegations being central to its decision.[206]

85. Haradinaj replies that, contrary to the SPO's claims, the Trial Panel relied on the unverified nature of this information to reach its conclusion that it was irrelevant, although this information was not unverified and supported a central issue at trial.[207]

(ii) Assessment of the Court of Appeals Panel

86. The Trial Panel found, *inter alia*, that the Accused failed to establish that the publication of Mr Marty's allegations amounts to exceptional circumstances, as required by Rule 136 of the Rules, to allow further submissions after the closing of the case, on the basis that: (i) Mr Marty's allegations are irrelevant to the case; (ii) the material would not amount to potentially exculpatory material under Rule 103 of the Rules and, since it is irrelevant to the proceedings, it would not come under the terms of Rule 102(3) of the Rules either; and (iii) the SPO may be relieved of its disclosure obligation, if the existence of the relevant evidence is known and the evidence is accessible to the Defence.[208]

[204] Haradinaj Appeal Brief, para. 120.
[205] SPO Response Brief, paras 44, 46.
[206] SPO Response Brief, paras 44-45.
[207] Haradinaj Reply Brief, para. 31, referring to SPO Response Brief, para. 45.
[208] Decision on Defence Requests for Further Submissions, paras 16-19.

87. The Panel notes that Haradinaj's submissions that Mr Marty's allegations are relevant to the case for the most part merely repeat arguments that were already addressed by the Trial Panel, without demonstrating that the Trial Panel's rejection of them constituted an error warranting the intervention of the Appeals Panel.[209] Accordingly, the Panel summarily dismisses these arguments.[210] In any event, the Panel finds no error in the Trial Panel's conclusion that the Defence has not demonstrated any link between those matters and the facts underlying its case in the current proceedings,[211] since even if the material showed improprieties committed by Serbian authorities, this would not affect the present case.[212]

88. As for Haradinaj's argument that the Trial Panel erred by relying on the unverified nature of the allegations when concluding that they are irrelevant to the case, the Panel notes that the Trial Panel found in relevant part that Mr Marty's allegations "entail unverified allegations of impropriety on the part of Serbian authorities, which appear unrelated to the SPO's cooperation with such authorities or any claims of SPO impropriety raised by the Defence in the current proceedings" and that, for this reason, the Trial Panel was not satisfied that they were relevant to the case.[213] In the Panel's view, Haradinaj misrepresents the Trial Panel's finding, since it is clearly the fact that the content of the allegations was "unrelated to the SPO's cooperation with such authorities or any claims of SPO impropriety raised by the

[209] *Compare* Haradinaj Appeal Brief, paras 121-125 *with* Gucati Request for Further Submissions, paras 3-4, 14 and Haradinaj Request for Further Submissions, paras 4.1-4.9.
[210] See e.g. *Thaçi* Appeal Decision on Interim Release, para. 60.
[211] Decision on Defence Requests for Further Submissions, para. 16.
[212] See Appeal Decision on SPO Request Regarding Item 206, para. 38. Contra Haradinaj Appeal Brief, para. 124. Haradinaj's reference to the SPO's obligation to refrain from any activity which is incompatible with its functions or mandate or which is likely to negatively affect confidence in its independence and integrity under the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers (see Haradinaj Appeal Brief, para. 124, referring to Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, Article 31(c)) is irrelevant as it concerns the imposition of disciplinary sanctions. See Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers, Chapter V.
[213] Decision on Defence Requests for Further Submissions, para. 16. This sentence is the only instance where the word "unverified" appears.

Defence in the current proceedings", and not their characterisation as "unverified", that led to this conclusion.

89. In light of the above, the Appeals Panel finds that Haradinaj fails to demonstrate an error in the Trial Panel's refusal to disclose material related to Mr Marty's allegations. Accordingly, the Appeals Panel dismisses Haradinaj's Ground 10.

4. Alleged Errors Regarding the Admission of Evidence of Witnesses DW1250, DW1251, DW1252 and DW1253 (Haradinaj Grounds 1 in part, 6)

(a) Submissions of the Parties

90. Haradinaj submits that the Trial Panel erred in law and/or fact by refusing to hear the testimony of Witnesses DW1250 and DW1251 and by unduly restricting the extent of the expert evidence of Ms Anna Myers (Witness DW1252) ("Ms Myers") and Mr Reid, thereby directly contravening the Accused's right to call evidence reasonably relevant and necessary to the presentation of his defence.[214] Haradinaj specifically argues that Witnesses DW1250 and DW1251, by virtue of their prior professional positions, would be able to testify as to the existence of political interference, widespread corruption and collaboration with Serbian authorities amongst the EEAS and, therefore, to support the "central tenet" of the Accused's defence that his disclosures were justified by public interest.[215] Haradinaj also argues that the Trial Panel restricted key parts of expert witnesses Ms Myers's and Mr Reid's testimonies, which were directly relevant to his defence of whistleblowing and its application to

[214] Haradinaj Appeal Brief, paras 72, 78-79, 84. See also Haradinaj Appeal Brief, para. 83 (submitting that "these findings were at best ignorant to the reality of [the Accused's] case, or at worst an attempt to silence evidence directly relevant to the allegations of partiality, political interference, procedural impropriety, and unfairness").

[215] Haradinaj Appeal Brief, paras 73-77. According to Haradinaj, Witness DW1250 would additionally be in a position to provide evidence about judicial partiality and impropriety on behalf of the Presiding Judge of the Trial Panel. See Haradinaj Appeal Brief, para. 76. See also Haradinaj Appeal Brief, para. 43. See also above, fn. 70.

the facts of the case, and to the SPO's chain of custody over the documents that were seized on the KLA WVA's premises and its adherence to investigative standards, respectively.[216]

91. The SPO responds that Haradinaj merely repeats arguments that failed before the Trial Panel and/or the Appeals Panel without setting out how such decisions, which were fully consistent with the Law, the Rules and ECtHR jurisprudence, undermined the overall fairness of the proceedings and invalidated the Trial Judgment.[217] According to the SPO, the question of the relevance of Witnesses DW1250's and DW1251's proposed evidence to the present case has already been resolved by an interlocutory appeal and no justification is given for reconsidering that decision.[218] The SPO also submits that Haradinaj does not articulate an error when asserting that the Trial Panel unduly limited the scope of Ms Myers's and Mr Reid's testimonies, and that the limitations were clear and applied fairly to both Parties.[219]

92. Haradinaj replies that the SPO mischaracterises his position and fails to engage with the substance of his arguments, and submits that he is not trying to relitigate issues, but to highlight the Trial Panel's errors.[220]

(b) Assessment of the Court of Appeals Panel

93. At the outset, the Appeals Panel recalls that the admissibility of evidence is primarily a matter within the Trial Panel's discretion and that it will only intervene in limited circumstances.[221]

[216] Haradinaj Appeal Brief, paras 34(d), 79-82.
[217] SPO Response Brief, para. 41.
[218] SPO Response Brief, paras 42-43.
[219] SPO Response Brief, para. 15. The SPO also submits that the limitations to Mr Reid's testimony were fully consistent with the relevant appellate decision. See SPO Response Brief, para. 15, referring to Appeal Decision on Defence Witnesses, paras 25, 27-30.
[220] Haradinaj Reply Brief, paras 17-18.
[221] See above, para. 35.

94. As Haradinaj acknowledges, the Appeals Panel has already issued a decision confirming the Trial Panel's decision not to admit Witnesses DW1250's and DW1251's proposed evidence, on the basis that it does not relate to the charges and does not support Haradinaj's public interest defence, since it does not constitute evidence that would suggest that some of the material allegedly disclosed by the Accused contains indications of improprieties which would have affected the independence, impartiality or integrity of the SITF/SPO's investigation.[222] Similarly, the Appeals Panel has already ruled on the admissibility of Mr Reid's evidence, having found that Mr Reid's opinion on the SPO's practices, based on his own knowledge and experience of ICTY practices and practices in international criminal investigations, would assist a trier of fact in understanding the evidence before it, and requires expertise beyond that which the Trial Panel already possesses.[223] Accordingly, the Appeals Panel reversed the Trial Panel's decision not to hear Mr Reid, but did so only to the extent that his evidence aims to challenge the evidence of SPO witness Ms Pumper.[224]

95. The Panel recalls that an appeals panel can only depart from its previous decisions for cogent reasons in the interests of justice.[225] Haradinaj has failed to demonstrate a clear error justifying a reconsideration or any cogent reason that would lead the Panel to reach a different conclusion regarding the non-admission of Witnesses DW1250's and DW1251's evidence and the limitations imposed on the admission of Mr Reid's evidence. Haradinaj merely repeats arguments previously raised before the Trial Panel and the Appeals Panel.

96. Concerning Ms Myers's evidence, the Panel observes that the Trial Panel admitted her evidence with few limitations, which were restricted only to her

[222] Appeal Decision on Defence Witnesses, paras 19-21, 31. See also Haradinaj Appeal Brief, para. 78.
[223] Appeal Decision on Defence Witnesses, paras 27-29.
[224] Appeal Decision on Defence Witnesses, paras 29-31. See Trial Judgment, para. 64, referring to Trial Judgment, paras 577-578, 646.
[225] See above, para. 37.

comments and conclusions regarding the status of the Accused as "whistle-blowers" and the lawfulness of their conduct.[226] The Trial Panel also ordered the Parties to refrain from any question that would require Ms Myers to comment on the evidence tendered in these proceedings or on how any of her legal analysis would apply to the facts of the present case, on the basis that these issues fall squarely within the Trial Panel's competence and would constitute a usurpation of the Trial Panel's exclusive functions and responsibilities.[227] The Appeals Panel considers that the Trial Panel's finding in this regard is in line with well-established jurisprudence.[228] In any event, Haradinaj fails to demonstrate how the exclusion of this limited part of Ms Myers's proposed evidence impacted the Trial Judgment.

97. In light of the above, the Panel finds that Haradinaj fails to demonstrate an error in the Trial Panel's findings regarding the admission of the evidence of Witnesses DW1250 and DW1251, and of Ms Myers and Mr Reid. Accordingly, the Panel dismisses Haradinaj's Ground 1 in relevant part[229] and Ground 6.

5. Alleged Errors Regarding the Trial Panel's Reliance on Hearsay Evidence (Haradinaj Ground 7)

(a) Submissions of the Parties

98. Haradinaj submits that the Trial Panel erred in law by failing to set out the extent to which it relied on the SPO's hearsay evidence or to specify the weight attributed to each item in determining the Accused's guilt.[230] He argues that the Trial Panel must examine (i) whether there is good reason to admit anonymous hearsay

[226] Decision on Defence Witnesses, paras 98, 101. See also Trial Judgment, para. 63, referring to Trial Judgment, paras 827, 830, 848, 867.
[227] Decision on Defence Witnesses, paras 99, 101.
[228] See Appeal Decision on Defence Witnesses, paras 26-27, referring to *Ntaganda* Decision on Expert Witnesses, para. 8; *Ruto and Sang* Decision on Expert Report, para. 12; *Popović et al.* Appeal Judgement, para. 79; *Taylor* Decision on Exclusion of Evidence, para. 22.
[229] The Panel has addressed the remainder of the challenges in Haradinaj Ground 1 in the section on Public Interest. See below, paras 321-340.
[230] Haradinaj Appeal Brief, paras 85, 99.

evidence, keeping in mind that all reasonable efforts should be made to secure a witness's attendance, and (ii) whether it was the sole or decisive basis for a conviction.[231] In his view, where hearsay evidence is decisive, the Trial Panel must assess the adequacy of safeguards.[232]

99. In this context, Haradinaj takes issue with the fact that the evidence of those allegedly affected by the Accused's statements was given by SPO staff member Mr Miro Jukić (Witness W04842) ("Mr Jukić") through the presentation of anonymous hearsay from individuals who could not be identified or questioned.[233] He considers that – despite other witnesses' limited, outdated and non-specific *viva voce* evidence – the anonymous hearsay evidence was decisive as it went to elements of intimidation, retaliation and obstruction.[234]

100. Haradinaj argues that, although the Trial Panel excluded some hearsay evidence and was aware of the weight to be given to anonymous hearsay, (i) it was unclear whether it actually assessed the need for Mr Jukić's evidence, given that the SPO could have applied for protective measures for the underlying witnesses, which would have involved individual assessments and (ii) the Trial Panel failed to specify the weight given to each underlying statement, regardless of potential variations in credibility and probative value.[235]

101. The SPO responds that Haradinaj's arguments should be dismissed as inconsistent and contrary to common sense.[236] Alternatively, it submits that Haradinaj fails to substantiate how hearsay evidence was used solely or decisively in his conviction, given that Mr Jukić was extensively cross-examined, his testimony on

[231] Haradinaj Appeal Brief, paras 86-89.
[232] Haradinaj Appeal Brief, paras 87, 90, 94.
[233] Haradinaj Appeal Brief, para. 91; Haradinaj Reply Brief, paras 19-20.
[234] Haradinaj Appeal Brief, paras 92-93, 98; Haradinaj Reply Brief, para. 21.
[235] Haradinaj Appeal Brief, paras 95-98; Haradinaj Reply Brief, para. 21.
[236] SPO Response Brief, para. 52.

measures taken for witnesses affected in this case was not hearsay, and the Trial Panel did not rely on his recollection of other witnesses stating that they felt threatened or scared when assessing the consequences for witnesses.[237] The SPO points out that the impact on witnesses was not an element of intimidation and attempted obstruction, and that Haradinaj was acquitted of retaliation.[238] Moreover, it recalls that most witness contact notes were declared inadmissible, and the limited number of those admitted were not relied upon to establish that witnesses had suffered serious consequences.[239] Finally, it submits that Haradinaj's assertion that the Trial Panel failed to specify the weight given to hearsay does not identify an error and is manifestly groundless.[240]

(b) Assessment of the Court of Appeals Panel

102. The Panel summarily dismisses Haradinaj's Ground 7, for the reasons set out below. First, the Panel summarily dismisses Haradinaj's arguments insofar as they relate to retaliation, given his acquittal on this charge.[241]

103. Second, the Panel also notes that there are inconsistencies between Haradinaj's framing of this ground of appeal (alleging the Trial Panel's failure to "set out the extent to which it relied on hearsay" and to "specify the weight attributed" to hearsay)[242] and the arguments made thereunder (alleging that the Trial Panel improperly used

[237] SPO Response Brief, paras 53-55.
[238] SPO Response Brief, para. 55.
[239] SPO Response Brief, para. 56.
[240] SPO Response Brief, para. 57. See also SPO Response Brief, para. 52.
[241] Trial Judgment, para. 1016. See above, para. 31. See Haradinaj Appeal Brief, paras 92-93, where Haradinaj clarifies that his arguments under Ground 7 challenge the use of hearsay evidence *inter alia* with regard to the charge of retaliation. See also Haradinaj Reply Brief, para. 21. The Panel also notes that, given this acquittal, the hearsay evidence could not have been used solely or decisively for the Accused's conviction under this charge. See *Dimović* Judgment, para. 38. Contra Haradinaj Appeal Brief, paras 89-93, 98-99.
[242] Haradinaj Appeal Brief, para. 85. See also SPO Response Brief, para. 52. The Panel additionally notes that substantive changes were made to this ground of appeal in the Haradinaj Appeal Brief compared to his Notice of Appeal, which warrant summary dismissal of parts of this ground of appeal. See Haradinaj Notice of Appeal, para. 11; Haradinaj Appeal Brief, para. 85.

hearsay as a sole or decisive basis for convicting the Accused),[243] which would warrant summary dismissal of part of his ground of appeal.[244] In any event, Haradinaj concedes that hearsay evidence is admissible at trial and can be relied on,[245] and that the Trial Panel set out its approach as to hearsay evidence.[246]

104. Third, while Haradinaj's arguments focus on the use of Mr Jukić's evidence in relation to the charges of intimidation and obstruction,[247] he fails to make any references to paragraphs of the Trial Judgment where the Trial Panel actually did so. The Trial Judgment paragraphs that Haradinaj does cite, both in his Notice of Appeal and in his Appeal Brief, are either entirely unrelated to his arguments,[248] or refer to the Trial Panel's general preliminary findings on the admission of and weight attributed to hearsay (and other) evidence in the case, or to evidence of the general climate of witness intimidation in Kosovo (neither of which Haradinaj appears to challenge *per se* in this ground of appeal).[249] Accordingly, Haradinaj fails to meet the formal requirements set out in Article 47(1)(b)(2) of the Practice Direction on Filings.[250]

105. In light of the above, the Panel finds that Haradinaj fails to demonstrate an error in the Trial Panel's findings. For these reasons, the Appeals Panel dismisses Haradinaj's Ground 7.

[243] Haradinaj Appeal Brief, paras 86-99. See also SPO Response Brief, para. 52.
[244] See above, paras 30-31.
[245] See Haradinaj Appeal Brief, paras 87-90.
[246] See Haradinaj Appeal Brief, para. 95.
[247] Haradinaj's arguments also relate to the charge of retaliation, which the Panel declines to consider for the reasons given above, at para. 102.
[248] Trial Judgment, paras 15, 251, 383, 518, cited in Haradinaj Appeal Brief, fns 92-93.
[249] Trial Judgment, paras 24-26, 33, 38-45, 577, cited in Haradinaj Notice of Appeal, fn. 16, and Haradinaj Appeal Brief, fns 92-95.
[250] See also above, para. 29.

6. Alleged Errors Regarding the Trial Panel's Refusal to Grant Requests to Define the "Modes of Liability and Elements of Crime" Prior to the Trial Judgment (Haradinaj Ground 5)

(a) Submissions of the Parties

106. Haradinaj submits that the Trial Panel erred in law by not defining the "modes of liability and elements of crime" until after the conclusion of the trial, thereby failing to require the SPO to identify with sufficient specificity the particular modes of liability and *mens rea* forming the basis of charges in the Indictment.[251]

107. Haradinaj specifically submits that the Trial Panel erred in law by directing the Parties to make submissions on the elements and modes of liability, and then choosing "to defer" any decision until the trial judgment.[252] Haradinaj argues that this meant the Defence was unaware of what the SPO needed to prove for each offence, which "negatively prejudiced" the Accused in the "fair, informed, and strategic preparation of their defence".[253]

108. The SPO responds that this ground of appeal should be rejected *in limine*, since Haradinaj fails to provide reasoning to support his assertions and "does not explain how the Trial Panel's approach prejudiced him".[254] The SPO further submits that the Defence was not "unaware" of what the SPO needed to prove for each offence, and that the particular modes of liability and *mens rea* forming the basis of charges in the Indictment were "sufficiently specified".[255] According to the SPO, the Parties were given equal and ample opportunity to provide their views on the elements of the

[251] Haradinaj Appeal Brief, para. 68.
[252] Haradinaj Appeal Brief, para. 70. See also Haradinaj Appeal Brief, para. 69, referring to KSC-BC-2020-07, Transcript, 8 September 2021, p. 710; Defence Submissions on Elements of Crimes and Modes of Liability. See also Haradinaj Reply Brief, para. 16.
[253] Haradinaj Appeal Brief, para. 70. See also Haradinaj Reply Brief, para. 16.
[254] SPO Response Brief, para. 37.
[255] SPO Response Brief, para. 38. See also SPO Response Brief, para. 39, referring to Decision on Defence Motions to Dismiss Charges, para. 26.

crimes and modes of liability during trial, and this determination is to be made in the judgment at the end of the trial.[256]

(b) Assessment of the Court of Appeals Panel

109. The Panel recalls its jurisprudence that challenges to the contours or elements of a crime or mode of liability are matters to be addressed at trial.[257] The Appeals Panel therefore agrees with the Trial Panel that these are issues of law and evidence which are properly advanced and argued during the course of the trial,[258] and indeed matters to be addressed at the stage of the judgment in the case.[259] As the Trial Panel appropriately noted in its decision on Rule 130 of the Rules:

> [T]he Panel refrains at this stage from setting out the elements of the charged offences, as that exercise pertains to the determination of whether the Accused are guilty or not guilty for the purposes of the judgment. Accordingly, for the purpose of the present decision, the Panel has assessed the evidence against the elements of the charged offences as identified by the Pre-Trial Judge. These elements have been known to the Defence since the issuance of the Confirmation Decision. […] [T]hey have been relied upon by the SPO as the normative basis relevant to the presentation of its evidence. While the Defence is, course, permitted to dispute those elements as part of its case, it suffers no prejudice from the Panel deciding upon such challenges only at the end of the case.[260]

110. The Appeals Panel notes that extensive oral and written submissions were made by both Parties, not only as to the evidence but also the applicable law.[261] Moreover, considering that Haradinaj was clearly informed that the SPO relied on the

[256] SPO Response Brief, paras 39-40.
[257] *Thaçi et al.* Appeal Decision on Jurisdiction, paras 98, 100, 236; *Thaçi et al.* Defects in the Indictment Decision, paras 56, 177; *Shala* Defects in the Indictment Decision, para. 32.
[258] See also *Tolimir* Appeal Decision on Jurisdiction, para. 10; *Gotovina et al.* Appeal Decision on Jurisdiction, paras 15, 18.
[259] *Kordić and Čerkez* Decision on Judgement for Acquittal, para. 36; *Karadžić* Transcript, p. 28735, lines 12-13.
[260] Decision on Defence Motions to Dismiss Charges, para. 26.
[261] KSC-BC-2020-07, Transcript, 8 September 2021, pp. 647-683, 710; Defence Submissions on Elements of Crimes and Modes of Liability; Defence Motion under Rule 130, para. 11.

applicable law as set out in the Confirmation Decision,[262] the Panel is of the view that Haradinaj was aware "of what the SPO needed to prove for each offence" and was not "negatively prejudiced" in the preparation of his case.[263]

111. In light of the above, the Panel finds that Haradinaj fails to establish that the Trial Panel's approach was erroneous in law or prejudiced him. Accordingly, the Panel dismisses Haradinaj's Ground 5.

B. ALLEGED ERRORS CONCERNING VIOLATING THE SECRECY OF PROCEEDINGS – PROTECTED INFORMATION (COUNT 5)

112. Gucati and Haradinaj challenge the Trial Panel's findings on the *actus reus* underpinning their conviction under Count 5 of the Indictment ("Count 5") for violating the secrecy of proceedings, through the unauthorised revelation of secret information disclosed in official proceedings, punishable under Article 392(1) of the KCC.[264] The SPO responds that the Accused's grounds of appeal on Count 5 should be dismissed.[265]

113. The Panel recalls that the offence of violating the secrecy of proceedings, through the unauthorised revelation of secret information disclosed in official proceedings, pursuant to Article 392(1) of the KCC, is defined as follows:

> Whoever, without authorization, reveals information disclosed in any official proceeding which must not be revealed according to law or has been declared to be secret by a decision of the court or a

[262] Decision on Defence Motions to Dismiss Charges, para. 26; SPO Submissions on Applicable Law, para. 1.
[263] Contra Haradinaj Appeal Brief, para. 70.
[264] Gucati Appeal Brief, paras 135-189; Haradinaj Appeal Brief, paras 54, 188-193; Gucati Reply Brief, paras 31-46; Haradinaj Reply Brief, paras 54-56. See also Indictment, paras 33, 48. The Panel recalls that according to para. 48 of the Indictment, the offence of "violating secrecy of proceedings, through unauthorised revelation of secret information disclosed in official proceedings" is punishable under Articles 17, 31, 32(1)-(2), 33 and 35 of the KCC, applicable by virtue of Articles 15(2) and 16(3) of the Law.
[265] SPO Response Brief, paras 77-86, 88. See also SPO Response, paras 47-51.

> competent authority shall be punished by a fine or by imprisonment of up to one (1) year.

114. As specified by the Trial Panel, the offence of violating the secrecy of proceedings, within the meaning of Article 392(1) of the KCC, requires the following material elements (*actus reus*): (i) the unauthorised revelation of (ii) information disclosed in any official proceeding (iii) which must not be revealed according to law or has been declared to be secret by a decision of the court or a competent authority.[266] The Trial Panel further underlined that, for information to fall under Article 392(1) of the KCC, it must satisfy one of two alternative conditions: (i) it must not be revealed according to law; or (ii) it has been declared to be secret by a decision of the court or a competent authority.[267]

115. The Trial Panel found that the Protected Information[268] was revealed "without authorisation";[269] that prosecutorial investigations fall within the scope of "official proceedings";[270] that the information does not necessarily need to be disclosed directly "to the perpetrator";[271] and that the Protected Information qualified as information declared secret by a competent authority, within the meaning of Article 392(1) of the KCC.[272] Having established that one of the two alternative conditions under Article 392(1) of the KCC was met, the Trial Panel did not need to ascertain the fulfilment of the other alternative, but nevertheless elected to do so.[273] Ultimately, the Trial Panel was satisfied that the Protected Information fell under both alternatives of Article 392(1) of the KCC.[274]

---

[266] Trial Judgment, para. 69.
[267] Trial Judgment, paras 76, 465.
[268] The Protected Information was defined by the Trial Panel as SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 and the documents in Batch 3. See Trial Judgment, para. 473. See also Annex 2 to Trial Judgment, p. 6.
[269] Trial Judgment, paras 73, 486-489.
[270] Trial Judgment, paras 74, 477-479.
[271] Trial Judgment, para. 75.
[272] Trial Judgment, para. 473.
[273] Trial Judgment, para. 474.
[274] Trial Judgment, paras 76-79, 465-476.

116. The Appeals Panel will address the challenges to the Trial Panel's findings on the *actus reus* of Article 392(1) of the KCC as follows: (i) the unauthorised revelation of (ii) information disclosed in any official proceeding and (iii) which must not be revealed according to law or has been declared to be secret by a decision of the court or a competent authority.

1. Alleged Errors Regarding Findings on "Unauthorised Revelation" (Gucati Grounds 4(G)-(H), 5; Haradinaj Ground 3 in part)

(a) Submissions of the Parties

117. Gucati recalls the Trial Panel's finding that the revelation of information is "without authorization" if it is not permitted by law and argues under his Ground 4(G)-(H) that the disclosure of confidential information in the public interest is permitted by law.[275] Gucati further argues under his Ground 5 that the disclosure of confidential information by a whistle-blower is permitted by law and that the SPO failed to prove that the source of the leak was not a whistle-blower.[276]

118. Haradinaj argues that the Trial Panel erred in relying on the ICTY *Hartmann* Trial Judgement in support of its finding that to regard any prior unauthorised revelation of the Protected Information as having the effect of lifting its protected status would defeat or undermine the purpose of Article 392(1) of the KCC.[277] Haradinaj argues that the Trial Panel should have relied instead on the jurisprudence of the domestic courts of Kosovo.[278] In Haradinaj's view, this error undermines the legal validity of the convictions.[279]

---

[275] Gucati Appeal Brief, paras 190-202. See also Gucati Reply Brief, para. 46.
[276] Gucati Appeal Brief, paras 203-208.
[277] Haradinaj Appeal Brief, para. 54, fn. 61.
[278] Haradinaj Appeal Brief, para. 54.
[279] Haradinaj Appeal Brief, para. 54, fn. 61. Haradinaj notes but does not challenge the Trial Panel's finding that any prior unauthorised revelation of the Protected Information would not have had the effect of lifting its protected status and thereby rendering further revelations "authorised". See Haradinaj Appeal Brief, para. 153.

119. The SPO responds to Gucati that public interest would exclude criminal liability, but would not alter or disprove the *actus reus* of the offence, and that this interpretation is the only way to avoid undermining the purpose of Article 392(1) of the KCC. In addition, the SPO submits that the Trial Panel committed no error in rejecting the Accused's allegations regarding public interest.[280]

120. The SPO responds to Haradinaj that the Trial Panel was not bound by domestic Kosovo jurisprudence, but nevertheless gave it careful consideration when rendering the Trial Judgment.[281]

(b) Assessment of the Court of Appeals Panel

121. The Appeals Panel first notes that the Trial Panel correctly held that the revelation of information is "without authorization" if it is not permitted by law or the decision of a court or competent authority.[282] Thus, the question is whether, in the case at hand, the revelation of the information was permitted.

122. Gucati submits that the disclosure of confidential information can, in certain circumstances, be permitted by law.[283] The Panel notes Gucati's reliance on Article 200(2) of the KCC, but finds that this provision is in line with the Trial Panel's findings that, according to Article 200(2) and (4) of the KCC, public interest, if proven, may exceptionally exclude criminal liability, but would not affect the *actus reus* of the offence under Article 392(1) of the KCC.[284] Accordingly, Gucati's arguments are

[280] SPO Response Brief, para. 88.
[281] SPO Response Brief, paras 47-51.
[282] Trial Judgment, paras 73, 486.
[283] Gucati Appeal Brief, paras 190-212. See also Gucati Reply Brief, paras 46-48.
[284] Trial Judgment, para. 487. The Trial Panel further found that: "where considerations of public interest outweigh the interests of protecting information, they could exclude a person's criminal responsibility *despite* the commission of an offence". See Trial Judgment, para. 487. The Appeals Panel recalls that the notion of grounds excluding criminal responsibility does not mean that no offence is committed in circumstances where both the *actus reus* and the *mens rea* have been established. It only means that, although the *actus reus* of the offence has been fulfilled, an accused is not criminally responsible for it since his responsibility has been excluded by the respective ground(s). See below, para. 323.

irrelevant in this context, which deals with challenges to the *actus reus* of Count 5. The same reasoning applies to Gucati's allegation that the disclosure of confidential information by a whistle-blower is permitted by law. In any event, the Appeals Panel has considered Gucati's Grounds 4(G)-4(H) and 5 in the section on Defences in the present Judgment.[285]

123. The Panel further notes that Haradinaj challenges the Trial Panel's reliance on the ICTY *Hartmann* Trial Judgement.[286] However, Haradinaj does not challenge the substance of the Trial Panel's finding as such, but only the Trial Panel's reliance on ICTY jurisprudence rather than on Kosovo jurisprudence.[287] The Panel recalls that the Law clearly stipulates that Judges may be assisted by sources of international law, including subsidiary sources such as the jurisprudence of the international *ad hoc* tribunals, the ICC and other criminal courts.[288] Accordingly, the Panel finds that the Trial Panel's reliance on ICTY jurisprudence could not in itself constitute an error of law.

124. In light of the above, the Panel finds that the Accused failed to demonstrate an error in the Trial Panel's finding that the revelation of the Protected Information was without authorisation. Accordingly, the Panel dismisses Haradinaj's Ground 3 in relevant part.[289]

---

[285] See below, paras 321-340, 347-349. The Appeals Panel has also already addressed Gucati's arguments raised under Gucati Ground 4(H) concerning the question of the non-disclosure of the Batches. See above, paras 65-73.
[286] Haradinaj Appeal Brief, para. 54, fn. 61. See also Trial Judgment, para. 488.
[287] The Panel notes that Haradinaj challenges the finding that any prior unauthorised revelation of the Protected Information would not have had the effect of lifting its protected status and thereby rendering further revelations "authorised" within the meaning of Article 392(1) of the KCC. However, his challenge is not developed in relation to Count 5 of the Indictment. See Haradinaj Appeal Brief, para. 153.
[288] Article 3(3) of the Law. See also Appeal Decision on Gucati's Arrest and Detention, para. 11.
[289] The Panel has addressed the remainder of the challenges in Haradinaj Ground 3 in the section on Concurrence under Count 2. See below, paras 301-310.

2. Alleged Errors Regarding Findings on "Information Disclosed in Any Official Proceeding" (Gucati Ground 4(A))

(a) Submissions of the Parties

125. Gucati submits that Article 392(1) of the KCC requires that the information must have been disclosed to the perpetrator in an official proceeding.[290]

126. Gucati also submits that, contrary to the Trial Panel's findings, the perpetrator of this offence can only be the "initial recipient of the information", who has been made privy to that information in the course of an official proceeding.[291] According to Gucati, a person who overhears, or accidentally comes into possession of, information which is subject to a non-disclosure decision of the court cannot be the "target" of the offence under Article 392(1) of the KCC.[292] In Gucati's view, this interpretation does not mean that such a person is "beyond the reach of the law" since other offences, such as Article 393 of the KCC, may still apply to him or her.[293]

127. Gucati further submits that the exchange of information within the SITF/SPO, or shared between the SITF/SPO and its counterparts in the course of cooperation for investigative purposes, may qualify as "disclosure" for the purposes of Article 392(1) of the KCC only where the alleged perpetrator falls within one of those categories (SITF/SPO or its counterparts).[294] Because Gucati did not fall into either category, he argues that there was no "disclosure in any official proceeding" of the information he

[290] Gucati Appeal Brief, para.135. See also Gucati Appeal Brief, para. 147. Gucati argues that, by contrast, protected information overheard, for example, on a train by a third party is not information "disclosed in any official proceedings". See Gucati Appeal Brief, para. 136.
[291] Gucati Appeal Brief, paras 137, 142; Gucati Reply Brief, paras 31-32. See also Gucati Appeal Brief, para. 143.
[292] Gucati Appeal Brief, para. 137.
[293] Gucati Appeal Brief, paras 138-141. See also Gucati Reply Brief, para. 34.
[294] Gucati Appeal Brief, para. 144.

revealed.[295] Referring to Article 2(3) of the KCC, Gucati argues that any ambiguity in the KCC should be resolved in the way most favourable to the Accused.[296]

128. The SPO responds that the Trial Panel made no error, and that the plain language of Article 392(1) of the KCC does not require that the information be disclosed directly and only to the perpetrator in the official proceeding.[297]

(b) Assessment of the Court of Appeals Panel

129. The Panel notes that Gucati does not challenge the notion of "official proceeding" as defined by the Trial Panel and the related finding that, in accordance with the KCC and the KCPC, prosecutorial investigations are included within the scope of "criminal proceedings", which are incorporated in the definition of "official proceedings".[298]

130. However, Gucati challenges the Trial Panel's findings on the target of the offence as, in his view, the perpetrator of the offence under Article 392(1) of the KCC can only be the SITF/SPO or its counterparts that have been privy to the information disclosed in an official proceeding.[299]

131. The Panel does not consider that Article 392(1) of the KCC should be read in such a restrictive way. The Panel rather observes that Article 392(1) of the KCC refers to "[w]hoever without authorization reveals […] information […]" and, based on the plain or ordinary meaning of the word "whoever", applies to *any person*, regardless of whether that person is part of the official Specialist Chambers' proceedings.[300] Accordingly, the Panel dismisses Gucati's interpretation and agrees with the Trial Panel's finding that Article 392(1) of the KCC does not specifically require that the

[295] Gucati Appeal Brief, paras 144-145.
[296] Gucati Reply Brief, para. 33.
[297] SPO Response Brief, paras 77-78.
[298] Trial Judgment, para. 74.
[299] Gucati Appeal Brief, paras 137-146.
[300] See *Salihu et al*. Commentary, Article 400(1) of the 2012 KCC, mns 4, 11, pp. 1142-1143.

information must have been disclosed directly to the perpetrator of the offence and that a different interpretation would be inconsistent with the plain meaning of the text of the provision, as well as with the purpose of this provision, that is the protection of the secrecy of the proceedings.[301]

132. Given that the Panel has confirmed that Article 392(1) of the KCC does not specifically require that the information must have been disclosed directly to the perpetrator of the offence, the Panel does not need to address Gucati's remaining arguments that Article 392(1) of the KCC does not apply to a person who overhears, or accidentally comes into possession of, information which is subject to a non-disclosure decision of the court, but that other articles of the KCC may apply.[302]

133. The Panel further disagrees with Gucati's argument that, in order for conduct to qualify as "disclosure" for the purposes of Article 392(1) of the KCC, the alleged perpetrator must be the SITF/SPO or its counterparts.[303] Here again, the Panel finds that the plain or ordinary meaning of the word "disclosure" does not suggest such a restrictive interpretation. In that regard, the Panel recalls relevant jurisprudence from the ICTY, according to which the word "disclosure":

> […] is here to be understood in its literal sense, being the revelation of something that was previously confidential. Thus, the passing of confidential information to a third party would amount to disclosure, as would the publication of such information in a newspaper.[304]

134. Applied to the circumstances of this case, disclosure covers the conduct of the direct perpetrator of the offence – meaning the person passing confidential

[301] Trial Judgment, para. 75.
[302] Gucati Appeal Brief, paras 137-141. In light of its finding, the Panel considers that the hypothesis put forward by Gucati of a disclosure that would take place on a train is irrelevant in the context of this case and does not affect the Trial Panel's findings. See Gucati Appeal Brief, para. 136.
[303] Gucati Appeal Brief, para. 144.
[304] *Marijačić and Rebić* Trial Judgement, para. 17.

information to Gucati and Haradinaj – as well as the subsequent dissemination of such information by the Accused, as charged in the Indictment.[305]

135. The Panel further finds that, contrary to Gucati's assertion,[306] nothing in the wording of Article 392(1) of the KCC justifies the application of Article 2(3) of the KCC, according to which, in case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the Accused (*lex mitior* rule). Having found that the interpretation of Article 392(1) of the KCC bears no ambiguity, recourse to Article 2(3) of the KCC is not warranted.

136. In light of the above, the Panel finds that Gucati fails to demonstrate any error in the Trial Panel's findings on "information disclosed in any official proceeding". Accordingly, the Panel dismisses Gucati's Ground 4(A).

3. Alleged Errors Regarding Findings on "Which Must Not Be Revealed According to Law or Has Been Declared to Be Secret by a Decision of the Court or a Competent Authority" (Gucati Ground 4(B)-(F); Haradinaj Ground 21)

(a) Submissions of the Parties

137. The first alternative of Article 392(1) of the KCC criminalises the unauthorised revelation of information "which must not be revealed according to law". In Gucati's view, the Trial Panel's finding that this requirement was also met is based on an erroneous interpretation of Rule 106 of the Rules and of Article 62(1) of the Law, which do not expressly prohibit the revelation of the SPO's internal work product.[307]

138. Addressing the second alternative of Article 392(1) of the KCC on information that "has been declared to be secret by a decision of the court or a competent authority", Gucati argues that the definition of "secret" is provided by the Kosovo

[305] Indictment, para. 6.
[306] Gucati Reply Brief, para. 33.
[307] Gucati Appeal Brief, paras 156-166; Gucati Reply Brief, para. 40.

Law on the Classification of Information and Security Clearances, and that the KCC must be interpreted in accordance with the law of Kosovo.[308] Gucati underlines that, according to this definition, information can only be declared "secret" under specific conditions, and that there was no evidence in the present case of any information having been specifically declared "secret" pursuant to the above-mentioned law by the SPO/SITF.[309]

139. While Gucati acknowledges that the Kosovo Law on the Classification of Information and Security Clearances was not incorporated into the statutory framework of the Specialist Chambers, he argues that Article 392(1) of the KCC is to be interpreted in the context of the law of Kosovo as a whole.[310] Haradinaj makes similar arguments and submits that the Trial Panel failed to take into account and to apply the specific definition of "secret information" provided under the Kosovo Law on the Classification of Information and Security Clearances.[311]

140. Gucati further stresses that Article 392(1) of the KCC requires the SPO to prove the lawfulness of any decision and/or declaration that the impugned information was indeed secret.[312] Gucati argues that the Trial Panel erroneously found that it was sufficient that the SPO simply treated or marked information as confidential despite the wording of the Kosovo Law on the Classification of Information and Security Clearances and relevant provisions of the Rules that set specific requirements, both

[308] Gucati Appeal Brief, paras 147-149, 151-153. Gucati adds that the Kosovo Law on the Classification of Information and Security Clearances applies to "all public authorities in Kosovo exercising executive and judicial competences". See Gucati Appeal Brief, para. 150; Gucati Reply Brief, para. 41.
[309] Gucati Appeal Brief, paras 149, 152-155; Gucati Reply Brief, paras 38-39. See also Gucati Appeal Brief, paras 167-171.
[310] Gucati Reply Brief, paras 34-35.
[311] Haradinaj Appeal Brief, paras 188-193; Haradinaj Reply Brief, paras 54-56. See also Transcript, 1 December 2022, pp. 95-97; Transcript, 2 December 2022, pp. 198-199.
[312] Gucati Appeal Brief, paras 167, 178, 180. Gucati argues that the terms of Article 392(1) of the KCC "require a *decision* followed by a *declaration*" (emphasis in original). See Gucati Appeal Brief, paras 167, 174.

formal and substantive, for the making of decisions and declarations on classification.[313]

141. Furthermore, Gucati contends that the SPO had to prove that the information was lawfully and rightfully classified as secret.[314] However, Gucati argues that, save for six identified "witnesses/potential witnesses", the SPO called no evidence as to the identities of the persons it sought to obtain information from.[315] In his view, the SPO adduced no evidence as to what information it sought from the "witnesses/potential witnesses", nor the reasons why.[316] Accordingly, Gucati asserts that the Trial Panel was unable to consider the content of the impugned material and ascertain for itself whether it was necessary to classify as confidential the impugned information therein and whether or not any classification had been carried out abusively.[317]

142. According to Gucati, the Trial Panel further erred and reversed the burden of proof in finding that it received no evidence showing that the SITF/SPO had abusively treated as confidential any of the information relevant to these proceedings.[318]

143. Haradinaj argues that he is only charged with the second alternative provided by Article 392(1) of the KCC, which is the "unauthorised revelation of secret information disclosed in official proceedings", and that, accordingly, he is not charged in relation to "information which must not be revealed according to law".[319]

---

[313] Gucati Appeal Brief, paras 167-179; Gucati Reply Brief, para. 41.
[314] Gucati Appeal Brief, paras 180-182. See also Gucati Reply Brief, para. 43.
[315] Gucati Appeal Brief, para. 183.
[316] Gucati Appeal Brief, para. 183.
[317] Gucati Appeal Brief, paras 183-184, 187; Gucati Reply Brief, paras 43-45. Gucati's arguments concerning the non-disclosure of the Batches have been addressed in the section on Disclosure. See above, paras 65-73. Gucati further argues that the evidence of Ms Pumper did not assist regarding the procedure for classification. See Gucati Appeal Brief, paras 185-186. Challenges to Ms Pumper's evidence have been addressed elsewhere. See above, paras 66-72; see below, paras 239-242.
[318] Gucati Appeal Brief, paras 188-189; Gucati Reply Brief, paras 44-45.
[319] Haradinaj Appeal Brief, paras 189-191. See also Gucati Appeal Brief, para. 147. See also Transcript, 1 December 2022, p. 97.

144. The SPO argues that the Indictment clearly also covered the other alternative in Article 392(1) of the KCC, and that the Trial Panel made findings on the two alternatives in Article 392(1) of the KCC, which criminalises revealing information which "must not be revealed according to law" or that has been "declared to be secret".[320]

145. With regard to the first alternative, the SPO submits that Gucati's arguments on the inapplicability of Rule 106 of the Rules or of Article 62 of the Law must fail because the Trial Panel independently found that the information had also been declared secret within the meaning of the second alternative of Article 392(1) of the KCC. According to the SPO, these grounds can be summarily dismissed once grounds under the second alternative are rejected.[321]

146. The SPO further argues that, in any event, Gucati's arguments on the first alternative of Article 392(1) of the KCC have no merit, since the provisions used by the Trial Panel (Rule 106 of the Rules or Article 62 of the Law) fall within the Specialist Chambers' legal framework.[322]

147. With regard to the second alternative, the SPO submits that the Trial Panel properly established that the SPO is a "competent authority" within the meaning of Article 392(1) of the KCC and that the term "secret" must be interpreted in accordance with its ordinary meaning, noting that the Kosovo Law on the Classification of Information and Security Clearances is not incorporated by reference into either Article 392(1) of the KCC or the Specialist Chambers' legal framework.[323] The SPO further submits, *inter alia*, that the evidence that was admitted at trial shows the confidential nature of the disclosed material, and that Gucati fails to establish that no

[320] SPO Response Brief, para. 80. See also Transcript, 2 December 2022, p. 139.
[321] SPO Response Brief, para. 81.
[322] SPO Response Brief, para. 82.
[323] SPO Response Brief, paras 79-80, 83-84. See also Transcript, 2 December 2022, pp. 139-140.

reasonable panel could have concluded that the secret information was lawfully declared as such.[324]

(b) Assessment of the Court of Appeals Panel

148. The Panel will start its assessment with the challenges concerning the second alternative of Article 392(1) of the KCC on information that "has been declared to be secret by a decision of the court or a competent authority".

149. Although the Kosovo Law on the Classification of Information and Security Clearances may be an informative source to interpret the provisions of the Specialist Chambers' legal framework, it is not applicable in the present proceedings. The Panel recalls that this Kosovo law is not incorporated by reference into the Law and shall therefore not, as per Article 3(4) of the Law, apply to the jurisdiction of the Specialist Chambers.[325] Rather, the Panel agrees with the Trial Panel's findings and the SPO's submissions[326] that the term "secret" is used in Article 392(1) of the KCC in its generic sense, meaning that the information cannot be disclosed to unauthorised persons.[327] Accordingly, the Panel considers that the terms "secret" and "confidential" should not be understood differently from each other and from the generic meaning of "secret" in the current context. Therefore, information treated as confidential by the SPO is to be regarded as secret within the meaning of Article 392(1) of the KCC.

150. The Panel notes that Gucati does not challenge the finding that the SPO qualifies as a competent authority for the purposes of Article 392(1) of the KCC, but rather submits that the SPO failed to prove that the classification was not carried out

[324] SPO Response Brief, paras 85-86.
[325] According to Article 3(4) of the Law: "Any other Kosovo law, regulation, piece of secondary regulation, other rule or custom and practice which has not been expressly incorporated into this Law shall not apply to the organisation, administration, functions or jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office".
[326] SPO Response Brief, para. 83.
[327] Trial Judgment, para. 78.

abusively.[328] The Panel understands that Gucati is referring here to the Trial Panel's finding that it "has received no evidence that the SITF or the SPO has done so abusively or unnecessarily in respect of any of the information relevant to these proceedings".[329]

151. The Panel notes that the Law and the Rules permit the SPO to adopt, on its own motion, measures of protection pursuant to, *inter alia*, Articles 35(2)(f) and 54(8) of the Law and Rules 30(2)(a), 82, 106 and 107(1) of the Rules.[330] The competence of the SPO to adopt measures of protection is further confirmed by Article 61(4) of the Law. Under these provisions, the SPO has the authority to take necessary measures to ensure, notably, the confidentiality of information and the protection of any person. None of these provisions require a panel to supervise the lawfulness or rightfulness of the SPO's actions. This follows from the more general principle that the SPO shall be independent in the performance of its functions. Accordingly, measures of protection adopted by the SPO qualify as information declared to be secret by a competent authority and are not subject to a decision of a panel. Gucati's assertion that the SPO had to prove the lawfulness of both the declaration and the decision[331] is therefore groundless.[332] In fact, the Trial Panel did not make findings on whether the information had been declared secret by a decision of a court and instead limited its finding to whether the Protected Information qualified as information declared secret by a competent authority, within the meaning of Article 392(1) of the KCC.[333]

---

[328] Gucati Appeal Brief, paras 180-189.
[329] Trial Judgment, para. 472.
[330] See Trial Judgment, para. 78.
[331] Gucati Appeal Brief, paras 167, 178.
[332] See below, paras 183-185. The reference to the *Salihu et al.* Commentary put forward by Gucati in support of his argument is inapposite. See Gucati Appeal Brief, para. 180, fn. 103, referring to *Salihu et al.* Commentary, Article 400(1) of the 2012 KCC, mn. 10, pp. 1142-1143 according to which, if the information was declared confidential pursuant to an unlawful decision by a court or institution, for example, if the public was unlawfully excluded from the trial proceedings, then no criminal offence would be committed.
[333] Trial Judgment, para. 473.

152. The Appeals Panel acknowledges that Gucati is also challenging the limited disclosure provided by the SPO with regard to the Protected Information,[334] but recalls that the Panel has addressed challenges pertaining to the SPO's disclosure elsewhere in the present Judgment.[335] The Panel notably found that, for the purposes of the charges against the Accused, it is sufficient that at least one document contained in the Batches was found to be confidential and the Trial Panel did not need to establish that all respective documents were confidential.[336] The Appeals Panel further recalls that the Trial Panel established the confidential nature of the Batches.[337]

153. In any event, as the Appeals Panel has found that the SPO was not under an obligation to prove that the Protected Information was lawfully and rightfully classified as confidential, it considers that the extent of the SPO's disclosure is irrelevant for assessing challenges to the Trial Panel's findings on Count 5 of the Indictment.

154. In light of the above, the Panel dismisses the Defence's arguments that the Trial Panel erred in finding that the Protected Information qualified as information declared secret by a competent authority, within the meaning of Article 392(1) of the KCC.[338]

155. Having rejected the challenges to one of the two alternatives under Article 392(1) of the KCC, the Panel need not address the challenges to the fulfilment of the other, namely whether the Protected Information also qualifies as information "which must not be revealed according to law". This is because, even if these challenges were successful, they would have no impact on the Trial Judgment as to the conviction of the Accused under Article 392(1) of the KCC, since one of the

[334] Gucati Appeal Brief, paras 183-184.
[335] See above, paras 65-73.
[336] See above, para. 68.
[337] Trial Judgment, paras 424-458.
[338] Trial Judgment, para. 473.

alternatives under that provision suffices for the fulfillment of the *actus reus* of the offence. Thus, the general principle applies that arguments which do not have any potential to produce a reversal of an impugned decision may be immediately dismissed and need not be considered on the merits.[339] For the same reason, the Panel summarily dismisses Haradinaj's argument that, under Count 5 of the Indictment, he is not charged in relation to "information which must not be revealed according to law".[340]

156. Accordingly, the Panel dismisses the remainder of Gucati's Ground 4 and Haradinaj's Ground 21.

C. ALLEGED ERRORS CONCERNING VIOLATING THE SECRECY OF PROCEEDINGS – PROTECTED PERSONS (COUNT 6)

157. Gucati and Haradinaj challenge the Trial Panel's findings on the *actus reus* underpinning their conviction under Count 6 of the Indictment ("Count 6") for the unauthorised revelation of the identities and personal data of protected witnesses, punishable under Article 392(2) and (3) of the KCC.[341] The SPO responds that the Accused's grounds of appeal on Count 6 should be dismissed.[342]

158. The Panel recalls that the offence of violating the secrecy of proceedings through unauthorised revelation of the identities and personal data of protected witnesses and the aggravated form of the offence, within the meaning of Article 392(2) and (3) of the KCC, are defined as follows:

> 2. Whoever without authorization reveals information on the identity or personal data of a person under protection in the criminal

[339] See above, para. 31.
[340] Haradinaj Appeal Brief, paras 189-191.
[341] Gucati Appeal Brief, paras 214-278; Haradinaj Appeal Brief, paras 103-107, 194-208; Gucati Reply Brief, paras 49-69. See also Indictment, paras 34-35, 48. The Panel recalls that according to para. 48 of the Indictment, the offence of "violating secrecy of proceedings, through unauthorised revelation of the identities and personal data of protected witnesses" is punishable under Articles 17, 28, 31, 32(1)-(3), 33 and 35 of the KCC, applicable by virtue of Articles 15(2) and 16(3) of the Law.
[342] SPO Response Brief, paras 89-104.

> proceedings or in a special program of protection shall be punished by imprisonment of up to three (3) years.
>
> 3. If the offense provided for in paragraph 2. of this Article results in serious consequences for the person under protection or the criminal proceedings are made impossible or severely hindered, the perpetrator shall be punished by imprisonment of six (6) months to five (5) years.

159. The Trial Panel noted that Article 392(2) of the KCC constitutes a form of unauthorised revelation of protected information under Article 392(1) of the KCC, and stated that its findings under Article 392(1) of the KCC apply *mutatis mutandis* for this sub-category, unless otherwise determined by the Trial Panel.[343]

160. The Trial Panel found that "information on the identity or personal data" of Witnesses and Potential Witnesses contained in the Protected Information was revealed "without authorisation", and that the Witnesses and Potential Witnesses concerned were "person[s] under protection in the criminal proceedings" within the meaning of Article 392(2) of the KCC.[344] The Trial Panel further found that the unauthorised revelation resulted in serious consequences for the persons protected under Article 392(2) of the KCC, and that therefore the aggravated form of this offence as penalised under Article 392(3) of the KCC was fulfilled in relation to the Witnesses at Risk.[345]

---

[343] Trial Judgment, para. 92, referring to Confirmation Decision, para. 43. Under Gucati Ground 6, Gucati indicates that both Article 392(1) and Article 392(2) of the KCC provide that an offence is committed only where the revelation of information of the identity or personal data of a person under protection in criminal proceedings occurs "without authorization". Accordingly, he submits that his submissions in relation to: (i) the classification of the SITF Requests and WCPO Responses as confidential and; (ii) the lawful bases for the revelation of the impugned material in relation to Count 5 apply *mutatis mutandis* to Count 6. See Gucati Appeal Brief, paras 215-216. See also SPO Response Brief, para. 89. The Panel's findings on these issues in relation to Count 5 also apply *mutatis mutandis* to Count 6.

[344] Trial Judgment, paras 89, 94-99, 509-527. The Trial Panel noted that the SPO did not plead that the Accused revealed information on the identity or personal data of a person in a special program of protection, and therefore this alternative element was not addressed. See Trial Judgment, para. 508.

[345] Trial Judgment, paras 100, 534-547, 552.

161. The Panel will address the challenges to the Trial Panel's findings on the *actus reus* of Article 392(2) of the KCC as follows: (i) "person" [under protection in the criminal proceedings], and (ii) [person] "under protection in the criminal proceedings". The Panel will then turn to address the challenges relating to the aggravated form of the offence pursuant to Article 392(3) of the KCC.

1. Alleged Errors Regarding Findings on "Person" [Under Protection in the Criminal Proceedings] (Gucati Ground 8(A); Haradinaj Ground 22)

(a) Submissions of the Parties

162. Gucati argues that the definition of "witness" and "potential witness" adopted by the Trial Panel was erroneous in law and provided without warning.[346] Gucati underlines that the SPO restricted the scope of Count 6 to "any person(s) likely to have information about a crime, the perpetrator, or important circumstances relevant to [Specialist Chambers'] proceedings".[347] According to Gucati, the Trial Panel unfairly extended the scope of Count 6 to any person whom the SITF/SPO had met and had obtained information from, or from whom the SPO was seeking to obtain information, including through other organisations.[348] In doing so, he argues that the Trial Panel wrongly permitted the SPO to avoid proving to the criminal standard that any person alleged to be a witness or potential witness (i) had provided, or (ii) was likely to be able to provide, information that related to a crime or other important circumstances relevant to the Specialist Chambers' proceedings.[349] Gucati further argues that there is no evidence on the record that the alleged witnesses and potential witnesses had or were likely to have information relevant to the Specialist Chambers' proceedings.[350]

[346] Gucati Appeal Brief, para. 232. See also Gucati Appeal Brief, paras 228-230; Gucati Reply Brief, paras 52-53.
[347] Gucati Appeal Brief, para. 225.
[348] Gucati Appeal Brief, para. 226.
[349] Gucati Appeal Brief, paras 226-227, 232.
[350] Gucati Appeal Brief, paras 227, 231-232. See also Gucati Reply Brief, para. 54; Transcript, 2 December 2022, p. 177.

163. Haradinaj submits that the Trial Panel erred in law in finding that a "person under protection [in the] criminal proceedings" under Article 392(2) of the KCC was "any person in relation to whom there is a legal requirement, an order or a measure of protection issued or implemented in criminal proceedings" and can be "a person whose identity or personal data appears in [Specialist Chambers] or SPO documents or records the disclosure of which has not been authorised".[351]

164. The SPO responds that Gucati's assertion that the Trial Panel broadened the definition of the term "witness" as defined in the Indictment is wrong, and that, in any event, the SPO adduced ample evidence showing that the content of the Batches included the details of persons with information about a crime, the perpetrator, or important circumstances relevant to the Specialist Chambers' proceedings.[352] In support of its assertion, the SPO points to Section V(B) of the Trial Judgment.[353] The SPO further responds that Haradinaj's arguments should be summarily dismissed.[354]

165. In his Reply Brief, Gucati notably asserts that Section V(B) of the Trial Judgment does not set out anywhere what crime, perpetrator or circumstances relevant to the Specialist Chambers' proceedings any individual may have had information about, and why those circumstances were important to the Specialist Chambers' proceedings.[355]

(b) Assessment of the Court of Appeals Panel

166. The Panel observes that the SPO, in the Indictment, did not refer to "a person under protection in the criminal proceedings" but rather referred to "witness(es)" and defined the term "witness" as "any person(s) likely to have information about a crime,

[351] Haradinaj Appeal Brief, paras 194-195, referring to Haradinaj Ground 4; Haradinaj Reply Brief, para. 57.
[352] SPO Response Brief, paras 92-93.
[353] SPO Response Brief, para. 93, fn. 230.
[354] SPO Response Brief, para. 103.
[355] Gucati Reply Brief, para. 65.

the perpetrator, or important circumstances relevant to [the Specialist Chambers'] proceedings".[356] The Trial Panel also discussed and defined the term "witness", rather than the term "protected person".[357] The Trial Panel considered that the SPO's definition of a "witness" was overly broad.[358] Relying instead on Ms Pumper's definitions, that the Trial Panel found to be accurate and reasonable, the Trial Panel adopted her definition of a "witness" as a "person whom the SITF/SPO had met and had obtained information from, including in the form of an interview" (referred to as "Witnesses" in the Trial Judgment).[359] The Trial Panel also adopted Ms Pumper's definition of a "potential witness" as "someone from whom the SPO was seeking to obtain, including through other organisations, information, including in the form of an interview" (referred to as "Potential Witnesses" in the Trial Judgment).[360] The Trial Panel found that the SITF/SPO witnesses and potential witnesses named in the Protected Information qualified as Witnesses and Potential Witnesses.[361] The Trial Panel further found that, for the purposes of Count 6, the term "person" within the meaning of Article 392(2) of the KCC covered the Witnesses and Potential Witnesses as defined by Ms Pumper.[362]

167. The Appeals Panel notes that Gucati challenges the definition adopted by the Trial Panel that, in his view, extends the scope of Count 6 by permitting the SPO to avoid proving that any person alleged to be a witness or potential witness had provided or was likely to be able to provide information that related to a crime or other important circumstances relevant to the proceedings.[363] The Trial Panel's definition does not indeed include a reference to the requirement that the witness or

[356] Indictment, para. 4. See also SPO Final Trial Brief, para. 18.
[357] Trial Judgment, paras 509-512.
[358] See Trial Judgment, para. 512.
[359] Trial Judgment, paras 511-512.
[360] Trial Judgment, paras 511-512.
[361] Trial Judgment, para. 513.
[362] Trial Judgment, paras 512-513.
[363] Gucati Appeal Brief, paras 226, 232.

potential witness be able to provide information relating to a crime or other important circumstances relevant to the proceedings.[364] The Trial Panel however relied on the evidence given by Ms Pumper in support of the definition it provided. In that regard, the Appeals Panel observes that, although Ms Pumper's evidence is only partially reflected in the Trial Judgment, a review of the transcripts of her testimony, as relied upon by the Trial Panel, shows that Ms Pumper expressly indicated that, in her view, a witness is "someone who the SITF has met and whom we sought to obtain information from which is related to our mandate, to the investigation".[365]

168. That the Trial Panel understood and adopted Ms Pumper's definition as encompassing this requirement is reflected in its observation that her definitions are "comparable in scope with those of the Pre-Trial Judge", who referred notably to persons providing (or likely to provide) information to the SITF and/or SPO "about any crimes or offences falling under [Specialist Chambers] jurisdiction".[366] It is further reflected in the Trial Panel's acceptance that Ms Pumper's definition was "consonant" with the definition of "witnesses" set out in the Kosovo Law on Witness Protection, and "generally consistent" with the definition of the notion of witness adopted in other instruments.[367] The Trial Panel also considered that Ms Pumper's definitions describe the notion of witnesses and potential witnesses "within a criminal investigation",[368] showing that the Trial Panel understood the scope of the definitions provided by Ms Pumper to be limited to matters related to crimes or other important circumstances relevant to the Specialist Chambers' proceedings.

169. The use by the SPO of the term "witness" was further clarified at trial at the Trial Panel's request. The SPO stressed that it equated the reference to "protected

[364] Trial Judgment, paras 511-512.
[365] Trial Judgment, para. 511, fns 1072-1073, referring to KSC-BC-2020-07, Transcript, 20 October 2021, p. 1080.
[366] Trial Judgment, para. 511. See also Confirmation Decision, paras 44, 61.
[367] Trial Judgment, para. 511. See also Kosovo Law on Witness Protection, Article 3(1.3).
[368] Trial Judgment, para. 512.

persons" under Count 6 with "protected witnesses", and that the use of "witness" was a short form term to describe the sub-set of people affected by the crimes charged.[369] This definition is consistent with the purpose of the offence under Article 392(2) of the KCC, which is to protect, under criminal law, "witnesses" or "participants in proceedings" from being identified.[370]

170. Accordingly, the Panel finds that Gucati fails to demonstrate that the definition of "Witness" and "Potential Witness" adopted by the Trial Panel extended the scope of Count 6, was erroneous in law, or was provided without warning.[371]

171. The Panel further notes that the SPO points to Section V(B) of the Trial Judgment,[372] in support of its assertion that the trial record contains ample evidence showing that "the contents of the Batches included persons with information about a crime, the perpetrator, or important circumstances relevant to [Specialist Chambers] proceedings".[373] However, it fails to point to any concrete example. A review of this section nonetheless shows that Ms Pumper indicated that Batch 1 notably contained 35 statements or parts of statements of victims and witnesses taken by the Serbian authorities, which included personal data and detailed information about "serious crimes".[374] The Panel is therefore satisfied that the trial record contains evidence referring to persons who provided information about crimes within the Specialist Chambers' jurisdiction.

172. Finally, the Panel finds that Haradinaj's Ground 22 is unsubstantiated and merely recalls arguments presented in relation to his Ground 4, challenging the Trial

[369] SPO Submissions on the Term "Witness", paras 9-10.
[370] See *Salihu et al.* Commentary, Article 400(2) of the 2012 KCC, mns 2, 4, pp. 1143-1144.
[371] Gucati Appeal Brief, paras 226, 232.
[372] SPO Response Brief, para. 93, fn. 230. See also Gucati Appeal Brief, para. 231.
[373] SPO Response Brief, para. 93.
[374] See Trial Judgment, para. 345, fn. 711 and evidence cited therein.

Panel's decision to allow the SPO to withhold material unlawfully disclosed by Haradinaj.[375] The Panel therefore summarily dismisses Haradinaj's Ground 22.

173. In light of the above, the Panel finds that Gucati and Haradinaj fail to demonstrate an error in the Trial Panel's findings on the notion of "person" within the meaning of Article 392(2) of the KCC. Accordingly, the Panel dismisses Gucati's Ground 8(A) and Haradinaj's Ground 22.

2. Alleged Errors Regarding Findings on [Person] "Under Protection in the Criminal Proceedings" (Gucati Grounds 7, 8(B); Haradinaj Ground 23)

(a) Submissions of the Parties

174. Gucati challenges the Trial Panel's findings on "protection in the criminal proceedings" for the purposes of Article 392(2) of the KCC.[376] Referring to the Trial Panel's assessment as providing "sweeping protection", Gucati argues that Article 62(2) of the Law specifically refers to protections being "granted", as opposed to a mere mention of an individual's name on a SPO document.[377] Gucati further argues that the Trial Panel erroneously proceeded on the basis that every witness or potential witness treated by the SITF/SPO as confidential was a person under protection and, in doing so, failed to assess or to hear evidence on each of the protected persons' consent or opinion.[378] In his view, the *actus reus* of Count 6 was therefore not established.[379]

---

[375] Haradinaj Appeal Brief, paras 194-195. See also Haradinaj Appeal Brief, paras 55-67. The Appeals Panel recalls that Haradinaj's arguments raised under Haradinaj Ground 4 have been addressed in the section on Disclosure. See above, paras 65-68, 73.
[376] Gucati Appeal Brief, paras 217-224, 243.
[377] Gucati Appeal Brief, paras 218-219. Gucati specifically refers to Mr Vladimir Vukčević ("Mr Vukčević") as an example of a person whose identity or personal data appears in Specialist Chambers/SPO documents but he is not a person *under protection in the criminal proceedings*. See Gucati Appeal Brief, para. 219.
[378] Gucati Appeal Brief, paras 220-224. See also Gucati Reply Brief, paras 49-51.
[379] Gucati Appeal Brief, para. 224. See also Gucati Appeal Brief, para. 243.

175. Relying on Article 35(2)(f) of the Law, which provides that the responsibilities of the Specialist Prosecutor include taking necessary measures to ensure the confidentiality of information or the protection of the concerned persons, Gucati argues that the Trial Panel failed to consider whether the measures were actually taken and necessary, and instead wrongly assumed that all persons named within the SITF/SPO documents were *ipso facto* protected.[380] Gucati further argues that protection does not extend to any person who cooperated with the SPO but, by virtue of Rule 30(2)(a) of the Rules, only to those at risk on account of information provided to the SPO.[381] In his view, while Article 35(2)(f) of the Law and Rule 30(2)(a) of the Rules require an assessment of the risk and the necessity of any protective measures in relation to the individuals concerned, the Trial Panel did not hear any evidence in that regard in relation to *any* alleged "Witness" or "Potential Witness" identified in the Protected Information, until after the Indictment period at least.[382]

176. According to Haradinaj, the SPO also had to provide evidence on the circumstances and scope of the protection offered to these individuals.[383] In that regard, Haradinaj argues that the SPO should have followed a two-step procedure (first, identifying each of the witnesses, and second, providing the basis of the protection for each individual).[384] Haradinaj argues that the Trial Panel's finding – that Article 392(2) of the KCC seeks to protect not the identity of the persons *as such*, but their identity as witnesses – is a "false distinction" because "this distinction is in effect, the second step to be taken".[385]

177. Haradinaj further submits that the SPO failed to adduce evidence concerning: (i) the decisions that provide these individuals with their protected status; (ii) the date

[380] Gucati Appeal Brief, paras 234-238, 243. See also Gucati Reply Brief, paras 55-57.
[381] Gucati Appeal Brief, paras 239-240.
[382] Gucati Appeal Brief, paras 241-242; Gucati Reply Brief, paras 58-59.
[383] Haradinaj Appeal Brief, paras 196-200.
[384] Haradinaj Appeal Brief, paras 203-206.
[385] Haradinaj Appeal Brief, paras 203-204, referring to Trial Judgment, para. 98.

on which such a status was provided; (iii) the time-frame for which such protection was granted; (iv) the risk to manage; and (v) the legal basis of the proceedings to which each of the protected individuals relates.[386] He argues that the Trial Panel erred in law, as it prevented the Defence from having the ability to challenge the SPO's case.[387]

178. The SPO responds that Gucati misrepresents the Trial Panel's findings when arguing that persons are protected solely in reference to Article 62 of the Law, while this article was only one of a variety of legal bases for how persons could get protection.[388] The SPO further submits that Gucati's arguments on consent being a prerequisite to protecting persons are flawed because (i) Article 392(2) of the KCC sets out no such requirement, and (ii) the Specialist Chambers' framework sets out no such requirement for protective measures under their framework.[389]

179. The SPO also disagrees with Gucati's interpretation of the taking of necessary measures to ensure confidentiality under Article 35(2)(f) of the Law, and stresses that there is no requirement under Article 392(2) of the KCC that an individualised risk assessment be established for each protected person.[390] Moreover, in its view, the Indictment does not plead any specific individual as a protected person under Count 6.[391]

180. The SPO further responds that Haradinaj impermissibly tries to challenge the Indictment and fails to show any "latent ambiguity" on the Trial Panel's part with regard to the charges.[392]

[386] Haradinaj Appeal Brief, paras 196, 206.
[387] Haradinaj Appeal Brief, paras 196-200, 207-208.
[388] SPO Response Brief, para. 90.
[389] SPO Response Brief, para. 91.
[390] SPO Response Brief, paras 94-95.
[391] SPO Response Brief, para. 95.
[392] SPO Response Brief, para. 104.

(b) Assessment of the Court of Appeals Panel

181. The Trial Panel found that the reference to "under protection in the criminal proceedings" does not necessarily require a judicial order; it may also refer to measures implemented by prosecutorial authorities during their investigations.[393] The Trial Panel further found that a person "under protection in the criminal proceedings" can also be a person whose identity or personal data appears in Specialist Chambers or SPO documents, the disclosure of which has not been authorised.[394]

182. As regards the "identity" of persons covered by Article 392(2) of the KCC, the Trial Panel underscored that what Article 392(2) of the KCC seeks to protect is not the identity of the persons *as such*, but their identity as witnesses, victims, persons of interest or other participants in the criminal proceedings.[395]

183. The Appeals Panel recalls that, within the Specialist Chambers' framework, protection in the criminal proceedings can refer to an order for protective measures issued by a competent panel pursuant to, *inter alia*, Articles 23, 39(11), 40(6)(f) and 58 of the Law and Rules 80, 81, 105 and 108 of the Rules.[396] However, the Panel agrees with the Trial Panel that the reference to "under protection in the criminal proceedings" does not necessarily require a judicial order, and can also entail measures of protection adopted by the SPO during its investigations pursuant to, *inter alia*, Article 35(2)(f) of the Law and Rule 30(2)(a) of the Rules.[397] In that regard, provisions governing measures taken by the SPO in the course of its investigations to provide for the safety of Witnesses and Potential Witnesses are not to be confused with a panel's authority to order protective measures under, *inter alia*, Rule 80 of the Rules. Only the latter necessitates the fulfilment of the additional requirements

[393] Trial Judgment, para. 95.
[394] Trial Judgment, para. 95.
[395] Trial Judgment, para. 98.
[396] See Trial Judgment, para. 95.
[397] Trial Judgment, para. 95.

mentioned by the Accused, including a judicial order "granting" the protection, the identification of the persons concerned, or the consent of the person in respect of whom the protective measures are sought.[398]

184. With regard to Article 35 of the Law, the Specialist Chamber of the Constitutional Court observed that the SPO shall have the responsibility to investigate and prosecute persons responsible for the crimes falling within the jurisdiction of the Specialist Chambers, and that the SPO shall not only have the responsibility but also the authority to perform these functions.[399] These functions include, as per Article 35(2)(f) of the Law, taking necessary measures to ensure the confidentiality of information or the protection of any person. The Specialist Chamber of the Constitutional Court further recognised that, in discharging the responsibility to investigate and prosecute crimes within the jurisdiction of the Specialist Chambers, the SPO requires a degree of freedom and a margin of discretion. The Specialist Chamber of the Constitutional Court also emphasised that the SPO is authorised to undertake a range of investigative measures, which do not in themselves require prior judicial authorisation.[400]

185. The Panel notes Gucati's reference to the Trial Panel's alleged "sweeping protection" or "sweeping analysis",[401] but Gucati's arguments do not contain any reference to the Trial Judgment and the Panel has been unable to identify which "sweeping analysis" he is referring to. In any event, Gucati fails to demonstrate that the investigative measures taken by the SPO under Article 35(2)(f) of the Law or

[398] See Rule 80 of the Rules. The Panel notes that Gucati specifically refers to Mr Vukčević as an example of a person whose identity or personal data appears in Specialist Chambers/SPO documents but he is not a person *under protection in the criminal proceedings*. See Gucati Appeal Brief, para. 219. The Panel however recalls that the Trial Panel found that Mr Vukčević does not qualify as Witness or Potential Witness since his cooperation with the SITF has been made public by its former Chief Prosecutor. See Trial Judgment, para. 514.
[399] Constitutional Court Judgment on Revised Rules, para. 17.
[400] Constitutional Court Judgment on Revised Rules, para. 18.
[401] Gucati Appeal Brief, paras 218, 236, 238.

Rule 30(2)(a) of the Rules, that do not require prior judicial authorisation, should be subject to the verification or assessment of the Trial Panel.

186. Turning to Haradinaj's arguments, the Panel finds that he fails to demonstrate that the Trial Panel's finding – that Article 392(2) of the KCC seeks to protect not the identity of the persons *as such*, but their identity as witnesses[402] – is a "false distinction".[403] The Panel agrees with the Trial Panel that the fact that the identity of a person is publicly known cannot be equated to the revelation of his or her identity as a "person under protection in criminal proceedings".[404] This finding is also supported by the fact that the relevant legal provisions of the Specialist Chambers' legal framework do not aim to protect the identity of any persons, but only to provide for the protection of victims, witnesses and potential witnesses.[405] In addition, Haradinaj's arguments that the SPO should have followed a two-step procedure,[406] fail to identify any error in the Trial Panel's findings. These arguments are moreover unsupported and do not mention or reflect any relevant provisions of the Specialist Chambers' legal framework.

187. In light of the above, the Panel finds that Gucati and Haradinaj fail to demonstrate an error in the Trial Panel's findings on "protection in the criminal proceedings" for the purposes of Article 392(2) of the KCC. Accordingly, the Panel dismisses Gucati's Grounds 7 and 8(B) and Haradinaj's Ground 23.

[402] Trial Judgment, para. 98.
[403] Haradinaj Appeal Brief, para. 204.
[404] Trial Judgment, para. 98.
[405] See e.g. Articles 23, 53(1)(e) of the Law.
[406] Haradinaj Appeal Brief, paras 203-206.

3. Alleged Errors Regarding Findings on the Aggravated Form of the Offence Pursuant to Article 392(3) of the KCC (Gucati Grounds 9, 10, 11; Haradinaj Ground 8 in part)

(a) Submissions of the Parties

188. Gucati recalls that Article 392(3) of the KCC provides for an aggravated form of the offence where it results in "serious consequences" for the person under protection.[407] Gucati argues that the Trial Panel erred in finding that the test for "serious consequences" was satisfied by way of a "substantial interference with the safety, security, well-being, privacy or dignity of protected persons or their families".[408] According to him, the Trial Panel incorrectly "dilute[d]" the test in Article 392(3) of the KCC, and its findings as to "serious consequences" are invalidated by equating "serious consequences" with "substantial inference".[409]

189. Gucati further claims that the Trial Panel erred: (i) in placing undue reliance on the unreliable and self-contradictory assertion of Mr Jukić that two alleged relocations of protected persons occurred as a consequence of Gucati's actions;[410] (ii) in relying on the "individualised assessment of a high level of risk posed" to the two persons allegedly relocated, which was made by the SPO alone and unsupported;[411] (iii) in finding that the negative consequences associated with relocation amounted to "serious consequences" for these two persons;[412] (iv) in finding that the "ensuing awareness" of persons – subject to emergency risk planning by the SPO – that they were at risk of harm or imminent relocation amounted to "serious consequences";[413] and (v) in finding that "the fear and concern resulting from being publicly named as

[407] Gucati Appeal Brief, para. 244.
[408] Gucati Appeal Brief, para. 245.
[409] Gucati Appeal Brief, paras 246-248; Gucati Reply Brief, paras 60-62.
[410] Gucati Appeal Brief, paras 249-262; Gucati Reply Brief, para. 63. See also Transcript, 1 December 2022, p. 64.
[411] Gucati Appeal Brief, paras 263-266. See also Gucati Reply Brief, para. 64.
[412] Gucati Appeal Brief, paras 267-270; Gucati Reply Brief, para. 65.
[413] Gucati Appeal Brief, paras 271-273.

a Witness" amounted to "serious consequences" for the person identified in the confidential version of the Trial Judgment.[414]

190. In a ground challenging the Trial Panel's assessment of some of the witnesses' credibility,[415] Haradinaj disputes the Trial Panel's reliance on the testimony of Mr Jukić.[416] According to Haradinaj, Mr Jukić "demonstrated himself and his knowledge of the case to be unreliable and of questionable credibility".[417] Specifically, Haradinaj argues that Mr Jukić could not confirm how many witnesses he had come across, instead giving "vastly incorrect approximations".[418] Despite this, and in his view, the Trial Panel was willing to "roundly excuse and justify these deficiencies" and reached conclusions which no reasonable decision maker could have come to.[419]

191. The SPO responds that Gucati fails to establish: (i) any error in the Trial Panel's definition of the term "serious consequences";[420] (ii) that no reasonable trial panel could have found Mr Jukić credible concerning his evidence on relocations;[421] (iii) any error in the Trial Panel's acceptance of the SPO's risk assessments for the two relocated individuals, which was based on Mr Jukić's testimony;[422] (iv) any error in the Trial Panel's reliance on Mr Jukić's testimony in relation to "negative consequences"

[414] Gucati Appeal Brief, paras 274-278; Gucati Reply Brief, paras 66-69; Transcript, 1 December 2022, p. 64. See Trial Judgment, para. 538.
[415] The Panel understand that the purpose of Haradinaj Ground 8 is to, *inter alia*, challenge the Trial Panel's assessment of the evidence provided by Ms Pumper, Mr Jukić and Mr Daniel Moberg (Witness W04876). See Haradinaj Appeal Brief, paras 100, 107. The SPO responds that this ground should be summarily dismissed and that in any event, the Trial Panel gave detailed explanations for how it evaluated all three witnesses. See SPO Response Brief, paras 58-59. Although the Panel has addressed some of Haradinaj's arguments in this section as well as under Count 3, the Panel observes that Haradinaj's arguments are presented in a confusing manner and fail to identify any error of the Trial Panel or any relief sought. The Panel declines to address this ground any further. The remainder of Haradinaj Ground 8 has been addressed in the section on the *actus reus* under Count 3. See below, paras 243, 250.
[416] Haradinaj Appeal Brief, paras 100, 103-107. See also Haradinaj Appeal Brief, paras 101-102.
[417] Haradinaj Appeal Brief, para. 103.
[418] Haradinaj Appeal Brief, paras 103-104. See also Haradinaj Reply Brief, para. 26.
[419] Haradinaj Appeal Brief, paras 105-107. See also Haradinaj Reply Brief, paras 22-26.
[420] SPO Response Brief, para. 96.
[421] SPO Response Brief, para. 98.
[422] SPO Response Brief, para. 99.

suffered by relocated witnesses;[423] and (v) that no reasonable trial panel could have relied on Mr Jukić's evidence in making its findings on the "Emergency Risk Management System".[424]

192. In relation to the person identified in the confidential version of the Trial Judgment,[425] the SPO argues that the Trial Panel's findings are based on the evidence on the record and that Gucati merely disagrees with these findings, failing to establish that no reasonable trial panel could have reached these conclusions.[426]

(b) Assessment of the Court of Appeals Panel

193. The Panel will first address the challenges to Mr Jukić's credibility, and will then turn to assessing any error in the Trial Panel's definition and assessment of "serious consequences" under Article 392(3) of the KCC.[427]

194. With respect to both Gucati's and Haradinaj's challenges to the testimony of Mr Jukić, the Panel recalls that it was incumbent on the Trial Panel to assess the credibility of a witness, as well as the reliability of the evidence presented.[428]

195. The Panel notes that Gucati's Ground 10, where he challenges Mr Jukić's evidence, does not contain any references to the Trial Judgment[429] and could as such be summarily dismissed for failing to identify the challenged findings.[430] In addition,

[423] SPO Response Brief, para. 100.
[424] SPO Response Brief, para. 101.
[425] Trial Judgment, para. 538.
[426] SPO Response Brief, para. 102.
[427] The Panel notes that under Haradinaj Ground 23, Haradinaj also makes the general submission that the Trial Panel erred "by applying the aggravated form envisioned in Article 392(1) of the KCC". See Haradinaj Appeal Brief, para. 196. The Panel understands that the reference to Article 392(1) of the KCC is a typographical error and that Haradinaj rather means to refer to Article 392(3) of the KCC. The Panel further observes that Haradinaj does not develop any arguments in support of this allegation which is therefore dismissed as unsubstantiated. See above, paras 29, 32.
[428] See above, para. 36.
[429] See Gucati Appeal Brief, paras 249-273. The Panel notes that Gucati refers to the Trial Judgment only once under Gucati Ground 10(A)-(D). See Gucati Appeal Brief, para. 255, fn. 137.
[430] See above, paras 29, 32.

the Panel finds that Gucati and Haradinaj merely disagree with the Trial Panel's findings without establishing any error in the Trial Panel's assessment.

196. The Panel notes that, at trial, the Defence challenged the veracity of several aspects of Mr Jukić's testimony and his evidence regarding the number of relocated witnesses. The Trial Panel expressly addressed these challenges in the Trial Judgment.[431] The Trial Panel underlined that the Defence had "ample opportunity to test the accuracy and reliability of this evidence".[432] The Trial Panel found the evidence of Mr Jukić to be probative and generally consistent in substance. It further found that discrepancies, if any, in the witness's testimony were not the result of untruthfulness or bias, and instead found that Mr Jukić's evidence was reliable.[433]

197. The Panel further observes that before becoming a witness security and handling team leader, Mr Jukić was a witness security officer in the SPO. As such, he was involved in the preparation of emergency risk management plans and he was in direct contact with all of the SPO witnesses.[434] Although his testimony was not corroborated, due to his professional roles he was in a relevant position to testify on this matter and, as already noted, the Defence amply challenged his credibility at trial.[435] In addition, the Panel recalls that there is no general requirement that the testimony of a witness be corroborated if deemed otherwise credible.[436] Accordingly, the Defence fails to demonstrate any error in the Trial Panel's assessment of Mr Jukić's testimony.

198. Turning to the definition and assessment of "serious consequences" under Article 392(3) of the KCC, the Panel recalls, as specified by the Trial Panel, that

[431] Trial Judgment, para. 536. See also Trial Judgment, paras 52-53, 507.
[432] Trial Judgment, para. 541.
[433] Trial Judgment, paras 58, 536, 540.
[434] KSC-BC-2020-07, Transcript, 28 October 2021, pp. 1690, 1707-1708. See also SPO Final Trial Brief, paras 125, 132.
[435] Trial Judgment, paras 52, 536, 540.
[436] See above, para. 36.

Article 392(3) of the KCC penalises two types of aggravated forms of the basic offence in Article 392(2) of the KCC: (i) serious consequences for the persons protected under Article 392(2) of the KCC; and (ii) criminal proceedings made impossible or being severely hindered.[437] As to this second form of aggravation, the Trial Panel found that the SPO failed to establish that the Accused's revelation of the identity and personal data of Witnesses and Potential Witnesses made impossible or severely hindered SPO investigations within the meaning of Article 392(3) of the KCC.[438]

199. As for the first form of aggravation, the Trial Panel found that "serious consequences may include substantial interference with the safety, security, well-being, privacy or dignity of protected persons or their families".[439] The Panel is mindful of Gucati's argument that, in so finding, the Trial Panel incorrectly diluted the test in Article 392(3) of the KCC from "serious" to "substantial".[440] Gucati however fails to substantiate why and how the Trial Panel's reference to "substantial interference" would actually "dilute" the test or impact the nature of the consequences that could constitute the aggravated form of the offence.

200. The Panel notes that the Trial Panel refers to "substantial interference" only in the section of the Trial Judgment setting out the applicable law.[441] Gucati acknowledges the Trial Panel's findings, but nonetheless argues that these findings as to "serious consequences" are invalidated by equating "serious consequences" with "substantial interference".[442] The Panel finds that Gucati's allegation is groundless, since the Trial Panel explicitly referred to "serious consequences" in its assessment of Article 392(3) of the KCC.[443]

[437] See Trial Judgment, paras 100, 534.
[438] See Trial Judgment, para. 551. See also Trial Judgment, paras 548-550.
[439] Trial Judgment, para. 100. See also Trial Judgment, paras 535-547.
[440] Gucati Appeal Brief, para. 246.
[441] Trial Judgment, para. 100.
[442] Gucati Appeal Brief, para. 247.
[443] Trial Judgment, para. 547.

201. The Panel further notes the Trial Panel's exact findings do not equate "serious consequences" with "substantial interference". Instead, the Trial Panel found that "[s]erious consequences *may include* substantial interference with the safety, security, well-being, privacy or dignity of protected persons or their families".[444]

202. The Panel notes that, in addressing the reference to "serious consequences" in relation to another count in the Indictment, the Pre-Trial Judge in this case gave further specificity to the meaning of "serious consequences", and observed that "it is the occurrence rather than the specific content of 'serious consequences' that forms the aggravated form of Count 2", concluding that additional details as to the forms through which such serious consequences materialised could be addressed at trial.[445] As for the occurrence of such consequences, the Appeals Panel identifies no error in the Trial Panel's finding that the high level of risk that made the relocation of two Witnesses necessary, and the negative consequences associated with such a measure, amounted to serious consequences within the meaning of Article 392(3) of the KCC.[446]

203. The Panel notes that the Trial Panel acknowledged that, apart from the two relocations, Mr Jukić did not specify how many of the security or protective measures adopted as a result of the revelation of information were emergency risk management plans.[447] Therefore, the Trial Panel's general reference to "the Witnesses who were subject to emergency risk planning" lacks precision,[448] and the Panel will consider that this reference in fact only applies to the two Witnesses who were relocated. In that regard, although Gucati argues that there was "no evidence of any involvement of a witness with emergency risk planning by the SPO", he nonetheless accepts that these emergency risk management plans were deployed at least for the two persons who

[444] Trial Judgment, para. 100 (emphasis added).
[445] Decision on Preliminary Motions, para. 58. The Panel further notes that Gucati did not appeal this finding. See Appeal Decision on Preliminary Motions.
[446] Trial Judgment, para. 536.
[447] Trial Judgment, para. 537, fn. 1115.
[448] Trial Judgment, para. 547.

were (allegedly) relocated.[449] Accordingly, the Appeals Panel finds that the Trial Panel did not err in finding that serious consequences within the meaning of Article 392(3) of the KCC occurred for the two Witnesses who were relocated and subjected to emergency risk planning.

204. Finally, Gucati argues that there is no evidence that the person identified in the confidential version of the Trial Judgment – who had made public his cooperation with prosecutors investigating alleged offences committed by KLA members – was afraid of being publicly named as a witness.[450] The Trial Panel found in relation to the person identified in the confidential version of the Trial Judgment that:

> in the context of Kosovo, where cases involving allegations of crimes by KLA members have been marred and known to have been marred by instances of witness intimidation, the fear and concern resulting from being publicly named as a Witness, further to earlier derogatory statements, amount to serious consequences within the meaning of Article 392(3) of the KCC […].[451]

205. A review of the trial record shows that this person was publicly known for cooperating with investigators on alleged offences committed by KLA members.[452] The Panel observes that he was not called as a SPO witness in this case, and therefore the Trial Panel's above-mentioned findings are based on the testimony of Mr Jukić, who did not personally contact the person identified in the confidential version of the Trial Judgment, but merely knew that he "was complaining about publishing of the leaked documents" and that the SPO did not take any measure to protect this particular individual.[453] The Appeals Panel finds that the Trial Panel's findings on this person's "fear and concern resulting from being publicly named as a Witness" are not based on the available evidence in this case. The Trial Panel provided no explanation

[449] Gucati Appeal Brief, paras 271-272.
[450] Gucati Appeal Brief, paras 274-278. See also Trial Judgment, para. 538.
[451] Trial Judgment, para. 538 (footnote omitted).
[452] KSC-BC-2020-07, Transcript, 25 October 2021, p. 1315. See also Gucati Appeal Brief, para. 274; SPO Final Trial Brief, para. 245; Trial Judgment, para. 505.
[453] KSC-BC-2020-07, Transcript, 4 November 2021, pp. 1904-1905. See also Gucati Appeal Brief, para. 276.

supporting its finding, and has not further held or explained whether it considered that a complaint about the publishing of the leaked documents would amount to a "serious consequence" for the purposes of Article 392(3) of the KCC.

206. Accordingly, the Appeals Panel agrees with Gucati's assertion that the Trial Panel erred in relation to this specific finding, and therefore grants Gucati's Ground 11, challenging the Trial Panel's findings on Article 392(3) of the KCC regarding the person identified in the confidential version of the Trial Judgment who was publicly named as a Witness. However, having found no error in the Trial Panel's finding that two Witnesses were relocated and subjected to emergency risk planning, and that these instances constituted "serious consequences" for the purposes of Article 392(3) of the KCC, the Appeals Panel finds that the Trial Panel's error in relation to the person identified in the confidential version of the Trial Judgment has no impact on the general finding of the Trial Panel that the *actus reus* of Article 392(3) of the KCC was established in this case.[454]

207. In light of the above, the Panel finds that Gucati and Haradinaj fail to demonstrate an error in the Trial Panel finding that the aggravated form of the offence under Article 392(3) of the KCC was established. Accordingly, the Panel dismisses Gucati's Grounds 9 and 10 and Haradinaj's Ground 8 in relevant part.

D. ALLEGED ERRORS CONCERNING INTIMIDATION DURING CRIMINAL PROCEEDINGS (COUNT 3)

1. Alleged Errors Regarding the *Actus Reus* of Article 387 of the KCC (Gucati Grounds 1, 2(A) in part, 2(B); Haradinaj Grounds 8 in part, 19)

208. Gucati and Haradinaj challenge the Trial Panel's findings on the *actus reus* underpinning their conviction under Count 3 of the Indictment ("Count 3") for using serious threats to induce or attempt to induce witnesses to refrain from making a

[454] Trial Judgment, para. 538. The impact of this finding, if any, on the Accused's sentence will be addressed under Section H below.

statement to the SPO and/or the Specialist Chambers, punishable under Article 387 of the KCC.[455] The SPO responds that the Accused's relevant grounds of appeal should be dismissed.[456]

209. The Panel recalls that the offence of intimidation during criminal proceedings, pursuant to Article 387 of the KCC, is defined as follows:

> Whoever uses force or serious threat, or any other means of compulsion, a promise of a gift or any other form of benefit to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings shall be punished by a fine of up to one hundred and twenty-five thousand (125,000) EUR and by imprisonment of two (2) to ten (10) years.

210. The Trial Panel found that the offence of intimidation during criminal proceedings required the following material elements: (i) the use of force, serious threat, any other means of compulsion, a promise of a gift or any other form of benefit, (ii) against any person making or likely to make a statement or provide information to the police, a prosecutor or a judge.[457] The Trial Panel noted that the SPO did not plead that the Accused used force, any other means of compulsion, a promise of a gift or any other form of benefit – and so did not address these alternative elements. The Trial Panel therefore assessed whether the Accused used serious threat against any person making or likely to make a statement or provide information to the police, a prosecutor or a judge.[458] The Trial Panel was satisfied that the serious threats that stemmed from the Accused's acts and statements would have created serious fears

[455] Gucati Appeal Brief, paras 10-59, 80-89, 96-108; Haradinaj Appeal Brief, paras 100-101, 104-107, 178-181; Gucati Reply Brief, paras 2, 15-24; Haradinaj Reply Brief, paras 22-26, 47-49. See also Indictment, paras 29-30, 48. The Panel recalls that according to para. 48 of the Indictment, the offence of "Intimidation during Criminal Proceedings" is punishable under Articles 17, 28, 31, 32(1)-(3), 33, 35, and 387 of the KCC, applicable by virtue of Articles 15(2) and 16(3) of the Law.
[456] SPO Response Brief, paras 60-71.
[457] Trial Judgment, para. 109.
[458] Trial Judgment, para. 557.

and concerns for many Witnesses or Potential Witnesses, thereby constituting a strong disincentive for such persons to provide (further) information about any crimes under the Specialist Chambers' jurisdiction.[459]

(a) Alleged Errors Regarding the Definition of the Material Elements of the Offence Under Article 387 of the KCC (Gucati Ground 1)

(i) Submissions of the Parties

211. First, Gucati argues that the Trial Panel erred in law in its finding on the *actus reus* of Article 387 of the KCC.[460] In particular, he argues that the Trial Panel erred by finding that the last part of Article 387 of the KCC ("when such information relates to obstruction of criminal proceedings") only qualifies the third alternative of that article, namely "fail[ing] to state true information to the police, a prosecutor or a judge".[461] Instead, he argues that this part refers to all alternatives, namely including to the two first alternatives ("to refrain from making a statement or to make a false statement"), and that the Trial Panel's interpretation, by ignoring this qualifier, creates a meritless distinction between the three alternatives.[462] Gucati argues that, since there was no

[459] Trial Judgment, paras 585-586. See also Trial Judgment, paras 558-584.
[460] Gucati Appeal Brief, paras 19-20. The Panel notes that Haradinaj appears to have abandoned in his Appeal Brief a similar ground of appeal that was initially in his Notice of Appeal. See Haradinaj Notice of Appeal, Ground 19, para. 25, wherein he submitted that the Trial Panel erred in law in regard to Article 387 of the KCC "when interpreting the scope of the phrase '*when such information relates to obstruction of criminal proceedings*'".
[461] Gucati Appeal Brief, paras 12-13, 18-20. See also Gucati Reply Brief, paras 16-17, 21. Gucati submits that the "placement and formulation" of the qualifier "when such information relates to obstruction of criminal proceedings" in Article 387 of the KCC is modelled on the same qualifier "when such information relates to organized crime" in Article 310 of the PCCK which, as the Trial Panel appears to have accepted, qualified each of the three alternatives. See Gucati Appeal Brief, paras 14-16; Transcript, 1 December 2022, pp. 37-39.
[462] Gucati Appeal Brief, paras 10-13, 17-18; Transcript, 1 December 2022, pp. 22-34. See also Gucati Reply Brief, paras 16-17. During the Appeal Hearing, Gucati further clarified that the last part of Article 387 "when such information" does not only correlate to the words "true information" in the third alternative, as the legislative drafters of Article 387 of the KCC allegedly acknowledge that there is no material distinction between a "statement" and the "provision of information" for the purposes of legal proceedings; therefore, according to Gucati, the first two alternatives (namely refraining from making a statement and making a false statement) both also "contain information". See Transcript, 1 December 2022, pp. 36-40.

evidence of the use of serious threats within the meaning of Article 387 of the KCC *in relation to the obstruction of criminal proceedings*, the *actus reus* was not fulfilled.[463]

212. Moreover, Gucati submits that, even after finding that the qualifying "obstruction" part would only apply to the third alternative of Article 387 of the KCC, the Trial Panel then ignored the "obstruction" part entirely when it found that the *actus reus* was satisfied when serious threat was used against any person likely to "provide (further) information about *any* crimes under [Specialist Chambers] jurisdiction".[464] Gucati also argues that the Trial Panel made no finding that any serious threat was used against a person making or likely to make a "statement", but instead erroneously referred to persons providing "information" or giving "evidence".[465]

213. Gucati further argues that the Trial Panel erred in law when finding that "serious threat" in Article 387 of the KCC encompassed a threat to inflict serious harm on the health, well-being, safety, security or privacy of a person.[466] In Gucati's view, "serious threat" is to be interpreted by taking the preceding use of "force" into account.[467] In addition, he argues that there was, at any rate, no finding – and no evidence – of the use of force, the use of serious threat of force, or the use of threat to inflict serious harm on the health of any person in this case, even if such a threat might amount to "other means of compulsion".[468] The Trial Panel has, in Gucati's view, "at

[463] Gucati Appeal Brief, paras 21-23, 25; Transcript, 1 December 2022, pp. 28-29, 34-36. Gucati also submits that the Trial Panel's approach was more closely aligned with a conviction for an offence under Article 386(1) of the KCC than under Article 387 of the KCC. See Transcript, 1 December 2022, pp. 34-35; Gucati Appeal Brief, para. 24; Gucati Reply Brief, para. 15.
[464] Gucati Appeal Brief, paras 52-55, 58-59. See also Gucati Reply Brief, para. 18.
[465] Gucati Appeal Brief, paras 56-57. See also Gucati Appeal Brief, paras 115-116.
[466] Gucati Appeal Brief, paras 26-29; Annex 2 to Gucati Appeal Brief; Annex 1 to Gucati Appeal Brief, p. 2.
[467] Gucati Appeal Brief, para. 26; Transcript, 1 December 2022, pp. 54-55, 59-61, wherein Gucati also submits that Article 181 of the KCC, defining threat as an offence, "makes it clear that serious threat refers to threat to the life and body of the person".
[468] Gucati Appeal Brief, paras 30-32; Transcript, 1 December 2022, pp. 55-56, 59-60.

its highest" established that the acts and statements of the Accused provided a "strong disincentive" for persons to provide information, but argues that such a disincentive "is not equivalent to coercion".[469]

214. In addition, Gucati submits that the Trial Panel erred in law when it found that an act and/or statement which causes serious fears and concerns, or from which a serious threat "stem[s]", itself amounts to a serious threat under Article 387 of the KCC.[470] More specifically, Gucati argues that "serious threat" implies a threat to "inflict" serious harm "in the future", that this element was absent from the Trial Panel's findings,[471] and that the Trial Panel failed to explain what it meant by serious threats "stemming" from the Accused's acts and statements.[472]

215. Finally, Gucati submits that the Trial Panel erred in law by finding that Article 387 of the KCC does not require proof that the "serious threat" did in fact *induce*[473] a person to refrain from making a statement, or to make a false statement, or to otherwise fail to state true information to the police, a prosecutor or a judge.[474] He argues that in relation to offences of contempt, the relevant provisions at the ICTY and ICC do not require proof of consequence, placing the emphasis on the criminal conduct, while Articles 386 and 387 of the KCC emphasise the

[469] Gucati Appeal Brief, para. 31.
[470] Gucati Appeal Brief, paras 34-37, 42. See also Gucati Reply Brief, para. 20.
[471] Gucati Appeal Brief, paras 33, 36-37, 40-41. Gucati further submits that the Trial Panel's findings that the Accused's acts and statements caused, contributed to, augmented, or amplified fears and concerns were insufficient. See Gucati Appeal Brief, paras 34, 37.
[472] Gucati Appeal Brief, paras 38-39.
[473] Gucati also argues that there is no meaningful distinction between the language in Article 387 ("to induce") and Article 386 ("induces") of the KCC. See Gucati Appeal Brief, paras 44-45, 47; Confirmation Decision, para. 62; SPO Submissions on Applicable Law, para. 20.
[474] Gucati Appeal Brief, paras 43-47, 50-51; Transcript, 1 December 2022, pp. 41-46.

consequence of the conduct.[475] Finally, Gucati submits that the Trial Panel did not find that any person was in fact *induced*.[476]

216. The SPO responds that if the "obstruction" part of Article 387 of the KCC was construed as a general qualifier for all three of the alternatives of Article 387, this would lead to an absurd interpretation whereby only witnesses with information about obstruction could be intimidated; this is also not how Kosovo courts interpret Article 387 of the KCC.[477] In the SPO's view, it was therefore not necessary for the Trial Panel to make any findings that the information related to the obstruction of criminal proceedings.[478] The SPO further responds that Gucati's arguments under Ground 1(E) are dependent on his incorrect legal interpretation under Ground 1(A), and thus should also be rejected.[479]

217. The SPO further responds that it is clear from Article 387 of the KCC that the "threat", which is merely one of the enumerated forms of conduct mentioned in this article, is only required to be "serious" and does not need to be "of force".[480]

218. The SPO also argues that "serious threat" in Article 387 of the KCC is a legal qualification of the conduct of the Accused.[481] It submits that neither Gucati nor Haradinaj[482] challenge the Trial Panel's considerations which made it conclude that

---

[475] Gucati Appeal Brief, paras 46-50, referring to ICTY Rules, Rule 77(A)(iv); Rome Statute, Article 70(1)(c); Transcript, 1 December 2022, pp. 44-46.
[476] See Gucati Appeal Brief, para. 51.
[477] SPO Response Brief, para. 61, referring to Kosovo Basic Court Judgment of 10 June 2020; Kosovo Basic Court Judgment of 12 February 2021. Contra Gucati Reply Brief, para. 19, in which Gucati submits that both decisions cited by the SPO are first instance decisions. See also Transcript, 2 December 2022, pp. 133-135, wherein the SPO submits that there were further changes between Article 310 of the PCCK, the predecessor to Article 387 of the KCC, and the current version of the KCC than those changes Gucati highlights; for example, the title of Article 310 in the PCCK was "Intimidation during Criminal Proceedings for Organised Crime", which was not transposed in Article 387 of the current KCC, which states "Intimidation during Criminal Proceedings".
[478] SPO Response Brief, paras 60, 62; Transcript, 2 December 2022, pp. 135-136.
[479] SPO Response Brief, para. 62.
[480] SPO Response Brief, para. 63. See also Transcript, 2 December 2022, pp. 136-137.
[481] SPO Response Brief, para. 64.
[482] See below, paras 234, 237.

the Accused's conduct amounted to a "serious threat", but that they make mere "assertions that the Trial Panel failed to give sufficient weight to the evidence".[483] The SPO further submits that the Accused fail to show that the Trial Panel erred in its factual assessment that the Accused's acts and statements qualified as "serious threats".[484]

219. The SPO finally responds that the Trial Panel's finding that Article 387 of the KCC requires no proof of consequence is in fact consistent with the ICTY and ICC chambers' analogous interpretation of similar offences.[485] The SPO also rejects Gucati's "contextual reading" of Articles 386 and 387 of the KCC, arguing that the former differs from the latter in that it requires "particular consequences".[486]

(ii) Assessment of the Court of Appeals Panel

220. At the outset, the Appeals Panel notes that it is clear from the Trial Panel's findings that the Accused were found guilty under the first alternative of Article 387 of the KCC, namely having used serious threats to induce someone to "refrain from making a statement".[487]

221. The Appeals Panel will first discuss the scope of the qualifier "when such information relates to obstruction of criminal proceedings" in Article 387 of the KCC, as raised by Gucati.[488] The Appeals Panel considers that the words "such information" in the qualifier of Article 387 of the KCC refer to the "true information" in the third

[483] SPO Response Brief, paras 64-65.
[484] SPO Response Brief, para. 66.
[485] SPO Response Brief, paras 67-68, referring to *Beqaj* Trial Judgement, para. 21; *Haraqija and Morina* Trial Judgement, para. 18; Rome Statute, Article 70(1)(c); *Bemba et al.* Trial Judgment, paras 43, 48; *Bemba et al.* Appeal Judgment, para. 737. See also Transcript, 2 December 2022, p. 136.
[486] SPO Response Brief, para. 69, referring to Confirmation Decision, para. 62, fn. 40, cited in Trial Judgment, para. 115.
[487] See Trial Judgment, paras 585-586, 604 ("[A]ll aforementioned acts and statements of the Accused formed a conscious and essential part of the serious threat they used to induce Witnesses and Potential Witnesses to refrain from giving (further) evidence to the [Specialist Chambers]/SPO."), 605.
[488] See Gucati Ground 1(A).

alternative, namely the person failing to state "true information to the police, a prosecutor or a judge", because of the placement and the formulation of the qualifier. The Panel notes, first, that the qualifier refers to "such information" and thus to the "true information" mentioned in the third alternative, and second, that the qualifier is directly placed after the third alternative.[489]

222. Moreover, in comparing Article 387 of the KCC and Article 310 of the PCCK – the preceding provision to Article 387 of the KCC, which was entitled "Intimidation during criminal proceedings for organized crime" – the Appeals Panel does not agree with Gucati's understanding that the Trial Panel accepted that the placement and formulation of the qualifier ("when such information relates to organized crime") meant that it applied to each of the three alternatives in Article 310 of the PCCK.[490] The Trial Panel merely noted in the relevant footnote the difference in language in the title and the text of the two provisions, but made no such finding. Further, contrary to Gucati's suggestion, the Appeals Panel does not consider any potential intent by the legislative drafters in the wording of Article 310 of the PCCK to be determinative for its understanding of Article 387 of the KCC.[491] As the "obstruction" part does not apply to the first alternative of Article 387 of the KCC, the Appeals Panel considers that the Trial Panel did not err in refraining to make findings that the Accused used serious threats in relation to the obstruction of criminal proceedings.

223. The Appeals Panel observes that most of Gucati's arguments under Ground 1(E) are inextricably linked to his Ground 1(A) and should likewise be

[489] See Transcript, 1 December 2022, pp. 36-38; Transcript, 2 December 2022, pp. 133-134. See also Trial Judgment, para. 114.
[490] See Trial Judgment, para. 114, fn. 186. Contra Gucati Appeal Brief, paras 14-16; Transcript, 1 December 2022, p. 38.
[491] See Transcript, 1 December 2022, pp. 25-27, 36-41; Transcript, 2 December 2022, pp. 133-134. Contra Gucati Appeal Brief, paras 14-16; Transcript, 1 December 2022, pp. 37-39.

dismissed.[492] With respect to the allegedly erroneous use of the terms "evidence" ("which does not appear in Art[icle] 387 [of the] KCC")[493] and "information" instead of "statement", the Panel is not persuaded by Gucati's arguments. The Panel notes that Gucati does not challenge the finding that, in accordance with the KCC and the KCPC, prosecutorial investigations are included within the scope of "criminal proceedings".[494] Accordingly, the Appeals Panel agrees with the Trial Panel's finding, in relation to Count 3, that the *actus reus* was met because serious threats were issued against persons, encompassing Witnesses and Potential Witnesses, who gave "evidence" or provided "information" – rather than made a "statement" – to the Specialist Chambers or SPO.[495]

224. The Appeals Panel turns next to Gucati's challenge regarding the definition of "serious threat" in Article 387 of the KCC, and his argument that it must be interpreted with the preceding use of "force" in mind.[496] The Panel first notes that this issue, and in particular Gucati's challenge to the definition of serious threat in Article 401(1) of the KCC, will be discussed further in the section below on Count 1.[497] The Panel observes that the predecessor to Article 387 of the KCC, namely Article 310 of the PCCK, contained the phrase "[w]hoever uses force, *a threat to use force* or any other means of compulsion, a promise of a gift or any other form of benefit".[498] However, the words "threat to use force" were removed from both the 2012 KCC and the current (2019) KCC.[499] The Appeals Panel considers that this deletion of the words "threat to use force" in the 2012 KCC and the current KCC reflects the legislators' intent to make

[492] Most of Gucati's arguments under Ground 1(E) rest on his incorrect interpretation that Article 387 of the KCC restricts the relevant information to information relating to "obstruction of criminal proceedings". See Gucati Appeal Brief, paras 52-55, 58-59.
[493] Gucati Appeal Brief, para. 57.
[494] Trial Judgment, paras 74, 113. See also above, para. 129.
[495] See Trial Judgment, paras 113, 581, 585-587.
[496] Gucati Ground 1(B). See Gucati Appeal Brief, paras 26-32; Transcript, 1 December 2022, pp. 54-55, 59-61.
[497] See below, paras 278-280.
[498] Emphasis added. See PCCK, Article 310.
[499] See Transcript, 1 December 2022, pp. 59-61. See also Transcript, 2 December 2022, p. 136.

Article 387 of the KCC broader, so as to include not only a threat to use force, but any serious threat of harmful action.[500]

225. Moreover, the Appeals Panel considers that a threat can be serious even if it does not relate to the use of force and, in this regard, observes that the Kosovo courts have also adopted such an interpretation.[501] Furthermore, the Appeals Panel finds relevant the Trial Panel's consideration of other provisions of the KCC, which either use the term "threat" to describe harmful action other than the use of force,[502] or clearly indicate when "threat" refers to the use of force or violence.[503]

226. Gucati's argument that the Trial Panel erred in not making any findings on the use of force, serious threat of force, or threat to inflict serious harm on the health of any person in this case must also fail.[504] First, as noted above, the Trial Panel properly assessed the Accused's acts and statements under the broader definition of "serious threat", as one of the means listed in Article 387 of the KCC to perpetrate the offence – without necessarily being related to the use of force.[505] Moreover, in its assessment of whether the Accused's acts and statements amounted to a serious threat and would have created serious fears and concerns for many Witnesses or Potential Witnesses,[506] the Trial Panel was guided by the Pre-Trial Judge's definition of serious threat, which

[500] See also Trial Judgment, para. 144; see below, para. 278.
[501] See Kosovo Basic Court Judgment of 12 February 2021, referred to in Annex 2 to SPO Response Brief, pp. 2-12, wherein the court qualified, as a serious threat under Article 395 of the 2012 KCC, a threat by the accused to tell the family of the victim's wife that he had a love affair with a woman. See also KCC, Article 181; *Salihu et al*. Commentary, Article 185(1) of the 2012 KCC, mns 2-3, p. 497, which accepts a broader definition of "serious threat" than the one suggested by Gucati. Contra Transcript, 1 December 2022, pp. 54-55, 59-61 (wherein Gucati submits that Article 181 of the KCC "makes it clear that serious threat refers to threat to the life and body of the person"). See also above, fn. 467.
[502] See Trial Judgment, para. 144, fn. 233, referring to KCC, Articles 160(2.7), 161(2.5), 167(4), 168(4), 169, 170(6.5), 171, 181, 227(3.2), 229(2.2).
[503] See Trial Judgment, para. 144, fn. 234, referring to KCC, Articles 114, 118, 121, 158(1), 160(2.1), 161(2.1), 227(3.1), 229(2.1), 247(3). See also above, para. 278.
[504] See Gucati Appeal Brief, paras 30-32; Transcript, 1 December 2022, pp. 55-56, 59-60.
[505] See Trial Judgment, para. 557 (wherein the Trial Panel noted that it would not address use of force or the other means listed in Article 387 of the KCC as they were not pleaded in this case).
[506] See Trial Judgment, paras 585-586.

included an assessment of the serious harm inflicted on the health, well-being, safety, security or privacy of a person.[507] The Appeals Panel considers that, as discussed below, and since Article 387 of the KCC does not require that the conduct had a particular effect on the person, the Trial Panel in fact went further than what is required by Article 387 of the KCC in finding that the Accused's revelation of the identity and personal data of Witnesses and Potential Witnesses had serious consequences for the Witnesses at Risk, as a confirmation of the seriousness of the threat.[508]

227. With regard to the temporal scope of the "serious threat" raised by Gucati, even if he is correct to state that "threat" implies that some harm will be inflicted *in the future*,[509] the Panel notes that this was in fact reflected in the Trial Panel's findings.[510] Indeed, the Trial Panel assessed whether the conduct of the Accused amounted to a serious threat by considering evidence indicating that the persons *will* suffer harm. In particular, the Trial Panel considered: (i) the statements of the Accused regarding some of the consequences of the revelation, namely that the Witnesses and Potential Witnesses included in the Protected Information were now "known" and could not be protected anymore by the Specialist Chambers and SPO, and were therefore exposed to harm;[511] (ii) the manner in which the Protected Information was revealed, and

[507] See Trial Judgment, paras 112 (fn. 182), 558 (fn. 1173), referring to Confirmation Decision, para. 60.
[508] See Trial Judgment, paras 582-583, referring to Article 392(3) of the KCC in relation to Count 6. The Trial Panel found that "[n]onetheless, any such effect, if established, can inform the level and seriousness of the threat stemming from the acts and statements of the Accused". See Trial Judgment, para. 582. See also below, para. 229.
[509] Gucati Ground 1(C). See Gucati Appeal Brief, paras 36, 40.
[510] Contra Gucati Appeal Brief, para. 37.
[511] Trial Judgment, paras 565-568. See in particular Trial Judgment, fns 1190, citing Gucati ("Because they transferred the Special Court from Kosovo to The Hague on security grounds, we know that, for the protection of witnesses and everybody but *today, who is protecting these witnesses*, who protects all these documents?" (emphasis added)), referring to P00009, p. 5, 1193, citing Haradinaj ("The first batch was only intended to tell us […] you poor morons, you fools, you born spies, you spies, do not think that someone will protect you, they will only exploit you, because *no one in the world has ever protected a spy after exploiting him. On the contrary, he has been either killed, discredited, or derided*. How can you have such expectations, betray your people, your army, lie, concoct with evidence provided by the enemy?" (emphasis added)), referring to P00008, p. 26.

specifically the fact that the Accused drew attention to the large number of witnesses they identified and "repeatedly vowed to make public any new [Specialist Chambers]/SPO documents received without any distinction as to the content of such documents";[512] and (iii) that in the specific context in Kosovo, such statements would produce an intimidating effect on Witnesses and Potential Witnesses.[513]

228. The Appeals Panel moreover notes the Trial Panel's consideration that the Accused did not act in a private capacity, but that their actions and statements to publish Specialist Chambers and SPO material were condoned by the KLA WVA's leadership committee.[514] With this, the Trial Panel reasonably brought another factor into its assessment, which pointed to an increased threat level given the nature of the acts, which were not merely private but condoned by the KLA WVA's leadership. In addition, the Trial Panel clearly explained "what was meant by serious threats 'stemming' from the Accused's acts and statements".[515] As a result, the Appeals Panel does not find any error in the Trial Panel's conclusion that the Accused's acts and statements would have caused "serious fears and concerns for many persons who gave evidence to the [Specialist Chambers]/SPO or were likely to do so".[516]

229. Turning to Gucati's argument on proof of consequence,[517] the Appeals Panel notes that the Trial Panel found that Article 387 of the KCC does not require proof that the force or serious threat did in fact induce a person to refrain from making a statement, make a false statement or fail to state true information.[518] The Appeals Panel notes that Article 387 of the KCC places the emphasis on the criminal conduct, namely the use of serious threat in providing that "[w]hoever *uses* force or serious threat […]

[512] Trial Judgment, para. 562. See also Trial Judgment, paras 559-561, 563-564.
[513] Trial Judgment, para. 578. See also Trial Judgment, paras 576-577, 579-581.
[514] See Trial Judgment, para. 580.
[515] Trial Judgment, paras 582, 586. See also Trial Judgment, paras 558-581, 583-584. Contra Gucati Appeal Brief, paras 38-39.
[516] Trial Judgment, para. 585. See also Trial Judgment, paras 560, 564, 568, 575.
[517] See Gucati Ground 1(D); Transcript, 1 December 2022, pp. 41-46.
[518] Trial Judgment, para. 115.

to induce another person",[519] while Article 386 of the KCC places the emphasis on the result, namely that the perpetrator "causes" or "induces" a person to make a false statement, conceal a material fact or decline to give a statement.[520] In the Appeals Panel's view, the Trial Panel correctly found that its interpretation, adopting that of the Pre-Trial Judge, is consistent with the actual wording of Article 387 of the KCC.[521] In this regard, the Trial Panel found that this interpretation comports best with the purpose of the provision, which is to protect the information of witnesses and other information providers and, more generally, the integrity of criminal proceedings by penalising a perpetrator who intends to influence a witness.[522] Such an interpretation is also consistent with the ICTY's and ICC's approach and interpretation of similar offences.[523]

230. In light of the aforementioned, the Panel finds that Gucati fails to demonstrate an error in the Trial Panel's findings on the definition of the material elements of the offence under Article 387 of the KCC. Accordingly, the Panel dismisses Gucati's Ground 1.

---

[519] Emphasis added.

[520] Article 386(1) of the KCC provides that "[w]hoever, by any means of compulsion or bribe, with the intent to: (1.1) causes any person to make a false statement, provide a false document or conceal a material fact in an official proceeding; [...] [or] (1.7) induces a witness or an expert to decline to give or to give a false statement in court proceedings […]" is guilty of the offence of obstruction of evidence of official proceedings. See Trial Judgment, para. 115; Confirmation Decision, para. 62. Contra Gucati Appeal Brief, para. 45.

[521] Trial Judgment, para. 115, referring to Confirmation Decision, para. 62.

[522] Trial Judgment, para. 115.

[523] See ICTY Rules, Rule 77(A)(iv), according to which the ICTY may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who "threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness"; Rome Statute, Article 70(1)(c), according to which "[c]orruptly influencing" a witness amounts to an offence against the ICC's administration of justice. See Piragoff, D. K., in *Ambos* Rome Statute Commentary, Article 70, mns 19-24; see also *Ambos* Treatise ICL II, pp. 282-289; *Haraqija and Morina* Trial Judgement, para. 18; *Margetić* Trial Judgement, para. 64; *Beqaj* Trial Judgement, para. 21; *Bemba et al.* Appeal Judgment, para. 737; *Bemba et al.* Trial Judgment, paras 43, 48.

(b) Alleged Errors Regarding the Admission of Evidence in Relation to Establishing the *Actus Reus* of the Offence Under Article 387 of the KCC (Gucati Ground 2(A) in part, 2(B); Haradinaj Grounds 8 in part, 19)

(i) Submissions of the Parties

231. Gucati submits that the Trial Panel erred in law and fact by relying on Ms Pumper's evidence to find that the Accused revealed the identity and/or personal data of hundreds of Witnesses and Potential Witnesses contained in the Batches, and ultimately finding that the *actus reus* of Article 387 of the KCC was established.[524]

232. Gucati argues that Ms Pumper's assertions concerning the numbers of (potential) witnesses mentioned in the Protected Information could not be properly challenged and appear to be erroneous, as only six individuals were in fact identified as (potential) witnesses.[525] In Gucati's view, the Trial Panel could therefore not use the "scope of [the] revelation" to assess whether the conduct of the Accused amounted to or involved a serious threat under Article 387 of the KCC,[526] and could not reasonably have concluded that "the sheer number of revealed identities" would have "caused fears and concerns for many of those who gave evidence to the [Specialist Chambers]/SPO or had been likely to do so".[527]

233. Gucati further submits that the Trial Panel correctly refrained from making findings in relation to witnesses from whom they had not heard evidence – and who could not have been cross-examined by the Defence – regarding any serious fears and concerns caused by the Accused's acts and statements.[528] However, he

[524] Gucati Appeal Brief, paras 80-84.
[525] Gucati Appeal Brief, paras 80-83, 88. See also Transcript, 1 December 2022, pp. 48-49.
[526] Gucati Appeal Brief, paras 84-87. See also Gucati Reply, para. 2.
[527] Gucati Appeal Brief, paras 88-89; Transcript, 1 December 2022, pp. 48-49, 52-53. See also Transcript, 2 December 2022, pp. 178-180.
[528] Gucati Appeal Brief, paras 96-99, 105.

argues that the Trial Panel erred in relying on the "concerns expressed by Witnesses as a result of the revelation" – found in evidence that the Trial Panel stated it would not rely on – to assess whether any threat was serious under Article 387 of the KCC.[529] In Gucati's view, the Trial Panel erred in finding that *many* persons had serious fears and concerns, as only one witness was found to have suffered fear and concern which could be described as "substantial interference with th[e] safety, security, well-being, privacy or dignity of protected persons or their families".[530]

234. Haradinaj argues that the Trial Panel erred in the exercise of its discretion when making findings on the contents of the Batches, given Ms Pumper's methodology "by way of sampling" in analysing the seized witness lists.[531] Haradinaj further submits that the Trial Panel erred by relying on his own comments to find that the SPO proved that he used "serious threats" to induce or attempt to induce any person under Count 3.[532] He argues that the most immediate and reasonable inference to be drawn from his comments at the time of the disclosure was his "well-accepted and public opposition to the *modus operandi* of the SPO and [Specialist Chambers]", and not the existence of threats as found by the Trial Panel.[533]

235. The SPO responds to Gucati that the Trial Panel relied on the concerns expressed by the witnesses whom Gucati challenges only to confirm its finding that the acts and statements of the Accused amounted to a serious threat and would have created serious fears and concerns.[534] In the SPO's view, Gucati fails to

[529] Gucati Appeal Brief, paras 100, 103, 105, 108; Gucati Reply Brief, paras 22-24.
[530] Gucati Appeal Brief, paras 102, 104, 106. Gucati further submits that the information on protective measures applied to witnesses by the SPO alone was insufficient to reasonably support the Trial Panel's finding. See Gucati Appeal Brief, para. 101.
[531] Haradinaj Appeal Brief, paras 100-101; Haradinaj Reply Brief, paras 22, 24-26. See also Haradinaj Appeal Brief, paras 104-107; Haradinaj Reply Brief, para. 23.
[532] Haradinaj Appeal Brief, paras 178-181; Haradinaj Notice of Appeal, Ground 20, para. 26.
[533] Haradinaj Appeal Brief, paras 179-181; Haradinaj Reply Brief, paras 47-49.
[534] SPO Response Brief, para. 70.

explain why the convictions under Count 3 would not stand irrespective of the challenged factual considerations.[535] Moreover, the SPO submits that Gucati misrepresents the Trial Panel's reasoning when arguing that its findings on the "many witnesses" who suffered serious fears and concerns were based on evidence which the Defence could not challenge during trial, as the evidence was provided by Mr Jukić, whom the Defence cross-examined.[536]

236. The SPO responds that Haradinaj's argument regarding Ms Pumper's methodology should be summarily dismissed as he does not show how it would invalidate the Trial Panel's finding, and that, in any event, the Trial Panel explained how it evaluated Ms Pumper's evidence and relied on an abundance of other evidence to ascertain that the Batches contained information on protected persons.[537]

237. Finally, the SPO responds to Haradinaj that he only argues that the Trial Panel failed to give sufficient weight to the evidence, rather than challenging the correctness of the Trial Panel's considerations.[538] The SPO further submits that the Accused failed to show that the Trial Panel erred in its factual assessment that the Accused's acts and statements qualified as a "serious threat".[539]

238. Gucati replies regarding Ground 2(B) that, in finding that many witnesses had serious fears and concerns, the Trial Panel relied on evidence of "concerns expressed by Witnesses", which could only refer to the SPO's witness contact notes – material that the Trial Panel had specifically stated it would not rely on in its findings.[540]

[535] SPO Response Brief, para. 70.
[536] SPO Response Brief, para. 71.
[537] SPO Response Brief, paras 58-59.
[538] SPO Response Brief, paras 64-65.
[539] SPO Response Brief, para. 66.
[540] Gucati Reply Brief, paras 22-24.

(ii) Assessment of the Court of Appeals Panel

239. The Appeals Panel turns first to Gucati's arguments concerning the evidence provided by Ms Pumper regarding the scope of the revelation.[541]

240. The Appeals Panel has already addressed the question of the non-disclosure of the Batches and recalls its finding that the Accused failed to demonstrate an error in the Trial Panel's consideration of undisclosed and/or redacted documents contained in the Batches, including that the admission of Ms Pumper's evidence did not cause any prejudice to the Defence that would justify its exclusion under Rule 138(1) of the Rules.[542]

241. The Appeals Panel therefore considers that the Trial Panel did not err in relying on Ms Pumper's evidence to find that the Accused revealed the identity and/or personal data of hundreds of Witnesses and Potential Witnesses contained in the Protected Information.[543] In the Panel's view, the fact that only six individuals were publicly identified by name by the Accused[544] does not reduce the "scope of [the] revelation" as it has been established that the Accused "revealed" the identity and/or personal data of (potential) witnesses by distributing the Three Sets to journalists during the Three Press Conferences, and allowing them to look at the names and statements of Witnesses and Potential Witnesses.[545]

242. In any event, the Panel observes that the "scope of [the] revelation" is but one factor considered by the Trial Panel to evaluate whether the Accused's conduct

[541] See Gucati Ground 2(A).
[542] See above, paras 65-73.
[543] Trial Judgment, paras 345-346, 350, 355, 379-381, 559.
[544] See Trial Judgment, paras 345, 355, 372, 625-627.
[545] Trial Judgment, paras 561-564. The Panel notes that while arguing that there was an "error apparent" with the "test" Ms Pumper used to calculate those numbers, Gucati does not define such an error. See Gucati Appeal Brief, para. 83.

amounted to a "serious threat" under Count 3.[546] Therefore, even if the Accused had revealed the identity and/or personal data of only six (potential) witnesses, the *actus reus* of intimidation during criminal proceedings under Article 387 of the KCC would still be established.

243. The Appeals Panel will next address Haradinaj's challenge to Ms Pumper's methodology. The Panel first notes that Haradinaj fails to point to any evidence in support of his contention that Ms Pumper used a "sampling" methodology when analysing the witness lists.[547] Additionally, he fails to provide any support for the proposition that such a methodology would be insufficient in the circumstances, in particular given that the Trial Panel also relied on other evidence, notably the Accused's own contemporaneous and subsequent statements, when making findings on the Batches' contents.[548] Given the deference owed to the Trial Panel's factual findings,[549] the Appeals Panel is not persuaded that any error has been made in the Trial Panel's assessment of Ms Pumper's analysis of the witness lists. For these reasons, the Appeals Panel dismisses Haradinaj's arguments in that regard.

244. Turning to Gucati's argument on the evidence relied on by the Trial Panel to assess whether any threat was serious,[550] the Panel observes that Gucati misreads the Trial Panel's findings with regard to the "serious fears and concerns" element in Article 387 of the KCC. As noted above and correctly found by the Trial Panel,[551] proof

---

[546] Trial Judgment, para. 558, wherein the Trial Panel indicated that it would consider the following factors: "(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 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." See also Trial Judgment, paras 559-584.

[547] The Panel notes that Haradinaj cites Ms Pumper's testimony on the process of authentication, however it does not support Haradinaj's contention on sampling. See Haradinaj Appeal Brief, fn. 96, referring to KSC-BC-2020-07, Transcript, [20 October 2021], pp. 1068-1070. The Panel notes that the date of the transcript reference provided by Haradinaj was incorrect.

[548] Trial Judgment, paras 331-381. See also above, para. 72.

[549] See above, para. 33.

[550] See Gucati Ground 2(B); Gucati Appeal Brief, paras 100-108; Gucati Reply Brief, paras 22-24.

[551] See above, para. 229.

of the consequences of the threat is not a requirement under Article 387 of the KCC. The Trial Panel found that the seriousness of the threat had been established through the Accused's acts and statements,[552] and, moreover, to confirm the seriousness of the threat, it reasonably considered the evidence regarding protective measures adopted by the SPO and the concerns expressed by Witnesses challenged by Gucati.[553]

245. In any event, the Panel notes that the Trial Panel cross-referenced these findings to its findings on Article 392(3) of the KCC regarding a limited number of Witnesses who suffered "serious consequences" from the Accused's acts and statements, and observes that those findings were based on evidence provided by Mr Jukić, whom the Defence was able to cross-examine.[554] Furthermore, having found no error in the Trial Panel's definition and assessment of "serious consequences" within the meaning of Article 392(3) of the KCC,[555] the Appeals Panel finds that the Trial Panel's reference to such findings was appropriate.

246. The Appeals Panel turns next to Haradinaj's argument that his statements to which the Trial Panel referred were not express or inferred threats, but rather show Haradinaj's well-known public opposition to the SPO and Specialist Chambers.[556]

247. At the outset, the Panel notes that Ground 19 of Haradinaj's Notice of Appeal addresses other issues, namely errors of law with regard to both the *actus reus* and the *mens rea* of the offence under Article 387 of the KCC.[557] The arguments addressed in

[552] See Trial Judgment, paras 558-581.
[553] Trial Judgment, para. 582, wherein the Trial Panel stated that "[t]he serious fears and concerns that the Accused's acts and statements engendered are further confirmed by evidence regarding protective measures the SPO had to adopt and concerns expressed by Witnesses as a result of the revelation of Protected Information." See also Trial Judgment, para. 584.
[554] Trial Judgment, para. 583, referring to Trial Judgment, para. 547. See above, paras 196-197.
[555] See above, paras 198-202, 207.
[556] Haradinaj Ground 19. See Haradinaj Appeal Brief, paras 178-181; Haradinaj Notice of Appeal, para. 26.
[557] See Haradinaj Notice of Appeal, Ground 19, para. 25, wherein Haradinaj submits that "[t]he Trial Panel erred in law in regard to [Article] 387 [of the] KCC when finding that the offence it defines can

Ground 19 of the Haradinaj Appeal Brief are in fact part of Ground 20 of the Haradinaj Notice of Appeal.[558] The Panel recalls that the Accused must request leave from the Appeals Panel to amend their notices of appeal, showing "good cause", and, similarly, their appeal briefs shall be set out and numbered in the same order as in their notices of appeal, unless otherwise varied with leave from the Panel.[559] This in principle warrants summary dismissal of Haradinaj's Ground 19. Noting that Haradinaj seems to have abandoned his initial arguments under Ground 19 of his Notice of Appeal and merely moved his arguments under Ground 20 – and they are not new arguments made since filing his Notice of Appeal – the Panel will exceptionally address Haradinaj's arguments here on the merits out of fairness.

248. In this regard, the Panel observes that Haradinaj does not challenge the Trial Panel's relevant factual findings that he: (i) revealed the identity and/or personal data of Witnesses and Potential Witnesses;[560] (ii) displayed and distributed the Three Sets at the Three Press Conferences while publicly and repeatedly pointing out the presence of names/information of Witnesses and Potential Witnesses, and inviting persons present to look at and take copies of these documents;[561] (iii) stated that the public now knew who the Witnesses and Potential Witnesses were and that the Specialist Chambers and SPO were unable to guarantee their privacy and security;[562] and (iv) described Witnesses and Potential Witnesses as,

be committed with eventual intent and when interpreting the scope of the phrase '*when such information relates to obstruction of criminal proceedings*'".

[558] See Haradinaj Notice of Appeal, Ground 20, para. 26, wherein Haradinaj submits that "[t]he Trial Panel has erred in fact in finding that the SPO proved that the Appellant used serious threats to induce or attempt to induce any person under Count 3 […]".

[559] See above, para. 30.

[560] Trial Judgment, para. 559. The Panel notes that Haradinaj only challenges the scope of revelation, arguing that a number of individuals were in fact publicly known in Kosovo as Witnesses or Potential Witnesses at the time of the Indictment, and that the Trial Panel could not have been certain of the actual number, status or vulnerability of those individuals. See Haradinaj Appeal Brief, Ground 14, para. 147(a), (c). See also below, paras 390-391.

[561] Trial Judgment, para. 561.

[562] Trial Judgment, paras 565-567.

inter alia, spies, traitors, collaborators, criminals and bloodsuckers.[563] Indeed, these findings are all based on Haradinaj's own statements.

249. In light of these unchallenged findings, the Panel considers that Haradinaj fails to show that no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the Trial Panel, namely that the Accused's acts and statements amounted to a "serious threat".[564] Therefore, the Panel dismisses Haradinaj's Ground 19.

250. In light of the above, the Panel finds that Gucati and Haradinaj fail to demonstrate an error in the Trial Panel's findings on the *actus reus* of the offence under Article 387 of the KCC. Accordingly, the Panel dismisses the remainder of Gucati's Ground 2,[565] the remainder of Haradinaj's Ground 8[566] and Haradinaj's Ground 19.

2. Alleged Errors Regarding the *Mens Rea* of Article 387 of the KCC (Gucati Ground 3; Haradinaj Ground 20)

251. Gucati and Haradinaj also challenge the Trial Panel's findings on the *mens rea* underpinning their conviction under Count 3 of the Indictment for using serious threats to induce or attempt to induce witnesses to refrain from making a statement to the SPO and/or the Specialist Chambers, under Article 387 of the KCC.[567] The SPO responds that the Accused's relevant grounds of appeal should be dismissed.[568]

252. The Trial Panel held, by majority, that the offence under Article 387 of the KCC requires either direct or eventual intent (*dolus eventualis*),[569] and ultimately found that

[563] Trial Judgment, paras 570-574.
[564] See above, paras 29, 32.
[565] The Panel dismissed the remainder of the challenges in Gucati's Ground 2(A) in the section on Disclosure. See above, paras 65-73.
[566] The Panel dismissed the remainder of the challenges in Haradinaj's Ground 8 in the section concerning the aggravated form of the offence under Count 6. See above, paras 193-197, 207.
[567] Gucati Appeal Brief, paras 109-134; Haradinaj Appeal Brief, paras 182-196; Gucati Reply Brief, paras 25-30; Haradinaj Reply Brief, paras 50-53. See also Indictment, paras 29-30, 48.
[568] SPO Response Brief, paras 72-76.
[569] Trial Judgment, para. 124.

the Accused acted with direct intent, namely "awareness of, and desire for, inducing Witnesses and Potential Witnesses who were identified in the Protected Information to refrain from giving (further) evidence to the [Specialist Chambers]/SPO".[570]

(a) Submissions of the Parties

253. Gucati submits that the Trial Panel did not set out the specific requirements for direct intent under Count 3.[571] In his view, the Trial Panel erred in law by finding it sufficient that the Accused acted with awareness of, and desire for, inducing Witnesses and Potential Witnesses.[572] Gucati also submits that, in any event, the Trial Panel made no finding that the Accused acted with awareness of, and desire for, inducing a person specifically to refrain from making a "statement", but instead erroneously referred to persons providing "information" or giving "evidence" while this term does not appear in Article 387 of the KCC.[573] Gucati submits again that the Trial Panel "simply ignored" the qualifier "when such information relates to obstruction of criminal proceedings" for the consideration of the *mens rea*.[574]

254. Moreover, Gucati argues that the Trial Panel failed to establish that the Accused were aware that the information at issue was "true", which according to him, is a requirement of Article 387 of the KCC.[575] At the Appeal Hearing, Gucati further stressed that the "statement" referred to in the first alternative of Article 387 of the KCC ("to refrain from making a statement") must be true, as there cannot be a distinction between requiring a perpetrator to induce someone to fail to state true

[570] Trial Judgment, paras 605, 960.
[571] Gucati Appeal Brief, paras 109, 114, 122.
[572] Gucati Appeal Brief, paras 110-114. See also Transcript, 1 December 2022, p. 56.
[573] Gucati Appeal Brief, paras 115-116; Gucati Reply Brief, para. 25.
[574] Gucati Appeal Brief, paras 117-118; Gucati Reply Brief, para. 30. See also above, paras 211-212.
[575] Gucati Appeal Brief, paras 119-121; Gucati Reply Brief, paras 26-29; Transcript, 1 December 2022, pp. 56-57. The Panel notes that Gucati borrows from the Trial Panel's interpretation of Article 388(1) of the KCC that *inter alia* the Accused must be aware that the information from the Witnesses was, at least to some extent, truthful. See Trial Judgment, paras 621, 623, cited in Gucati Appeal Brief, paras 120-121.

information (in the third alternative) and "not requir[ing] the same intention of veracity in relation to the statement" in the first alternative.[576]

255. Gucati further submits that the Trial Panel erred in law when finding that the offence under Article 387 of the KCC can alternatively be committed with eventual intent.[577]

256. Haradinaj submits that the Trial Panel erred in fact by inferring direct intent from his acts and statements.[578] In his view, his acts and statements, and the factual findings made by the Trial Panel in this respect, do not reveal "a desire to change" what (potential) witnesses may say to the Specialist Chambers and/or the SPO.[579] Rather, Haradinaj submits that his statements "could be meant only to point out the SPO/[Specialist Chambers'] failures and incompetence and thus discredit it and undermine its legitimacy".[580] Haradinaj argues that the only evidence that could "at first sight" support the existence of the requisite *mens rea* is insufficient.[581]

257. The SPO responds that the Trial Panel did set out the specific requirements for direct intent of intimidation during criminal proceedings under Article 387 of the KCC, and clearly made the required findings.[582] With respect to Gucati's argument about information relating to obstruction of criminal proceedings, the SPO submits that Gucati conflates *actus reus* requirements with *mens rea* requirements.[583] Furthermore, the SPO responds that Article 387 of the KCC criminalises inducing

[576] Transcript, 1 December 2022, pp. 39-41, 57.
[577] Gucati Appeal Brief, paras 123-134. See also Transcript, 1 December 2022, pp. 57-58. The Panel notes that Haradinaj appears to have abandoned in his Appeal Brief a similar ground of appeal that was initially in his Notice of Appeal. See Haradinaj Notice of Appeal, Ground 19, para. 25. See also above, para. 247.
[578] Haradinaj Appeal Brief, paras 182-184, 187.
[579] Haradinaj Appeal Brief, paras 183-184.
[580] Haradinaj Appeal Brief, para. 184.
[581] Haradinaj Appeal Brief, paras 185-186, referring to P00008, pp. [30]-31, cited in Trial Judgment, para. 601.
[582] SPO Response Brief, para. 72.
[583] SPO Response Brief, para. 73.

someone to "refrain from making a statement", and that the Trial Panel reached its finding of direct intent on this basis.[584] According to the SPO, the Trial Panel was not required to make a finding on the truth of the information at issue.[585]

258. The SPO also responds that given the absence of error in the Trial Panel's findings as to direct intent, Gucati's arguments on eventual intent should be summarily dismissed.[586]

259. The SPO further responds that Haradinaj merely disagrees with the Trial Panel's interpretation of the evidence while, at the same time, acknowledging that there is some evidence supporting its interpretation.[587]

(b) Assessment of the Court of Appeals Panel

260. The Appeals Panel will start its assessment with the Accused's challenges regarding direct intent.

261. The Appeals Panel first observes that, contrary to Gucati's assertion, the Trial Panel set out the specific requirements of direct intent for the offence of intimidation during criminal proceedings under Article 387 of the KCC.[588] In particular, the Trial Panel considered that direct intent is the "desire to induce a person" to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings.[589]

262. Moreover, the Appeals Panel considers that the Trial Panel's definition and relevant findings demonstrate that the Accused possessed the direct intent to use

[584] SPO Response Brief, para. 74.
[585] SPO Response Brief, para. 74. The SPO argues in particular that Gucati's reference to the Trial Panel's interpretation of Article 388(1) of the KCC is entirely inapposite.
[586] SPO Response Brief, para. 75.
[587] SPO Response Brief, para. 76.
[588] Trial Judgment, paras 121-122. Contra Gucati Appeal Brief, para. 109.
[589] Trial Judgment, para. 122. See also Trial Judgment, para. 588.

serious threat to dissuade Witnesses and Potential Witnesses from giving evidence to the Specialist Chambers or SPO.[590] In particular, the Trial Panel found, *inter alia*, that the Accused: (i) wanted to distribute the Three Sets as widely as possible; (ii) did not take any measures to limit the revelation of names listed in the Protected Information; and (iii) made disparaging statements directed at the Witnesses and Potential Witnesses, indicating that "those who were exposed for having 'collaborated' with the [Specialist Chambers]/SPO were now at risk of harm".[591] The Trial Panel further found that the Accused's statements that the Specialist Chambers/SPO could not protect its witnesses, "intertwined with the disparaging and threatening remarks expressed by the Accused, were intended to make Witnesses and Potential Witnesses feel vulnerable".[592] The Appeals Panel considers that the Trial Panel's findings on direct intent for the offence of intimidation during criminal proceedings under Article 387 of the KCC are reasonable.

263. The Appeals Panel notes that Gucati advances two specific arguments that the Trial Panel erred in its consideration of the *mens rea* by: (i) referring to persons providing "information" or giving "evidence" – while the word "evidence" does not appear in Article 387 of the KCC – and ignoring the qualifier of "when such information relates to obstruction of criminal proceedings";[593] and (ii) not making a finding as to the truthfulness of the information to be provided by witnesses under Article 387 of the KCC.[594] Regarding the first argument, the Appeals Panel considers that Gucati repeats the same arguments as those made regarding the *actus reus*.

[590] See Trial Judgment, paras 121-122, 588-605. See also SPO Response Brief, para. 72. Contra Gucati Appeal Brief, para. 114.
[591] See Trial Judgment, paras 589-590, 596, 603. See also Trial Judgment, paras 591-595, 597-602.
[592] See Trial Judgment, para. 604.
[593] See Gucati Appeal Brief, paras 115-118. See also Gucati Reply Brief, paras 25, 30.
[594] See Gucati Appeal Brief, paras 119-121. See also Gucati Reply Brief, paras 26-29.

Having rejected the arguments on the *actus reus* above,[595] the Panel similarly dismisses these repetitive arguments.

264. The Panel turns to Gucati's second argument that a *mens rea* finding was required as to the truthfulness of the information to be provided by witnesses under Article 387 of the KCC.[596] The Panel recalls that failing to state "true information" is only part of one of the three alternatives under Article 387 of the KCC, and, most importantly, this is an alternative under which the Accused were not convicted;[597] thus, no issue of a possible *mens rea* requirement can arise in the circumstances at hand.[598] Gucati's attempt to apply the Trial Panel's interpretation of the *mens rea* under Article 388(1) of the KCC, namely that the (awareness of the) truthfulness of the information is an element of the *mens rea* requirement, to Article 387 of the KCC is therefore inapposite.

265. In light of the aforementioned, the Appeals Panel finds that Gucati fails to demonstrate an error in the Trial Panel's assessment of direct intent. Based on the fact that direct intent was established, the Appeals Panel finds that Gucati's arguments that eventual intent is not sufficient to sustain a conviction under Article 387 of the KCC[599] are hypothetical and would have no impact on the impugned Trial Judgment.[600] The Panel therefore summarily dismisses Gucati's arguments in this regard.

266. Turning to Haradinaj's arguments regarding direct intent, the Panel observes that he does not challenge the factual findings as to the Accused's statements, from which the Trial Panel concluded that he "acted with awareness of, and desire for,

[595] See above, paras 221-223.
[596] See Gucati Appeal Brief, paras 119-121.
[597] See above, paras 220-222. See also Trial Judgment, paras 114, 604-606.
[598] See Transcript, 1 December 2022, pp. 39-41.
[599] See Gucati Appeal Brief, paras 123-134.
[600] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed and need not to be considered on the merits. See above, para. 31.

inducing Witnesses and Potential Witnesses who were identified in the Protected Information to refrain from giving (further) evidence to the [Specialist Chambers]/SPO".[601] Haradinaj even acknowledges that the Trial Panel could infer from its findings that he 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/[Specialist Chambers] and the protection of KLA WVA members from conviction".[602] Haradinaj also admits that one particular remark could "at first sight" be viewed as supporting the requisite intent.[603] Nevertheless, he again suggests that his statements could only be interpreted as an attempt to discredit the SPO and Specialist Chambers and undermine their legitimacy.[604]

267. The Appeals Panel notes that the Trial Panel specifically addressed Haradinaj's alternative interpretation of the evidence, but found that Haradinaj's statements were intended to make Witnesses and Potential Witnesses feel vulnerable and "formed a conscious and essential part of the serious threat" he used to dissuade them from giving (further) evidence to the Specialist Chambers and SPO.[605] In the Appeals Panel's view, Haradinaj merely disagrees with the Trial Panel's findings, without establishing any error in the Trial Panel's assessment.[606]

268. In light of the above, the Panel finds that Gucati and Haradinaj fail to demonstrate an error in the Trial Panel's findings on the *mens rea* of the offence under Article 387 of the KCC. Accordingly, the Panel dismisses Gucati's Ground 3 and Haradinaj's Ground 20.

---

[601] See Haradinaj Appeal Brief, paras 183-184; Trial Judgment, para. 605.
[602] See Haradinaj Appeal Brief, para. 184.
[603] See Haradinaj Appeal Brief, para. 185, with regard to the following remark pronounced by Haradinaj at an interview on 20 September 2020: "[the Specialist Chambers/SPO] will totally collapse. From what I read ... the testimony on which it has been built. It will totally collapse, because the witnesses, too, know now that others know who they are […]." See P00008, pp. 30-31.
[604] See Haradinaj Appeal Brief, para. 184. See also above, paras 234, 248-249.
[605] See Trial Judgment, para. 604. See also Trial Judgment, paras 603, 605; see above, para. 262.
[606] See Trial Judgment, paras 589-604.

E. ALLEGED ERRORS CONCERNING OBSTRUCTING OFFICIAL PERSONS IN PERFORMING OFFICIAL DUTIES BY SERIOUS THREAT (COUNT 1)

1. Alleged Errors Regarding the *Actus Reus* of Article 401(1) and (5) of the KCC (Gucati Ground 12; Haradinaj Ground 18)

269. Gucati and Haradinaj challenge the Trial Panel's findings on the *actus reus* underpinning their conviction under Count 1 of the Indictment ("Count 1") on obstruction of official persons in performing official duties by serious threat, punishable under Article 401(1) and (5) of the KCC.[607] The SPO responds that the Accused's appeals on the *actus reus* of Count 1 should be dismissed.[608]

270. The Panel recalls that Article 401(1) of the KCC provides that:

> Whoever, by force or serious threat, obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished by imprisonment of three (3) months to three (3) years.

271. Further, Article 401(5) of the KCC provides that:

> When the offense provided for in paragraph 1. or 2. of [Article 401 of the KCC] is committed against a judge, a prosecutor, an official of a court, prosecution officer or a person authorized by the court and prosecution office, a police officer, a military officer, a customs officer or a correctional officer during the exercise of their official functions the perpetrator shall be punished by imprisonment of one (1) to five (5) years.

272. The Trial Panel was satisfied that the Accused fulfilled one of the *actus reus* elements of the offence of obstructing official persons in performing official duties by serious threat under Article 401(1) of the KCC amounting to an attempted form thereof, having found, *inter alia*, that: (i) a serious threat may be directed also against

[607] Gucati Appeal Brief, paras 279-291; Haradinaj Appeal Brief, paras 173-177; Haradinaj Reply Brief, para. 46. See also Indictment, paras 25-28, 48. The Panel recalls that according to para. 48 of the Indictment, the offence of "Obstructing Official Persons in Performing Official Duties, by serious threat" is punishable under Articles 17, 28, 31, 32(1)-(3), 33, 35, and 401(1) and (5) of the KCC, applicable by virtue of Articles 15(2) and 16(3) of the Law.
[608] SPO Response Brief, paras 105-110.

another person or object, other than the official person; (ii) the acts and statements of the Accused amounted to a serious threat, since they would have created serious fears and concerns among those who gave evidence to the Specialist Chambers/SPO or who were likely to do so; and (iii) a serious threat towards one or more Witnesses or Potential Witnesses could, in principle, obstruct Specialist Chambers/SPO officials performing Specialist Chambers/SPO work, as it could impede or hinder the ability of the SPO to investigate and prosecute crimes or prevent Specialist Chambers panels from hearing evidence relevant to such crimes.[609]

(a) Submissions of the Parties

273. Gucati submits that "serious threat" in the context of Article 401(1) of the KCC means serious threat of force.[610] In his view, nowhere in the KCC does the definition of "threat" encompass such broad interests as well-being, safety, security, or privacy, as adopted by the Trial Panel for the purposes of this Article.[611] According to Gucati, as Article 401(1) of the KCC falls under the category of "criminal offences against public order", in contrast to Article 387 of the KCC, "any other means of compulsion" will not suffice.[612] He further argues that the development from Article 316(1) of the PCCK to Article 401(1) of the KCC amounts only to added emphasis from the legislator that the threat has to be serious.[613] Gucati also submits that there is no evidence in the present case to support a finding of the use of force, the use of serious threat of force, or the use of threat to inflict serious harm on the health of any person.[614]

274. Furthermore, both Accused submit that the use of force or serious threat must be directed at the person performing official duties.[615] According to Gucati, the aim of

[609] Trial Judgment, paras 639-643, 647, 657-658.
[610] Gucati Appeal Brief, paras 279-280.
[611] Gucati Appeal Brief, para. 283, referring to Gucati Appeal Brief, paras 27-29.
[612] Gucati Appeal Brief, paras 284-285.
[613] Gucati Appeal Brief, para. 281.
[614] Gucati Appeal Brief, para. 286.
[615] Gucati Appeal Brief, paras 287-289; Haradinaj Appeal Brief, paras 173, 177.

Article 401 of the KCC is to protect official persons performing official duties against violent or threatening actions,[616] while according to Haradinaj, the text of the Article contains no language to suggest that its purpose is to prevent indirect obstruction of official duties as well.[617] During the Appeal Hearing, the Accused further clarified that there is no inconsistency between the submission that, on the one hand, the target of the threat must be the official person and, on the other, that the offence can be committed by an attempt to obstruct.[618]

275. In addition, Gucati submits that Article 401(1) of the KCC requires that the obstruction occurs while an official person is in the act of performance of his or her official duties and that, accordingly, the SPO should specify the official action which is obstructed and with which the use of force or serious threat is concurrent or simultaneous.[619] Gucati further submits that there is no evidence to support a finding that the use of force or serious threat was directed at an official person when performing official duties.[620]

276. The SPO responds that attempts to read an additional requirement that the serious threat in Article 401(1) of the KCC must be one of force have no statutory basis and are contrary to the ordinary meaning of "threat" and the overall purpose of the provision to ensure undisturbed performance of official duties.[621] Moreover, the SPO

[616] Gucati Appeal Brief, para. 288; Transcript, 1 December 2022, p. 114. Gucati also argues that this is consistent with Article 401(5) of the KCC, which according to him demonstrates that this offence can only be committed against persons during the exercise of their official functions. See Gucati Appeal Brief, para. 290.
[617] Haradinaj Appeal Brief, para. 176. Haradinaj also argues that the authorities cited by the Trial Panel in support of its finding to the contrary "could be understood differently". See Haradinaj Appeal Brief, para. 176, fn. 171, referring to Trial Judgment, para. 146, fn. 239, citing *Salihu et al*. Commentary; Transcript, 1 December 2022, pp. 91-92. See also Haradinaj Reply Brief, para. 46.
[618] Transcript, 1 December 2022, pp. 109-114; Transcript, 2 December 2022, p. 196. Cf. Transcript, 1 December 2022, p. 94 (wherein Counsel for Haradinaj, while agreeing with the suggestion that threatening a private witness with intent and attempting to obstruct an official person is a possible interpretation, argues that there is no evidence which supports that).
[619] Gucati Appeal Brief, para. 287.
[620] Gucati Appeal Brief, para. 291.
[621] SPO Response Brief, paras 105-107.

submits that, since the serious threat was found to be concurrent with the official duties, Gucati has failed to articulate an error.[622] The SPO finally argues that nothing in the plain language of the Article requires that the serious threat be specifically directed only at the official person in question, and that the Accused "ignore basic principles of causality in being blind to how seriously threatening (potential) witnesses could obstruct" the work of the Specialist Chambers/SPO.[623]

(b) Assessment of the Court of Appeals Panel

277. At the outset, the Panel observes that Gucati does not identify the parts of the Trial Judgment that he wishes to challenge in this ground of appeal. Nevertheless, the Panel will be guided by the parts of the Trial Judgment that Gucati identified in his Notice of Appeal.[624]

278. Regarding Gucati's challenge to the definition of "serious threat" in Article 401(1) of the KCC, the Panel agrees with the Trial Panel's finding that the removal from the 2012 KCC and from the current KCC of the term "threat of immediate use of force", which was used in the equivalent provision of the PCCK,[625] is a clear indication that the legislator intended the term "serious threat" to encompass any serious threat of harmful action, not only a threat to use force.[626] If the legislator's intention was only to clarify that the threat of immediate use of force had to be serious, as Gucati suggests,[627] then the legislator would be expected to have added the word "serious" instead of removing the phrase "immediate use of force". In this regard, the

[622] SPO Response Brief, para. 109. See also SPO Response Brief, para. 108.
[623] SPO Response Brief, para. 110; Transcript, 2 December 2022, pp. 141-142, 147-148. See also Transcript, 2 December 2022, pp. 142-143 (submitting that: (i) the specific intent argued by the Defence regarding the direction of obstruction is inconsistent with the authorities submitted by it; and (ii) if Counsel for Haradinaj acknowledges that threatening a private witness with intent and attempting to obstruct an official person is possible under the provision, then his entire ground of appeal should be dismissed as it alleges an error of law).
[624] Gucati Notice of Appeal, fns 31-33, referring to Trial Judgment, paras 144, 148.
[625] See PCCK, Article 316(1).
[626] Trial Judgment, para. 144.
[627] Gucati Appeal Brief, para. 281.

Panel also observes the Trial Panel's reference to other provisions of the KCC which either use the term "threat" to describe harmful action other than the use of force[628] or clearly indicate when "threat" refers to use of force or violence.[629] The Panel further observes that Article 401(4) of the KCC specifically foresees the threat of use of force with a weapon or dangerous instrument as an aggravating factor with an increased sentencing range.[630]

279. This interpretation of "serious threat" within the context of Article 401(1) of the KCC as not being limited to a threat to use force is also consistent with the interpretation of the term by courts in Kosovo.[631] The Panel is not persuaded by the comparison attempted by Gucati between this offence and Article 387 of the KCC, which allows for the offence of intimidation during criminal proceedings to be established not only through force or serious threat, but also through other means of compulsion.[632] In the Panel's view, the fact that the offence under Article 401(1) of the KCC falls in the category of criminal offences against public order, while Article 387 of the KCC is in the category of offences against the administration of justice, does not play any role in the interpretation of "serious threat" for the purposes of Article 401(1) of the KCC. Such a systematic interpretation, taking into account the umbrella category of offences, as suggested by the Defence, may only become relevant if the literal meaning of certain terms is not clear. This is not the case in this instance. Instead,

[628] Trial Judgment, para. 144, fn. 233, referring to KCC, Articles 160(2.7), 161(2.5), 167(4), 168(4), 169, 170(6.5), 171, 181, 227(3.2), 229(2.2).
[629] Trial Judgment, para. 144, fn. 234, referring to KCC, Articles 114, 118, 121, 158(1), 160(2.1), 161(2.1), 227(3.1), 229(2.1), 247(3).
[630] See also KCC, Article 401(6).
[631] See Kosovo Appeal Judgment of 7 December 2017, paras 108, 112-113; Kosovo Basic Court Judgment of 21 November 2016, pp. 39-40 (wherein a EULEX trial panel held that although the essence of Article 409(1) of the 2012 KCC, which repeats verbatim Article 401(1) of the KCC, and Article 316(1) of the PCCK is the same, both the Trial Panel and the Appeals Panel ultimately: (i) accepted that neither of the defendants had used any kind of force; and (ii) assessed whether the proven actions of the defendants could be qualified as threats of immediate use of force *or* serious threats). See also KCC, Article 181 (wherein threat as a distinct criminal offence is defined more broadly, not limited to the use of force).
[632] Contra Gucati Appeal Brief, paras 284-285.

the Panel can be guided by the ordinary meaning of the terms used and the object and purpose of the Law, according to general principles of interpretation.[633]

280. The Panel recalls in this regard that it found no error in the Trial Panel's finding that the Accused's conduct amounts to "serious threat" in the context of Article 387 of the KCC.[634] In view of this interpretation, the Panel is satisfied that the Trial Panel correctly interpreted the term "serious threat" in the context of Article 401(1) of the KCC as not only referring to a threat to use force. The Trial Panel therefore properly found that the acts and statements of the Accused amounted to a serious threat and would have created serious fears and concerns among those who gave evidence to the Specialist Chambers/SPO or who were likely to do so.[635]

281. Turning next to the challenges concerning the direction of the serious threat, the Panel notes the Trial Panel's findings that: (i) a "serious threat" for the purposes of Article 401(1) of the KCC may be directed against an official person, another person, or an object;[636] and (ii) it need not happen at the very same moment when the official person is actively exercising a particular duty, as long as it occurs with a view to obstructing the performance of an expected or ongoing official duty.[637] The Trial Panel further held that the terms "official duties" and "official functions" within the meaning of Article 401(1) and (5) of the KCC are used in their plural form, thereby indicating that the form and nature of the particular duty obstructed need not be identified as long as the duties or functions that were obstructed fell within the official person's competencies.[638] The Trial Panel also found that, within the Specialist Chambers' legal framework, "official duties" and "official functions" exercised by the

[633] *Thaçi et al.* Appeal Decision on Jurisdiction, para. 139.
[634] See above, paras 244-250.
[635] Trial Judgment, paras 144, 640, 643. See also Confirmation Decision, para. 68.
[636] Trial Judgment, para. 146.
[637] Trial Judgment, para. 148.
[638] See Trial Judgment, para. 147, referring to *Salihu et al*. Commentary, Article 409(1) of the 2012 KCC, mn. 5, p. 1166.

"official person" relate to any responsibility or work of an official of the Specialist Chambers or the SPO within the context of official proceedings, including SPO investigations.[639]

282. The Panel, Judge Ambos dissenting, agrees with the Trial Panel's finding that nothing in the language of this provision requires that the serious threat be specifically directed at the official person in question.[640] To incorporate that element, the provision would have been formulated in a manner that explicitly requires that the use of force or serious threat be directed against the official person(s). Indeed, while the official person(s) are explicitly the targets of the obstruction, the provision does not link the terms "force or serious threat" to the official person(s). In this regard, the Appeals Panel considers that the Trial Panel was correct to interpret Article 401(1) of the KCC in accordance with the rationale of the offence, which is to ensure that official duties are not obstructed, directly or indirectly.[641] In other words, the provision is not designed to protect official persons as such, as suggested by Gucati, but rather to protect them in the unimpeded exercise of their official duties.[642] This protection is not afforded through other provisions of the KCC. What is important for the establishment of the *actus reus* of the offence, in the Majority's view, is that the accused's act must have had the capacity to obstruct official persons. In the circumstances of the present case, the threat against (potential) witnesses had the capacity to do so.[643] Accordingly, the Panel, Judge Ambos dissenting, finds no error in the Trial Panel's finding that the offence under Article 401(1) of the KCC is established

[639] Trial Judgment, paras 147, 637-638.
[640] Trial Judgment, paras 146, 639.
[641] Trial Judgment, para. 146.
[642] See *Salihu et al*. Commentary, Article 409(1) of the 2012 KCC, mn. 2, p. 1165 (commenting that "the primary subject of [this] protection is the [official] duty, that is, unhindered performance of official duties by the official person, with the protection of the official person himself a corollary of such protection"). Contra Gucati Appeal Brief, para. 288. The fact that this provision also applies to situations where someone compels an official person to perform official duties does not alter this conclusion, as even in this case, the provision ensures that the lawful course of the official duties is protected. Contra Gucati Appeal Brief, para. 288.
[643] See Trial Judgment, paras 640-642.

also in cases where the serious threat is directed against another person, namely, in this case, those who gave evidence to the Specialist Chambers/SPO or who were likely to do so.[644]

283. As for the timing of the serious threat, the Appeals Panel notes the Trial Panel's findings that force or serious threat must be aimed at obstructing the performance of the official person's duties before or while they are exercised or expected to be exercised, and that they can happen at a moment in time other than when the official person is actively exercising a particular duty, with a view to obstructing the performance of an expected or ongoing official duty.[645] The Panel agrees with this interpretation. Requiring that the use of force or serious threat be simultaneous with the exercise of official duties would be inconsistent with the protection that this provision aims to afford to the safety of the performance of official duties. Indeed, in the Panel's view, the provision does not explicitly restrict its application to situations where the use of force or serious threat is exercised simultaneously with the official duties.

284. Considering its findings in relation to the basic form of Article 401(1) of the KCC, the Panel understands the phrase "during the exercise of their official functions" in the aggravated form of Article 401(5) as *in relation to* the exercise of their official functions, namely not just – in the strict temporal sense of "during" – limited to the period of the exercise of these functions. In any event, to the extent that a serious threat

[644] Trial Judgment, paras 146, 639-640. See also *Salihu et al*. Commentary, Article 409(1) of the 2012 KCC, mn. 4, pp. 1165-1166. The Panel disagrees with Haradinaj's interpretation of the *Salihu et al*. Commentary that the threat might be directed against both an official person and another person or object at the same time (see Haradinaj Appeal Brief, para. 176, fn. 171, referring to Trial Judgment, fn. 239), as the authors have clearly distinguished the case where force or threat is used against both an official person and other persons from a case where force or threat is used against a person other than the official, and have referred to examples where violence only targeted objects that are used to carry out a specific official act. See *Salihu et al*. Commentary, Article 409(1) of the 2012 KCC, mns 3-4, pp. 1165-1166.

[645] Trial Judgment, para. 148.

towards (potential) witnesses could impede or hinder ongoing investigations,[646] such a serious threat occurred at a time concurrent with the exercise of official duties.

285. In light of the above, the Appeals Panel, Judge Ambos dissenting, finds that the Accused fail to demonstrate an error in the Trial Panel's assessment of the *actus reus* of the offence under Article 401(1) and (5) of the KCC. Accordingly, the Panel dismisses by majority Gucati's Ground 12 and Haradinaj's Ground 18.

2. Alleged Errors Regarding the *Mens Rea* of Article 401(1) and (5) of the KCC (Gucati Ground 13)

286. Gucati challenges the Trial Panel's findings on the *mens rea* underpinning his conviction under Count 1 on obstruction of official persons in performing official duties by serious threat, punishable under Article 401(1) and (5) of the KCC.[647] The SPO responds that Gucati's ground of appeal should be dismissed.[648]

287. The Trial Panel held that the offence under Article 401(1) of the KCC, as well as its aggravated form under Article 401(5) of the KCC, require either direct or eventual intent.[649] It ultimately found that the Accused acted with awareness of, and desire for, obstructing Specialist Chambers/SPO officials in performing Specialist Chambers/SPO work,[650] namely with direct intent as defined by the Trial Panel.[651]

(a) Submissions of the Parties

288. Gucati submits that the Trial Panel erred in finding that the Accused had direct intent on the basis of having acted with awareness of, and desire for, obstructing Specialist Chambers/SPO officials in performing Specialist Chambers/SPO work, while it had correctly found that direct intent for the purposes of Article 401(1) and (5)

[646] Trial Judgment, paras 204, 379-381, 421, 637, 647.
[647] Gucati Appeal Brief, paras 292-298. See also Indictment, paras 25-28, 48.
[648] SPO Response Brief, paras 111-112.
[649] Trial Judgment, paras 152, 155.
[650] Trial Judgment, para. 671.
[651] Trial Judgment, para. 153.

of the KCC was met when the perpetrator "acted *with awareness of, and desire for, using force or serious threat in order to* obstruct an official person in performing official duties".[652] According to Gucati, there was no finding, or evidence, that Gucati was aware that his actions and statements amounted to a serious threat and desired that to be so.[653] Gucati also argues that only direct intent would have been sufficient for attempted obstruction, since the fact that the offence under these provisions is complete even when the obstruction is attempted indicates a "specific purpose" or "goal-oriented activity".[654]

289. The SPO responds that Gucati does not allege 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, and that the Trial Panel did make the findings that Gucati asserts are absent.[655] According to the SPO, Gucati manifestly fails to show that no reasonable trial panel could have reached the same conclusions on direct intent.[656]

(b) Assessment of the Court of Appeals Panel

290. The Panel observes that the Trial Panel defined *in abstracto* the legal standard of direct intent for the purposes of Article 401(1) of the KCC as the perpetrator having "acted with awareness of, and desire for, using force or serious threat in order to obstruct an official person in performing official duties".[657] When applying this standard to the facts of the case, the Trial Panel concluded that the Accused acted "with awareness of, and desire for, obstructing [Specialist Chambers]/SPO Officials in performing [Specialist Chambers]/SPO Work".[658] Nevertheless, the Appeals Panel

[652] Gucati Appeal Brief, paras 292-294 (emphasis in the original).
[653] Gucati Appeal Brief, paras 295, 297.
[654] Gucati Appeal Brief, paras 296, 298; Transcript, 1 December 2022, pp. 115-116.
[655] SPO Response Brief, paras 111-112.
[656] SPO Response Brief, para. 112. See also Transcript, 2 December 2022, pp. 141-142.
[657] Trial Judgment, para. 153, referring to Confirmation Decision, para. 72. Gucati also agrees with the Trial Panel's definition of direct intent for Count 1. See Gucati Appeal Brief, para. 292, referring to Trial Judgment, para. 15[3].
[658] See Trial Judgment, paras 671, 960.

considers that although the Trial Panel did not repeat verbatim the legal standard in its conclusion on the Accused's intent, it made the appropriate findings in its assessment, namely that the Accused intended the use of serious threat as the means by which to achieve the result of obstructing official person(s) in performing official duties.

291. In this regard, the Appeals Panel notes that a trial judgment must be read as a whole.[659] The Trial Panel referred to its finding under Count 3 that the Accused's intent to intimidate (potential) witnesses was a means to the end of preventing the Specialist Chambers/SPO from prosecuting and trying ex-KLA members or of undermining the effectiveness of those efforts, and that the Accused used serious threat to dissuade (potential) witnesses from giving (further) evidence to the Specialist Chambers/SPO.[660] The Trial Panel also found under Count 3 that the Accused's acts and statements "formed a conscious and essential part of the serious threat they used to induce Witnesses and Potential Witnesses to refrain from giving (further) evidence to the [Specialist Chambers]/SPO".[661] Under Count 1, the Trial Panel specifically assessed whether these statements and acts translated into an intent to obstruct Specialist Chambers/SPO officials in performing their Specialist Chambers/SPO work.[662] The Appeals Panel therefore considers that the Trial Panel's conclusion on the Accused's *mens rea* under Count 1 included, in line with the set legal definition of the *mens rea*, that the Accused directly intended using serious threat against (potential) witnesses to obstruct Specialist Chambers/SPO officials in performing their Specialist Chambers/SPO work.

292. The Panel is further not persuaded by Gucati's argument that the fact that the offence is complete when the obstruction is attempted "reinforces the requirement for

[659] See e.g. *Stanišić and Župljanin* Appeal Judgement, para. 138; *Orić* Appeal Judgement, para. 38.
[660] Trial Judgment, para. 661, referring to Trial Judgment, para. 603.
[661] Trial Judgment, para. 604. See also Trial Judgment, paras 639-643.
[662] Trial Judgment, para. 661.

the pursuit of the purpose".[663] Gucati himself submits that a "specific purpose" or "goal-oriented activity" requires direct intent which he defines as the "awareness and desire for the obstruction of an official person performing official duties".[664] The Panel notes that, in fact, this corresponds to the Trial Panel's definition of direct intent,[665] which it applied to the Accused in the present case.[666] Thus, in essence, Gucati himself does not read a specific purpose requirement into the attempted form of the offence under Article 401(1) of the KCC and there is indeed no basis in this provision to do so. Moreover, the general definition of attempt in Article 28 of the KCC does not provide for a specific intent requirement, but only refers to the general concept of intent.

293. In light of the above, the Panel finds that Gucati fails to demonstrate an error in the Trial Panel's assessment of the *mens rea* of the offence under Article 401(1) and (5) of the KCC. Accordingly, the Panel dismisses Gucati's Ground 13.

F. ALLEGED ERRORS CONCERNING OBSTRUCTING OFFICIAL PERSONS IN PERFORMING OFFICIAL DUTIES BY COMMON ACTION OF A GROUP (COUNT 2)

1. Alleged Errors Regarding the Concurrence of Article 401(1) and (2) of the KCC (Gucati Ground 16; Haradinaj Ground 3 in part)

294. Gucati and Haradinaj challenge their conviction by the Trial Panel under Count 2 of the Indictment ("Count 2") on obstruction of official persons in performing official duties by common action of a group, punishable under Article 401(2)-(3) and (5) of the KCC, on the basis that punishment for both this offence and the offence

[663] Gucati Appeal Brief, para. 296.
[664] Gucati Appeal Brief, para. 296.
[665] Trial Judgment, para. 153.
[666] See Trial Judgment, paras 671, 960.

under Count 1 is not "admissible".[667] The SPO responds that the Accused's relevant grounds of appeal should be dismissed.[668]

295. The Panel recalls that Article 401(2) of the KCC provides that:

> Whoever participates in a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished by a fine or by imprisonment of up to three (3) years.

296. Further, Article 401(3) of the KCC provides that:

> The leader or organizer of the group which commits the offense provided for in paragraph 2. of [Article 401 of the KCC] shall be punished by imprisonment of one (1) to five (5) years.

297. The Trial Panel convicted the Accused for both Counts 1 and 2, having found that a perpetrator can fulfil the requirements of and could be held responsible for both of the offences foreseen in Article 401(1) and (2) of the KCC.[669] The Trial Panel held in this regard that: (i) the language of these provisions does not suggest that the two forms of this offence are mutually exclusive; and (ii) their elements are distinct.[670] The Trial Panel went on to apply the cumulative convictions test used by international criminal tribunals, having found that the basis for the theory of concurrence applied in the Kosovo Appeal Judgment of 28 May 2014 in the *M.I. et al.* case is unclear and that the Parties did not identify any other legal basis that would provide for a different test.[671]

---

[667] Gucati Appeal Brief, paras 325-331; Haradinaj Appeal Brief, paras 48-53; Gucati Reply Brief, paras 6-14; Haradinaj Reply Brief, para. 11. See also Indictment, paras 25-28, 48. The Panel recalls that according to para. 48 of the Indictment, the offence of "Obstructing Official Persons in Performing Official Duties, by participating in the common action of a group" is punishable under Articles 17, 28, 32(1)-(3), 33, 35, and 401(2)-(3) and (5) of the KCC, applicable by virtue of Articles 15(2) and 16(3) of the Law.
[668] SPO Response Brief, paras 47-51.
[669] Trial Judgment, paras 170, 1012(a)-(b), 1015(a)-(b). Specifically, Gucati was convicted on the basis of Article 401(1)-(3) and (5) of the KCC and Haradinaj on the basis of Article 401(1)-(2) and (5) of the KCC.
[670] Trial Judgment, paras 165, 169.
[671] Trial Judgment, paras 165-168.

(a) Submissions of the Parties

298. Both Accused submit that the Trial Panel erred in disregarding the Kosovo Appeal Judgment of 28 May 2014 in the *M.I. et al.* case, where the Kosovo Court of Appeals held that the offence of obstruction of official persons in performing official duties by common action was subsidiary to the one of obstruction of official persons in performing official duties by use of force or serious threat and, accordingly, a person cannot be convicted on the basis of both provisions.[672] According to Gucati, the Trial Panel was bound by this decision, as is the Appeals Panel, since they are attached to the court system of Kosovo pursuant to Article 3(1) of the Law and the present case concerns "conduct under Kosovo domestic law".[673] According to Haradinaj, this decision, although not providing a legally binding precedent, has persuasive force for the interpretation of the KCC.[674] Haradinaj also argues that it was incorrect for the Trial Panel to ignore the Kosovo Court of Appeals' interpretation, which followed from a civil law doctrine, and to prefer instead the "cumulative convictions" test which was developed by international criminal tribunals.[675]

299. The SPO responds that there is no statutory requirement to interpret the applicable law of the Specialist Chambers in accordance with previous decisions of ordinary Kosovo courts.[676] The SPO further argues that the Trial Panel considered in detail the Kosovo Appeal Judgment of 28 May 2014 when setting out why it considered that the cumulative convictions test applied by international tribunals was the more appropriate test.[677] Moreover, according to the SPO, the reasoning of this judgment is clearly distinguishable from the present case, as it concerns the

[672] Gucati Appeal Brief, paras 328-329, 331; Haradinaj Appeal Brief, paras 48, 50-51. See also Gucati Reply Brief, para. 6; Haradinaj Reply Brief, para. 11.
[673] Gucati Appeal Brief, paras 325-327, 329-330; Gucati Reply Brief, paras 7-13.
[674] Haradinaj Appeal Brief, para. 49.
[675] Haradinaj Appeal Brief, paras 52-53.
[676] SPO Response Brief, paras 47-48, 51.
[677] SPO Response Brief, paras 49, 51, referring to Trial Judgment, paras 165-170; Transcript, 2 December 2022, pp. 144-145, 149-153, 202-203.

interpretation of the provision of the PCCK which is equivalent to Article 401(1) of the KCC that required a serious threat *of force*, unlike the predecessor to Article 401(2) of the KCC.[678] During the Appeal Hearing, the SPO submitted a judgment by the Kosovo Court of Appeals, arguing that it endorses the cumulative convictions test.[679]

300. In reply, Gucati submits that the SPO's effort to distinguish between the Kosovo Appeal Judgment of 28 May 2014 and the present case is without substance[680] and that the Kosovo appeal judgment referred to by the SPO during the Appeal Hearing does not demonstrate that a conviction in relation to both Article 401(1) and (2) of the KCC can be sustained on the same indictment.[681]

(b) Assessment of the Court of Appeals Panel

301. The Panel notes that, while the jurisprudence of courts in Kosovo may offer some guidance, it is not binding on the Specialist Chambers. The Panel also acknowledges that, as the Trial Panel held, Article 76 of the KCC, which concerns the punishment of concurrent criminal offences, is not explicitly incorporated into the Specialist Chambers' legal framework.[682] Nevertheless, the Panel agrees with the Defence that, to the extent that the crimes charged are crimes under the KCC, the concurrence between them should be judged on the basis of the legal theory of concurrence as applied in the national context.[683]

---

[678] SPO Response Brief, para. 50, referring to PCCK, Articles 316(1), 318(1); Transcript, 2 December 2022, pp. 143-144.
[679] Transcript, 2 December 2022, pp. 149, 202, referring to Kosovo Appeal Judgment of 25 April 2013; F00113, Memorandum regarding Court of Appeals of Kosovo Judgment, Case number PAKR 1122/2012, dated 25 April 2013, 1 February 2023. See also CRSPD14, Emails between SPO, CMU and Appeals Panel regarding District Court Judgment, 12 January 2023 (confidential), referring to Kosovo District Court Judgment of 24 May 2012.
[680] Gucati Reply Brief, para. 14, referring to SPO Response Brief, para. 50 and Gucati Appeal Brief, paras 279-283.
[681] Transcript, 2 December 2022, pp. 204-205.
[682] See Trial Judgment, para. 166. See also Article 3(2)(c) and (4) of the Law.
[683] See Haradinaj Appeal Brief, paras 52-53, referring to Trial Judgment, paras 166-170. See also Trial Judgment, Separate Opinion of Judge Barthe, paras 10-18 (suggesting, *inter alia*, that Article 44(4) of the Law can be interpreted to allow for the application of fundamental legal principles that are inextricably

302. The cumulative convictions test, on which the Trial Panel relied, has been applied by the *ad hoc* international criminal tribunals,[684] which have, in turn, taken recourse, *inter alia*, to the "Blockburger test" developed by the United States Supreme Court.[685] As the Trial Panel noted, the cumulative convictions test allows for criminal convictions under different statutory provisions only if each statutory provision involved has a materially distinct element not contained in the other and, where this test is not met, a conviction will be entered for the more specific provision.[686] The fact that the cumulative convictions test is the standard in international criminal tribunals is, in the Panel's view, due to various factors, including the factual characteristics of the relevant criminal behaviour characterised as macro-delinquency, and the fact that the definitions of the offences in international criminal law have generally not been part of a systematically rigorous codification.[687] The Panel is not persuaded, however, that the test applied in the context of international case law would be appropriate to determine the relationship of concurrence in the current case, which concerns ordinary criminal offences under Kosovo law.

303. Civil law countries, to the tradition of which the Kosovo legal system belongs, usually treat *concursus delictorum* (or *concours de qualifications ou d'infractions*, *concorso di reati*, *concurso/concurrencia de leyes/delitos*, *Konkurrenzlehre*) as a question of legal theory or as falling within the general principles of criminal law.[688] In that regard, the Appeals Panel considers that Article 76(1) of the KCC, and its predecessor Article 71(1) of the PCCK, recognise the concept of concurrence of crimes by providing that, where

---

linked with the imposition of punishments, such as the concurrence of crimes, and that they would apply in similar cases before the criminal courts in Kosovo).

[684] See e.g. *Čelebići* Appeal Judgement, paras 409, 412; *Kupreškić et al.* Trial Judgement, paras 681-687.

[685] See *Blockburger* Judgment, para. 304.

[686] Trial Judgment, para. 167, referring to *Čelebići* Appeal Judgement, paras 412-413; *Strugar* Appeal Judgement, paras 321-322; *Kordić and Čerkez* Appeal Judgement, paras 1032-1033; *Nahimana et al.* Appeal Judgement, para. 1019; *Ntagerura et al.* Appeal Judgement, para. 425; *Bemba* Trial Judgment, paras 746-748; *Katanga* Trial Judgment, para. 1695.

[687] *Stuckenberg* Cumulative Charges and Cumulative Convictions, p. 840. See also *Fernández-Pacheco Estrada* The ICC and the Čelebići Test, p. 712.

[688] *Stuckenberg* Cumulative Charges and Cumulative Convictions, p. 841.

one person commits by one or more acts several criminal offences for which he or she is tried at the same time, the court shall first pronounce the punishment for each act and then impose an aggregate punishment for all of these acts.[689] Although Article 76 of the KCC does not provide further details as to how a court is expected to apply the concept of concurrence, the Panel considers that this provision indicates that concurrence in the KCC is rooted in the civil law tradition and that, unlike the cumulative convictions test, it is treated as a question of general principles of criminal law. The Panel therefore considers that it should be guided by these same considerations in the circumstances of the present case.[690]

304. With respect specifically to the offences provided under Article 401(1) and (2) of the KCC, the Panel observes that the Trial Panel found that they were both established in relation to the same acts and, accordingly, their relationship is not one of real concurrence (*concours réel*, *concurso real*, *Realkonkurrenz*), that is having committed different criminal acts, but one of ideal concurrence (*concours idéal*, *concurso ideal*, *Idealkonkurrenz*) which itself needs to be distinguished from apparent (false) concurrence/merger (*concours apparent*, *concurso apparente*, *Gesetzeskonkurrenz/-einheit*).[691] Thus, what is important in order to determine whether a conviction can be entered for both offences or only for one of them is whether this concurrence is a true one or only an apparent one (merger). In the first case, each offence requires at least one element that the other offence does not contain.[692] In the second case, where every element of a "larger" crime is indispensable to meet the requirements of the other "smaller" crime and where additional elements need to be proved for the "larger" crime that are not required for the "smaller" crime, conviction can only be entered for

[689] See e.g. Kosovo Basic Court Judgment of 23 October 2015, section V(a), para. 8.
[690] See Trial Judgment, Separate Opinion of Judge Barthe, para. 5.
[691] See *Ambos* Treatise ICL II, pp. 292-294.
[692] *Ambos* Treatise ICL II, pp. 295-296. The Panel observes that this type of concurrence comes close to the cumulative convictions test.

the "larger" crime.[693] Three forms of merger can be distinguished: speciality (*lex specialis derogat legi generali*), consumption and subsidiarity.[694]

305. The Kosovo Court of Appeals, in the Kosovo Appeal Judgment of 28 May 2014, made reference to the "Blockburger test" noting its frequent application by common law courts, but ultimately opted for the theory of concurrence, since "[i]n civil law systems – such as in Kosovo – courts tend to solve the same problem by applying the rules of theory of concurrence."[695] The Kosovo Court of Appeals then distinguished between real and ideal concurrence and the various forms of merger (adding the form of "alternativity" to the above-mentioned speciality, subsidiarity and consumption).[696] Comparing the "individual specific actions of obstruction performed by the perpetrator" under Article 316(1) of the PCCK (the equivalent of Article 401(1) of the KCC) and the situation where the perpetrator participated in a "group and took part in the common actions" under Article 318(1) of the PCCK (the equivalent of Article 401(2) of the KCC), the Kosovo Court of Appeals identified as the rationale for the lower minimum punishment in the latter case "the fact that the gravity of the offense is lower when [it cannot be] proven that specific acts against public authority were committed by the perpetrator".[697] As to the concurrence between the two offences, the Kosovo Court of Appeals found that they are "in a relation of ideal concurrence in the modality of implicit subsidiarity [according to which] [t]he lesser offense [Article 318(1) of the PCCK] is subsidiary to the situations on which the greater offense [Article 316(1) of the PCCK] is not established".[698]

[693] *Ambos* Treatise ICL II, pp. 294-295.
[694] See *Ambos* Treatise ICL II, pp. 294-295; *Fernández-Pacheco Estrada* The ICC and the Čelebići Test, p. 706.
[695] Kosovo Appeal Judgment of 28 May 2014, section 6.3, p. 27.
[696] Kosovo Appeal Judgment of 28 May 2014, section 6.3, pp. 27-28.
[697] Kosovo Appeal Judgment of 28 May 2014, section 6.3, p. 29.
[698] Kosovo Appeal Judgment of 28 May 2014, section 6.3, p. 29.

306. As to the Kosovo Appeal Judgment of 25 April 2013, to which the SPO refers, the Appeals Panel notes that, while recognising that the cumulative convictions test may apply with respect to the respective offences, the Kosovo Court of Appeals in that case ultimately found that one offence was subsumed by the other.[699] Thus, in the result, it applied the rules of merger or apparent concurrence in line with the civil law doctrine of concurrence (*concursus delictorum*).[700]

307. The Panel recalls that, in the current KCC, the two criminal offences of obstructing official persons in performing official duties by force or serious threat and obstructing official persons in performing official duties by common action of a group are both included in the same Article (Article 401 of the KCC), which indicates that they protect the exact same legal interest, namely the unimpeded performance of official duties. As to their definitional elements (*actus reus*), the difference between the two provisions lies in the fact that under paragraph 1 of Article 401 of the KCC, the perpetrator himself/herself performs an act of obstruction (by force or serious threat), while under paragraph 2, he or she only acts as part of a group of persons. Further, the Panel observes that Article 401(2) of the KCC foresees a lower minimum punishment (namely, a fine or imprisonment of up to three years) compared to paragraph 1 of the same Article (providing only for imprisonment of three months to three years) and that both provisions foresee the same maximum sentence. The Panel considers that this distinction in terms of the minimum punishment can be explained by the fact that, similarly to what the Kosovo Court of Appeals held in the Kosovo Appeal Judgment of 28 May 2014, Article 401(1) of the KCC requires specific individual actions of obstruction committed by an accused. By contrast, under Article 401(2) of the KCC, the perpetrators act as part of a group, where it would

[699] Kosovo Appeal Judgment of 25 April 2013, paras 28-29. See Transcript, 2 December 2022, p. 149.
[700] See also above, para. 303.

generally not be possible to establish the specific individual actions of obstruction committed by an accused and which, in turn, may entail varying degrees of risk.[701]

308. The Panel finds in this regard, as the Kosovo Court of Appeals in substance did, that in the circumstances of this case the relationship between paragraphs 1 and 2 of Article 401 of the KCC is best captured by the rule of subsidiarity. While this rule, like any other forms of merger, is not a "modality" of ideal concurrence, it indeed expresses a situation, as correctly defined by the Kosovo Court of Appeals, where one provision (Article 401(2) of the KCC) "is only applicable if it is not possible to apply the other" (Article 401(1) of the KCC).[702]

309. At any rate, in the present case, where the Accused's individual acts have been specified and the Accused have been convicted for Article 401(1) of the KCC, a further conviction under Article 401(2) of the KCC is neither warranted nor necessary. In other words, in this case, Article 401(1) of the KCC fully encompasses the criminal wrong realised by the Accused and it alone suffices to account for their culpability with respect to obstructing official persons in performing official duties. Convicting for both criminal offences would therefore result, in the Panel's view, in an over-criminalisation of their conduct.

---

[701] See Kosovo Appeal Judgment of 28 May 2014, section 6.3, pp. 28-29. See also Trial Judgment, Separate Opinion of Judge Barthe, para. 15. Cf. Kosovo Appeal Judgment of 7 December 2017, paras 138-139 (wherein the Kosovo Court of Appeals held that the offence as embodied in Article 401(2) of the KCC is "an autonomous criminal offence beyond the concept of restrict or classic [form] of co-perpetration", given that a group has a different dynamic which increases the dangerousness, and that the action required to establish this criminal offence is to take part in a group of persons, which is an individual act). See also *Salihu et al*. Commentary, Article 409(2) of the 2012 KCC, mns 1, 3, 6, pp. 1167-1168 (wherein the authors opine that "[t]he dangerousness posed by this criminal offence [under Article 401(2) of the KCC] to society does not come from the actions of an individual, but rather, from the joint action of multiple persons who are aware of such joint action, i.e. aware of jointly causing a proscribed consequence").

[702] Kosovo Appeal Judgment of 28 May 2014, section 6.3, p. 27. The Panel recalls that this judgment discussed the offences in question under the PCCK. See above, para. 305. The Panel further observes that given that the Kosovo Court of Appeals correctly distinguished between ideal concurrence and the forms of merger, see above para. 305, it is quite possible that the wording "modality of ideal concurrence" constitutes an inadvertent error.

310. In light of the above, the Appeals Panel grants Gucati's Ground 16 and this part of Haradinaj's Ground 3.[703] Accordingly, the Panel decides that the Accused can only be convicted on the basis of Article 401(1) and (5) of the KCC, reverses the Accused's conviction on the basis of Article 401(2) and (5) of the KCC and Gucati's conviction on the basis of Article 401(3) of the KCC, and enters a verdict of acquittal under Count 2 of the Indictment.[704] The impact of this finding, if any, on the Accused's sentence will be addressed under Section H below.

2. Alleged Errors Regarding the *Actus Reus* and the *Mens Rea* of Article 401(2) of the KCC (Gucati Grounds 14, 15)

311. The Panel finds that, in light of the finding made above with respect to the relation of concurrence between paragraphs 1 and 2 of Article 401 of the KCC, it is unnecessary to address Gucati's allegations of errors regarding the *actus reus* and *mens rea* of Article 401(2) of the KCC. Accordingly, Gucati's Grounds 14 and 15 are dismissed as moot.

G. Alleged Errors Concerning Defences

312. As underlined by the Trial Panel, at trial, the Accused put forward a number of defences/grounds excluding responsibility for their conduct.[705] The Trial Panel, however, found that the criminal responsibility of the Accused could not be excluded by any of the defences/grounds excluding responsibility raised.[706]

[703] The Panel has addressed Haradinaj's challenge in Haradinaj Ground 3 concerning the Trial Panel's reliance on the *Hartmann* Trial Judgment under Count 5. See above, paras 121-124.
[704] Article 401(3) of the KCC constitutes an aggravated form of Article 401(2) of the KCC.
[705] Trial Judgment, para. 795. The Trial Panel uses the term "justifications" but given this term's specific meaning in civil law jurisdictions and beyond, the Appeals Panel prefers to use the more general terms "defences"/"grounds excluding responsibility". On the meaning of these terms see also below, para. 323.
[706] Trial Judgment, para. 927.

313. In their appeals, Gucati and/or Haradinaj challenge the Trial Panel's findings rejecting the raised defences of: (i) public interest;[707] (ii) whistle-blowing;[708] (iii) entrapment;[709] (iv) extreme necessity;[710] and (v) act of minor significance.[711] The SPO responds that the Accused's appeals on these matters should be dismissed.[712]

314. The Panel observes that Haradinaj's Grounds 11 to 15 on defences suffer from several deficiencies and procedural shortcomings that warrant summary dismissal.[713] Some of Haradinaj's arguments, although defective, will be addressed by the Panel below in the context of the assessment of Gucati's appeal. Otherwise, for Haradinaj's

[707] Gucati Appeal Brief, paras 190-202; Gucati Reply Brief, para. 48; Haradinaj Appeal Brief, paras 34(b), 108-114; Haradinaj Reply Brief, paras 27-29.
[708] Gucati Appeal Brief, paras 206-212; Gucati Reply Brief, para. 78. See also Haradinaj Appeal Brief, paras 34(b), 136.
[709] Gucati Appeal Brief, paras 332-392; Haradinaj Appeal Brief, paras 135-144. See also Gucati Reply Brief, paras 72-75, 79-87; Haradinaj Reply Brief, paras 34-36.
[710] Haradinaj Appeal Brief, paras 127, 129-134; Haradinaj Reply Brief, paras 32-33.
[711] Haradinaj Appeal Brief, paras 145-155; Haradinaj Reply Brief, para. 39.
[712] SPO Response Brief, paras 87-88, 116-154.
[713] Haradinaj raises the defence of act of minor significance (under Grounds 14 and 15) and the defence of extreme necessity (under Ground 11) for the first time on appeal. See Haradinaj Pre-Trial Brief, para. 277, wherein Haradinaj indicated that he "gives notice at this stage of an intention to raise the following 'active' Defences to the allegations per the Indictment", namely entrapment, mistake of law, mistake of fact, and defence of public interest. The Panel further notes that the topics of Grounds 12-14 of the Haradinaj Notice of Appeal bear no relationship to the topics under the corresponding grounds of the Haradinaj Appeal Brief. *Compare* Haradinaj Ground 12 in the Notice of Appeal at para. 16 (whistle-blowing) *with* Haradinaj Ground 12 in the Appeal Brief at para. 135 (entrapment/incitement). See Haradinaj Reply Brief, para. 34 (where Haradinaj states that "an administrative filing error means that submissions in the [Appeal Brief] have omitted those relevant to Ground 12"). See also Transcript, 1 December 2022, p. 81 (where Haradinaj argues that the deficiencies of Ground 12 "are not so serious"). As for Haradinaj Ground 13, the title of the ground of appeal is the same in the Haradinaj Notice of Appeal, para. 17 and in the Haradinaj Appeal Brief, para. 136 (whistle-blowing). However, the substance of the arguments under this ground of appeal concerns mostly entrapment. As for Ground 14 of the Haradinaj Notice of Appeal, para. 18, although reference is made to whistle-blowing, the substance of the arguments also concerns mostly entrapment. The Panel was also not persuaded by Haradinaj's oral argument that the issues addressed under Grounds 12-13 of his Appeal Brief were foreshadowed under Ground 16 in his Notice of Appeal and therefore should not be summarily dismissed; see Transcript, 1 December 2022, pp. 81-83. The Panel further notes that Ground 14 of Haradinaj Appeal Brief, paras 145-148 pertains to "act of minor significance" and that in his Reply Brief, para. 37, Haradinaj states that "[i]n relation to Ground 14, [he] no longer raises the failure to investigate the impropriety of the SPO's investigation as a separate head of appeal, as it is a recurring theme that runs through the entire case". See also Haradinaj Notice of Appeal, paras 15-19; Haradinaj Appeal Brief, paras 127-155; Haradinaj Reply Brief, paras 32-39.

arguments that do not overlap with those put forward by Gucati, the Panel was only able to consider, to the extent possible, properly articulated arguments.[714] The Panel decided to do so out of fairness to the Accused.

1. Alleged Errors Regarding the Defence of Public Interest (Gucati Ground 4(G), 4(H) in part; Haradinaj Grounds 1 in part, 9)

(a) Submissions of the Parties

315. Gucati submits that the Trial Panel erred in law when finding that the SPO did not have to prove beyond reasonable doubt that there was no legal basis for revealing the impugned information and that the disclosure was not in the public interest.[715] Gucati also submits that disclosure of confidential information, when such interest outweighs the individual interest of non-disclosure, is permitted by law and therefore no offence is committed.[716]

316. Gucati further submits that the Trial Panel erred in law when finding that there was no credible basis to conclude that the disclosed information contained indications of improprieties attributable to the SITF/SPO.[717] He argues that the content of the Batches was never produced in full to the Trial Panel, nor was it further considered. As such, he submits that the finding that there was no basis to conclude that the information revealed by the Accused contained improprieties amounted to a "reversal of the burden of proof".[718]

317. Haradinaj submits that the Trial Panel erred by determining that the defence of public interest was not available under Kosovo law, and by failing to consider the involvement of "SITF/SPO Serbian sources" in the "globally condemned criminal Milošević regime" or "the stance that Serbia has taken over the years towards

[714] See above, paras 29-32.
[715] Gucati Appeal Brief, paras 192, 195-198. See also Gucati Reply Brief, para. 48.
[716] Gucati Appeal Brief, paras 191-194, 202.
[717] Gucati Notice of Appeal, p. 9.
[718] Gucati Appeal Brief, paras 200-202.

Kosovo".[719] He argues that, by preventing him from referring to this public information that was essential to his position, the Trial Panel prejudiced his defence.[720] He further submits that acts which are compatible with the right to freedom of expression as guaranteed by the Kosovo Constitution and the ECHR cannot be considered as "criminal".[721]

318. The SPO responds to Gucati that the Trial Panel clearly explained that Article 392(1) of the KCC does not incorporate any sort of public interest as a basis for authorisation to reveal "secret" information.[722] The SPO further recalls the Trial Panel's findings that there was no basis to conclude that there were any improprieties in relation to the SITF/SPO's cooperation with Serbia, and submits that no error can be identified in this respect, since Gucati's assertions are "illogical and unsupported by the evidence".[723]

319. The SPO further submits that Haradinaj's Ground 9 on the defence of public interest should "be rejected *in limine* since it is unsubstantiated".[724] The SPO also responds that there can be no error in terms of the Trial Panel "failing to consider" defence arguments concerning Serbian authorities, since the Trial Panel did indeed consider them.[725] The SPO also argues that Haradinaj provides no reason as to why the Trial Panel should have considered "the stance that Serbia has taken over the years towards Kosovo", nor explains what this means.[726] Hence, the SPO submits that

[719] Haradinaj Appeal Brief, paras 108, 113-114. See also Transcript, 1 December 2022, pp. 75-76; Transcript, 2 December 2022, pp. 201, 209-210.
[720] Haradinaj Appeal Brief, para. 34(b).
[721] Haradinaj Appeal Brief, para. 110.
[722] SPO Response Brief, para. 87.
[723] SPO Response Brief, para. 88. See also Transcript, 2 December 2022, pp. 126, 138, 156.
[724] SPO Response Brief, paras 133-134. See also Transcript, 2 December 2022, p. 131.
[725] SPO Response Brief, para. 135.
[726] SPO Response Brief, para. 136.

Haradinaj merely repeats arguments set out and dismissed at trial and does not establish any error.[727]

320. Haradinaj replies that he indeed substantiated the arguments he raised in his Appeal Brief.[728] He further replies that the Trial Panel only focused on "the association of the SITF/SPO Serbian interlocutors with previous regimes" but failed to "reflect the broader context of the acute long-standing Serbian enmity towards Kosovo and the sheer weight of the dependence of the SITF/SPO investigations on Serbian sources".[729]

(b) Assessment of the Court of Appeals Panel

321. As a preliminary matter, the Panel notes that both Gucati and Haradinaj argue that, if the revelation of protected information is permitted by law or compatible with the right to freedom of expression, then the impugned conduct cannot be considered as criminal and no offence was committed.[730]

322. Addressing similar arguments raised by the Defence at trial, the Trial Panel underlined that:

> First, neither Article 392(1) of the KCC nor any other provision of that code expressly incorporates any grounds on which revelation of information would be authorised. Second, in line with Article 200(2) and (4) of the KCC, public interest, if proven in respect of this offence, would exclude criminal liability, but would not alter or disprove the *actus reus* of an offence.[731]

[727] SPO Response Brief, para. 137.
[728] Haradinaj Reply Brief, paras 27-28.
[729] Haradinaj Reply Brief, para. 29.
[730] Gucati Appeal Brief, para. 190; Haradinaj Appeal Brief, para. 110; Gucati Reply Brief, para. 46; Haradinaj Reply Brief, para. 27. The Panel notes that Gucati argues that the defence of public interest is applicable in relation to Count 5. See Gucati Appeal Brief, paras 190-202. Haradinaj makes a more general submission alleging under his Ground 6 that the disclosure of the impugned material was justified by the public interest in information regarding "what he maintains to be the discriminatory, politically motivated, and non-independent *modus operandi* of the SPO/[Specialist Chambers]". See Haradinaj Appeal Brief, para. 73. He further argues that his actions were driven by considerations of public interest and that, therefore, "the conviction of the Appellant on Counts 1, 2, 3, 5 and 6 should be reversed". See Haradinaj Appeal Brief, para. 114.
[731] Trial Judgment, para. 487. See also Trial Judgment, paras 73, 486, 797.

323. The Panel agrees with this observation and generally notes that defences, understood in a broad sense, operate either as substantive reasons to exclude individual criminal responsibility or as procedural obstacles or bars to criminal prosecution,[732] and include "all grounds which, for one reason or another, hinder the sanctioning of an offence – despite the fact that the offence has fulfilled all definitional elements of a crime".[733] Thus, the existence of grounds excluding criminal responsibility, namely a substantive defence, does not mean that no offence is committed in circumstances where both the *actus reus* and the *mens rea* have been established. It only means that, although the *actus reus* of the offence has been fulfilled, an accused is not criminally responsible for it since his or her responsibility has been excluded by the respective ground(s).

324. The Trial Panel observed that neither Rule 95(5) of the Rules nor any other provision of the Law or the Rules include public interest as grounds excluding criminal responsibility.[734] It nonetheless decided to address this claim "in the context of the Accused's freedom of expression and as a potential justification that may affect their individual criminal responsibility".[735] The Trial Panel defined the notion of public interest in the context of SITF/SPO cooperation with Serbia as follows:

---

[732] *Ambos* Treatise ICL I, pp. 408-409. See also *Ambos* Treatise ICL I, pp. 410-414 on the further distinction between justifications and excuses as part of substantive defences.
[733] *Eser* Defences in War Crime Trials, p. 251.
[734] Trial Judgment, paras 800, 806.
[735] Trial Judgment, para. 806. The Trial Panel recalled that "both the Law and the Constitution demand that the [Specialist Chambers] abide by and apply internationally recognised human rights standards, including those laid out in the ECHR", and referred in that regard to Article 40 of the Kosovo Constitution and to Article 10 of the ECHR which guarantee the freedom of expression. The Trial Panel also referred to ECtHR case law which determined that the exercise of the freedom of expression in pursuit of a public interest warrants particular protection. See Trial Judgment, para. 806, fn. 1687, referring to *Von Hannover (No. 2)* Judgment, para. 109; *Leempoel* Judgment, para. 68; *Standard Verlags (No. 2)* Judgment, para. 46; *Von Hannover* Judgment, para. 60; *Satakunnan Markkinapörssi Oy and Satamedia Oy* Judgment, para. 171; *Castells* Judgment, para. 43. The Panel notes that the ECtHR, in balancing the right to freedom of expression with other rights and obligations (such as the right to respect for private life or the necessity to prevent the disclosure of confidential information), used the criteria of general interest, or public interest. In this regard, it found that while the definition of what constitutes a subject of general interest will depend on the circumstances of the case (*Von Hannover (No.*

> [T]he claimed public interest in relation to which relevant evidence could be permissibly elicited is limited to evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties occurring in the context of the cooperation between the Republic of Serbia (or its officials) and the SITF/SPO, which would have affected the independence, impartiality or integrity of the SITF/SPO's investigation.[736]

325. The Trial Panel further noted that this finding had not been disputed by the Parties.[737] At the end of its assessment, the Trial Panel found that there was no credible basis to conclude that the Protected Information revealed by the Accused contained indications of improprieties attributable to the SITF/SPO.[738]

326. Gucati argues that the SPO was required to prove beyond reasonable doubt that disclosure was not in the public interest.[739] He further submits that the finding that there were no indications of improprieties attributable to the SITF/SPO amounted to a reversal of the burden of proof.[740]

327. The Panel acknowledges that several of Gucati's arguments pertain to the standard and burden of proof for grounds excluding criminal responsibility and that this specific standard requires particular attention. In that regard, the Panel finds the ICC jurisprudence instructive.

328. In the context of the *Ongwen* Appeal Judgment, the ICC Appeals Chamber observed that, in the absence of a specific provision in the Rome Statute regulating the standard of proof regarding grounds excluding criminal responsibility, "the general

---

2) Judgment, para. 109), such public interest has been defined as "the authority and impartiality of the judiciary, the effectiveness of the criminal investigations and the right of the accused to the presumption of innocence and protection of his private life" (*Bédat* Judgment, para. 55).

[736] Trial Judgment, para. 808. See also Decision on Defence Witnesses, para. 61.

[737] See Trial Judgment, para. 809.

[738] Trial Judgment, para. 817.

[739] Gucati Appeal Brief, paras 192, 195-196. See also Gucati Reply Brief, para. 47. In his Reply Brief, Gucati asserts that the risk of a guilty accused being acquitted if the SPO fails to prove his or her guilt beyond reasonable doubt is "inherent" in the standard of proof before the Specialist Chambers, as set out in Article 21(3) of the Law. See Gucati Reply Brief, para. 48.

[740] Gucati Appeal Brief, para. 202.

provisions of article 66 of the [Rome] Statute apply".[741] The same observation applies at the Specialist Chambers, where Article 21(3) of the Law as well as Rule 140(1) of the Rules require guilt to be proved "beyond reasonable doubt". This means that the onus is on the SPO to prove the guilt of the Accused (persuasive burden), including regarding grounds for excluding criminal responsibility once these are raised.[742]

329. As confirmed by the ICC Appeals Chamber in the *Ongwen* Appeal Judgment:

> [T]his burden and standard of proof entails that the facts indispensable for entering a conviction, namely, those constituting the elements of the crime or crimes charged (such as the mental or subjective elements) and the mode or modes of liability alleged against the accused must be established beyond reasonable doubt by the Prosecutor. Generally, the Prosecutor does not bear the burden *per se* to "disprove each element" of a ground excluding an accused's criminal responsibility. However, he or she must establish the guilt of the accused beyond reasonable doubt, even when a ground for excluding criminal responsibility is raised.[743]

330. In the *Ongwen* Appeal Judgment, the ICC Appeals Chamber clarified the difference between the SPO's burden to establish the guilt of the Accused beyond reasonable doubt (burden of persuasion) and the Defence's responsibility to present evidence to substantiate the grounds excluding criminal responsibility (burden of production or evidential burden),[744] stressing as to the latter that "it is not enough to merely give notice of such an intention."[745] As further underlined by the ICC Appeals Chamber:

> This so-called "evidentiary burden" on the part of the Defence does not equate to a shift in the burden of proof as the Prosecutor is not absolved of his or her burden to establish the elements of the crimes (including the mental element) and the modes of liability beyond

[741] *Ongwen* Appeal Judgment, para. 337.
[742] See also *Ambos* Treatise ICL I, pp. 414-415 and references cited therein. See also *Kokott* Burden of Proof, p. 9.
[743] *Ongwen* Appeal Judgment, para. 338 (footnote omitted).
[744] See *Roberts* Criminal Evidence, pp. 243-245 on the classic distinction between burden of proof (persuasive burden) and burden of production/evidential burden.
[745] *Ongwen* Appeal Judgment, para. 340.

> reasonable doubt. The Trial Chamber must then decide whether a ground for excluding an accused's criminal responsibility exists, on the basis of all the evidence adduced by the parties and participant.[746]

331. This responsibility of the Defence to present supporting evidence is also reflected in Rule 104(1)(b) of the Rules, according to which the Defence shall notify the SPO of "the names and current contact information of witnesses and any other evidence upon which the Accused intends to rely" to establish grounds excluding criminal responsibility.

332. The Panel is satisfied that, when the Trial Panel assessed whether a ground for excluding the Accused's criminal responsibility – such as public interest – existed, it did so on the basis of all of the evidence adduced by the Parties. The Trial Panel considered and addressed the Defence's arguments in support of their claim of public interest, such as the Defence's claim that the SITF/SPO's reliance on and cooperation with certain Serbian officials was proof of improprieties, as they regarded these individuals as responsible for war crimes or as tools of the Milošević regime; the claim that the statements collected by the SITF and/or SPO might have been obtained by means of coercion or duress; and the claim that witnesses had provided false statements during the investigation as a way to secure residency or asylum.[747]

333. The Trial Panel, however, concluded that the allegations put forward by the Defence provided no credible basis to conclude that the Protected Information revealed by the Accused contained indications of improprieties attributable to the SITF/SPO.[748] Gucati does not claim on appeal that any supporting evidence he may have presented in relation to the defence of public interest has been unfairly

---

[746] *Ongwen* Appeal Judgment, para. 340 (footnote omitted).
[747] Trial Judgment, paras 811-816. At trial, the Gucati Defence did not claim that public interest would provide a defence but rather suggested that the pursuit of public interest would be relevant to evaluating the lawfulness of the Accused's conduct. See Trial Judgment, para. 801 and references cited therein.
[748] See Trial Judgment, para. 817.

disregarded by the Trial Panel. Thus, the Appeals Panel finds that Gucati has failed to show that the Trial Panel reversed the burden of proof in reaching its conclusion.

334. Further, contrary to Haradinaj's argument that the Trial Panel erred in finding that the defence of public interest was not available under Kosovo law,[749] the Trial Panel expressly considered the notion of public interest under Article 200 of the KCC, which requires, as per Article 200(2) of the KCC, that the public interest outweighs the interest of the non-disclosure of the confidential information. The Trial Panel found that the definition provided in Article 200(4) of the KCC did not differ in substance from the notion of public interest recognised by the ECtHR.[750] The Trial Panel assessed the Accused's claims within the normative framework set by the Kosovo Constitution, relevant Kosovo legislation and Article 10 of the ECHR.[751]

335. Applied to criminal proceedings, the ECtHR[752] and international tribunals such as the ICTY or the STL, have, especially in the context of contempt cases,[753] emphasised the need to balance the protection of confidential information related to court proceedings and the right to freedom of expression.

336. The Panel further observes that, when weighing the public interests involved, these tribunals have accepted that restrictions can be imposed on the right to freedom of expression, as long as the scope of the restriction is proportionate to the value which the restriction serves to protect.[754] Following this approach, in the context of a

[749] Haradinaj Appeal Brief, para. 108.
[750] See Trial Judgment, para. 807. See also Decision on Defence Witnesses, para. 54 and authorities cited therein.
[751] Trial Judgment, para. 807.
[752] See e.g. *Dupuis and Others* Judgment, para. 43; *Stoll* Judgment, para. 102. See also *Bladet Tromsø and Stensaas* Judgment, para. 65; *Monnat* Judgment, para. 66; *July and SARL Libération* Judgment, para. 69; *Campos Dâmaso* Judgment, paras 34-35; *Bédat* Judgment, para. 55.
[753] See *Hartmann* Trial Judgement, paras 69-74; *Hartmann* Appeal Judgement, paras 158-164. See also *Akhbar and Al Amin* Trial Judgment, paras 157-160.
[754] See e.g. *Akhbar and Al Amin* Trial Judgment, para. 158, referring to *Morais v. Angola*, para. 6.8.

contempt case involving the disclosure of confidential information, the ICTY Trial Chamber stated:

> In publishing confidential information, the Chamber considers the Accused created a real risk of interference with the Tribunal's ability to exercise its jurisdiction to prosecute and punish serious violations of humanitarian law. The disclosure of protected information [...] serves to undermine international confidence in the Tribunal's ability to guarantee the confidentiality of certain information and may deter the level of cooperation that is vital to the administration of international criminal justice. In these circumstances, the Chamber is satisfied that trial proceedings for contempt are proportionate to the allegations and do not contravene the letter or spirit of Article 10(2) of the ECHR.[755]

337. The Appeals Panel considers that the Trial Panel properly assessed whether the public interest alleged in this case would outweigh the interest in the non-disclosure of the confidential information. Taking into consideration the importance of witnesses for criminal investigations and the extent, nature and alleged purpose of the revealed information, the Trial Panel was satisfied that the restriction was necessary in a democratic society in order to protect a pressing social need, and proportionate to the legitimate aims pursued.[756] The Panel finds that the Defence failed to demonstrate that the Trial Panel's assessment was erroneous.

338. In light of this finding, the Panel does not need to address the remaining arguments raised by the Defence, and notably Haradinaj's largely unsubstantiated arguments that: the Trial Panel failed to consider the "involvement of SITF/SPO Serbian sources" in the "Milošević regime"; "the stance that Serbia has taken over the years towards Kosovo"; or the dependence of the SITF/SPO investigations on Serbian sources.[757]

---

[755] *Hartmann* Trial Judgement, para. 74 (footnotes omitted).
[756] Trial Judgment, para. 821. See also Trial Judgment, paras 810-820, 822-824.
[757] Haradinaj Appeal Brief, paras 108, 113-114; Haradinaj Reply Brief, para. 29. See above, paras 29, 31-32.

339. The Panel recalls, however, that the definition adopted by the Trial Panel on the notion of public interest in the context of SITF/SPO cooperation with Serbia was not disputed by the Parties.[758] Had Haradinaj wanted this definition to include other considerations such as those mentioned above, he should have challenged it at trial. Although he argues on appeal that the Trial Panel prejudiced him in relation to this line of defence, he fails to substantiate his claim.[759]

340. In light of the above, the Appeals Panel finds that Gucati and Haradinaj fail to demonstrate an error in the Trial Panel's dismissal of the defence of public interest. Accordingly, the Panel dismisses Gucati's Ground 4(G), the remainder of Gucati's Ground 4(H),[760] Haradinaj's Ground 9 and the remainder of Haradinaj's Ground 1.[761]

2. Alleged Errors Regarding the Defence of Whistle-Blowing (Gucati Ground 5)

(a) Submissions of the Parties

341. In addition to the arguments overlapping with those on public interest already addressed above by the Panel,[762] Gucati argues that, while the Accused was not in a work or employment relationship with the SPO or Serbia, the Trial Panel accepted that such a person is entitled to whistle-blower protection if he or she facilitates "onward disclosure" by a whistle-blower source who is in a work or employment relationship

[758] Trial Judgment, para. 809. See also Trial Judgment, para. 808.
[759] See Haradinaj Appeal Brief, para. 34(b). In support of his allegation, Haradinaj only argues that the Defence was repeatedly prevented during the proceedings from mentioning the names of some individuals in public session.
[760] The Panel has addressed the remainder of the challenges in Gucati Ground 4(H) in the section on Disclosure. See above, paras 65-73.
[761] The Panel has addressed the remainder of the challenges in Haradinaj Ground 1 in the section on Fair Trial and Evidential Issues. See above, paras 50-53, 56-58, 65-73, 93-97.
[762] See Gucati's arguments that when the revelation of information is permitted by law, such as revelation of information by a whistle-blower, it is done with authorisation and no offence is committed. Gucati Appeal Brief, para. 205. See also Gucati's allegation that the SPO had to prove that the source of the leak was not a whistle-blower and that the failure of the Trial Panel to require the SPO to demonstrate as such amounted to a reversal of the burden of proof. See Gucati Appeal Brief, paras 208, 212.

with the entity from which the material may have originated, even if the whistle-blower is unknown to the facilitator.[763]

342. Gucati submits that the Trial Panel reversed the burden of proof and erred in finding that there was no evidence that the leak of information was the result of the actions of a whistle-blower from the SPO or the Serbian authorities.[764] In support of this, Gucati submits that the Trial Panel "heard evidence" that an identified serving SPO officer was implicated as a source of the leak of the documents, two media articles stated that the information came from the SPO, and the information contained in Batch 3 suggested that at least one of the Three Sets must have come from the SPO.[765]

343. Moreover, Gucati submits that the SPO tendered for admission only a fraction of the impugned information that was leaked and that, as such, the balancing exercise conducted by the Trial Panel is invalidated by the fact that the latter was ignorant of the full contents of the Batches.[766] Based on this, Gucati submits that such a failure invalidates the Trial Panel's findings on the *actus reus* of Count 5.[767]

344. The SPO responds that Gucati misstates the applicable law, misrepresents the evidentiary record,[768] and that his assertion that the SPO was required to prove that the source of the leak was not a whistle-blower is "unsupported and absurd".[769] The SPO argues that the Trial Panel specifically addressed the evidence referred to by

[763] Gucati Appeal Brief, para. 206. See also Transcript, 2 December 2022, pp. 187-188.
[764] Gucati Appeal Brief, para. 212.
[765] Gucati Appeal Brief, para. 207.
[766] Gucati Appeal Brief, paras 209, 211. See also Gucati Reply Brief, para. 78. The Panel recalls that it has addressed elsewhere Gucati's challenges to the source of the leaked information and to the extent of the SPO's disclosure of the Batches. See above, paras 65-73; see below, paras 361-374.
[767] The Panel assumes this is the count Gucati is referring to, since the actual count is indeed not mentioned. See Gucati Appeal Brief, para. 212.
[768] SPO Response Brief, para. 116.
[769] SPO Response Brief, para. 117, referring to Gucati Appeal Brief, para. 208.

Gucati and found that a basis for concluding that the SPO was involved in the leak had not been established.[770]

345. The SPO further responds that, contrary to Gucati's claim, the Trial Panel did not accept that individuals associated with a whistle-blower are protected even when the whistle-blower is unknown to the facilitator of the information.[771] It further submits that Gucati's argument that the Trial Panel heard evidence that an identified SPO officer was implicated by a witness as a source of the leak is wrong.[772]

346. Gucati replies that the Trial Panel accepted that, in certain circumstances, the protection can extend to a person "associated" with a whistle-blower.[773] Gucati further replies that Mr Jukić confirmed that another witness had implicated, on two different instances, a named SPO officer as a source of the leak of documents.[774]

(b) Assessment of the Court of Appeals Panel

347. The Trial Panel noted that the case law of the ECtHR recognises that whistle-blowers enjoy specific protection of their freedom of expression as guaranteed under Article 10 of the ECHR.[775] The Trial Panel recalled and adopted the definition of whistle-blower given by the ECtHR, which limits such protection to a person who has disclosed, in good faith, information in the context of a relationship of employment.[776]

348. The Trial Panel also accepted the suggestion of Defence expert, Ms Myers, that, unlike a whistle-blower, a person "associated" with a whistle-blower need not be in a

[770] SPO Response Brief, para. 120.
[771] SPO Response Brief, para. 118, referring to Gucati Appeal Brief, para. 206.
[772] SPO Response Brief, para. 119. See also SPO Response Brief, paras 121-122 where the SPO recalls the Trial Panel's findings. See also Transcript, 2 December 2022, p. 156.
[773] Gucati Reply Brief, para. 71.
[774] Gucati Reply Brief, paras 72-73. Gucati further argues that such evidence was not excluded, but that the Trial Panel rather held that it was "highly speculative and had been credibly challenged". See Gucati Reply Brief, para. 75.
[775] Trial Judgment, para. 825.
[776] Trial Judgment, para. 828 and references cited therein.

work or employment relationship with the person or entity whose practices are being denounced. The Trial Panel, however, considered that the Accused could not benefit from whistle-blower protection as individuals "associated" with a whistle-blower.[777] Ultimately, the Trial Panel found that, even if the Accused were to qualify as whistle-blowers:

> […] the interference with their freedom of expression resulting from their arrest, investigation and prosecution was prescribed by law, necessary in a democratic society and proportionate to the purposes of protecting witnesses from harm, enabling the SPO to fulfil its mandate effectively, and maintaining public confidence in the integrity of proceedings before the [Specialist Chambers].[778]

349. The Appeals Panel finds that nothing in Gucati's arguments disputes or 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.[779] Therefore, the Appeals Panel finds that Gucati's arguments do not have the potential to affect this finding.[780] Accordingly, the Panel dismisses Gucati's Ground 5.

3. Alleged Errors Regarding the Defence of Entrapment by the SPO (Gucati Grounds 17, 18, 19; Haradinaj Grounds 12, 13)

(a) Submissions of the Parties

350. Gucati submits that the Trial Panel's errors in dealing with his plea of entrapment amounted to an "inappropriate reverse burden and standard of proof", which should lead to the Panel overturning his convictions on all Counts and acquitting him.[781]

---

[777] Trial Judgment, para. 830.
[778] Trial Judgment, para. 831.
[779] See Trial Judgment, para. 831.
[780] See above, para. 31.
[781] Gucati Appeal Brief, paras 340, 351, 353, 363, 365, 369, 371, 378, 380, 389, 391; Transcript, 1 December 2022, pp. 108-109. See also Gucati Reply Brief, para. 87.

351. Gucati argues that all that is required with regard to entrapment is for the Defence to make an allegation of incitement which is not wholly improbable.[782] Gucati underlines that this threshold is very low and contains no evidential burden, and asserts that, once the Defence had made such an allegation, it was for the SPO to disprove it, which it failed to do as implicitly acknowledged by the Trial Panel and which should have resulted in the evidence being excluded.[783] Gucati argues that the Trial Panel erred in applying an improper standard and requiring the Defence to provide *prima facie* evidence of entrapment.[784]

352. Gucati further submits that "[a]s a matter of fact, acts of incitement occurred" and that "[w]ithout providing the means [namely, the delivery of the Batches to the Accused], the offences could not have been committed."[785] In Gucati's view, the only issue of fact was whether SPO officer(s) or external agents working on their instructions or in concert with them were involved in inciting the Accused, since: (i) it was clear that the offences could not have occurred without the deliveries and the incitement to publicise; (ii) there is no requirement that the Accused had been forced or compelled to carry out the offence; (iii) the Accused's predisposition is irrelevant.[786] While Gucati could not prove his claim that a SPO officer was involved in entrapping

[782] Gucati Appeal Brief, paras 332-333, 335, 337; Transcript, 1 December 2022, p. 107. Gucati also claims that his allegation of entrapment was clearly set out both before and during the trial, and argues that the Trial Panel understood perfectly that he alleged that he had been entrapped by Specialist Chambers/SPO officials. Gucati Appeal Brief, paras 341-343, 350; Transcript, 1 December 2022, pp. 107-108. See also Gucati Reply Brief, para. 84.
[783] Gucati Appeal Brief, paras 332-333, 335, 338-339; Transcript, 1 December 2022, pp. 105-107; Transcript, 2 December 2022, p. 185. See also Gucati Appeal Brief, paras 352, 364, 370, 379, 390, 392.
[784] Gucati Appeal Brief, paras 334, 336; Gucati Reply Brief, para. 80; Transcript, 1 December 2022, pp. 106-107, 109. See also Gucati Reply Brief, para. 79; Transcript, 1 December 2022, pp. 87, 107, 109; Transcript, 2 December 2022, p. 185.
[785] Transcript, 1 December 2022, p. 108.
[786] Gucati Appeal Brief, paras 344-347; Gucati Reply Brief, paras 81-82; Transcript, 1 December 2022, pp. 107-108; Transcript, 2 December 2022, pp. 180-181.

him, he argues that, in any event, the burden of proof was on the SPO rather than on him.[787]

353. Regarding the alleged involvement of a SPO officer, Gucati argues that, where there are indications that the Three Sets came from the SPO, it falls to the latter to prove that they did not come from the SPO or to prove that there was no intentional plan to entrap the Accused.[788] He points to evidence showing, in his view, that the very nature of the first and second of the Three Sets provided an indication that they came from the SITF/SPO, and further submits that the Trial Panel accepted that the third of the Three Sets "must" have come from the SPO.[789]

354. In addition, Gucati argues that the Trial Panel heard evidence that a named serving SPO officer had been implicated by a witness as a source of the leak.[790] According to Gucati, the Trial Panel erred in finding that this evidence was "highly speculative and had been credibly challenged", although it was provided on two occasions and had not been challenged by the SPO.[791] Gucati further argues that two news articles admitted into evidence referred to obtaining information similar to the impugned information from "a source in the SPO in [T]he Hague".[792] Nonetheless, he submits that the SPO – which was aware of the identity of the journalist making those claims – called no evidence to challenge or undermine them.[793]

355. Furthermore, Gucati submits that the Trial Panel erred by reversing the burden of proof by speculatively assuming that the SPO had been unable to prevent further

[787] Gucati Appeal Brief, paras 348-349; Transcript, 1 December 2022, p. 108.
[788] Gucati Appeal Brief, paras 362-363. See also Gucati Appeal Brief, paras 366-367.
[789] Gucati Appeal Brief, paras 354-359, 361. See also Gucati Appeal Brief, 366-367.
[790] Gucati Appeal Brief, paras 360(a), 381, 384-385, 387; Gucati Reply Brief, paras 72-74.
[791] Gucati Appeal Brief, paras 382-385, 387-388, referring to Trial Judgment, para. 878; Gucati Reply Brief, paras 74-75, 85.
[792] Gucati Appeal Brief, paras 360(b), 368; Gucati Reply Brief, paras 76, 86.
[793] Gucati Appeal Brief, para. 368.

deliveries of materials, and argues that the SPO's failure to take preventative steps is consistent with wanting or orchestrating the deliveries.[794]

356. Despite the deficiencies identified by the Appeals Panel above in relation to Haradinaj's Grounds 12 and 13,[795] the Panel understands that Haradinaj argues that the Trial Panel erred in failing to investigate the source of the leak from the SPO, thereby transferring the burden to the Defence to support their "*prima facie* credible claims of entrapment", and further erred in ignoring or rejecting evidence showing that the source of the leak was the SPO.[796] Haradinaj further affirms that, in his view, he satisfied the "not wholly improbable" standard applicable to entrapment claims.[797]

357. The SPO responds that Gucati fails to establish that the Trial Panel erred in law by applying an incorrect test to establish whether Article 6 of the ECHR was complied with regarding his claim of entrapment.[798]

358. The SPO argues that the Trial Panel considered, at length, all of the arguments concerning the claim of entrapment, ultimately finding that the claim was wholly improbable, and Gucati fails to establish any error in this finding.[799]

359. The SPO further challenges Gucati's claim related to evidence showing that a witness implicated a SPO officer as a source of the leak.[800] The SPO also submits that Gucati mischaracterises the "two news articles" he is referring to and that, in any

[794] Gucati Appeal Brief, paras 372-378.
[795] See above, para. 314.
[796] Haradinaj Appeal Brief, paras 135-144. See also Transcript, 1 December 2022, pp. 82-86; Transcript, 2 December 2022, pp. 197-198.
[797] Transcript, 1 December 2022, pp. 86-89.
[798] SPO Response Brief, paras 124, 132; Transcript, 2 December 2022, pp. 128-131, 154-156.
[799] SPO Response Brief, paras 125, 128; Transcript, 2 December 2022, pp. 122, 126-127, 129-131, 154. The SPO further argues that Gucati misrepresents some of the Trial Panel's findings and ignores others, notably those showing that he gave inconsistent evidence on his allegation of entrapment. See SPO Response Brief, para. 126.
[800] SPO Response Brief, para. 129; Transcript, 2 December 2022, p. 127.

event, he made no attempt at trial to explore the basis of the allegations therein.[801] In addition, the SPO argues that the Trial Panel made no specific finding that the SPO was unable to prevent further deliveries.[802]

360. The SPO also responds that Haradinaj's Grounds 12 and 13 should be rejected *in limine*, as Haradinaj failed to comply with several procedural requirements applicable on appeal.[803] On the merits, the SPO responds that Haradinaj had every opportunity to present arguments in support of his claim of entrapment at trial, and that there has been no reversal of burden of proof.[804] The SPO further responds that Haradinaj misrepresents the evidence and the wording of the Trial Judgment, and that his requests for disclosure of items were carefully considered by the Trial Panel.[805]

(b) Assessment of the Court of Appeals Panel

361. As the Trial Panel pointed out, before the Specialist Chambers, "entrapment does not offer a formal defence to the charges, but sets out procedural requirements for courts and prosecuting authorities to adopt in order to guarantee the fairness of proceedings in a case involving an entrapment claim".[806] The Appeals Panel will nevertheless address the entrapment claim in the section dealing with defences, in line with the structure of the Trial Judgment.

362. The Trial Panel found that the Accused's entrapment claim was "wholly improbable and unfounded", as it was "satisfied that there is no reasonable basis to conclude that either of the Accused was entrapped by any SPO official or any individual acting under the SPO's direction or control".[807]

[801] SPO Response Brief, para. 130.
[802] SPO Response Brief, para. 131.
[803] SPO Response Brief, paras 141-143.
[804] SPO Response Brief, paras 145-146.
[805] SPO Response Brief, paras 147-149.
[806] Trial Judgment, para. 839.
[807] Trial Judgment, paras 889-890.

363. The Panel notes that the Trial Panel correctly identified the fact that, "provided that the accused's allegations are not wholly improbable, it falls on the prosecution to prove that there was no entrapment".[808] The Trial Panel also correctly identified a court's obligation to "examine the facts of the case and take the necessary steps to uncover whether there was any entrapment", in line with ECtHR jurisprudence.[809] The Appeals Panel, however, agrees with Gucati's assertion that the Trial Panel's requirement that the Defence provide *prima facie* evidence of entrapment is not supported by the two ECtHR judgments cited by the Trial Panel.[810]

364. The ECtHR's case law does however reflect this requirement, albeit in different judgments than the ones cited by the Trial Panel. In the *Matanović* Judgment, for example, the ECtHR stated that:

> It follows from the Court's case-law that a preliminary consideration in its assessment of a complaint of incitement relates to the existence of an arguable complaint that an applicant was subjected to incitement by the State authorities. In this connection, in order to proceed with further assessment, the Court must satisfy itself that the situation under examination falls *prima facie* within the category of "entrapment cases." [...] If the Court is satisfied that the applicant's complaint falls to be examined within the category of "entrapment cases", it will proceed, as a first step, with the assessment under the substantive test of incitement.[811]

365. In this judgment, the ECtHR also affirmed the general principles concerning the issue of entrapment as set out in the *Ramanauskas* Judgment on which Gucati relied

[808] Trial Judgment, para. 837.
[809] Trial Judgment, para. 837.
[810] Gucati Appeal Brief, paras 332-338; Trial Judgment, para. 837, fn. 1748, citing *Bannikova* Judgment, para. 57 and *Ramanauskas* Judgment, para. 70. The Panel notes that the cited jurisprudence instead states: "[i]t falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are not wholly improbable. In the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement". See *Ramanauskas* Judgment, para. 70. See also *Bannikova* Judgment, para. 57. See also Transcript, 1 December 2022, pp. 105-109; Transcript, 2 December 2022, p. 185.
[811] *Matanović* Judgment, paras 131-132 and references cited therein.

during the Appeal Hearing.[812] The Court reiterated that it "falls to the prosecution to prove that there was no incitement, provided that the defendant's allegations are 'not wholly improbable'".[813] Accordingly, the Appeals Panel finds that Gucati's arguments do not demonstrate that the Trial Panel's finding set an "improper standard" for its assessment of the entrapment claim.[814]

366. The Appeals Panel further finds that the Defence misconstrues the applicable standard from the above-mentioned ECtHR jurisprudence, when arguing that the "not wholly improbable" standard is so low that it excludes any evidential requirement, even when the SPO's involvement in any capacity in the commission of the offences is in dispute, and that a mere allegation of entrapment, without further substantiation, requires the SPO to prove either its own lack of involvement or, if there was such involvement, to prove that it did not intend to entrap the Accused.[815]

367. Although the offence may not have occurred had the Three Sets not been delivered to the Accused, the Panel recalls that the ECtHR jurisprudence on entrapment requires the involvement of law enforcement officers (or those acting under their instructions) in the commission of the offence as a pre-existing starting point for its discussions. In other words, and contrary to the present case where the SPO denied any kind of involvement, the fact that law enforcement officers (or those acting under their instructions) were involved in the commission of the offence had never been in dispute in those cases; what had been in dispute was the extent and

[812] *Matanović* Judgment, para. 121; Transcript, 2 December 2022, p. 185, referring to *Ramanauskas* Judgment, para. 70 according to which: "it falls to the prosecution to prove there was no entrapment provided only that the allegation is not wholly improbable".
[813] *Matanović* Judgment, para. 130.
[814] Gucati Appeal Brief, para. 336. See also Transcript, 1 December 2022, pp. 107-109 arguing that the Trial Panel "applied an inappropriate reverse burden and standard of proof […] on the accused to prove, at least to a *prima facie* standard, that he was entrapped, and that is not in accordance with the European Court's case law and jurisprudence on entrapment." See also Transcript, 2 December 2022, p. 185. See also Guide on Article 6 of the ECHR, para. 251.
[815] Transcript, 1 December 2022, pp. 105-109; Transcript, 2 December 2022, p. 185.

nature of that involvement. This is reflected in the ECtHR's very definition of entrapment, commonly referred to *inter alia* as "police incitement", namely:

> Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution […].[816]

368. It is therefore clear that the ECtHR intended the issue of whether law enforcement officers (or those acting under their instructions) were involved at all in the commission of the offence to fall within the scope of the "not wholly improbable" test.

369. Accordingly, the Panel does not see any merit in Gucati's and Haradinaj's argument that the Trial Panel's findings requiring the Accused to bring *prima facie* evidence of the SPO's involvement in some capacity in the commission of the offences amounted to an erroneous reversal of the burden of proof on entrapment.[817] Furthermore, for the same reasons, the Appeals Panel also dismisses Gucati's argument that the Trial Panel erroneously "import[ed] requirements" for him to adduce evidence that compelled an inference that he was entrapped, or to establish a reasonable basis on which to conclude or infer that entrapment had occurred.[818]

370. Moving next to Gucati's challenges to the Trial Panel's factual findings, the Appeals Panel notes that he challenges the Trial Panel's finding that evidence implicating a named SPO officer as the source of the leak was highly speculative and credibly challenged by the SPO.[819]

---

[816] *Akbay and Others* Judgment, para. 112; *Ramanauskas* Judgment, para. 55.
[817] Gucati Appeal Brief, para. 351; Haradinaj Appeal Brief, paras 142-144.
[818] Gucati Appeal Brief, para. 336.
[819] Gucati Appeal Brief, paras 381-389, referring to Trial Judgment, para. 878.

371. Keeping in mind the high degree of deference accorded on appeal to the Trial Panel's factual findings and the fact that the Trial Panel need not articulate every step of its reasoning,[820] the Appeals Panel finds that Gucati has failed to show that no reasonable trier of fact could have found that the evidence allegedly implicating a named SPO officer as a source of the leak was highly speculative and credibly challenged. In addition, the Panel sees no error in the Trial Panel attributing low weight to the two media articles admitted into evidence which claim that the information they were publishing came from a source in the SPO.[821]

372. Moreover, in this case, as the SPO points out, the Defence was given access to the official note documenting what was said by the witness who implicated the named SPO officer, but did not seek its admission, or call the witness in question to testify at trial, nor did it call the named SPO officer as a witness at trial.[822]

373. Finally, the Panel notes that Gucati takes issue with the Trial Panel using the word "inability" when assessing the SPO's (lack of) prevention of further deliveries of documents, following the first and second of the Three Deliveries, arguing that this finding is speculative.[823] The Panel considers that Gucati misrepresents the Trial Panel's findings. It is clear that the impugned language was not intended as a finding that the SPO could not have prevented further deliveries (in the sense that there was evidence to show that it had in fact attempted to do so and had been unsuccessful, as Gucati suggests). The language used in the Trial Judgment is rather to be understood as meaning that, although the SPO did not prevent further deliveries, this lack of prevention did not show that the SPO orchestrated them.[824] The Panel is therefore not

[820] See above, para. 33.
[821] Trial Judgment, para. 861.
[822] SPO Response Brief, para. 129. The Trial Panel noted in that regard that the Defence did not seek to interview or call this individual as a witness. See Trial Judgment, para. 878.
[823] Gucati Appeal Brief, paras 372-378, referring to Trial Judgment, para. 871.
[824] Trial Judgment, para. 871.

persuaded that the Trial Panel made an "assumption in favour of the SPO", as Gucati argues.[825]

374. In light of the above, the Appeals Panel finds that Gucati and Haradinaj fail to demonstrate an error in the Trial Panel finding that the entrapment claim raised by the Accused was wholly improbable and unfounded. Accordingly, the Panel dismisses Gucati's Grounds 17, 18 and 19 and Haradinaj's Grounds 12 and 13.

4. Alleged Errors Regarding the Defence of Extreme Necessity (Haradinaj Ground 11)

(a) Submissions of the Parties

375. Haradinaj submits that the Trial Panel erred in law and fact by failing to consider the SPO's "collusion" with the Serbian authorities in the context of the Specialist Chambers' "mono-ethnic nature" when finding that the Accused's criminal responsibility cannot be excluded by the defence of extreme necessity, within the meaning of Article 13 of the KCC.[826] Haradinaj further argues that the risk of prosecution based on "one-sided justice" was an imminent and unprovoked danger which required an imminent and drastic action to prevent it.[827] According to Haradinaj, exposing the "inherently unjust state of affairs" outweighs the "relatively minor degree of harm" resulting from the disclosure of allegedly protected information.[828]

376. The SPO responds that the Trial Panel considered the Defence arguments concerning the allegation of impropriety of SITF/SPO cooperation with the Serbian authorities within the context of the case before it.[829] The SPO further argues that the considerations which led the Trial Panel to dismiss the claim of extreme necessity in

[825] Contra Gucati Appeal Brief, para. 376.
[826] Haradinaj Appeal Brief, paras 127-130, 134.
[827] Haradinaj Appeal Brief, paras 131-132.
[828] Haradinaj Appeal Brief, para. 133.
[829] SPO Response Brief, para. 138.

relation to malicious and unprovoked prosecutions also apply to Haradinaj's new iteration that it was the risk of prosecution based on "one-sided justice" which was an imminent and unprovoked danger.[830] The SPO also submits that Haradinaj "grossly understates" the harm of his crimes.[831]

377. Haradinaj replies that the Trial Panel's findings referred to by the SPO do not refer to his arguments about the mono-ethnic nature of the Specialist Chambers.[832] He also argues that the SPO misrepresents his clarification of the nature of "the imminent and unprovoked danger", and that he simply stated that he was *not* preventing *any specific prosecutions* that were about to take place, but rather an imminent and unprovoked *danger* of such prosecutions.[833]

(b) Assessment of the Court of Appeals Panel

378. The Panel recalls that, pursuant to Article 13(2) of the KCC, "[a]n act is committed in extreme necessity when a person commits the act to avert an imminent and unprovoked danger from himself, herself or another person which could not have otherwise been averted, provided that the harm created to avert the danger does not exceed the harm threatened." The Trial Panel found that: (i) it received no evidence supporting a claim of extreme necessity;[834] and (ii) even if a risk of malicious prosecution had existed, there was no basis to claim that the disclosures would have effectively helped avert the danger of such prosecution and that the harm thus created would not have exceeded the harm threatened.[835]

[830] SPO Response Brief, para. 140. According to the SPO, Haradinaj's argument that it is not that malicious and unprovoked prosecutions were necessarily imminent supports the Trial Panel's findings. See SPO Response Brief, para. 139.
[831] SPO Response Brief, para. 140.
[832] Haradinaj Reply Brief, para. 32.
[833] Haradinaj Reply Brief, para. 33.
[834] Trial Judgment, paras 910, 912.
[835] Trial Judgment, para. 911.

379. Contrary to Haradinaj's claim, the Trial Panel considered in its assessment of the defence of extreme necessity the related issue of whether the information revealed by the Accused contained any indications of impropriety in the SITF/SPO cooperation with Serbian authorities and found none.[836] The Trial Panel also considered the Accused's claims about the Specialist Chambers being a "mono-ethnic" and "biased" court in several instances, where it found it relevant.[837] Haradinaj's attempt to clarify that what he was trying to prevent was the risk of prosecutions, as opposed to specific prosecutions, does not impact on the Trial Judgment's findings, as the Trial Panel considered these arguments[838] and Haradinaj fails to demonstrate any error in this regard.

380. In any event, for the defence of extreme necessity to be established pursuant to Article 13(2) of the KCC, in addition to the existence of an imminent and unprovoked danger which is averted from himself, herself or another person, two more conditions need to be met, namely that: (i) no other possibility to avoid the danger was available, so that the damage to the relevant legal good must have been the only means to avoid the danger;[839] and (ii) the harm caused must not exceed the harm sought to be avoided[840] or – *vice versa* – the latter harm should outweigh the former (objective proportionality or balancing test).[841] Thus, when the risk could have been avoided by

[836] Trial Judgment, para. 910. See also Trial Judgment, paras 811-817. Contra Haradinaj Appeal Brief, paras 127, 129-130, 134.
[837] See e.g. Trial Judgment, paras 270, 272, 289-290, 665, 667, 822, 918. The Panel notes that arguments about the alleged mono-ethnic nature of the Specialist Chambers were not made at trial in relation to the defence of extreme necessity. See Gucati Pre-Trial Brief, para. 35(b); Gucati Final Trial Brief, para. 94, cited in Trial Judgment, para. 908.
[838] Trial Judgment, para. 911. Contra Haradinaj Appeal Brief, para. 131; Haradinaj Reply Brief, para. 33.
[839] See *Salihu et al*. Commentary, Article 13 of the 2012 KCC, mn. 10(b)(1), pp. 57-58.
[840] See *Salihu et al*. Commentary, Article 13 of the 2012 KCC, mn. 10(b)(3), pp. 58-59.
[841] Cf. Eser, A., and Ambos, K., in *Ambos* Rome Statute Commentary, Article 31, mn. 57. This corresponds to the classical choice-of-a-lesser-evil approach as known in the context of the traditional necessity defence.

causing less harm to the protected legal interest, an accused has exceeded the defence of extreme necessity.[842]

381. With respect to the first additional condition, it is clear to the Appeals Panel that the perceived risk, even if true, could have been avoided through other, lesser, means that did not involve the disclosure of the Protected Information. In fact, as the Trial Panel correctly found, there is no basis to claim that the revelation of the Protected Information would have effectively helped avert the danger of prosecution.[843]

382. With respect to the second additional condition, the Appeals Panel notes the Trial Panel's finding that the Accused were permitted to exercise their freedom of speech, *inter alia*, when questioning the legitimacy of the Specialist Chambers, criticising their actions, challenging the SITF/SPO's cooperation with Serbia and claiming that the Specialist Chambers were ethnically biased, but that their acts went well beyond a legitimate exercise of freedom of speech when they gravely interfered with other legitimate public interests protected by law.[844] The Appeals Panel agrees with this assessment and, accordingly, considers that even if the Accused's claim that the risk of prosecutions based on "one-sided justice" were true, the harm their acts caused through the revelation of the names and personal data of Witnesses and Potential Witnesses clearly exceeded the harm they were allegedly trying to avoid.[845]

383. In light of the above, the Appeals Panel finds that Haradinaj fails to demonstrate an error in the Trial Panel's dismissal of the defence of extreme necessity. Accordingly, the Appeals Panel dismisses Haradinaj's Ground 11.

---

[842] See *Salihu et al*. Commentary, Article 13 of the 2012 KCC, mn. 10(c), pp. 59-60.
[843] Trial Judgment, para. 911.
[844] Trial Judgment, para. 822. See also Trial Judgment, para. 821.
[845] See Trial Judgment, para. 911. See also *Salihu et al*. Commentary, Article 13 of the 2012 KCC, mn. 10(b)(3), p. 59 (wherein the authors of the commentary state that, in general, legal rights of a personal nature are more valuable than other legal goods).

5. Alleged Errors Regarding the Defence of Act of Minor Significance (Haradinaj Grounds 14, 15)

(a) Submissions of the Parties

384. Haradinaj submits that the Trial Panel failed to consider that the information disclosed by the Accused was already in the public domain following a leak from the SPO, when reaching its conclusion with regard to Article 11 of the KCC.[846]

385. Haradinaj argues that the Trial Panel erred in, *inter alia*: (i) failing to adequately consider that a number of individuals said to be protected and thus "exposed" by the Accused were in fact publicly known in Kosovo to be Witnesses or Potential Witnesses;[847] (ii) finding that the Accused disclosed the data of hundreds of witnesses, although it had no means to be sure of the actual number, status or vulnerability of those allegedly "exposed" by the Accused;[848] (iii) finding that the Accused "indiscriminately" released information;[849] (iv) focusing on the seriousness of the incurred custodial sentences rather than on the gravity of the Accused's actions;[850] and (v) failing to refer to the greater impact of the SPO's leak on public confidence.[851]

386. Haradinaj further argues that, even if the Accused had committed the criminal offence for which they have been found guilty under Article 392(1) of the KCC, this offence would nonetheless be of minor significance because the confidentiality of the Protected Information was violated before it reached them and that, therefore, the Accused's actions caused a minor degree of harm.[852]

---

[846] Haradinaj Appeal Brief, paras 145-155. In his Reply Brief, Haradinaj indicates that "[he] no longer raises the failure to investigate the impropriety of the SPO's investigation as a separate [ground] of appeal, as it is a recurring theme that runs through the entire case". Haradinaj Reply Brief, para. 37.
[847] Haradinaj Appeal Brief, para. 147(a).
[848] Haradinaj Appeal Brief, para. 147(c).
[849] Haradinaj Appeal Brief, para. 147(d).
[850] Haradinaj Appeal Brief, para. 147(b).
[851] Haradinaj Appeal Brief, para. 147(e).
[852] Haradinaj Appeal Brief, paras 151-155; Haradinaj Reply Brief, para. 39.

387. The SPO responds that, in light of the difference between the Haradinaj Notice of Appeal and the Haradinaj Appeal Brief, it considers that Haradinaj has decided not to pursue the issues initially raised in Ground 14 of his Notice of Appeal and that these could be dismissed *in limine*.[853] On the substance, the SPO submits that: (i) the Trial Panel rejected the defence of act of minor significance on the basis of several relevant factors, which Haradinaj challenges without articulating any reasons;[854] and (ii) Haradinaj cites no evidence to support his assertion that "a number of individuals said to be protected and thus 'exposed' by the Appellant's disclosures are in fact publicly known" and the SPO has never confirmed whether any person was a witness in its investigations.[855]

(b) Assessment of the Court of Appeals Panel

388. The Panel notes that Ground 15 of the Haradinaj Notice of Appeal is limited to arguing that part of the information was already in the public domain following a leak from the SPO.[856] This argument, however, has been expanded considerably into further submissions in Grounds 14 and 15 in the Haradinaj Appeal Brief. The Panel recalls that the Accused are not free to vary their notices of appeal in any way without prior leave of the Appeals Panel.[857] As already explained,[858] out of fairness to the Accused, the Panel decided to consider Haradinaj's submissions, to the extent possible, whenever they are properly articulated.[859]

---

[853] SPO Response Brief, paras 150-151. See also Transcript, 2 December 2022, pp. 156-157.
[854] SPO Response Brief, paras 152, 154, referring to Trial Judgment, paras 924-925. The Panel also notes the SPO's argument that Haradinaj improperly seeks to rely on an item that was not admitted into evidence. See SPO Response Brief, para. 154, referring to Haradinaj Appeal Brief, fn. 141.
[855] SPO Response Brief, para. 153.
[856] Haradinaj Notice of Appeal, para. 19.
[857] See above, para. 30.
[858] See above, para. 314.
[859] The Panel refers to Haradinaj's assertion that the Trial Panel erred in focusing on the seriousness of the incurred custodial sentences rather than on the gravity of the Accused's actions. See Haradinaj Appeal Brief, para. 147(b). The Panel disagrees with this assertion and recalls the Panel's power to dismiss obscure and unsounded arguments. See above, paras 29, 32. The Panel further refers to Haradinaj's assertion that the Trial Panel erred in failing to refer to the greater impact of the SPO's leak

389. The Trial Panel held that, in light of the gravity of the Accused's acts and statements, the danger involved in the Accused's conduct could not be deemed insignificant[860] and thus the Accused's criminal responsibility could not be excluded by the defence of acts of minor significance within the meaning of Article 11 of the KCC.[861] The Panel observes that the Trial Panel clearly considered and rejected the Defence's contention that the information disclosed by the Accused was already in the public domain at the time of the events, following an alleged leak from the SPO. In particular, the Trial Panel found that it "received no evidence that any parts of the Three Sets, except the public documents in the [second of the Three Sets], were already in the public domain".[862]

390. With respect to Haradinaj's argument that a number of individuals were publicly known within Kosovo to be Witnesses or Potential Witnesses at the time relevant for the charges,[863] the Panel finds that this would not as such render the offence committed by the Accused insignificant. Contempt of court is a grave offence, constituting a direct challenge to the integrity of the trial process,[864] especially in the current circumstances, where Haradinaj was found to have revealed hundreds of documents containing Protected Information, SPO internal work product, as well as the names and personal details of hundreds of Witnesses and Potential Witnesses.[865]

391. Turning to Haradinaj's argument that the Trial Panel could not have been sure of the actual number, status or vulnerability of those supposedly "exposed" by the Accused's disclosures, the Panel notes that Haradinaj does not develop this argument

---

on the public confidence. See Haradinaj Appeal Brief, para. 147(e). The Panel recalls its power to dismiss arguments which do not have the potential to cause the impugned decision to be reversed. See above, para. 31.

[860] Trial Judgment, para. 925.

[861] Trial Judgment, para. 926.

[862] Trial Judgment, para. 488.

[863] Haradinaj Appeal Brief, para. 147(a).

[864] *Nzabonimpa et al.* Trial Judgement, para. 397.

[865] See e.g. Trial Judgment, para. 989. See also Trial Judgment, paras 335-355.

other than by referring to Ground 8 of his Appeal Brief.[866] This alone would justify summary dismissal of this argument. In any event, Haradinaj's argument is without merit as, in the Panel's view, even the disclosure of the name of one witness or potential witness would render the consequence of Haradinaj's action "significant" for the purposes of Article 11 of the KCC.

392. Regarding Haradinaj's argument that the Trial Panel erred in finding that he disclosed information indiscriminately while he rather made efforts to warn journalists not to publish the names of witnesses,[867] the Panel observes that this argument is improperly based on material that was not admitted into evidence,[868] and agrees with the Trial Panel's finding that journalists or the press are members of the public for the purposes of the offence of violating the secrecy of proceedings under Article 392(1) of the KCC.[869]

393. The Panel further rejects Haradinaj's unsubstantiated argument that the prior violation of confidentiality of the Protected Information would render the acts of the Accused of minor significance for the following reasons: (i) Haradinaj's argument is hypothetical; and (ii) both Accused have repeatedly described the documents as confidential.[870]

[866] See Haradinaj Appeal Brief, para. 147(c).
[867] Haradinaj Appeal Brief, para. 147(d).
[868] Haradinaj Appeal Brief, para. 147(d), fn. 141.
[869] Trial Judgment, para. 484. The Trial Panel further found that "the Accused acted with awareness of, and desire for, revealing, without authorisation, the Protected Information" and that "[t]heir act of revealing such information mostly to the professional media does not in any way affect this finding". See Trial Judgment, para. 499.
[870] Trial Judgment, para. 488. Moreover, the Panel observes that Haradinaj misrepresents the Trial Panel's findings that did not, anywhere in the Trial Judgment, accept that the Accused's actions "for the most part, cause a minor degree of harm". See Haradinaj Appeal Brief, para. 154, referring to Ground 11, referring in turn to Trial Judgment, paras 547, 551.

394. In light of the above, the Appeals Panel finds that Haradinaj fails to demonstrate an error in the Trial Panel's dismissal of the defence of act of minor significance. Accordingly, the Panel dismisses Haradinaj's Grounds 14 and 15.

H. ALLEGED ERRORS CONCERNING SENTENCING (GUCATI GROUND 20; HARADINAJ GROUND 24)

395. In determining the sentence for the Accused, the Trial Panel noted that it applied the regime under Article 44(4)-(5) of the Law and Rules 163 and 165 of the Rules, and also took "guidance from other relevant Kosovo provisions and case-law of international courts/tribunals".[871] The Trial Panel further noted that it considered all relevant factors, and tailored each sentence to reflect the gravity of the charged offences, the nature and extent of each Accused's involvement, and the individual circumstances of each Accused, including certain mitigating factors.[872]

396. On this basis, and considering the applicable sentencing ranges for each Count, the Trial Panel imposed the following sentences on each of the Accused, for each Count:

(i) Count 1 (under Article 401(1) and (5) of the KCC, committed in attempted form and taking into account the aggravated form) – one year of imprisonment;

(ii) Count 2 (for Gucati, under Articles 401(2)-(3) and (5) of the KCC, committed in attempted form and taking into account both aggravated forms; for Haradinaj, under Article 401(2) and (5) of the KCC, committed in attempted form and taking into account one aggravated form) – one year of imprisonment;

[871] Trial Judgment, para. 942. See also Trial Judgment, paras 941, 943-959.
[872] See Trial Judgment, paras 960-980, 987-1005.

(iii) Count 3 (under Article 387 of the KCC) – a fine of 100 euros and four years of imprisonment;

(iv) Count 5 (under Article 392(1) of the KCC) – one year of imprisonment; and

(v) Count 6 (under Article 392(2)-(3) of the KCC, including the aggravated form) – two years of imprisonment.[873]

397. Based on these individual sentences, and pursuant to Rule 163(4) of the Rules, the Trial Panel then determined a single sentence for each of the Accused, which should reflect the totality of the criminal conduct but shall in any case not be less than the highest individual sentence in respect of each charge.[874] In doing so, the Trial Panel also took into account the fact that the Accused were "convicted under both [Counts 1 and 2] and that [they] might have been convicted under only one of these counts under a different regime on cumulative conviction".[875] Accordingly, the Trial Panel sentenced Gucati and Haradinaj each to a single sentence of four and a half years of imprisonment, with credit for time served, and to a fine of 100 euros.[876]

398. Gucati and Haradinaj challenge the Trial Panel's findings on sentencing.[877] The SPO responds that the Accused fail to establish any error in the sentences imposed and that their Appeals should be rejected.[878]

[873] See Trial Judgment, paras 980-982, 1005-1008.
[874] See Trial Judgment, para. 956.
[875] Trial Judgment, paras 983, 1008. See also Trial Judgment, paras 165-170.
[876] Trial Judgment, paras 982, 984-985, 1008-1010. The Trial Panel noted that as regards Count 3, Article 387 of the KCC requires the imposition of a fine and that "[c]onsidering that a fine would have little retributive or deterrent effect in this case, the Panel is of the view that a symbolic amount of 100 EUR is appropriate". See Trial Judgment, paras 982, 1008.
[877] Gucati Appeal Brief, paras 393-427; Haradinaj Appeal Brief, paras 209-235; Gucati Reply Brief, paras 88-95; Haradinaj Reply Brief, paras 58-59.
[878] SPO Response Brief, paras 162-190.

1. Alleged Errors Regarding the Trial Panel's Assessment of Gravity and Other Considerations in Sentencing

(a) Submissions of the Parties

399. First, Gucati submits that the Trial Panel erred in sentencing when assessing gravity.[879] In particular, he argues that the Trial Panel did not find that Gucati used "the serious threat of force,"[880] nor that he intended that actual harm be caused to any witness or potential witness.[881] Gucati further argues that the Trial Panel's findings that (i) Gucati "mostly revealed to the professional media only" and (ii) he had no intention of obstructing any Specialist Chambers Judge, should have been reflected in the sentence.[882]

400. Gucati further submits that, as harm is a primary indicator of gravity, the Trial Panel's finding that there was no actual harm caused to investigations was not given sufficient weight in its determination of the final sentence.[883] Gucati specifically argues that few persons were found by the Trial Panel to have in fact suffered consequences which amounted to "substantial interference".[884] However, in his view, the fact that the person identified in the confidential version of the Trial Judgment made his cooperation with prosecutors public was a mitigating factor which the Trial Panel did

[879] Gucati Appeal Brief, para. 393; Transcript, 1 December 2022, pp. 61, 68. See also Gucati Notice of Appeal, Ground 20, pp. 19-20.
[880] Gucati Appeal Brief, para. 394, wherein Gucati argues that the use of a serious threat of force cannot be implied from the Trial Panel's finding that the acts and statements of the Accused amounted to "serious threat". See Trial Judgment, para. 585. See also Transcript, 1 December 2022, pp. 61-62.
[881] Gucati Appeal Brief, para. 395; Transcript, 1 December 2022, pp. 61-62.
[882] Gucati Appeal Brief, paras 396-397; Gucati Reply Brief, para. 93; Transcript, 1 December 2022, pp. 61-62.
[883] Gucati Appeal Brief, paras 400-402. See also Gucati Appeal Brief, paras 398-399; Transcript, 1 December 2022, pp. 61-63.
[884] Gucati Appeal Brief, para. 404. See also Gucati Appeal Brief, paras 403, 405; Gucati Reply Brief, para. 94; Transcript, 1 December 2022, pp. 64-65. Gucati refers to: (i) the person identified in the confidential version of the Trial Judgment; (ii) two relocated persons; and (iii) "[b]etween 20-30 persons subject to other security measures". See Gucati Appeal Brief, para. 404. See also Trial Judgment, para. 538.

not take into account.[885] Gucati also argues that, with respect to Gucati Ground 2(A)(a) and (b), the Trial Panel erred by not excluding evidence as to the contents of the Batches and that it was unfair for the Trial Panel to sentence him on the basis that the names and personal details of "hundreds of Witnesses and Potential Witnesses" were revealed, while only "six 'Witnesses' were actually identified in evidence".[886]

401. Moreover, according to Gucati, the Trial Panel also made a discernible error in sentencing by failing to reflect the relative roles of the two Accused in relation to Count 3.[887] Gucati argues that, given the Trial Panel's findings that Gucati did not publicly name any witnesses – unlike Haradinaj – and made fewer media appearances than Haradinaj, it erred in imposing the same penalty for both Accused under Count 3.[888]

402. Haradinaj argues that the Trial Panel erred in finding that there was a "climate of witness intimidation" in Kosovo at the time of the allegations against the Accused, and using it as an aggravating feature to increase his sentence, when no evidence was presented to establish such a climate.[889] Haradinaj further asserts that the Trial Panel erred by failing to differentiate between what it deemed "criminal" and instances of Haradinaj "exercising his legitimate right to free speech and expression", and by appearing to use these instances as aggravating factors in imposing his sentence.[890]

403. Haradinaj specifically argues that the Trial Panel erred by failing to consider in sentencing the fact that the SPO was clear in its position that Mr Berisha, or any other

[885] Gucati Appeal Brief, para. 406; Gucati Reply Brief, paras 94-95; Transcript, 1 December 2022, p. 64.
[886] Gucati Appeal Brief, paras 407-410. See above, paras 60-61, 231-233.
[887] Gucati Appeal Brief, para. 411.
[888] Gucati Appeal Brief, paras 412-419.
[889] Haradinaj Appeal Brief, paras 209-216.
[890] Haradinaj Appeal Brief, paras 209, 217-222. Haradinaj argues that, in fact, the Trial Panel recognised that the Accused were permitted to exercise their freedom of speech and thus his media appearances should not be deemed criminal or used as an aggravating factor. See Haradinaj Appeal Brief, para. 220, referring to Trial Judgment, para. 822.

journalist, did not commit a criminal offence by publishing documents, implying that the SPO does not consider the information contained therein to be secret.[891]

404. The SPO responds that the Accused both largely fail to explain how the alleged errors impact the sentence and to demonstrate how the Trial Panel went beyond its "discretionary framework" in imposing the sentence.[892] Regarding the Accused's challenges to the Trial Panel's assessment of gravity, the SPO submits that the Trial Panel considered relevant factors including the nature, volume and scope of the information disclosed by the Accused to find that the crimes committed were grave.[893] According to the SPO, Gucati ignores the Trial Panel's findings on his level of intent and on the amount of information Gucati revealed indiscriminately without authorisation being "massive" and "broadly disseminated".[894] With respect to Gucati's argument that the person identified in the confidential version of the Trial Judgment made his cooperation with the SPO public should have been considered in mitigation of his sentence, the SPO responds that it should be dismissed *in limine* because it was not argued at trial, and regardless, this would not have deprived that person of protection.[895]

405. Furthermore, the SPO argues that Gucati failed to demonstrate any error in the Trial Panel's determination of his sentence in relation to Count 3, and that Gucati's argument that the Trial Panel focused on Haradinaj's conduct, yet sentenced both of the Accused on that basis, is inaccurate and misrepresents the relevant findings.[896]

[891] Haradinaj Appeal Brief, paras 209, 232.
[892] SPO Response Brief, para. 164; Transcript, 2 December 2022, pp. 167-168, 170. See also SPO Response Brief, paras 162-163.
[893] SPO Response Brief, paras 179-180; Transcript, 2 December 2022, pp. 168-170.
[894] SPO Response Brief, paras 181-183. See also Transcript, 2 December 2022, pp. 169-170.
[895] SPO Response Brief, para. 184.
[896] SPO Response Brief, paras 186-187. See also Transcript, 2 December 2022, p. 170.

According to the SPO, the Trial Panel imposed well-reasoned sentences on both Gucati and Haradinaj, which reflect the totality of their criminal conduct.[897]

406. The SPO also responds that Haradinaj fails to demonstrate an error in the Trial Panel's consideration of the climate of witness intimidation in Kosovo during the relevant period,[898] and specifies that the Trial Panel did not consider it as an aggravating factor but rather noted it in the context of its assessment of gravity.[899] Regarding Haradinaj's argument that the Trial Panel erroneously relied on examples of Haradinaj exercising his legitimate right to free speech and expression in imposing a sentence, the SPO submits that Haradinaj fails to refer to a single instance of such alleged reliance by the Trial Panel, and that nothing in the Trial Judgment suggests that Haradinaj's mere appearances on media programmes were in and of themselves criminal or given any particular weight in sentencing.[900]

407. Moreover, the SPO submits that Haradinaj fails to articulate the basis for or establish any error regarding the fact that no other individuals, including Mr Berisha, were charged in this case.[901]

408. Gucati replies that none of the SPO's references to the Trial Judgment contradict his contention that the Trial Panel did not find that he intended actual harm to be caused to any witness.[902] Finally, Gucati replies that, at the time when he was "required to mitigate", he did not know that the Trial Panel would find that the person identified in the confidential version of the Trial Judgment suffered fear from being publicly named.[903]

[897] SPO Response Brief, paras 188, 190. See also SPO Response Brief, para. 189.
[898] SPO Response Brief, paras 165-166. See also Transcript, 2 December 2022, p. 170.
[899] SPO Response Brief, para. 167.
[900] SPO Response Brief, paras 168-169.
[901] SPO Response Brief, paras 177-178.
[902] Gucati Reply Brief, para. 92, referring to Gucati Appeal Brief, para. 395; SPO Response Brief, fn. 442.
[903] Gucati Reply Brief, para. 95. See Trial Judgment, para. 538.

(b) Assessment of the Court of Appeals Panel

409. Pursuant to Article 44(4) of the Law, the punishment imposed on persons found guilty of crimes under Article 15(2) of the Law shall be in line with the punishments for those crimes set out in the KCC. According to Article 44(5) of the Law, in imposing a sentence, the Specialist Chambers shall take into account aggravating and mitigating factors, including the gravity of the crime and its consequences and the individual circumstances of the convicted person. Rule 163(1) of the Rules also provides that the Trial Panel shall balance the aggravating and mitigating factors mentioned in Article 44(5) of the Law.

410. The Appeals Panel recalls that, according to international criminal jurisprudence, deterrence and retribution are the primary objectives of sentencing, and rehabilitation is relevant but should not play a predominant role.[904] The Panel also notes that the "gravity of the offence is the primary consideration […] in imposing a sentence"[905] and that "a sentence proportional to the gravity of the criminal conduct will necessarily provide sufficient retribution and deterrence".[906] In addition, the Panel notes that Article 38(1) of the KCC, which focuses rather on rehabilitation and deterrence, and not explicitly on retribution, provides that:

> The purposes of punishment are:
>
> 1.1. to prevent the perpetrator from committing criminal offenses in the future and to rehabilitate the perpetrator;

[904] *Stakić* Appeal Judgement, para. 402; *Deronjić* Sentencing Appeal Judgement, para. 136; *Kordić and Čerkez* Appeal Judgement, para. 1079; *Čelebići* Appeal Judgement, paras 805-806. See also *Bemba et al.* Sentencing Appeal Judgment, para. 205; Fife, R. E., in *Ambos* Rome Statute Commentary, Article 77, mn. 3.

[905] *Hadžihasanović and Kubura* Appeal Judgement, para. 321, citing *Musema* Appeal Judgement, para. 382; *Nahimana et al.* Appeal Judgement, para. 1038, and jurisprudence cited therein; *Rutaganda* Appeal Judgement, para. 591; *Bemba* Sentencing Decision, para. 15. See also *Kordić and Čerkez* Appeal Judgement, para. 1079.

[906] *Krajišnik* Appeal Judgement, para. 777. See also *Stakić* Appeal Judgement, para. 402; *Deronjić* Sentencing Appeal Judgement, para. 136; *Čelebići* Appeal Judgement, paras 805-806.

> 1.2. to prevent other persons from committing criminal offences;
>
> 1.3. to provide compensation to victims of the community for losses or damages caused by the criminal conduct; and
>
> 1.4. to express the judgment of society for criminal offences, increase morality and strengthen the obligation to respect the law.[907]

411. In this regard, the Panel notes that, for deterrence, the sentence should be adequate to dissuade a convicted person from re-offending (individual deterrence), while also aiming to dissuade other potential perpetrators from committing the same or similar crimes (general deterrence).[908] Retribution should be understood as the imposition of an appropriate punishment which reflects the culpability of the convicted person, but it should not express revenge or vengeance.[909] Rehabilitation is focused on the reintegration of the convicted person into society.[910]

412. The Trial Panel considered that the "primary goal of sentencing is to ensure that the final sentence reflects the totality of the criminal conduct and the overall culpability of the convicted person".[911]

413. The Appeals Panel notes that appeals against sentencing are appeals *stricto sensu*, meaning that they are corrective in nature.[912] The Appeals Panel recalls that a trial panel has discretion in determining an appropriate sentence, including tailoring

[907] See also Trial Judgment, para. 938.
[908] See e.g. *Krajišnik* Appeal Judgement, paras 776, 805; *Bemba* Sentencing Decision, para. 11. See also Trial Judgment, para. 938.
[909] *Kordić and Čerkez* Appeal Judgement, para. 1075; *Bemba* Sentencing Decision, para. 11. See also Trial Judgment, para. 938.
[910] *Murray* Judgment, para. 102. See Article 10(3) of the ICCPR. See also Trial Judgment, paras 938-939, wherein the Trial Panel notes that despite its limited role in sentencing at international courts and tribunals, it considered rehabilitation as a relevant factor in sentencing as the Accused are charged with offences under Kosovo law. See also e.g. *Bemba et al.* Sentencing Appeal Judgment, para. 205.
[911] See Trial Judgment, para. 939, referring to *Stanišić and Simatović* Trial Judgement, para. 611; *Mladić* Appeal Judgement, para. 545; *Martić* Appeal Judgement, para. 350; *Čelebići* Appeal Judgement, para. 430.
[912] See e.g. *Šešelj* Sentencing Appeal Judgement, para. 17; *Rašić* Appeal Judgement, para. 9.

it to reflect the gravity of the crimes, and the extent of the accused's involvement in the offences and their individual circumstances.[913]

414. The Appeals Panel will not substitute its own sentence for that imposed by the Trial Panel, unless the appealing Party demonstrates that the Trial Panel committed a discernible error in exercising its discretion or failed to follow the applicable law.[914] Consequently, the Appeals Panel will only interfere with the Trial Panel's exercise of discretion where the sentence it imposed is: (i) based on an incorrect interpretation of the governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of its discretion. In this regard, the Appeals Panel will also consider whether the Trial Panel, in reaching its decision on sentencing, gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations.[915]

415. The Panel will first address Gucati's challenges regarding the Trial Panel's assessment of gravity in its sentencing findings. The Panel observes that the Trial Panel examined, "when assessing the gravity of offences against the administration of justice", the nature and scope of the offences and other relevant circumstances surrounding the case.[916] The Trial Panel found that the offences committed by the Accused entailed, *inter alia*, the "brazenly wide" dissemination of hundreds of documents containing Protected Information, including the names and/or details of a

[913] See e.g. *Lubanga* Sentencing Appeal Judgment, paras 34, 40; *Krajišnik* Appeal Judgement, para. 734; *Šešelj* Sentencing Appeal Judgement, para. 17; *Rašić* Appeal Judgement, para. 9. See also Trial Judgment, para. 956.
[914] See *Šešelj* Sentencing Appeal Judgement, para. 17; *Rašić* Appeal Judgement, para. 9. Regarding alleged errors in the exercise of discretion, see Appeal Decision on Gucati's Arrest and Detention, para. 14.
[915] See Appeal Decision on Gucati's Arrest and Detention, para. 14. See also *Šešelj* Sentencing Appeal Judgement, para. 18; *Rašić* Appeal Judgement, para. 10; *Fatuma et al.* Appeal Judgement, para. 63, citing *Mladić* Appeal Judgement, para. 539; *Karadžić* Appeal Judgement, para. 749; *Ngirabatware* Appeal Judgement, para. 255; *Bemba et al.* Sentencing Appeal Judgment, para. 22, citing *Kenyatta* Appeal Decision on Non-Compliance, paras 22-25.
[916] See Trial Judgment, paras 951, 962-969, 973, 987-994, 998.

large number of Witnesses and Potential Witnesses, such that the ultimate effect or scale of its dissemination is unknown.[917] The Trial Panel further considered in sentencing that the revelation of Protected Information was done through "an organisational platform" and several broadcast media appearances, demonstrating "repeated conduct and consistent vows to undertake the same offences again", "coupled with disparaging remarks toward witnesses in a climate of witness intimidation".[918]

416. The Trial Panel also considered under gravity that the "magnitude and scope of this revelation of Protected Information could dissuade witnesses from engaging or continuing to engage with the SPO/[Specialist Chambers] investigative or judicial process", and could further prevent the fulfilment of their mandate.[919] The Trial Panel further weighed in its assessment of gravity the effect of the Accused's acts on victims of crimes under the Specialist Chambers' jurisdiction and the potential of them being denied their right to truth and access to justice, noting in particular that such acts "occurred within a prevalent and long-standing climate of witness intimidation in Kosovo".[920]

417. In light of this, the Appeals Panel considers that the Trial Panel did not err in its findings on gravity and the scale on which the Accused committed the offences. Specifically, with respect to the argument that the Trial Panel did not consider in assessing gravity that "there was no finding that [Gucati] used the serious threat of force",[921] the Appeals Panel first recalls its finding above that the term "serious threat"

[917] Trial Judgment, paras 963-966, 979, 988-991, 1004. The Trial Panel found that the fact that the revelation of Protected Information was repeatedly discussed in televised or online media appearances and Facebook posts further increased the dissemination of the information to unknown recipients, finding that this undermined the Accused's argument that the information was revealed only to professional journalists and media. See Trial Judgment, paras 967, 992.
[918] Trial Judgment, paras 979, 1004.
[919] Trial Judgment, paras 968, 993.
[920] Trial Judgment, paras 968, 993.
[921] See Gucati Appeal Brief, para. 394.

encompasses not only a threat to use force, but any serious threat of harmful action and that the Trial Panel did not err in its findings in this regard.[922] The Appeals Panel further notes that the Trial Panel considered in its sentencing assessment the fact that the Accused never made direct threats involving death or serious injury.[923] The Panel considers that the Trial Panel properly assessed the gravity of the Accused's conduct in this regard.[924] Therefore, the Panel considers that the Trial Panel did not make an identifiable error in its assessment of gravity with regard to this finding.

418. The Panel now turns to Gucati's arguments that the Trial Panel did not consider in its assessment of gravity that Gucati revealed the Protected Information "mostly to the professional media" which allegedly reduced risk,[925] and that he had no intention of obstructing any Specialist Chambers Judge.[926] The Panel notes, with regard to the first argument, that the Trial Panel considered in the assessment of gravity that "evidence of this broad dissemination of information via televised or online platforms undermines the Accused's argument that the information was revealed only to professional journalists and the professional media",[927] and further found that the "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".[928] The Appeals Panel considers that revealing the Protected Information to the media was in fact a way to further disseminate the information and, on the contrary, did not reduce the risk or make the Accused's conduct any less grave. Therefore, the Panel

[922] See above, paras 224-226, 278-280.
[923] See Trial Judgment, paras 973, 998.
[924] See below, para. 432.
[925] See Trial Judgment, para. 499; Gucati Appeal Brief, para. 396; Gucati Reply Brief, para. 93.
[926] Gucati Appeal Brief, para. 397 (arguing that the Trial Panel did consider in sentencing that Gucati "did not directly threaten any SPO official").
[927] Trial Judgment, para. 967.
[928] Trial Judgment, para. 964.

finds that the Trial Panel did not err with respect to this factor in assessing gravity for sentencing purposes.

419. In relation to Gucati's argument that he did not intend to obstruct any Specialist Chambers Judge, the Panel notes that in its sentencing assessment – on the nature and extent of Gucati's involvement – the Trial Panel considered that Gucati did not make any direct threats involving death or serious injury in relation to witnesses and that he did not "directly threaten any SPO official and was cooperative during the seizure operations of the SPO", in compliance with the Single Judge's and SPO's orders.[929] The Trial Panel found that "the Accused acted with awareness of, and desire for, obstructing [Specialist Chambers]/SPO Officials in performing [Specialist Chambers]/SPO Work".[930] The Panel considers that the Trial Panel took into account the scope of Gucati's proven intent in determining the sentence. As such, the Panel finds that the Trial Panel did not err by not specifically considering Gucati's alleged intent *not* to obstruct any Specialist Chambers Judge in its assessment of gravity.

420. With respect to Gucati's arguments relating to Gucati Ground 2(A), namely that the Trial Panel erred by not excluding evidence as to the contents of the Batches and that it was unfair for the Trial Panel to sentence him on that basis,[931] the Appeals Panel recalls its finding above that the Trial Panel did not err by not excluding evidence as to the contents of the Batches.[932] The Appeals Panel thus considers that the Trial Panel appropriately assessed the relevant factors for sentencing based on the evidence before it, and finds no error on the basis of Gucati's challenge.

421. Finally, with respect to Gucati's argument that the Trial Panel's finding that there was no actual harm caused to investigations was not given sufficient weight in

[929] Trial Judgment, para. 973.
[930] Trial Judgment, para. 671. See also above, paras 290-291.
[931] See Gucati Appeal Brief, paras 407-410.
[932] See above, para. 73.

sentencing,[933] the Panel observes that the Trial Panel found that, in considering the gravity of the offences, it weighed them "against its finding that, ultimately, the SPO failed to establish that its ability to effectively investigate or prosecute crimes was actually obstructed".[934] The Appeals Panel thus finds that the Trial Panel considered this finding when sentencing the Accused, as noted clearly in its reasoning.

422. Regarding Gucati's submission that the public cooperation with the SPO of the person identified in the confidential version of the Trial Judgment should have been considered in mitigation,[935] the Panel agrees with the SPO that, as this argument was not raised at trial, it should be dismissed *in limine*.[936] In this respect, the Appeals Panel recalls its finding above in the section on Count 6 that, although the Trial Panel erred in relation to its finding regarding this person, the Trial Panel's error has no impact on the general finding that the *actus reus* of Article 392(3) of the KCC was established in this case.[937] The Panel considers that this error has no impact on sentencing.

423. The Panel turns to Gucati's argument that the Trial Panel erred by failing to appropriately reflect in sentencing Gucati's specific role – in comparison to Haradinaj's – under Count 3.[938] First, the Panel notes that the Trial Panel entered findings on Count 3 that both Accused, *inter alia*, revealed the identity and/or personal data of "hundreds of Witnesses and Potential Witnesses" contained in the Protected Information, "made repeated derogatory and disparaging remarks" about witnesses, repeatedly vowed to make public any new Specialist Chambers/SPO documents they received, and did not take any measures to limit the dissemination of names.[939] The Panel also observes that the Trial Panel accepted that, through the repeated conduct

[933] See Gucati Appeal Brief, paras 400-402.
[934] Trial Judgment, paras 969, 994.
[935] See Gucati Appeal Brief, para. 406. See also Trial Judgment, para. 538.
[936] See Appeal Decision on Preliminary Motions, para. 15. See also SPO Response Brief, para. 184.
[937] See above, para. 206.
[938] See Gucati Appeal Brief, paras 411, 413-419.
[939] See Trial Judgment, paras 559, 562, 590. See also Trial Judgment, paras 561, 563-570; SPO Response Brief, paras 186-187.

of disseminating protected material, Gucati "did not publicly name any witness" and "participated in fewer media appearances than Mr Haradinaj".[940] The Trial Panel nonetheless found that "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 [Specialist Chambers]/SPO".[941] The Panel considers that the Trial Panel carefully assessed the evidence and all of the relevant factors comprising sentencing, including Gucati's role in the offences in comparison with Haradinaj's.[942] As such, the Panel finds that Gucati fails to demonstrate any error in the Trial Panel's determination of his sentence in relation to Count 3.

424. With regard to Haradinaj's argument that the Trial Panel erred in finding that there was a "climate of witness intimidation" in Kosovo and that it was an aggravating factor in sentencing,[943] the Panel notes that the Trial Panel did not consider it as an aggravating factor in determining Haradinaj's sentence; rather, it was listed among many factors in assessing the gravity of the offences of which Haradinaj was convicted.[944] Moreover, the Trial Panel considered extensive evidence in reaching this finding in the Trial Judgment.[945] The Defence also made specific submissions at trial on whether such a climate existed and the Trial Panel found that this evidence "undercuts" these arguments.[946] The Panel considers that Haradinaj does not demonstrate any error in the Trial Panel's approach and thus, his challenge in this regard fails.

[940] Trial Judgment, para. 971.
[941] Trial Judgment, para. 971.
[942] See Trial Judgment, paras 559, 562, 566, 569-575, 590, 971. Contra Gucati Appeal Brief, paras 411, 413.
[943] See Haradinaj Appeal Brief, paras 209-216.
[944] See Trial Judgment, para. 993. See also Trial Judgment, paras 987-992.
[945] See e.g. Trial Judgment, paras 576-581.
[946] See Trial Judgment, para. 579, fn. 1228.

425. Next, the Panel notes that Haradinaj does not cite any relevant findings by the Trial Panel in support of his argument that it erred in considering instances of him exercising his right to free speech as an aggravating factor in sentencing.[947] In the absence of substantiated and specific arguments, the Panel will not assess them further on appeal.[948] In any event, as found above, the Panel agrees with the Trial Panel's assessment *inter alia* that, although the Accused were permitted to exercise freedom of speech, their acts went well beyond a legitimate exercise of this right when they gravely interfered with other legitimate public interests protected by law.[949]

426. Regarding Haradinaj's submission that the Trial Panel failed to consider in sentencing that the SPO did not charge Mr Berisha or other journalists in this case for publishing documents,[950] the Panel considers that this is not an allegation of error by the Trial Panel, but rather an implied challenge to the SPO's exercise of prosecutorial discretion in this case, which falls outside the scope of the current appeal proceedings.

2. Alleged Errors Regarding the Trial Panel's Failure to Consider Relevant Jurisprudence in Sentencing

(a) Submissions of the Parties

427. Gucati and Haradinaj argue that sentencing consistency is important and that the Trial Panel erred by refusing to consider relevant jurisprudence, including the range of sentences imposed on those convicted of similar, albeit different, offences at international criminal courts and tribunals.[951] In particular, Gucati submits that a

[947] Haradinaj Appeal Brief, paras 209, 217-222.
[948] See above, para. 29.
[949] See above, para. 382, referring to Trial Judgment, para. 822.
[950] See Haradinaj Appeal Brief, paras 209, 232.
[951] Gucati Appeal Brief, paras 420-423, referring to *Strugar* Appeal Judgement, paras 348-349; Haradinaj Appeal Brief, paras 223-231, referring to, *inter alia*, *Lubanga* Sentencing Decision, para. 12; *Marijačić and Rebić* Trial Judgement; *Jović* Trial Judgement, para. 26; *Al Khayat* Sentencing Judgment. See also Transcript, 1 December 2022, pp. 63, 65-68, 98-102, where the Accused refer, *inter alia*, to *Fatuma et al.*, *Šešelj*, *Rašić*, *Bemba et al.*, *Marijačić and Rebić*, *Jović*, *Akhbar and Al Amin*, *Al Jadeed and Al Khayat* and *Margetić* cases. Haradinaj also argues that the sentences imposed in these cases were at the lower end of the sentencing ranges prescribed in each case. See Transcript, 1 December 2022, pp. 101-102. The

sentence of four and a half years of imprisonment was at the high end of a range established for "witness interference" cases,[952] and was "grossly disproportionate and unjustifiable".[953]

428. Gucati and Haradinaj request that, in the event that the appeals against conviction are successful on one or more counts, the sentences be reduced to reflect this.[954]

429. The SPO responds that, in determining the individualised sentences for each Accused, the Trial Panel did not err in its consideration of the specific facts and circumstances of this particular case, as no other case is directly comparable.[955] In this regard, the SPO argues that, although consistency in sentencing is important and the Trial Panel's reasoning extensively referred to and was consistent with international jurisprudence, the Trial Panel was not obliged to follow such jurisprudence and its discretion was instead limited by the sentencing ranges applicable to the case at hand.[956] Finally, the SPO argues that consistency in sentencing cannot mean that the sentencing practice cannot evolve over time, in line with a changing understanding of the seriousness of certain offences.[957]

Accused furthermore argue that none of the aggravating circumstances from those cases are present in the case at hand. See Transcript, 1 December 2022, pp. 66, 103. See also Gucati Appeal Brief, para. 425 and authorities listed therein, where Gucati identifies in those cases distinguishing features absent from the present case.

[952] Gucati Appeal Brief, para. 424, referring to *Fatuma et al.* Appeal Judgement, Partially Dissenting Opinion of Judge Orie; Annex 3 to Gucati Appeal Brief. See also Transcript, 1 December 2022, pp. 63, 65-68, wherein Gucati submits that the range in previous cases goes from a fine, at the lowest level, up to a sentence of maximum two years, at the top of the range.

[953] Gucati Appeal Brief, paras 425-426; Gucati Reply Brief, para. 91; Transcript, 1 December 2022, p. 68; Transcript, 2 December 2022, p. 195. Haradinaj also argues that the sentence is "manifestly excessive". See Transcript, 1 December 2022, pp. 98, 103-104. See also Haradinaj Appeal Brief, para. 209.

[954] Gucati Appeal Brief, para. 427; Haradinaj Appeal Brief, paras 234-235; Haradinaj Reply Brief, para. 59; Transcript, 1 December 2022, pp. 69, 98; Transcript, 2 December 2022, pp. 194, 201.

[955] SPO Response Brief, paras 170-171, 174. See also Transcript, 2 December 2022, pp. 165-166, and authorities cited therein; SPO Response Brief, paras 170-176, 184, and authorities cited therein.

[956] Transcript, 2 December 2022, pp. 166-168, 172-175.

[957] Transcript, 2 December 2022, pp. 172-176.

430. Gucati replies that, in arguing that no case is directly comparable to the present one in terms of imposing a sentence, the SPO ignores the cases he identified in Annex 3 to the Gucati Appeal Brief at the "top end of the sentencing range".[958] He moreover argues that the SPO is incorrect in suggesting that the Trial Panel should have departed from the ranges set out in these cases due to certain differences in the facts compared to the case at hand or due to the passage of time, contending instead that such differences could not account for the differences in sentence and that some of the sentences were imposed in the past few years.[959]

(b) Assessment of the Court of Appeals Panel

431. The Appeals Panel will address whether the Trial Panel erred by finding that sentencing practices in cases at international criminal courts and tribunals were not directly comparable when determining the appropriate sentences for the Accused.[960] The Panel will first consider whether the sentences imposed by the Trial Panel were proportionate in relation to the sentences prescribed by the KCC, while adhering to the relevant provisions of the Law and Rules.

432. At the outset, the Panel notes that, while the Defence argues that the overall sentence of four and a half years of imprisonment is "grossly disproportionate and unjustifiable",[961] the Trial Panel in fact made, for the most part, sparing use of the

[958] Gucati Reply Brief, para. 90. See also Gucati Reply Brief, paras 88-89.
[959] Transcript, 2 December 2022, pp. 185-194. Haradinaj also adopts this argument. See Transcript, 2 December 2022, p. 201.
[960] See e.g. Gucati Appeal Brief, paras 420-423; Haradinaj Appeal Brief, paras 223-231. See also Annex 3 to Gucati Appeal Brief. The Panel notes that the SPO requests that it reject Annex 3 to Gucati Appeal Brief as a "transparent attempt to circumvent the word limit". See SPO Response Brief, fn. 415. The Panel notes that in Annex 3, Gucati summarises the procedural background and varying sentences in 16 contempt cases at international courts and tribunals. Although Gucati refers to these cases in his relevant arguments in his Appeal Brief (see Gucati Appeal Brief, para. 425), the Panel does not consider these summaries in Annex 3 to form part of his arguments and are more akin to a list of cases in a glossary. Moreover, both Parties discussed many of the cases listed in Annex 3 during the Appeal Hearing. As such, the Panel will not reject Annex 3 to Gucati Appeal Brief.
[961] See Gucati Appeal Brief, paras 425-426; Haradinaj Appeal Brief, para. 209; Gucati Reply Brief, para. 91; Transcript, 1 December 2022, pp. 68, 98, 103-104; Transcript, 2 December 2022, p. 195.

sentencing ranges prescribed under the relevant provisions of the KCC for each Count where it entered a conviction. Specifically, while the Trial Panel did impose the *maximum* sentence of one year of imprisonment under Count 5, it imposed the *minimum* sentences of one year of imprisonment under Counts 1 and 2, a sentence of four years of imprisonment under Count 3 which corresponds to a quarter of the available sentencing range,[962] and a sentence of two years of imprisonment for Count 6 which is a third of the available sentencing range.[963]

433. The Panel recalls that, according to Rule 163(4) of the Rules, in order to reflect the totality of the Accused's criminal conduct for all of the Counts, the single sentence shall not be less than the highest sentence imposed for an individual count, which in this case is the sentence imposed for Count 3 for both Accused.[964] In this respect, the Panel notes that the Trial Panel's finding on the single sentence of four and a half years of imprisonment is six months over the "minimum" possible sentence of four years of imprisonment under the Rules.

434. Regarding the overall determination of the sentence, the Appeals Panel agrees with the Trial Panel that "the determination of an appropriate sentence is highly dependent on the circumstances of each specific case"[965] and that previous sentencing

[962] The Panel notes that the Trial Panel also imposed under Count 3 a "symbolic" fine of 100 euros on each of the Accused, from a maximum of 125,000 euros. However, the Panel will not address this fine in any further detail, as it is not challenged by the Defence. See Trial Judgment, paras 980, 982, 1005, 1008.

[963] See Trial Judgment, paras 980-981, 1005-1006. The Panel notes that the applicable sentencing ranges are as follows: (i) Count 1 – one to five years of imprisonment (under Article 401(1) and (5) of the KCC); (ii) Count 2 – one to five years of imprisonment (for both of the Accused, under Article 401(2)-(3) and (5) of the KCC for Gucati and under Article 401(2) and (5) of the KCC for Haradinaj); (iii) Count 3 – a fine of up to 125,000 euros and two to ten years of imprisonment (under Article 387 of the KCC); (iv) Count 5 – a fine or up to one year of imprisonment (under Article 392(1) of the KCC); and (v) Count 6 – six months to five years of imprisonment (under Article 392(2)-(3) of the KCC). See also above, para. 396.

[964] See Trial Judgment, paras 984, 1009. See also Trial Judgment, para. 956.

[965] See Trial Judgment, para. 957. See also Trial Judgment, paras 979, 1004.

practice is one factor to consider when determining a sentence.[966] This finding is consistent with international criminal jurisprudence on sentencing, namely that while a panel may rely on sentencing practices in prior cases, it is not often possible to "transpose" or "infer" the sentence from one case to another.[967]

435. That being said, the Panel notes that, as discussed further during the Appeal Hearing, consistency in sentencing – for similar cases in particular – is important, but must allow for the exercise of discretion to account for, *inter alia*, the individual facts of each case.[968] The Panel therefore considers that, in addition to looking at the prescribed sentencing ranges from the KCC, the sentencing practice of Kosovo courts dealing with the same or similar offences and the practice of international criminal courts and tribunals are relevant to assess the Trial Panel's use of discretion in sentencing the Accused.

436. First, the Appeals Panel identified a number of relevant domestic Kosovo cases dealing with the offence of obstructing official persons in performing official duties (Count 1), together with other charges not relevant to this case. The Panel notes that the individual sentences imposed in those cases were either equal to the minimum available sentence, or slightly *above* the minimum applicable sentence.[969] As noted

[966] See *Strugar* Appeal Judgement, para. 349; *Lubanga* Sentencing Appeal Judgment, para. 76. See also Trial Judgment, paras 957, 979, 1004.
[967] See *Lubanga* Sentencing Appeal Judgment, paras 76-77; *Strugar* Appeal Judgement, para. 348. See also Trial Judgment, paras 957, 979, 1004.
[968] See Transcript, 2 December 2022, pp. 167-168, 172-176, 188-194. See also *Ambos* Treatise ICL II, pp. 334-335, 347-348.
[969] See Kosovo Appeal Judgment of 15 September 2016; Kosovo Basic Court Judgment of 29 February 2016; Kosovo Basic Court Judgment of 23 October 2015; Kosovo Appeal Judgment of 28 May 2014 (the Panel notes that, in this case, contrary to Article 316(3) of the PCCK which prescribed a sentence of between three months and five years of imprisonment, Z.Č. was sentenced *inter alia* to two months of imprisonment for the charge of obstructing official persons in performing official duties (in an aggravated form)).The Panel notes that, in addition to dealing with the offence of obstructing official persons in performing official duties (Count 1), the case law identified by the Appeals Panel also deals, *inter alia*, with the offence of participating in a group obstructing official persons in performing official duties (Count 2), of which the Accused are no longer found guilty in light of the Appeals Panel's findings above in relation to concurrence (see above, para. 310). Nevertheless, the Panel considers the sentencing practice concerning the offence under Count 2 informative in its analysis of the

above, for the Accused's convictions under Count 1, the Trial Panel imposed the minimum applicable sentence, and therefore appears to have been more conservative in its sentencing than the Kosovo cases. The Panel was unable to identify Kosovo sentencing jurisprudence dealing with the other offences of which the Accused were convicted,[970] nor did the Parties bring any to the Panel's attention.

437. The Appeals Panel further observes that the Trial Panel took note of the range of sentences imposed on persons convicted of similar offences at international criminal courts and tribunals.[971] The Appeals Panel has further considered relevant cases from international criminal courts and tribunals raised by the Parties during the Appeal Hearing and in their written submissions.[972] The Panel is cognisant of the variations in the sentences imposed – some significantly different – as compared to the sentences in this case.[973] However, the Appeals Panel cannot ignore the specific facts of this case, viewed within the context of the applicable Kosovo legal framework and the sentencing ranges of the KCC, including the findings that the Trial Panel considered in its assessment of the relevant sentencing factors, such as the Accused's wide dissemination of the Protected Information, repeated conduct and consistent vows to undertake the same offences again, together with "disparaging remarks

---

proportionality of the Trial Panel's individual sentences in this case. The Panel notes that the sentences imposed in those cases were slightly or considerably *above* the minimum applicable sentence. See Kosovo Appeal Judgment of 7 December 2017; Kosovo Appeal Judgment of 4 August 2016; Kosovo Appeal Judgment of 28 May 2014.

[970] Namely, Count 3 (intimidation during criminal proceedings), Count 5 (violating secrecy of proceedings, through unauthorised revelation of secret information disclosed in official proceedings) and Count 6 (violating secrecy of proceedings, through unauthorised revelation of the identities and personal data of protected witnesses). See Trial Judgment, paras 1012, 1015.

[971] See Trial Judgment, paras 979, 1004, referring to *Marijačić and Rebić* Trial Judgement, para. 53; *Jović* Trial Judgement, para. 27; *Akhbar and Al Amin* Sentencing Judgment, p. 8; *Al Khayat* Sentencing Judgment, para. 23; *Nzabonimpa et al.* Trial Judgement, paras 407-408.

[972] See e.g. *Margetić* Trial Judgement; *Bemba et al.* Sentencing Decision; *Bemba et al.* Re-Sentencing Decision. See also Gucati Appeal Brief, para. 225; Transcript, 1 December 2022, pp. 67-68, 102-103; Transcript, 2 December 2022, pp. 165-166, 185-186.

[973] See e.g. *Haraqija and Morina* Trial Judgement, para. 122; *Margetić* Trial Judgement, para. 94; *Jović* Trial Judgement, para. 45; *Marijačić and Rebić* Trial Judgement, para. 53; *Bemba et al.* Sentencing Decision, pp. 98-99; *Bemba et al.* Re-Sentencing Decision, pp. 50-51. See also *Ambos* Treatise ICL II, pp. 311-315, 334-335, 347-349.

toward witnesses in a climate of witness intimidation".[974] In light of the emphasis on deterrence in Article 38 of the KCC, and considering the seriousness of the Accused's offences, the Appeals Panel finds that the Trial Panel did not err in its determination of the Accused's sentences on the basis of the convicted counts.

438. The Appeals Panel echoes the Trial Panel's observation, made during the pronouncement of the Trial Judgment, that:

> [t]his case is important because it reflects the very reason why the Specialist Chambers was created. This case concerns the proper administration of justice, the integrity and security of proceedings and, crucially, the safety, well-being and freedom from fear of hundreds of persons who have come forward to fulfil their civic duty as witnesses. Their protection from intimidation and harm lies at the very foundation of any system of criminal justice, be that domestic or international. Without witnesses, there can be no justice for victims or for society at large. The acts and conduct of the accused challenged that very foundation.[975]

439. The Appeals Panel agrees with the Trial Panel that the Accused's crimes were serious and of distinct importance. Therefore, and also in considering the factors explored above regarding the prescribed sentencing ranges and the sentencing practice in Kosovo and that of international criminal courts and tribunals, the Appeals Panel finds no basis for the Accused's contention that their sentences were "grossly

---

[974] See above, para. 415. See also Trial Judgment, para. 979 (with respect to Gucati) (and see also para. 1004, where the Trial Panel made very similar observations with respect to Haradinaj, with the appropriate variations based on the facts), where the Trial Panel, in finding that the sentences for the Accused should take into consideration only the facts of this case, noted that the offences of which the Accused are convicted:

> encompass the revelation of at least one hundred SITF Requests, several WCPO Responses, all treated by the SPO as confidential, a highly sensitive SPO internal work product and the names and personal details of *hundreds* of Witnesses and Potential Witnesses. The offences encompass: (i) dissemination on a wide scale involving a large number of protected witnesses; (ii) with the use of an organisational platform and several broadcasted media appearances; (iii) through repeated conduct and consistent vows to undertake the same offences again; (iv) coupled with disparaging remarks towards witnesses in a climate of witness intimidation; and (v) with the potential effect of Protected Information being accessible for a long time to a large number of persons.

[975] See KSC-BC-2020-07, Transcript, 18 May 2022, pp. 3858-3859.

disproportionate and unjustifiable", based on the counts on which they were convicted.

440. However, the Appeals Panel recalls its finding above on Counts 1 and 2, namely that the Accused can only be convicted on the basis of Article 401(1) and (5) of the KCC, reversing the Accused's convictions on the basis of Article 401(2) and (5) of the KCC and Gucati's conviction on the basis of Article 401(3) of the KCC, and entering a verdict of acquittal for both Accused under Count 2 of the Indictment.[976] In light of the Appeals Panel's finding reversing the Accused's convictions for Count 2, the Panel considers that the single sentences imposed by the Trial Panel should be reduced. Taking into account proportionality and the minimum single sentence allowed by Rule 163(4) of the Rules – four years of imprisonment based on the Trial Panel's finding on the Accused's sentences for Count 3[977] – the Appeals Panel, Judge Ambos dissenting,[978] finds that the single sentences for Gucati and Haradinaj each shall be reduced by three months, to a single sentence of four years and three months of imprisonment.

441. In light of the above, the Appeals Panel grants Gucati's Ground 20 in relevant part and Haradinaj's Ground 24 in relevant part, and dismisses the remainder of these grounds.

[976] See above, para. 310.
[977] See above, para. 433.
[978] In light of the dissent by Judge Ambos with respect to an aspect of the Majority's interpretation of the *actus reus* of Article 401(1) of the KCC, resulting in an acquittal under Count 1 for Gucati and Haradinaj, Judge Ambos considers that the single sentence for Gucati and Haradinaj each shall be reduced by six months to a single sentence of four years – the minimum single sentence allowed by Rule 163(4) of the Rules based on the Trial Panel's finding on the Accused's sentences for Count 3. See Section VI, paras 17-19.

V. DISPOSITION

442. For these reasons, having considered all of the arguments made by the Parties, the Court of Appeals Panel, pursuant to Article 46 of the Law and Rules 182 and 183 of the Rules:

GRANTS Gucati Grounds 11, 16 and 20 in relevant part and Haradinaj Grounds 3 in relevant part and 24 in relevant part;

DISMISSES Gucati's and Haradinaj's appeals in all other respects;

REVERSES Gucati's and Haradinaj's conviction for Obstructing Official Persons in Performing Official Duties by participating in the common action of a group under Count 2 of the Indictment;

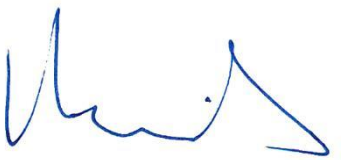
AFFIRMS Gucati's and Haradinaj's conviction for Intimidation During Criminal Proceedings under Count 3 of the Indictment, Violating Secrecy of Proceedings through unauthorised revelation of secret information disclosed in official proceedings under Count 5 of the Indictment, and Violating Secrecy of Proceedings through unauthorised revelation of the identities and personal data of protected witnesses under Count 6 of the Indictment, and **FURTHER AFFIRMS**, Judge Ambos dissenting, Gucati's and Haradinaj's conviction for Obstructing Official Persons in Performing Official Duties by serious threat under Count 1 of the Indictment;

SETS ASIDE the single sentence of four and a half years of imprisonment imposed on Gucati and Haradinaj and **IMPOSES**, Judge Ambos dissenting, a single sentence of four years and three months of imprisonment on Gucati, with credit for the time served, and a single sentence of four years and three months of imprisonment on Haradinaj, with credit for the time served;

AFFIRMS Gucati's and Haradinaj's additional sentence to pay a fine of one hundred euros (100 EUR);

RULES that this Judgment shall be enforced immediately pursuant to Rule 185(1) of the Rules; and

ORDERS that, in accordance with Article 50(1) of the Law and Rule 166(3) of the Rules, Gucati and Haradinaj shall remain in the custody of the Specialist Chambers pending the finalisation of the arrangements for their transfer to the State where their sentences will be served.



Judge Michèle Picard,
Presiding Judge

Judge Kai Ambos

Judge Nina Jørgensen

Dated this Thursday, 2 February 2023

At The Hague, the Netherlands

VI. PARTIALLY DISSENTING OPINION OF JUDGE KAI AMBOS

1. I concur with the reasoning and conclusions of the Appeals Panel confirming the conviction of Mr Gucati and Mr Haradinaj (collectively, "Accused") on the basis of Articles 387 and 392(1)-(3) of the Criminal Code of the Republic of Kosovo ("KCC") (namely, Counts 3, 5 and 6). I note in this regard the severity of the conduct which forms the basis of these convictions. Indeed, this conduct gravely impacts on the integrity of criminal proceedings as well as on the safety, security, well-being, privacy or dignity of (potential) witnesses or their families. I further agree with the Appeals Panel's reasoning on the relationship of concurrence between paragraphs (1) and (2) of Article 401 of the KCC (Counts 1 and 2, respectively). However, for the reasons outlined below (see below, Section A), I unfortunately cannot join the Majority with respect to its interpretation of the *actus reus* of Article 401(1) of the KCC and I would have acquitted the Accused in that regard. For the same reasons, I would not uphold the conviction for Article 401(2) of the KCC. As a further consequence of these findings, I would have reduced the single sentence to four (4) years (see below, Section B).

A. PRINCIPLE OF LEGALITY, ESPECIALLY *LEX STRICTA*, AND ARTICLE 401(1) OF THE KCC

2. Article 401(1) of the KCC punishes, in the relevant part, a person who "by force or serious threat, obstructs or attempts to obstruct an *official person* in performing official duties […]" (emphasis added). The Trial Panel found no evidence that the Accused have "directly threatened any [Specialist Chambers]/SPO Official in the performance of [Specialist Chambers]/SPO Work" and, instead, considered that Article 401(1) of the KCC "does not require that the serious threat be directed against the official person only" but that it "may be directed also against another person […]".[1] The Trial Panel held that "nothing in the wording of Article 401 of the

[1] KSC-BC-2020-07, F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022 (confidential version filed on 18 May 2022) ("Trial Judgment"), para. 639.

KCC requires that the force or serious threat be directed against the official person only".[2] According to the Trial Panel, restricting this offence to acts directed at official persons "would be inconsistent with the ratio of the offence – which seeks to ensure that official duties are not obstructed, directly or indirectly – and would include a limitation in the text not foreseen by the legislator".[3] This is also in line with the ruling of the Pre-Trial Judge.[4] My colleagues agree with these findings and partly repeat the underlying reasoning. They consider, *inter alia*, that "nothing in the language of this provision requires that the serious threat be specifically directed at only the official person in question"; otherwise, the provision "would have been formulated in a manner" that explicitly provided so.[5] They further refer to "the rationale of the offence, which is to ensure that official duties are not obstructed, directly or indirectly", namely, that the offence is designed to protect official persons "in the unimpeded exercise of their official duties", and conclude that it suffices "that the accused's act must have had the capacity to obstruct official persons".[6]

3. I respectfully disagree with this interpretation of Article 401(1) of the KCC. In my view, this amounts to a too broad interpretation which violates the principle of legality in its variation of *lex stricta* (prohibition of analogy in *malam partem*). This principle is explicitly provided for by Article 33 of the Kosovo Constitution[7] and, in a

[2] Trial Judgment, para. 146.
[3] Trial Judgment, para. 146.
[4] KSC-BC-2020-07, F00074/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment, 22 December 2020 (strictly confidential and *ex parte* version filed on 11 December 2020, reclassified as strictly confidential on 22 December 2020, reclassified as confidential on 24 February 2021), para. 68: "[…] Article 401(1) of the KCC does not require that the force or the serious threat is directed against the official person. Rather, the force or serious threat may be directed against one or more other persons, as long as it results in the (attempted) obstruction of an official person in performing official duties."
[5] Appeal Judgment, para. 282.
[6] Appeal Judgment, para. 282.
[7] The Kosovo Constitution of 2008 superseded any constitution previously applicable in the territory of Kosovo and the Specialist Chambers are only bound to uphold the protections enshrined in it. See KSC-BC-2020-06, IA009/F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021 ("*Thaçi et al.* Appeal Decision on Jurisdiction"), para. 26; KSC-BC-2020-04, IA002/F00010, Decision on Pjetër Shala's Appeal Against

more elaborated form, by Article 2 of the KCC. Article 2(3) of the KCC specifically defines the *lex stricta* element as follows:

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

4. The legality principle is enshrined in Kosovo's legal tradition as a civil law jurisdiction as reflected in the law of the former Yugoslavia.[8] In line with this tradition, the principle is often paraphrased with the Latin maxim *nullum crimen, nulla poena sine lege* and encompasses as its basic components the rules of *lex praevia* (prohibition of retroactive criminalisation), *lex certa* (certainty of the elements of the offence), *lex stricta* (strict interpretation and prohibition of analogy in *malam partem*) and *lex scripta* (written law).[9] While the prohibition of retroactivity and the requirement of certainty are also recognized in common law jurisdictions – as prohibition of *ex post facto* laws and void of vagueness doctrine[10] – and *lex stricta* can also be found there at least as a

---

Decision on Motion Challenging the Establishment and Jurisdiction of the Specialist Chambers, 11 February 2022 ("*Shala* Appeal Decision on Jurisdiction"), para. 20; KSC-CC-2022-16, F00004, Decision on the Referral of Pjetër Shala to the Constitutional Court Panel Concerning Fundamental Rights Guaranteed by Article 33 of the Kosovo Constitution and Article 7 of the European Convention on Human Rights, 6 July 2022, paras 22, 64.

[8] See Constitution of the Socialist Federal Republic of Yugoslavia (1974), Article 181; Criminal Code of the Socialist Federal Republic of Yugoslavia, (1976), Article 36. See also Munda, A., "*Das Strafrecht Jugoslawiens*", in Mezger, E., Schönke, A., Jescheck, H. H. (eds.), *Das ausländische Strafrecht der Gegenwart Vol. I*, Duncker & Humblot 1955, pp. 382-383.

[9] The latin formulation was coined by the German criminal law theorist Johann Paul Anselm Feuerbach in his Treatise on Criminal Law of 1801 (*Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts*, Giessen: Heyer 1801, para. 24, p. 20) but the principle can be traced back to the English *Magna Carta Libertatum*, 15 June 1215, Article 39, and, of course, to the French *Déclaration des Droits de l'Homme et du Citoyen*, 1789, Articles 7, 8. As to the historical background, please indulge me in quoting one of my own works: Ambos, K., "*Nulla Poena Sine Lege* in International Criminal Law", in Haveman, R. and Olusanya, O. (eds), *Sentencing and Sanctioning in Supranational Criminal Law*, Antwerp: Intersentia 2006 ("*Ambos Nulla Poena Sine Lege* in ICL"), pp. 17 et seq. See from a comparative perspective, Pradel, J., *Droit Pénal Comparé* (Fourth Edition), Dalloz 2016, p. 59; Dubber, M. and Hörnle, T., *Criminal Law: A Comparative Approach*, Oxford University Press 2014 ("Dubber and Hörnle"), pp. 73-74.

[10] See e.g. United States of America, Constitution, Article I, section 9, para. 3 ("No Bill of Attainder or ex post facto Law shall be passed") and for the prohibition of vagueness, see the due process guarantees of the Fifth and Fourteenth Amendments. See also Dubber and Hörnle, pp. 74 et seq, 85 et seq.

rule of strict or lenient interpretation (rule of lenity),[11] the requirement of written law is alien to the traditional common law approach allowing for (unwritten) common law crimes.

5. The principle of legality is also recognized in international law, especially by Article 7 of the European Convention on Human Rights ("ECHR"),[12] binding on the Specialist Chambers as per Article 3(2)(e) of the Law.[13] However, only Articles 22-24 of the Rome Statute of the International Criminal Court ("Rome Statute") provide for the elaborated form of the *nullum crimen sine lege* principle,[14] with Article 22(2) of the Rome Statute explicitly defining *lex stricta* in the same way as done by Article 2(3) of the KCC.[15] This explains why the human rights case law, especially that of the European Court of Human Rights ("ECtHR"), pursues what has been termed a "minimalist" approach,[16] allowing for the gradual clarification of rules of criminal

Interestingly, the principle's relationship with due process goes back to the respective translation by Sir Edward Coke's famous *The Second Part of the Institutes of the Laws of England* (Fourth Edition), 1671, pp. 51-55.

[11] Hall, J., *General Principles of Criminal Law* (Second Edition), Bobbs-Merrill 1960, pp. 38 et seq.; Horder, J., *Ashworth's Principles of Criminal Law* (Tenth Edition), Oxford University Press 2022 ("Horder"), p. 91; Dubber and Hörnle, p. 73.

[12] See also Universal Declaration of Human Rights, Article 11(2); International Covenant on Civil and Political Rights, Article 15(1); American Convention on Human Rights, Article 9.

[13] See also Kosovo Constitution, Article 22; *Shala* Appeal Decision on Jurisdiction, para. 26.

[14] Cf. Broomhall, B., in Ambos, K. (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Fourth Edition), C. H. Beck, Hart, Nomos 2022 ("*Ambos* Rome Statute Commentary"), Article 22, mns 29 et seq.; Schabas, W. A. and Ambos, K., in *Ambos* Rome Statute Commentary, Article 23, mns 5 et seq.; Halling, M., in *Ambos* Rome Statute Commentary, Article 24, mns 19 et seq. See also Ambos, K., *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Second Edition), Oxford University Press 2021 ("*Ambos* Treatise ICL I"), pp. 145-146.

[15] Article 22(2) of the Rome Statute reads: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted."

[16] ECtHR, *Ilnseher v. Germany*, nos 10211/12 and 27505/14, Judgment, Dissenting Opinion of Judge Pinto de Albuquerque Joined by Judge Dedov, 4 December 2018 ("Judge Pinto de Albuquerque Dissenting Opinion"), paras 90 et seq. On minimalist vs. maximalist approaches, see also *Ambos Nulla Poena Sine Lege* in ICL, pp. 28 et seq.

liability through judicial interpretation[17] and otherwise focusing on accessibility and foreseeability (sufficient notice) with regard to the criminality of a certain conduct.[18]

6. Another reason for the more flexible approach of human rights case law is its object of reference – (serious) human rights violations – which often strikes the balance between a strict and a more flexible (normativized) understanding of legality in favour of the latter, giving prevalence to prosecution over a too narrow (formalistic) reading of legality.[19] This flexible approach is most clearly expressed by Article 7(2) of the ECHR – the (in)famous Nuremberg clause – which permits the trial and punishment for conduct "criminal according to the general principles of law", that is, for *mala in se* offences as opposed to *mala prohibita*.[20] At any rate, this human rights case law – relied on by the Appeals Panel in a different composition[21] – is of little, if any relevance in the context of the present case, since, it either does not deal with the *lex stricta* rule at all or it conflates it with *lex certa*, at most ruling out wholly unreasonable interpretations for their incompatibility with the essence of the respective offence and the foreseeability standard.[22] Apart from that, human rights case law rarely deals with

[17] ECtHR, *Drėlingas v. Lithuania,* no. 28859/16, Judgment, 12 March 2019 ("*Drėlingas* Judgment"), para. 96; ECtHR, *Vasiliauskas v. Lithuania*, no. 35343/05, Judgment, 20 October 2015 ("*Vasiliauskas* Judgment"), para. 155; ECtHR, *Streletz, Kessler and Krenz v. Germany*, nos 34044/96, 35532/97 and 44801/98, Judgment, 22 March 2001 ("*Streletz et al.* Judgment"), para. 82; ECtHR, *S.W. v. The United Kingdom*, no. 20166/92, Judgment, 22 November 1995, para. 36; ECtHR, C.*R. v. The United Kingdom*, no. 20190/92, Judgment, 22 November 1995, para. 34.

[18] *Drėlingas* Judgment, para. 96; ECtHR, *G.I.E.M. S.R.L. and Others v. Italy*, nos. 1828/06, 34163/07, 19029/11, Judgment, 28 June 2018, para. 242; *Vasiliauskas* Judgment, para. 155.

[19] On the normativization of *nullum crimen sine lege* in international criminal law in this regard, cf. *Ambos*, Treatise ICL I, pp. 145-146.

[20] See on this distinction the highly instructive Schmitt, C., "*Das internationalrechtliche Verbrechen des Angriffskriegs und der Grundsatz "Nullum crimen, nulla poena sine lege*", Legal Brief 1945, *edited by H. Quaritsch*, Duncker & Humblot 1994, pp. 21-22 (quoting, *inter alia*, H. R. Brill's famous definition in the 1922 Encyclopedia of Criminal Law: "Crimes *mala in se* include all breaches of the public peace or order, injuries to person or property, outrages upon public decency or good morals and wilful and corrupt breaches of official duty.").

[21] *Thaçi et al.* Appeal Decision on Jurisdiction, paras 142, 211, 214; see also *Shala* Appeal Decision on Jurisdiction, para. 27 (foreseeability has to be assessed on a case-by-case-basis).

[22] One of the few cases where *lex stricta* is mentioned is ECtHR, *Kokkinakis v. Greece*, no. 14307/88, Judgment, 25 May 1993, para. 52 ("criminal law must not be extensively construed to an accused's detriment, for instance by analogy") but it is then conflated with *lex certa* ("[…] offence must be clearly

ordinary criminality as captured by the ordinary offences of our domestic criminal codes.

7. The *lex stricta* rule is directed at the judge – in contrast to *leges praeviae*, *certae* and *scriptae* directed at the legislator – and thus operates as a principle of (statutory) interpretation.[23] As such, it is highly relevant in civil law jurisdictions like that of Kosovo. Let us look at a few representative related jurisdictions. In *France*, Article 111-4 of the French Criminal Code (*Code Pénal*) explicitly subjects the "*loi pénale*" to an "*interprétation stricte*" and the case law applies this rule to interpret criminal offences narrowly.[24] In *Germany*, the principle of legality has constitutional status[25] and the German Constitutional Court has stressed the *lex certa* rule in several decisions, excluding "any interpretation of a criminal offence which broadens the contents […] and thus makes conduct punishable which is not covered by the elements of the offence in line with its possible literal meaning".[26] The Court has repeatedly

---

defined in law") and reduced to subjective foreseeability ("[…] condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."). A more typical rejection of the legality objection can be found in *Streletz et al.* Judgment, para. 50 and ECtHR, *Radio France and Others v. France*, no. 53984/00, Judgment, 30 March 2004, para. 20 (both dismissing a violation of Article 7 of the ECHR since it does not outlaw "the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, 'provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen'"). See also Judge Pinto de Albuquerque Dissenting Opinion, para. 92.

[23] Cf. Broomhall, B., in *Ambos* Rome Statute Commentary, Article 22, mns 10-11; see also Horder, p. 91 (stressing the rule's relevance for "the courts' task in interpreting legislation").

[24] Cf. France, Court of Cassation (*Cour de Cassation*), Plenary Assembly, 99-85.973, 29 June 2001 (holding in this "arrêt de principe" that "le principe de légalité […] qui impose une interprétation stricte de la loi pénale, s'oppose à ce que l'incrimination prévue par l'article 221-6 du Code pénal, réprimant l'homicide involontaire d'autrui, soit étendue au cas de l'enfant à naître dont le régime juridique relève de textes particuliers sur l'embryon ou le foetus"). See also France, Constitutional Council (*Conseil Constitutionnel*), 96-377 DC, Decision, 16 July 1996, para. 11 ("[…] le principe de légalité impose d'interpréter strictement la loi pénale, de se prononcer sans que son appréciation puisse encourir la critique d'arbitraire").

[25] Cf. Germany, Constitution (*Grundgesetz für die Bundesrepublik Deutschland*), 23 May 1949 (entered into force on 25 May 1949, last amended on 19 December 2022), Article 103(2); see also Germany, Criminal Code (*Strafgesetzbuch*), 15 May 1871 (last amended 4 December 2022), § 1.

[26] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvR 388/05, Decision, 7 March 2011 ("German Constitutional Court Decision of 7 March 2011"), para. 21 (with further references): "Ausgeschlossen ist jede Auslegung einer Strafbestimmung, die den Inhalt der gesetzlichen

emphasised that "the possible literal meaning of the law marks the outer limit of permissible judicial interpretation"[27] or, in other words, "draws a limit to judicial interpretation that is insurmountable".[28] In *Italy*, similar to Germany, the legality principle is enshrined in the Constitution[29] and Article 12(1) of the so-called *Preleggi*[30] provides for a rule of strict interpretation.[31] The Italian Constitutional Court, similar to the German one (to which it explicitly refers), has repeatedly held that the *lex stricta* rule constitutes "an insurmountable limit" for the judicial interpretation of a "legislative text" for it is this text and not its subsequent interpretation that must provide the citizens "with a clear warning" while he/she cannot be sanctioned for a conduct "that ordinary language does not allow to be traced back to the literal meaning of the expressions used by the legislator".[32] Last but not least, in *Spain*, the

Sanktionsnorm erweitert und damit Verhaltensweisen in die Strafbarkeit einbezieht, die die Tatbestandsmerkmale der Norm nach deren möglichem Wortsinn nicht erfüllen".

[27] Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvR 568/04, Decision, 1 July 2004, para. 4.

[28] German Constitutional Court Decision of 7 March 2011, para. 21: "Der mögliche Wortsinn des Gesetzes zieht der richterlichen Auslegung eine Grenze, die unübersteigbar ist."

[29] Cf. Italy, Constitution (*Costituzione della Repubblica Italiana*), 22 December 1947 (entered into force on 1 January 1948, last amended on 7 November 2022), Article 25(2) and (3); see also Italy, Criminal Code (*Codice Penale*), Royal Decree no. 1398, 19 October 1930 (last amended in 2022), Articles 1 and 2.

[30] The *Preleggi* ("preliminary provisions" or "pre-laws") constitute preliminary provisions to the Civil Code, containing general principles on the application and interpretation of the law with a view, *inter alia*, to fill gaps in the existing legislation. See *Disposizioni sulla legge in generale or Preleggi*, Royal Decree no. 262, 16 March 1942.

[31] Article 12(1) of the *Preleggi* reads: "Nell'applicare la legge *non* si può ad essa attribuire *altro senso* che quello fatto palese dal significato proprio *delle parole* secondo la connessione di esse, e dalla intenzione del legislatore." (emphasis added).

[32] Italy, Constitutional Court (*Corte Costituzionale*), no. 98, Judgment, 28 April 2021, *Considerato in diritto*, para. 2.4. ("[…] costituisce così un limite insuperabile rispetto alle opzioni interpretative a disposizione del giudice di fronte al testo legislativo. E ciò in quanto, nella prospettiva culturale nel cui seno è germogliato lo stesso principio di legalità in materia penale, è il testo della legge – non già la sua successiva interpretazione ad opera della giurisprudenza – che deve fornire al consociato un chiaro avvertimento circa le conseguenze sanzionatorie delle proprie condotte; sicché non è tollerabile che la sanzione possa colpirlo per fatti che il linguaggio comune non consente di ricondurre al significato letterale delle espressioni utilizzate dal legislatore."). In this judgment, the Italian Constitutional Court refers to case law of the German Federal Constitutional Court. See also Italy, Criminal Court of Cassation (*Corte di Cassazione Penale*), section II, no. 40860, Judgment, 20 September 2022, p. 4, para. 2 ("è necessario in primo luogo tenere conto nella interpretazione delle norme del significato lessicale delle parole utilizzate dal legislatore"); Italy, Criminal Court of Cassation (*Corte di Cassazione Penale*), section VI, no. 49657, Judgment, 8 July 2022, p. 5, para. 5.1 (affirming that one must not attribute "altro

principle of legality is also recognized in the Constitution[33] and the Spanish Constitutional Court has repeatedly stressed the limits of judicial interpretation, subjecting the judge "strictly" to the literal meaning of the law, as well as prohibiting any form of analogy or exercise of (judicial) discretion.[34]

8. Fully in line with this case law – and much more specific and demanding than the ECtHR – the ICC Trial Chamber in the *Katanga* case held the following:

> In application of the principle of strict construction, the provisions of the Statute concerning the crimes may not […] be defined by analogy or applied to situations not expressly provided for in the actual wording of the statutory provisions. The Chamber therefore cannot adopt a method of interpretation that might broaden the definition of the crimes and it is instead duty-bound to apply strictly the provisions which specifically proscribe only the conduct which the drafters expressly intended to criminalise.[35]

9. In a similar vein, Kosovo case law has emphasised the importance of the principle of legality, including its *lex stricta* component. Thus, the Kosovo Court of Appeals held that a judge must not fill a gap in the criminal law by applying a statute beyond its wording or by extending a precedent through the creation of a new

---

senso che quello fatto palese dal significato proprio delle parole, secondo la connessione di esse, e dalla intenzione del legislatore").

[33] Cf. Spain, Constitution (*Constitución Española*), 6 December 1978 (entered into force on 29 December 1978), Article 25(1).

[34] Cf. Spain, Constitutional Court (*Tribunal Constitucional*), Plenary, 133/1987, Judgment, 21 July 1987, *Fundamento Jurídico* 4 ("[…] que la ley describa un supuesto de hecho estrictamente determinado (*lex certa*); lo que significa un *rechazo de la analogía* como fuente creadora de delitos […] [y la] *prohibición de extensión analógica* del Derecho penal, al resolver sobre los límites de la interpretación de los textos legales […]) and *Fundamento Jurídico* 5 ("[…] el principio de legalidad penal garantiza, por un lado, el *estricto sometimiento* del Juez *a la ley penal*, *vedando* todo margen de arbitrio o de *discrec[c]ionalidad* en su aplicación así como una interpretación analógica de la misma […]" (emphasis added)). See also Spain, Constitutional Court (*Tribunal Constitucional*), 142/1999, Judgment, 22 July 1999, *Fundamento Jurídico* 3 (affirming that the judge operates in a situation of a "sujeción estricta a la ley penal" and must not employ an "interpretación extensiva y la analogía *in malam partem*"). I note in passing that the Spanish Constitutional Court does not explicitly mention *lex stricta* but apparently subsumes it under *lex certa*. See, however, a recent decision of the Spanish Supreme Court (*Tribunal Supremo*) where *lex stricta* is at least mentioned. See Spain, Supreme Court (*Tribunal Supremo*), 4323/2020, Judgment, 26 November 2020, pp. 5, 7.

[35] ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 52.

unwritten crime, any amendment of the law must be left to the legislator, interpretation via analogy is prohibited, and every provision must be interpreted strictly.[36] In more concrete terms, EULEX Judge Timo Vuojolathi has interpreted the offence of "aiding the perpetrator to elude discovery" narrowly so as to avoid a violation of the principle of legality.[37]

10. From all of this it follows that the *lex stricta* rule has to be taken very seriously by the Specialist Chambers and the applicable criminal law must not lightly be interpreted broadly or expansively to the detriment of the accused; any doubt as to the meaning of a statutory provision, including as to its objective elements (*actus reus*), has to be resolved in favour of the accused.[38] As to Article 401(1) of the KCC, this means that its wording – speaking of "force or serious threat" to be directed against "an official person in performing official duties" – cannot be reasonably interpreted in including threats directed against private persons, for example witnesses. For this reason, I am rather puzzled by the argument of the Trial Panel and of the Majority of the Appeals Panel that "nothing in the language of this provision requires that the serious threat be specifically directed at the official person in question".[39] I would rather say the opposite: the text of Article 401(1) of the KCC states unequivocally that the threat must be directed against an official person but it does not say that it can also be directed against private persons.

11. In addition to this, an argument of the type "nothing in the language of this provision requires", as made by the Majority,[40] is, in my view, putting the card before the horse. For what is precisely required by the legality principle is that the legislator clearly provides for the elements of an offence which are the basis of the punishability

[36] See Kosovo, Court of Appeals, PN1 2486/14, Ruling, 19 December 2014.
[37] Kosovo, Court of Appeals, *E.K. et al.*, PAKR 271/13, Judgment, Partially Dissenting Opinion of Judge Timo Vuojolahti, 30 January 2014, pp. 22-23.
[38] See also Horder, p. 91.
[39] Appeal Judgement, para. 282, referring to Trial Judgment, paras 146, 639.
[40] See above, para. 2.

of the relevant conduct. As to Article 401(1) of the KCC, this means that if this provision were to cover conduct directed against private persons, it should explicitly say so by including a reference to these private persons. In line with the *lex stricta* requirement, it is not, as explained and demonstrated above, for the adjudicator to read elements to the detriment of the accused in a provision which are not there; rather, the adjudicator must accept the legislative decision, omit the missing elements and apply the offence on its face.

12. Arguably, a situation where a person uses force or a serious threat against a person who is related or close to an official person, for example a family member of a SPO official, comes closer to the wording of Article 401(1) of the KCC. While this hypothetical scenario, which is among those mentioned in the *Salihu et al*. Commentary,[41] can be left unresolved here, it is worth noting that in the case at hand, the threats were directed against private persons unrelated to SPO officials and thus the present case represents a situation which is, in my view, clearly outside the wording of the provision.

13. A purpose-based interpretation, focusing on the legal interest protected, cannot remedy this explicit gap in the wording of Article 401(1) of the KCC. It could only come into play if the wording of this provision were not clear and therefore one had to take recourse to the alleged purpose in order to come to a reasonable interpretation.[42] Indeed, the absolute primacy of a literal interpretation is just another

[41] Cf. Salihu, I. et al., *Commentary on the Criminal Code of the Republic of Kosovo*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH 2014, Article 409(1) of the 2012 KCC, mn. 3, p. 1165, where this situation is mentioned as the one most often occurring when persons other than the official persons are targeted, but it is put on an equal footing with the use of force/serious threat against another (private) person only if this conduct "results in the official person being prevented from carrying the official action or in the disruption of the execution of an official action […]". For the reasons stated above, I disagree with this broad interpretation.

[42] I note in passing that the Appeals Panel makes the same argument with regard to the relationship of a literal and systematic interpretation, cf. Appeal Judgment, para. 279: "Such a systematic interpretation, taking into account the umbrella category of offences, as suggested by the Defence, may only become relevant if the literal meaning of certain terms is not clear."

consequence of a strict application of the *lex stricta* rule, in line with the maxim *in claris non fit interpretatio* (in clear things no interpretation is required).[43]

14. It is equally inadmissible, in light of the *lex stricta* rule, to opt for an expansive interpretation going beyond the wording of a provision in order to compensate evidentiary shortcomings given the narrow drafting of the respective provision. Concretely speaking, if, as in the case at hand, it cannot be demonstrated with the available evidence that official persons have been threatened,[44] this evidentiary shortcoming as to the *actus reus* of Article 401(1) of the KCC cannot be remedied by giving the provision, to the detriment of the accused, an expansive interpretation going beyond its wording. Instead, it is my view that the lack of evidence as to threats against official persons has to lead to an acquittal on the relevant count.

15. The narrow interpretation dictated by *lex stricta* defended here does not produce an impunity gap. The conduct by the Accused is covered by Articles 387 and 392(1)-(3) of the KCC, and especially Article 387, since it encompasses the situation where threats are explicitly directed against private witnesses.

[43] This has explicitly been recognized by the Italian Criminal Court of Cassation. See Italy, Criminal Court of Cassation (*Corte di cassazione penale*), United Sections (Sezioni Unite), no. 38810, Judgment, 13 June 2022, p. 15, para. 6.2 ("Rimane tuttavia fondamentale il canone ermeneutico *in claris non fit interpretatio*, il quale prescrive di attenersi, ove la lettera della legge non sia oscura, a una interpretazione fedele al tenore testuale della norma. […] [L]'interpretazione letterale della legge è il canone ermeneutico prioritario per l'interprete, sicché l'ulteriore criterio dato dall'interpretazione logica e sistematica soccorre e integra il significato proprio delle parole, arricchendolo delle indicazioni derivanti dalla *ratio* della norma e dal suo inserimento nel sistema ma tale criterio non può servire a scavalcare o eludere quello letterale allorché la disposizione della quale occorra fare applicazione sia chiara e precisa."). I note in passing that this rule is also applied by the Court of Justice of the European Union ("ECJ") in the context of the *acte clair* doctrine, cf. e.g. ECJ, *Abels/Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*, Case 135/83, Judgment, 7 February 1985, paras 11, 13 (taking recourse to other methods of interpretation than a "textual" one only where "terminological divergencies" arise between different language versions); ECJ, *Hamlin Electronics GmbH vs. Hauptzollamt Darmstadt*, Case C-338/90, Judgment, 31 March 1992, para. 12 (stating that only "where a provision is ambiguous it must be interpreted according to the general scheme and purpose […]").
[44] Trial Judgment, para. 639.

16. Accordingly, in my respectful view, the *actus reus* of Article 401(1) of the KCC has not been established in the present case. For the same reasons, I am not able to subscribe to a conviction under Article 401(2) of the KCC either, since this provision, too, requires the action to be directed against "an official person in performing official duties".

B. IMPACT ON SENTENCING

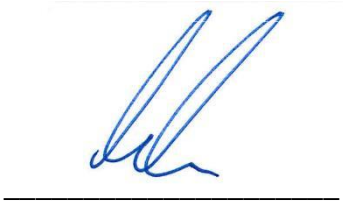
17. I agree with the Trial Panel's determination of the individual sentences for the Accused, including the four years of imprisonment for Count 3 (Article 387 of the KCC).[45] Given the applicable standard of review regarding sentencing, which calls for deference to a Trial Panel's exercise of its discretion and only allows for an appellate interference in case of an abuse of this discretion or a wrong application of the law,[46] and considering the dismissal of the Accused's specific challenges to sentencing,[47] amending the Trial Panel's individual sentences for each count would amount to an impermissible interference by the Appeals Panel. I therefore explicitly agree with the Appeals Panel's finding that "the Trial Panel did not err in its determination of the Accused's sentences on the basis of the convicted counts".[48]

18. In this regard, Rule 163 (4) clause 2 of the Rules demands that the single sentence "shall not be less" than the highest individual sentence determined in respect of each charge, which, in this case, would be the four years of imprisonment imposed by the Trial Panel for Count 3. While I note in passing that this mandatory single sentence rule, which appears to be modelled after Article 78(3) clause 2 of the Rome

[45] Trial Judgment, paras 981, 1006. See also Appeal Judgment, paras 437, 439-440.
[46] Appeal Judgment, paras 413-414, 435.
[47] Appeal Judgment, paras 415-426, 431-439.
[48] Appeal Judgment, para. 437.

Statute,[49] presupposes a certain sequence in determining sentences,[50] it is beyond a panel's or a judge's authority to deviate from it for the very fact of its mandatory ("shall") character.

19. As a consequence of these considerations, the acquittal of the Accused with regard to Count 1, as per my view, is, in terms of sentencing, limited to a further reduction by three months of the sentence imposed by the Majority. Therefore, I would have imposed a single sentence of four (4) years reflecting the totality of the criminal conduct of the Accused.



Judge Kai Ambos

Dated this Thursday, 2 February 2023

At The Hague, the Netherlands

[49] On this provision, see Khan, K. A. A., and Ellis, A., in *Ambos* Rome Statute Commentary, Article 78, mn. 21.

[50] Rule 163(4) of the Rules requires, as does Article 78(3) of the Rome Statute, that, *first*, the individual sentences have to be determined ("determine a sentence in respect of each charge in the indictment […]") and, *second*, the Panel determines the final single sentence ("[…] shall impose a single sentence […]"). For Article 78(3) of the Rome Statute, see Khan, K. A. A., and Ellis, A., in *Ambos* Rome Statute Commentary, Article 78, mn. 9 ("[…] separate sentence to be pronounced for each crime, but a single sentence to be imposed on the convicted person"). It is my view that it would undermine the integrity of each single sentence and be *contra legem* if judges were to determine the final single sentence first. The sequential process ensures that the appropriate sentence for each count/charge is clear to the parties and that the total sentence is not simply the sum of the individual sentences.