



In: KSC-BC-2020-07
The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding Judge
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

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Trial Judgment**

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TRIAL PANEL II, pursuant to Articles 43 and 44 of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 158-159, 163 and 165 of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules") pronounced the Trial Judgment ("Judgment") in the case of the *Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj* on 18 May 2022. The written reasons for the Judgment are provided below in accordance with Rule 159 of the Rules.

1. This case concerns the actions of **HYSNI GUCATI** ("Mr Gucati") and **NASIM HARADINAJ** ("Mr Haradinaj") (collectively, "the Accused") during a three-week period from 7 September 2020 until 25 September 2020 in respect of which the Accused are charged.
2. The trial in this case opened on 7 October 2021¹ and closed on 17 March 2022.² Between 18 October 2021 and 28 January 2022, the Panel heard or received the evidence of fifteen witnesses.³ During the trial proceedings, the Panel admitted 238 exhibits in evidence.⁴ In this Judgment, the Panel refers only to the English version of exhibits and transcripts.⁵
3. Judge Barthe's separate opinion is appended to the Judgment.
4. Public Annex 1 contains the procedural background of the case. Public Annex 2 contains a list of acronyms, defined terms and short forms of filings and jurisprudence used in the Judgment and in Judge Barthe's separate opinion. Public Annex 3 contains a list of transcript pages to be reclassified as public.⁶

¹ Transcript, 7 October 2021, p. 747.

² Transcript, 17 March 2022, p. 3855.

³ F597/A01.

⁴ F598/A01.

⁵ When the Panel references an exhibit (*e.g.* P1, 1D1, 2D1 or C1) it refers to the English version and its page number(s). Likewise, when referring to the transcript of a hearing, the Panel refers to the English-language transcript. Page numbers are those of the PDF files in Legal Workflow.

⁶ See *infra* paras 928-929 (Status of Information in the Batches).

I. THE CHARGES

A. COUNTS AND MODES OF LIABILITY

5. The Specialist Prosecutor's Office ("SPO") alleged in the Indictment that:

- between at least April and September 2020, Mr Gucati and Mr Haradinaj made statements accusing witnesses of cooperating with the SPO and other persons of being, *inter alia*, liars, collaborators, and traitors. This conduct demonstrates their intent and motives to undermine and obstruct the official proceedings of the Specialist Chambers ("SC"), including investigations of the SPO ("SC Proceedings");⁷
- between at least 7 and 25 September 2020 ("Indictment Period"), Mr Gucati, Mr Haradinaj and others disseminated without authorisation confidential and non-public information ("Confidential Information") relating to the confidential investigations of the Special Investigative Task Force ("SITF") and the SPO, encouraged others to further disseminate the Confidential Information, and undertook other actions for the declared purpose of obstructing the SC/SPO. This Confidential Information included documents marked "confidential" and the names, personal data and evidence of hundreds of witnesses under protection in the context of SC Proceedings and prior criminal proceedings in, or relating to, Kosovo;⁸
- Mr Gucati and Mr Haradinaj organised and coordinated the unauthorised dissemination and related actions, including by, with certain others, reviewing the Confidential Information, partaking in decisions as to whether and how to disseminate it, and organising and participating in

⁷ F251/A01 Indictment, para. 5. *See also* F251/A02; F251/A01/RED.

⁸ F251/A01 Indictment, para. 6.

related events, including press conferences and other public appearances, where Confidential Information was publicly disseminated and discussed.⁹

6. For these acts, Mr Gucati and Mr Haradinaj were charged with two counts of a “Criminal Offence against Public Order” for:

- **Obstructing Official Persons in Performing Official Duties**, by serious threat, punishable under Articles 17, 28, 31, 32(1)-(3), 33, 35 and 401(1) and (5) of the Kosovo Criminal Code (“KCC”), and Articles 15(2) and 16(3) of the Law (Count 1); and
- **Obstructing Official Persons in Performing Official Duties**, by participating in the common action of a group, punishable under Articles 17, 28, 32(1)-(3), 33, 35 and 401(2)-(3) and (5) of the KCC, and Articles 15(2) and 16(3) of the Law (Count 2).¹⁰

7. The Accused were also charged with four counts of “Criminal Offences against the Administration of Justice and Public Administration” for:

- **Intimidation During Criminal Proceedings**, punishable under Articles 17, 28, 31, 32(1)-(3), 33, 35 and 387 of the KCC, and Articles 15(2) and 16(3) of the Law (Count 3);¹¹
- **Retaliation**, punishable under Articles 17, 28, 31, 32(1)-(2), 33, 35, and 388(1) of the KCC, and Articles 15(2) and 16(3) of the Law (Count 4);¹²
- **Violating Secrecy of Proceedings**, through unauthorised revelation of secret information disclosed in official proceedings, punishable under

⁹ F251/A01 Indictment, para. 7.

¹⁰ F251/A01 Indictment, paras 25-28, 48.

¹¹ F251/A01 Indictment, paras 29-30, 48.

¹² F251/A01 Indictment, paras 31-32, 48.

Articles 17, 31, 32(1)-(2), 33, 35 and 392(1) of the KCC, and Articles 15(2) and 16(3) of the Law (Count 5);¹³ and

- **Violating Secrecy of Proceedings**, through unauthorised revelation of the identities and personal data of protected witnesses, punishable under Articles 17, 28, 31, 32(1)-(3), 33, 35 and 392(2)-(3) of the KCC, and Articles 15(2) and 16(3) of the Law (Count 6).¹⁴

8. The SPO alleged that, through their actions, and in violation of Article 16(3) of the Law, the Accused are individually criminally responsible for these offences through the following modes of liability:

- committing, alone and/or in co-perpetration, the offences under Counts 1-6;
- attempting to commit the offences under Counts 1-4 and 6;
- agreeing to commit the offences under Counts 1-6 and taking substantial acts towards the commission of these offences;
- inciting and assisting in the commission of the offences under Counts 1-6;
- inciting the commission of the offences under Counts 1-6, and such offences were attempted; and/or
- inciting the commission of the offences under Counts 1-4 and 6, and such offences were neither committed, nor attempted.¹⁵

9. This was done, the Indictment alleged, with the requisite knowledge and intent, in the sense that the Accused:

- intended to commit and incite or assist the (attempted) commission of the offences under Counts 1-6;¹⁶

¹³ F251/A01 Indictment, paras 33, 48.

¹⁴ F251/A01 Indictment, paras 34-35, 48.

¹⁵ F251/A01 Indictment, paras 37-44, 47(i)-(vi).

¹⁶ F251/A01 Indictment, para. 45.

- in the alternative, the Accused: (i) were aware that the offences under Counts 1-6 could occur as a result of their acts and omissions, and that their acts or omissions could incite or assist in the commission of the offences; and (ii) acceded to their occurrence.¹⁷

10. In accordance with Articles 6(2) and 15(2) of the Law, the Panel shall adjudicate these charges insofar as they relate to the proceedings and officials of the SC and/or the SPO, and thus fall under the jurisdiction of the SC.

B. CUMULATIVE NATURE OF THE CHARGES

11. The Panel notes that the SPO is entitled to bring charges that reflect the nature, scope and gravity of the alleged culpable conduct of the Accused. The Panel also notes that there is no dispute between the Parties that the SPO is permitted in principle to put forth cumulative charges in respect of the same general conduct.¹⁸

12. That being said, the SPO must also ensure that cumulative charges do not cause confusion or undue delay. The multiplication of counts and modes of liability in respect of the same or overlapping conduct complicates an already laborious exercise of identifying what evidence is adduced as relevant for which count(s) and mode(s) of liability. Duplicative charging can also be unfair to the Accused where it creates ambiguities regarding the nature of the prosecution's case or the evidence that is relevant to particular aspects of that case.

13. In the case at hand, the Panel observes that the same set of facts and circumstances is relevant for multiple counts and/or modes of liability. Rule 158(2) of the Rules requires the Panel to decide separately on each charge, including each applicable mode of liability. The Panel will accordingly address each charge, but it will refer, where appropriate, to facts and circumstances discussed under other charges.

¹⁷ F251/A01 Indictment, para. 46.

¹⁸ F567 Gucati Final Trial Brief, para. 147; Transcript, 14 March 2022, p. 3483; Transcript, 17 March 2022, pp 3806, 3824. *See also* F567/RED.

Likewise, the Panel will address each mode of liability, but it will refer, where appropriate, to facts and circumstances discussed under other modes of liability. The Panel will elaborate especially on the mode of liability under which the Accused are found criminally responsible.

C. ALLEGATIONS PERTAINING TO NON-INDICTED INDIVIDUALS

14. The SPO charged only Mr Gucati and Mr Haradinaj for the offences alleged in the Indictment. However, in various parts of the Indictment, the SPO referred to other individuals who, it claimed, contributed to or participated in the commission of these offences, namely: (i) Faton Klinaku (“Mr Klinaku”) and Tomë Gashi (“Mr Tomë Gashi”);¹⁹ (ii) other members or representatives of the Kosovo Liberation Army War Veterans’ Association (“KLA WVA”);²⁰ and (iii) persons who attended, observed or were otherwise informed of the three press conferences and other media appearances, certain members of the press and persons in possession of or with access to Confidential Information (“Other Persons”).²¹ The SPO collectively referred to Mr Klinaku, Mr Tomë Gashi and other members or representatives of the KLA WVA as “Associates”. The SPO Pre-Trial Brief and Final Trial Brief contained detailed arguments concerning the acts and conduct of Mr Klinaku and Mr Tomë Gashi, who, the SPO stated, were knowingly involved in the commission of the charged offences.²²

15. At trial, the issue of the criminal responsibility of non-indicted individuals arose in relation to an SPO witness (W04866), Halil Berisha (“Mr Berisha”). The Parties

¹⁹ IA4-F7, paras 6, 16.

²⁰ F251/A01 Indictment, paras 6-7, 25-26, 28-31, 33-34, 39, 41-46.

²¹ F251/A01 Indictment, paras 41-46.

²² See e.g. F181/A1 SPO Pre-Trial Brief, paras 10, 22, 24, 30-31, 34, 57-58, 79-80, 83-85, 93-94, 97-100, 116, 122, 128, 130, 132, 140, 154-155, 161, 169, 173, 175-179, 185-187, 192-194, 197, 208-213, 215; F565 SPO Final Trial Brief, paras 24, 27-29, 44-45, 50-51, 60, 63, 66, 70, 80-81, 94, 105, 113-114, 122, 187, 194-197, 261-262, 264-267, 270, 272, 275-276, 278-282, 351, 357, 415. See also F181/A01/RED; F565/RED. See also Transcript, 14 March 2022, pp 3458-3460, 3512-3515, 3524; Transcript, 17 March 2022, pp 3754, 3774, 3779, 3789.

expressed the view that Mr Berisha did not commit any offence by authoring and publishing certain articles regarding the material he received.²³ In their closing statements, the Defence invited the Panel to assess the Accused's conduct and understanding of the law against Mr Berisha's and to conclude that, just as Mr Berisha did not commit any offence, neither did the two Accused.²⁴

16. The Panel notes that the SPO did not charge Mr Klinaku, Mr Tomë Gashi, any further Associates, Other Persons or Mr Berisha. Consistent with the presumption of innocence, the Panel limits its consideration of these individuals' actions and statements to what is necessary for the assessment of the criminal responsibility of the Accused.²⁵ The Panel accordingly refrains from making any finding as to the criminal responsibility of any of these individuals.²⁶ Furthermore, the Panel draws no conclusion as to the Accused's criminal responsibility from the views of the Parties in respect of non-indicted individuals.

II. ADMISSION AND EVALUATION OF EVIDENCE

A. GENERAL CONSIDERATIONS

17. The general framework of the admission and evaluation of the evidence is laid out in Articles 21, 37, 40(6)(e) and (h) of the Law and Rules 137-140 of the Rules. The Panel also refers to its Order on the Conduct of the Proceedings, which it adopted at the beginning of these proceedings, having considered submissions of the Parties, in order to ensure the fair and expeditious conduct of this trial.²⁷

²³ Transcript, 26 October 2021, p. 1507; Transcript, 27 October 2021, pp 1577, 1632.

²⁴ Transcript, 15 March 2022, pp 3552-3585, 3590-3599; Transcript, 16 March 2022, pp 3693, 3712. *See also* F566 Haradinaj Final Trial Brief, paras 230, 329. *See also* F566/RED.

²⁵ ECtHR, [Karaman Judgment](#), paras 40-44, 64.

²⁶ F334 SPO Bar Table Decision, paras 26-27; F502 Gucati Bar Table Decision, para. 47.

²⁷ F314/A01 Order on the Conduct of Proceedings.

18. The Panel carried out its evaluation and weighing of the evidence within that general framework and in light of the Constitution of Kosovo (“Constitution”) and the fundamental rights guaranteed therein. Where relevant, the Panel also took into account the practice and jurisprudence of other courts and tribunals, which operate under normative regimes comparable to that applicable before the SC.

B. ADMISSION OF EVIDENCE

19. In accordance with Rule 138(1) of the Rules, the Panel admitted evidence where it was relevant, authentic, had probative value and its probative value was not outweighed by its prejudicial effect. The Panel set out its understanding of these standards in two decisions on the admission of items through the bar table.²⁸

20. The Panel will address below a number of specific issues related to the admission of evidence during trial.

1. Evidence of facts and circumstances preceding the Indictment Period

21. The Panel recalls its finding that evidence was relevant if it was connected, directly or indirectly, to elements of the offence(s) or mode(s) of liability pleaded in the Indictment or other facts and circumstances material to the case of a Party.²⁹ The Panel encouraged the Parties to focus their evidential efforts on the Indictment Period.

22. This did not mean, however, that the Panel excluded evidence pertaining to a period of time that preceded or followed the Indictment Period.³⁰ The SPO led evidence pertaining to actions and statements attributed to the Accused pre-dating the Indictment Period. While these did not constitute the *actus reus* of any of the charged

²⁸ F334 SPO Bar Table Decision, para. 11; F502 Gucati Bar Table Decision, paras 9-13.

²⁹ F502 Gucati Bar Table Decision, para. 10; F334 SPO Bar Table Decision, para. 12.

³⁰ See e.g. ICTR, [Nahimana et al. Appeal Judgment](#), para. 313; [Ngeze and Nahimana 5 September 2000 Decision](#), p. 6; [Kabiligi 13 November 2000 Decision](#), pp 4-5.

offences,³¹ they were circumstances that the SPO relied on to establish that the Accused possessed at all times relevant to the charges the requisite *mens rea*.³² The Panel therefore admitted such evidence when it was relevant to inferences regarding the intent of the Accused.³³

23. Evidence pertaining to such circumstances is addressed in the relevant parts of this Judgment.³⁴

2. Hearsay evidence and right to confrontation

24. The Panel notes that there is no procedural bar to the admission of hearsay evidence.³⁵ Accordingly, the Panel did not necessarily exclude evidence that was not a direct account of what a witness saw, said, did or heard, but was hearsay in nature.³⁶

25. The Panel denied the admission of hearsay evidence where it unfairly interfered with the Accused's right to confrontation.³⁷ In excluding such evidence, the Panel applied the principle enshrined in Article 6(3)(d) of the European Convention on Human Rights ("ECHR"), Article 31(4) of the Constitution and Article 21(4)(f) of the Law, according to which the accused have the right to confront and challenge evidence presented against them.³⁸ This principle requires that, before an accused can be convicted, all evidence against him or her must normally be produced in his or her presence at a public hearing with a view to adversarial argument.³⁹ Any exceptions to this principle must not infringe the rights of the accused.⁴⁰

³¹ F251/A01 Indictment, para. 5.

³² F565 SPO Final Trial Brief, paras 21-23; F181/A01 SPO Pre-Trial Brief, para. 7.

³³ See e.g. ICTR, [Simba 29 July 2004 Decision](#), p. 3. See also [Ngeze and Nahimana 5 September 2000 Decision, Separate Opinion of Judge Shahabuddeen](#), paras 9-17.

³⁴ See *infra* paras 572-574, 600 (Count 3), 659, 666 (Count 1), 855, 858 (Defences).

³⁵ See e.g. ICC, [Ngudjolo Chui Appeal Judgment](#), para. 226; ICC, [Bemba et al. Appeal Judgment](#), para. 874.

³⁶ See e.g. ICTY, [Aleksovski 16 February 1999 Decision](#), para. 15; [Karadžić Trial Judgment](#), para. 13.

³⁷ F334 SPO Bar Table Decision, para. 90.

³⁸ ECtHR, [Cutean Judgment](#), para. 60.

³⁹ ECtHR, [Al-Khawaja and Tahery GC Judgment](#), paras 118-119.

⁴⁰ ECtHR, [Schatschaschwili GC Judgment](#), paras 111-131.

26. In application of these principles, the Panel excluded SPO official notes, which recorded statements attributed to persons allegedly affected by the Accused's actions ("Contact Notes").⁴¹ The Panel denied the admission of these notes because, *inter alia*, none of the aforementioned persons were called at trial to give evidence and no good reason for their absence was provided.⁴² The Panel saw this as a risk of severely eroding the right of the Accused to confront in an effective fashion the case presented against them.⁴³ Furthermore, the Panel denied the admission of statements authored by an SPO investigator who was not called to give evidence at trial without a good reason for his non-attendance having been provided.⁴⁴ Evidence that the Panel admitted through the bar table procedure – not in open court in the presence of the Accused – was subject to adversarial argument.⁴⁵

3. Lawfulness of searches and chain of custody

27. The Panel notes that the present case involved challenges regarding the chain of custody of material seized from the KLA WVA premises.⁴⁶ These arguments are addressed in detail in the relevant parts of the Judgment.⁴⁷

28. For present purposes, the Panel notes that, in line with Rule 138(1) of the Rules, proof or a record of chain of custody is not a condition for the admission of evidence. The existence, specificity and reliability of such a record, if it exists, are factors of potential relevance to evaluating the conditions of admissibility of the collected evidence. The Panel also notes that there is no international consensus or standard regarding the manner and form in which a record of a chain of custody must be made.

⁴¹ F334 SPO Bar Table Decision, para. 86.

⁴² F334 SPO Bar Table Decision, para. 91.

⁴³ F334 SPO Bar Table Decision, para. 93.

⁴⁴ Transcript, 19 October 2021, pp 937-939 (Oral Order on Admissibility of Certain Exhibits). *See also* ECtHR, [Al-Khawaja and Tahery Judgment](#), para. 119.

⁴⁵ F334 SPO Bar Table Decision; F291; F308; F309; F502 Gucati Bar Table Decision; F487; F488; F496. *See also* F308/RED; F309/RED; F487/RED.

⁴⁶ *See infra* paras 302-304 (Findings on the Batches).

⁴⁷ *See infra* paras 305-330 (Findings on the Batches).

The admissibility of collected evidence would only be affected if the purported shortcomings of the chain of custody would raise questions about the authenticity and/or reliability of that evidence. In any event, the reliability and authenticity of evidence collected in a seizure operation must always be assessed in light of all relevant circumstances and not merely on the basis of the formal record that was made, if any, of the seizure operation.

29. Consistent with Rule 139(7) of the Rules, when evaluating the evidence, the Panel took into account the manner in which evidence was collected in this case and the effect this might have had on the course and fairness of the proceedings.

4. Evidence on the justness of and commission of crimes during the 1998-1999 war

30. The Panel found that the character of the 1998-1999 armed conflict in Kosovo, including its claimed justness, or the commission of crimes by individuals belonging to any party during that conflict were not issues relevant to the present case. For these reasons, the Panel did not allow the eliciting or tendering of such evidence, but admitted evidence of the Accused's personal experience during that conflict.⁴⁸

31. While the Panel allowed the eliciting and tendering of evidence regarding the Defence's claim of public interest,⁴⁹ it clearly delineated the scope of such evidence.⁵⁰ The Panel also clarified that evidence related to public interest did not include shedding light on alleged Serbian crimes during the conflict.⁵¹

32. The Panel allowed the eliciting of evidence regarding the Accused's belief whether any KLA member may have committed a crime, including during the conflict, and whether that crime could be legitimately investigated and prosecuted by the SITF or

⁴⁸ Transcript, 2 December 2021, p. 2110 (Oral Order to the Defence Teams on the Questioning of Their Witnesses); Transcript, 14 January 2022, p. 3041. As regards admitted evidence regarding the Accused's personal experience during the armed conflict, *see e.g.* 1D3, paras 4-7; 2D1, paras 10-12.

⁴⁹ *See infra* paras 806-809 (Defences).

⁵⁰ F470, para. 61.

⁵¹ Transcript, 14 January 2022, p. 3041.

the SPO, as these issues were of potential relevance to the Accused's *mens rea* and motives.⁵²

5. Evidence relevant to "defences"

33. The Panel allowed both Defence teams to elicit and tender evidence relating to all defences raised by the Accused, including in respect of claims of public interest and entrapment notwithstanding the lack of express legal basis and regulation of those in the SC legal framework. The Panel will address these issues in the relevant parts of this Judgment.⁵³

C. EVALUATION OF EVIDENCE

1. Presumption of innocence and burden of proof

34. The Panel has applied the presumption of innocence stated in Article 31(5) of the Constitution and Article 21(3) of the Law, which embodies a general principle of law. Accordingly, the SPO bore the onus of establishing the guilt of the Accused. Consistent with the above, the Panel did not require the Accused to prove their innocence, nor to present evidence of any fact material to their defence. While both Accused chose to call evidence, they did not bear the burden of contradicting the SPO's evidence.⁵⁴ Furthermore, any failure of the Accused to submit credible and reliable evidence was not construed as an indication of guilt.⁵⁵

⁵² Transcript, 14 January 2022, p. 3041.

⁵³ See *infra* paras 801-832, 833-889 (Defences).

⁵⁴ See e.g. ICTR, [Kalimanzira Appeal Judgment](#), para. 20. See also ICTR, [Zigiranyirazo Appeal Judgment](#), para. 19; [Muhimana Appeal Judgment](#), para. 18.

⁵⁵ See e.g. ICTR, [Kamuhanda Trial Judgment](#), para. 85. See also ICTR, [Nahimana et al. Appeal Judgment](#), para. 414.

2. Standard of proof

35. Pursuant to Rule 140(2) of the Rules, the standard of proof beyond reasonable doubt was applied to the facts constituting the elements of the offence(s) and of the mode(s) of liability as charged as well as to other facts on which the conviction depends.⁵⁶ As required by the same provision, the requirement of proof beyond reasonable doubt was not applied to individual pieces of evidence. The Panel has therefore determined whether the weight of *all* of the evidence was sufficient to establish beyond reasonable doubt the elements of the charged offences, and ultimately, the responsibility of the Accused.

36. In its application of the standard of proof, the Panel abided by the following principles. A “reasonable doubt” cannot consist in imaginary or frivolous doubt based on empathy or prejudice.⁵⁷ It must be based on logic and common sense, and have a rational link to the evidence, lack of evidence or inconsistencies in the evidence.⁵⁸ The standard of “beyond reasonable doubt”:

does not mean beyond a vain, imaginary, or fanciful doubt, but means that the defendant’s guilt must be fully proved to a moral certainty, before he is condemned. Stated differently, it is such a doubt as, after full consideration of all the evidence, would leave an unbiased, reflective person charged with the responsibility of decision, in such a state of mind that he could not say that he felt an abiding conviction amounting to a moral certainty of the truth of the charge.⁵⁹

37. In respect of circumstantial evidence, pursuant to Rule 140(3) of the Rules, the standard of proof beyond reasonable doubt is only satisfied if the inference drawn from that evidence is the *only* reasonable one that could be drawn from the evidence.⁶⁰

⁵⁶ See e.g. ICTY, [Šainović et al. Appeal Judgment](#), para. 132; [Martić Appeal Judgment](#), para. 55; [Halilović Appeal Judgment](#), para. 125; [Karadžić Trial Judgment](#), para. 10; ICTR, [Ntagerura et al. Appeal Judgment](#), para. 174, fn. 356.

⁵⁷ See e.g. ICTY, [Halilović Appeal Judgment](#), para. 109; ICTR, [Rutaganda Appeal Judgment](#), para. 488; [Delalić et al. Trial Judgement](#), para. 601.

⁵⁸ See e.g. [Rutaganda Appeal Judgment](#), para. 488.

⁵⁹ NMT, [US v. Pohl et al.](#), p. 965.

⁶⁰ See e.g. ICTY, [Kvočka et al. Appeal Judgement](#), para. 237; [Šainović et al. Appeal Judgment](#), para. 995; [Karadžić Trial Judgment](#), para. 14.

If the evidence allows for other reasonable conclusion(s) to be drawn, which are either consistent with the non-existence of the fact sought to be inferred or with the innocence of the Accused,⁶¹ the standard of proof beyond reasonable doubt is not satisfied.⁶²

3. Assessment of evidence for the purposes of judgment

38. Pursuant to Rule 139(2) of the Rules, the Panel carried out a holistic evaluation and weighed all evidence taken as a whole to determine whether or not the facts at issue have been established. Individual items of the evidence, such as the testimony of different witnesses, or documents admitted into evidence, were therefore analysed in the light of the entire body of evidence adduced.⁶³ In accordance with Rule 139(6) of the Rules, the Panel did not necessarily reject a piece of evidence as unreliable because of inconsistencies. In some instances, especially in relation to witness statements and testimonies, the Panel accepted parts of the evidence and rejected others.

39. Pursuant to Rule 139(3) of the Rules, the Panel took into consideration, but did not require, corroboration in order to prove any charged offence or conduct.

40. The Panel has also accounted for specificities relevant to direct and circumstantial evidence, other specific categories of evidence and the evidence of witnesses, as outlined below.

(a) Direct and circumstantial evidence

41. Evidence may be direct or circumstantial. The Panel regarded direct evidence as direct proof of a fact, such as the testimony of an eye witness. A document, a record

⁶¹ See e.g. ICTR, [Ntagerura et al. Appeal Judgment](#), para. 306; ICTY, [Čelebići Appeal Judgment](#), para. 458.

⁶² See e.g. ICTY, [Vasiljević Appeal Judgment](#), para. 120; [Karadžić Trial Judgment](#), paras 10, 14; [Kvočka et al. Appeal Judgment](#), para. 237; [Šainović et al. Appeal Judgment](#), para. 995.

⁶³ See e.g. ICTY, [Mrkšić and Šljivančanin Appeal Judgment](#), para. 217; [Karadžić Trial Judgment](#), para. 8; [Orić 21 October 2004 Order](#), para. 4; [Milošević Appeal Judgment](#), para. 20, fn. 59; [Halilović Appeal Judgment](#), para. 119; [Orić Appeal Judgment](#), para. 86; [Limaj et al. Trial Judgment](#), para. 20; ICTR, [Ntagerura et al. Appeal Judgment](#), para. 174; [Karemera et al. 29 May 2009 Decision](#), paras 13-14, 16-17, 20, 22.

or an object may also be direct evidence when it can prove a fact by itself. Direct evidence does not require drawing inferences.⁶⁴

42. Circumstantial evidence is evidence of a number of different circumstances surrounding an event from which a fact at issue may be reasonably inferred.⁶⁵ Pursuant to Rule 139(5) of the Rules, the Panel assessed circumstantial evidence with caution and provided reasoned findings, in particular regarding the consistency and intrinsic coherence of such evidence.

(b) Specific categories of evidence

43. Certain categories of evidence have been approached with particular caution. This was the case, for instance, with hearsay evidence⁶⁶ and media reports,⁶⁷ which have been evaluated by the Panel taking into account their particular evidential nature. As regards hearsay evidence, the Panel was mindful that the weight, if any, attributed to this category would depend upon the specific circumstances of the case.⁶⁸ As such, the Panel assessed hearsay evidence on a case-by-case basis accounting, in particular, for the presence of corroboration and the extent to which the Defence was able to test and challenge that evidence.⁶⁹ The Panel generally refrained from admitting from the bar table media reports to establish the truth of their content. The Panel required contextualisation through a relevant witness before admission.⁷⁰

⁶⁴ See e.g. United States of America, [Santos v. City of Providence et al. Jury Instructions](#), p. 5.

⁶⁵ See e.g. ICTY, [Karadžić Trial Judgment](#), para. 14; [Čelebići Appeal Judgment](#), para. 458.

⁶⁶ See *supra* paras 24-26.

⁶⁷ See e.g. ICTY, [Karadžić Trial Judgment](#), para. 22.

⁶⁸ See e.g. ICC, [Ngudjolo Chui Appeal Judgment](#), para. 226; [Bemba et al. Appeal Judgment](#), para. 874.

⁶⁹ See *supra* paras 24-26. See e.g. ICTY, [Aleksovski 16 February 1999 Decision](#), para. 15. See also ICTY, [Karadžić Trial Judgment](#), para. 13.

⁷⁰ F334 SPO Bar Table Decision, para. 39. See e.g. ICTY, [Karadžić Trial Judgment](#), para. 22.

(c) Witnesses

44. Pursuant to Rule 139(4) of the Rules, in determining the weight to be given to the testimony of a witness, the Panel assessed the credibility of the witness and the reliability of his or her testimony. For that purpose, it had regard, *inter alia*, to the demeanour of the witness, the witness's relationship to either party, the probability and the consistency of their evidence, as well as the circumstances of the case and corroboration from other evidence.⁷¹ Consistent with Rule 139(3) of the Rules, the Panel considered that the testimony of a single witness on a material fact did not, as a matter of law, require corroboration.⁷² In such a case, the Panel examined the evidence of the witness with the utmost caution before accepting it as a sufficient basis for the finding in question.⁷³ In accordance with Rule 139(6) of the Rules, minor discrepancies between the evidence of different witnesses, or between the testimony of a particular witness and his or her prior statements have not been regarded as discrediting such evidence.⁷⁴ Furthermore, pursuant to Rule 140(4) of the Rules and in line with its findings on the admissibility of evidence in light of the right to confrontation, the Panel did not base any conviction solely or to a decisive extent on the evidence of a witness whom the Defence had no opportunity to examine.⁷⁵

45. In light of the above, the Panel makes the following observations regarding: (i) the evidence of the Accused; and (ii) the challenges raised regarding the credibility of the witnesses heard.

i) Evidence of the Accused

46. Article 21(4)(h) of the Law provides that an accused shall not be compelled to testify against himself or herself or to admit guilt. The Accused in this case chose freely

⁷¹ See e.g. ICTY, [Karadžić Trial Judgment](#), para. 11.

⁷² See e.g. ICTY, [Čelebići Appeal Judgment](#), para. 506; [Karadžić Trial Judgment](#), para. 12.

⁷³ See e.g. ICTY, [Karadžić Trial Judgment](#), para. 12.

⁷⁴ See e.g. ICTY, [Karadžić Trial Judgment](#), para. 12; [Milutinović et al. Trial Judgment](#), para. 49.

⁷⁵ See *supra* paras 24-26.

to testify. The Accused's decision to give evidence does not mean that they accepted any onus to prove their innocence,⁷⁶ nor does it mean that a choice must be made between the evidence of an Accused and that of an SPO witness. The Panel has given due regard to the evidence of the Accused and other witnesses.⁷⁷

47. In accordance with Rules 139(2), (4) and 142(4) of the Rules, in order to decide what weight to give to an Accused's testimony, the Panel must assess the Accused's credibility and, in the context of the totality of the evidence, the reliability of his testimony.⁷⁸ The Panel has done so in respect of both Accused. The Panel will briefly summarise its findings in this regard.

48. The Panel found parts of Mr Gucati's written statement and parts of his testimony to be reliable, in particular his candid narration regarding the time and general circumstances of events forming the background to this case. The Panel approached the reliability of other aspects of his evidence with much greater caution, as Mr Gucati advanced explanations in respect of the claimed reasons for his actions and intentions, which were inconsistent with or contradicted his contemporaneous accounts and/or by other reliable evidence.⁷⁹

49. The Panel found parts of Mr Haradinaj's written statement and limited aspects of his testimony to be reliable, in particular when corroborated, and has relied upon those in relation to some of its findings. The Panel found a great deal of his oral evidence to lack reliability. The Panel notes, in particular, that during cross-examination, Mr Haradinaj was repeatedly unresponsive to Counsel's questions, was often evasive, made irrelevant speeches, gave improbable explanations, refused to engage with facts

⁷⁶ See *supra* para. 34. See e.g. ICTY, [Vasiljević Trial Judgment](#), para. 13; [Kunarac et al. Trial Judgment](#), para. 560.

⁷⁷ See e.g. ICTY, [Vasiljević Trial Judgment](#), para. 13; [Kunarac et al. Trial Judgment](#), para. 560.

⁷⁸ See e.g. ICTR, [Karera Appeal Judgment](#), paras 19, 27-29; ICTY, [Popović et al. Trial Judgment](#), para. 21.

⁷⁹ See *infra* paras 373-374, 450-452 (Findings on the Batches). See e.g. DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2168-2169, 2190, 2200; Transcript, 7 December 2021, pp 2240-2254, 2285, 2287, 2310-2317, 2277-2279; Transcript, 8 December 2021, pp 2343-2351, 2353-2355, 2358-2363. See also 1D3, para. 16.

and propositions put to him by Counsel, denied statements he made even when confronted with the video recordings of those statements, sought to minimise his role or the nature thereof, gave improbable interpretations of his statements or that of others and distorted events in order to provide a narrative favourable to his defence.⁸⁰ The Panel has taken these instances into consideration when making findings and in assessing Mr Haradinaj's overall credibility.

ii) Challenges to the credibility of witnesses

50. W04841. Both Defence teams challenged the credibility of SPO witness W04841, Zdenka Pumper ("Ms Pumper"), and the reliability of her evidence, on the basis that she conducted a limited review of the authenticity and the confidentiality of the material seized or received by the SPO and did not undertake certain verifications (such as whether information was already in the public domain).⁸¹ The SPO rejected these submissions.⁸²

51. The Panel addresses specific challenges regarding the evidence surrounding the content, authenticity and confidentiality of the seized material in relevant parts of this Judgment.⁸³ For present purposes, the Panel underscores that it has found the evidence of Ms Pumper highly probative, consistent in substance and thorough. The Panel is further satisfied that Ms Pumper conducted her review within the limits of her responsibilities and the instructions she received, and that any issue arising from her

⁸⁰ See *infra* paras 375, 416-420, 453-455 (Findings on the Batches). See *e.g.* DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2725-2726, 2744, 2782, 2785, 2885; Transcript, 13 January 2022, pp 3000, 3002-3004. See also 2D1, paras 107, 111.

⁸¹ See *e.g.* W04842 (Zdenka Pumper), Transcript, 20 October 2021, pp 1056, 1059, 1062, 1064, 1069-1070, 1127, 1129, 1132-1133, 1142, 1144-1145; Transcript, 25 October 2021, p. 1321; Transcript, 16 March 2022, pp 3653-3657, 3693-3694; F566 Haradinaj Final Trial Brief, paras 79, 270-271, 310, 320-322, 324, 326, 328, 351, 356, 358-359, 515; F567 Gucati Final Trial Brief, paras 87(a), 107. See also F439, para. 92(a); F440, paras 151-152. See also F439/RED; F440/RED.

⁸² F565 SPO Final Trial Brief, paras 136-137.

⁸³ See *infra* paras 331-381, 382-423, 424-458 (Findings on the Batches).

review was not the result of negligence or bias on her part. Accordingly, the Panel has found Ms Pumper credible and her evidence reliable.

52. W04842. Both Defence teams challenged the credibility of SPO witness W04842, Miro Jukić (“Mr Jukić”).⁸⁴ The SPO rejected these allegations.⁸⁵

53. In particular, the Defence challenged the evidence of Mr Jukić on the following issues: (i) discrepancies in dating Contact Notes he prepared of his interviews with witnesses following the charged events;⁸⁶ (ii) the presence of an SPO field office in Prishtinë/Pristina;⁸⁷ (iii) his claimed presence at a meeting although the Contact Note thereof made no such mention;⁸⁸ (iv) the number of witnesses the SPO called in the aftermath of the charged events;⁸⁹ (v) the number of witnesses who stated that they had received direct threats during or in the aftermath of the charged events;⁹⁰ (vi) Mr Jukić’s account of some of the conversations he had with witnesses in the aftermath of the charged events;⁹¹ (vii) the number of witnesses subject to relocation;⁹² and (viii) the amount of time Mr Jukić spent dealing with the consequences of the Accused’s actions.⁹³

⁸⁴ See e.g. F566 Haradinaj Final Trial Brief, paras 33, 72, 135, 143-151, 153-157, 159-161, 172-176, 239-243; Transcript, 15 March 2021, pp 3618-3625, 3694; W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1860, 1880-1881, 1892; F440, para. 46.

⁸⁵ F565 SPO Final Trial Brief, paras 136, 140. See also Transcript, 14 March 2021, pp 3469-3474.

⁸⁶ W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1864-1869, 1877-1878, 1899; Transcript, 15 March 2022, pp 3621-3625. See also F566 Haradinaj Final Trial Brief, para. 373.

⁸⁷ See e.g. Transcript, 14 March 2022, p. 3469.

⁸⁸ F566 Haradinaj Final Trial Brief, para. 236; Transcript, 15 March 2022, p. 3625. See also W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1749-1750.

⁸⁹ See e.g. F566 Haradinaj Final Trial Brief, para. 237.

⁹⁰ F566 Haradinaj Final Trial Brief, paras 146-147, 153-159, 238; Transcript, 15 March 2022, pp 3609-3611. See also W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1834.

⁹¹ F566 Haradinaj Final Trial Brief, para. 144; See also Transcript, 15 March 2022, pp 3621-3622; W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1703-1706, 1758-1759; Transcript, 4 November 2021, pp 1833, 1880-1881.

⁹² F566 Haradinaj Final Trial Brief, paras 170, 173-175, 371-372. See also W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1888-1889; Transcript, 15 March 2022, pp 3618-3621.

⁹³ See F566 Haradinaj Final Trial Brief, paras 70-71, 88; W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1823-1824. See also Transcript, 15 March 2022, pp 3609, 3626.

54. The Panel will briefly address below the first three Defence challenges listed above. The remaining challenges are addressed in more detail under Count 6.⁹⁴

55. As regards the discrepancies in dating Contact Notes, the Panel notes that Mr Jukić explained that discrepancies between the time of making a note and the date appearing on it were due to typos,⁹⁵ delayed recording of the notes in Zylab⁹⁶ or different ways of dating a note.⁹⁷ Mr Jukić also made it clear that post-dating of notes did not involve any alteration of the *substance* of those notes.⁹⁸

56. As regards the claim of the Haradinaj Defence that Mr Jukić's evidence regarding the presence of an SPO field office in Prishtinë/Pristina was untruthful, on the basis of an answer that Mr Jukić's gave to the Gucati Defence,⁹⁹ the Panel notes that the Haradinaj Defence elected not to cross-examine Mr Jukić at the time.¹⁰⁰ In any event, the Panel notes that Mr Jukić clearly stated, when questioned by the Gucati Defence, that SPO officers did not have an "office", "official permanent representative over there".¹⁰¹ The Panel therefore finds Mr Jukić's evidence on this matter reliable.

57. As regards his claimed presence at a meeting notwithstanding that the Contact Note of that meeting makes no mention of his presence, the Panel observes that the note was not tendered into evidence for the truth of its content.¹⁰² The Panel further observes that the Contact Note was not prepared by Mr Jukić and its author was not called as a witness. In any event, considering that Mr Jukić was a witness security

⁹⁴ See *infra* paras 536-541 (Count 6).

⁹⁵ W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1729; Transcript, 4 November 2021, pp 1843, 1847-1848, 1853.

⁹⁶ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1725-1727; Transcript, 4 November 2021, pp 1843-1844, 1847-1849, 1852-1854, 1857-1860, 1862, 1864.

⁹⁷ W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1845-1846.

⁹⁸ See e.g. W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1848-1849.

⁹⁹ F566 Haradinaj Final Trial Brief, paras 136, 241; W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1776-1777.

¹⁰⁰ W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1899-1900. The Haradinaj Defence briefly cross-examined Mr Jukić on 15 December 2021, on matters unrelated to the present topic.

¹⁰¹ W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1776-1777.

¹⁰² ERN 084247-084248 RED.

officer at the time,¹⁰³ the Panel considers that it would have been entirely logical for him to attend such a meeting even without his presence being recorded.

58. For the above reasons and those provided in relevant parts of this Judgment,¹⁰⁴ the Panel has found the evidence of Mr Jukić probative and generally consistent in substance. The Panel is satisfied that discrepancies, if any, in his testimony were not the result of untruthfulness or bias. The Panel further notes that both Defence teams relied upon Mr Jukić's evidence, when that evidence was considered favorable.¹⁰⁵ Accordingly, the Panel has found Mr Jukić credible and his evidence reliable.

59. W04866. During his testimony, Mr Haradinaj contradicted the evidence of Mr Berisha and claimed that he never asked Mr Berisha to make copies of the documents for other journalists during the press conference held on 7 September 2020.¹⁰⁶ The Panel notes that the Haradinaj Defence did not challenge Mr Berisha in cross-examination in relation to his account of what Mr Haradinaj had told him.¹⁰⁷ The SPO submitted that Mr Berisha was forthcoming and gave a neutral account of the events.¹⁰⁸ The Panel finds Mr Haradinaj's evidence on that point to be self-serving and to lack credibility. The Panel, therefore, accepts Mr Berisha's account on that point as reliable.

60. W04876. Both Defence teams challenged the credibility of SPO witness W04866, Daniel Moberg ("Mr Moberg"), pointing to his lack of recollection of the chronology of the events.¹⁰⁹ In the SPO's view, Mr Moberg's acknowledgment of the limits of his

¹⁰³ W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1690.

¹⁰⁴ See *infra* paras 536, 540 (Count 6).

¹⁰⁵ See e.g. F566 Haradinaj Final Trial Brief, paras 137, 163, 178-179, 462, 523; Transcript, 15 March 2022, pp 3603, 3605, 3607 (Gucati Defence).

¹⁰⁶ DW1249 (Nasim Haradinaj) Transcript, 11 January 2022, p. 2733; 2D1, para. 60. See also W04866 (Halil Berisha) Transcript, 26 October 2021, p. 1522.

¹⁰⁷ See, in particular, Transcript, 27 October 2021, p. 1634-1635.

¹⁰⁸ F565 SPO Final Trial Brief, paras 136, 138-139.

¹⁰⁹ Transcript, 14 March 2022, p. 3586; Transcript, 16 March 2022, pp 3671, 3688-3689, 3693; F566 Haradinaj Final Trial Brief, para. 283. See also W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1945, 1947-1948, 1950-1951, 1955.

recollection makes his testimony all the more reliable.¹¹⁰ When assessing the evidence regarding the three seizure operations, the Panel took into consideration the limits of Mr Moberg's recollection,¹¹¹ and has found that they did not affect his credibility as a witness or the reliability of his evidence.

61. DW1241, DW1242, DW1243, DW1244. As regards the Gucati Defence witnesses DW1241 Taibe Miftari ("Ms Miftari"), DW1242 Elmedina Ballhazhi ("Ms Ballhazhi"), DW1243 Pren Marashi ("Mr Marashi") and DW1244 Metush Kryeziu ("Mr Kryeziu"), the SPO submitted that the reliability of their testimony was affected by a pronounced pro-Accused bias and little knowledge of relevance to the charges.¹¹² When assessing the evidence of these witnesses, the Panel took into consideration their close relationship with the Accused and their opinion about the charged events. That being said, the Panel has found parts of their evidence generally reliable, in particular in respect of their narration of the chronology of events forming the background to this case.¹¹³

62. DW1245. The SPO challenged the credibility of Gucati Defence witness DW1245, Cele Gashi ("Mr Cele Gashi"), arguing that he adjusted his evidence regarding the time he spent reviewing the material to "better support the Defence case".¹¹⁴ The Panel agrees with the SPO and considers that the evidence of Mr Cele Gashi on this matter was untruthful, as it contradicted repeated contemporaneous accounts of the Accused regarding the time spent reviewing the relevant material and conflicted with his own earlier written statement.¹¹⁵ That being said, the Panel has found limited parts of

¹¹⁰ F565 SPO Final Trial Brief, paras 136, 141.

¹¹¹ See *infra* paras 318, 322 (Findings on the Batches).

¹¹² F565 SPO Final Trial Brief, paras 147-148.

¹¹³ See *infra* paras 208, 210, 244-245, 275-276 (The Events at Issue).

¹¹⁴ F565 SPO Final Trial Brief, para. 147. See also DW1245 (Cele Gashi), Transcript, 10 December 2021, pp 2583-2584, 2591-2598, 2603-2604, 2606-2607.

¹¹⁵ 1D9, para. 14.

Mr Cele Gashi's evidence reliable, namely his narration of the general chronology and circumstances of some of the events forming the background of this case.¹¹⁶

63. DW1246, DW1252. As regards the Haradinaj Defence witnesses DW1246 Rashit Qalaj ("Mr Qalaj") and DW1252 Anna Myers ("Ms Myers"), the SPO argued, *inter alia*, that they knew "nothing of relevance" about the case.¹¹⁷ The Panel has found both witnesses to be generally credible and has relied on certain aspects of their evidence to the extent relevant to its consideration of the defences raised in this case.¹¹⁸

64. DW1253. The SPO also challenged the evidence of the Haradinaj Defence expert witness DW1253, Robert Reid ("Mr Reid"), on the basis, *inter alia*, that he was not provided with the necessary information to assess the SPO's investigation and did not properly review the information he did receive.¹¹⁹ In light of the failure of the Haradinaj Defence to submit timely requests before the Panel for granting Mr Reid access to the relevant evidence,¹²⁰ the Panel hesitates to impute to this witness an inability to properly review the information ultimately received. Furthermore, Mr Reid was prepared to amend or qualify his evidence when provided with additional information regarding relevant aspects of his analysis. In any event, the Panel has found Mr Reid credible and significant parts of his evidence reliable, in particular his account and analysis of the practices of the International Criminal Tribunal for the former Yugoslavia ("ICTY") regarding collection of evidence and his recollection regarding witness intimidation in Kosovo.¹²¹

¹¹⁶ See *infra* paras 211, 243-245 (The Events at Issue).

¹¹⁷ F565 SPO Final Trial Brief, para. 149.

¹¹⁸ See *infra* paras 827, 830, 848, 867 (Defences).

¹¹⁹ DW1253 (Robert Reid), Transcript, 28 January 2022, pp 3259-3266, 3250-3354; F565 SPO Final Trial Brief, paras 150-152.

¹²⁰ F529/COR, paras 25-26.

¹²¹ See *infra* paras 577-578 (Count 3), 646 (Count 1).

III. APPLICABLE LAW

A. GENERAL CONSIDERATIONS

65. In adjudicating this case, the 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.¹²²

66. In interpreting these provisions, the Panel gave due consideration to the findings of the Pre-Trial Judge.¹²³ These findings are fully reasoned and were not subject to any application for appellate review.

67. For the purpose of clarifying or interpreting these provisions, the Panel also took into consideration relevant KCC provisions not applicable before the Specialist Chambers as well as decisions of Kosovo courts. The Panel also took note of the *Salihu et al.* commentary of the 2012 Kosovo Criminal Code, Law No. 04/L-082 ("2012 KCC"), as an informative, but not necessarily persuasive source of interpretation in all relevant respects.

B. VIOLATING THE SECRECY OF PROCEEDINGS UNDER ARTICLE 392(1) KCC

68. Article 392(1) of the KCC reads:

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

¹²² Articles 6(2), 15(2) and 16(3) of the Law refer to the 2012 KCC, Law No. 04/L-082. 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. *See* F147 Decision on Preliminary Motions, paras 28-34. *See also* F147/RED.

¹²³ F74 Confirmation Decision. *See also* F74/RED.

1. Material elements

69. The Panel finds that 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 the law or has been declared to be secret by a decision of the court or a competent authority.¹²⁴

(a) Parties' submissions

70. The Gucati Defence submits that: (i) public interest provides authorisation;¹²⁵ (ii) the information must have been disclosed to the perpetrator in an official proceeding;¹²⁶ and (iii) the classification of information as "secret" is distinct from "confidential".¹²⁷ The Haradinaj Defence mirrors and adopts these submissions.¹²⁸

71. The SPO submits that: (i) the public interest does not automatically confer authorisation to disclose;¹²⁹ (ii) there is no requirement that the information was disclosed to the perpetrator in an official proceeding;¹³⁰ (iii) "official proceedings" include prosecutorial investigations;¹³¹ (iv) information which "must not be revealed according to the law" includes all information protected under the SC framework;¹³² (v) information need not have been declared "secret" under Law 03/L-178;¹³³ and (vi) Article 392(1) of the KCC does not limit the manner in which information is revealed.¹³⁴

¹²⁴ F74 Confirmation Decision, para. 34.

¹²⁵ Transcript, 16 March 2022, pp 3648-3649; Transcript, 8 September 2021, p. 653; F345, paras 20-22.

¹²⁶ F439, para. 78.

¹²⁷ Gucati Final Trial Brief, para. 68; F439, para. 76.

¹²⁸ F342, paras 8, 10-11; F439, paras 11, 41.

¹²⁹ F341, para. 28.

¹³⁰ Transcript, 14 March 2022, p. 3435; F447, para. 55. *See also* F447/RED.

¹³¹ Transcript, 14 March 2022, p. 3435; F447, para. 55.

¹³² Transcript, 14 March 2022, p. 3434; F565 SPO Final Trial Brief, para. 234; F341, para. 29; F447, para. 54.

¹³³ Transcript, 14 March 2022, p. 3434.

¹³⁴ Transcript, 14 March 2022, p. 3429.

(b) The Panel's findings

72. The Panel finds that the revelation of information may include displaying, publicising, broadcasting, publicly disseminating or distributing material, in original or copied/recorded form, citing, describing or referring to the content of the material, as well as making the material available to others so as to allow them to read, copy or record the material or its content.¹³⁵

73. The Panel further considers that the revelation of information is “without authorization” if it was not permitted by law or the decision of a court or a competent authority.¹³⁶ Article 392(1) of the KCC does not expressly incorporate any grounds on which revelation of information would be authorised. The Panel will therefore address the interplay, if any, between the claim of public interest advanced by the Defence and this provision in the discussion regarding Count 5 and defences.

74. As regards the question whether information must have been formally disclosed in the context of official proceedings, the Panel notes that, in accordance with the KCC and the Kosovo Criminal Procedure Code (“KCPC”), prosecutorial investigations are included within the scope of “criminal proceedings”, which are included in the definition of “official proceedings”.¹³⁷ Accordingly, SPO investigations qualify as an “official proceeding” for the purposes of Article 392(1) of the KCC.¹³⁸ For this reason, the term “disclosure” must be interpreted to include information exchanged within the SITF/SPO for the purposes of investigation and prosecution as well as information shared between the SITF/SPO and its counterparts in the course of cooperation for investigative purposes. The term can also refer to other types of official communication of information during pre-trial, trial or appellate proceedings, such as

¹³⁵ See, albeit with less detail, F74 Confirmation Decision, para. 35.

¹³⁶ F74 Confirmation Decision, para. 35.

¹³⁷ F74 Confirmation Decision, para. 36.

¹³⁸ F74 Confirmation Decision, para. 36.

testimony of witnesses, evidentiary material presented by the Parties or the content of filings made before a competent panel.

75. As regards the question whether information needs to be disclosed *to the perpetrator* during the official proceeding, the Panel notes that nothing in the language of Article 392(1) of the KCC suggests such a requirement. To hold otherwise would mean that a person who overhears, accidentally comes in possession of, or is told of protected information disclosed in an official proceeding is not bound by Article 392(1) of the KCC not to further reveal that information, because the information was not formally disclosed to him or her. This interpretation is inconsistent with the plain meaning of the provision, and, if accepted, would enable anyone other than the initial recipient of the information to fall beyond the reach of the law. Such an interpretation would go against the very purpose of the provision, which is the protection of the secrecy of proceedings.

76. As regards the nature of the information, the Panel clarifies that Article 392(1) of the KCC refers to two types of information disclosed in any official proceeding: (i) information “which must not be revealed according to law”; and (ii) information which “has been declared to be secret by a decision of the court or a competent authority”.

77. The first type covers information in relation to which there is a law or provision in the law that either: (i) expressly prohibits the disclosure of that information; or (ii) categorises, classifies or describes the information in a way that implicitly prevents its disclosure. Within the SC framework, Article 62(1) of the Law provides that, given security and privacy considerations, the documents, papers, records and archives of the SC, including the Registry, and of the SPO “shall not be considered public documents in Kosovo” and that “[t]here shall be no general right of access” thereto.¹³⁹ This provision classifies all SC and SPO records as non-public documents and

¹³⁹ F74 Confirmation Decision, para. 37(a).

describes them as not generally accessible to the public. In this way, Article 62(1) of the Law sets out a general restriction of access to SC and SPO records, which results in a prohibition of their disclosure. Article 62(2) of the Law further confirms this prohibition by indicating that access to these records is granted (i) upon application and (ii) only if such access is in the interests of justice and (iii) protects and maintains confidentiality and any protection granted to persons by the SC or the SPO.

78. The second type covers information that a court or competent authority has declared to be secret. Article 392(1) of the KCC does not qualify the notions of “court” or “competent authority”. The Panel considers that these refer to any judicial or other authority that has been granted competence by law to declare information secret, which necessarily includes criminal courts and prosecutorial authorities. The term “secret” is used here in its generic sense, meaning that the information cannot be disclosed to unauthorised persons. This is also confirmed by the title of the provision, which refers to the “secrecy” of proceedings, *i.e.* the non-public or protected parts of the proceedings.¹⁴⁰ The phrase “declared [...] by a decision” refers to any positive act of a competent authority through which information is announced, stated, described, marked or treated in that authority’s performance of functions, as secret.¹⁴¹ Within the SC framework, a competent Panel can order measures of protection of information pursuant to, *inter alia*, Articles 23, 39(11), 40(6)(d), 54(8), 58, 62(2) of the Law, Rules 82, 105, 108 of the Rules or any other applicable law.¹⁴² The Law and the Rules also 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, Rules 30(2)(a), 82, 106, 107(1) of the Rules or any other applicable law.¹⁴³ The competence of the SC and the SPO to order or adopt

¹⁴⁰ Article 392(1) of the KCC uses the terms “secrecy” and “secret” in the same manner as done in Articles 85(1)-(2), 95(2), 236(2)-(4) and 473(1) of the KCPC. It does not refer to “State secrets”, “official secrets”, “trade secrets” or “business secrets” also provided in other provisions of the KCC.

¹⁴¹ See various definitions of “declare” in OED Online (Oxford University Press, March 2022) <www.oed.com/view/Entry/48260> accessed 13 May 2022.

¹⁴² F74 Confirmation Decision, para. 37(b).

¹⁴³ F74 Confirmation Decision, para. 37(c).

measures of protection is further confirmed by Article 61(3)-(4) of the Law. According to this provision, documentation or information that has been given protected confidential status by the SC or the SPO, can only be released upon order of a Panel or with the consent of the Specialist Prosecutor.

79. The Panel further notes that proof that certain information cannot be revealed according to law or that it has been declared secret by a decision of a court or competent authority typically lies in the act itself, which can take the form of, *inter alia*, a law or other legislative document, judicial order or official document of a competent authority.

2. Mental elements

80. Article 21 of the KCC reads:

1. A criminal offense may be committed with direct or eventual intent.
2. A person acts with direct intent when he or she is aware of his or her act and desires its commission.
3. A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence.

81. The offence of unauthorised revelation of protected information must be committed with intent within the meaning of Article 21 of the KCC.¹⁴⁴

(a) Parties' submissions

82. The Gucati Defence submits that for both forms of intent the perpetrator must have "knowledge" that the information was secret.¹⁴⁵ The Haradinaj Defence mirrors these submissions adding that the Pre-Trial Judge's interpretation is too wide in scope.¹⁴⁶

¹⁴⁴ F74 Confirmation Decision, para. 38.

¹⁴⁵ Transcript, 8 September 2021, pp 652-653; F439, para. 80.

¹⁴⁶ F342, para. 9.

83. The SPO submits that either direct or eventual intent suffices for this offence, meaning that acting in the awareness that secret information might be revealed, short of actual knowledge, suffices.¹⁴⁷

(b) The Panel's findings

84. The Panel finds that, consistent with Article 21 of the KCC, the offence under Article 392(1) of the KCC requires proof of either of the following mental elements (*mens rea*): direct or eventual intent.

85. For direct intent, the perpetrator must have acted with awareness of, and desire for, revealing, without authorisation, information disclosed in official proceedings, which must not be revealed according to the law or has been declared to be secret.¹⁴⁸

86. For eventual intent, the perpetrator must have: (i) acted with the awareness that, as a result of his or her conduct, information disclosed in official proceedings, which must not be revealed according to the law or has been declared to be secret, can be revealed without authorisation; and (ii) acceded to that occurrence.¹⁴⁹

C. VIOLATING THE SECRECY OF PROCEEDINGS UNDER ARTICLE 392(2) AND (3) KCC

87. Article 392(2) of the KCC reads:

Whoever without authorization reveals information on the identity or personal data of a person under protection in the criminal proceedings or in a special program of protection shall be punished by imprisonment of up to three (3) years.

88. Article 392(3) of the KCC reads:

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.

¹⁴⁷ F341, para. 30.

¹⁴⁸ F74 Confirmation Decision, para. 39.

¹⁴⁹ F74 Confirmation Decision, para. 40.

1. Material elements

89. The Panel finds that the offence of violating the secrecy of proceedings, within the meaning of Article 392(2) of the KCC, requires the following material elements (*actus reus*): (i) the unauthorised revelation of (ii) information on the identity or personal data of (iii) a person under protection in the criminal proceedings or in a special program of protection.¹⁵⁰

(a) Parties' submissions

90. The Gucati Defence submits that: (i) personal data provided by third parties is not protected under Article 392(2) of the KCC;¹⁵¹ (ii) the information must be of a person under protection in the criminal proceedings in which the information was disclosed to the perpetrator;¹⁵² and (iii) the information must be of a person under "protection" at the time of the alleged offence.¹⁵³ The Haradinaj Defence mirrors these submissions.¹⁵⁴

91. The SPO submits that: (i) personal data appearing in confidential correspondence with third parties is protected;¹⁵⁵ (ii) there is no requirement that the perpetrator is part of the same criminal proceedings as the witness;¹⁵⁶ and (iii) public knowledge about an individual being a witness does not change their protected status.¹⁵⁷

(b) The Panel's findings

92. The Panel notes that this offence constitutes a form of unauthorised revelation of protected information under Article 392(1) of the KCC and is punishable by a more

¹⁵⁰ F74 Confirmation Decision, para. 41.

¹⁵¹ F345, paras 10-11.

¹⁵² Gucati Final Trial Brief, para. 81; F439, para. 86.

¹⁵³ F439, para. 89.

¹⁵⁴ F342, paras 14-15.

¹⁵⁵ F341, para. 32; F447, para. 61.

¹⁵⁶ F447, para. 60.

¹⁵⁷ F447, para. 60.

severe sentence.¹⁵⁸ Therefore, the findings under Article 392(1) of the KCC apply *mutatis mutandis* for this sub-category, unless otherwise determined by the Panel.¹⁵⁹

93. As regards the act of unauthorised revelation, the scope of “criminal proceedings” and the question of disclosure to the perpetrator as opposed to other persons, the Panel refers to its findings above.¹⁶⁰

94. As regards the protected person, the Panel clarifies that Article 392(2) of the KCC refers to two types of persons: (i) those “under protection in the criminal proceedings”; and (ii) those “in a special program of protection”.

95. The first type covers persons who the law regards as protected, as well as those for whom an order or a measure of protection has been adopted in criminal proceedings. The Panel underscores that the requirement of being under protection in criminal proceedings does not necessarily require a judicial order; it may also refer to a protected status provided by law (*e.g.* for underage or other vulnerable witnesses) or to measures implemented by prosecutorial authorities during their investigations. Within the SC framework, this requirement can refer to an order for protective measures issued by a competent Panel pursuant to, *inter alia*, Articles 23, 39(11), 40(6)(f), 58 of the Law, Rules 80, 81, 105, 108 of the Rules or any other applicable law.¹⁶¹ It can also refer to specific provisions of the Law and the Rules providing for protection of specific categories of witnesses, such as Article 23(2) of the Law. The requirement can also entail measures of protection adopted by the SPO during its investigations pursuant to, *inter alia*, Article 35(2)(f) of the Law, Rule 30(2)(a) of the Rules or any other applicable law.¹⁶² By the same token and in line with Article 62 of the Law, a person “under protection in the criminal proceedings” can also be a person whose identity or

¹⁵⁸ F74 Confirmation Decision, para. 42.

¹⁵⁹ F74 Confirmation Decision, para. 43.

¹⁶⁰ *See supra* paras 73-74. F74 Confirmation Decision, para. 43.

¹⁶¹ F74 Confirmation Decision, para. 44(a).

¹⁶² F74 Confirmation Decision, para. 44(b).

personal data appears in SC or SPO documents or records the disclosure of which has not been authorised.¹⁶³

96. The second type covers persons who are enrolled by the police or a court in programs of protection. Within the SC framework, any person subject to SC or SPO protection programs falls into this category.

97. The proof of protected status under Article 392(2) of the KCC, including the indication of the authority to order such a status or the duration of the measure, if limited, lies therefore in the act (law, court order, competent authority document) itself.

98. As regards the “identity” of persons covered by Article 392(2) of the KCC, the Panel underscores 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. Therefore, 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*. The Panel further finds that “identity” includes information such as: family name(s), including maiden or previous name(s), first name(s) and any prior or current pseudonyms.¹⁶⁴ “Personal data” of persons covered by Article 392(2) of the KCC include information such as: personal identification number; date and place of birth; prior or current address or residence; nature, location, time and/or duration of prior or current employment; identities of family members; description or location of significant possessions (house, car); and any other detail that may lead to the identification of the person.¹⁶⁵

¹⁶³ F74 Confirmation Decision, para. 44(c).

¹⁶⁴ F74 Confirmation Decision, para. 45.

¹⁶⁵ F74 Confirmation Decision, para. 45.

99. Lastly, the Panel holds the view that the basic form of this offence, as provided in Article 392(2) of the KCC, does not require that the unauthorised revelation result in any harm or other prohibited consequence.¹⁶⁶

100. Conversely, Article 392(3) of the KCC penalises an aggravated form of this offence, where: (i) the unauthorised revelation results in serious consequences for the persons protected under Article 392(2) of the KCC; or (ii) the criminal proceedings are made impossible or severely hindered.¹⁶⁷ Serious consequences may include substantial interference with the safety, security, well-being, privacy or dignity of protected persons or their families. Severe hindrance or impossibility of criminal proceedings may include the ensuing inability or concrete difficulties to collect evidence, preserve the security of proceedings or ensure the safety of witnesses, as well as the significant diversion of resources to address such consequences.¹⁶⁸

2. Mental elements

101. The offence of unauthorised revelation of the identity or personal data of protected persons must be committed with intent within the meaning of Article 21 of the KCC.

(a) Parties' submissions

102. The Gucati Defence submits that the perpetrator must have knowledge that the information is of a person subject to specific measures of protection in criminal proceedings.¹⁶⁹ The Haradinaj Defence mirrors these submissions and adds that the perpetrator should have known about the existence of the order and its content.¹⁷⁰

¹⁶⁶ F74 Confirmation Decision, para. 46.

¹⁶⁷ F74 Confirmation Decision, para. 46.

¹⁶⁸ F74 Confirmation Decision, para. 46.

¹⁶⁹ Transcript, 8 September 2021, pp 653-654; F439, para. 90.

¹⁷⁰ F342, para. 17.

103. The SPO submits that eventual intent suffices, and that the same considerations for the mental elements of Article 392(1) of the KCC apply under Article 392(2).

(b) The Panel's findings

104. The Panel finds that, consistent with Article 21 of the KCC, the offence under Article 392(2) of the KCC requires either of the following mental elements (*mens rea*): direct or eventual intent.¹⁷¹

105. For direct intent, the perpetrator must have acted with awareness of, and desire for, revealing without authorisation information on the identity or personal data of persons under protection in the criminal proceedings or in a special protection program.¹⁷²

106. For eventual intent, the perpetrator must have: (i) acted with the awareness that, as a result of his or her conduct, information on the identity or personal data of persons under protection in the criminal proceedings or in a special protection program can be revealed without authorisation; and (ii) acceded to that occurrence.¹⁷³

107. As regards the aggravated form under Article 392(3) of the KCC, the Panel, having taken into consideration Article 24 of the KCC, finds that the aggravating circumstances must be attributable, at a minimum, to the negligence of the perpetrator within the meaning of Article 23 of the KCC.

D. INTIMIDATION DURING CRIMINAL PROCEEDINGS UNDER ARTICLE 387 KCC

108. Article 387 of the KCC reads:

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

¹⁷¹ F74 Confirmation Decision, para. 47.

¹⁷² F74 Confirmation Decision, para. 48.

¹⁷³ F74 Confirmation Decision, para. 49.

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.

1. Material elements

109. The Panel finds that the offence of intimidation during criminal proceedings, within the meaning of Article 387 of the KCC, requires the following material elements (*actus reus*): (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.¹⁷⁴

(a) Parties' submissions

110. The Gucati Defence submits that: (i) the failure to provide information must relate to an offence under Article 386 of the KCC;¹⁷⁵ (ii) there is no basis to restrict the words "when such information relates to obstruction of criminal proceedings" to "failing to state true information to the police, a prosecutor or a judge" only;¹⁷⁶ and (iii) the offence requires proof of consequence.¹⁷⁷ The Haradinaj Defence mirrors and adopts the Gucati Defence submissions.¹⁷⁸

111. The SPO argues that: (i) no proof of consequence is required;¹⁷⁹ and (ii) the requirement that the information must relate to the "obstruction of criminal proceedings" is only relevant for failures to state true information to the police, a prosecutor or a judge.¹⁸⁰

¹⁷⁴ F74 Confirmation Decision, para. 58.

¹⁷⁵ Transcript, 16 March 2022, p. 3632; Gucati Final Trial Brief, para. 49.

¹⁷⁶ Gucati Final Trial Brief, paras 44-51; F439, para. 58.

¹⁷⁷ Transcript, 16 March 2022, pp 3631-3632; Gucati Final Trial Brief, paras 43, 48; Transcript, 8 September 2021, pp 656-657; F439, para. 51.

¹⁷⁸ F342, paras 26-31; F440, paras 11, 30-31.

¹⁷⁹ Transcript, 14 March 2022, p. 3448; F447, para. 37.

¹⁸⁰ F447, para. 38.

(b) The Panel's findings

112. The Panel finds that the offence under Article 387 of the KCC can only be perpetrated through one of the means listed in the article, *i.e.* use of force, serious threat, compulsion, promise of a gift or any other form of benefit. The Panel accordingly takes a narrower view than that of the Pre-Trial Judge, *i.e.* that Article 387 of the KCC proscribes any conduct that may have (or is expected by the perpetrator to have) an impact or influence on the statement or information to be given by the person.¹⁸¹ That being said, the Panel adopts the Pre-Trial Judge's definitions in relation to "force", "serious threat" and "compulsion".¹⁸²

113. As regards the person to be induced, the Panel notes that the title of Article 387 of the KCC is "Intimidation during *criminal proceedings*" (emphasis added). As the Panel has found above, prosecutorial investigations are part of "criminal proceedings".¹⁸³ Accordingly, the term "person" used in Article 387 of the KCC must be interpreted to include not only "parties" to criminal proceedings (*i.e.* prosecution and the accused), participating victims or witnesses called before a panel, but also any other person whose evidence is sought by prosecutorial authorities in the framework of their investigations.¹⁸⁴ The Panel further notes that Article 387 of the KCC refers to "another person" to be induced. This suggests that such a person must be identifiable either as an individual or, at least, as a member of a clearly identifiable category of individuals. Within the SC legal framework, a person likely to provide evidence to the SITF, the SPO and/or to an SC Panel about crimes or offences falling under SC jurisdiction would be covered by Article 387 of the KCC.¹⁸⁵

¹⁸¹ F74 Confirmation Decision, para. 59.

¹⁸² F74 Confirmation Decision, para. 60: "[F]orce may include any form of physical violence or intoxication exerted upon a person. A serious threat may include threats to use force or to inflict serious harm on the health, well-being, safety, security or privacy of a person. Compulsion refers to any act of constraining or coercing a person". (footnotes omitted).

¹⁸³ *See supra* para. 74.

¹⁸⁴ *See*, albeit broader in scope, F74 Confirmation Decision, para. 61.

¹⁸⁵ F74 Confirmation Decision, para. 61.

114. As regards the qualifier “when such information relates to obstruction of criminal proceedings”, the Panel notes again the scope of the provision, as reflected in its title (“criminal proceedings”) as well as the placement and formulation of the qualifier. The Panel accordingly considers that the phrase “when such information relates to obstruction of criminal proceedings” qualifies the third alternative, *i.e.* the person failing to “state true information to the police, a prosecutor or a judge” and, in any event, it does not limit the application of the entire provision.¹⁸⁶

115. As regards the question whether the offence requires proof of consequence, the Panel finds that the words “[w]hoever uses force or serious threat [...] to induce” do not require proof of result. That is, Article 387 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. 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 the perpetrator who intends to influence a witness.¹⁸⁷

2. Mental elements

116. The offence of intimidation must be committed with intent within the meaning of Article 21 of the KCC.

¹⁸⁶ The equivalent article of the 2003 provisional criminal code had as its title “Intimidation during criminal proceedings for organised crime”. See UNMIK/REG/2003/25, Provisional Criminal Code of Kosovo, 6 July 2003, Article 310. The text of that article included the phrase “when such information relates to organized crime”. Article 395 of the 2012 KCC no longer contained any reference to organised crime, its title referred only to intimidation during criminal proceedings and the reference to organised crime in the text was replaced with a reference to obstruction of criminal proceedings. This was reproduced in Article 387 KCC.

¹⁸⁷ F74 Confirmation Decision, para. 62, referring to ICTY, [Beqaj Trial Judgment](#), para. 21; [Haraqija and Morina Trial Judgment](#), para. 18; ICC, [Bemba et al. Trial Judgment](#), paras 43, 48; [Bemba et al. Appeal Judgment](#), para. 737.

(a) Parties' submissions

117. The Gucati Defence submits that intimidation is an offence of specific intent.¹⁸⁸

The Haradinaj Defence mirrors these submissions.¹⁸⁹

118. The SPO submits that the standard direct or eventual intent suffices.¹⁹⁰

(b) The Panel's findings

119. The Panel recalls that Article 21 of the KCC provides that a criminal offence can be committed with direct or eventual intent (*dashja/umišljaj*). The provision does not indicate whether any offences in the KCC can be committed only with one or the other of these two forms. The Panel further notes that the KCC does not expressly recognise the notion of "specific" or "special intent" as a distinct category of *mens rea*. The Panel observes, however, that Article 22 of the KCC recognises, *inter alia*, "purpose" (*qëllim/namera*) as an element of criminal offences that may be inferred from factual circumstances. Article 22 of the KCC does not indicate, however, whether purpose attaches to all offences or only to those committed with either direct or eventual intent. Turning to the text of the KCC, the Panel observes that none of its provisions expressly refer to direct or eventual intent. Instead, the KCC frequently uses formulas such as "knowingly",¹⁹¹ "intentionally",¹⁹² and "with [the] intent(ion) to"¹⁹³. The Panel notes that the Albanian or Serbian terms used for these formulas do not necessarily reflect the English terms.¹⁹⁴ The Panel also notes the use of the formulas "[in order] to

¹⁸⁸ Transcript, 16 March 2022, pp 3633, 3715-3717; Transcript, 8 September 2021, pp 660, 672.

¹⁸⁹ F342, para. 32.

¹⁹⁰ Transcript, 14 March 2022, p. 3502; F341, para. 21.

¹⁹¹ See e.g. Articles 218, 223, 235, 280(1.4), 282(1.2-1.4), 336(1)-(2), 383(1), 390(1) of the KCC.

¹⁹² See e.g. Articles 126(2), 128(6), 145(2.1-2.4), 147(2.1-2.4), 148, 158(3), 159(5), 160(4), 161(4), 167(1), 168(1), 169(2), 173(1.5), (1.11), 184(1), 196(3), 231(1), 279(1), 290(2), 325(1), 414(3.1-3.2), 415(1) of the KCC.

¹⁹³ See e.g. Articles 134, 142, 162(1), 182(1), 248(1), 261(1), 267(1), 284(1), 292(1), 301(1), 313(1), 317(1), 323(1), 386(1), 388(1), 389(1) of the KCC.

¹⁹⁴ See e.g. in the Albanian version, "knowingly" appears as "me vetëdije" (Articles 218, 223 of the KCC), "me dije[ni]" (Articles 235, 280(1.4), 282(1.2-1.4), 383(1), 390(1) of the KCC) or "me dashje" (Article 336(1)-(2) of the KCC). "Intentionally" appears as "me dashje" (Articles 17, 27, 28, 32, 33, 126(2), 128(6), 158(3), 173(1.5), (1.11), 184(1), 196(3), 231(1), 279(1), 414(3.1-3.2) of the KCC), "me vetëdije"

[verb]”,¹⁹⁵ “with the aim of”¹⁹⁶ or “for the purpose of”¹⁹⁷. The latter two formulas are not differentiated in the Albanian version of the KCC, which uses for both the phrase “*me qëllim të*”, incorporating the legal term for “purpose”.¹⁹⁸ The Serbian version uses a number of different terms for both.¹⁹⁹

120. In light of the unqualified terms of Article 21 of the KCC and in the absence of express limitations in the KCC as regards the application of intent and purpose as elements of a criminal offence and taking into consideration the manner in which the formulas are used, the Panel, by majority, cannot conclude that the legislator intended to criminalise certain offences only if committed with direct intent or to require direct intent for any offence that entails a purpose. The fact that other legal systems exclude the possibility of “specific intent” crimes being committed with eventual intent, or that certain authors opine that this should be the case, does not enable this Panel to import such principles into the Kosovo legal system and thereby amend the provisions of the KCC. The Panel instead considers, by majority, that Article 21 applies to all offences

(Article 415(1) of the KCC) or as “*me qëllim*” or “*qëllimisht*” (Articles 145(2.1-2.4), 147(2.1-2.4), 148, 159(5), 160(4), 161(4), 167(1), 168(1), 169(2), 290(2), 325(1) of the KCC). “With the intent to” appears as “*me qëllim të*”, incorporating the legal term for “purpose” in the Albanian version of Article 22 of the KCC. In the Serbian version, “knowingly” appears as “*svesno*” (Articles 218, 223, 235, 280(1.4), 282(1.2-1.4), 336(1)-(2), 383(1), 390(1) of the KCC). “Intentionally” appears as “*svesno*” (Articles 126(2), 168(1), 173(1.11), 184(1), 279(1), 415(1) of the KCC), “*umišljajno*” or “*smišljeno*” (Articles 128(6), 196(3) of the KCC), “*namerno*” (Articles 145(2.1-2.4), 147(2.1-2.4), 148, 158(3), 159(5), 160(4), 161(4), 167(1), 169(2), 231(1), 325(1), 414(3.1-3.2) of the KCC) and “*hotimično*” (Article 290(2) of the KCC). “With the intent to” appears as “*u nameri*”, incorporating the legal term for “purpose” in the Serbian version of Article 22 of the KCC, although Article 248(1) of the KCC uses “*sa ciljem*” for the same term.

¹⁹⁵ See e.g. Articles 34, 164(2), 165(3), 168(4), 171(1), 181(1)-(2), 194(1), 233, 282(1.3), 283(2), 297, 309, 310, 387, 403 of the KCC.

¹⁹⁶ See e.g. Articles 113(13), 119(1), 120, 121, 122, 123, 124(4), 128(6) of the KCC.

¹⁹⁷ See e.g. Articles 113(15), 133(2), 137, 138(4), 154(1), 163(2), 164(10.1), 173(1.6-1.7), 196(3), 199(3), 239(6) of the KCC.

¹⁹⁸ See e.g. the Albanian version of the provisions listed under fns. 193, 196 and 197. See also Article 22 of the KCC (Albanian version).

¹⁹⁹ In the Serbian version, “with the aim of” appears as “*u cilju*” or “*sa ciljem*” (Articles 113(13) and 128(6) of the KCC) and “*u nameri*” (Articles 119(1), 120, 121, 122, 123, 124(4) of the KCC). “With the purpose of” appears as “*sa ciljem*” or “*u cilju*” (Articles 113(2.15), 133(2), 173(1.6-1.7), 196(3), 239(6) of the KCC), “*u svrhu*” (Article 137 of the KCC) and “*u nameri*” (Articles 138(4), 154(1), 163(2), 164(10.1), 199(3) of the KCC).

in the KCC, without distinction and regardless of whether an offence also requires a specific purpose. The form of intent for each offence is to be inferred from the evidence as a whole.

121. As regards Article 387 of the KCC, the Panel notes the presence of the phrase “to induce”, which has been interpreted as reflecting a requirement of “specific direct intent”.²⁰⁰ The Panel found above that the words “[w]hoever uses force or serious threat [...] to induce” indicate that Article 387 of the KCC does not require proof of result.²⁰¹ In fact, the Panel considers, by majority, that the phrase “to induce” indicates either the desire of the perpetrator under Article 21(2) of the KCC or the accepted prohibited consequence of his or her actions, under Article 21(3) of the KCC.²⁰² This is confirmed by similar phrases used in other provisions criminalising conduct offences.²⁰³

122. In line with its above findings, the Panel, by majority, does not consider that the phrase “to induce” limits the form of intent applicable for this offence. Under Article 387 of the KCC, interpreted in light of Article 21 of the KCC, a perpetrator may desire to induce a person or may be aware that a person can be induced as a result of the perpetrator’s conduct and accede to that occurrence. To hold otherwise would mean that any perpetrator who intentionally uses force or serious threat against witnesses in a criminal trial with the accepted, but not necessarily desired, consequence that witnesses would refrain from testifying, would go unpunished. Such an interpretation is inconsistent with the plain meaning of the words of Article 387 of the KCC, when read alongside Article 21(3) of the KCC. It is also inconsistent with the intention of Article 387 of the KCC, which is to prevent and punish acts of intimidation

²⁰⁰ Transcript, 16 March 2022, p. 3716.

²⁰¹ See *supra* para. 115.

²⁰² F74 Confirmation Decision, para. 62.

²⁰³ See *e.g.* Articles 165(3), 171(1), 181(1)-(2), 194(1), 233, 283(2), 309-310, 403 of the KCC.

during criminal proceedings. There is no indication that the legislator intended such a result.

123. As a result, the Panel finds that nothing in the wording of Article 387 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 favor of the Accused. The Panel finds that Article 2(3) of the KCC is not intended to allow a Party to read an ambiguity into the KCC in order to advance a favourable interpretation of a particular provision. Instead, Article 2(3) of the KCC is intended to apply when other means of interpretation are incapable of resolving such an ambiguity. This is not the case here.

124. For these reasons, the Panel, by majority, finds that the offence under Article 387 of the KCC can be committed with either direct or eventual intent.²⁰⁴

E. RETALIATION

125. Article 388(1) of the KCC reads:

Whoever takes any action harmful to any person, including interference with lawful employment or livelihood of any person, with the intent to retaliate for providing truthful information relating to the commission or possible commission of any criminal offense to police, an authorized investigator, a prosecutor or a judge, shall be fined and punished by imprisonment of up to three (3) years.

1. Material elements

126. The Panel finds that the offence of retaliation, within the meaning of Article 388(1) of the KCC, requires the following material elements (*actus reus*): (i) a harmful action (ii) directed against any person (iii) in the context of that person providing information relating to the commission or possible commission of any criminal offence to police, an authorised investigator, a prosecutor or a judge. The

²⁰⁴ F74 Confirmation Decision, para. 63.

Panel notes that the Pre-Trial Judge included the notion of “truthful information” in the material elements of the offence, but did not make any specific findings in its regard.²⁰⁵ For reasons set out below, the Panel will address “truthful information” under the *mens rea* requirements.

(a) Parties’ submissions

127. The Gucati Defence submits that the offence requires: (i) proof of consequence;²⁰⁶ and (ii) the subject of retaliation to have provided truthful information and thus if the information provided was false no offence is committed.²⁰⁷ The Haradinaj Defence mirrors and adopts the submissions of the Gucati Defence.²⁰⁸

128. The SPO submits that: (i) the harm intended need not have occurred;²⁰⁹ and (ii) whether or not a witness actually gave truthful information is irrelevant;²¹⁰ what is required is an intent to retaliate against such a person.²¹¹

(b) The Panel’s findings

129. As regards the term “any action harmful to any person”, the Panel observes that such action is not delimited in Article 388(1) of the KCC. The examples provided in the provision (“interference with lawful employment or livelihood of any person”) are illustrative. The Panel thus adopts the analysis and findings of the Pre-Trial Judge that encompass various forms of serious interference with a person’s rights or interests, including through violence, serious threats, interference with individual safety, security, well-being, privacy, dignity or any other interference harmful to the person or his or her immediate family.²¹²

²⁰⁵ F74 Confirmation Decision, para. 52.

²⁰⁶ Transcript, 16 March 2022, p. 3640.

²⁰⁷ Gucati Final Trial Brief, paras 60-61; Transcript, 8 September 2021, pp 654-655; F439, paras 68-69.

²⁰⁸ F342, paras 20-22; F440, paras 11, 34-38.

²⁰⁹ Transcript, 14 March 2022, p. 3450; F565 SPO Final Trial Brief, para. 222; F341, para. 23.

²¹⁰ Transcript, 14 March 2022, p. 3451.

²¹¹ F565 SPO Final Trial Brief, para. 224; F447, para. 49.

²¹² F74 Confirmation Decision, para. 53.

130. As regards the person against whom the harmful action is directed, the Panel notes that Article 388(1) of the KCC does not qualify the term. The Panel therefore finds that “any person” can refer to an individual or a category of individuals. Furthermore, the Panel interprets “any person” in this context to include not only witnesses called to testify, but also any person who provided or is in the course of providing information in police or prosecutorial investigations. Within the SC legal framework, a person who provided or is in the course of providing information to the SITF, the SPO and/or to an SC Panel about any crimes or offences falling under SC jurisdiction is covered by Article 388(1) of the KCC.²¹³

131. As regards the question of whether the person must have given “truthful” information to the police or prosecutorial investigators, the Panel observes that the phrase “with the intent to retaliate for providing truthful information relating to the commission or possible commission of any criminal offense” qualifies the *mens rea* element and is not part of the *actus reus* element of this offence. To hold otherwise would mean that no harmful action would be punishable under Article 388(1) of the KCC if it was not shown that the person spoke the truth about the commission or possible commission of a crime. This would lead to the absurd consequence that persons who cannot prove that their evidence is true or whose evidence is questioned, challenged or deemed unreliable would not be protected by the law against retaliatory actions. It would also raise the question of which authority is competent to determine the truth of the information provided. It would also allow anyone accused of committing that offence to question the truthfulness of an account and thus evade responsibility. The Panel accordingly finds that its interpretation that the truthfulness of the information is part of the *mens rea* rather than the *actus reus* comports best with the purpose of the provision: to protect persons providing information about offences and, more generally, the integrity of criminal proceedings. The meaning and scope of

²¹³ F74 Confirmation Decision, para. 53.

application of “truthful information” will therefore be discussed under the mental elements of the present offence.

132. As regards the question whether the offence requires proof of consequence, the Panel notes that the harmful action must be taken against a person who has provided or is in the course of providing information about the commission or possible commission of a crime.²¹⁴ If the harmful action is taken before the person is due to provide such information, it does not meet the elements of retaliation. The phrase “[w]hoever takes any action harmful to any person” suggests that some form of action that is harmful must occur, such as the use of violence, threats, termination of employment, demotion or imposition of unreasonable salary cuts. That being said, Article 388(1) of the KCC does not require proof of any harm or consequence further or in addition to the harmful action that occurred.

2. Mental elements

133. The offence of retaliation must be committed with intent within the meaning of Article 21 of the KCC.²¹⁵

(a) Parties’ submissions

134. The Gucati Defence submits that: (i) the offence of retaliation requires specific intent;²¹⁶ and (ii) it requires the perpetrator to believe that the information provided was truthful.²¹⁷ The Haradinaj Defence mirrors these submissions.²¹⁸

²¹⁴ See e.g. *Salihu et al.*, Article 396(1) of the 2012 KCC, mn. 3, p. 1125.

²¹⁵ F74 Confirmation Decision, para. 55.

²¹⁶ Transcript, 16 March 2022, pp 3640, 3716-3717; Transcript, 8 September 2021, p. 655.

²¹⁷ Transcript, 16 March 2022, pp 3641-3642; Gucati Final Trial Brief, para. 61; Transcript, 8 September 2021, pp 654-655; F439, para. 68.

²¹⁸ F342, para. 25.

135. The SPO submits that the offence requires specific intent,²¹⁹ but that the perpetrator need only act with the knowledge that the information provided by the witness he retaliated against might be true.²²⁰

(b) The Panel's findings

136. The Panel notes that the Parties agreed that the offence under Count 4 requires specific intent.

137. The Panel has found above that the KCC does not expressly recognise the notion of "specific intent", that phrases such as "with the intent to" signify a purpose (*qëllim/namera*) of the offence. The Panel also found, by majority, that there is nothing in the KCC that suggests that offences requiring purpose can only be committed with direct intent.²²¹ At the same time, the Panel is mindful that the Pre-Trial Judge has found that retaliation requires specific intent and that, throughout the trial, the Parties relied on this finding when making submissions on this offence. For this reason, the Panel shall not depart from the Pre-Trial Judge's finding. In any event, the Panel is satisfied that the wording of Article 388(1) of the KCC, "with the intent to retaliate" ("*me qëllim te hakmarrjes"/"u nameri da izvrši odmazdu"*) indicates an element of purpose.

138. Interpreted in this context, the purpose to retaliate under Article 388(1) of the KCC requires some form of awareness on the part of the perpetrator regarding the truthfulness of information. In particular, the perpetrator must be aware that the person against whom he or she retaliates has provided or is providing, at least to some extent, truthful information about the commission or possible commission of a crime. The Panel recognises that the provision would be more consistent if the word "truthful" was removed. It is not, however, for the Panel to amend the KCC. The Panel must apply it as it stands. Insofar as there is ambiguity in the expression "the intent to

²¹⁹ Transcript, 14 March 2022, p. 3450; F341, para. 25.

²²⁰ Transcript, 14 March 2022, p. 3451.

²²¹ See *supra* paras 119-120.

retaliate for providing truthful information”, that ambiguity must be resolved in favour of the Accused. Accordingly, and in line with the wording of Article 388(1) of the KCC, it is insufficient to show that the perpetrator believed that the information might be true or that he or she was not interested in the truth of the information. At the same time, a mere claim or statement by the perpetrator that he or she did not know or believe that the information was truthful or that he or she considered the information to be false does not suffice, on its own, to exclude the possibility that the offence was committed. It is for the SPO to establish, based on the available evidence, that at the time of commission, the perpetrator was aware that the person against whom he or she retaliated provided, at least to some extent, truthful information about the commission or possible commission of a crime.

F. OBSTRUCTING OFFICIAL PERSONS UNDER ARTICLE 401(1) AND (5) KCC

139. Article 401(1) of the KCC reads:

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.

140. Article 401(5) of the KCC reads:

When the offense provided for in paragraph 1. or 2. of this Article is committed against a judge, a prosecutor, an official of a court, prosecution officer or a person 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.

1. Material elements

141. The Panel finds that the offence of obstructing an official person in performing official duties, within the meaning of Article 401(1) of the KCC, requires the following material elements (*actus reus*): (i) the use of force or serious threat resulting in the (ii) obstruction or attempted obstruction of an official person in performing official

duties, or the compelling of that person to perform official duties.²²² The Panel further finds that the wording of Article 401(1) of the KCC (“obstructs or attempts to obstruct”) indicates that the offence can be committed either when the obstruction has actually occurred or when it has only been attempted.

(a) Parties’ submissions

142. The Gucati Defence submits that a serious threat: (i) means serious threat of force;²²³ (ii) must be of immediate use of force against the official person themselves;²²⁴ and (iii) must be simultaneous with the official action.²²⁵ The Haradinaj Defence mirrors and adopts the submissions of the Gucati Defence.²²⁶

143. The SPO claims that: (i) there is no requirement that the serious threat is of force;²²⁷ (ii) the threat can be directed at persons other than the official person or even objects;²²⁸ and (iii) no requirement exists to prove that a specific official duty was affected.²²⁹

(b) The Panel’s findings

144. As regards the meaning of “serious threat”, the Panel observes that nothing in the wording of Article 401 of the KCC suggests that “serious threat” refers only to a threat of force.²³⁰ The Panel observes that the 2003 provisional criminal code contained

²²² F74 Confirmation Decision, para. 67.

²²³ Transcript, 16 March 2022, p. 3644; Gucati Final Trial Brief, para. 12; Transcript, 8 September 2021, p. 660; F439, para. 20.

²²⁴ Transcript, 16 March 2022, p. 3645; Gucati Final Trial Brief, para. 20; F345, para. 5; F439, paras 26-28.

²²⁵ Transcript, 16 March 2022, p. 3645; Gucati Final Trial Brief, para. 20; F439, para. 28.

²²⁶ F342, paras 33-36; F440, para. 11.

²²⁷ Transcript, 14 March 2022, pp 3455, 3475-3476; F565 SPO Final Trial Brief, para. 172; F341, para. 8; F447, para. 10.

²²⁸ Transcript, 14 March 2022, p. 3456; F565 SPO Final Trial Brief, para.172; F341, para. 10; F447, para. 12.

²²⁹ F341, para. 9.

²³⁰ *Per a contrario, Salihu et al.*, Article 409(1) of the 2012 KCC, mn. 2, p. 1165.

in the equivalent article the phrase “by force or threat of immediate use of force”.²³¹ This phrase was removed in both the 2012 KCC and the KCC.²³² The Panel interprets this removal as a clear indication that the legislator intended the term “serious threat” to encompass not only a threat to use force, but any serious threat of harmful action. The Panel also takes note of other provisions of the KCC, which use the term “threat” to describe harmful action other than the use of force,²³³ or which clearly indicate when “threat” refers to use of force or violence.²³⁴ Furthermore, the Panel notes that Article 401 of the KCC does not specify nor restrict the type or category of action that might qualify as a serious threat. As a result, the Panel agrees with the Pre-Trial Judge that “serious threat” includes threat to use force or to inflict serious harm on the health, well-being, safety, security or privacy of a person.²³⁵

145. The Panel further finds that the term “obstruct” means to prevent, impede, hinder, or delay the motion, passage, or progress of something.²³⁶

146. As regards the addressee of the “serious threat”, the Panel notes that Article 401(1) of the KCC uses the term “official person”. Taking into consideration Article 113(2) of the KCC,²³⁷ the Panel finds that, within the SC legal framework, an “official person” under Article 401(1) of the KCC would be any person authorised to act on behalf of the SC or SPO, including a judge, a prosecutor, an investigator or any

²³¹ See UNMIK/REG/2003/25, Provisional Criminal Code of Kosovo, 6 July 2003, Article 316(1): “Whoever, by force or threat of immediate use of force, obstructs an official person in performing official duties falling within the scope of his or her authorisations or, using the same means, compels him or her to perform official duties shall be punished by imprisonment of three months to three years”.

²³² Article 409(1) of the 2012 KCC: “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”.

²³³ See e.g. Articles 181, 160(2.7), 161(2.5), 167(4), 168(4), 169, 170(6.5), 171, 227(3.2), 229(2.2) of the KCC.

²³⁴ See e.g. Articles 114, 118, 121, 158(1), 160(2.1), 161(2.1), 227(3.1), 229(2.1), 247(3) of the KCC.

²³⁵ F74 Confirmation Decision, para. 70.

²³⁶ F74 Confirmation Decision, para. 70.

²³⁷ Article 113(2) of the KCC defines an official person as, *inter alia*, “a person who is entrusted with the actual performance of certain official duties or works” (Article 113(2.4) of the KCC).

other SC or SPO official.²³⁸ The Panel further notes that nothing in the wording of Article 401 of the KCC requires that the force or serious threat be directed against the official person only.²³⁹ Restricting the application of this offence to acts directed at official persons would exclude situations where the force or serious threat is directed against one or more other persons or an object with a view to obstructing the official duties or functions of that person. This 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. As a result, the Panel considers that a “serious threat” may be directed against an official person, another person, or an object.

147. As regards the terms “official duties” and “official functions” within the meaning of Article 401(1) and (5) of the KCC, the Panel observes that they are used in their plural form; the language of these provisions does not suggest a requirement of singular specificity, *i.e.* identifying the form and nature of the particular duty obstructed.²⁴⁰ The Panel considers that, within the SC legal framework, “official duties” and “official functions” exercised by the “official person” relate to any responsibility or work of an SC or SPO official within the context of official proceedings, including SPO investigations.²⁴¹ Hence, these provisions require that the official duties or functions can be ascertained as falling within the official person’s competencies.²⁴²

148. As regards the aim and timing of obstruction, the Panel observes that Article 401(1) of the KCC refers to the (attempted) obstruction of an official person “in performing official duties”. The Panel interprets this phrase to mean that the use of

²³⁸ F74 Confirmation Decision, para. 69.

²³⁹ See *e.g. Salihu et al.*, Article 409(1) of the 2012 KCC, mns. 3-4, pp 1165-1166. See also F74 Confirmation Decision, para. 68.

²⁴⁰ See *e.g. Salihu et al.*, Article 409(1) of the 2012 KCC, mn. 5, p. 1166.

²⁴¹ F74 Confirmation Decision, para. 69.

²⁴² See *e.g. Salihu et al.*, Article 409(1) of the 2012 KCC, mn. 5, p. 1166.

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. The use of force or serious threat need not happen at the very same moment the official person is actively exercising a particular duty; it can happen at another moment in time with a view to obstructing the performance of an expected or ongoing official duty.

149. Lastly, the Panel finds that, where the offence under Article 401(1) of the KCC is committed against an SC or SPO official, the requirements of the aggravated form under Article 401(5) of the KCC are also met.²⁴³

2. Mental elements

150. The offence of obstructing an official person under Article 401(1) and/or (5) of the KCC must be committed with intent within the meaning of Article 21 of the KCC.

(a) Parties' submissions

151. The Gucati Defence asserts that when the offence is one of an attempt, only direct intent will suffice.²⁴⁴ The Haradinaj Defence joins these submissions.²⁴⁵ The SPO has not taken a position on this.

(b) The Panel's findings

152. The Panel finds 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 of the following mental elements (*mens rea*): direct or eventual intent.

²⁴³ F74 Confirmation Decision, para. 69.

²⁴⁴ Transcript, 8 September 2021, p. 662.

²⁴⁵ F342, paras 37-38.

153. For direct intent, the perpetrator must have acted with awareness of, and desire for, using force or serious threat in order to obstruct an official person in performing official duties.²⁴⁶

154. For eventual intent, the perpetrator must have: (i) used force or serious threat with the awareness that, as a result of his or her conduct, the obstruction of an official person in performing official duties can occur; and (ii) acceded to that occurrence.²⁴⁷

155. The Panel further finds that nothing in the language of Article 401(1) or (5) of the KCC suggests that the attempted form of this offence can only be perpetrated with direct intent. Instead, the language and purpose of that prohibition clearly allow for the possibility of the offence being attempted with eventual intent, as defined above.

G. OBSTRUCTING OFFICIAL PERSONS UNDER ARTICLE 401(2)-(3) KCC

156. Article 401(2) of the KCC reads:

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.

157. Article 401(3) of the KCC reads:

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

1. Material elements

158. The Panel finds that the offence of obstructing an official person in performing official duties, within the meaning of Article 401(2) of the KCC, requires the following material elements (*actus reus*): (i) participation in a group of persons which by common

²⁴⁶ F74 Confirmation Decision, para. 72.

²⁴⁷ F74 Confirmation Decision, para. 73.

action (ii) obstructs or attempts to obstruct an official person in performing official duties.²⁴⁸ The Panel further finds that the wording of Article 401(2) of the KCC (“obstructs or attempts to obstruct”) indicates that the offence can be committed either when the obstruction has occurred or when it has only been attempted.

(a) Parties’ submissions

159. The Gucati Defence submits that: (i) the offence is subsidiary and applies only when the greater offence under Article 401(1) of the KCC is not established;²⁴⁹ (ii) “common action” must refer to common action to use force or serious threat;²⁵⁰ and (iii) the common action must be simultaneous with the official action obstructed.²⁵¹ The Haradinaj Defence mirrors and adopts the submissions of the Gucati Defence.²⁵²

160. The SPO submits that: (i) obstruction by a group poses heightened danger and warrants additional sanction;²⁵³ and (ii) obstruction is not limited to common action to use force or serious threat of force or to situations of mob action.²⁵⁴

(b) The Panel’s findings

161. As regards the notion of a “group”, the Panel takes into consideration Article 113(12) of the KCC and finds that it must consist of three or more persons.²⁵⁵

162. As regards the nature of “common action”, the Panel notes that nothing in the language of Article 401(2) of the KCC suggests that “common action” must denote force or serious threat. While “common action” could indeed relate to the use of force

²⁴⁸ F74 Confirmation Decision, para. 74.

²⁴⁹ F345, para. 8.

²⁵⁰ Transcript, 16 March 2022, pp 3646-3647, 3695; Gucati Final Trial Brief, para. 30; Transcript, 8 September 2021, pp 662, 671. *See also* F345, para. 9.

²⁵¹ Gucati Final Trial Brief, para. 31; F439, para. 39.

²⁵² F342, para. 39; Transcript, 8 September 2021, pp 663, 671; F440, para. 11.

²⁵³ F341, para. 13.

²⁵⁴ Transcript, 14 March 2022, p. 3459; F447, para. 31; F341, para. 14.

²⁵⁵ F74 Confirmation Decision, para. 75.

and other forms of violent conduct by a group, it can also take other forms, such as putting up barricades or blocking roads. While such examples usually denote a “crowd” action, nothing in the wording of Article 401(2) of the KCC suggests that “common action” should only refer to “crowd” or “mob” violence or should be limited to any particular type of acts.²⁵⁶ Article 401(2) of the KCC punishes joint criminality without limiting it to any particular form. Accordingly, “common action” under Article 401(2) of the KCC cannot be limited to “crowd” or “mob” violence but covers in principle any type of collective criminal activity that pursues the relevant obstructive purpose.²⁵⁷

163. As regards participation in a group, the Panel notes that this entails any person who, by his or her conduct, partakes in, contributes to or enables in some other form, the common action of obstructing or attempting to obstruct an official person in performing official duties.²⁵⁸ The Panel underscores that Article 401(2) of the KCC does not require that the actions of each participant in the group contribute directly to the obstructive purpose.

164. As regards the notion, scope, aim and timing of obstruction as well as the meaning of the terms “official person” and “official duties”, the Panel refers to its findings regarding Article 401(1) of the KCC.²⁵⁹

165. As regards the relationship between Article 401(1) and (2) of the KCC, the Panel observes that the language of paragraphs (1) and (2) of Article 401 of the KCC does not suggest that the two forms of this offence are mutually exclusive. The Panel notes that in one particular case the Kosovo Court of Appeals has held that “these provisions are in a relation of ideal concurrence in the modality of implicit subsidiarity. The lesser offense [*i.e.* the equivalent of Article 401(2) of the KCC] is subsidiary to the situations

²⁵⁶ *Per a contrario*, *Salihu et al.*, Article 409(2) of the 2012 KCC, mn. 3, p. 1167.

²⁵⁷ F74 Confirmation Decision, para. 75.

²⁵⁸ *See e.g.* *Salihu et al.*, Article 409(2) of the 2012 KCC, mn. 4, pp 1167-1168.

²⁵⁹ *See supra* paras 145-148.

on which the greater offense is not established”.²⁶⁰ The Kosovo Court of Appeals then held that “the punishment for both criminal offenses [...] would not be admissible because they are not in a relation of real concurrence”.²⁶¹ The Kosovo Court of Appeals defined “real concurrence” as consisting “in the perpetration by the same person of a plurality of criminal offenses through distinct actions”.²⁶² In relation to these findings, the Panel observes the following.

166. First, the Court of Appeals in that case did not identify the legal basis on which it relied to apply the theory of concurrence. Instead, it indicated that “[i]n civil law systems – such as in Kosovo – courts tend to solve the same problem by applying the rules of theory of concurrence”.²⁶³ It is unclear what legal basis was being relied upon for such a proposition.²⁶⁴ The Court of Appeals may have been relying on Article 71(1) of the Provisional Criminal Code of Kosovo of 6 July 2003, which is equivalent to Article 76 of the KCC.²⁶⁵ However, it is not readily apparent that the reasoning of the Kosovo Court of Appeals indeed derived from that provision.²⁶⁶ The Panel notes that Article 76 of the KCC is not expressly incorporated in the Law and, by virtue of Article 3(2)(c) and (4) of the Law, is not applicable.²⁶⁷

²⁶⁰ Kosovo, [M.I. et al. Appeal Judgment](#), section 6.3, p. 29.

²⁶¹ Kosovo, [M.I. et al. Appeal Judgment](#), section 6.3, p. 29.

²⁶² Kosovo, [M.I. et al. Appeal Judgment](#), section 6.3, p. 28.

²⁶³ Kosovo, [M.I. et al. Appeal Judgment](#), section 6.3, p. 27.

²⁶⁴ See e.g. [Čelebići Appeal Judgment](#), paras 406-413, highlighting the different national approaches taken in this matter.

²⁶⁵ Kosovo, [M.I. et al. Appeal Judgment](#), section 6.4, p. 31.

²⁶⁶ Article 76(1) of the KCC is identical to Article 71(1) of the UNMIK/REG/2003/25, Provisional Criminal Code of Kosovo, 6 July 2003 and Article 80(1) of the 2012 KCC. They all provide: “if a perpetrator, by one or more acts, commits 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 these acts”.

²⁶⁷ See also Rule 163(4) of the Rules that sets out a similar test and Article 44(4) of the Law, according to which the punishment imposed on persons adjudged guilty of crimes under Article 15(2) of the Law shall be in line with the punishments for those crimes set out in the 2012 KCC.

167. Second, the Panel notes that both Parties have accepted that it is within the Panel's discretion to take guidance from the cumulative convictions test applied by international tribunals.²⁶⁸ This test was formulated as follows:

[M]ultiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.²⁶⁹

168. The Parties did not identify any other legal basis that would provide for a different test.

169. Third, the Panel considers that the elements of Article 401(2) of the KCC are distinct from those under Article 401(1) of the KCC. In particular, Article 401(1) of the KCC requires proof of the use of force or serious threat by the perpetrator, which is not an element of the offence under Article 401(2) of the KCC. Therefore, as found above,²⁷⁰ obstructive actions pursuant to paragraph (2) can be performed by any form of joint criminality, not necessarily involving force or serious threat. Furthermore, Article 401(2) of the KCC requires common action by a group of persons, which is not required under Article 401(1) of the KCC. Article 401(2) of the KCC is neither a subsidiary or residual nor an aggravated form of Article 401(1) of the KCC. It instead

²⁶⁸ Transcript, 17 March 2022, pp 3805-3806, 3808, 3822-3824 (Gucati Defence); Gucati Final Trial Brief, para. 147. The Panel notes, however, that the Gucati Defence maintained at the same time that Article 401(2) of the KCC was subsidiary to Article 401(1) of the KCC. See Gucati Final Trial Brief, para. 146.

²⁶⁹ ICTY, [Čelebići Appeal Judgment](#), paras 412-413. See e.g. ICTY, [Strugar Appeal Judgment](#), paras 321-322; [Kordić and Čerkez Appeal Judgment](#), paras 1032-1033; ICTR, [Nahimana et al. Appeal Judgment](#), para. 1019; [Ntagerura et al. Appeal Judgment](#), para. 425; ICC, [Bemba Trial Judgment](#), paras 746-748; [Katanga Trial Judgment](#), para. 1695.

²⁷⁰ See *supra* para. 162.

criminalises a different form of obstruction that carries the specific danger of the common action of multiple – at least three – perpetrators.

170. In light of the above, the Panel considers that a perpetrator can fulfil the requirements of and could be held responsible for both offences, although sentencing on these offences should reflect the overall nature and gravity of the conduct in question.

171. Finally, Article 401(3) of the KCC provides for a more severe punishment when the perpetrator is the leader or organiser of the group.²⁷¹ The Panel notes in this regard that Article 401(3) of the KCC does not limit such role to official positions. The Panel therefore considers that the aggravated form under Article 401(3) of the KCC can apply to *de facto* leaders or organisers as well.

2. Mental elements

172. The offence of obstructing an official person through participation in a group must be committed with intent within the meaning of Article 21 of the KCC.

(a) Parties' submissions

173. The Gucati Defence asserts that use of the word “common” makes it clear that only a shared direct intent by three or more persons will suffice.²⁷² The Haradinaj Defence mirrors these submissions.²⁷³

174. The SPO submits that either direct or eventual intent suffices.²⁷⁴

²⁷¹ F74 Confirmation Decision, para. 77.

²⁷² Transcript, 8 September 2021, p. 662.

²⁷³ Haradinaj Submission, paras 41-42.

²⁷⁴ F341, para. 15.

(b) The Panel's findings

175. Consistent with Article 21 of the KCC, the Panel finds that the offence under Article 401(2) of the KCC as well as its aggravated form under Article 401(3) of the KCC require either direct or eventual intent.

176. For direct intent, the perpetrator must have acted with awareness of, and desire for, participating in a group in order to obstruct by common action an official person in performing official duties.²⁷⁵

177. For eventual intent, the perpetrator must have: (i) acted with the awareness that, as a result of his or her participation in the group, the obstruction by common action of an official person in performing official duties can occur; and (ii) acceded to that occurrence.²⁷⁶

178. The Panel further finds that nothing in the language of Article 401(2) of the KCC suggests that participation in the common action of a group requires direct intent and that the offence cannot be committed with eventual intent, as defined above. Moreover, the provision does not require that all persons in the group participate with the same form of intent. Accordingly, some may participate with direct intent, while others with eventual intent. The action(s) of the group must be common, not necessarily the intent of its members.

H. MODES OF LIABILITY

1. Commission

179. Article 17(1) of the KCC reads:

A perpetrator of a criminal offence is criminally liable if he or she is mentally competent and has committed the criminal offence intentionally or negligently.

²⁷⁵ F74 Confirmation Decision, para. 79.

²⁷⁶ F74 Confirmation Decision, para. 80.

180. In relation to the objective elements of this mode of liability, the Panel finds that commission, within the meaning of Article 17(1) of the KCC, requires that the perpetrator physically carries out the material elements of an offence, or omits to act when required to do so under the law.²⁷⁷

181. In relation to the subjective elements of this mode of liability, the Panel finds that commission requires direct or eventual intent, within the meaning of Article 21 of the KCC.²⁷⁸ Criminal offences may also be committed by negligence, when explicitly provided so by law.²⁷⁹ The KCC does not provide that the offences charged in the Indictment can be committed by negligence.

2. Co-perpetration

182. Article 31 of the KCC reads:

When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense.

(a) Parties' submissions

183. The Gucati Defence submits that co-perpetration requires specific intent, namely knowledge and wilfulness on the part of the perpetrator.²⁸⁰ The Haradinaj Defence mirrors these submissions and adds that the actions of the co-perpetrators must be concerted in the course of perpetration of the offence.²⁸¹

184. The SPO submits that no requirement of specific intent can be distilled from the plain language of this provision. The SPO adds that the requirement that co-perpetrators commit crimes "knowingly and wilfully" is not in the statutory language

²⁷⁷ F74 Confirmation Decision, para. 83.

²⁷⁸ F74 Confirmation Decision, para. 82.

²⁷⁹ Article 17(2) of the KCC.

²⁸⁰ Transcript, 8 September 2021, p. 662.

²⁸¹ F342, para. 44.

and, even if it was, these words are generally understood as an expression of only general intent.²⁸²

(b) The Panel's findings

185. In relation to the objective elements of this mode of liability, the Panel finds that co-perpetration, within the meaning of Article 31 of the KCC, requires that (i) two or more persons jointly (ii) participate in or substantially contribute in any other way to the commission of an offence.²⁸³

186. The Panel finds that joint commission does not require an explicit agreement prior to the commission of the offence. To infer the existence of an agreement, it is sufficient that the actions of the co-perpetrators are concerted in the course of committing the offence.²⁸⁴ The Panel further finds that Article 31 of the KCC does not delimit what constitutes participation in, or substantial contribution to, the commission of the offence.²⁸⁵ The Panel further considers, contrary to the findings of the Pre-Trial Judge, that there is no requirement that each co-perpetrator must fulfil at least one of the required material elements of the offence(s) committed jointly.²⁸⁶ Instead, he or she must substantially contribute to the offence without personally fulfilling one of the elements of the offence.

187. In relation to the subjective elements of this mode of liability, the Panel finds that co-perpetration requires direct or eventual intent, within the meaning of Article 21 of the KCC.²⁸⁷ Moreover, a co-perpetrator is criminally responsible within the limits of his or her intent. It is therefore possible that one co-perpetrator acts with direct intent, while another with eventual intent.²⁸⁸

²⁸² F341, para. 40.

²⁸³ F74 Confirmation Decision, para. 84.

²⁸⁴ F74 Confirmation Decision, para. 85.

²⁸⁵ F74 Confirmation Decision, para. 86.

²⁸⁶ F74 Confirmation Decision, para. 86.

²⁸⁷ F74 Confirmation Decision, para. 82.

²⁸⁸ See e.g. *Salihu et al.*, Article 31 of the 2012 KCC, mn. 29, pp 153-154.

3. Incitement

188. Article 32(1)-(3) of the KCC reads:

1. Whoever intentionally incites another person to commit a criminal offense shall be punished as if he or she committed the criminal offense if the criminal offense is committed.
2. Whoever intentionally incites another person to commit a criminal offense shall be punished as if he or she committed the criminal offense if the criminal offense is attempted but not committed.
3. Whoever intentionally incites another person to commit a criminal offense punishable by imprisonment of at least five (5) years and the offense is not even attempted, the inciter shall be punished for attempt.

(a) Parties' submissions

189. The Gucati Defence and the Haradinaj Defence adopted the position that the third form of incitement under Article 32(3) of the KCC can only be applied to offences that carry a minimum sentence of five-year imprisonment.²⁸⁹

190. The SPO submits in relation to Article 32(3) of the KCC that if any of the charged offences has a sentencing range that can exceed five years, even if not the minimum sentence, then the third form of incitement can be applied to that offence.²⁹⁰

(b) The Panel's findings

191. In relation to the objective elements of this mode of liability, the Panel finds that incitement, within the meaning of Article 32 of the KCC, requires that the perpetrator exert psychological influence on another person with a view to creating or strengthening the decision of that other person to commit a criminal offence. Such influence may take the form of, *inter alia*, encouraging, urging or pressuring the person to commit the offence, as well as guiding or instructing him or her in the commission thereof.²⁹¹

²⁸⁹ Transcript, 8 September 2021, p. 685.

²⁹⁰ Transcript, 8 September 2021, p. 684.

²⁹¹ F74 Confirmation Decision, para. 88. *See also Salihu et al.*, Article 32 of the 2012 KCC, mn. 10, p. 160.

192. In relation to the subjective elements of this mode of liability, the Panel finds that incitement requires direct or eventual intent, within the meaning of Article 21 of the KCC.²⁹²

193. In relation to the application of this mode of liability to the charged offences, the Panel notes that Article 32 of the KCC provides for three forms of incitement. The first, under Article 32(1) of the KCC, requires that the perpetrator incites another person to commit a criminal offence and the inciter incurs responsibility if the criminal offence is committed. Under the second form, pursuant to Article 32(2) of the KCC, the inciter also incurs responsibility if the criminal offence is attempted, but not committed. Under the third form, pursuant to Article 32(3) of the KCC, the inciter incurs responsibility for inciting an offence punishable by imprisonment of at least five (5) years, even if the offence is not attempted.²⁹³ The Panel considers, in contrast with the Pre-Trial Judge,²⁹⁴ that the phrase “punishable by imprisonment of at least five (5) years” means that the third form of incitement can only be applied to offences that provide for a *minimum* imprisonment of five (5) years.²⁹⁵ None of the offences charged in the Indictment carry a minimum sentence of 5-year imprisonment. For this reason, the Panel finds that the third form of incitement, under Article 32(3) of the KCC, cannot be applied to any of the six counts of the Indictment.

4. Assistance

194. Article 33(1)-(2) of the KCC reads:

²⁹² F74 Confirmation Decision, para. 82 and *Salihu et al.*, Article 32 of the 2012 KCC, mn. 17, p. 161.

²⁹³ F74 Confirmation Decision, para. 89.

²⁹⁴ F74 Confirmation Decision, para. 90.

²⁹⁵ To compare, the KCC uses a different wording in Article 28(2), which reads “[a]n attempt to commit a criminal offense for which a *punishment* of three or more years *may be imposed* shall be punishable”. (emphasis added). See also *Salihu et al.*, Article 32(3) of the 2012 KCC, mn. 1, p. 163: “In such instances, the inciter shall be punished for an attempt, *if the law provides for a sentence of five years or more* for the respective criminal offence” and “[...] the inciter shall only be held criminally liable for a criminal offence that is *punishable by a minimum sentence of five years imprisonment*”. (emphasis added).

1. Whoever intentionally assists another person in the commission of a criminal offense shall be punished more leniently than the perpetrator of the offense.

2. Assistance in committing a criminal offense includes, but is not limited to: giving advice or instruction on how to commit a criminal offense; making available the means to commit a criminal offense; creating conditions or removing the impediments to the commission of a criminal offense; or, promising in advance to conceal evidence of the commission of a criminal offense, the perpetrator or identity of the perpetrator, the means used for the commission of a criminal offense, or the profits or gains which result from the commission of a criminal offense.

195. In relation to the objective elements of this mode of liability, the Panel finds that assistance, within the meaning of Article 33(1) of the KCC, requires that the person assists the perpetrator in the commission of a criminal offence.²⁹⁶ The Panel further finds that such assistance includes, but is not limited to, the acts listed under Article 33(2) of the KCC.²⁹⁷

196. In relation to the subjective elements of this mode of liability, the Panel finds that assistance requires direct or eventual intent, within the meaning of Article 21 of the KCC.²⁹⁸ The person assisting a criminal offence need not intend the commission of that offence, but he or she must provide assistance to the perpetrator knowingly and intentionally. Nonetheless, the person assisting a criminal offence need not know all the details of the offence, *e.g.* place and time or manner and means of performance.²⁹⁹

5. Agreement to commit a criminal offence

197. Article 35(1)-(2) of the KCC reads:

1. Whoever agrees with one or more other persons to commit a criminal offense and one or more of such persons does any substantial act towards the commission of the criminal offense, shall be punished as provided for the criminal offense.

2. For the purposes of this Article, the term “substantial act towards the commission of a crime”, need not be a criminal act, but shall be a substantial preparatory step towards the commission of the crime which the persons have agreed to commit.

²⁹⁶ F74 Confirmation Decision, para. 91.

²⁹⁷ F74 Confirmation Decision, para. 92.

²⁹⁸ F74 Confirmation Decision, para. 82. *See e.g. Salihu et al.*, Article 33 of the 2012 KCC, mn. 18, p. 168.

²⁹⁹ *See e.g. Salihu et al.*, Article 33 of the 2012 KCC, mn. 16, p. 168.

198. In relation to the objective elements of this mode of liability, the Panel finds that an agreement to commit a criminal offence, within the meaning of Article 35 of the KCC, requires that (i) the perpetrator agrees with one or more other persons to commit a criminal offence and (ii) one or more of these persons undertake any substantial act towards the commission of the criminal offence.³⁰⁰ The Panel further notes the explanation of a “substantial act towards the commission of a crime” under Article 35(2) of the KCC.³⁰¹

199. In relation to the subjective elements of this mode of liability, the Panel finds that agreement to commit a crime requires direct or eventual intent, within the meaning of Article 21 of the KCC.³⁰²

6. Attempt

200. Article 28(1)-(3) of the KCC reads:

1. Whoever intentionally takes action toward the commission of an offense but the action is not completed or the elements of the intended offense are not fulfilled, is considered that he or she has attempted to commit a criminal offense.
2. An attempt to commit a criminal offense for which a punishment of three or more years may be imposed shall be punishable. An attempt to commit any other criminal offense shall be punishable only if expressly provided for by law.
3. A person who attempts to commit a criminal offense shall be punished as if he or she committed the criminal offense, however, the punishment may be reduced.

201. In relation to the objective elements of this mode of liability, the Panel finds that attempt, within the meaning of Article 28 of the KCC, requires that the perpetrator took action towards the commission of an offence, but the action was not completed or the elements of the intended offence were not fulfilled.³⁰³ The Panel notes that Article 28 of the KCC does not further delimit what constitutes taking action towards

³⁰⁰ F74 Confirmation Decision, para. 93.

³⁰¹ F74 Confirmation Decision, para. 94.

³⁰² F74 Confirmation Decision, para. 82.

³⁰³ F74 Confirmation Decision, para. 95.

the commission of the offence. The Panel considers, however, that such action must amount to more than preparatory acts.³⁰⁴ Accordingly, a perpetrator attempts the commission of an offence when he or she has begun to execute one or more of the material elements of the offence.³⁰⁵

202. In relation to the subjective elements of this mode of liability, the Panel finds that attempt requires direct or eventual intent, within the meaning of Article 21 of the KCC.³⁰⁶

203. In relation to the application of this mode of liability to the charged offences, the Panel notes that, pursuant to Article 28(2) of the KCC, an attempt to commit a criminal offence is punishable only if: (i) a punishment of three or more years may be imposed for the committed offence; or (ii) it was expressly so provided for by law.³⁰⁷ The Panel accordingly finds that an attempt may only be punishable in relation to the offences under Counts 1-4 and 6. Article 392(1) of the KCC (Count 5) provides for imprisonment of up to one year and does not expressly make punishable attempted commission.³⁰⁸

IV. THE EVENTS AT ISSUE

204. During the Indictment Period, the Accused received from unknown sources three sets of documents (“Three Sets”) pertaining to the work and investigations of the SITF and SPO. This material was delivered to the premises of the KLA WVA in Prishtinë/Priština on 7 September 2020, 16 September 2020, and 22 September 2020 (“Three Deliveries”).

³⁰⁴ F74 Confirmation Decision, para. 96.

³⁰⁵ See, in an albeit stricter formulation, F74 Confirmation Decision, para. 96.

³⁰⁶ F74 Confirmation Decision, para. 82; *Salihu et al.*, Article 28 of the 2012 KCC, mn. 2b), pp 130-131.

³⁰⁷ F74 Confirmation Decision, para. 97.

³⁰⁸ F74 Confirmation Decision, para. 97.

205. After each delivery, the Accused called and hosted a press conference where they discussed and made available to journalists each of the Three Sets (“Three Press Conferences”).

206. 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.

A. THE FIRST SET OF DOCUMENTS

7 September 2020

(a) The delivery of documents

207. On 7 September 2020, sometime between 9.15 a.m. and 10.00 a.m.,³⁰⁹ without apparent forewarning,³¹⁰ an unknown person delivered a set of documents relating to SITF and SPO investigations (“First Set”) to the KLA WVA premises in Prishtinë/Priština (“First Delivery”).³¹¹

208. The individual entered the KLA WVA premises and left a cardboard box on the front desk close to the KLA WVA’s secretary, Ms Miftari.³¹² The individual said that he would bring more material and that this lot was intended for “the person who

³⁰⁹ P1, p. 1 (Mr Gucati estimating the drop at around 9.15 a.m.); 1D4, para. 3; 1D9, para. 10 (Ms Miftari and Mr Gashi putting an estimated arrival time at “approximately 10:00 hours”); 1D19; 1D20; 1D21; 1D22 (extracts of the CCTV footage showing delivery at 9.53 a.m.); DW1240 (Hysni Gucati), Transcript, 8 December 2021, p. 2414; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2453; DW1245 (Cele Gashi), Transcript, 10 December 2021, p. 2582; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2720 (placing it at 9.30-10.00 a.m). *See also* P24, p. 7 (Mr Haradinaj placing the delivery at around 9.00 a.m.); 2D1, para. 46 (Mr Haradinaj suggesting it arrived between 10.00 a.m. and 10.30 a.m., in contradiction to earlier, contemporaneous accounts).

³¹⁰ P1, p. 4 (Mr Haradinaj: “We had no warning that we would receive these. This package was brought in and was left with us. It was the ladies who received the package. We went out to look at it”). *See also* DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2181.

³¹¹ P1, p. 1; P9, p. 1; DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2453-2455.

³¹² *See e.g.* 1D3, para. 13; 1D4, paras 3-6; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2165. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2453-2454.

speaks on TV".³¹³ Mr Gucati and Ms Miftari understood this to refer to both Accused,³¹⁴ while Mr Haradinaj thought that this referred to him.³¹⁵

209. The individual spoke Albanian without an accent.³¹⁶ He could not otherwise be identified.³¹⁷

210. Ms Miftari informed Mr Gucati, Mr Haradinaj and Mr Klinaku that a box had been left in her office by an unknown person.³¹⁸ Mr Gucati, Mr Haradinaj and Mr Klinaku came to inspect the box, which they feared might contain a bomb or explosives.³¹⁹ The box was opened and revealed documents; it was then taken to Mr Gucati's office.³²⁰ Also present in the KLA WVA premises at that time were Mr Cele Gashi and Mr Elvir Gucati.³²¹

(b) The review of the documents

211. Mr Gucati, Mr Haradinaj, Mr Klinaku and Mr Cele Gashi reviewed the content of the box.³²² According to Mr Gucati, there was a hand-written note on top of the

³¹³ 1D3, para. 13; 1D4, paras 5-7; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2165, 2212; Transcript, 8 December 2021, p. 2403-2404; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2454.

³¹⁴ DW1240 (Hysni Gucati), Transcript, 8 December 2021, pp 2403-2404; DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2471-2472.

³¹⁵ 2D1, para. 48; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2723.

³¹⁶ See e.g. 1D4, para. 6 (Ms Miftari: "The man spoke in Albanian and there was nothing unusual or strange about the way that he spoke"); Transcript, DW1241 (Taibe Miftari) 9 December 2021, pp 2454-2455.

³¹⁷ 1D4, paras 4, 8; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2165. See also P1, p. 1.

³¹⁸ See e.g. 1D3, para. 13; 1D4, paras 3-10; 2D1, para. 48; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2165; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2454; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2720-2722.

³¹⁹ 1D3, para. 13; 1D4, para. 10; 2D1, para. 49; DW1240 (Hysni Gucati), Transcript, 8 December 2021, pp 2396-2397; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2455.

³²⁰ 1D3, para. 13; 1D4, paras 10-11; 2D1, paras 49-51; DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2252; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2455; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2723.

³²¹ 1D3, para. 12; 1D4, para. 7; 1D9, para. 10; 2D1, para. 47; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2168; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2454.

³²² P1, p. 1; 1D3, paras 13-16; 1D9, para. 14; 2D1, paras 50-51; DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2253; DW1245 (Cele Gashi), Transcript, 10 December 2021, pp 2583-2584, 2591, 2594-2600.

documents saying that 7,000 additional files would later be brought.³²³ The First Set was estimated to contain approximately 4,000 documents or pages of documents;³²⁴ it consisted of four bundles of identical documents.³²⁵

212. Mr Gucati, Mr Haradinaj, Mr Klinaku, Mr Cele Gashi and possibly two other members of the KLA WVA leadership decided that a press conference should be called in relation to the First Delivery.³²⁶ Mr Gucati authorised Mr Klinaku to inform the media and to invite them to attend the press conference.³²⁷

(c) Media announcement of KLA WVA press conference

213. Shortly after the First Delivery, the first article thereon was published by *Gazeta Infokus*.³²⁸

(d) First press conference

214. At about 1.00 p.m. on 7 September 2020,³²⁹ a press conference was held and hosted by both Accused, in their respective capacities as Chairman and Deputy Chairman of the KLA WVA (“First Press Conference”).³³⁰

³²³ 1D3, para. 15; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2166; Transcript, 8 December 2021, pp 2394-2396.

³²⁴ P1, pp 1-2; P17, p. 7; P24, p. 7; 1D3, para. 19; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2172. *See also* P9, p. 7; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2723-2724. *See infra* paras 362, 398 (Findings on the Batches).

³²⁵ *See e.g.* 2D1, paras 53, 61; DW1249 (Nasim Haradinaj) Transcript, 11 January 2022, pp 2723-2724. *See infra* paras 363, 374 (Findings on the Batches).

³²⁶ *See e.g.* 1D3, para. 17; 2D1, para. 52; DW1240 (Hysni Gucati) Transcript, 6 December 2021, p. 2169; DW1249 (Nasim Haradinaj) Transcript, 11 January 2022, p. 2727.

³²⁷ 1D3, para. 18; DW1240 (Hysni Gucati) Transcript, 6 December 2021, p. 2170. *See also* 2D1, para. 56; DW1249 (Nasim Haradinaj) Transcript, 11 January 2022, p. 2727.

³²⁸ P129, p. 8; 1D2, p. 32.

³²⁹ 1D3, para. 19; 2D1, para. 55; DW1240 (Hysni Gucati) Transcript, 8 December 2021, p. 2414; DW1249 (Nasim Haradinaj) Transcript, 11 January 2022, p. 2729.

³³⁰ P1. *See also* P51.

215. About 12 to 25 journalists attended, including from the following media outlets: *Gazeta Infokus*, *Kosovo Press*, *Ekonomia online*, and possibly *Kallxo.com*.³³¹

216. The First Set was laid out on a table before the Accused.³³² Journalists looked through it.³³³

217. Mr Gucati began by greeting the journalists present and gave a general introduction on the reasons for the First Press Conference, namely the First Delivery.³³⁴ Mr Gucati then gave the floor to Mr Haradinaj, indicating that Mr Haradinaj had looked at the First Set briefly and analysed it with Mr Klinaku and others, and “will inform you about everything that is contained in these documents”.³³⁵

218. Taking the floor, Mr Haradinaj said that he was “pleasantly surprised” by the First Delivery, suggesting that the First Set was testimony to the bias of the SC/SPO and criticised those who supported its creation.³³⁶ Mr Haradinaj added that they only had time to flick through the First Set but “have noticed a lot of things”.³³⁷ He explained that they called the press conference without preparing as they deemed the First Set valuable for the media and the public; noting that every document that “leaked” from the SC was “[t]here”, available for the media.³³⁸

219. Later during the First Press Conference, Mr Haradinaj stated that they knew neither how the First Set was obtained, nor the intent behind the First Delivery.³³⁹ He said that he believed the First Delivery to be a provocation from the SC/SPO, in light

³³¹ 2D1, paras 57-58; W04866 (Halil Berisha) Transcript, 26 October 2021, pp 1516-1517; Transcript, 27 October 2021, p. 1634; DW1240 (Hysni Gucati) Transcript, 6 December 2021, p. 2170; DW1249 (Nasim Haradinaj) Transcript, 11 January 2022, p. 2730.

³³² DW1240 (Hysni Gucati) Transcript, 6 December 2021, p. 2171; Transcript, 8 December 2021, pp 2370, 2382; DW1249 (Nasim Haradinaj) Transcript, 11 January 2022, pp 2730-2731.

³³³ P1. *See also* 2D1, para. 57.

³³⁴ P1, p. 1; 1D3, para. 20.

³³⁵ P1, p. 1.

³³⁶ P1, pp 1-2.

³³⁷ P1, p. 2. *See also* P1, p. 4.

³³⁸ P1, p. 4.

³³⁹ P1, p. 5.

of the “top secret” nature of the documents constituting the First Set.³⁴⁰ Mr Haradinaj also gave detailed comments on the content of the First Set.³⁴¹ Mr Haradinaj then criticised the SC, questioned its capacity to protect witnesses in light of the First Delivery,³⁴² and indicated that they were making the First Set public so that this failure to protect was known.³⁴³

220. Mr Haradinaj, in Mr Gucati’s presence, committed to providing copies of the First Set to the journalists, invited them to take copies, and noted that they would be able to read as many names as they wanted in it.³⁴⁴ Mr Haradinaj also prompted journalists to look into the statements and names contained in the First Set.³⁴⁵ Three of the four copies of the material constituting the First Set were taken by the media.³⁴⁶ The last copy would later be recovered by the SPO.³⁴⁷

221. Once the First Press Conference ended, journalists and cameramen started filming or taking pictures of the First Set.³⁴⁸ One of the journalists, Mr Berisha, asked to take a copy; Mr Haradinaj answered that he could take the documents,³⁴⁹ adding that since there were not enough copies for all media, the journalist should collaborate with other media if they asked for copies and share the documents with them.³⁵⁰ Mr Berisha spent about ten minutes with his cameraman looking at the documents on

³⁴⁰ P1, p. 5.

³⁴¹ P1, pp 2, 3, 8.

³⁴² P1, p. 2-3. *See also* P1, p. 5.

³⁴³ P1, pp 2-3, 5.

³⁴⁴ *See e.g.* P1, pp 5-7.

³⁴⁵ P1, p. 8.

³⁴⁶ *See e.g.* Transcript, 5 November 2021, p. 1960. *See infra* para. 236 (The Events at Issue).

³⁴⁷ *See infra* para. 236 (The Events at Issue).

³⁴⁸ W04866 (Halil Berisha), Transcript, 26 October 2021, pp 1519-1520. *See e.g.* P1, pp 1, 6, 8.

³⁴⁹ W04866 (Halil Berisha), Transcript, 26 October 2021, p. 1520; Transcript, 27 October 2021, pp 1585-1586. *See supra* para. 59 (Admission and Evaluation of Evidence).

³⁵⁰ W04866 (Halil Berisha), Transcript, 26 October 2021, pp 1521-1522.

the table before taking a part of those – approximately 1,000 pages³⁵¹ – and leaving for the office.³⁵² At around 2.00 p.m., the First Press Conference was over.³⁵³

(e) Media appearances of the Accused

222. Later on 7 September 2020, Mr Gucati appeared on *RTK1*'s TV-show "Imazh".³⁵⁴ Mr Gucati explained the circumstances of the First Delivery.³⁵⁵ He gave details and commented on some information contained in the First Set, such as on a number of witness statements, as well as details of interviews contained therein.³⁵⁶ Mr Gucati claimed that the First Set showed cooperation between SPO and Serbian authorities.³⁵⁷

223. He noted that: (i) a note accompanied the First Set suggesting that 7,000 more files would be delivered;³⁵⁸ (ii) there was not enough time for them to go through all the documents;³⁵⁹ and (iii) a copy of the documents was handed to Kosovo Press.³⁶⁰ He said that, in his view, the First Set was authentic.³⁶¹

224. Mr Gucati questioned the protection of witnesses by the SC.³⁶² Mr Gucati said that they would not release names because they would not know the individuals who, he noted, included Serbs, Romas and Turks.³⁶³ He described persons he identified in the First Set as having cooperated with the SC as "Albanian speakers",³⁶⁴ "traitors"³⁶⁵

³⁵¹ W04866 (Halil Berisha), Transcript, 26 October 2021, pp 1520-1521; Transcript, 27 October 2021, pp 1633-1634. *See also* Transcript, 27 October 2021, pp 1587-1588.

³⁵² W04866 (Halil Berisha), Transcript, 27 October 2021, p. 1585.

³⁵³ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2733.

³⁵⁴ P9.

³⁵⁵ P9, p. 1.

³⁵⁶ P9, p. 10.

³⁵⁷ P9, p. 6.

³⁵⁸ P9, p. 4. That note has not been found by the SPO. *See also* P92, para. 13; 1D3, para. 15; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2166.

³⁵⁹ P9, p. 6. *See also* P9, p. 7.

³⁶⁰ P9, p. 5.

³⁶¹ P9, pp 4-5.

³⁶² P9, p. 5.

³⁶³ P9, pp 6-7.

³⁶⁴ P9, pp 6, 12.

³⁶⁵ P9, p. 12.

and “collaborators”.³⁶⁶ Mr Gucati said that he saw in the First Set “lots of people in whom we trusted”;³⁶⁷ he opined that some witnesses took part in interviews to get “papers so they would be granted asylum in the West” and that their accounts contained “a lot of fabrications”.³⁶⁸ Mr Gucati acknowledged that “[things] could happen” as a result of publishing the names of persons identified in the First Set.³⁶⁹

(f) Further media reports and correspondence with the SPO

225. On 7 September 2020, several further media articles were published by [REDACTED] about the content of the First Set.³⁷⁰

226. On the same day, *Gazeta Infokus* informed the SPO that they had in their possession material taken from the KLA WVA on 7 September 2020.³⁷¹

227. Also on 7 September 2020, the SPO received from [REDACTED] photos of documents contained in Batches 1 and 4.³⁷²

8 September 2020

(a) The seizure of the First Set

228. On 8 September 2020, SPO representatives arrived at the KLA WVA premises.

229. The SPO representatives served an order of the Single Judge of the SC (“Single Judge”) on the KLA WVA to Mr Klinaku (“First Order”).³⁷³ Paragraphs 22 and 25 of

³⁶⁶ P9, pp 11, 13.

³⁶⁷ P9, p. 9.

³⁶⁸ P9, p. 11.

³⁶⁹ P9, p. 8.

³⁷⁰ See e.g. P125, pp 1, 4; P125ET, pp 1-2; P129, pp 1, 12, 14, 15; 1D2, pp 1, 9, 44, 50, 55, 61. See also P86, paras 13-18.

³⁷¹ P98, para. 4. See also P98, p. 7; P98.1.

³⁷² P101. See *infra* para. 338 (Findings on the Batches).

³⁷³ F5 First Order; 1D3, para. 28; 1D4, paras 14-17; 1D9, paras 17-22; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2181-2182. See also P56; P57; P92, paras 2-4, 6; DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2456-2457.

the First Order as well as Rule 42(1) of the Rules were read out to Mr Klinaku in English and translated into Albanian; a copy of the First Order was provided to him.³⁷⁴

230. Paragraph 22(a) and (c) of the First Order: (i) authorised the SPO to seize the documents in possession of Mr Gucati and/or the KLA WVA;³⁷⁵ and (ii) ordered Mr Gucati, the KLA WVA, and any other individual in possession of the material in question and/or their content, to refrain from copying, in whatever form, and further disseminating, by whatever means of communication, the documents and their content.³⁷⁶

231. Both Accused were absent from the KLA WVA premises on that day, but Mr Klinaku contacted Mr Gucati during the search; Mr Gucati instructed Mr Klinaku to hand over the documents to the SPO.³⁷⁷ Acting pursuant to the First Order, the SPO seized a number of documents from the First Set still in the possession of the KLA WVA (“First Seizure”).³⁷⁸ This material is referred to by the SPO as “Batch 1”.³⁷⁹

(b) Further media reports

232. On 8 September 2020, an article was published by *Gazeta Infokus* about the First Seizure.³⁸⁰

(c) Media appearances of Associates

233. On 8 September 2020, Mr Klinaku was featured on *RTK1*’s news report in which the disclosure of the First Set and the First Seizure was discussed.³⁸¹

³⁷⁴ P92, pp 3-4, 6; W04876 (Daniel Moberg), Transcript, 5 November 2021, p. 1930.

³⁷⁵ P52, para. 22(a).

³⁷⁶ P52, para. 22 (c).

³⁷⁷ DW1240 (Hysni Gucati) Transcript, 6 December 2021, pp 2182-2183. *See also* W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1959-1960; 1D3, paras 27-28.

³⁷⁸ P92.

³⁷⁹ P86, para. 5. *See infra* paras 334-345 (Findings on the Batches).

³⁸⁰ P129, p. 4; P129ET, p. 4; 1D2, p. 23.

³⁸¹ P13.

(d) Facebook posts

234. On 8 September 2020, posts regarding the First Delivery and the First Seizure appeared on the Facebook accounts of both Accused.³⁸²

9-15 September 2020

(a) Further media reports

235. Between 9 and 11 September 2020, three further articles were published in relation to the First Set by *Gazeta Infokus* and [REDACTED].³⁸³

(b) Handover of documents by *Gazeta Infokus*

236. On 9 September 2020, further to contacting the SPO on 7 September 2020, *Gazeta Infokus* voluntarily handed over to the SPO the documents it had obtained at the First Press Conference (“Fourth Set”).³⁸⁴ The Fourth Set is referred to by the SPO as “Batch 4”.³⁸⁵

(c) Media appearances of the Accused and Associates

237. On 9 September 2020, Mr Haradinaj appeared on *RTK1*’s TV show “Imazh” in which the content, origin and authenticity of the First Set, its dissemination to the journalists, and the issue of witness protection and collaboration with Serbia were again discussed.³⁸⁶ Mr Haradinaj called upon journalists to have the “courage” to publish the information.³⁸⁷

³⁸² P60, pp 25-26, P80 (same post on Mr Haradinaj’s account); P78, P79 (same post on Mr Haradinaj’s account); P83, p. 49 (Mr Gucati’s account, sharing a post from Mr Haradinaj’s account).

³⁸³ P129, pp 2-3; 1D2, pp 5, 20 (two *Gazeta Infokus* articles published on 9 September 2020); P125, p. 9; P125, p. 3 ([REDACTED]).

³⁸⁴ P99; P100. *See also* W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 887-892.

³⁸⁵ P89, para. 5.

³⁸⁶ P24.

³⁸⁷ P24, pp 3, 10.

238. On 10 September 2020, Mr Klinaku participated as a representative of the KLA WVA in a TV program of *Top Channel* wherein he discussed, *inter alia*, the First Seizure.³⁸⁸

239. On 11 September 2020, Mr Haradinaj gave an interview – which was later re-published on his Facebook account³⁸⁹ – to RTK1's TV-show "Imazh".³⁹⁰ During that interview, Mr Haradinaj vowed that the KLA WVA would make public material similar to the First Set whenever they receive it.³⁹¹ He also discussed, *inter alia*, the authenticity and content of the First Set, the KLA WVA's review of it, the SC and its cooperation with Serbian officials, and the issue of witness protection.³⁹²

(d) Facebook posts

240. On 9, 10, 11 and 12 September 2020, several posts regarding the First Set appeared on the Facebook account of Mr Haradinaj.³⁹³ The media appearances of Mr Klinaku (10 September 2020) and of Mr Haradinaj (11 September 2020) were shared in these posts.³⁹⁴

241. On 10 September 2020, one post regarding the First Set appeared on the Facebook account of Mr Gucati.³⁹⁵

³⁸⁸ P22; P60, pp 23-24; P76.

³⁸⁹ P60, pp 21-22.

³⁹⁰ P21.

³⁹¹ P21, p. 3.

³⁹² P21, pp 3-5.

³⁹³ P60, p. 29; P61, pp 3-4; P83, p. 1 (9 September 2020); P60, pp 23-24; P76; P77 (same post on Mr Haradinaj's account) (10 September 2020); P60, pp 21-22, 27-28 (11 September 2020); P83, p. 2 (12 September 2020).

³⁹⁴ P60, pp 23-24; P76 (10 September 2020); P60, pp 21-22 (11 September 2020).

³⁹⁵ P83, p. 48.

(e) KLA WVA committee decision

242. On 14 or 15 September 2020, the 23 members of the KLA WVA leadership committee – which included both Accused – unanimously decided to continue publicising such material if it came again in possession of the organisation.³⁹⁶

B. THE SECOND SET OF DOCUMENTS

16 September 2020

(a) The delivery of documents

243. On 16 September 2020, at around 3.30 p.m.,³⁹⁷ a second set of documents (“Second Set”) was delivered by an unknown person to the premises of the KLA WVA (“Second Delivery”).³⁹⁸ *Arbresh.info* caught video footage of the Second Delivery.³⁹⁹

244. The individual, thought to be a different man than the person who had brought the First Delivery,⁴⁰⁰ dropped three boxes on a table close to Ms Miftari’s desk.⁴⁰¹ He said nothing and left.⁴⁰² There was no identifiable indication of his identity.⁴⁰³

³⁹⁶ 1D4, para. 26; 1D8, para. 9; 1D9, paras 23, 29; 2D1, para. 73; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2746. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458, 2472-2473, 2475.

³⁹⁷ P2, p. 1 (“around 15.30”); 1D4, para. 18; 1D23, 1D24, 1D25, 1D26 (excerpts of CCTV footage showing delivery at 15:32); DW1242 (Elmedina Ballhazhi), Transcript, 9 December 2021, p. 2456. Ms Ballhazhi gave an estimate between 11.00 a.m. and 12 noon which appears to be inconsistent with the evidence. *See e.g.* 1D5, para. 3. It is apparent from her account that she was confused about the time and days she described. *See e.g.* DW1242 (Elmedina Ballhazhi), Transcript, 9 December 2021, p. 2513. *See also* 2D1, para. 70: Mr Haradinaj misplaced the delivery between 9.30 a.m. and 10.30 a.m.

³⁹⁸ *See e.g.* P2, p. 1; 1D3, para. 33; 1D4, para. 18; 1D9, paras 24-25; 2D1, para. 70.

³⁹⁹ 1D5; 1D6.

⁴⁰⁰ 1D4, para.22. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2457; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2743-2744.

⁴⁰¹ 1D4, para.19. *See also* 1D9, paras 24-25; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2456.

⁴⁰² 1D4, para.19. *See also* 1D9, paras 24-27; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2212; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2462.

⁴⁰³ 1D3, para. 34; 1D4, para. 22; 1D9, para.26; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2188.

Mr Klinaku followed him briefly before retreating when it was thought that he might be armed.⁴⁰⁴ The boxes were then retrieved from Ms Miftari's office and taken to Mr Gucati's office.⁴⁰⁵

(b) The review of the documents

245. Present in the KLA WVA premises at the time were Mr Gucati, Mr Haradinaj, Mr Klinaku, Ms Miftari, Mr Cele Gashi, Mr Elvir Gucati and Mr Faik Fazliu.⁴⁰⁶

246. As it had happened on the first occasion, the Second Set was reviewed by Mr Gucati, Mr Haradinaj, Mr Klinaku and others present.⁴⁰⁷ Upon review, they suspected the material came from the SC/SPO.⁴⁰⁸ The Second Set consisted of between 1,300 and 2,600 pages of documents.⁴⁰⁹ It appeared to contain three collections of the same documents,⁴¹⁰ with some documents in English, Albanian and Serbian.⁴¹¹

247. As with the First Set, Mr Gucati, Mr Haradinaj, Mr Klinaku and other members of the KLA WVA leadership who were present decided to call a press conference to inform the media.⁴¹² Mr Gucati authorised Mr Klinaku to inform the media accordingly and to invite them to attend.⁴¹³

⁴⁰⁴ 1D3, para. 34; 1D4, para. 21; 1D9, para.27; 2D1, para. 71; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2188-2189; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2457; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2741-2742. *See also* P17, p. 9.

⁴⁰⁵ 1D3, para. 34; 1D4, paras 21, 23; 2D1, para. 70. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2457; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2743.

⁴⁰⁶ 1D3, paras 32-33; 1D4, paras 18, 20; 1D9, para. 24; 2D1, para. 70; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2186-2188; DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2456-2457; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2740.

⁴⁰⁷ 1D3, paras 36-37; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2190; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2744-2746. *See also* DW1245 (Cele Gashi), Transcript, 10 December 2021, pp 2587-2589.

⁴⁰⁸ DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2191.

⁴⁰⁹ P2, pp 10-11; P17, p. 2. *See also* 2D1, para.75; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2744.

⁴¹⁰ 2D1, para. 75.

⁴¹¹ 2D1, para. 79.

⁴¹² 1D3, para. 35; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2190-2191; Transcript, 8 December 2021, p. 2410.

⁴¹³ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2190-2191.

(c) Second press conference

248. Approximately an hour and a half later,⁴¹⁴ a press conference was held by the KLA WVA (“Second Press Conference”) with both Accused and other members of the KLA WVA, including Mr Klinaku, present.⁴¹⁵

249. During this Second Press Conference, the content of the Second Set was discussed by both Accused, in each other’s presence. Mr Gucati introduced the matter.⁴¹⁶ He indicated that they did not manage to catch the person who delivered the documents and could not figure out who he was.⁴¹⁷ Mr Gucati showed a document in Serbian and invited those present to take the documents.⁴¹⁸ He named SITF and Serbian officials from the Second Set.⁴¹⁹ Mr Gucati said that they did not have the time to review the Second Set in full, adding that Mr Haradinaj had done as much as he could in reviewing the material.⁴²⁰

250. Mr Gucati then handed the floor to Mr Haradinaj, who discussed and described, *inter alia*, the content and confidential nature of the Second Set, his views on the Second Delivery, and his suspicions towards the SC in light of its cooperation with Serbian authorities.⁴²¹ Mr Haradinaj stated their reasons for making the documents public and indicated that they did not consider it unlawful to reveal the names of officials.⁴²² He reiterated that, every time they received material, they would make it public.⁴²³ Mr Haradinaj also encouraged those present to publish the information.⁴²⁴

⁴¹⁴ See DW1245 (Cele Gashi), Transcript, 10 December 2021, p. 2597.

⁴¹⁵ P2; 2D1, para. 80.

⁴¹⁶ P2, pp 1-2.

⁴¹⁷ P2, p. 1.

⁴¹⁸ P2, pp 1-2.

⁴¹⁹ P2, p. 1. See also 1D3, para. 36; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2191-2192.

⁴²⁰ P2, p. 2.

⁴²¹ P2, pp 2-4, 6-8, 11.

⁴²² P2, p. 4.

⁴²³ P2, p. 4.

⁴²⁴ P2, p. 7.

251. As during the First Press Conference, the Accused invited members of the media present to take or make copies of the material.⁴²⁵ An unknown number of members of the press followed that invitation and took some of the material.⁴²⁶ Both Accused left the room, some journalists stayed behind.⁴²⁷

(d) Media reports

252. On 16 September 2020, two articles were published by *Gazeta Infokus* about the Second Set.⁴²⁸

(e) Media appearances of the Accused

253. On 16 September 2020, Mr Haradinaj participated in *Kanal10's* TV-show called "Prime Time" during which he, *inter alia*, discussed the authenticity and content of the First Set and Second Set, welcomed further deliveries, criticised the SC and questioned the justification for its creation.⁴²⁹ Potential consequences of publicising this material were also discussed, with Mr Haradinaj indicating that they were not responsible for anything as long as the names of witnesses were not revealed.⁴³⁰ He also stated that he wanted to damage the SC.⁴³¹

(f) Facebook posts

254. On 16 September 2020, posts regarding the Second Set appeared on the Facebook accounts of both Accused.⁴³²

⁴²⁵ P2, pp 4, 9-10. *See also* P50.

⁴²⁶ *See e.g.* P4, p. 3; DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2281-2283; 2D1, para. 79.

⁴²⁷ 2D1, para. 80.

⁴²⁸ P129, pp 9, 13; 1D2, pp 35, 47.

⁴²⁹ P5, p. 1; P18, pp 2-4, 7.

⁴³⁰ P18, p. 3.

⁴³¹ P18, pp 5-7.

⁴³² P60, pp 19-20; P74 (Mr Haradinaj); P83, p. 47 (Mr Gucati).

17 September 2020

(a) Media appearances of the Accused

255. On 17 September 2020, before the seizure of the Second Set, Mr Haradinaj gave an interview to *KosovaPress*. Therein, he reiterated his views of the SC, that further deliveries were welcome and that they would disclose whatever material came to them. He also emphasised that the journalists took a lot of the material.⁴³³

(b) The seizure of the Second Set

256. On 17 September 2020, SPO representatives arrived at the KLA WVA premises.⁴³⁴

257. Mr Gucati, Mr Haradinaj, Mr Klinaku, Mr Kryeziu, Mr Marashi and a journalist were present.⁴³⁵ Mr Tomë Gashi, a lawyer from Prishtinë/Priština, was also present.⁴³⁶ Mr Gucati received from the SPO representatives an order from the Single Judge authorising the seizure of documents and ordering that there should be no duplication and further dissemination of the material in question (“Second Order”).⁴³⁷ After some discussions, KLA WVA representatives agreed that the SPO could take the material without the presence of the Kosovo Police.⁴³⁸

⁴³³ P33, pp 1-3.

⁴³⁴ 1D3, para. 38; 1D4, para. 27; 1D8, paras 10, 13; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2193.

⁴³⁵ DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2197; P7, pp 7-8; 2D1, para. 85

⁴³⁶ 2D1, paras 89-90, 92.

⁴³⁷ F7 Second Order; P4, p. 8; DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2289-2295. The indication that material should not be distributed was reinforced orally by the SPO investigator. *See also* Transcript, 7 December 2021, pp 2292-2293, 2295.

⁴³⁸ 1D3, para. 42; 2D1, para. 93; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2197; Transcript, 7 December 2021, pp 2288-2289.

258. Acting pursuant to the Second Order, the SPO seized the documents left from the Second Set still in possession of the KLA WVA (“Second Seizure”).⁴³⁹ This material is referred to by the SPO as “Batch 2”.⁴⁴⁰

(c) Further media appearances of the Accused and Associates

259. Shortly after the Second Seizure, on 17 September 2020, Mr Gucati and other KLA WVA members held a press conference.⁴⁴¹ It was attended by both Mr Gucati and Mr Tomë Gashi.⁴⁴²

260. During that conference, the Second Set, the effect of its disclosure, and the Second Seizure were extensively discussed.⁴⁴³ Mr Gucati said that they did not know who was providing them this material, he indicated that the media has been given about 70% of the documents they had obtained, and he explained the reasons for making the material public.⁴⁴⁴

261. Mr Tomë Gashi, in his capacity as the KLA WVA’s lawyer, claimed that their actions were lawful with the caveat not to publish names of witnesses.⁴⁴⁵ He also advised journalists not to publish such names.⁴⁴⁶ Mr Tomë Gashi also showed journalists two documents from the Second Set which he attributed to the SC/SPO as well as the Second Order.⁴⁴⁷ He also made a number of claims about, *inter alia*, the SPO/SC, the origin of the Second Set, and the Second Seizure.⁴⁴⁸

⁴³⁹ W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1937-1941.

⁴⁴⁰ P86, para. 19.

⁴⁴¹ 1D3, para. 44.

⁴⁴² P4. *See also* DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2290.

⁴⁴³ P4, pp 2-3, 8.

⁴⁴⁴ P4, p. 3.

⁴⁴⁵ P4, p. 3.

⁴⁴⁶ P4, pp 3-5, 7, 9-10.

⁴⁴⁷ P4, pp 1, 3.

⁴⁴⁸ P4, pp 6-7.

262. On 17 September 2020, Mr Haradinaj participated in T7's TV show "Frontal", where he discussed, *inter alia*, the Second Delivery and the Second Seizure.⁴⁴⁹ He claimed that the SPO only recovered about 20% of the Second Set and indicated that journalists had taken the rest.⁴⁵⁰ Mr Haradinaj also called for further disclosure of such material⁴⁵¹ and congratulated the media for publishing the documents.⁴⁵² The participants also exchanged views on the Second Set, *inter alia*, its origin,⁴⁵³ its sensitive nature,⁴⁵⁴ the protection of those whose name appeared in it,⁴⁵⁵ and the possible consequence of its public disclosure on witnesses.⁴⁵⁶ The lawfulness of Mr Haradinaj's actions was also discussed.⁴⁵⁷

263. On the same day, 17 September 2020, Mr Haradinaj also appeared on *Euronews Albania* broadcast, where he, *inter alia*, claimed that the SC served Serbian interests,⁴⁵⁸ insinuated that Serb war criminals provided the information relied upon by the SPO,⁴⁵⁹ and confirmed that the First Set and Second Set were SC/SPO documents.⁴⁶⁰ Mr Haradinaj also criticised the SC and the media.⁴⁶¹

264. On the same day, Mr Haradinaj gave another interview, to T7's TV-show "Pressing".⁴⁶² He explained that they were disclosing the information to discredit the SC and protect KLA WVA members.⁴⁶³ He invited more deliveries.⁴⁶⁴ Mr Haradinaj

⁴⁴⁹ P6, pp 3-5.

⁴⁵⁰ P6, pp 17-18. *See also* P6, p. 23.

⁴⁵¹ P6, p 4.

⁴⁵² P6, p. 16.

⁴⁵³ P6, pp 29-30.

⁴⁵⁴ P6, pp 18-20.

⁴⁵⁵ P6, pp 9, 17, 40-41.

⁴⁵⁶ P6, pp 21-22.

⁴⁵⁷ P6, pp 15, 36.

⁴⁵⁸ P19, p. 1.

⁴⁵⁹ P19, pp 3-4.

⁴⁶⁰ P19, p. 2.

⁴⁶¹ P19, p 3.

⁴⁶² P34.

⁴⁶³ P34, p. 2.

⁴⁶⁴ P34, p. 2.

expressed his hope that the indictment against Mr Thaçi and others would not be filed because of the leak.⁴⁶⁵ He also said that the SPO had confirmed that the documents were authentic during the Second Seizure.⁴⁶⁶

(d) Facebook posts

265. On 17 September 2020, three posts regarding the First Set and Second Set and their delivery appeared on the Facebook account of Mr Haradinaj.⁴⁶⁷

(e) Further media reports

266. Also on 17 September 2020, four articles were published by *Gazeta Infokus* and [REDACTED] about the Second Set.⁴⁶⁸

18-21 September 2020

(a) Further media reports

267. Between 18 and 21 September 2020, one further article was published by [REDACTED] and a video-clip by [REDACTED] regarding the First and Second Sets.⁴⁶⁹

(b) Media appearances of the Accused and Associates

268. On 18 September 2020, Mr Haradinaj appeared on *RTK3's* TV-show "Open Studio" with Mr Tomë Gashi.⁴⁷⁰ He called the Second Delivery a "miracle" and expressed his hope that the person bringing the material would keep his promise for

⁴⁶⁵ P34, p. 2.

⁴⁶⁶ P34, pp 2-3.

⁴⁶⁷ P61, pp 1-2; P72; P73.

⁴⁶⁸ P129, pp 5, 7; 1D2, p. 29 (*Gazeta Infokus*); P124, p. 3; P128; 1D10; [REDACTED].

⁴⁶⁹ P125, p. 11; P123.

⁴⁷⁰ P7.

more deliveries.⁴⁷¹ Mr Haradinaj also stated that the origin of the documents was irrelevant, the only important factor being the “confirmation that this is not a Kosovo court”.⁴⁷² At the same time, he claimed that the SPO had accepted that the documents were theirs,⁴⁷³ and that, in any event, 80% of the material had been taken by journalists.⁴⁷⁴

269. Mr Tomë Gashi stated that the SC was unable to protect witnesses.⁴⁷⁵ While he claimed that publicising information regarding cooperation between institutions was not a criminal offence,⁴⁷⁶ Mr Tomë Gashi advised journalists and others in possession of the documents not to make the identity of witnesses public.⁴⁷⁷ Mr Tomë Gashi added that witnesses had no reason to feel intimidated.⁴⁷⁸ Both Mr Haradinaj and Mr Tomë Gashi made the claim that the witness statements had been obtained by duress or intimidation.⁴⁷⁹ Mr Haradinaj also said that the reason to make the material public was to show that the SC’s work “is zero”, adding that he thinks “this Court is finished”.⁴⁸⁰ Mr Tomë Gashi repeatedly linked this matter to his hope that the pending charges against Mr Thaçi and others would not be confirmed.⁴⁸¹ Mr Haradinaj echoed this hope.⁴⁸²

270. On 19 September 2020, Mr Haradinaj was interviewed by *ABC News Albania*.⁴⁸³ He claimed that the SC was biased and that its mandate had expired.⁴⁸⁴ He described

⁴⁷¹ P7, p. 2.

⁴⁷² P7, p. 13.

⁴⁷³ P7, p. 11.

⁴⁷⁴ P7, pp 7, 11. *See also* P17, p. 6.

⁴⁷⁵ P7, p. 5.

⁴⁷⁶ P7, p. 14.

⁴⁷⁷ P7, pp 4-5, 8, 15.

⁴⁷⁸ P7, pp 8-9.

⁴⁷⁹ P7, pp 6, 9.

⁴⁸⁰ P7, p. 6.

⁴⁸¹ P7, pp 5, 16-17.

⁴⁸² P7, pp 12-13.

⁴⁸³ P17.

⁴⁸⁴ P17, pp 1, 3.

the conversations with the SPO during the Second Seizure, including regarding the “sensitive” nature of the documents.⁴⁸⁵ Mr Haradinaj claimed that the documents were “a basis for the indictment” and that the witness statements were obtained under duress.⁴⁸⁶ Mr Haradinaj also showed a certified version of the Second Order to the camera, along with an SPO document acknowledging receipt of the seized material.⁴⁸⁷ He indicated that the SPO took over 20% of the Second Set.⁴⁸⁸ Mr Haradinaj welcomed further deliveries; he also complimented and expressed his support to the individuals behind the first two deliveries.⁴⁸⁹ Mr Haradinaj opined that the leak tarnished the reputation of the SC.⁴⁹⁰

271. On 20 September 2020, Mr Haradinaj was a guest in the TV program “Kosovo Show”, in which he stated that he did not recognise the SC/SPO.⁴⁹¹ Mr Haradinaj added that, in his view, the leak questioned the credibility of the SC/SPO,⁴⁹² and that the person responsible for the deliveries was “more than welcome”.⁴⁹³ Mr Haradinaj reiterated his reasons for making the material public.⁴⁹⁴ He also claimed that the files were a re-working of old Serbian convictions and that witnesses had been manipulated or received benefits in return for their accounts.⁴⁹⁵ Mr Haradinaj appeared to deny that the leak could create a risk for witnesses and blamed the SC for not keeping the names safe.⁴⁹⁶

⁴⁸⁵ P17, pp 2, 4-5.

⁴⁸⁶ P17, p. 2.

⁴⁸⁷ P17 video-clip, minutes 00:13:20-00:14:32. *See also* P17, pp 5-6.

⁴⁸⁸ P17, p. 6.

⁴⁸⁹ P17, p. 5.

⁴⁹⁰ P17, p. 9.

⁴⁹¹ P25, p. 9.

⁴⁹² P25, p. 2.

⁴⁹³ P25, p. 3.

⁴⁹⁴ P25, pp 9-10.

⁴⁹⁵ P25, pp 5-7.

⁴⁹⁶ P25, pp 7-8.

272. On the same day, 20 September 2020, Mr Haradinaj participated in another broadcast, by *Reporteri*, in which he discussed the leak of the material,⁴⁹⁷ welcomed more deliveries,⁴⁹⁸ and praised those who delivered the first two sets.⁴⁹⁹ Mr Haradinaj expressed indifference about the origin of the material and how it was obtained.⁵⁰⁰ He reiterated that the KLA WVA's perceived duty was to disclose the information.⁵⁰¹ He opined that the material unmasked the SC/SPO and showed that it collected information from "criminals, bloodsuckers".⁵⁰² Mr Haradinaj also insinuated that the accounts of the witnesses were unreliable.⁵⁰³ He opined that the First Set showed the "poor morons", "fools", "born spies" that they would not be protected.⁵⁰⁴ Mr Haradinaj also suggested that the SC was biased, political and racist,⁵⁰⁵ and that it "will totally collapse, because the witnesses, too, know now that others know who they are".⁵⁰⁶ Mr Haradinaj also confirmed that the documents had been taken by the media;⁵⁰⁷ he stated that they expected the media to further publicise the content of that material.⁵⁰⁸

(c) Facebook posts

273. On 18 and 21 September 2020, two posts regarding the documents appeared on the Facebook account of Mr Gucati.⁵⁰⁹ The 21 September 2020 post stated, *inter alia*, that the First Set and the Second Set were acknowledged to be SC official documents,

⁴⁹⁷ P8, pp 1-4.

⁴⁹⁸ P8, p. 4.

⁴⁹⁹ P8, p. 24.

⁵⁰⁰ P8, p. 17.

⁵⁰¹ P8, pp 6-7.

⁵⁰² P8, p. 7.

⁵⁰³ P8, p. 7.

⁵⁰⁴ P8, p. 26.

⁵⁰⁵ P8, p. 27.

⁵⁰⁶ P8, pp 30-31.

⁵⁰⁷ P8, p. 10.

⁵⁰⁸ P8, pp 21-22.

⁵⁰⁹ P83, p. 46 (18 September 2020); P59 (21 September 2020).

included the names of the majority of witnesses and were “very confidential and sensitive”.⁵¹⁰

274. On 18, 19, 20 and 21 September 2020, several posts appeared on the Facebook account of Mr Haradinaj.⁵¹¹ The posts of 18 September 2020 shared Mr Haradinaj’s media appearances on *Euronews Albania* (17 September 2020)⁵¹² and *RTK3’s Open Studio* (18 September 2020).⁵¹³ The 19 September 2020 post shared Mr Haradinaj’s appearance on *Kanal10* (16 September 2020).⁵¹⁴ The 20 September 2020 post shared the video-clip of [REDACTED].⁵¹⁵

C. THE THIRD SET OF DOCUMENTS

22 September 2020

(a) The delivery of documents

275. On 22 September 2020, another set of documents (“Third Set”) was delivered to the KLA WVA. Between approximately 10.00 a.m. and 11.00 a.m., an unknown individual – different from the first two deliverymen⁵¹⁶ – entered the KLA WVA premises and dropped documents on the floor (“Third Delivery”).⁵¹⁷ The unknown individual indicated in Albanian⁵¹⁸ that more material would be forthcoming on a

⁵¹⁰ P59, p. 3.

⁵¹¹ P60, pp 14-17 (18 September 2020); P60, pp 10-11 (19 September 2020); [REDACTED]; P68 (21 September 2020).

⁵¹² P60, pp 14-15.

⁵¹³ P60, pp 16-17.

⁵¹⁴ P60, pp 12-13.

⁵¹⁵ [REDACTED].

⁵¹⁶ 1D4, para. 34. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458-2459.

⁵¹⁷ P35, p. 1 (Mr Gucati: “at around 10.45 [a.m.]”); P163; P164; 1D4, paras 28, 31; 1D9, para. 30; 1D27; 1D28; 1D29; 1D30 (extracts of the CCTV footage showing delivery at 10.34 a.m.); 2D1, paras 102, 104: Mr Haradinaj gave a slightly later estimate of 11.00-11.30 a.m., which contradicts the account of Mr Gucati, contemporaneous accounts, the recollection of Ms Miftari and the record of CCTV of that event. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458-2459.

⁵¹⁸ P35, pp 10-11; 1D4, paras 32, 34; DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2459, 2474.

CD.⁵¹⁹ Ms Miftari went to inform the other members of the KLA WVA of the Third Delivery.⁵²⁰

(b) The review of the documents

276. Present at the time in the KLA WVA premises were Mr Gucati, Mr Haradinaj, Mr Klinaku, and Ms Miftari as well as a delegation of German KFOR personnel.⁵²¹ KFOR representatives reviewed and took pictures of the Third Set.⁵²² Mr Haradinaj had authorised them accordingly and suggested it was no problem for them to do so.⁵²³

277. The Third Set consisted of two copies of the same set of documents,⁵²⁴ which were all in English.⁵²⁵ Both Accused (and others) spent some time reviewing its content.⁵²⁶ Mr Gucati, Mr Haradinaj and other members of the KLA WVA leadership who were present at the KLA WVA premises again decided to call a press conference.⁵²⁷

(c) Media announcement of KLA WVA press conference

278. Shortly after the Third Delivery, the first articles thereon were published by [REDACTED] and *Gazeta Infokus*.⁵²⁸

⁵¹⁹ P12, p. 4; 1D3, para. 46. *See also* DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2199, 2213-2215.

⁵²⁰ 2D1, para. 104.

⁵²¹ P35, p. 9; 1D3, para. 46; 1D4, para. 33; 1D9, para. 30; 2D1, para. 102; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2198; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2459.

⁵²² P35, p. 9; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2200.

⁵²³ 2D1, paras 108-109.

⁵²⁴ P35, p. 2; W04841 (Zdenka Pumper), Transcript, 21 October 2021, p. 1214.

⁵²⁵ 2D1, paras 106, 111.

⁵²⁶ 2D1, paras 107, 111; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2199-2200; Transcript, 7 December 2021, p. 2297. *See also infra* para. 361 (Findings on the Batches).

⁵²⁷ 1D3, para. 47; 2D1, para. 107; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2200; Transcript, 8 December 2021, p. 2410.

⁵²⁸ P125ET.4; P129, p. 11; 1D2, p. 41.

(d) Third press conference

279. Later that day, 22 September 2020, at around 1.00 p.m.,⁵²⁹ a press conference was held by both Accused (“Third Press Conference”).⁵³⁰ Mr Klinaku and Mr Cele Gashi were also present.⁵³¹ About twenty-five (25) media outlets attended this conference.⁵³²

280. The Third Set was laid out on the table in front of the Accused.⁵³³ The content of the Third Set was discussed by both Accused, in each other’s presence. Mr Gucati again introduced the matter and indicated that the Third Set was leaked from the SC and contained the names of individuals they were not authorised to disclose.⁵³⁴ He then criticised the SC for cooperating with Serbia and for not being able to protect its documents.⁵³⁵ Mr Gucati then gave the floor to Mr Haradinaj, who “was able to read the documents a little more, for about 30 minutes”.⁵³⁶

281. Mr Haradinaj described the content of the Third Set and indicated that there were many names mentioned therein.⁵³⁷ He invited the person who delivered the Third Set to bring the promised CD and he vowed to publish it.⁵³⁸ Mr Haradinaj described the Third Delivery as a “miracle”.⁵³⁹ He reiterated that they were defending the members of the KLA WVA,⁵⁴⁰ and that he was ready to go to prison for publishing the material.⁵⁴¹

⁵²⁹ 2D1, para. 110.

⁵³⁰ P35. *See also* P3.

⁵³¹ P35. *See also* P3.

⁵³² P12, p. 7; 2D1, para. 110. *See also* P30, p. 5.

⁵³³ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2200-2201. *See also* P3; P35.

⁵³⁴ P35, p. 1.

⁵³⁵ P35, p. 2.

⁵³⁶ P35, p. 2.

⁵³⁷ P35, pp 2-3.

⁵³⁸ P35, pp 2, 8.

⁵³⁹ P35, p. 3.

⁵⁴⁰ P35, p. 3.

⁵⁴¹ P35, pp 12-13.

282. The Accused showed and pointed to a number of the documents and invited journalists to take copies,⁵⁴² urging them to publish the documents.⁵⁴³ Mr Gucati indicated that the Third Set had been shown to German KFOR present at the premises at the time of the Third Delivery.⁵⁴⁴ Mr Haradinaj claimed that the SPO retrieved about 20% of the Second Set, the rest having been disseminated and taken by journalists.⁵⁴⁵

283. At the end of the Third Press Conference, Mr Gucati invited journalists to look into the Third Set and both Accused offered the documents to those present.⁵⁴⁶ Documents from the Third Set were then taken and photographed by journalists during and in the aftermath of the Third Press Conference.⁵⁴⁷

(e) Facebook posts

284. On the same day, 22 September 2020, posts regarding the Third Delivery appeared on the Facebook accounts of both Accused.⁵⁴⁸

(f) The seizure of the Third Set

285. Within hours of the Third Press Conference, SPO representatives arrived at the KLA WVA premises. The Accused, Mr Klinaku and Mr Tomë Gashi were present.⁵⁴⁹ An order of the Specialist Prosecutor was served, instructing Mr Gucati and the KLA WVA to immediately produce all documents and records, including internal work product of the SPO, and to refrain from recording or copying, in whatever form, or

⁵⁴² P35, pp 2, 4-5, 7, 13-15.

⁵⁴³ P35, pp 12-14.

⁵⁴⁴ P35, p. 9.

⁵⁴⁵ P35, p. 6.

⁵⁴⁶ P35, pp 14-15.

⁵⁴⁷ 1D3, para. 49; 2D1, para. 111. *See also* DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2201.

⁵⁴⁸ P60, pp 3-5; P67 (same post on Mr Haradinaj's account); P64; P65; P66; P83, pp 44-45.

⁵⁴⁹ P12, pp 1-3.

further disseminating such documents.⁵⁵⁰ What was left of the material from the Third Set was seized by the SPO (“Third Seizure”).⁵⁵¹ This material is referred to by the SPO as “Batch 3”.⁵⁵²

(g) Media appearances of the Accused and Associates

286. After the Third Seizure, on 22 September 2020, both Accused, along with Mr Tomë Gashi, participated in a broadcasted interview at the KLA WVA premises. Both the Accused and Mr Tomë Gashi discussed at length the origin and authenticity of the Third Set, the Third Seizure and making the documents public.⁵⁵³

287. Later on that day, 22 September 2020, Mr Haradinaj took part in *RTK1*’s TV-show “Imazh”, where he discussed, *inter alia*, the authenticity and seizure of the Third Set,⁵⁵⁴ stating that he looked into it, though not in depth.⁵⁵⁵ He reiterated that the receipt of the Third Set was a “miracle”.⁵⁵⁶ Mr Haradinaj repeated his indifference regarding the origin of the material and stated that what was important was that it undermined the work of the SC.⁵⁵⁷ Mr Haradinaj also reaffirmed his opposition to the SC,⁵⁵⁸ and his call on the media to publish the material.⁵⁵⁹ The lawfulness of the Accused’s actions and the protected nature of what was being disclosed was also discussed.⁵⁶⁰

288. On the same day, 22 September 2020, Mr Haradinaj participated in another program, *T7*’s TV-show “Pressing”.⁵⁶¹ Mr Haradinaj complimented the persons who

⁵⁵⁰ P54. *See also* P30, p. 5; P58; 1D3, para. 50; W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1937-1941; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2201-2202. *See also infra* paras 320, 440 (Findings on the Batches).

⁵⁵¹ 1D3, para. 51; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2202.

⁵⁵² P86, para. 28.

⁵⁵³ P12, pp 1-7.

⁵⁵⁴ P30, pp 1, 5, 10.

⁵⁵⁵ P30, p. 3.

⁵⁵⁶ P30, p. 2.

⁵⁵⁷ P30, p. 18.

⁵⁵⁸ P30, p. 15.

⁵⁵⁹ P30, pp 5-9, 20.

⁵⁶⁰ P30, pp 15-16.

⁵⁶¹ P11.

delivered the Three Sets,⁵⁶² criticised the SC for failing to keep this information confidential,⁵⁶³ and reiterated his determination to make such material public.⁵⁶⁴ Mr Haradinaj and other guests then discussed, *inter alia*, the effect and consequences of the Three Deliveries, including whether they amounted to obstruction of justice.⁵⁶⁵

289. On 22 September 2020, Mr Gucati also appeared in two TV programs. On a TV-show broadcast by *KTV*, Mr Gucati discussed, *inter alia*, the origin, authenticity, content and seizure of the Three Sets, the possible consequences of his actions, and explained that he released the documents to demonstrate the bias of the SC through its collaboration with Serbia.⁵⁶⁶ Mr Gucati added that he would want to disband the SC and would publish such documents if new information was provided to them again.⁵⁶⁷ He also suggested that the SC lost credibility as a result of the leak.⁵⁶⁸

290. On a TV-show broadcast by *Euronews Albania*, Mr Gucati reiterated that the documents came from the SC,⁵⁶⁹ expressed his hope that the court would be abolished,⁵⁷⁰ and stated that they would disclose any new material they received to show the SC's bias.⁵⁷¹

(h) Further media reports

291. On 22 September 2020, three further articles were published by *Top Channel* and *Gazeta Infokus* about the Third Set.⁵⁷²

⁵⁶² P11, p. 2.

⁵⁶³ P11, p. 3.

⁵⁶⁴ P11, pp 4, 8, 29.

⁵⁶⁵ P11, pp 24-25, 30, 35, 38, 47, 56, 64-65.

⁵⁶⁶ P28, pp 1-2, 10-11, 13-14.

⁵⁶⁷ P28, pp 7, 11. *See also* P28, pp 12-13.

⁵⁶⁸ P28, pp 13-14.

⁵⁶⁹ P29, p. 1.

⁵⁷⁰ P29, p. 1.

⁵⁷¹ P29, p. 2.

⁵⁷² P155; P129, pp 6, 10. *See also* P156; 1D2, pp 26, 38.

23-24 September 2020

(a) Further media reports

292. On 23 and 24 September 2020, further articles were published in relation to the Third Set by [REDACTED], [REDACTED], [REDACTED] and *Top Channel*.⁵⁷³

(b) Facebook posts

293. On 24 September 2020, a *Euronews Albania* report regarding the publication of “SPO files” and featuring an interview with Mr Haradinaj was shared on the Facebook account of Mr Haradinaj.⁵⁷⁴

(c) Media appearances of the Accused and Associates

294. On 24 September, Mr Gucati appeared on *RTK1*'s TV-show “Imazh” in which he discussed once again making the Three Sets public and talked about one of these documents.⁵⁷⁵ He qualified the SC as biased and unfair, and reiterated that they would make public whatever material they receive.⁵⁷⁶

295. On the same day, 24 September 2020, Mr Haradinaj appeared briefly on *Euronews Albania*, reiterating that he would not collaborate with or support the SC.⁵⁷⁷

296. Also on 24 September 2020, Mr Klinaku appeared as a KLA WVA representative in *RTV*'s TV-show “Debat Plus”, in which he discussed the publicising of the Three Sets, the publication of witness names and the consequences thereof.⁵⁷⁸

⁵⁷³ P120; P121; P122; P157; P159. *See also* P158; P160.

⁵⁷⁴ P60, pp 1-2. *See also* P62.

⁵⁷⁵ P31.

⁵⁷⁶ P31, pp 1-2.

⁵⁷⁷ P16, p. 1.

⁵⁷⁸ P23.

D. THE SEARCH OF THE KLA WVA PREMISES AND THE ARREST OF THE ACCUSED

297. On 25 September 2020, SPO representatives arrived at the KLA WVA premises and arrested Mr Gucati, executing an arrest warrant issued by the Single Judge.⁵⁷⁹ The SPO also conducted a search of the KLA WVA premises pursuant to an order of the same Single Judge.⁵⁸⁰ Mr Tomë Gashi, acting as counsel of the KLA WVA, was present during the search.⁵⁸¹

298. On the same day, 25 September 2020, Mr Haradinaj gave five interviews, including to *KlanKosova* and *Euronews Albania*.⁵⁸² During these interviews, Mr Haradinaj reiterated, *inter alia*: (i) his invitation to the journalists to publish the disclosed material;⁵⁸³ (ii) his views about the SC, noting that he would not follow orders of the SC or recognise it;⁵⁸⁴ and (iii) that he would welcome more deliveries.⁵⁸⁵

299. Mr Haradinaj was arrested later on that day, 25 September 2020, upon an order from the Single Judge.⁵⁸⁶

⁵⁷⁹ 1D3, paras 53-56; 2D1, para. 118. *See also* DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2202-2204; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2791-2792.

⁵⁸⁰ *See e.g.* W04841 (Zdenka Pumper), Transcript, 25 October 2021, pp 1391-1407; Transcript, 26 October 2021, pp 1479-1488; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2002-2003; DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2459-2460.

⁵⁸¹ W04841 (Zdenka Pumper), Transcript, 26 October 2021, p. 1484; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2204.

⁵⁸² P14; P15; P26; P27; P32.

⁵⁸³ P27, p. 1.

⁵⁸⁴ P14, p. 1; P15, pp 1-2; P26, p. 2; P32, pp 1-2.

⁵⁸⁵ P15, p. 2.

⁵⁸⁶ P14; 2D1, paras 118-125. *See also* DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, pp 2802-2809.

V. FINDINGS ON THE BATCHES

A. SEIZURE OF THE THREE SETS AND CHAIN OF CUSTODY OF THE BATCHES

1. Delivery, distribution and handover of the Three Sets

300. As noted above, the Accused received through the Three Deliveries the Three Sets.⁵⁸⁷ The Accused publicised, made available and/or disseminated the Three Sets during the Three Press Conferences and other media appearances.⁵⁸⁸ The Accused did not dispute being in possession of the Three Sets, nor that they made available much of that material to the media. In fact, the Accused repeatedly indicated that approximately 70-80% of the Three Sets was given to the media.⁵⁸⁹ Furthermore, both Accused indicated that what was left in the KLA WVA possession of the first,⁵⁹⁰ second⁵⁹¹ and third⁵⁹² of the Three Sets was handed over to the SPO.

301. In light of the above, the Panel is satisfied that what was handed over to the SPO on the occasion of the three seizure operations were remnants of the Three Sets. The

⁵⁸⁷ See *supra* paras 207, 243, 275 (The Events at Issue).

⁵⁸⁸ See *supra* paras 214-296 (The Events at Issue).

⁵⁸⁹ P4, p. 3; P6, pp 17-18; P7, pp 7, 11; P17, p. 6; P35, p. 6; DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2281-2283.

⁵⁹⁰ P24, pp 5-6 (Mr Haradinaj); DW1240 (Hysni Gucati), Transcript, 8 December 2021, pp 2390-2391, 2393. See also P7, pp 2-3; P17, pp 3-4; P21, p. 4; P24, pp 2-3; P29, p. 2 (Mr Gucati); P33, p. 1; 1D3, para. 28 (Mr Gucati); 2D1, paras 67, 115 (Mr Haradinaj); DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2182-2183; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2738; Transcript, 14 January 2022, pp 3079-3080.

⁵⁹¹ P4, pp 3-4, 8-9 (Mr Gucati); P6, pp 17-18 (Mr Haradinaj); P7, p. 7 (Mr Haradinaj); P8, p. 13 (Mr Haradinaj); P17, pp 1, 4-6 (Mr Haradinaj); P28, p. 7 (Mr Gucati); P29, p. 2 (Mr Gucati); P30, p. 10 (Mr Haradinaj); P35, p. 6 (Mr Haradinaj); 1D3, para. 42 (Mr Gucati); 2D1, paras 92-94, 115 (Mr Haradinaj); DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2197; Transcript, 7 December 2021, pp 2282-2284; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2770-2771.

⁵⁹² P28, p. 7 (Mr Gucati); P29, p. 2 (Mr Gucati); P30, pp 1, 5, 10 (Mr Haradinaj); 1D3, para. 50 (Mr Gucati); 2D1, paras 114-115 (Mr Haradinaj); DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2202; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2786-2787.

Panel must now determine whether the seized remnants correspond to what the SPO recorded as Batch 1, 2 and 3 (“Batches”).⁵⁹³

2. Seizure and chain of custody

(a) Defence challenges regarding the chain of custody of the Batches

302. The Defence challenged the chain of custody of the material seized by the SPO from the KLA WVA premises. In particular, the Haradinaj Defence submitted that the SPO failed to comply with the requirement of Rule 39(4) of the Rules to prepare a detailed inventory.⁵⁹⁴ It also submitted that as a result of the alleged flaws and shortcomings of the search and seizure operations conducted by the SPO and the absence of proper chain of custody procedures, the authenticity of the material cannot be established and the Batches cannot be relied upon.⁵⁹⁵

303. The SPO responded that the evidence clearly established the authenticity of the Batches, noted that Ms Pumper’s charts were more detailed than any inventory that could have been prepared on the day of the seizure operations, and opined that the chain of custody was preserved.⁵⁹⁶

304. The Panel notes that the challenge regarding the absence of an inventory and other purported shortcomings in the chain of custody pertains to the question whether: (i) the remnants of the First Set seized at the KLA WVA premises on 8 September 2020 correspond to Batch 1; (ii) the remnants of the Second Set seized at the KLA WVA premises on 17 September 2020 correspond to Batch 2; and (iii) the

⁵⁹³ See *supra* paras 228-231, 256-258, 285 (The Events at Issue).

⁵⁹⁴ F566 Haradinaj Final Trial Brief, para. 514. See also Transcript, 16 March 2022, p. 3687.

⁵⁹⁵ F260 Haradinaj Pre-Trial Brief, paras 180-198; F287, para. 54; F317, paras 42, 45; F440, paras 142-143, 146-148; F444, para. 13; F566 Haradinaj Final Trial Brief, paras 261-263, 265-267, 288-289, 300-301, 514; Transcript, 16 March 2022, pp 3686-3689, 3698-3701. See also F260/RED; F317/RED. See also W04841 (Zdenka Pumper), Transcript, 25 October 2021, p. 1384.

⁵⁹⁶ Transcript, 14 March 2022, pp 3480-3481, 3526-3529.

remnants of the Third Set seized at the KLA WVA premises on 22 September 2020 correspond to Batch 3.

(b) The First Seizure

305. The Panel notes that the First Seizure was authorised by the Single Judge in the First Order, which was based on Articles 35(3), 39(3) and 53(1) of the Law and Rules 31-32, 37, 39 and 202 of the Rules. There is no indication that the legal basis of the First Order was erroneous, hence the Panel shall not address this matter further.

306. The First Order set out the time, duration and scope of the seizure,⁵⁹⁷ the requirements for its execution and service,⁵⁹⁸ the requirements for the retention, storage and protection of the seized material,⁵⁹⁹ and the SPO's reporting obligations.⁶⁰⁰ The Panel will address these in turn.

307. As regards the time, duration and scope of the seizure, the Single Judge required the SPO to: (i) execute the First Order within five days of its issuance;⁶⁰¹ and (ii) seize the material received by Mr Gucati and/or the KLA WVA in the morning of 7 September 2020 and any related material of similar nature received between the issuance of the First Order and its execution.⁶⁰² The SPO carried out the seizure within one day of the First Order, on 8 September 2020.⁶⁰³ Furthermore, the SPO seized the remnants of the First Set, in line with the scope of the seizure authorised in the First Order.⁶⁰⁴ The Panel finds therefore no failure of the SPO in complying with these measures.

⁵⁹⁷ P52, paras 15-16

⁵⁹⁸ P52, paras 20, 23.

⁵⁹⁹ P52, paras 18-19.

⁶⁰⁰ P52, para. 17.

⁶⁰¹ P52, para. 15.

⁶⁰² P52, para. 16.

⁶⁰³ P92, para. 1; P52, para. 15.

⁶⁰⁴ P92, para. 7; P52, paras 16, 22(a).

308. As regards execution and service, the Single Judge authorised the SPO, as a competent authority under Rule 49(1) of the Rules, to serve and to execute the First Order.⁶⁰⁵ The Single Judge also ordered the SPO to execute the seizure in accordance with Rule 39 of the Rules.⁶⁰⁶ The SPO served the First Order on Mr Klinaku, as representative of the KLA WVA.⁶⁰⁷ Mr Klinaku signed the handover note (“First Handover Note”), which described the seized material as “documents delivered to the KLA WVA” and “1 stack of documents, printed”.⁶⁰⁸ Mr Klinaku recorded no complaint regarding the conduct of the operation on the First Handover Note nor on a handwritten page that he signed (“Klinaku Handwritten Note”).⁶⁰⁹ Before handing over the documents, Mr Klinaku called Mr Gucati, who instructed him to hand the material over to the SPO.⁶¹⁰ Mr Klinaku also indicated that there was no need for a lawyer to be present.⁶¹¹

309. Rule 39(4) of the Rules requires the SPO to prepare an inventory with a detailed description of and information regarding each item seized (“Rule 39(4) Inventory”). The same Rule requires the SPO, the independent observer, the person concerned and his or her counsel, if present, to sign the Rule 39(4) Inventory. The Rule further allows comments to be made on the same inventory regarding the execution of the search and seizure. The only document on the record that bears the signatures of the SPO, the independent observer and Mr Klinaku is the First Handover Note. The Klinaku Handwritten Note bears the signature of Mr Klinaku and one SPO staff member. Neither document appears to be a Rule 39(4) Inventory containing “a detailed description of and information regarding each item seized”. Furthermore, the Panel

⁶⁰⁵ P52, para. 20.

⁶⁰⁶ P52, para. 23.

⁶⁰⁷ P92, paras 2-4, 6.

⁶⁰⁸ P56.

⁶⁰⁹ P56; P57.

⁶¹⁰ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2182-2183. *See also* W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1959-1960; 1D3, paras 27-28.

⁶¹¹ P92, para. 5.

did not receive in evidence any Rule 39(4) Inventory of the First Seizure. Nor did the Panel receive evidence that a Rule 39(4) Inventory had been prepared after the First Seizure.

310. As regards chain of custody and reporting, the First Order ordered the SPO to “store, protect, and transfer the seized material, in accordance with the standard chain of custody procedures”.⁶¹² The First Order also required the SPO to “take appropriate measures to protect the seized material against loss, accidental or unauthorised access, alteration, dissemination or destruction”.⁶¹³ Furthermore, the First Order required the SPO to submit, within a specific timeframe, a report to the Single Judge, indicating: (i) the date, time, duration, location, scope, and circumstances of the seizure;⁶¹⁴ (ii) the fulfilment of the requirements under Rule 39 of the Rules;⁶¹⁵ and (iii) the procedure and precautions adopted for the storage and protection of the seized material.⁶¹⁶ Consistent with the First Order, the SPO filed, within fourteen (14) days, a report of the First Seizure.⁶¹⁷

311. In relation to the chain of custody following the First Seizure, the Panel observes the following. First, Mr Moberg, the SPO representative who seized the remnants of the First Set and who carried out or witnessed the steps pertaining to the chain of custody of the documents, authored an official note in this regard and also testified at trial.⁶¹⁸ He indicated that the seized documents and the First Handover Note were transported by SPO staff to the SPO premises in Prishtinë/Priština, where they were scanned.⁶¹⁹ The scanned, digital versions were then transmitted with encryption to the

⁶¹² P52, para. 18.

⁶¹³ P52, para. 18.

⁶¹⁴ P52, para. 17.

⁶¹⁵ P52, para. 17.

⁶¹⁶ P52, para. 18.

⁶¹⁷ F8. Annex 1 contains the signed handover document, admitted as P56. *See also* F8/RED.

⁶¹⁸ P92; W04876 (Daniel Moberg), Transcript, 5 November 2021.

⁶¹⁹ P92, paras 10-11; W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1931, 1958.

SPO in The Hague.⁶²⁰ The hard copies of the seized documents were placed in two separate evidence bags, and the First Handover Note was placed in one of these bags.⁶²¹ Both evidence bags were sealed and placed in the safe in the SPO premises in Prishtinë/Priština,⁶²² until they were transported to the SPO office in The Hague.⁶²³ Ms Pumper testified that she was able to verify that the documents she reviewed as “Batch 1” were those obtained during the First Seizure, because of the consecutive sequence of ERNs⁶²⁴ through which the documents were entered into the SPO evidential database. In particular, Ms Pumper testified that the First Handover Note was the “cover page” (ERN 080449), followed by the seized material identified as “Batch 1” (ERN 080450-081339) and by the Klinaku Handwritten Note (ERN 081340), which was the last page.⁶²⁵

(c) The Second Seizure

312. The Panel notes that the seizure of the Second Set was authorised by the Single Judge in the Second Order, which was based on Articles 35(3), 39(3) and 53(1) of the Law and Rules 31-32, 37, 39 and 202 of the Rules. There is no indication that the legal basis of the Second Order was erroneous or misinterpreted, hence the Panel shall not address this matter further.

313. The Second Order set out the time, duration and scope of the seizure,⁶²⁶ the requirements for its execution and service,⁶²⁷ the requirements for the retention,

⁶²⁰ P92, para. 11; W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1931, 1958.

⁶²¹ P92, para. 12; W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1931-1932, 1958.

⁶²² P92, para. 12; W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1931-1932, 1958.

⁶²³ P92, para. 14; W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1932, 1958.

⁶²⁴ “Evidence Reference Numbers” assigned to evidentiary material.

⁶²⁵ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 854-857, 859.

⁶²⁶ P53, paras 15-16.

⁶²⁷ P53, paras 20, 23.

storage and protection of the seized material,⁶²⁸ and the SPO's reporting obligations.⁶²⁹ The Panel will address these in turn.

314. As regards the time, duration and scope of the seizure, the Single Judge required the SPO to: (i) execute the Second Order within five days of its issuance;⁶³⁰ and (ii) seize material received by Mr Gucati and/or the KLA WVA in the afternoon of 16 September 2020 and any related material of similar nature received between the issuance of the Second Order and its execution.⁶³¹ The SPO carried out the Second Seizure on 17 September 2020, the day the Second Order was issued.⁶³² Furthermore, the SPO seized the remnants of the Second Set, in line with the scope of the seizure authorised in the Second Order.⁶³³ The Panel finds therefore no failure of the SPO in complying with these measures.

315. As regards execution and service, the Single Judge authorised the SPO, as a competent authority under Rule 49(1) of the Rules, to serve and to execute the Second Order.⁶³⁴ The Single Judge also ordered the SPO to execute the seizure in accordance with Rule 39 of the Rules.⁶³⁵ The SPO served the Second Order on Mr Gucati.⁶³⁶ Mr Gucati signed the handover note ("Second Handover Note"),⁶³⁷ which described the seized material as "documents brought to WVA by unknown man, 16.9.2020", and recorded no complaint regarding the conduct of the operation.⁶³⁸

⁶²⁸ P53, paras 18-19, 24(b).

⁶²⁹ P53, paras 17, 24(a).

⁶³⁰ P53, para. 15.

⁶³¹ P53, para. 16.

⁶³² P55; W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1937-1940, 1950.

⁶³³ W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1937-1941; P53, paras 16, 22(a).

⁶³⁴ P53, para. 20.

⁶³⁵ P53, para. 23.

⁶³⁶ P4, p. 8; W04876 (Daniel Moberg), Transcript, 5 November 2021, p. 1939; DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2289-2293, 2295.

⁶³⁷ P55; 2D1, paras 94, 115; DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2291.

⁶³⁸ P55.

316. As with the First Seizure, the only document on the record that bears the signatures of the SPO, the independent observer and Mr Gucati is the Second Handover Note.⁶³⁹ Furthermore, as with the First Seizure, the Panel did not receive in evidence any Rule 39(4) Inventory. Nor did the Panel receive evidence that such a Rule 39(4) Inventory was prepared after the Second Seizure.

317. As regards chain of custody and reporting, the Second Order set out the same requirements as the First Order.⁶⁴⁰ Consistent with the Second Order, the SPO filed, within fourteen (14) days, a report of the Second Seizure.⁶⁴¹

318. In relation to the the chain of custody following the Second Seizure, the Panel observes the following. First, the SPO representative who prepared an official note regarding the Second Seizure was not called as a witness by the Parties and the Panel declined to admit an official note he prepared regarding this event.⁶⁴² As a result, the Panel cannot rely on the account of that SPO representative. Second, Mr Moberg, who testified about the three seizure operations, stated that he could no longer distinguish between the Second Seizure and the Third Seizure, but confirmed that on both occasions documents were seized.⁶⁴³ Mr Moberg testified that the seized documents were removed by SPO staff in evidence bags and taken to the SPO premises in Prishtinë/Priština, where they were scanned, before being sent with encryption to the SPO in The Hague.⁶⁴⁴ Third, Ms Pumper gave evidence in respect of the Second Seizure, including on the basis of the Second Handover Note.⁶⁴⁵ Ms Pumper testified that she was able to verify that the documents she reviewed as “Batch 2” were those obtained during the Second Seizure, because of the consecutive sequence of ERNs

⁶³⁹ P55.

⁶⁴⁰ P53, paras 17-19.

⁶⁴¹ F28. *See also* F00028/RED.

⁶⁴² Transcript, 19 October 2021, pp 937-939 (Oral Order on the Admission of Certain Exhibits (P92MFI, P103MFI and P105MFI)).

⁶⁴³ W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1938-1940.

⁶⁴⁴ W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1939-1941.

⁶⁴⁵ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 911-913.

through which the documents were entered into the SPO evidential database. In particular, Ms Pumper testified that the Second Handover Note was the “cover page” (ERN 079500), followed by what seems to be a copy of the Second Order which was not produced by the SPO,⁶⁴⁶ and finally by the seized material (ERN 079512-080448).⁶⁴⁷

(d) The Third Seizure

319. The Panel notes that the Third Seizure was ordered by the Specialist Prosecutor on 22 September 2020 pursuant to Articles 35(2) and 53(1) of the Law (“SPO Order”).⁶⁴⁸ There is no indication that the legal basis of the SPO Order was erroneous or misinterpreted, hence the Panel shall not address this matter further.

320. The SPO Order required Mr Gucati and the KLA WVA to, *inter alia*, “[i]mmediately produce all documents and records, including internal work product, of the Specialist Prosecutor's Office”.⁶⁴⁹ The SPO went to the KLA WVA premises on the day the SPO Order was issued,⁶⁵⁰ and served it on the KLA WVA. Mr Haradinaj signed a note acknowledging “receipt of: the order to produce documents and records” (“Acknowledgement Note”), and recorded no complaint regarding the conduct of the operation.⁶⁵¹

321. On 23 September 2020, the SPO filed a notice to the Single Judge in respect of the Third Seizure.⁶⁵² On 25 September 2020, the Single Judge found that, since the SPO Order did not foresee or result in any search of or compelled intrusion into the KLA

⁶⁴⁶ The Panel notes that the Second Order, as admitted into evidence (P53), bears the ERN 092017-092027.

⁶⁴⁷ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 912-914.

⁶⁴⁸ P54.

⁶⁴⁹ P54.

⁶⁵⁰ The Panel is satisfied that the initial date of 9 September 2020 was erroneously typed on the SPO Order and that the handwritten correction to 22 September 2020 is the accurate date. *See* P54. *See infra* para. 874 (Defences).

⁶⁵¹ P58.

⁶⁵² F10. Annex 1 contains the SPO Order and the Acknowledgement Note, admitted as P54 and P58 respectively. In the notice, the SPO submitted that the Third Seizure did not fall under the scope of Rules 37-39 of the Rules (para. 5). *See also* F10/RED.

WVA premises, and because the documents appeared to have been voluntarily provided to the SPO upon service of the SPO Order, no approval pursuant to Rule 38(3) of the Rules was required.⁶⁵³ The Single Judge did not address the question whether, in such circumstances, a Rule 39(4) Inventory was necessary. In any event, the Panel did not receive in evidence any such inventory, nor did it receive evidence that a Rule 39(4) Inventory was prepared after this seizure. Furthermore, no evidence was received that a note recording the seizure or handover of the material was prepared. The Acknowledgment Note bears the signatures of an SPO representative and Mr Haradinaj, but only refers to the receipt of the SPO Order.

322. The SPO Order did not detail the procedure for retaining and storing the seized documents. In relation to the chain of custody following this seizure, the Panel observes the following. First, as with the Second Seizure, the SPO representative who prepared an official note regarding the Third Seizure was not called as a witness by the Parties and the Panel declined to admit a note prepared by him which recorded the process of seizure.⁶⁵⁴ As a result, the Panel cannot rely on the account of that SPO representative. Second, Mr Moberg confirmed that documents were seized by the SPO during the Third Seizure.⁶⁵⁵ Third, Ms Pumper testified about the Third Seizure, including on the basis of the Acknowledgement Note.⁶⁵⁶ Ms Pumper also testified that she was able to verify that the documents she reviewed as “Batch 3” were those seized during the Third Seizure.⁶⁵⁷ In particular, Ms Pumper testified that: (i) she transported one of the evidence bags of the Third Seizure, opened that bag and submitted its content into evidence, receiving ERN numbers;⁶⁵⁸ and (ii) she opened the other sealed

⁶⁵³ F17, para. 9. *See also* F17/RED.

⁶⁵⁴ Transcript, 19 October 2021, pp 937-939 (Oral Order on the Admission of Certain Exhibits (P92MFI, P103 MFI and P105MFI)).

⁶⁵⁵ W04876 (Daniel Moberg), Transcript, 5 November 2021, p. 1939.

⁶⁵⁶ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 922-924.

⁶⁵⁷ W04841 (Zdenka Pumper), Transcript, 18 October 2021, p. 921.

⁶⁵⁸ W04841 (Zdenka Pumper), Transcript, 18 October 2021, p. 921.

evidence bag pertaining to the same seizure, submitted its content into evidence, receiving ERN numbers.⁶⁵⁹ Ms Pumper also indicated that the ERN numbers of the documents known as Batch 3 that she later reviewed corresponded to the ERN numbers that she received after submitting the documents contained in the evidence bags into the SPO evidentiary database.⁶⁶⁰

(e) The handover of documents by *Gazeta Infokus*

323. For the purpose of determining the content of the Batches discussed below, the Panel shall also address the chain of custody regarding the Fourth Set.

324. As noted above, further to information received from *Gazeta Infokus*,⁶⁶¹ on 9 September 2020, Mr Moberg and another SPO representative went to the office of this media outlet, where they were handed the Fourth Set.⁶⁶² The documents were handed over voluntarily and a note acknowledging their receipt by the SPO was signed by Mr Berisha and Mr Moberg (“Delivery Document”).⁶⁶³ The Delivery Document described the Fourth Set as “documents delivered to *Gazeta Infokus*” and “documents from KLA WVA”.⁶⁶⁴

325. In relation to the chain of custody following this handover, the Panel observes the following. First, Mr Berisha testified that the SPO took away all the documents that *Gazeta Infokus* had received during the First Press Conference.⁶⁶⁵ Mr Berisha also identified the Delivery Document as being signed by him during the handover.⁶⁶⁶ Second, Mr Moberg, the SPO representative who received the Fourth Set, authored an

⁶⁵⁹ W04841 (Zdenka Pumper), Transcript, 18 October 2021, p. 922.

⁶⁶⁰ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 921-922.

⁶⁶¹ P98, paras 4-6. *See supra* para. 226 (The Events at Issue).

⁶⁶² P99, paras 1-3. *See supra* para. 236 (The Events at Issue).

⁶⁶³ P99, paras 1, 3; P100.

⁶⁶⁴ P100.

⁶⁶⁵ W04866 (Halil Berisha), Transcript, 26 October 2021, p. 1532.

⁶⁶⁶ W04866 (Halil Berisha), Transcript, 26 October 2021, pp 1535-1536.

official note in this regard.⁶⁶⁷ In this note, Mr Moberg indicated that he placed the documents in two evidence bags (the Delivery Document was placed in one of these bags), which were then transported by car to the SPO premises in Prishtinë/Priština.⁶⁶⁸ On 17 September 2020, the two evidence bags were handed over by Mr Moberg to SPO representatives to be transported to the SPO premises in The Hague.⁶⁶⁹ Third, Ms Pumper testified about the handover, including on the basis of the Delivery Document.⁶⁷⁰ Ms Pumper also testified that she was able to verify that the documents she reviewed as “Batch 4” were those obtained at the *Gazeta Infokus* office on 9 September 2020, because of the consecutive sequence of ERNs through which the documents were entered into the SPO evidential database. In particular, Ms Pumper testified that the Delivery Document was the “cover page” (ERN 078569), which was then followed by the Fourth Set identified as “Batch 4” (ERN 078570-079499).⁶⁷¹

3. Conclusion

326. The Panel accepts that the SPO did not submit to the Pre-Trial Judge and has failed to produce in evidence a record that meets the requirements of a Rule 39(4) Inventory or any other detailed document describing each seized item in respect of any of the seizures. In relation to the First and Second Seizures, the Panel considers that it would have been the prerogative of the Single Judge or the Pre-Trial Judge to decide whether to follow up with the SPO on the absence of a Rule 39(4) Inventory, as part of the latter’s reporting obligations. The Single Judge decided in the exercise of his discretion that there was no need to do so. As regards the Third Seizure, the Panel notes that the SPO indicated that Rule 39 of the Rules did not apply and the Single Judge did not specifically address this issue, although he found that Rule 38(3)

⁶⁶⁷ P99.

⁶⁶⁸ P99, para. 5.

⁶⁶⁹ P99, para. 6.

⁶⁷⁰ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 889-891.

⁶⁷¹ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 890-893.

of the Rules was not applicable.⁶⁷² The voluntary handover of the Fourth Set, in the absence of any order, does not fall under the scope of Rules 37-39 of the Rules.

327. Rule 39(4) of the Rules provides that “[t]he Specialist Prosecutor shall prepare an inventory with a detailed description of and information regarding each item seized”. The requirement is mandatory (“shall”) and does not leave a discretion to the SPO as to whether or not to prepare such a document. The SPO should, therefore, have drawn one up and thus failed to comply with the Rules. At the same time, the Rules do not provide for any remedy or relief to apply when the requirement is not fulfilled. The Panel notes that the requirement to prepare an inventory is intended, *inter alia*, to ensure that the SPO is in a position to establish the integrity of the evidence collection in response to any challenge to its admissibility if produced as evidence at trial.⁶⁷³ The integrity of the evidence collection could also be established through the testimony of an investigator who participated in the seizure of the relevant material or by other comparable means.⁶⁷⁴

328. Accordingly, the Panel observes that the evidence regarding each seizure or handover includes the account of Mr Moberg, who was present on all four occasions when material was retrieved.⁶⁷⁵ The evidence also includes the account of Ms Pumper, verifying that the documents she reviewed as Batches 1-4 were those submitted into the SPO evidential database, after being obtained at the KLA WVA premises and the *Gazeta Infokus* office.⁶⁷⁶ The Panel also notes that there is no evidence that any of these documents came from a source other than the KLA WVA premises and the *Gazeta Infokus* office. Nor is there evidence that any material seized from the KLA WVA premises or obtained from the *Gazeta Infokus* office was not submitted into the SPO

⁶⁷² F17, paras 4, 9.

⁶⁷³ DW1253 (Robert Reid), Transcript, 24 January 2022, p. 3238.

⁶⁷⁴ DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3238-3239.

⁶⁷⁵ P92; P99; W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1930-1932, 1936-1941, 1958.

⁶⁷⁶ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 854-857, 859, 889-893, 912-914, 921-924.

evidential database or that the integrity of any of the documents was affected in the process.

329. In light of the above, the Panel is satisfied that the chain of custody of the seized material has been adequately established by evidence on the record and that: (i) the remnants of the First Set seized at the KLA WVA premises on 8 September 2020 correspond to Batch 1; (ii) the remnants of the Second Set seized at the KLA WVA premises on 17 September 2020 correspond to Batch 2; and (iii) the remnants of the Third Set seized at the KLA WVA premises on 22 September 2020 correspond to Batch 3. The Panel is further satisfied that the Fourth Set received by the SPO from *Gazeta Infokus* on 9 September 2020 corresponds to Batch 4.

330. Having made this determination, the Panel shall hereafter refer to the material obtained at the KLA WVA premises and the *Gazeta Infokus* office as Batches 1-4. The Panel will continue referring to the Three Sets when addressing the actions of the Accused during the Indictment Period. In any event, for the purpose of findings regarding the charged offences, the Panel relies solely on the evidence on the record.

B. CONTENT OF THE BATCHES

331. The SPO did not produce in evidence the totality of Batch 1 and Batch 3.⁶⁷⁷ A redacted version of Batch 2 (P104) is part of the record. The SPO submitted that disclosing Batches 1 and 3 to the Accused entailed the risk of returning the means by which they committed the charged offences.⁶⁷⁸ It also averred that the counterbalancing measures ordered by the Pre-Trial Judge in lieu of full disclosure have been effective and preserved the fairness of the proceedings, in particular the tabular description of the Batches by Ms Pumper.⁶⁷⁹

⁶⁷⁷ See *infra* paras 339, 354 (Findings on the Batches).

⁶⁷⁸ F565 SPO Final Trial Brief, para. 166.

⁶⁷⁹ F565 SPO Final Trial Brief, paras 166-167.

332. While the Panel agrees that the disclosure of Batches 1 and 3 to the Accused would have carried heightened risks for both those named therein and for the SPO's investigations, it also considers that the absence of this material from the record has made the determination of the content, authenticity and confidentiality of the Batches a more complex exercise. The Panel is cognisant that criminal charges can be proven in various ways,⁶⁸⁰ but it underscores that disclosure of the impugned material at the core of the charges (if necessary with limited redactions) is the most effective and sometimes the only way in which a case can be determined.

333. To ascertain the content of the Batches, the Panel relied on: (i) the declarations and testimony of Ms Pumper regarding their content and associated exhibits, namely, the admitted excerpts of Batches 1 and 4, P104 (Batch 2), admitted excerpts of Batch 3, and media reports; (ii) where applicable, evidence of other witnesses; and (iii) the statements of the Accused.

1. Ms Pumper's evidence and associated exhibits

(a) Batch 1

334. To ascertain the content of Batch 1 through Ms Pumper's evidence, the Panel will also take into consideration the evidence of Mr Berisha regarding Batch 4. Mr Berisha has described Batch 4, corresponding to the Fourth Set, as having been taken from the First Set on the occasion of the First Press Conference.⁶⁸¹ Given this indication, the content of Batch 4 is relevant for ascertaining the content of the First Set and, ultimately, of Batch 1.

⁶⁸⁰ F565 SPO Final Trial Brief, para. 169.

⁶⁸¹ W04866 (Halil Berisha), Transcript, 26 October 2021, pp 1520-1521.

i) General content of Batches 1 and 4

335. As regards the content of Batch 1, Ms Pumper stated that: (i) it contained 891 pages of documents written in English, Serbian and German;⁶⁸² (ii) over 200 documents were written in the Serbian language, using either the Latin or the Cyrillic alphabet;⁶⁸³ and (iii) it included a document in German produced by German KFOR personnel.⁶⁸⁴

336. Ms Pumper further stated that Batch 1 included: (i) over a hundred of “confidential requests for assistance” addressed by the SITF (“SITF Requests”) to the competent Serbian authorities between 2013 and 2015,⁶⁸⁵ mostly composed of a cover letter and confidential annexes;⁶⁸⁶ (ii) responses from the Serbian War Crimes Prosecution Office (“WCPO”) to the SITF Requests (“WCPO Responses”); and (iii) documents from Serbian authorities, such as internal reports by the WCPO and by the Serbian Police (“MUP”) and internal communications between the WCPO and the MUP (“Serbian Documents”).⁶⁸⁷ Ms Pumper also indicated that some of these Serbian Documents referred to measures taken in furtherance of SITF/SPO investigations.⁶⁸⁸

337. Ms Pumper also produced a chart in which she described, per page number(s), each document contained in Batch 1 and provided, *inter alia*, indicia suggesting the confidential nature of the document and whether any names of (potential) witnesses were mentioned (“Batch 1 Chart”).⁶⁸⁹

338. Further, Ms Pumper indicated that photographs received by the SPO on 7 September 2020 at 6.34 p.m. from a Kosovo media outlet (“Seven Photographs”)

⁶⁸² P86, para. 6; P88, paras 5-6.

⁶⁸³ P88, para. 6.

⁶⁸⁴ P88, para. 13.

⁶⁸⁵ P86, paras 7, 9; W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 860, 862.

⁶⁸⁶ P86, para. 8.

⁶⁸⁷ P86, para. 7; P88, para. 8; W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 860-861.

⁶⁸⁸ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 886-887; P90 (Annex 1 – Chart on Batch 1), pp 16, 18-19, 23, 30, 45, 47.

⁶⁸⁹ P90 (Annex 1 – Chart on Batch 1); W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 869-870.

contained screenshots of three SITF Requests and one Serbian Document contained in Batch 1.⁶⁹⁰

339. The Panel notes that the five excerpts of Batch 1 discussed by Ms Pumper during her testimony appear to be SITF Requests addressed to the WCPO for the collection of evidence.⁶⁹¹

340. As regards Batch 4, Mr Berisha testified that the documents he took from the First Press Conference: (i) amounted to approximately 1,000 pages;⁶⁹² (ii) contained correspondence, communication between SITF officials and prosecutors and other officials of Serbia;⁶⁹³ and (iii) included requests from the SITF to the Serbian prosecutors to assist with finding witnesses and their addresses, and that such witnesses were mentioned by name in the requests.⁶⁹⁴

341. Ms Pumper said Batch 4 comprised 930 pages.⁶⁹⁵ She further stated that all documents that were contained in Batch 1 were also contained in Batch 4, with the exception of four documents.⁶⁹⁶ In this regard, Ms Pumper produced a chart in which she described, per page number(s), each document contained in Batch 4. She indicated, *inter alia*, indicia suggesting the confidential nature of the document and whether any names of (potential) witnesses were mentioned, corresponding pages in Batch 1 and a description of the differences, if any, between the documents contained in both Batches 1 and 4 (“Batch 4 Chart”).⁶⁹⁷

342. Ms Pumper also indicated that Batch 4 contained a number of documents that were not contained in Batch 1, namely: (i) other SITF Requests; (ii) other Serbian

⁶⁹⁰ P89, paras 14-16, 18, 20. *See also* P101; P102.

⁶⁹¹ P93, P94, P95, P96, P97.

⁶⁹² W04866 (Halil Berisha), Transcript, 26 October 2021, pp 1520-1521.

⁶⁹³ W04866 (Halil Berisha), Transcript, 27 October 2021, pp 1572-1573, 1600, 1626.

⁶⁹⁴ W04866 (Halil Berisha), Transcript, 27 October 2021, pp 1572-1573. *See also infra* para. 343.

⁶⁹⁵ P89, para. 7.

⁶⁹⁶ P89, para. 8, as amended by P87. W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 891, 893-895, 904.

⁶⁹⁷ P91 (Annex 1 – Chart on Batch 4).

Documents; and (iii) a two-page Albanian document, apparently unrelated to the other documents in Batch 4.⁶⁹⁸ Furthermore, six of the Seven Photographs depicted documents contained in Batch 1, namely: (i) four SITF Requests, three of which were also contained in Batch 1; and (ii) two Serbian Documents, one of which was also contained in Batch 1.⁶⁹⁹

343. The Panel notes that, following the First Press Conference, several media outlets provided details from alleged SITF Requests, including names, personal details of witnesses and/or other information regarding their content.⁷⁰⁰ Furthermore, several media articles provided screenshots of pages depicting mainly SITF Requests.⁷⁰¹ Some were issued by *Gazeta Infokus*, with descriptions and/or screenshots of content of Batch 4.⁷⁰²

ii) Witness names in Batches 1 and 4

344. For the purpose of reviewing the Batches, Ms Pumper considered a witness to be a person whom the SITF/SPO had met and had obtained information from, including in the form of an interview.⁷⁰³ She considered a potential witness to be someone from whom the SPO was seeking to obtain, including through other organisations, information, including in the form of an interview.⁷⁰⁴ Ms Pumper also noted that, in

⁶⁹⁸ P89, paras 11-13.

⁶⁹⁹ P89, paras 14-20. *See also* P101; P102.

⁷⁰⁰ P123; P124, pp 1-2 (1D16), 3-4 (P128), 5; P125, pp 9-10 (P125ET.3); P129, pp 1 (1D2, pp 1-4, 9-19), 12 (1D2, pp 44-46), 14 (1D2, pp 50-54), 15 (1D2, pp 55-67); 1D17. *See also* P86, paras 13-14 (*referring to* P125, pp 4-8), para. 15 (*referring to* P125, pp 1-3), para. 16 (*referring to* P124, pp 1-2), para. 17 (*referring to* P124, pp 3-4) and para. 18 (*referring to* P124, pp 4-5).

⁷⁰¹ P123; P124, pp 1-2 (1D16), 3-4 (P128), 5; P125, pp 1-3 (1D11), 4-8 (P129, p. 14; 1D2, pp 50-54); P129, p. 15 (1D2, pp 55-67); 1D17.

⁷⁰² P125, pp 1-3 (P125ET.1; 1D11), 4-8 (P125ET.2; P129, p. 14; 1D2, pp 50-54); P129, pp 1 (1D2, pp 1-4, 9-19), 12 (1D2, pp 44-46), 15 (1D2, pp 55-67).

⁷⁰³ W04841 (Zdenka Pumper), Transcript, 20 October 2021, p. 1080.

⁷⁰⁴ W04841 (Zdenka Pumper), Transcript, 20 October 2021, p. 1080.

the course of her review, she checked whether identified individuals were registered in the SPO's global witness list.⁷⁰⁵

345. As regards Batch 1, Ms Pumper indicated that: (i) over 150 documents contained references to the names of 699 individuals;⁷⁰⁶ (ii) the confidential annexes of the SITF Requests listed "hundreds of names of witnesses and potential witnesses",⁷⁰⁷ in relation to whom the SITF sought to obtain through the competent Serbian authorities assistance to conduct interviews and records of previous statements;⁷⁰⁸ (iii) the Serbian Documents mentioned the names of dozens of victims and witnesses who had been interviewed by the SITF/SPO;⁷⁰⁹ (iv) the same names (mentioned in the Serbian Documents) were also mentioned in documents forming part of SITF Requests containing schedules for SITF interviews, which were also contained in Batch 1;⁷¹⁰ and (v) it also 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.⁷¹¹ Ms Pumper also identified four individuals, [REDACTED], whose names and other details were included in the annexes to various SITF Requests, "among other witnesses and potential witnesses whom the SITF sought to interview and in relation to whom the record of previous statements was requested".⁷¹² In the Batch 1 Chart, Ms Pumper identified a large number of documents as containing names of (potential) witnesses.⁷¹³

346. As regards Batch 4, Ms Pumper stated that: (i) the additional SITF Requests, not included in Batch 1, contained dozens of names of SITF/SPO witnesses and potential

⁷⁰⁵ W04841 (Zdenka Pumper), Transcript, 20 October 2021, p. 1079.

⁷⁰⁶ P88, para. 10 as amended by P87. Ms Pumper did not specify whether she identified all of these individuals as witnesses or potential witnesses.

⁷⁰⁷ P86, para. 9.

⁷⁰⁸ P86, para. 8.

⁷⁰⁹ P88, para. 11; W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 886-887.

⁷¹⁰ P88, para. 11.

⁷¹¹ P88, para. 12 as amended by P87.

⁷¹² P86, para. 10; W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 884-885.

⁷¹³ P90 (Annex 1 – Chart on Batch 1).

witnesses;⁷¹⁴ and (ii) the Serbian Documents not included in Batch 1 contained, *inter alia*, partial or complete records of witness statements taken by the Serbian authorities, reports issued by and communications between the MUP and the WCPO, and documents and lists which contained names and personal details of individuals whom she identified as victims, SITF/SPO witnesses and potential witnesses.⁷¹⁵

(b) Batch 2

347. Ms Pumper described Batch 2 as containing: (i) 937 pages of documents written in English, Albanian and Serbian;⁷¹⁶ and (ii) mainly copies of judgments issued by Kosovo courts and other judicial institutions, including the ICTY, in relation to war crimes.⁷¹⁷ The copies of these judgments did not bear any logo or marks typical of SITF or SPO documents.⁷¹⁸

348. Ms Pumper further indicated that Batch 2 included six pages already contained in Batch 1, covering (parts of) three SITF Requests and two Serbian Documents (“Six Pages”).⁷¹⁹ For these, Ms Pumper produced a chart similar to that prepared for Batch 1, describing each page by providing, *inter alia*, indicia suggesting the confidential nature of the document and whether any names of witnesses or potential witnesses were mentioned (“Batch 2 Chart”).⁷²⁰

349. The Panel notes that the admitted version of Batch 2, P104, corroborates the above evidence. It contains: (i) judgments of Kosovo courts, or parts or duplications thereof;⁷²¹ (ii) one indictment of the Special Prosecution Office of Kosovo;⁷²²

⁷¹⁴ P89, para. 11.

⁷¹⁵ P89, para. 12.

⁷¹⁶ P86, para. 20.

⁷¹⁷ P86, para. 21; W04841 (Zdenka Pumper), Transcript, 18 October 2021, p. 914.

⁷¹⁸ P86, para. 21; W04841 (Zdenka Pumper), Transcript, 21 October 2021, p. 1197.

⁷¹⁹ P86, paras 22-27; W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 914-917; Transcript, 21 October 2021, pp 1197-1200.

⁷²⁰ P90 (Annex 3 – Chart on Batch 2).

⁷²¹ P104, pp 1-415, 524-614, 628-834.

⁷²² P104, pp 416-480.

(iii) indictments and judgment summaries of the ICTY, or parts or duplications thereof;⁷²³ and (iv) the Six Pages with redactions.⁷²⁴

350. According to Ms Pumper, one of the Six Pages, an excerpt of an SITF Request, referred to logistical arrangements to carry out interviews.⁷²⁵ Another page, which was an excerpt of a Serbian Document, contained instructions to other Serbian authorities further to an SITF Request to establish the address and facilitate the interview with a potential witness named in a confidential annex not included in Batch 2.⁷²⁶ Yet another page, also an excerpt of a Serbian Document, contained the names, dates of birth and professional functions of at least two SITF/SPO witnesses and potential witnesses.⁷²⁷

351. The Panel further notes that, following the Second Press Conference, a number of reports referred to the Second Delivery,⁷²⁸ but most did not contain details regarding the Second Set. One media report, however, provided a screenshot of a page depicting an ICTY document that is part of Batch 2.⁷²⁹

(c) Batch 3

352. Ms Pumper described Batch 3 as: (i) consisting of two incomplete copies of the same document;⁷³⁰ (ii) written in English; and (iii) encompassing incomplete copies of “an SPO confidential document”, comprising 261 pages, which pertained to SPO

⁷²³ P104, pp 496-523, 621-627, 835-937.

⁷²⁴ P104, pp 615-620. *See also* P139-P144, which are excerpts of Batch 1 corresponding to the six pages in Batch 2 and P145-150, which are excerpts of Batch 4 corresponding to the six pages in Batch 2. *See* F427, paras 30, 33.

⁷²⁵ P86, para. 24; W04841 (Zdenka Pumper), Transcript, 21 October 2021, pp 1200-1204.

⁷²⁶ P86, para. 26; W04841 (Zdenka Pumper), Transcript, 21 October 2021, pp 1207-1209.

⁷²⁷ P86, para. 27; W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 916-917; Transcript, 21 October 2021, pp 1209-1210.

⁷²⁸ P129, pp 5, 7 (1D2, pp 29-31), 9 (1D2, pp 35-37), 13 (1D2, pp 47-49).

⁷²⁹ P125, p. 12; P104, p. 835.

⁷³⁰ P86, para. 29; P90, para. 7; W04841 (Zdenka Pumper), Transcript, 19 October 2021, p. 951; Transcript, 21 October 2021, p. 1214.

investigations and official proceedings and which constituted internal work product.⁷³¹

353. Ms Pumper provided details in relation to the two incomplete copies. The first one, "Set 1", comprised 245 pages, while the second, "Set 2", ran to 244 pages.⁷³² Both were said to be incomplete copies of "an SPO internal, confidential memorandum, which pertains to SPO investigations and official proceedings and which constitutes internal work product".⁷³³ Ms Pumper further indicated that both Set 1 and Set 2 included an analysis of available evidence and applicable law in relation to five SPO suspects, namely Mr Azem Syla, Mr Thaçi, Mr Jakup Krasniqi, Mr Kadri Veseli and Mr Rexhep Selimi.⁷³⁴ She stated that both copies appeared to be dated December 2019, but contained specific references to dates of witness and suspect interviews dated up to March 2020.⁷³⁵

354. The Panel notes that the fourteen exhibits admitted in evidence as excerpts of Batch 3 appear to be and have been described by Ms Pumper as pairs of corresponding pages from Set 1 and Set 2, containing analysis of evidence and related legal considerations.⁷³⁶

355. Ms Pumper further indicated that Batch 3 contained references to: (i) names and evidence provided by witnesses, potential witnesses and suspects;⁷³⁷ and

⁷³¹ P86, para. 29; W04841 (Zdenka Pumper), Transcript, 19 October 2021, p. 951; Transcript, 21 October 2021, p. 1215.

⁷³² P90, paras 8(i), 9(i); W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 926-927.

⁷³³ P90, paras 8(i), 9(i); W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 926-927.

⁷³⁴ P86, para. 29; P90, paras 8(i), 9(i); W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 926, 931-932; Transcript, 19 October 2021, p. 952; Transcript, 21 October 2021, p. 1215.

⁷³⁵ P90, paras 8(ii), 9(ii); W04841 (Zdenka Pumper), Transcript, 19 October 2021, p. 950.

⁷³⁶ P106; P107; P108; P109; P110; P111; P112; P113; P114; P115; P116; P117; P118; P119; W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 927-930; Transcript, 19 October 2021, pp 940-948.

⁷³⁷ P86, para. 31; P90, paras 8(i), 9(i); W04841 (Zdenka Pumper); Transcript, 18 October 2021, p. 926; Transcript, 19 October 2021, p. 949.

(ii) “approximately 150 (potential) witnesses”.⁷³⁸ Ms Pumper identified [REDACTED], [REDACTED], who was named in Batch 3.⁷³⁹

356. The Panel further notes that, following the Third Press Conference, several media reports described the content and/or provided screenshots of pages that were indicated to have been made available by the KLA WVA from the Third Set. In particular, several media reports provided details from the alleged draft indictment, including names of the suspects, details of analysis, as well as names and/or other information of persons.⁷⁴⁰ Furthermore, several media reports provided screenshots of pages containing the aforementioned information.⁷⁴¹

2. Statements of the Accused

357. The Panel has assessed the contemporaneous statements and the evidence of the Accused as regards the content of the Three Sets to establish whether and to what extent: (i) they corroborate the evidence regarding the content of the Batches; and (ii) the Accused were aware of the content of the documents they disseminated and publicly described.

(a) Review of the Three Sets

358. As found above, the Accused reviewed each of the Three Sets after they were delivered.⁷⁴²

⁷³⁸ P90, paras 8(iv), 9(iv); W04841 (Zdenka Pumper), Transcript, 19 October 2021, p. 950.

⁷³⁹ P86, para. 31.

⁷⁴⁰ P120; P121; P122; P155; P156; P157; P158; P159; P160. *See also* P86, paras 36-74.

⁷⁴¹ P120; P121; P122; P125, pp 14-18 (P125ET.4;1D12); P155; P156; P157; P158; P159; P160. *See also* P86, paras 36-74.

⁷⁴² *See supra* paras 211, 246, 276-277 (The Events at Issue).

359. As regards the First Set, Mr Gucati conducted a rather superficial review.⁷⁴³ Mr Haradinaj's review was more extensive and lasted, by his contemporary account, 3 to 4 hours.⁷⁴⁴ Neither of the Accused conducted a document-by-document review.⁷⁴⁵

360. As regards the Second Set, the Accused would have had about one hour and a half to review it before the Second Press Conference, although it is not clear that they spent this entire time doing so.⁷⁴⁶ The review was not exhaustive, but Mr Haradinaj said that he read as much as he could during that time.⁷⁴⁷

361. As regards the Third Set, the Accused would have had about one hour and a half to review it, although it is not clear that they spent this entire time doing so.⁷⁴⁸ The

⁷⁴³ P1, p. 1 (Mr Gucati: "Nasim is better informed about [the documents] as he has looked at them briefly. He looked at these and analysed them with Faton [Klinaku] and other friends"); 1D3, paras 14, 16; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2168-2169.

⁷⁴⁴ P8, pp 20, 33 ([Panelist]: "So you read a lot for four hours. Mr Haradinaj: I am a specialist in reading"); P18, pp 3-4 (Mr Haradinaj: "as much as we could... for three hours"); P21, pp 4 (Mr Haradinaj: "From what we were able to see during four hours, there are details of people, names and family names"), 5 (Mr Haradinaj: "That's what we could superficially see by browsing for four hours."); P24, p. 7 (Mr Haradinaj: "We had, of course, four hours at our disposal to do that, from around 9 o'clock to 1 o'clock"); P25, p. 4 (Mr Haradinaj: "The first file, we had about three or four hours to look through them but it was a large volume, I would say anything from 800 to 12-1300 pages").

⁷⁴⁵ P1, pp 2 (Mr Haradinaj: "We have only flicked through but we have noticed a lot of things in here"), 4 (Mr Haradinaj: "We read it quickly. [...] We had no time to read them. Can you see how large the files are? You will need a whole week to read it"), 5 (Mr Haradinaj: "This is all, at a quick look"); P9 pp 7 (Mr Gucati: "We haven't looked and checked the whole documents which are shown on the screen. There were a lot, over 4000. We only looked into some documents and checked them, and at a certain point, lists – different ones – appeared, that were within the bundles"), 10 (Mr Gucati: "We haven't been able to go through and check all of them"); P24, pp 3 (Mr Haradinaj: "But we were not able to read all of them"), 5, 7 (Mr Haradinaj: "Because we leafed through them, that is, we looked at them").

⁷⁴⁶ See *supra* paras 243, 246, 248 (The Events at Issue).

⁷⁴⁷ P2, p. 1 (Mr Gucati: "we did not have time to even check them [...] It is mainly Nasim who has done as much as he could. [...] he has worked harder than me in this regard"); P7, p. 17 (Mr Haradinaj: "We looked at them briefly, for an hour and a half"); P8, p. 9 ([Panelist]: "Nasim, have you read the files? Mr Haradinaj: Yes, as much as I could during our office hours"); P33, p. 3 (Mr Haradinaj: "from the moment we received them – we could not read much, [...] we had some time to leaf through them and the journalists took a lot").

⁷⁴⁸ See *supra* paras 275, 277, 279 (The Events at Issue).

evidence suggests that the review of the Third Set was more superficial than that of the previous ones and might have taken Mr Haradinaj about 30 minutes.⁷⁴⁹

(b) Contemporaneous statements of the Accused

i) First Set

362. Mr Gucati described the First Set as: (i) containing “around 4,000 files of the Specialist Chambers”;⁷⁵⁰ (ii) reflecting the collaboration between the SC and the Serbian prosecutors;⁷⁵¹ and (iii) containing witness names as well as information about witness interviews taken in specific locations.⁷⁵² Furthermore, Mr Gucati referred to the First Set as containing reference numbers of documents and dates,⁷⁵³ stamps and signatures,⁷⁵⁴ and documents pertaining to Adem Jashari and other named former KLA members.⁷⁵⁵

363. Mr Haradinaj noted that the First Set: (i) consisted of four copies/files of “about 1,000-1,200-1,300-1,400 pages”;⁷⁵⁶ (ii) contained contacts between Clint Williamson and Vladimir Vukčević (“Mr Vukčević”);⁷⁵⁷ (iii) contained “names of all the witnesses”;⁷⁵⁸ and (iv) included statements of witnesses with their names and personal details,⁷⁵⁹ summonses for specific persons,⁷⁶⁰ and requests to Serbia to provide location for

⁷⁴⁹ P30, pp 3-4 (Mr Haradinaj: “we haven’t had time to read it in depth because we wanted to be a little more... we gave all the materials to the media”); P35, p. 2 (Mr Gucati: “Nasim, more or less ... not that he knows more than me, but he was able to read these documents a little more, for about 30 minutes”).

⁷⁵⁰ P1, p. 1.

⁷⁵¹ P9, p. 6.

⁷⁵² P1, p. 4; P9, pp 5, 7, 10.

⁷⁵³ P28, pp 13-14. *See also* DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2248-2250 (claiming that he was made aware of this *post-facto* by a journalist).

⁷⁵⁴ *See e.g.* P9, pp 5-6; P28, pp 13-14.

⁷⁵⁵ *See e.g.* P9, pp 9, 13-14.

⁷⁵⁶ P1, p. 2; P24, p. 7.

⁷⁵⁷ P1, p. 2; P21, p. 4.

⁷⁵⁸ P1, p. 2.

⁷⁵⁹ P1, pp 2, 5; P24, p. 8; P21, pp 4-5.

⁷⁶⁰ P1, p. 2.

witnesses.⁷⁶¹ Furthermore, Mr Haradinaj: (i) noted that the First Set contained “a lot of things”;⁷⁶² (ii) spotted names and ethnicity of witnesses as well as names of SITF and Serbian officials;⁷⁶³ (iii) was able to determine that some of the witnesses had already been interviewed at an earlier time;⁷⁶⁴ (iv) saw dates and places of interviews, places of residence and telephone numbers of witnesses;⁷⁶⁵ (v) identified a summons issued by a known official;⁷⁶⁶ (vi) noted the cooperation with known police chiefs with their (alleged) place of residence being acknowledged;⁷⁶⁷ (vii) identified the language of documents;⁷⁶⁸ (viii) spotted SITF Requests and letters of appreciation for the cooperation;⁷⁶⁹ and (ix) acknowledged having read documents in Serbo-Croatian.⁷⁷⁰

364. The Panel also notes that, during the First Press Conference, Mr Gucati and Mr Haradinaj showed pages of the First Set to the camera.⁷⁷¹

ii) Second Set

365. Mr Gucati described the Second Set as: (i) containing three copies of the same documents;⁷⁷² (ii) showing that the SC has cooperated with the Serbian prosecutors;⁷⁷³ and (iii) containing names of Serbian officials.⁷⁷⁴

⁷⁶¹ P24, p. 8.

⁷⁶² P1, p. 2. *See also* P21, p. 5.

⁷⁶³ *See e.g.* P1, p. 2; P21, pp 4-5; P24, pp 8-9.

⁷⁶⁴ P1, p. 2; P21, p. 5; P24, p. 8.

⁷⁶⁵ P1, pp 2-3, 5; P21, p. 5; P24, p. 8.

⁷⁶⁶ P1, p. 2.

⁷⁶⁷ P1, p. 2; P21, p. 4; P24, p. 8.

⁷⁶⁸ *See e.g.* P1, pp 4-5.

⁷⁶⁹ P24, p. 8.

⁷⁷⁰ P1, p. 5.

⁷⁷¹ P1 video-clip, minutes 00:01:17-00:01:18 (Mr Gucati), 00:14:44-00:14:49 (Mr Gucati), 00:14:33-00:14:35 (Mr Haradinaj), 00:15:55-00:16:03 (Mr Gucati), 00:16:35-00:16:52 (Mr Haradinaj).

⁷⁷² P2, pp 10-11. Mr Gucati estimated that each copy contained 800-900 pages, amounting to a total of 2,400 pages. Mr Haradinaj replied, however, that there were less than 800 pages in each copy and that the total set was counting around 1,300-1,400 pages.

⁷⁷³ P2, p. 1.

⁷⁷⁴ P2, p. 1.

366. Mr Haradinaj described the Second Set as containing: (i) three copies;⁷⁷⁵ (ii) communications between Clint Williamson and Kwai Hong Ip, on one hand, and Mr Vukčević and others, on the other hand;⁷⁷⁶ (iii) names of witnesses and dates and places of interviews/residence;⁷⁷⁷ (iv) judgments of Kosovo courts and the ICTY, including the indictment against Ramush Haradinaj;⁷⁷⁸ and (v) “more unclassified” pages than the First Set.⁷⁷⁹ Mr Haradinaj further claimed to have identified, based on the Second Set: (i) 57 communications of Clint Williamson with Mr Vukčević;⁷⁸⁰ (ii) “over 130 communications” of David Schwendiman with another Serbian state official;⁷⁸¹ and (iii) 37 communications of “Kai Ip” with [REDACTED], [REDACTED] and “so on”.⁷⁸²

367. The Panel also notes that, during the Second Press Conference, Mr Gucati showed pages of the Second Set to the camera.⁷⁸³

iii) Third Set

368. Mr Gucati described the Third Set as showing that an indictment was being drafted,⁷⁸⁴ and containing names.⁷⁸⁵

369. Mr Haradinaj described the Third Set as: (i) consisting of two copies;⁷⁸⁶ (ii) containing a draft indictment, recently prepared, including the names of suspects,

⁷⁷⁵ P2, p. 11.

⁷⁷⁶ P2, pp 2-3; P18, p. 3; P2, pp 1, 3; P17, p. 7; P18, p. 3; P19, pp 1, 4; 2D1, para. 76.

⁷⁷⁷ P18, p. 3.

⁷⁷⁸ P2, p. 4; P6, p. 30.

⁷⁷⁹ P2, p. 11.

⁷⁸⁰ P2, p. 2.

⁷⁸¹ P2, pp 2-3. *See also* P7, p. 6.

⁷⁸² P2, p. 3.

⁷⁸³ P2 video-clip, minutes 00:01:17-00:01:18 (Mr Gucati), 00:11:14-00:11:16 (Mr Gucati), 00:11:44-00:11:46 (Mr Gucati), 00:14:33-00:14:35 (Mr Haradinaj), 00:15:55-00:16:03 (Mr Gucati), 00:16:35-00:16:52 (Mr Haradinaj).

⁷⁸⁴ P35, p. 2; P28, p. 13; P29, p. 1.

⁷⁸⁵ P29, p. 1; P35, pp 1, 14.

⁷⁸⁶ P30, p. 4.

their charges and the reasoning underlying them;⁷⁸⁷ (iii) mentioning the “particulars of many other people”, such as ex-soldiers and Serbian officials, and the name of a former KLA “insider”;⁷⁸⁸ (iv) containing names of locations he could connect to an ICTY case;⁷⁸⁹ (v) referring to the time during the war;⁷⁹⁰ and (vi) containing stamps and official logos.⁷⁹¹

370. The Panel observes that, during the Third Press Conference, Mr Gucati and Mr Haradinaj showed pages of the Third Set to the camera.⁷⁹²

371. The Panel further notes that Mr Gucati was present during all Three Press Conferences when Mr Haradinaj made various comments regarding the content of the Three Sets.

372. The Panel considers that the Accused’s descriptions of all Three Sets correspond in substance to the nature of the information that Ms Pumper identified as being present in the Batches.

(c) Evidence of the Accused

373. During his testimony, Mr Gucati repeatedly claimed that he only conducted a superficial review of the material.⁷⁹³ Mr Gucati also sought to downplay the extent of his awareness of the content of the material. He pointed to the fact that he did not speak English and only a little bit of Serbian and therefore could not understand the documents written in both of these languages.⁷⁹⁴

⁷⁸⁷ P35, pp 2-3; P30, pp 2, 4.

⁷⁸⁸ P35, pp 2-3; P11, pp 9, 55-56; P30, p. 3.

⁷⁸⁹ P35, p. 2.

⁷⁹⁰ P35, p. 4.

⁷⁹¹ P35, pp 3-4.

⁷⁹² P35 video-clip, minutes 00:01:17-00:01:18 (Mr Gucati), 00:14:33-00:14:35 (Mr Haradinaj), 00:15:55-00:16:03 (Mr Gucati), 00:16:35-00:16:52 (Mr Haradinaj).

⁷⁹³ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2168-2169, 2190, 2200; Transcript, 7 December 2021, pp 2240-2254. *See also* 1D3, para. 16.

⁷⁹⁴ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2168-2169.

374. Nonetheless, the Panel notes that Mr Gucati conceded during his testimony that he had been aware, at the time, that the First Set contained: (i) four identical copies;⁷⁹⁵ (ii) names and statements of witnesses;⁷⁹⁶ (iii) names of Serbian officials involved in cooperation with SITF/SPO;⁷⁹⁷ (iv) logos, stamps and signatures on documents;⁷⁹⁸ and (v) documents pertaining to Adem Jashari.⁷⁹⁹ Mr Gucati also indicated that he had read “seven or eight”, “ten at most” statements of witnesses contained in the First Set.⁸⁰⁰ Mr Gucati also acknowledged that he had spotted documents from ICTY cases in the Second Set.⁸⁰¹ As regards the Third Set, Mr Gucati conceded that he had noticed at the time that it related to a draft indictment and that it contained names that they were not authorised to disclose.⁸⁰² He claimed, however, that he did not realise these were names of witnesses.⁸⁰³

375. Mr Haradinaj in his testimony sought to significantly minimise the time he spent reviewing the Three Sets and his awareness of their content. He testified that he spent only “10, 20 minutes” reviewing the First Set,⁸⁰⁴ “10 to 15 minutes” reading the Second Set,⁸⁰⁵ and no more than three minutes reviewing the Third Set.⁸⁰⁶ Furthermore,

⁷⁹⁵ DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2250-2254 (identifying similar front-pages and signatures on the documents and saying that layout, number of pages and content of documents was the same in all four lots).

⁷⁹⁶ DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2255 (“I mostly see the Serbian people whose names I’m not allowed to refer, I saw their statements in the first pages”), 2263 (“we know that there were witnesses there from all the ethnicities”). *See also* 1D3, para. 23.

⁷⁹⁷ *See e.g.* DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2243 (“As I said earlier, Vladimir Vukčević and [REDACTED] were the cooperate -- collaborators. Yes, I did notice these two names, and I noticed that you have cooperated with these two people”), pp 2257, 2263-2266; P59.

⁷⁹⁸ DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2242, 2247, 2250, 2274.

⁷⁹⁹ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2256; Transcript, 8 December 2021, pp 2370-2371, 2423, 2426, 2431-2432.

⁸⁰⁰ DW1240 (Hysni Gucati), Transcript, 8 December 2021, pp 2425-2426.

⁸⁰¹ *See e.g.* 1D3, para. 37; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2193.

⁸⁰² DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2297-2303.

⁸⁰³ DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2298-2303.

⁸⁰⁴ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2725-2726).

⁸⁰⁵ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2744. *See also* p. 2744.

⁸⁰⁶ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2785. *See also* Transcript, 11 January 2022, p. 2782; Transcript, 13 January 2022, pp 3000, 3002-3004. *See also* 2D1, paras 107, 111.

as noted above,⁸⁰⁷ Mr Cele Gashi contradicted his earlier statement that he and others spent 2-3 hours reviewing the First Set by testifying that he spent only 30 to 40 minutes doing so.⁸⁰⁸ The Panel notes, however, that Mr Haradinaj's review of the first two of the Three Sets appeared to be sufficiently extensive to enable him to comment on differences between the information contained therein.⁸⁰⁹

376. For these reasons, the Panel has approached the evidence of both Accused on this matter with great caution as it clearly reflected an attempt on their part to claim that they had less awareness of the content of the Three Sets than they truly had.

(d) Conclusion

377. The Panel is satisfied that Mr Gucati's contemporaneous statements, his presence during Mr Haradinaj's presentations at the Three Press Conferences and some of the concessions he made during testimony show that he was aware of the general content of all Three Sets, albeit to a lesser extent than Mr Haradinaj. Furthermore, the Panel is satisfied that Mr Haradinaj's contemporaneous statements show the detailed extent to which he was aware of the content of the Three Sets. Both Accused were aware, beginning with the First Press Conference, that the Three Sets included names of witnesses.

378. The Panel also finds that the contemporaneous statements of the Accused as well as parts of their evidence on what they knew of the Three Sets corroborate the evidence stemming from Ms Pumper, Mr Berisha, admitted Batch excerpts or versions and the media reports.

⁸⁰⁷ See *supra* para. 62 (Admission and Evaluation of Evidence).

⁸⁰⁸ Compare 1D9, para. 14 with DW1245 (Cele Gashi), Transcript, 10 December 2021, pp 2583-2584.

⁸⁰⁹ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2745 ("The origin appeared to be the same, but the documents were entirely different. The majority were letters of thanks for the cooperation, requests for finding locations to question people, and so on and so forth. The -- in the first one, there was a lot that was in Serbian, in Albanian, in English, old court papers from Kosovo. And I became certain of these when Witness number 1 came and told us what it was. I wasn't able to come to the conclusion from -- from that initial inspection").

3. Conclusion on the content of the Batches

379. Having considered the evidence, the Panel is satisfied that Batch 1, as well as Batch 4, contained at least the following categories of information: (i) SITF Requests; (ii) WCPO Responses; and (iii) Serbian Documents. Batches 1 and 4 also included the names of hundreds of witnesses and potential witnesses connected to SITF/SPO investigations, including those of four Serbian officials, namely [REDACTED].

380. Furthermore, the Panel is satisfied that Batch 2 contained the following categories of information: (i) Kosovo and ICTY court documents; and (ii) the Six Pages with redactions containing three SITF Requests and two Serbian Documents. The Six Pages included the names and other personal details of at least two SITF/SPO witnesses and potential witnesses.

381. The Panel is further satisfied that Batch 3 contained two incomplete copies of an internal SPO work product, analysing evidence and related legal considerations in relation to five SPO suspects. Batch 3 included references to approximately 150 witnesses or potential witnesses, [REDACTED].

C. AUTHENTICITY OF THE BATCHES

382. The Defence also challenged the authenticity of the Three Sets, in the sense of whether they formed part of the records of one or more SPO investigation(s).⁸¹⁰

383. To verify the authenticity of the Batches, the Panel relied on: (i) the declarations and testimony of Ms Pumper regarding their authenticity, including indicia thereof, admitted excerpts of Batches 1 and 4, P104 as well as admitted excerpts of Batch 3; and (ii) the statements of the Accused.

⁸¹⁰ F566 Haradinaj Final Trial Brief, paras 300-301; Transcript, 16 March 2022, pp 3686-3689, 3699-3701; Transcript, 17 March 2022, pp 3768-3769.

384. In light of its findings regarding the categories of information contained in the Batches,⁸¹¹ the Panel will concentrate on verifying the authenticity of identified categories of documents.

1. Ms Pumper's evidence and associated exhibits

385. Ms Pumper indicated at the time of her testimony that the review of authenticity of the material retrieved from the KLA WVA was still ongoing and that she had not checked whether every document was authentic.⁸¹² Nonetheless, Ms Pumper gave evidence about the process of locating, in the SPO databases, corresponding copies of the material seized from the KLA WVA and about the indicia of authenticity she observed on some of the material.

(a) Batch 1

386. Ms Pumper testified that she located several excerpts of Batch 1 in the SPO evidential database.⁸¹³ She also testified that the vast majority of SITF Requests were uploaded into one of the SPO databases and had a registration number.⁸¹⁴ She also indicated that the SITF Requests in Batch 1 were marked with the SITF logo on the top-left corner, included the SITF address, email address and website address on the bottom-left corner, and were signed by SITF prosecutors, identified with their names and titles.⁸¹⁵ The details provided in the Batch 1 Chart also describe indicia of authenticity, such as the title, where available, number, and the author of the document, including for WCPO Requests and Serbian Documents.⁸¹⁶

⁸¹¹ See *supra* paras 379-381 (Findings on the Batches).

⁸¹² W04841 (Zdenka Pumper), Transcript, 20 October 2021, pp 1068-1069.

⁸¹³ W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 876-879. Ms Pumper referred to P94, P95, P96 and P97.

⁸¹⁴ W04841 (Zdenka Pumper), Transcript, 21 October 2021, p. 1199.

⁸¹⁵ P86, para. 7. See also W04841 (Zdenka Pumper), Transcript, 18 October 2021, p. 864.

⁸¹⁶ P90 (Annex 1 – Chart on Batch 1). See also P90, para. 4.

387. The Panel notes that the excerpts of Batch 1 that have been admitted into evidence all bear the SITF logo, appear to have a registration number (one of which is redacted), a date and a title, and are all signed by SITF prosecutors.⁸¹⁷

388. The Panel further notes that most documents contained in Batch 4 are also contained in Batch 1.⁸¹⁸ As for the documents contained in Batch 4, but not in Batch 1, Ms Pumper identified them as SITF Requests and Serbian Documents pertaining to confidential criminal investigations.⁸¹⁹

389. Based on this evidence, the Panel is satisfied that the SITF Requests, the WCPO Responses and the Serbian Documents contained in Batches 1 and 4 are copies of genuine documents pertaining to SITF/SPO and/or Serbian investigations.

(b) Batch 2

390. Ms Pumper testified that she was able to locate five of the Six Pages in one of the SPO databases.⁸²⁰

391. The Panel notes that the Six Pages in Batch 2 contain indicia of authenticity. They bear SITF or Serbian logos, appear to have registration numbers, dates and/or titles and all but one have signatures or official stamps.⁸²¹ The Panel is therefore satisfied that the Six Pages are copies of genuine documents pertaining to SITF/SPO and/or Serbian investigations.

392. As regards the rest of Batch 2, the SPO did not maintain that it contains confidential information.⁸²² For this reason, the Panel shall not assess in detail their

⁸¹⁷ P93; P94; P95; P96; P97.

⁸¹⁸ P89, paras 8-10.

⁸¹⁹ P89, paras 11-12.

⁸²⁰ W04841 (Zdenka Pumper), Transcript, 21 October 2021, pp 1198-1210. Ms Pumper could not remember whether the five pages were found in Zylab or in the DT folder. The Six Pages are P104, pp 615-620.

⁸²¹ P104, pp 615-620.

⁸²² P104, pp 496-523, 835-930. *See also* P2, pp 4-5; Transcript, 14 March 2022, pp 3519-3520.

authenticity, but shall note that they appear to be copies of genuine Kosovo and ICTY court documents.

(c) Batch 3

393. Ms Pumper relied on a comparison of Batch 3 and one of several working versions of the same record available in one of the SPO databases.⁸²³ Ms Pumper indicated that most pages in Batch 3 displayed a header and footer.⁸²⁴ She stated that the header includes the symbol of the SPO and the wording “Specialist Prosecutor’s Office” at the top centre, as well as the wording “CONFIDENTIAL Internal Work Product, JCE Linkage Narrative December 2019” at the top right corner.⁸²⁵ Ms Pumper further indicated that a few pages do not display a header and/or a footer, seemingly because those parts of the original document are not captured in the copies.⁸²⁶

394. The Panel notes that the excerpts of Batch 3 admitted into evidence all bear the SPO logo, and the marking “CONFIDENTIAL” in the header and/or the footer of the page.⁸²⁷ All but one pair appears to contain in the upper right corner the wording “Internal Work Product”.⁸²⁸

395. The Panel notes the Defence argument that various published versions of documents contained in Batch 3 had different markings (*e.g.* hand-made highlights and staple holes). According to the Defence, these markings could suggest that journalists who published excerpts of these documents might have received them

⁸²³ W04841 (Zdenka Pumper), Transcript, 19 October 2021, pp 951-952; Transcript, 21 October 2021, pp 1218-1225. *See also* DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3276-3277 (approving of that approach).

⁸²⁴ P86, para. 35; P90, paras 8(iii), 9(iii).

⁸²⁵ P86, para. 35; P90, paras 8(iii), 9(iii); W04841 (Zdenka Pumper), Transcript, 18 October 2021, p. 929.

⁸²⁶ P86, para. 35; P90, paras 8(iii), 9(iii); W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 928-929.

⁸²⁷ P106; P107; P108; P109; P110; P111; P112; P113; P114; P115; P116; P117; P118; P119.

⁸²⁸ P106; P107; P108; P109; P110; P111; P114; P115; P116; P117; P118; P119. The upper right corner of P112 and P113 is not completely visible, but the wording “JCE Linkage Narrative December 2019” appears.

from another source.⁸²⁹ The Panel notes there is no evidence as to whether those markings were made before or after the material was brought to the KLA WVA and/or before or after the Third Press Conference. Moreover, Batch 3 is only the remnant of the Third Set, the majority of which had been taken by journalists during the Third Press Conference.⁸³⁰ There is also no evidence of any journalist having received copies of documents or pages of documents contained in Batch 3 other than, directly or indirectly, as a result of the distribution of that material by the Accused on 22 September 2020. The Panel also recalls that Batch 3 contained two incomplete copies seized from the KLA WVA.⁸³¹ In any event, these different markings do not raise any doubt regarding the authenticity of the material. The content and substance of all the versions is identical and is unaffected by markings such as hand-made highlights and staple holes.

396. The Panel is therefore satisfied that Batch 3 contains copies of genuine documents pertaining to the SPO.

2. Statements of the Accused

397. The Panel has reviewed the contemporaneous statements and the evidence of the Accused as regards the authenticity of the Three Sets to establish whether and to what extent: (i) they corroborate evidence regarding the authenticity of the Batches; and (ii) the Accused were aware of the authenticity of the documents they disseminated and publicly described.

⁸²⁹ See e.g. W04841 (Zdenka Pumper), Transcript, 25 October 2021, pp 1351-1376.

⁸³⁰ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2786 (Mr Haradinaj stating that media representatives “took a lot” of material). See also 2D1, paras 110-112, 114; 1D3, paras 49-50.

⁸³¹ W04841 (Zdenka Pumper), Transcript, 18 October 2021, p. 926.

(a) Contemporaneous Statements of the Accused

398. As regards the First Set, at the First Press Conference, Mr Gucati described them as “around 4,000 files of the Specialist Chambers”.⁸³² At the same event, in the presence of Mr Gucati, Mr Haradinaj stated that “[i]t seems to us that these are all genuine documents”.⁸³³

399. At a media appearance on 7 September 2020 after the First Press Conference, Mr Gucati noted that “everything is possible, they could be fake”, but he opined that on the basis of their checks and the signatures in the documents, he thought that the First Set was authentic.⁸³⁴

400. On 9 September 2020, Mr Haradinaj said the following about the First Set:

I think they have to be probably seen by an expert, but from what we’ve seen, yes. With what we have seen and as much as we can tell, you can see that they are authentic documents. This was also evident in the reaction, as I was told, from the Tribunal people who came and took the copy yesterday. So, I would say yes. Yes, we believe they are. Nevertheless, it is up to the judiciary to verify, you know, we are not responsible for that.⁸³⁵

401. At the same event, Mr Haradinaj further stated that the First Set “are of the Specialist Chambers and you will be convinced [...]”,⁸³⁶ and that “[n]o matter where it came from, it is their material”.⁸³⁷ On 11 September 2020, Mr Haradinaj stated: “from what we have seen, the material is authentic leaked from their own people. And that means that it is theirs. It is the Prosecutor’s”.⁸³⁸

402. As regards the Second Set, on 16 September 2020, Mr Haradinaj stated that “[w]e feared someone had brought them over to mislead us [...] But, no! It’s their material.

⁸³² P1, p. 1.

⁸³³ P1, p. 4.

⁸³⁴ P9, pp 4-5, 6.

⁸³⁵ P24, p. 2.

⁸³⁶ P24, p. 5.

⁸³⁷ P24, p. 7.

⁸³⁸ P21, p. 4. *See also* P21, p. 5.

It is their material. It has his signature, it's his communication".⁸³⁹ Mr Haradinaj made similar statements in the following days, pointing out that their initial doubts have been resolved and that it was clear that the documents belonged to the SC/SPO.⁸⁴⁰

403. The Accused also stated repeatedly that the SPO confirmed that the Second Set was theirs. In particular, on 16 September 2020, after the Second Seizure, Mr Gucati, in the presence of Mr Tomë Gashi, stated that the Second Set belonged to the SC because otherwise "they wouldn't have collected them".⁸⁴¹ Mr Tomë Gashi confirmed Mr Gucati's opinion.⁸⁴²

404. On 18 September 2020, during a television interview and in the presence of Mr Tomë Gashi, Mr Haradinaj stated that "the accuracy and sensitivity [of the documents] have been confirmed also by the Prosecution",⁸⁴³ noting that "they have admitted it".⁸⁴⁴ Mr Tomë Gashi confirmed that opinion.⁸⁴⁵

405. On 20 September 2020, when questioned about the origin of the material, Mr Haradinaj responded that what mattered to him was not where the material had come from but whether it was authentic.⁸⁴⁶ He also stated "now that they have been authenticated, we are very happy".⁸⁴⁷

406. As regards the Third Set, at the Third Press Conference, Mr Gucati stated that "we assume and believe that these files have been leaked from Kosovo Specialist Chambers".⁸⁴⁸ Mr Haradinaj added that they were "copies of the originals" and that "they have their logo".⁸⁴⁹ He explained that "[w]e want to keep them... just for them

⁸³⁹ P18, p. 7.

⁸⁴⁰ P6, pp 3, 30; P34, p. 2; P19, p. 2; P7, pp 2-3; P17, p. 5.

⁸⁴¹ P4, pp 1, 4.

⁸⁴² P4, p. 4.

⁸⁴³ P7, p. 2.

⁸⁴⁴ P7, p. 11.

⁸⁴⁵ P7, pp 3, 12. *See also* P7, pp 10-11, 14. (Mr Tomë Gashi).

⁸⁴⁶ P8, p. 14. *See also* P8, pp 13, 24-25.

⁸⁴⁷ P8, p. 4.

⁸⁴⁸ P35, p. 1.

⁸⁴⁹ P35, p. 4.

to confirm their authenticity as they did with the other two lots so that there is no speculation whether they are authentic or not”.⁸⁵⁰

407. On the same day, 22 September 2020, after the Third Seizure, Mr Haradinaj stated that “[t]hree times now they have confirmed that it is their material and that it was leaked from their Chambers”.⁸⁵¹ In a different interview on the same day, Mr Gucati said: “again [t]he Specialist Chambers came over to collect the material. And, *de facto*, they admit that the material is theirs [...] they accept that it belongs to [t]he Chambers or the Specialist Court and that it came from them”.⁸⁵² In that same interview, Mr Gashi echoed the opinion of both Accused in their presence.⁸⁵³

408. During a further media appearance later on 22 September 2020, Mr Gucati stated that the documents were “copies of the papers from Specialist Court”.⁸⁵⁴ At yet another media appearance on the same day, Mr Gucati stated that “all of this leak came from their offices. They themselves have admitted to that. The investigator that has been at our premises for three days in a row admitted that the documents are theirs”.⁸⁵⁵

409. On 24 September 2020, in respect of all Three Sets, Mr Gucati confirmed that “[w]hen the gentleman took over the documents that we had, the first, the second and the third time, he presented to us a document with [the Court's] signature, admitting it *de facto* and saying ‘these are our documents’ by presenting a document from the Hague”.⁸⁵⁶ Mr Gucati also indicated that the documents bore logos and signatures of international prosecutors.⁸⁵⁷

⁸⁵⁰ P35, p. 7.

⁸⁵¹ P30, pp 1, 9-10; P11, pp 23-24, 26-28, 38, 47, 59.

⁸⁵² P12, p. 1.

⁸⁵³ P12, p. 2.

⁸⁵⁴ P29, p. 1. *See also* P31, p. 2 (Mr Gucati).

⁸⁵⁵ P28, p. 1. *See also* P28, pp 7, 13.

⁸⁵⁶ P31, pp 2-3.

⁸⁵⁷ P31, p. 2.

410. Lastly, both Accused indirectly acknowledged their awareness of the authenticity of the Three Sets through the numerous statements they made with regard to the “leaks” originating from the SPO and the SPO’s failure to protect its “secrets”.⁸⁵⁸

(b) Evidence of the Accused

411. The Panel notes that, in the written statements which they submitted to the Panel and during their testimony, the Accused contradicted in part their contemporaneous statements regarding the authenticity of the documents.

i) Evidence of Mr Gucati

412. Mr Gucati appeared to confirm, in his witness statement, that he considered the First Set to be authentic. He indicated that “[w]e were looking through the documents and ascertained that the documents were from the KSC/SPO. We realised that they were official documents but there were also documents from Serbia”.⁸⁵⁹

413. During cross-examination, Mr Gucati stated that, in relation to the First Set “[i]nitially, we did not know that they came from the KSC” and that “[w]e told the media that they need to be verified, the origin needs to be verified on whether it comes from the Kosovo Specialist Chambers or not”.⁸⁶⁰ When confronted with his witness statement’s assertion, Mr Gucati claimed that “this was after the news conference and after we were able to ascertain that they were from the KSC”.⁸⁶¹ Regarding the First Set, Mr Gucati further stated that “we can’t say for a fact on whether documents are authentic or they are copies of one another”.⁸⁶²

⁸⁵⁸ See *supra* paras 218, 271, 280, 289 (The Events at Issue).

⁸⁵⁹ 1D3, para. 14.

⁸⁶⁰ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2239.

⁸⁶¹ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2241.

⁸⁶² DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2254.

414. However, towards the end of his testimony, Mr Gucati stated that “[b]ased on the logo of the Court and the names that we saw there, we believed that they might belong to the Special Court”.⁸⁶³

415. The Panel concludes that Mr Gucati’s evidence confirms in part his contemporaneous statements that, at the time of the First Press Conference, he acted under the assumption that the First Set was authentic. The Panel further concludes that Mr Gucati’s evidence does not contradict his contemporaneous statements regarding the authenticity of the Second and Third Sets.

ii) Evidence of Mr Haradinaj

416. Mr Haradinaj indicated in his witness statement that he did not know whether the Three Sets were authentic.⁸⁶⁴

417. During direct examination, Mr Haradinaj stated that, in relation to the First Set, “we inferred that this was material belonging to the SPO or that somebody had brought them on their behalf or that somebody was trying to trap us on their behalf”.⁸⁶⁵ He also claimed, however, that “[a]t that point, we did not know whether they were authentic, were they fake, were they the originals”⁸⁶⁶ and that “[w]e were not 100 per cent sure that this was one of their materials”.⁸⁶⁷ Mr Haradinaj also suggested that during the Second Seizure, the SPO staff member present indicated that the SPO was in the process of verifying the authenticity of the First Set and that when they will finish, they will inform the KLA WVA.⁸⁶⁸

⁸⁶³ DW1240 (Hysni Gucati), Transcript, 8 December 2021, p. 2416.

⁸⁶⁴ 2D1, paras 107, 133.

⁸⁶⁵ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2726.

⁸⁶⁶ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2726.

⁸⁶⁷ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2727. *See also* p. 2734.

⁸⁶⁸ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2764.

418. During cross-examination, Mr Haradinaj claimed that he was still not clear about the authenticity of the material.⁸⁶⁹ Mr Haradinaj stated that “[c]oncretely, we were never told, not even by your officers, that they were your documents”.⁸⁷⁰ He added that “I always had doubts, perhaps they were not yours. This is the essence, that we had doubts”.⁸⁷¹ Asked whether he knew that the documents that the KLA WVA was receiving related to the SC, Mr Haradinaj responded “I had my doubts, but I thought no”.⁸⁷² Mr Haradinaj implied that the reason why he stated at the time that the documents were authentic was to contradict an accusation that “these were documents that were created by us, were brought to us by the Serbs or brought to us by Hashim Thaçi, Fatmir Limaj, Ramush Haradinaj, and they had brought them to us, and they accused us of being their tools”.⁸⁷³ When confronted with some of his contemporaneous statements, Mr Haradinaj reiterated “[e]ven today we have not received a confirmation that they are authentic or not”.⁸⁷⁴ Mr Haradinaj also claimed in relation to one of his contemporaneous statements that he was playing with words when he said that the documents turned out to be genuine.⁸⁷⁵

419. The Panel concludes that Mr Haradinaj’s evidence at trial significantly contradicts his contemporaneous statements regarding his awareness that the material being publicised was authentic and the fact that he was acting based on that understanding. The Panel also notes an inconsistency between the evidence of Mr Haradinaj and the position of his Defence. In particular, the Haradinaj Defence argued that Mr Haradinaj ought to be regarded as a whistle-blower in the sense put

⁸⁶⁹ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2950.

⁸⁷⁰ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2950.

⁸⁷¹ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2951.

⁸⁷² DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2953.

⁸⁷³ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2951.

⁸⁷⁴ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2956.

⁸⁷⁵ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 2983-2984 (regarding Mr Haradinaj’s statement in P17, p. 5).

forward by Ms Myers.⁸⁷⁶ The expert report and evidence of Ms Myers suggests that in order for a person to be regarded as a whistle-blower, he or she must have had a “reasonable belief” at the time of revelation of material that the information revealed was true and authentic.⁸⁷⁷

420. The Panel views the contradictory evidence provided by Mr Haradinaj at trial as an attempt to raise a doubt regarding what he knew about the nature of the material he and Mr Gucati were publicising. For these reasons, the Panel finds that Mr Haradinaj’s contemporaneous statements are reliable evidence of his belief of the authenticity of the documents.

(c) Conclusion

421. The Panel is satisfied that, in relation to the First Set and until the First Seizure, both Accused acted upon a belief, short of certainty, that the material was authentic, in the sense that it pertained to SITF/SPO and/or Serbian investigations. The Panel is further satisfied that, following the First Seizure, both Accused acted with the conviction that the Three Sets were authentic, in the sense that they pertained to SITF/SPO and/or Serbian investigations or were copies of Kosovo and ICTY documents. Accordingly, at all times during the Indictment Period, the Accused acted with an awareness that the Three Sets were authentic.

422. The Panel further finds that the contemporaneous statements of the Accused as well as parts of their evidence on what they thought of the authenticity of the Three Sets corroborate the evidence of Ms Pumper and the admitted Batch excerpts or versions.

⁸⁷⁶ Transcript, 21 January 2022, pp 3096-3098. *See also* F566 Haradinaj Final Trial Brief, paras 442-446, 464-477; Transcript, 16 March 2022, pp 3689-3690.

⁸⁷⁷ DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3123-3124, 3126, 3131, 3137. *See also* 2D6, paras 28(iii), 29, 38. *See also* Transcript, 21 January 2022, pp 3096-3098 (answer of Counsel of Mr Haradinaj to question of Panel member).

3. Conclusion on the authenticity of the Batches

423. In light of the above, the Panel finds that the following categories of documents contained in the Batches are authentic: (i) the SITF Requests, the WCPO Responses and the Serbian Documents contained in Batch 1; (ii) the Six Pages contained in Batch 2; and (iii) Batch 3. The Kosovo and ICTY court documents contained in Batch 2 also appear to be authentic, but the Panel will not consider these for the purposes of the charges.

D. CONFIDENTIALITY OF THE INFORMATION CONTAINED IN THE BATCHES

424. The Panel notes that the question of whether the information contained in the Batches was confidential lies at the heart of Counts 5 and 6. For this reason, the Panel will address questions regarding confidentiality under the SC legal framework, the interplay between confidentiality and Article 392 of the KCC, the authority and responsibility of the SITF/SPO regarding confidential information and relevant Defence challenges in its discussion under those counts.

425. For the purpose of this section, the Panel will: (i) verify the evidentiary basis of the SPO's claim regarding the confidentiality of the Batches; and (ii) ascertain the awareness of the Accused regarding the same. To this end, the Panel relies on: (i) Ms Pumper's evidence, the admitted excerpts or versions of the Batches, screenshots of excerpts appearing in media reports and the expert evidence of Mr Reid; and (ii) the statements of the Accused.

1. Ms Pumper's evidence and associated exhibits

426. Ms Pumper testified that, as an SPO staff member, she regarded the classification of SITF and SPO records in criminal investigations as confidential. She further indicated that, in her understanding, requests for assistance in criminal records were

part of the investigations and were also confidential.⁸⁷⁸ Ms Pumper's evidence was echoed by Mr Reid, who agreed that, as a matter of practice, the record of ongoing criminal investigations was confidential unless validly lifted by a competent authority.⁸⁷⁹ According to him, this would include, for instance, internal work product,⁸⁸⁰ and all information pertaining to witnesses.⁸⁸¹ The evidence of Mr Reid on that point was not challenged by the Defence.

(a) Batches 1 and 4

427. In relation to the general content of Batch 1, Ms Pumper indicated that both SITF Requests and the WCPO Responses pertained to confidential SITF/SPO investigations and criminal proceedings,⁸⁸² and that they were treated by the SITF/SPO as confidential.⁸⁸³ Ms Pumper also stated that, based on their content, including authorship, document date, and/or subject matter, the Serbian Documents appeared to pertain to confidential investigations. She further specified that seventeen of the Serbian Documents made express reference to confidentiality.⁸⁸⁴

428. In the Batch 1 Chart, Ms Pumper listed what she regarded as indicia of confidentiality. These included: (i) the author of the document, in particular judicial, investigative and/or prosecutorial entities; (ii) the identity and function of the person who signed a document; (iii) the intended recipient; (iv) the topic or issues discussed in the document; (v) references to criminal investigations and their confidential character; (vi) markings or abbreviations of (strict) confidentiality; (vii) names, codes, signatures and other details of witnesses and/or potential witnesses, lists or meeting

⁸⁷⁸ W04841 (Zdenka Pumper), Transcript, 18 October 2021, p 861.

⁸⁷⁹ DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3277-3279, 3281-3283.

⁸⁸⁰ DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3285-3287.

⁸⁸¹ DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3280, 3310-3312.

⁸⁸² W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 860-866; Transcript, 20 October 2021, pp 1055-1062; Transcript, 26 October 2021, p. 1471; P86, para. 7.

⁸⁸³ W04841 (Zdenka Pumper), Transcript, 25 October 2021, p. 1474.

⁸⁸⁴ P88, para. 7.

schedules of witnesses; (viii) case numbers; and (ix) logos, stamps and other official markings of authorities, in particular the SITF logo.⁸⁸⁵ Ms Pumper made it clear that she considered those indicia as a whole, rather than individually.⁸⁸⁶ Furthermore, Ms Pumper also provided screenshots of samples of such indicia, some of which expressly refer to confidentiality.⁸⁸⁷

429. The Panel is further satisfied that the admitted excerpts of Batch 1 corroborate the presence of confidentiality indicia identified by Ms Pumper.⁸⁸⁸ Furthermore, some indicia of confidentiality of Batch 1 were included in the screenshots of documents reproduced in the media reports following the First Press Conference.⁸⁸⁹

430. In relation to the general content of Batch 4, Ms Pumper listed in the Batch 4 Chart the same categories of confidentiality indicia as those identified in paragraph 428.⁸⁹⁰ Ms Pumper also provided screenshots of samples of such indicia, some of which expressly refer to confidentiality.⁸⁹¹ The presence and prominence of these indicia was further confirmed by Mr Berisha, who noticed confidential markings on the documents during a review that lasted approximately 30-45 minutes.⁸⁹² While he and his colleagues did not consider that the SITF logo or the names of Serbian officials were confidential, they redacted the names of witnesses and their personal details, case numbers and names of cases.⁸⁹³

⁸⁸⁵ P90, Annex 1 – Chart on Batch 1. *See also* W04841 (Zdenka Pumper), Transcript, 20 October 2021, pp 1058-1059; Transcript, 18 October 2021, pp 872-876.

⁸⁸⁶ W04841 (Zdenka Pumper), Transcript, 26 October 2021, p 1473.

⁸⁸⁷ P90, Annex 2.

⁸⁸⁸ P93; P94; P95; P96; P97.

⁸⁸⁹ *Compare:* (i) P90, Annex 2(a) with P125, pp 2, 5-7 and P124, pp 1-2, 4-5; (ii) Annex 2(b) with P125, p. 2, and P124, pp 4-5.

⁸⁹⁰ P89, paras 8-13; P91, para. 4, Annex 1 – Chart on Batch 4; W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 893-895.

⁸⁹¹ P91, Annex 2.

⁸⁹² W04866 (Halil Berisha), Transcript, 26 October 2021, pp 1523-1524.

⁸⁹³ W04866 (Halil Berisha), Transcript, 27 October 2021, pp 1602, 1607, 1613-1614, 1626-1627-1628. *See also* P125, P129, 1D2.

431. In relation to the witnesses named in Batch 1, the Panel has already found in paragraph 345 that: (i) the confidential annexes of the SITF Requests listed hundreds of names of witnesses and potential witnesses; and (ii) the Serbian documents also contained the names of dozens of witnesses, including those interviewed by the SITF/SPO. In relation to all aforementioned names, Ms Pumper indicated that they had not been publicly disclosed in the framework of SITF/SPO proceedings.⁸⁹⁴

432. In relation to the witnesses named in Batch 4, the Panel has already found in paragraph 346 that the additional SITF Requests and Serbian Documents contained names of dozens of SITF/SPO witnesses or potential witnesses. In relation to these names, Ms Pumper indicated that they had never been publicly identified by the SITF/SPO.⁸⁹⁵

(b) Batch 2

433. In relation to the general content of the Six Pages, Ms Pumper listed in the Batch 2 Chart what she regarded as indicia of confidentiality, namely: (i) case numbers; (ii) logos of relevant entities, in particular the SITF; (iii) the presence of witness names or lists; (iv) the name and function of the signatory and the person or entity being addressed; (v) express references to the confidentiality of the investigations or the relevant material; and (vi) stamps and other official markings.⁸⁹⁶ Ms Pumper also provided screenshots of samples of such indicia, some of which expressly refer to confidentiality.⁸⁹⁷

434. As regards the rest of Batch 2, the SPO did not maintain that it contains confidential documents.⁸⁹⁸

⁸⁹⁴ P86, paras 9, 12.

⁸⁹⁵ P89, para. 11.

⁸⁹⁶ P90, Annex 3 – Chart on Batch 2.

⁸⁹⁷ P90, Annex 4.

⁸⁹⁸ P104, pp 496-523, 835-930. *See also* P2, pp 4-5; Transcript, 14 March 2022, pp 3519-3520.

435. In relation to the witnesses named in the Six Pages, the Panel has already found in paragraph 350 that they included the names and other personal details of at least two witnesses or potential witnesses. The Panel recalls that the Six Pages are also included in Batch 1.⁸⁹⁹ Accordingly, Ms Pumper's relevant indication that witnesses named in Batch 1 had never been publicly identified by the SITF/SPO also applies to the names contained in the Six Pages.⁹⁰⁰

(c) Batch 3

436. The Panel has found in paragraphs 393-394 that Batch 3 contained SPO logos and the markings "CONFIDENTIAL" and/or "Internal Work Product". Ms Pumper also provided screenshots of the logo and markings.⁹⁰¹

437. The Panel is further satisfied that the admitted excerpts of Batch 3 corroborate the presence of confidentiality indicia identified by Ms Pumper.⁹⁰² Furthermore, full and partial versions of these indicia were included in screenshots of documents reproduced in media reports following the Third Press Conference.⁹⁰³

438. Furthermore, the Panel found in paragraph 355 that Batch 3 included references to approximately 150 witnesses or potential witnesses. In this regard, Ms Pumper indicated that, as of 22 September 2020, the names of witnesses, potential witnesses, other individuals and related information and evidence included in Batch 3 were not publicly disclosed in the framework of SITF/SPO investigations or SC proceedings.⁹⁰⁴ She also stated that witnesses whose name appeared in Batch 3 were subject to:

⁸⁹⁹ P86, para. 22.

⁹⁰⁰ P86, paras 9, 12, 22.

⁹⁰¹ P90, para. 10, Annex 5.

⁹⁰² P106; P107; P108; P109; P110; P111; P112; P113; P114; P115; P116; P117; P118; P119.

⁹⁰³ Compare: (i) P90, Annex 5(a) with P120, pp 2-5; P121, pp 2-3, 5-6; P122, pp 2-3, 5-6; P155, pp 4, 6-11; P157, pp 5-10; P159, pp 1, 3-8; (ii) P90, Annex 5(b)(2) with P121, pp 2-3, 5-6; P122, pp 2-3, 5-6; P155, pp 4-11; and (iii) P90, Annex 5(c) with P120, pp 2-5; P121, pp 2-3, 5-6; P122, pp 2-3, 5-6; P157, pp 5-10; P159, pp 1, 3-8.

⁹⁰⁴ P86, para. 30.

(i) orders by an SC Panel or requests by the SPO for non-disclosure;⁹⁰⁵ (ii) protective measures issued by Kosovo courts;⁹⁰⁶ and (iii) confidentiality and use restrictions imposed by international organisations who provided information to the SPO under such conditions.⁹⁰⁷

2. Statements of the Accused

439. The Panel has reviewed the contemporaneous statements and the evidence of the Accused as regards the confidentiality of information contained in the Three Sets to establish whether and to what extent: (i) they corroborate evidence regarding the confidentiality of the Batches; and (ii) the Accused were aware of the confidentiality of the information they disseminated and publicly described.

(a) Contemporaneous statements

i) The First and Second Orders

440. The Panel notes that the First Order and the Second Order indicated that the relevant sets of documents contained sensitive information.⁹⁰⁸ The same orders and also the SPO Order required Mr Gucati, the KLA WVA and any other individual who was in possession of the documents and or their content to refrain from copying in whatever form and further disseminating by whatever means the documents and their content.⁹⁰⁹

⁹⁰⁵ P86, para. 32; W04841 (Zdenka Pumper), Transcript, 19 October 2021, pp 954-960 *referring to* P151, P152 and P154.

⁹⁰⁶ P86, para. 33; W04841 (Zdenka Pumper), Transcript, 19 October 2021, pp 961-966, 1007-1008, 1329-1333 *referring to, inter alia*, P161.

⁹⁰⁷ P86, para. 34; W04841 (Zdenka Pumper), Transcript, 19 October 2021, pp 967-971 *referring to* P126.

⁹⁰⁸ P52, para. 21; P53, para. 21.

⁹⁰⁹ P52, para. 22(c); P53, para. 22(c); P54, p. 1. *See infra* paras 896 (Defences).

441. These orders would have indicated to the Accused that they were in possession of material they were not permitted to have or share with others.⁹¹⁰

ii) The documents were “secret”, “sensitive” or “confidential”

442. Both Accused made several statements regarding the “secret”, “confidential” or “sensitive” nature of the Three Sets.

443. In relation to the First Set, Mr Haradinaj, in the presence of Mr Gucati at the First Press Conference, described the set as containing “all secret data”,⁹¹¹ as “confidential and top secret”⁹¹² and as “top, top secret”.⁹¹³ Mr Haradinaj also stated that the SPO officer who seized the First Set confirmed that it was “sensitive”.⁹¹⁴ Mr Gucati later described the First Set as “confidential files”⁹¹⁵ and “very confidential and sensitive documents”.⁹¹⁶

444. In relation to the Second Set, Mr Gucati appeared to consider them confidential.⁹¹⁷ Likewise, Mr Haradinaj, at the Second Press Conference, in the presence of Mr Gucati, stated that “there are secrets” in the documents.⁹¹⁸ He also spotted locations in respect of which requests for cooperation were made and saw “top secret” markings.⁹¹⁹ At a media appearance after the Second Seizure, Mr Haradinaj claimed that the SPO “acknowledged that it was from them and that it was material of a sensitive nature”.⁹²⁰ Mr Haradinaj also opined: “Who are they sensitive to? They

⁹¹⁰ P4, p. 8 (Mr Gucati); P17, p. 6 (Mr Haradinaj); P83. *See also* DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2288-2293; DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 2927-2936.

⁹¹¹ P1, p. 2.

⁹¹² P1, p. 3.

⁹¹³ P1, p. 5.

⁹¹⁴ P7, p. 3.

⁹¹⁵ P59, p. 1 (Post on Mr Gucati’s Facebook account, dated 21 September 2020, seemingly referring to the First Set and/or Second Set).

⁹¹⁶ P59, p. 3 (Post on Mr Gucati’s Facebook account, dated 21 September 2020, seemingly referring to the First Set).

⁹¹⁷ P59, p. 1.

⁹¹⁸ P2, p. 3. *See also* P19, p. 2 (Mr Haradinaj: “[t]hey read “Top Secret”).

⁹¹⁹ P2, p. 3.

⁹²⁰ P6, p. 30. *See also* P17, p. 4.

are sensitive documents for The Hague Tribunal which cooperates with Serbia, but not for me".⁹²¹ At a further media appearance, Mr Haradinaj also stated that the SPO officer who seized the Second Set indicated that he came to the KLA WVA premises because "there is some sensitive material".⁹²²

445. In relation to the Third Set, during the Third Press Conference, after Mr Gucati described them as containing "various names in here whom we are not authorized to disclose",⁹²³ Mr Haradinaj vowed that "we will not keep anything secret".⁹²⁴ At a subsequent event, Mr Haradinaj stated that the Third Set concerned a "very sensitive matter".⁹²⁵ Shortly after the Third Seizure, Mr Tomë Gashi, in the presence of both Accused, opined that the material "seems to be of a very sensitive nature".⁹²⁶

iii) The documents contained names of protected witnesses

446. The Accused also made statements regarding the protected status of the witnesses whose names appeared in the Three Sets.

447. During the First Press Conference, in the presence of Mr Gucati, Mr Haradinaj informed those present that "here are the names of all the witnesses who they say are under their protection. All of them".⁹²⁷ At a media appearance shortly after the First Press Conference, Mr Gucati claimed he would not release the names of witnesses because he did not know these individuals.⁹²⁸ At the Second Press Conference, both Accused reiterated that they were not mentioning any witness names, apparently after being advised by their lawyer that "nothing is punishable if we do not mention the

⁹²¹ P6, p. 20.

⁹²² P7, p. 3. *See also* P17, p. 6.

⁹²³ P35, p. 1.

⁹²⁴ P35, p. 3.

⁹²⁵ P30, p. 9.

⁹²⁶ P12, pp 2-3.

⁹²⁷ P1, p. 2.

⁹²⁸ P9, pp 6-7.

names”.⁹²⁹ Later statements of the Accused regarding the non-mentioning of names seemed to stem from the understanding that this was prohibited. At a media appearance shortly after the Second Press Conference, Mr Haradinaj reiterated that “the first dossier contained many names...We won’t talk about them and we won’t mention their names”.⁹³⁰ On 17 September 2020, at a media appearance after the Second Seizure, Mr Haradinaj reiterated that “we have guarded” the names, because “we’ve not published them”.⁹³¹ During the Third Press Conference, in the presence of Mr Haradinaj, Mr Gucati said about the Third Set that it contained names that he was not authorised to disclose.⁹³² On 22 September 2020, at a media appearance after the Third Seizure, Mr Gucati stated that the KLA WVA have done nothing illegal, because they have protected “each and every one of the names that were included in the documents”⁹³³ and did not announce or made public names of witnesses.⁹³⁴

448. Statements made by Mr Tomë Gashi, the KLA WVA lawyer, in the presence of one or both Accused further confirm their awareness that the Three Sets contained names of protected witnesses. In particular, on 18 September 2020, at a media appearance with Mr Haradinaj, Mr Tomë Gashi stated that “those who took those files” indicated “absolutely not to make public the identity of witnesses, be them ordinary, protected or anonymous, because this is against the law”.⁹³⁵

(b) Evidence of the Accused

449. During their testimony, the Accused confirmed some of their contemporaneous statements concerning the confidentiality of the material, while downplaying others.

⁹²⁹ P2, p. 7.

⁹³⁰ P18, p. 3. *See also* P8, p. 11.

⁹³¹ P6, p. 40.

⁹³² P35, pp 1, 13. *See also* P29, p. 1.

⁹³³ P28, p. 1.

⁹³⁴ P28, pp 2, 11.

⁹³⁵ P7, p. 4. *See also* P12, p. 3.

450. In his oral evidence, Mr Gucati admitted that the First Set contained sensitive material.⁹³⁶ He also stated that he had never seen any of those documents in the public domain before.⁹³⁷ In relation to the Second Set, he stated that even though he saw “some documents with Serbian signs, [...] these were already public. [...] The whole documentation from a public trial was public, so [...] there’s nothing secret here”.⁹³⁸ Nonetheless, he later stated that he did not know “up until very late” that “the SITF/SPO documents in the first and second batch” were confidential.⁹³⁹ Mr Gucati also claimed that he understood that the documents were confidential after “your investigators came to us”.⁹⁴⁰

451. Mr Gucati also claimed at trial that during all Three Press Conferences, he took in consideration the privacy of persons, protected in Kosovo,⁹⁴¹ and that on that basis names of witnesses were not disclosed.⁹⁴² Mr Gucati further noted that the KLA WVA stopped the publication of the names and the statements as soon as they realised they were sensitive and that their mentioning was prohibited.⁹⁴³ Mr Gucati further indicated that his advice to journalists not to disclose names was given because he

⁹³⁶ DW1240 (Hysni Gucati), Transcript, 8 December 2021, pp 2418, 2420-2421.

⁹³⁷ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2288.

⁹³⁸ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2278.

⁹³⁹ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2285.

⁹⁴⁰ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2287.

⁹⁴¹ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2264.

⁹⁴² DW1240 (Hysni Gucati), Transcript, 7 December 2021, p 2308.

⁹⁴³ DW1240 (Hysni Gucati), Transcript, 8 December 2021, pp 2420-2421. *See also* Transcript, 6 December 2021, p. 2207 (Mr Gucati: “[I]f there is any witness that thinks that myself or Haradinaj have revealed any names of Albanian or Roma or Turkish or Bosnian witness living in Kosovo, let them come and face me directly”); Transcript, 7 December 2021, pp 2308 (Mr Gucati: “We have not released any names in the public. There has been no declaration made on our behalf. [...] show me one document or one media outlet where we have released the name of a witness. [...] show me one case that I’ve mentioned the name of this or that witness”), 2308-2309 (Mr Gucati: “I have not released a single name of one witness. That’s true for myself, for the chairmanship of the association. We have not released any names to the media related to any witness. [...] In the moment when I say that this is prohibited, and given that this is something that I have said in all the conferences, the use of the word “prohibition,” this is self-telling. It shows that it’s prohibited to disclose the name of a protected witness. I’ve never done this”); Transcript, 8 December 2021, p. 2417 (Mr Gucati: “I did know very well that there were names. That’s why we didn’t publish them. That’s why -- that was why we didn’t mention them, only to preserve their identity and independence”).

understood that the witnesses' privacy rights should be respected and that it was prohibited by law to release their names.⁹⁴⁴

452. The Panel finds that parts of Mr Gucati's testimony confirm his contemporaneous statements that he understood that witness names were not to be disclosed. The Panel finds that other parts reflect Mr Gucati's attempts to raise doubt regarding what he knew about the nature of the material.

453. During his testimony, Mr Haradinaj claimed that the SPO investigator could not tell him whether the First Set was confidential.⁹⁴⁵ While Mr Haradinaj confirmed that the SPO investigator seizing the Second Set told him that the material "may be sensitive", he emphasised that "he never told us exactly whether they were so".⁹⁴⁶ More generally, regarding all Three Sets, Mr Haradinaj stated that the SPO investigators never informed him that they were sensitive⁹⁴⁷ and "never said it was secret material".⁹⁴⁸ He also claimed that he did not know "what was public, what was not"⁹⁴⁹ and whether the SPO documents that he and Mr Gucati disseminated and described were confidential.⁹⁵⁰ Mr Haradinaj further stated that "top secret" markings on documents did not necessarily mean that they were secret, because "secrets cannot come to anyone's office".⁹⁵¹ Nonetheless, Mr Haradinaj also reiterated that "[w]e did not want to keep anything secret".⁹⁵² To a question regarding his understanding of the authenticity of the documents, Mr Haradinaj replied, among others, that "whether they are top secret or not, it's not important".⁹⁵³

⁹⁴⁴ DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2175; Transcript, 7 December 2021, p. 2308.

⁹⁴⁵ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2765.

⁹⁴⁶ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2936.

⁹⁴⁷ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2773.

⁹⁴⁸ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2956.

⁹⁴⁹ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2941.

⁹⁵⁰ DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2825.

⁹⁵¹ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 2941-2942. *See also* DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 2945, 2963.

⁹⁵² DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2948.

⁹⁵³ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2952.

454. Mr Haradinaj also claimed during his testimony that names of witnesses were neither mentioned nor published because he agreed with the opinion that names could be misused if they were mentioned.⁹⁵⁴ Mr Haradinaj stated that he advised journalists not to publish any names of witnesses because he has heard it “during panel discussions from people who were from civil society, from the judicial, and from other lawyers” that “there’d be no infringement of the law when names were not mentioned”.⁹⁵⁵ On this basis, Mr Haradinaj testified that “we became convinced that there would be no breaches of the law in this way, and we made the same appeal to them to follow the same logic”.⁹⁵⁶ Nonetheless, Mr Haradinaj later qualified his answer by saying that it was not his personal opinion that releasing the names of witnesses could harm them.⁹⁵⁷ He also claimed that he did not release witness names, because he did not know them.⁹⁵⁸ Later on he testified, however, that he saw the witness names in the material and that he knew they were under protection.⁹⁵⁹ Furthermore, Mr Haradinaj also appeared to partly distance himself from the opinion expressed by Mr Tomë Gashi regarding the release of witness names. While Mr Haradinaj

⁹⁵⁴ DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2852 (SPO Counsel: “So you knew that documents with witness names could be misused; isn’t that right?” [...] Mr Haradinaj: “Could be misused if we had mentioned them or sold them or published them. They could have been misused. I agree with that. And that’s why we did not mention or quote these names. Having heard this opinion, and this opinion is one that I heard from the various panels, I agreed with that opinion as long as it was said by persons who are professional in that field. I agree even today”).

⁹⁵⁵ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2759. *See also* Transcript, 12 January 2022, p. 2831 (SPO Counsel: “And it’s wrong to reveal witnesses’ names because doing so could cause them harm; isn’t that correct?” Mr Haradinaj: “This is a reference to something that was told to us by lawyers, panelists, and representatives of the civil society, and I reproduced what they had said. [...] This is not my personal opinion. It is the opinion of a panel that spoke on TV to which I referred”).

⁹⁵⁶ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2759.

⁹⁵⁷ DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2830 (Mr Haradinaj: “I was referring to what was being talked about by others and in the media. It’s not my personal opinion. And the concern was not only mine but it was the concern of everybody that was instilled by the media and by the public opinion expressed at the time”. SPO Counsel: “And this public opinion you’re referencing, revealing protected witness names could cause their death because people could harm them? Is this what you understood?” Mr Haradinaj: “No, this is not how I understood this, and I don’t see any reason that something would happen to witnesses”).

⁹⁵⁸ DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, pp 2830-2831.

⁹⁵⁹ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 2962-2964.

identified Mr Tomë Gashi as “our lawyer”, he said that “it’s mainly his opinion as a lawyer and of the moderator”.⁹⁶⁰ Mr Haradinaj added that while the KLA WVA took the opinions of Mr Tomë Gashi “for granted as valid”,⁹⁶¹ he personally believed that there was no reason for anyone to blackmail the witnesses.⁹⁶²

455. The Panel regards parts of Mr Haradinaj’s testimony as an attempt to raise doubt regarding what he knew about the nature of the material he and Mr Gucati revealed.

(c) Conclusion

456. In light of the above, the Panel is satisfied that the Accused disseminated the Three Sets and publicly described information therein with the awareness that it included confidential information and the names of protected witnesses. Further findings regarding the belief of the Accused that their actions were lawful will be made in relation to the defences raised.⁹⁶³

457. The Panel further finds that the contemporaneous statements of the Accused as well as parts of their evidence as regards the confidentiality of information contained in the Three Sets corroborate the evidence stemming from Ms Pumper, Mr Berisha, admitted Batch excerpts or versions and the media reports as to the confidentiality of information contained in the Batches.

3. Conclusion on the confidentiality of information contained in the Batches

458. Based on the above, the Panel is satisfied that the SITF/SPO, in the performance of its functions, treated SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 as well as internal work product corresponding to Batch 3 as confidential. The Panel is further satisfied that the SITF/SPO treated as confidential the content of these categories of documents, including the names, details and statements of witnesses or

⁹⁶⁰ DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2850.

⁹⁶¹ DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2850.

⁹⁶² DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, pp 2850-2851.

⁹⁶³ See *infra* paras 896-907 (Defences).

potential witnesses. The Panel also notes that the SITF/SPO considered the Serbian Documents and their content to pertain to confidential investigations, albeit not necessarily related to the SITF/SPO.

VI. COUNTS

459. The Panel observes that the same set of facts and circumstances is relevant for multiple counts. Given its responsibility under Rule 158(2) of the Rules, the Panel will address each charge, but it will refer, where appropriate, to facts and circumstances discussed under other charges. The Panel will assess below the evidence relevant to each count and the relevant submissions of the Parties. Given that the dissemination of the Three Sets and the public description of information contained therein is the starting point for all charges, the Panel will first address Counts 5 and 6. Thereafter, given that the alleged serious threat stemming from the acts and statements of the Accused relates to witnesses, the Panel will address Counts 3 and 4 and, lastly, Counts 1 and 2. Arguments of the Parties regarding the legal interpretation of the elements of charged offences and modes of liability have been addressed in the Applicable Law section of this Judgment.⁹⁶⁴

460. The Panel applies the cumulative convictions test as defined in paragraph 167.

⁹⁶⁴ See *supra* paras 68-203 (Applicable Law).

A. VIOLATING THE SECRECY OF PROCEEDINGS – PROTECTED INFORMATION (COUNT 5)**1. Parties' submissions**

461. The SPO alleged that during the Indictment Period, the Accused and their Associates,⁹⁶⁵ without authorisation, revealed Confidential Information.⁹⁶⁶

462. According to the SPO, the Accused did so, *inter alia*, by distributing parts of the Three Sets to the attendees of the Three Press Conferences and by publicly mentioning Confidential Information contained therein during public appearances or on social networks.⁹⁶⁷ The SPO averred that the Accused also encouraged, instructed, and advised: (i) certain members of the public in possession of or with access to confidential information relating to SC Proceedings⁹⁶⁸ to continue providing it to the KLA WVA; and (ii) certain members of the press and public to take or record, and further disseminate and publish, Confidential Information.⁹⁶⁹ It further submitted that the evidence demonstrated that the Accused: (i) were not authorised to reveal the Confidential Information in the Three Sets;⁹⁷⁰ (ii) acted with the awareness of, and desire for, revealing the Confidential Information without authorisation, or were at least aware that this consequence might ensue from their acts or omissions, and acceded to such occurrence;⁹⁷¹ (iii) intended to disseminate such information being aware that it was, and because it was, confidential;⁹⁷² and (iv) publicly acknowledged having reviewed the Three Sets and themselves characterised the content of the

⁹⁶⁵ See *supra* para. 14 (The Charges).

⁹⁶⁶ F251/A01 Indictment, para. 33; F181/A01 SPO Pre-Trial Brief, para. 193; F447, paras 53, 56; F565 SPO Final Trial Brief, paras 250-251; Transcript, 14 March 2022, pp 3430-3432, 3434-3435. See *supra* para. 5 (The Charges).

⁹⁶⁷ Transcript, 14 March 2022, p. 3430; F565 SPO Final Trial Brief, para. 251.

⁹⁶⁸ See *supra* para. 5 (The Charges).

⁹⁶⁹ F251/A01 Indictment, para. 33; Transcript, 14 March 2022, p. 3433.

⁹⁷⁰ F447, para. 57; F565 SPO Final Trial Brief, paras 252-253.

⁹⁷¹ F447, para. 58; F565 SPO Final Trial Brief, para. 252.

⁹⁷² F447, para. 253. See also Transcript, 14 March 2022, pp 3430-3431.

Three Sets as confidential or sensitive.⁹⁷³ According to the SPO, the Confidential Information was not to be revealed according to the Law and/or was classified by competent authorities, including the SC, SITF/SPO, and cooperating organisations and states pursuant to an agreement with the SITF/SPO.⁹⁷⁴ The SPO submitted that the information was classified in accordance with Articles 4(2), 23, 35(2)(d)-(f), 39, 54(8), 61(3)-(4), and 62 of the Law.⁹⁷⁵

463. The Defence challenged that the information in the Three Sets was confidential.⁹⁷⁶ In particular, the Defence submitted that: (i) the SITF/SPO classifications of the material as authentic and confidential were not always appropriate and necessary;⁹⁷⁷ (ii) some of the information was already in the public domain;⁹⁷⁸ (iii) the Accused were authorised to reveal information because of public interest considerations;⁹⁷⁹ and (iv) the Accused only revealed the material to the professional media.⁹⁸⁰ The Defence further submitted that Count 5 ought to be dismissed because the SPO failed to establish the origin, authenticity, confidentiality and chain of custody of the Batches and, in turn, failed to demonstrate that the Accused disclosed any protected information or violated any secrecy.⁹⁸¹ The Defence claimed that no evidence has been

⁹⁷³ F565 SPO Final Trial Brief, para. 253. *See also* Transcript, 14 March 2022, pp 3434, 3436; F447, para. 54.

⁹⁷⁴ *See also* F181/A01 SPO Pre-Trial Brief, para. 195.

⁹⁷⁵ F251/A01 Indictment, para. 33. *See also* Transcript, 14 March 2022, p. 3434.

⁹⁷⁶ F258 Gucati Pre-Trial Brief, paras 51, 53, 264, 268; F566 Haradinaj Final Trial Brief, paras 309, 311. *See also* F258/RED. *See also* Transcript, 16 March 2022, pp 3657-3664, 3695-3696.

⁹⁷⁷ Transcript, 16 March 2022, pp 3654-3662, 3695-3696; F258 Gucati Pre-Trial Brief, paras 51-53, 264-265, 268-269; F566 Haradinaj Final Trial Brief, para. 310. *See also* W04841 (Zdenka Pumper), Transcript, 20 October 2021, pp 1055-1072, 1074-1076; Transcript, 21 October 2021, pp 1198, 1203, 1205, 1214.

⁹⁷⁸ Transcript, 16 March 2022, pp 3656-3657; F258 Gucati Pre-Trial Brief, paras 115, 126; F566 Haradinaj Final Trial Brief, paras 271, 308, 335; F260 Haradinaj Pre-Trial Brief, para. 220; F440, para. 151.

⁹⁷⁹ Transcript, 16 March 2022, pp 3647-3651; F567 Gucati Final Trial Brief, paras 95-99.

⁹⁸⁰ Transcript, 17 March 2022, p. 3813; F258 Gucati Pre-Trial Brief, paras 80, 246, 255, 257, 277, 287, 327, 335, 340, 369, 373.

⁹⁸¹ Transcript, 16 March 2022, pp 3653-3654, 3662-3663, 3696; F567 Gucati Final Trial Brief, para. 78; F439, para. 83; F566 Haradinaj Final Trial Brief, paras 258-274, 301-302, 309-312, 334; F440, paras 141-142, 154-155, 161; F260 Haradinaj Pre-Trial Brief, para. 222, 245-246. *See also* F260 Haradinaj Pre-Trial Brief, paras 181, 186, 188-189, 253-256; F566 Haradinaj Final Trial Brief, paras 275-300, 303, 307-310, 313; F440, paras 143, 146-153.

adduced that: (i) a court or a competent authority declared the information revealed by the Accused secret;⁹⁸² (ii) relevant material was disclosed to the Accused in an official proceeding;⁹⁸³ or (iii) the Accused knew that the information had been declared secret by a competent authority.⁹⁸⁴ The Defence further questioned how the actions of the Accused could be criminal when the conduct of journalists mirroring that of the Accused was not deemed criminal.⁹⁸⁵

2. The Panel's findings on *actus reus*

464. The Panel will assess below whether the Accused revealed, without authorisation, information disclosed in an official proceeding which was not to be revealed according to the law or which was declared to be secret by the decision of a court or a competent authority.⁹⁸⁶

(a) Information which “must not be revealed according to the law” or “declared to be secret by a decision of the court or a competent authority”

465. As noted in paragraph 76, for information to fall under Article 392(1) of the KCC it must satisfy one of two alternative conditions: (i) a law must prohibit its revelation; or (ii) a court or a competent authority must have declared it to be secret.

466. The Panel has already found in paragraph 458 that the SITF/SPO, in the performance of its functions, treated as confidential SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 as well as the internal work product corresponding to Batch 3. This also applied to the content of these categories of

⁹⁸² F567 Gucati Final Trial Brief, paras 68-72; F439, para. 77. *See also* F258 Gucati Pre-Trial Brief, paras 13, 34.

⁹⁸³ F567 Gucati Final Trial Brief, paras 73-74; F439, paras 78-79.

⁹⁸⁴ F567 Gucati Final Trial Brief, paras 75-76; F439, paras 80-81.

⁹⁸⁵ F566 Haradinaj Final Trial Brief, paras 329-333; F440, paras 156-160. *See also* F258 Gucati Pre-Trial Brief, paras 171-172, 346; and, in relation to the Associates not being charged, F260 Haradinaj Pre-Trial Brief, paras 244, 247.

⁹⁸⁶ *See supra* para. 69 (Applicable Law).

documents, including to the names, details and statements of witnesses or potential witnesses. Some of these documents also bore the markings or indications of their confidential status.⁹⁸⁷

467. The Panel also noted that the SITF/SPO considered the Serbian Documents and their content to pertain to confidential investigations.⁹⁸⁸ The Panel did not receive, however, conclusive evidence on the legal or evidentiary basis for this claim. Ms Pumper indicated that some of the Serbian Documents contained the names of witnesses or potential witnesses of the SITF/SPO.⁹⁸⁹ In the Batch 1 Chart, Ms Pumper also indicated that some of these Serbian Documents referred to measures taken in furtherance of SITF/SPO investigations.⁹⁹⁰ The Panel could ascertain that most Serbian Documents that referred to SITF/SPO investigations also contained names of witnesses or potential witnesses of the SITF/SPO.⁹⁹¹ This suggests that some of the information contained in these documents *might* have been treated as confidential by the SITF/SPO either when it sent requests for assistance to the Serbian authorities or when that information was sent back to the SITF/SPO. The evidence does not show, however, whether any of these documents were received by the SITF/SPO so that they would have become part of its investigative records. The Panel is therefore not in a position to verify whether the Serbian Documents became part of SITF/SPO records and were treated, in the performance of SITF/SPO functions, as confidential.

468. Moreover, the Panel recalls that it can only adjudicate the charges insofar as they relate to the proceedings and the officials of the SC/SPO.⁹⁹² While the aforementioned Serbian Documents refer to measures taken in furtherance of SITF/SPO investigations, their classification is controlled by an authority other than the SITF/SPO and the Panel

⁹⁸⁷ See *supra* paras 428-430, 433, 436-437 (Findings on the Batches).

⁹⁸⁸ See *supra* para. 427 (Findings on the Batches).

⁹⁸⁹ See *supra* paras 431-432 (Findings on the Batches)

⁹⁹⁰ See *supra* para. 336 (Findings on the Batches).

⁹⁹¹ P90 (Annex 1 – Chart on Batch 1), pp 16, 18, 19, 23, 30, 45, 47.

⁹⁹² See *supra* para. 10 (The Charges).

has no competence to sanction the violation of confidentiality ordered by a third party. For this reason, the Panel will refrain from making any findings on the Serbian Documents.

469. The Panel therefore limits its findings on the SITF Requests and WCPO Responses contained in Batches 1, 2 and 4, and on Batch 3. The Panel must thus establish whether: (i) the SITF/SPO is a competent authority under Article 392(1) of the KCC; and if so, (ii) whether treating the aforementioned categories and their content as confidential amounts to that information being declared secret under the same provision.

470. As regards competent authority, the Panel observes the following. The SITF had been tasked to conduct investigations into allegations reported in the Council of Europe Parliamentary Assembly Report 12462 of 7 January 2011.⁹⁹³ When it was created, the SPO, as attested in Articles 24(2) and 35(10) of the Law, took over the mandate and personnel of the SITF as well as, *inter alia*, all agreements and arrangements the SITF had with other entities. Pursuant to Article 35(2)(f) of the Law, in the performance of its functions, the SPO has the authority and responsibility to, *inter alia*, take necessary measures to ensure the confidentiality of information and the protection of any person. Echoing this authority and responsibility, Rule 30(2)(a) of the Rules provides that the SPO, during an investigation, must ensure the safety and protection of victims, witnesses and other persons at risk on account of information provided to or cooperation with the Specialist Prosecutor.

471. The Panel interprets these provisions as conferring on the SPO the competence – and responsibility – to protect information and persons during its investigations, including those previously carried out by the SITF. The Panel underscores that this competence is a necessary embodiment of a generally accepted principle of

⁹⁹³ Article 1(2) of the Law. See also <https://www.scp-ks.org/en/spo/special-investigative-task-force> (accessed 13 May 2022).

confidentiality of criminal investigations.⁹⁹⁴ In the application of this competence, the SPO has the power to declare, in the sense of marking or treating, any record as non-public, confidential or strictly confidential, if necessary for the protection of information and persons during an investigation.⁹⁹⁵ This applies without distinction to records used internally or as part of cooperation with third parties. The protected status of SPO records can only be altered by the SPO itself, in accordance with Article 61(4) of the Law, or by an SC Panel, pursuant to Rules 80-84 of the Rules.

472. Turning to the relevant material, the Panel finds that the SITF/SPO was competent to mark or treat, in the performance of its functions, the SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 and the documents in Batch 3 as confidential. The Panel 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.

473. For these reasons, the Panel finds that the SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 and the documents in Batch 3 (“Protected Information”) qualify as information declared secret by a competent authority, within the meaning of Article 392(1) of the KCC.

474. Having established that one of the two alternative conditions under Article 392(1) of the KCC is met, the Panel need not ascertain the fulfilment of the other. Nonetheless, for the sake of completeness, the Panel elects to do so.

475. Accordingly, in addition to the above findings regarding Protected Information, the Panel observes the following. First, Batch 3 contained internal work product of the SPO, which was marked as such and as confidential.⁹⁹⁶ The revelation of such records is expressly prohibited by Rule 106 of the Rules, according to which the reports, memoranda or other internal documents prepared by the SPO or the SITF, or their

⁹⁹⁴ See also DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3312-3313.

⁹⁹⁵ See *supra* para. 78 (Applicable Law).

⁹⁹⁶ See *supra* paras 393-394 (Findings on the Batches).

assistants or representatives, in connection with the investigation or preparation of a case are not subject to disclosure or notification. Second, as found above, Article 62(1) of the Law sets out a general restriction of access to SC and SPO records, which is tantamount to a prohibition of their public disclosure.⁹⁹⁷ Such access can only be obtained under the conditions and within the limits provided by Article 62(2) of the Law, or by virtue of other relevant provisions of the Law and the Rules allowing reclassification of documents. As the Protected Information is part of the SPO records, Article 62(1) of the Law prohibits its revelation.

476. For these reasons, the Panel finds that the Protected Information also qualifies as information which must not be revealed according to the law, within the meaning of Article 392(1) of the KCC.

(b) Information “disclosed in any official proceeding”

477. The Panel has already found that SPO investigations qualified as an “official proceeding” for the purpose of Article 392(1) of the KCC.⁹⁹⁸ The Panel also found in the same paragraph that “disclosed” must be interpreted to include the exchange of information within the SITF/SPO for the purposes of investigation and prosecution as well as information shared between the SITF/SPO and its counterparts in the course of its cooperation for investigative purposes.

478. In light of the above, the Panel is satisfied that the SITF Requests and the WCPO Responses in Batches 1, 2 and 4 qualify as information exchanged between the SITF and Serbian authorities in the course of their cooperation for investigative purposes. The Panel is further satisfied that Batch 3 qualifies as information exchanged internally by the SPO for the purposes of investigation and prosecution. The internal work product in Batch 3 appears to have been drafted and prepared by SPO staff for the benefit of others within their Office, and thus disclosed from one to another.

⁹⁹⁷ See *supra* para. 77 (Applicable Law).

⁹⁹⁸ See *supra* para. 74 (Applicable Law).

479. For these reasons, the Panel finds that the Protected Information was disclosed in an official proceeding, within the meaning of Article 392(1) of the KCC.

(c) “[R]eveals information”

480. As found above, after each of the Three Deliveries, the Accused reviewed the material.⁹⁹⁹ As part of this process, they also allowed other KLA WVA members and KFOR personnel to inspect some of the documents.¹⁰⁰⁰ Mr Haradinaj also indicated that before and during the Second Seizure, a journalist was allowed to inspect and record the Second Set.¹⁰⁰¹

481. At the Three Press Conferences, the Accused, in the presence of each other, undertook the following actions in relation to the Three Sets. They: (i) displayed the documents on the table in front of them, pointed at their availability,¹⁰⁰² and invited or allowed those present to inspect the documents;¹⁰⁰³ (ii) showed the documents to the reporters and/or invited or allowed those with cameras to film or photograph the documents;¹⁰⁰⁴ (iii) invited and allowed those present to take documents with them;¹⁰⁰⁵

⁹⁹⁹ See *supra* paras 211, 246, 276-277 (The Events at Issue).

¹⁰⁰⁰ Regarding other KLA WVA members: 1D3, paras 12-17; 2D1, paras 47, 51. Regarding KFOR personnel: P35, p. 9 (Mr Gucati: “We did not hide them from the German KFOR, we showed every page to them. Mr Haradinaj: Whatever they wanted to do. Whatever they wanted. Whatever they wanted. Mr Gucati: They photographed them, the German KFOR photographed them. They, too, were present. The German KFOR was there by chance”); P11, p. 5; 1D3, para. 46; 1D4, para. 33; 2D1, paras 102-104, 106, 108-109; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2198-2200; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2459; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2777-2778.

¹⁰⁰¹ P7, pp 7-8; 2D1, para. 85. See also 1D3, para. 38.

¹⁰⁰² P1 video-clip, minutes 00:00:32-00:00:35 (Mr Gucati), 00:00:46-00:00:48 (Mr Gucati).

¹⁰⁰³ P1, pp 6-9 (Mr Haradinaj); P50, p. 1 (Mr Haradinaj); P35, pp 2 (Mr Gucati), 14 (both Accused).

¹⁰⁰⁴ P1 video-clip, minutes 00:01:14-00:01:18 (Mr Gucati), 00:14:20-00:14:35 (Mr Haradinaj), 00:14:44-00:14:49 (Mr Gucati), 00:15:55-00:16:03 (Mr Gucati), 00:16:35-00:16:52 (Mr Haradinaj); P2 video-clip, minutes 00:00:58-00:01:10 (Mr Gucati), 00:11:14-00:11:16 (Mr Gucati), 00:11:44-00:11:46 (Mr Gucati); P50 video-clip, minutes 00:15:55-00:16:19 (Mr Gucati); P35 video-clip, minutes 00:14:33-00:14:35 (Mr Haradinaj), 00:15:55-00:16:03 (Mr Gucati), 00:16:35-00:16:52 (Mr Haradinaj); 1D3, para. 49. See also W04866 (Halil Berisha), Transcript, 26 October 2021, pp 1519-1520.

¹⁰⁰⁵ P1, pp 5-6 (Mr Haradinaj); P2, p. 1 (Mr Gucati), p. 4 (Mr Haradinaj); P50, p. 1 (Mr Haradinaj); P35, pp 4-5 (Mr Haradinaj), 15 (both Accused); 2D1, paras 79, 111; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2201; Transcript, 7 December 2021, pp 2281-2283.

(iv) introduced and referred or cited to (Mr Gucati) or described in detail (Mr Haradinaj) information in the documents;¹⁰⁰⁶ (v) vowed to continue publishing any documents received and stated that it was their duty to do so;¹⁰⁰⁷ (vi) encouraged the journalists present to publish the documents and reproached some for not doing so;¹⁰⁰⁸ and (vii) indicated that if more documents were brought, the KLA WVA will accept them.¹⁰⁰⁹

482. In addition, during the Indictment Period, the Accused also participated in over twenty other media appearances, together, alone or in the presence of others.¹⁰¹⁰ During these media appearances, the Accused: (i) discussed the Three Sets in general, read from or described their content;¹⁰¹¹ (ii) repeatedly vowed to continue publishing any documents received;¹⁰¹² (iii) stated that it was their duty to share the documents with the media;¹⁰¹³ (iv) confirmed or vowed that copies were or would be made available to the media;¹⁰¹⁴ and/or (v) repeatedly encouraged journalists to publish the documents and reproached some for not doing so.¹⁰¹⁵

483. Furthermore, during the Indictment Period, posts that appeared on the Accused's Facebook accounts¹⁰¹⁶ shared media reports containing descriptions or

¹⁰⁰⁶ P1, pp 1, 7-8; P2, pp 1-2, 10-11; P35, pp 1-2 (Mr Gucati); P1, pp 1-3, 6-7; P2, pp 2-3, 10-11; P35, pp 2-3 (Mr Haradinaj).

¹⁰⁰⁷ P2, p. 4; P35, p. 3 (Mr Haradinaj).

¹⁰⁰⁸ P1, pp 4-5 (Mr Haradinaj); P2, pp 2, 7 (Mr Haradinaj); P35, pp 4-5, 12-13 (Mr Haradinaj), 14 (Mr Gucati).

¹⁰⁰⁹ P2, p. 8 (both Accused); P35, pp 8, 10 (Mr Haradinaj).

¹⁰¹⁰ See e.g. in approximate chronological order: P9, P24, P21, P18, P33, P4, P6, P19, P7, P17, P8, P25, P12, P30, P11, P28, P29, P31, P16, P15, P27, P26, P32.

¹⁰¹¹ P9, p. 5; P28, pp 10, 14; P29, p. 1; P31, p. 3 (Mr Gucati); P6, pp 19-20; P17, p. 2-4, 9; P18, pp 2-3; P19, pp 1-4; P21, pp 4-5; P24, pp 7-8; P33, p. 2 (Mr Haradinaj).

¹⁰¹² P4, pp 3, 8; P28, pp 7, 11, 12-13; P29, p. 2; P31, p. 2 (Mr Gucati); P6, pp 4, 14; P15, p. 2; P18, pp 1-2; P21, pp 3-5; P24, pp 7-8; P26, pp 4-5 (Mr Haradinaj).

¹⁰¹³ P9, p. 6 (Mr Gucati); P21, p. 3-5; P26, pp 2, 4-5 (Mr Haradinaj).

¹⁰¹⁴ P9, p. 6 (Mr Gucati); P6, pp 17-18; P7, p. 7; P8, p. 10; P11; p. 4; P17, p. 6; P21, pp 3-4; P24, pp 3, 5-6 (Mr Haradinaj).

¹⁰¹⁵ P6, pp 6, 9; P8, pp 20-22; P17, pp 6-7; P19, pp 2-3; P21, p. 5; P24, pp 2-3, 10; P30, pp 5-8; P33, p. 3; P11, p 4, 28-29 (Mr Haradinaj).

¹⁰¹⁶ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2929; DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2286, 2418-2421, in relation to P00059, and Transcript,

screenshots of documents pertaining to the Three Sets.¹⁰¹⁷ Other Facebook posts welcomed the delivery of one or more of the Three Sets.¹⁰¹⁸

484. The Panel notes that the Accused insisted during their testimony that they did not “publish” or “disseminate” the material, but only made it available to the professional media,¹⁰¹⁹ who, according to the Defence, had their own legal and ethical obligations to abide by when deciding what material (not) to publish.¹⁰²⁰ The Panel considers that, for the purposes of Article 392(1) of the KCC, journalists or the press are members of the public and, as such, their status does not qualify the notion of “revelation” for the purposes of this offence. Moreover, Article 392(1) of the KCC does not allow a person to delegate to another his or her obligation not to reveal protected information. In any event, the Panel recalls that the revelation of information entails not only the “publication” of the material, in the sense of publicly announcing, disseminating or broadcasting their content.¹⁰²¹ In fact, having considered the aforementioned evidence, the Panel is satisfied that the Accused revealed the Protected Information by: (i) displaying and making available the Three Sets during

8 December 2021, pp 2354-2363, in relation to P00083, pp 59-62, 63-66 recognising the Facebook profile “hisni.gucati” as his own; DW1240 (Hysni Gucati), Transcript, 8 December 2021, p. 2434, confirming that posts on his Facebook account have been published by himself, or with his authorisation, and that he would have immediately taken down a post published without his authorisation.

¹⁰¹⁷ Post on Mr Gucati’s Facebook account: P83, p. 46. Posts on Mr Haradinaj’s Facebook account: P60, p. 1 (also at P84, p. 3): Link to *Euronews Albania* Interview (P16), 24 September 2020; [REDACTED]; pp 8-9 (also at P70): Link to *ABC News Albania* (P17), 16 September 2020; pp 12-13: Link to “Prime Time” Interview (P5, P18), 16 September 2020; pp 14-15: Link to *Euronews Albania* interview (P19), 18 September 2020; pp 21-22, Link to “Imazh” Interview (P21), 11 September 2020; pp 23-24 (also at P76, P77), Link to Faton Klinaku interview (P22), 10 September 2020; p. 29, Link to “Imazh” Interview (P24), 9 September 2020; P61, p. 1: [REDACTED]; [REDACTED]; pp 3-4 (also at P82): Screenshot of InFokus article about handover of Batch 4, 9 September 2020.

¹⁰¹⁸ P83, p. 49 (Post of Mr Gucati, sharing Mr Haradinaj’s post); P75 (Post of Mr Haradinaj, also shared by Mr Gucati, *see* P83, p. 47).

¹⁰¹⁹ DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2218; Transcript, 7 December 2021, p. 2281; Transcript, 8 December 2021, p. 2417; DW1249 (Nasim Haradinaj), 12 January 2022, pp 2811-2812; Transcript, 13 January 2022, p. 2932.

¹⁰²⁰ Transcript, 17 March 2022, p. 3813; F258 Gucati Pre-Trial Brief, paras 246, 255, 257, 277, 287, 327, 335, 340, 369, 373.

¹⁰²¹ *See supra* para. 72 (Applicable Law).

the Three Press Conferences; (ii) citing, describing or referring to their content during such conferences, other media appearances and via Facebook posts; and (iii) allowing or inviting persons present at the KLA WVA premises and the Three Press Conferences to read, inspect, review, photograph, film or take copies of the Three Sets or parts thereof.

485. For these reasons, the Panel finds that the Protected Information was revealed by the Accused, within the meaning of Article 392(1) of the KCC.

(d) “[W]ithout authorization”

486. The Panel recalls its finding that the revelation of information is “without authorization” if it is not permitted by law or the decision of a court or a competent authority.¹⁰²² As regards the Protected Information, the Panel already found that its status can only be altered through measures pursuant to Articles 61(4) and 62 of the Law or Rules 80-84 of the Rules.¹⁰²³

487. As regards the Defence argument that considerations of public interest may provide authorisation under Article 392(1) of the KCC, the Panel observes the following. 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. Applying the same logic to the present offence, public interest considerations would not amount to an authorisation to perform the prohibited act under Article 392(1) of the KCC. Such an interpretation would permit any person claiming to be acting in pursuance of a public interest to assert the existence of an authorisation for revealing information protected under Article 392(1) of the KCC. This would defeat or undermine the very purpose of this provision.

¹⁰²² See *supra* para. 73 (Applicable Law).

¹⁰²³ See *supra* paras 471, 475.

Instead, 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. The Panel shall address these considerations when analysing the defences raised.¹⁰²⁴

488. As regards the Defence argument that the Accused would have been authorised to reveal the Protected Information because it was already in the public domain, the Panel observes the following. First, the Panel received no evidence that any parts of the Three Sets, except the public documents in the Second Set, were already in the public domain. In fact, both Accused have repeatedly described the documents as confidential,¹⁰²⁵ and Mr Gucati even conceded during his testimony that he had not seen any part of the First Set in the public domain before receiving it.¹⁰²⁶ Second, the Panel considers 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. Such an interpretation would defeat or undermine the very purpose of this provision.¹⁰²⁷ Lastly, even if the material had contained *some* public information, this would not provide justification for the disclosure of the rest of the information that was not yet in the public domain.

489. For these reasons, the Panel finds that the Accused revealed the Protected Information without authorisation, within the meaning of Article 392(1) of the KCC.

(e) Conclusion

490. In light of the above, the Panel is satisfied that the *actus reus* of the offence of violating the secrecy of proceedings under Article 392(1) of the KCC has been established beyond reasonable doubt.

¹⁰²⁴ See *infra* paras 805-824 (Defences).

¹⁰²⁵ See *supra* paras 442-445 (Findings on the Batches).

¹⁰²⁶ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2288.

¹⁰²⁷ See e.g. ICTY, [Hartmann Trial Judgment](#), paras 43, 46.

3. The Panel's findings on *mens rea*

491. Before assessing the Accused *mens rea* for this offence, the Panel recalls its above findings that the Accused acted with the awareness that the Three Sets were authentic and contained confidential information.¹⁰²⁸ Taking these findings into consideration, the Panel will assess whether the Accused acted with direct or eventual intent to reveal, without authorisation, the Protected Information.

492. The Panel notes at the outset that the acts described in paragraphs 480-483 reflect a clear resolve to reveal the Protected Information.

493. First, the Accused unequivocally stated their intention to reveal this information. Mr Gucati stated that the KLA WVA's duty "has been to let know".¹⁰²⁹ Mr Haradinaj, in Mr Gucati's presence, stated: "[w]e will reveal [the First Set]. Why should we not reveal them? We are making these public so it is known".¹⁰³⁰

494. Second, the Accused's explanation for revealing the Protected Information shows an unequivocal purpose to make public the fact that the SPO was collaborating with Serbian authorities and with persons whom they described as unreliable witnesses, and that the KLA WVA had been correct to claim so in the past.¹⁰³¹

495. Third, the Accused welcomed the Three Deliveries and/or called to be provided with more similar material.¹⁰³² At trial, both Accused denied having done so.¹⁰³³ Mr Haradinaj claimed that his call for more disclosure was intended to discover the identity of the individual delivering the material.¹⁰³⁴ That claim is contradicted by

¹⁰²⁸ See *supra* paras 421, 456 (Findings on the Batches).

¹⁰²⁹ P9, p. 6.

¹⁰³⁰ P1, p. 5. See also P1, p. 8 (Mr Haradinaj: "had we wanted, we would not have made these public at all").

¹⁰³¹ P1, p. 1 (Mr Gucati), 3 (Mr Haradinaj); P4, pp 3, 8 (Mr Gucati); P28, pp 2, 11 (Mr Gucati); P29, p. 2 (Mr Gucati); P31, p. 2 (Mr Gucati). See also *infra* paras 600-602 (Count 3), 662 (Count 1).

¹⁰³² See e.g. P35, pp 2, 8, 10; P17, p. 5; P25, pp 3, 9-10; P30, p. 2; P7, p. 2; P34, pp 2-3. See also P33, pp 2-3; P18, pp 2, 4; P29, p. 2.

¹⁰³³ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2981; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2223-2233.

¹⁰³⁴ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 2981, 2983-2984.

Mr Haradinaj's repeated statements that: (i) he did not care who the individual was;¹⁰³⁵ (ii) the individual was welcome and he "will not disclose his identity even if he comes without wearing a mask",¹⁰³⁶ and (iii) he hoped that his identity would never become known.¹⁰³⁷ It is further contradicted by the evidence that both Accused chastised Mr Klinaku for trying to follow the delivery person after the Second Delivery.¹⁰³⁸

496. Fourth, the Accused's repeated vows to "distribute", "make available", "make public" and "publicise" any new SC/SPO documents received show a clear resolve to repeat their actions in the future.¹⁰³⁹

497. As regards Mr Gucati's claim, made during his testimony, that the Accused revealed the Three Sets as they feared that the documents could get "in the hands of a thug",¹⁰⁴⁰ the Panel finds that this explanation is contradicted by the above evidence regarding the manner and purpose of the revelation, as well as the Accused's clear determination to continue revealing such material. Second, there is no evidence that this material had been given to anyone else before being delivered to the KLA WVA or that the Accused had information in their possession that this had occurred.

¹⁰³⁵ See P7, p. 13; P8, p. 17. See also P24, p. 5.

¹⁰³⁶ P35, p. 10.

¹⁰³⁷ See P33, p. 3.

¹⁰³⁸ Transcript, 6 December 2021, p. 2189; Transcript, 11 January 2022, p. 2741.

¹⁰³⁹ P24, p. 7 (Mr Haradinaj: "if I will receive this kind of material again, I will make it public again"); P21, p. 3 (Mr Haradinaj: "whenever we receive files we will make them public because that's our duty"); P2, p. 4 (Mr Haradinaj: "Every time we receive them, we will make them public"); P18, p. 1 (Mr Haradinaj: "we have stated publicly that we will reveal/make available whatever material we receive that compromises the Specialist Chambers and Specialist Prosecutor"); P4, pp 3 (Mr Gucati: "And we told them that any time we receive documents from the Specialist Chambers, we will make them public for the media"), 8 (Mr Gucati: "It is in our interest to distribute them as much as possible in the media"); P35, p. 3 (Mr Haradinaj: "We will publish everything we receive here, we will not keep anything secret. [...] This is our duty. This is our position"); P28, pp 7 (Mr Gucati: "Whatever sacrifices are to come, I am telling you sincerely, I will publicise all the files"), 11 (Mr Gucati: "Every document that I receive that is from the Special Court [...], we will make it public"), 12-13 (Mr Gucati: "if he brings the CDs, I will publicise them. We are not hiding anything, we are going to send it, we are going to get it out there"); P29, p. 2 (Mr Gucati: "we will act the same as we did today or in the past few days. We [...] will inform the Kosovo public"); P31, p. 2 (Mr Gucati: "every document of theirs that reaches us, we will make it public").

¹⁰⁴⁰ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2169-2170.

Furthermore, even if this had been a genuine concern, it would provide no justification for the course of action taken by the Accused.

498. Moreover, the multiple prompts addressed at journalists during the Three Press Conferences to inspect, film or take copies of the Three Sets show a determination to disseminate the documents as widely as possible. For instance, Mr Gucati invited journalists to “focus” their cameras on the documents, to “take them”, to “come a bit closer and have a look”, and stated that they were “welcome to read it”.¹⁰⁴¹ Likewise, Mr Haradinaj prompted journalists to take “as many copies as you want”, to “look at their statements, look at the names”, to “pick and choose, or walk away” and to “touch them, live, here you have them”.¹⁰⁴² The Accused’s determination to distribute widely these documents was further confirmed by their insistence that journalists should publish the material.¹⁰⁴³ Mr Haradinaj repeatedly stated that the media was the fourth

¹⁰⁴¹ P1, pp 1 (Mr Gucati: “maybe you can focus”), 6 (Mr Gucati: “Turn it around [...] Turn it around! Just put it up!”), 8 (Mr Gucati: “Here there are two of them if you can focus [your cameras] on them”); P2, p. 1 (Mr Gucati: “What can we do? You can take them”); P35, pp 2 (Mr Gucati: “You could come a bit closer and have a look at it. Here they are!”), 14 (Mr Gucati: “Here is the material. You are welcome to read it”).

¹⁰⁴² P1, pp 5 (Mr Haradinaj: “we will give you as many copies as you want”), 6 (Mr Haradinaj: “Take a copy if you want [points to the document in his hand] to have a look”), 8 (Mr Haradinaj: “Look at their statements, look at the names. Look at the statements! [...] Here is Williamson. [...] I have it if you want it”); P2, pp 4 (Mr Haradinaj: “For further information, get it yourself. Here are the files. Come along, you pick and choose, or walk away. We present them here, whoever likes to take them”), 9 (Mr Haradinaj: “And we will give them to you, it is not a problem”); P50, p. 1 (Mr Haradinaj: “You may even take them all in your pocket [laughing]. Touch them, touch them, live, here you have them, Sir, here you have them”); P35, pp 2 (Mr Haradinaj: “You have at your disposal what we have”), 5 (Mr Haradinaj: “Anyone who wishes can take them”), (Mr Haradinaj: “Come and have a look. You are the one to divulge”), 7 (Mr Haradinaj: “Here they are. Look at them. You can take a copy to have a look at it”), 14 (Mr Haradinaj: “Come and read it. Gucati: Here is the material. You are welcome to read it”).

¹⁰⁴³ P6, pp 9 ([Journalist]: “No, no, you have asked the media to publish them. Mr. Haradinaj: Well, yes, naturally”), 17 (Mr Haradinaj: “If I had listened to you, I would have sent those [files] to the court. That’s first, but I didn’t want to listen to you, because I wanted to make them available here”), 23 (Mr Haradinaj: “If I was a journalist and had them, I would have published them”); P30, p. 7 (Mr Haradinaj: “We are publicising them for you, we are not publishing them, we are giving them to you – you are publishing them”); P35, p. 14 (Mr Gucati: “The same way you published the names of the fake veterans. [...] Take the same courage like you did with the veterans”).

“pillar” or “force”¹⁰⁴⁴ and that it was their responsibility to publish “as much as they dare”.¹⁰⁴⁵ He also admonished journalists for not doing their “job” and not publishing the material.¹⁰⁴⁶

499. For these reasons, the Panel finds that the Accused acted with awareness of, and desire for, revealing, without authorisation, the Protected Information. Their act of revealing such information mostly to the professional media does not in any way affect this finding.

500. In light of the above, the Panel is satisfied that the *mens rea* of the offence of violating the secrecy of proceedings under Article 392(1) of the KCC has been established beyond reasonable doubt.

¹⁰⁴⁴ P11, p. 4 (Mr Haradinaj: “We know that you are the fourth force in power. That is why we have handed it over to you”), 31 (Mr Haradinaj: “That is why I took these documents to yourselves, you know best what it is to be professional, you are the fourth force”); P30, p. 5 ([Journalist]: “[...] are you keeping archive copies of these documents? Mr Haradinaj: No. You are our archive because you are the fourth power in this country. We are counting on you”); P8, p. 22 (“Mr. Haradinaj: “Since you are the fourth power, the fourth force [...] we thought you are more professional, more daring, have more legal protection”); P35, pp 4-5 (Mr Haradinaj: “[W]e consider you to be the fourth pillar of the state. At least you should be that, to what extent you are, you know better. We are handing the files over to you”), 12-13 (Mr Haradinaj: “the fourth pillar is responsible. Had I been part of the media I would have published them. [...] I cannot do your job. You are the media. [...] You are the fourth pillar of the state”).

¹⁰⁴⁵ P30, p. 20 (Mr Haradinaj: “I wanted the media to publicise it as much as they dare”); P24, p. 10 (Mr Haradinaj: “if you’re brave enough, make them public”).

¹⁰⁴⁶ P6, p. 6 (Mr Haradinaj: “You received the files but you have not published them. So you did not do your job”); P24, p. 3 (Mr Haradinaj: “it is now up to the people who took copies and who promised they would publish them. I have always counted on the courage of our media. However, from what I see, nobody has the guts to talk about them, even though they took the copies”); P33, p. 3 (Mr Haradinaj: “our media in Kosovo know that one minister resigned so that he could provide you with a law on protecting the media sources. Still you do not respect it. And, secondly, when it comes to Albanians on television or elsewhere – you had the freedom [speaking to one of the reporters], but people showed them on other TV channels [...]. However, when it comes to foreigners, you are behaving differently, you are hesitating. Here is the material, publish it, brother, do not allow [...] the effort of that minister [...] go wasted”).

4. Conclusion

501. In light of the foregoing, the Panel finds that the SPO has established beyond reasonable doubt the elements of the offence charged under Count 5 in relation to both Accused.

B. VIOLATING THE SECRECY OF PROCEEDINGS – PROTECTED PERSONS (COUNT 6)

1. Parties' submissions

502. The SPO alleged that during the Indictment Period, the Accused and their Associates, without authorisation, revealed or attempted to reveal the identities and personal data of witnesses under protection in SC Proceedings and prior criminal proceedings in Kosovo.¹⁰⁴⁷ The SPO further alleged that the Accused and their Associates also encouraged, instructed and advised members of the press and public to reveal such information without authorisation.¹⁰⁴⁸

503. The SPO submitted that the identities and personal data of witnesses were protected insofar as they were subject to: (i) orders by an SC Panel or requests by the SPO for non-disclosure; (ii) protective measures issued by Kosovo courts; (iii) confidentiality and use restrictions imposed by international organisations who provided information to the SPO under such conditions; and (iv) confidentiality and use restrictions imposed by the fact that the identities and personal data of witnesses were included in confidential material.¹⁰⁴⁹ According to the SPO, the Accused and Associates: (i) publicly stated that the Confidential Information included identities, personal data and evidence of witnesses and related to confidential SITF/SPO

¹⁰⁴⁷ Transcript, 14 March 2022, pp 3431-3432, 3436; F565 SPO Final Trial Brief, paras 255-258; F477, paras 59, 68; F181/A01 SPO Pre-Trial Brief, paras 197, 205; F251/A01 Indictment, para. 34.

¹⁰⁴⁸ F251/A01 Indictment, para. 34.

¹⁰⁴⁹ Transcript, 14 March 2022, 3437-3438, 3440; F565 SPO Final Trial Brief, para.238; F477, paras 63-66; F181/A01 SPO Pre-Trial brief, paras 198-202.

investigations;¹⁰⁵⁰ and (ii) acknowledged that the identities and personal data of witnesses should not, by law, be publicly disseminated.¹⁰⁵¹

504. The SPO also alleged that the unauthorised revelation of protected witness identities and personal data resulted in serious consequences for the witnesses and severely hindered SPO investigations.¹⁰⁵² In particular, the SPO averred that witnesses and/or their family members were intimidated. Their safety, privacy, reputations and livelihoods were threatened.¹⁰⁵³ Further, the SPO was forced to take measures to address actual and potential consequences, including to its witnesses and SC Proceedings.¹⁰⁵⁴ The SPO submitted that the Accused intended to cause serious consequences for witnesses under protection in SC Proceedings or that, at a minimum, they were aware that this prohibited consequence might ensue, and they acceded to the occurrence of this prohibited consequence.¹⁰⁵⁵ The SPO also added that it made urgent efforts to retrieve each of the three Batches and never told the Accused that they could keep Batch 1 for up to one month.¹⁰⁵⁶

505. In its Final Trial Brief, the SPO submitted that the Accused named a number of Serbian officials whose cooperation with the SPO was revealed for the first time. The SPO also averred that these names were contained in Batch 1. In particular, the SPO indicated that the names, last known addresses and telephone numbers of [REDACTED] were included in confidential annexes to various SITF Requests, amongst other witnesses and potential witnesses whom the SITF sought to interview.¹⁰⁵⁷ According to the SPO, these individuals qualified as witnesses, because

¹⁰⁵⁰ Transcript, 14 March 2022, pp 3436-3438; F565 SPO Final Trial Brief, paras 236-237, 241; F251/A01 Indictment, para. 34.

¹⁰⁵¹ F251/A01 Indictment, para. 34. *See also* Transcript, 14 March 2022, pp 3430-3431, 3433.

¹⁰⁵² Transcript, 14 March 2022, pp 3440-3441; F565 SPO Final Trial Brief, para. 259; F477, para. 67; F181/A01 SPO Pre-Trial Brief, para. 204; F251/A01 Indictment, para. 35.

¹⁰⁵³ F251/A01 Indictment, paras 22, 32.

¹⁰⁵⁴ F251/A01 Indictment, para. 22.

¹⁰⁵⁵ Transcript, 14 March 2022, pp 3442-3443; F565 SPO Final Trial Brief, para. 259. *See also* F477 para. 62.

¹⁰⁵⁶ F565 SPO Final Trial Brief, paras 247-249.

¹⁰⁵⁷ F565 SPO Final Trial Brief, para. 243.

they were persons who had information about crimes within SC jurisdiction.¹⁰⁵⁸ The SPO further alleged that the Accused also named Albanian witnesses whose evidence was relied upon by the SPO, [REDACTED]. According to the SPO, the name of this person was mentioned in Batch 3 and, while this person was publicly known at the time, the SPO had never confirmed whether this or any other person was a witness in its developing investigations.¹⁰⁵⁹

506. The Defence submitted that the SPO failed to prove that the information disclosed by the Accused was that of persons under protection at the time of the alleged offence and that the Accused had knowledge of that.¹⁰⁶⁰ Moreover, the Gucati Defence claimed that there is no evidence of serious consequences for the persons under protection or of criminal proceedings being made impossible or severely hindered.¹⁰⁶¹

507. The Defence also challenged the evidence of Mr Jukić, *inter alia*,¹⁰⁶² on: (i) the number of witnesses the SPO called in the aftermath of the charged events;¹⁰⁶³ (ii) the number of witnesses stating that they had received direct threats during or in the aftermath of the charged events;¹⁰⁶⁴ (iii) Mr Jukić's account of some of the conversations he had with witnesses he spoke to in the aftermath of the charged

¹⁰⁵⁸ F565 SPO Final Trial Brief, para. 244.

¹⁰⁵⁹ F565 SPO Final Trial Brief, para. 245.

¹⁰⁶⁰ Transcript, 16 March 2022, pp 3664, 3696; F567 Gucati Final Trial Brief, paras 84-87; F439, paras 89-92, 94-95; F440, paras 41, 164-167.

¹⁰⁶¹ F567 Gucati Final Trial Brief, para. 92.

¹⁰⁶² *See supra* paras 52-58 (Admission and Evaluation of Evidence).

¹⁰⁶³ *See e.g.* F566 Haradinaj Final Trial Brief, para. 237.

¹⁰⁶⁴ F566 Haradinaj Final Trial Brief, paras 146-147, 153-159, 238; Transcript, 15 March 2022, pp 3609-3611. *See also* W04842 (Miro Jukić), Transcript, 4 November 2021, p. 1834.

events,¹⁰⁶⁵ (iv) the number of witnesses subject to relocation;¹⁰⁶⁶ and (v) the amount of time Mr Jukić spent dealing with the consequences of the Accused's actions.¹⁰⁶⁷

2. The Panel's findings on the *actus reus* of the basic form of the offence

508. The Panel will assess below whether the Accused revealed, without authorisation, information on the identity or personal data of a person under protection in the criminal proceedings.¹⁰⁶⁸ The Panel notes that the SPO does 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 shall not be addressed.

(a) "[P]erson under protection in the criminal proceedings"

509. The Panel recalls its above finding that the notion of "a person under protection in the criminal proceedings" covers any person in relation to whom there is a legal requirement, an order or a measure of protection issued or implemented in criminal proceedings. The Panel will therefore define the scope of the term "person" for this count before determining whether such persons were "under protection in the criminal proceedings".¹⁰⁶⁹

i) Scope of the term "person"

510. The Panel notes that the SPO pleadings under this count refer to "witnesses" and not "persons", thereby narrowing the scope of application of Article 392(2) of the KCC.

¹⁰⁶⁵ F566 Haradinaj Final Trial Brief, para. 144; *see also* Transcript, 15 March 2022, pp 3621-3622; W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1703-1706, 1758-1759; Transcript, 4 November 2021, pp 1833, 1880-1881.

¹⁰⁶⁶ F566 Haradinaj Final Trial Brief, paras 170, 173-175, 371-372. *See also* W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1888-1889; Transcript, 15 March 2022, pp 3618-3621.

¹⁰⁶⁷ *See* F566 Haradinaj Final Trial Brief, paras 70-71, 88; W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1823-1824. *See also* Transcript, 15 March 2022, pp 3609, 3626.

¹⁰⁶⁸ *See supra* para. 89 (Applicable Law).

¹⁰⁶⁹ *See supra* para. 95 (Applicable Law).

The Panel will therefore assess the scope of the term “witness” for the purposes of Count 6.

511. The SPO defines witness as “any person(s) likely to have information about a crime, the perpetrator, or important circumstances relevant to SC Proceedings”.¹⁰⁷⁰ The Panel observes that this definition is broader than that used by Ms Pumper.¹⁰⁷¹ She defined a witness as a person whom the SITF/SPO had met and had obtained information from, including in the form of an interview.¹⁰⁷² Ms Pumper also defined 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.¹⁰⁷³ The Panel notes that Ms Pumper’s definitions are comparable in scope with those of the Pre-Trial Judge, who defined an “information provider” as any person providing information to the SITF and/or SPO about any crimes or offences falling under SC jurisdiction and a “potential information provider” as any person likely to provide information to the SITF, the SPO and/or to any SC Panel about any crimes or offences falling under SC jurisdiction.¹⁰⁷⁴ Ms Pumper’s definition is also consonant with the definition of “witnesses” set out in the Law on Witness Protection, Law No. 04/L-015, which is expressly incorporated by Article 23(1) and (4) of the Law. Ms Pumper’s definition is also generally consistent with the definition of the notion of “witness” adopted in other instruments dealing with the protection of witnesses in judicial proceedings.¹⁰⁷⁵

512. The Panel considers that Ms Pumper’s definitions accurately and reasonably describe the notion of witnesses and potential witnesses within a criminal investigation. Conversely, the Panel considers that the SPO definition of a “witness”

¹⁰⁷⁰ F251/A01 Indictment, para. 4. *See also* F565 SPO Final Trial Brief, para. 18; F281, para. 3.

¹⁰⁷¹ *See supra* para. 344 (Findings on the Batches).

¹⁰⁷² W04841 (Zdenka Pumper), Transcript, 20 October 2021, p. 1080.

¹⁰⁷³ W04841 (Zdenka Pumper), Transcript, 20 October 2021, p. 1080.

¹⁰⁷⁴ F74 Confirmation Decision, paras 54, 61.

¹⁰⁷⁵ *See e.g.* [Council of Europe Recommendation on Witness Protection](#), Appendix, section 1 (“Definitions”).

is overly broad and is not supported by relevant law nor by the evidence it adduced. In particular, the core issue for Count 6 is the alleged revelation of the identity of “witnesses” contained in the Batches. This allegation also forms part of Counts 1-4. The only evidence the SPO adduced on the presence of names and other details of witnesses in the Batches was that of Ms Pumper. The Panel is satisfied that her analysis and conclusions regarding the presence and number of such names or other identifying details in the Batches were based on her accurate and reasonable definitions of witnesses and potential witnesses. While the Defence challenged the manner in which Ms Pumper verified who was an SPO (potential) witness, it did not challenge her definitions of these terms.¹⁰⁷⁶ Accordingly, the Panel is satisfied that it can rely on Ms Pumper’s above definitions (“Witnesses”, “Potential Witnesses”) and on her conclusions regarding the presence of the names of such persons in the material which she reviewed.

513. For these reasons, the Panel finds that the term “person” under Count 6 covers Witnesses and Potential Witnesses. Further to its findings in paragraphs 379-381, the Panel finds that SITF/SPO witnesses and potential witnesses named in the SITF Requests and WCPO Responses contained in Batches 1, 2 and 4 and in Batch 3 qualify as Witnesses and Potential Witnesses for the purpose of Count 6 and within the meaning of Article 392(2) of the KCC.

514. In relation to the four Serbian officials whom Ms Pumper identified as being listed “amongst other witnesses and potential witnesses” in SITF Requests of Batch 1,¹⁰⁷⁷ the Panel notes that the alleged revelation of their names or other identifying details falls within the scope of Count 6 only to the extent that the individuals concerned qualify as Witnesses or Potential Witnesses. As regards the alleged revelation of the identity of other Serbian officials, who do not qualify as above, the Panel notes that the SPO did not plead this as a separate allegation under

¹⁰⁷⁶ W04841 (Zdenka Pumper), Transcript, 20 October 2021, pp 1080-1084.

¹⁰⁷⁷ See *supra* para. 345 (Findings on the Batches).

any count and the Panel shall not entertain it as such. In any event, to the extent that the names or other identifying details of Serbian officials were contained in the Protected Information, their revelation would fall under the scope of Count 5, as part of the content of such information. This does not apply to Mr Vukčević, whose cooperation with the SITF has been made public by its former Chief Prosecutor.¹⁰⁷⁸

ii) “[U]nder protection in the criminal proceedings”

515. As found in paragraph 458, the SITF/SPO, in the performance of its functions, treated as confidential the Protected Information and its content, including the names, details and statements of Witnesses and Potential Witnesses. The Panel found that the SITF/SPO was competent to do so by virtue of its authority and responsibility to protect information and persons during its investigations,¹⁰⁷⁹ which form part of criminal proceedings.¹⁰⁸⁰ The Panel considers that the SITF/SPO’s decision to treat as confidential the Protected Information was also a measure that it adopted pursuant to Article 35(2)(f) of the Law and Rule 30(2)(a) of the Rules to place Witnesses and Potential Witnesses under SITF/SPO protection.¹⁰⁸¹ Proof of this measure still being in place was the fact that the SITF/SPO did not publicly disclose the names of these Witnesses and Potential Witnesses in the framework of its investigations.

516. For these reasons, the Panel finds that the Witnesses and Potential Witnesses contained in the Protected Information were under protection in criminal proceedings, within the meaning of Article 392(2) of the KCC.

517. As regards the SPO’s submissions that Witnesses and Potential Witnesses in Batch 3 were under protection also by virtue of orders of SC Panels, SPO requests, Kosovo court orders or restrictions imposed by international organisations

¹⁰⁷⁸ C1, p. 6. *See also* Transcript, 6 December 2021, pp 2146-2147 (Oral Order on the Use of Names Mentioned in the Batches).

¹⁰⁷⁹ *See supra* paras 471-473 (Count 5).

¹⁰⁸⁰ *See supra* para. 74 (Applicable Law).

¹⁰⁸¹ *See supra* para. 95 (Applicable Law).

(“Additional Measures of Protection”), the Panel observes that no evidence was adduced to show that the Accused were aware of the existence of any of the Additional Measures of Protection or of the protected status of Witnesses and Potential Witnesses by virtue of those measures. While the Panel agrees with the SPO that the Accused need not be aware of the specific law or court order conferring protection to a witness,¹⁰⁸² this does not mean that the Panel can impute to the Accused the violation of protections of which the Accused could not have been aware and of which they were not demonstrably aware. Doing so would raise serious questions of accessibility of the legal basis criminalising certain conduct and the foreseeability of criminal liability based thereon.¹⁰⁸³ For instance, the KCC, the Law and the Rules are accessible laws criminalising certain conduct and rendering criminal liability foreseeable for any individual. Conversely, non-public orders or measures, even if stemming from these laws, can only serve as independent legal bases for criminal liability if the person in question can be shown to have been aware of their existence or their effect to an extent that allows him or her to appreciate their relevance to the lawfulness of his or her conduct. In the present case, while the Accused were perfectly capable of ascertaining the confidentiality of information and names in the Three Sets and were also aware that their publication could lead to criminal responsibility,¹⁰⁸⁴ they could not have been aware of specific and non-public orders or measures providing additional protection.

518. For these reasons, the Panel will refrain from relying on the Additional Measures of Protection for the purposes of establishing that any Witnesses or Potential Witnesses were under protection in criminal proceedings for the purpose of this case.

¹⁰⁸² F565 SPO Final Trial Brief, para. 239.

¹⁰⁸³ See ECtHR, [Müller et al. Judgment](#), para. 29; [Cantoni Judgment](#), para. 29; [Kafkaris GC Judgment](#), para. 140; [Del Río Prada GC Judgment](#), para. 79.

¹⁰⁸⁴ See *supra* paras 440-448 (Findings on the Batches), *infra* paras 896-900 (Defences).

(b) “[R]eveals information on the identity or personal data”

519. The Panel has found that the Accused revealed Protected Information through the acts described in paragraphs 481-483. Through the same acts, the Accused also made available to others the identity and/or personal data of Witnesses and Potential Witnesses contained in the Protected Information.

520. In addition to the above acts, the Accused pointed at the presence in the Three Sets of names, past and present residence, phone numbers, ethnicity, interview locations and content of statements of witnesses. They did so during the Three Press Conferences, at other media appearances and in Facebook posts.¹⁰⁸⁵ The Accused also invited journalists to acquaint themselves with such information.¹⁰⁸⁶ Mr Haradinaj publicly named at least five Witnesses or Potential Witnesses, namely [REDACTED].¹⁰⁸⁷

¹⁰⁸⁵ P1, pp 2 (Mr Haradinaj: “in here are the names of all the witnesses who they say are under their protection”), 4 (Mr Gucati: “The information received in 2013 [...] about witnesses, who were summoned and taken to Beograd, all of them”), 5 (Mr Haradinaj: “there are statements here, there is the name, the surname of the person, the place where he lived, the place where he currently lives, telephone numbers here and there”); P8, p. 11 (Mr Haradinaj, when asked whether he knew any people involved in the files: “It is only normal, if it was the name of a person I knew that I read, I knew him”); P9, pp 6-7 (Mr Gucati: “We wouldn’t release the names [...] because I don’t know people [...]. There is a wide-range of people, there are Serbian, there are Roma, Turks...”), 7, 10 (Mr Gucati indicating the location and date of some of the witness interviews, stating that some witnesses were Albanian and confirming that the content of witness interviews is contained in the First Set); P18, p. 3 (Mr Haradinaj: “the first dossier contained many names”); P11, p. 30 (Mr Haradinaj); P28, pp 2, 11, 13 (Mr Gucati); P29, p. 1 (Mr Gucati); P30, pp 4, 12 (Mr Haradinaj); P35, pp 1 (Mr Gucati: “There are various people, various names whom we are not authorized to disclose”), 3 (Mr Haradinaj: “there are names here on the basis of which they have raised those [...] indictments. [...] [t]he particulars of many people are mentioned here. [REDACTED] as are the names of many, many other people”), 14 (Mr Gucati: “They are Albanians too [...] 80% of the people who have given evidence there are Albanians”); P59, p. 1 (Mr Gucati: “The files [...] include the names of the majority of the witnesses”).

¹⁰⁸⁶ P1, p. 5 (Mr Haradinaj: “we will give you as many copies as you want. You can read as many names as you want in here”); P35, p. 2 (Mr Gucati: “There are many names here today, names of different people. [...] You could come a bit closer and have a look at it. Here they are!”), 13-14 ([Journalist]: “[REDACTED], was it in there too? [...] Mr Haradinaj: Come and read it here. Mr Gucati: You have the document in front of you, we gave it to you. Mr Haradinaj: Come and read it. Mr Gucati: Here is the material. You are welcome to read it”). *See also supra fn.* 1042.

¹⁰⁸⁷ P1, p. 2; [REDACTED].

521. As regards the Defence argument that the Accused did not reveal the names of witnesses because they did not utter them and repeatedly asked journalists not to publish such names,¹⁰⁸⁸ the Panel first notes that, as said above, Mr Haradinaj did in fact name five Witnesses or Potential Witnesses. Whether he was authorised to do so will be addressed below.¹⁰⁸⁹ Second, the Panel recalls that the revelation of information encompasses more than just utterances or public announcements.¹⁰⁹⁰ Having considered the aforementioned evidence, the Panel is satisfied that the Accused revealed the identity and/or personal data of Witnesses and Potential Witnesses contained in the Protected Information by: (i) displaying and making available the Three Sets during the Three Press Conferences; (ii) publicly and repeatedly pointing at the presence of names, past and present residence, phone numbers, ethnicity, interview locations and content of statements of witnesses, during the Three Press Conferences, other media appearances and Facebook posts; and (iii) allowing or inviting persons present at the KLA WVA premises and the Three Press Conferences to look at the names and statements of witnesses and, generally, to read, inspect, review, photograph, film or take copies of the Three Sets or parts thereof. The argument regarding the Accused's advice to journalists not to publish such names will be further discussed in relation to the requisite *mens rea* for this offence and the one under Count 3.¹⁰⁹¹

522. For these reasons, the Panel finds that the Accused revealed the identity and/or personal data of Witnesses and Potential Witnesses under SITF/SPO protection, within the meaning of Article 392(2) of the KCC.

¹⁰⁸⁸ F566 Haradinaj Final Trial Brief, paras 384-385; F440, paras 165-166.

¹⁰⁸⁹ See *infra* paras 523-526.

¹⁰⁹⁰ See *supra* paras 72 (Applicable Law), 484 (Count 5).

¹⁰⁹¹ See *infra* paras 531 (Count 6), 590 (Count 3).

(c) “[W]ithout authorization”

523. The Panel has found that the Accused revealed the Protected Information without authorisation,¹⁰⁹² as the status of such information could only be altered through measures pursuant to Articles 61(4), 62 of the Law or Rules 80-84 of the Rules.¹⁰⁹³ The Panel has also established that the identity and personal data of Witnesses and Potential Witnesses were under protection by virtue of being contained in the Protected Information.¹⁰⁹⁴

524. As regards the Defence argument that the names of some Witnesses or Potential Witnesses were not or no longer protected because they had already been in the public domain at the time relevant for the charges, the Panel observes the following. First, as noted above,¹⁰⁹⁵ the fact that the identity of a person is publicly known cannot be equated to his or her identity as a *person under protection in criminal proceedings* being revealed. In particular, the fact that the identity or the official function of a person is publicly known does not mean that his or her status as a Witness or Potential Witness under SITF/SPO protection can be made public. Second, the fact that a person provided evidence to Kosovo or ICTY prosecutors or testified before the ICTY or a Kosovo court does not mean that his or her protected status as a Witness or Potential Witness in SITF/SPO investigations is forfeited. Third, the fact that a Witness or Potential Witness under SITF/SPO protection makes his or her protected status publicly known does not mean that the SITF/SPO is no longer required to protect that person or that others are entitled to further disseminate such information. The Panel underscores that the protected status of a Witness or Potential Witness in SITF/SPO investigations derives from the SC legal framework. Accordingly, it is only the SPO or the SC that can waive or alter such protected status in accordance with the relevant

¹⁰⁹² See *supra* para. 489 (Count 5).

¹⁰⁹³ See *supra* paras 77-78 (Applicable Law), 471 (Count 5).

¹⁰⁹⁴ See *supra* paras 515-516 (Count 6).

¹⁰⁹⁵ See *supra* para. 98 (Applicable Law).

provisions. In other words, the authority and responsibility of the SPO and the SC to maintain the protected status of a person does not cease because that status has become known in one of the aforementioned ways or in any other manner not authorised by the SC legal framework.¹⁰⁹⁶

525. As regards the Defence argument that the Accused were authorised to reveal the names of certain Serbian officials who allegedly committed crimes, the Panel considers that its findings in paragraph 487 regarding the inapplicability of public interest as an alternative source of authorisation are equally valid here. Whether the same considerations can exclude criminal responsibility shall be addressed when analysing the defences raised.¹⁰⁹⁷

526. For these reasons, the Panel finds that the Accused revealed the identity and/or personal data of Witnesses and Potential Witnesses under SITF/SPO protection without authorisation, within the meaning of Article 392(2) of the KCC.

(d) Conclusion

527. In light of the above, the Panel is satisfied that the *actus reus* of the offence of violating the secrecy of proceedings under Article 392(2) of the KCC has been established beyond reasonable doubt.

3. The Panel's findings on the *mens rea* of the basic form of the offence

528. Before assessing the Accused's *mens rea* for this offence, the Panel recalls its findings that the Accused acted with the awareness that the Three Sets: (i) were authentic;¹⁰⁹⁸ and (ii) included names of witnesses who were protected.¹⁰⁹⁹ The Panel has also found that the Accused acted with awareness of, and desire for, revealing,

¹⁰⁹⁶ See e.g. ICTY, [Hartmann Trial Judgment](#), paras 43, 46. See also W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1759-1760.

¹⁰⁹⁷ See *infra* paras 810-824 (Defences).

¹⁰⁹⁸ See *supra* para. 423 (Findings on the Batches).

¹⁰⁹⁹ See *supra* paras 379-381, 456, 467 (Findings on the Batches).

without authorisation, the Protected Information.¹¹⁰⁰ Taking these findings into consideration, the Panel will assess below whether the Accused acted with direct or eventual intent in revealing, without authorisation, the identity or personal data of Witnesses and Potential Witnesses under SITF/SPO protection.

529. The Panel notes at the outset that the acts described in paragraphs 519-520 reflect the Accused's clear resolve to reveal the identity and personal data of Witnesses and Potential Witnesses under SITF/SPO protection.

530. In particular, the Accused made available the Protected Information to journalists in full awareness that it contained the names and details of witnesses that they themselves considered to be protected.¹¹⁰¹ They did so despite judicial orders and SPO requests to desist from disseminating such information.¹¹⁰² Moreover, as found above, the Accused also vowed repeatedly to make public any new SC/SPO documents received without any distinction as to the content of such documents.¹¹⁰³

531. As regards the Defence argument that the Accused acted lawfully because they advised journalists not to publish any names, the Panel recalls that both Accused were aware of the prohibition contained in the First Order, Second Order and SPO Order regarding the multiplication and dissemination of documents.¹¹⁰⁴ Despite these orders, the Accused continued to make available to journalists Protected Information containing such names. Moreover, they repeatedly drew attention to the presence of names in the material they revealed and they did so, in particular, during the

¹¹⁰⁰ See *supra* para. 499 (Count 5).

¹¹⁰¹ See *supra* paras 446-448, 456 (Findings on the Batches).

¹¹⁰² See *supra* paras 440-441 (Findings on the Batches).

¹¹⁰³ See *supra* paras 481-482 (Count 5). See also P2, p. 4 (Mr Haradinaj); P4, pp 3, 8 (Mr Gucati); P18, p. 1 (Mr Haradinaj); P21, p. 3 (Mr Haradinaj); P24, p. 7 (Mr Haradinaj); P28, pp 7, 11-13 (Mr Gucati); P29, p. 2 (Mr Gucati); P31, p. 2 (Mr Gucati); P35, p. 3 (Mr Haradinaj).

¹¹⁰⁴ P4, p. 8 (Mr Gucati); P17, p. 6 (Mr Haradinaj).

Three Press Conferences and other media appearances,¹¹⁰⁵ which were televised and presumably had a broad audience. Accordingly, the Panel is satisfied that the Accused intended, at all relevant times, to reveal witness names in the Three Sets. The argument that they did not utter the names of witnesses will be further discussed below.¹¹⁰⁶

532. For these reasons, the Panel finds that the Accused acted with awareness of, and desire for, revealing, without authorisation, the identity and personal data of Witnesses and Potential Witnesses under SITF/SPO protection.

533. In light of the above, the Panel is satisfied that the *mens rea* of the offence of violating the secrecy of proceedings under Article 392(2) of the KCC has been established beyond reasonable doubt.

4. The Panel's findings on the aggravated form of the offence

534. The Panel recalls that Article 392(3) of the KCC penalises and the SPO pleads 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) the criminal proceedings being severely hindered or made impossible.¹¹⁰⁷

(a) Serious consequences for the persons protected under Article 392(2) of the KCC

535. As found above, the Protected Information contained the names or other identifying details of hundreds of Witnesses and Potential Witnesses.¹¹⁰⁸ The Accused revealed this information, including by allowing journalists to take and make copies thereof, which resulted in 70-80% of the material received being disseminated.¹¹⁰⁹ As a

¹¹⁰⁵ P1, pp 2 (Mr Haradinaj), 4 (Mr Gucati), 5 (Mr Haradinaj); P8, p. 11 (Mr Haradinaj); P9, pp 6-7, 10 (Mr Gucati); P11, p. 30 (Mr Haradinaj); P18, p. 3 (Mr Haradinaj); P28, pp 2, 11, 13 (Mr Gucati); P29, p. 1 (Mr Gucati); P30, pp 4, 12 (Mr Haradinaj); P35, pp 1 (Mr Gucati), 3 (Mr Haradinaj), 14 (Mr Gucati).

¹¹⁰⁶ See *infra* paras 590 (Count 3), 896-906 (Defences).

¹¹⁰⁷ See *supra* para. 100 (Applicable law).

¹¹⁰⁸ See *supra* paras 379-381 (Findings on the Batches).

¹¹⁰⁹ P4, p. 3; P6, pp 17-18, 36; P7, pp 7, 11; P17, p. 6; P35, p. 6; DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2281-2283.

result, it was left to chance where and in whose hands the information revealed by the Accused would end up.¹¹¹⁰

i) Serious consequences

536. The Panel heard the evidence of Mr Jukić that, as a result of the revelation of Protected Information, two Witnesses were relocated outside of Kosovo.¹¹¹¹ This was based on an individualised assessment of a high level of risk posed to the persons concerned.¹¹¹² The Panel notes that the Defence challenged Mr Jukić's evidence regarding the number of relocated witnesses.¹¹¹³ The Panel considers, however, that it is apparent from Mr Jukić's evidence that the two individuals concerned were relocated under different procedures, but Mr Jukić considered both measures to amount to relocation.¹¹¹⁴ There is no credible indication that Mr Jukić exaggerated or lied about the number of relocated Witnesses. Instead, the Panel is satisfied that the high level of risk that made the relocation of these persons necessary and the negative consequences associated with such a measure (e.g. losing access to one's home, community and family) amount to serious consequences within the meaning of Article 392(3) of the KCC in relation to these two Witnesses.

537. Mr Jukić also indicated that, as a result of the revelation of Protected Information, emergency risk planning was undertaken in relation to a number of Witnesses.¹¹¹⁵

¹¹¹⁰ See e.g. P1, p. 5; P24, pp 3, 6.

¹¹¹¹ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1707-1709, 1761-1762; Transcript, 4 November 2021, pp 1887-1892, 1901-1902, 1905-1906.

¹¹¹² W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1707-1709, 1760-1761.

¹¹¹³ Haradinaj Final Trial Brief, paras 170, 173-175, 371-372. See also W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1888-1889; Transcript, 15 March 2022, pp 3618-3621.

¹¹¹⁴ W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1901-1902. See also Transcript, 28 October 2021, pp 1707-1709, 1760, 1762-1763; Transcript, 4 November 2021, pp 1888-1889.

¹¹¹⁵ The Panel notes that Mr Jukić indicated that, apart from the two relocations, there were between 20 and 30 other security or protective measures adopted as a result of the revelation of information. See W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1763. Mr Jukić did not specify how many of these measures were emergency risk management plans. Furthermore, the only other measure mentioned by Mr Jukić was the handing out of phones, which he said was done in respect of 5-10 witnesses and which,

Mr Jukić explained that emergency risk planning was an exceptional measure adopted on an individual basis when the risk to a witness was considered to be high and when their extraction should therefore be planned in case the risk materialised.¹¹¹⁶ The Panel is satisfied that the high level of risk that made such measures necessary and the ensuing awareness of the affected persons that they were at risk of harm and imminent relocation amount to serious consequences within the meaning of Article 392(3) of the KCC in relation to these Witnesses.

538. Furthermore, the Panel notes that, [REDACTED], Mr Haradinaj specifically identified [REDACTED] as mentioned in the Third Set.¹¹¹⁷ [REDACTED].¹¹¹⁸ The Panel is thus satisfied 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,¹¹¹⁹ the fear and concern resulting from being publicly named as a Witness, further to earlier derogatory statements,¹¹²⁰ amount to serious consequences within the meaning of Article 392(3) of the KCC in relation to that Witness.

in the Panel's interpretation does not amount to emergency risk planning. *See* Transcript, 4 November 2021, pp 1882-1883.

¹¹¹⁶ W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1708, 1760-1761. *See also* Transcript, 4 November 2021, p. 1885.

¹¹¹⁷ [REDACTED].

¹¹¹⁸ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1790-1793.

¹¹¹⁹ P165 (Mr Reid: "Witness intimidation in the trials for Kosovo, I've really never seen anything like it before"); DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3304-3307; Transcript, 28 January 2022, pp 3359-3361; W04842 (Miro Jukić), Transcript, 28 October, pp 1704 ("I recall that one of them said that he trusted us and now his name is in public and he and his family are in danger, and he told me that, 'I know very well what happened to the witnesses in Kosovo.'"), 1758-1759 ("I have some knowledge and experience in the Balkan region and in Kosovo during my work for International Criminal Tribunal for the former Yugoslavia. There was a lot of incidents happen to the witnesses. And also I know from my experience that there was some incidents in -- during the UNMIK and EULEX time when some witnesses was -- were threatened. I -- I think that was what that person was thinking during the phone call"); Transcript, 4 November 2021, pp 1885-1886 (testifying that two or three emergency risk management plans were put in place in the two years before 7 September 2020, apparently unrelated to the Accused).

¹¹²⁰ [REDACTED], Post of another person shared on Mr Haradinaj's Facebook account, [REDACTED].

539. Finally, regarding other Witnesses or Potential Witnesses whose identity or personal data were revealed by the Accused, Mr Jukić indicated that, as a result of the revelation of Protected Information: (i) “a lot of people” were concerned, scared, expressed fears and felt threatened;¹¹²¹ (ii) some of the individuals called by the SPO to be informed about the leak screamed on the phone, and some asked no longer to be contacted;¹¹²² (iii) individuals who called the SPO were very angry;¹¹²³ and (iv) two persons took their family away out of precaution.¹¹²⁴ Mr Jukić stated that two persons received direct threats,¹¹²⁵ but the Panel considers that it is not clear whether these threats were the result of the Accused’s actions; the Panel will therefore not rely upon this evidence for the present purposes. Mr Jukić also indicated that others were not worried about the events.¹¹²⁶

540. The Panel notes that the Defence challenged many of the above indications.¹¹²⁷ As regards the Defence challenges regarding the number of witnesses the SPO called, the Panel observes that only some of the Contact Notes were admitted in evidence.¹¹²⁸ The Panel is accordingly not in a position to evaluate, on the basis of the admitted Contact Notes, exactly how many witnesses were called or met by the SPO. The Panel also observes that some of the Contact Notes relate to exchanges with more than one Witness.¹¹²⁹ As a result, the Panel sees no reason to conclude that Mr Jukić exaggerated or lied about the number of contacted Witnesses. As regards the Defence challenge regarding the veracity of Mr Jukić’s account of some of the conversations he had with Witnesses, the Panel notes that the Contact Notes are not a verbatim account of those

¹¹²¹ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1693, 1699. *See also* P130; P131; P132; P135; P136; P137.

¹¹²² W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1702-1703.

¹¹²³ W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1703

¹¹²⁴ P131; P136; W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1714, 1727-1728. *See also* Transcript, 28 October 2021, pp 1748-1749.

¹¹²⁵ W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1833-1834.

¹¹²⁶ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1722-1723. *See also* P133.

¹¹²⁷ *See supra* paras 506-507 (Count 6).

¹¹²⁸ P130-132, 135-P137.

¹¹²⁹ *See* P135; P136; W04842 (Miro Jukić), 28 October 2021, p. 1726; Transcript, 4 November 2021, p. 1819.

exchanges. Rather, they are summaries of numerous conversations with Witnesses recorded over a relatively short period. The fact that none of the Contact Notes prepared by Mr Jukić contained an express reference to a Witness having “screamed” on the phone or that they do not record the manner or tone in which Witnesses expressed their concerns, does not call into question the accuracy or reliability of Mr Jukić’s account. Similarly, the fact that none of the Contact Notes recorded a Witness stating that he or she knew what happened to witnesses in Kosovo does not render this account unreliable. Considering that many of these Witnesses expressed fear and concern to those calling them, it is highly likely that the records of these calls would not register every aspect of what was said. There is accordingly no indication that Mr Jukić’s account on these points was untruthful.

541. The Panel notes, however, that the SPO opted not to call any of these Witnesses to testify about the consequences of the Accused’s actions upon them and the basis on which they formed their views regarding those consequences. This aspect sets the evidence regarding these Witnesses apart from the previous categories discussed. In particular, the Panel found above that serious consequences were established in relation to a number of Witnesses, relying on the evidence of Mr Jukić about measures taken by the SPO as a result of risk assessments made by him and his colleagues in the performance of their functions. The Defence had ample opportunity to test the accuracy and reliability of this evidence. Conversely, the Defence had no opportunity during the trial effectively to test the evidence of Witnesses whose concerns were recorded in the Contact Notes. Accordingly, the Panel shall refrain from making findings in respect of these individual Witnesses or categories of Witnesses. As a result, while the Panel is cognisant that the actions of the Accused would have created a climate of fear and concern among Witnesses and Potential Witnesses and that such fears and concerns were by no means inconsequential,¹¹³⁰ the Panel finds that the SPO

¹¹³⁰ See *infra* paras 582-585 (Count 3).

has not established serious consequences within the meaning of Article 392(3) of the KCC in relation to any of these other Witnesses or Potential Witnesses.

ii) Awareness that serious consequences can occur

542. The Panel notes that both Accused were aware that the revelation of the identity or personal data of Witnesses or Potential Witnesses could lead to serious consequences for witnesses. This is apparent from the fact that the Accused repeatedly asked journalists not to publish such names, thereby showing an awareness of the risks associated therewith.¹¹³¹

543. When it was drawn to Mr Gucati's attention that "many things could happen" because "the names may then come out", he was unambiguous about his indifference: "Could happen...".¹¹³² Furthermore, a post on Mr Gucati's Facebook account noted that the SC should be prosecuted for "jeopardising the witnesses whose names are included in these documents".¹¹³³

544. Mr Haradinaj was also aware of possible negative consequences for those concerned. He believed that the SC/SPO had been "playing with people's lives" for allowing the leaks and he stated that "it is irresponsible to play with people's lives because that is what they have done".¹¹³⁴ Mr Haradinaj was also aware that the revelation "has created a sense of worry and the realization that...they were misled", and that "now people are self-conscious".¹¹³⁵ When a journalist hypothesised that "in case these names are published, supposedly, these people are killed", Mr Haradinaj responded that "in order to keep your mouth shut, you should be questioned if someone is killed, because you know that someone is going to be killed. We do not

¹¹³¹ See *supra* para. 531.

¹¹³² P9, p. 8.

¹¹³³ P59, p. 1.

¹¹³⁴ P11, p. 39.

¹¹³⁵ P11, p. 65.

believe that anyone will be killed”.¹¹³⁶ When asked whether the revealing of documents could present any danger “for someone, for the witnesses”, Mr Haradinaj answered that journalists to whom they had given the material should take responsibility for it.¹¹³⁷ When Mr Tomë Gashi commented that “one might intimidate someone, but that is his business”, Mr Haradinaj replied that “[t]he witnesses have no reason [...] to be intimidated by these people, because these people have nothing to intimidate them with”.¹¹³⁸ He also agreed that misuse of information was a criminal offence, but that so were false testimony and fabrication of facts.¹¹³⁹ He also systematically rejected the suggestion by others that their actions would bring a sense of fear among witnesses.¹¹⁴⁰ In Mr Haradinaj’s words: “The issue does not concern the witnesses because they are of no interest to us”.¹¹⁴¹

¹¹³⁶ P2, p. 7.

¹¹³⁷ P6, pp 22-23.

¹¹³⁸ P7, pp 8-9.

¹¹³⁹ P7, pp 8-9.

¹¹⁴⁰ See e.g. P11, p. 65 ([Interlocutor 1]: “This has brought a sense of fear for witnesses. [Interlocutor 2]: Certainly. Mr Haradinaj: No, it hasn’t [...]. [Interlocutor 1]: Even if there weren’t any ... names, might think somebody could read it”); P25, p. 7 ([Journalist]: “But, do you think that you are risking the witnesses by publicising these files because, when you say to the public that, we have the files and the names within them....Mr Haradinaj: No, nobody is saying that we have, we have never said...[Journalist]: I’m telling you, do you think that you are frightening them? Mr Haradinaj: [...] it is not our responsibility, it is the responsibility of the person that willingly accepted to be manipulated, speculated about and blackmailed. [...]”); P34, p. 3 ([Interlocutor]: “the fact that the files of the Tribunal come to the Association of the War Veterans, is it in a way a kind of intimidation that is aimed, in addition to witnesses, to the whole process because you know that here are also names of various witnesses in there, namely Tribunal witnesses. So, is it a threat to these witnesses, who can testify, who can testify about the various crimes that took place during and after the war? Mr Haradinaj: Not at all, not at all because the witnesses have already testified at the time of the violence, at the time of the war when they were pressured, where they were threatened. And then, there are their later statements where you can’t tell whether they have the will or do not have the will, but we are not going to reveal this approach because this is the reason that we have not named them. And their names will never come out of the Association of the War Veterans, because we do not perform the tasks of dividing our people, but we stand for unification”).

¹¹⁴¹ P7, p. 2. See also P1, p. 5 (Mr Haradinaj: “The responsibility ultimately rests with the people who have undertaken to protect the witnesses. And I say this just in principle, not that I bother about the issue of those witnesses of the The Hague”).

545. The Accused tried during their testimony to deny that they were aware of the risks, but they ultimately admitted that the revealed information could be misused.¹¹⁴²

546. For these reasons, the Panel finds that the Accused were aware that serious consequences could occur as a result of their actions, and they acceded to their occurrence.

iii) Conclusion

547. For these reasons, the Panel finds that the Accused's revelation of the identity and personal data of Witnesses and Potential Witnesses resulted in serious consequences within the meaning of Article 392(3) of the KCC for the two Witnesses who were relocated, for the Witnesses who were subject to emergency risk planning and for the person who was publicly named as a Witness ("Witnesses at Risk"). The Panel further finds that the Accused were aware that these consequences could occur as a result of their actions and acceded to their occurrence.

(b) Criminal proceedings being severely hindered or made impossible

548. The Panel has received evidence that the SPO had to spend time and resources contacting and meeting with Witnesses affected by the revelation of Protected Information.¹¹⁴³ In particular, Mr Jukić testified that the SPO made around 200 calls to Witnesses in and after September 2020,¹¹⁴⁴ with him participating in approximately thirty of such calls and meeting approximately ten more Witnesses in person.¹¹⁴⁵ He

¹¹⁴² DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2308-2309; DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, pp 2833, 2843-2852.

¹¹⁴³ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1692-5, 1697-1701, 1711, 1715, 1761; Transcript, 4 November 2021, pp 1803-1805, 1818-1825, 1837-1838, 1906-1907. *See also* W04841 (Zdenka Pumper), Transcript, 19 October 2021, pp 1009-1012.

¹¹⁴⁴ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1698, 1761; Transcript, 4 November 2021, pp 1824-1825, 1907.

¹¹⁴⁵ W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1698 (explaining the process of calls to witnesses affected by the leak and numbering those at about 200 calls in total with him having made or participated in perhaps 30 of those). *See also* Transcript, 28 October 2021, pp 1701-1703.

also testified that the SPO prepared Contact Notes recording such calls and that witness security operations were re-prioritised as a result of the fears and concerns expressed by Witnesses.¹¹⁴⁶ While it is not clear from the record how much additional time and personnel was needed for these measures, the evidence shows that, without the Accused's actions, this use of investigative and prosecutorial resources would not have occurred. It continued until approximately mid-December 2020.¹¹⁴⁷ In addition, as found above, the SPO had to put in place a number of security measures in order to address the perceived threat to certain Witnesses resulting from the Accused's conduct.¹¹⁴⁸ This affected between 20 and 30 Witnesses.¹¹⁴⁹ Moreover, the SPO undertook three seizure operations for the retrieval of the Batches and one search and seizure operation at the time the Accused were arrested.¹¹⁵⁰

549. The Defence argued that Mr Jukić exaggerated the amount of time he spent dealing with the consequences of the Accused's actions; it was implied that he did so to help bolster the SPO's case.¹¹⁵¹ The Panel does not agree. Mr Jukić could not be expected to have kept a detailed record of every minute he spent dealing with these matters. Asking him to recall more than a year later the exact amount of time he spent necessarily involves an element of uncertainty and estimation.

550. While the Panel accepts that this diversion of resources put a strain on SPO operations, it is not convinced that the diversion was so significant that it severely hindered, delayed or made SPO investigations impossible.¹¹⁵² Likewise, the Panel has

¹¹⁴⁶ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1698-1699 (regarding the preparation of notes), pp 1700-1701 (regarding the planning process and re-prioritisation of activities).

¹¹⁴⁷ W04842 (Miro Jukić), Transcript, 4 November 2021, p. 1832.

¹¹⁴⁸ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1707-1709 (including distribution of phones, planning of emergency risk management, relocation of two witnesses); Transcript, 4 November 2021, pp 1882-1884 (making clear that phones were provided to a number of witnesses as a result of the September 2020 leak of information).

¹¹⁴⁹ W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1763.

¹¹⁵⁰ See *supra* paras 228-231, 256-258, 285, 297-299 (The Events at Issue).

¹¹⁵¹ See F566 Haradinaj Final Trial Brief, paras 70-71, 88; W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1823-1824. See also Transcript, 15 March 2022, pp 3609, 3626.

¹¹⁵² See *supra* para. 100 (Applicable Law).

heard no evidence that the aforementioned use of additional time and resources have led to any inability or difficulty on the part of the SPO to collect evidence. While the Panel received evidence that at least one Witness refused to engage with the SPO after the revelation of his or her name,¹¹⁵³ in the absence of any other evidence to the same effect,¹¹⁵⁴ the Panel cannot conclude that the SPO was no longer able or had difficulties collecting evidence. Furthermore, while the Panel has found that serious consequences have occurred in relation to the Witnesses at Risk, it cannot conclude on this basis that the SPO's ability to preserve the security of investigations or ensure the safety of Witnesses was lost or weakened. On the contrary, the evidence the Panel heard showed that the SPO took appropriate measures to address the situation.

551. For these reasons, the Panel finds 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.

5. Conclusion

552. In light of the foregoing, the Panel finds that the SPO has established beyond reasonable doubt the elements of the basic form of the offence charged under Count 6 in relation to both Accused. The Panel also finds that the SPO has established beyond reasonable doubt the aggravated form of the same offence against both Accused in relation to the Witnesses at Risk.

¹¹⁵³ W04841 (Zdenka Pumper), 19 October 2021, p. 1012; W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1703; Transcript, 4 November 2021, p. 1905.

¹¹⁵⁴ See *infra* paras 651-656 (Count 1).

C. INTIMIDATION DURING CRIMINAL PROCEEDINGS (COUNT 3)

1. Parties' submissions

553. The SPO alleged that, during the Indictment Period, the Accused and their Associates used serious threats to induce or attempt to induce witnesses to refrain from making a statement or to make a false statement or otherwise fail to state true information to the SPO and/or SC.¹¹⁵⁵

554. The SPO submitted that the Accused: (i) announced that documents including names and personal details of witnesses were made available to the press;¹¹⁵⁶ and (ii) referred to specific witness names, locations of residence and other personal details and made clear that persons will find out who these witnesses are.¹¹⁵⁷ The SPO asserted that this was clearly intended to put anyone who cooperated with the SPO on notice that their identity was now known and they would not be protected.¹¹⁵⁸ The SPO claimed that the Accused made disparaging remarks and accusations against witnesses, referring to them as "Albanian-speakers", "traitors", "criminals, bloodsuckers and spies",¹¹⁵⁹ and added that these words must be understood in light of the climate of witness intimidation in criminal proceedings against KLA members which pervades Kosovo.¹¹⁶⁰ In this respect, the SPO gave consideration to: (i) the necessity of witness testimonies to carry out investigations and criminal trials; (ii) the SPO's interest and statutory duty to protect the security of witnesses; and (iii) the far-reaching scope and the public nature of the threats.¹¹⁶¹ The SPO submitted that the

¹¹⁵⁵ F251/A01 Indictment, paras 29-30.

¹¹⁵⁶ F565 SPO Final Trial Brief, para. 216; F447, para. 41; F181/A01 SPO Pre-Trial Brief, para. 179.

¹¹⁵⁷ F565 SPO Final Trial Brief, para. 216; F447, para. 41; F181/A01 SPO Pre-Trial Brief, para. 179.

¹¹⁵⁸ F565 SPO Final Trial Brief, paras 198, 200, 217; Transcript, 14 March 2022, pp 3444-3445; F181/A01 SPO Pre-Trial Brief, para. 180.

¹¹⁵⁹ F565 SPO Final Trial Brief, paras 200, 217; Transcript, 14 March 2022, p. 3445; F447, para. 44; F181/A01 SPO Pre-Trial Brief, para. 183.

¹¹⁶⁰ F565 SPO Final Trial Brief, paras 202, 218; Transcript, 14 March 2022, p. 3446.

¹¹⁶¹ Transcript, 14 March 2022, pp 3457-3458.

Accused “were aware of, and desired to, induce witnesses to refrain from making a statement or to make a false statement or otherwise fail to state true information to the SPO and/or SC”.¹¹⁶² Alternatively, the SPO avered that the Accused were aware that, as a result of their actions, this prohibited consequence might ensue, and that they acceded to the occurrence of this prohibited consequence.¹¹⁶³

555. The Gucati Defence submitted that no evidence has been adduced that any person has been induced to refrain from making a statement, make a false statement or fail to state true information to the police, a prosecutor or a judge.¹¹⁶⁴ The Gucati Defence added that no evidence has been adduced to show that the Accused used force, serious threats, the promise of a gift or other form of benefit to induce any of those conducts.¹¹⁶⁵ The Gucati Defence claimed that the Panel has only heard of two anonymous complaints that witnesses were threatened, but asserted that: (i) neither complaint is admissible as to the truth of its contents; (ii) one amounts to another anonymous opinion only; and (iii) the other could not be directly linked to the actions of the Accused.¹¹⁶⁶

556. The Haradinaj Defence submitted that no details have been provided of a single individual that was specifically intimidated by the Accused or their actions.¹¹⁶⁷ The Haradinaj Defence asserted that not one individual said to have been directly affected by the three disclosures has given evidence, but that instead the SPO relied on Contact Notes authored by SPO staff members, many of whom were not called to give evidence either.¹¹⁶⁸ The Haradinaj Defence added that there was no evidence that the

¹¹⁶² F565 SPO Final Trial Brief, para. 219; Transcript, 14 March 2022, p. 3448; F447, para. 46; F181/A01 SPO Pre-Trial Brief, para. 185.

¹¹⁶³ F565 SPO Final Trial Brief, para. 219; F447, para. 46; F181/A01 SPO Pre-Trial Brief, para. 185.

¹¹⁶⁴ F567 Gucati Final Trial Brief, para. 52; F439, para. 60. *See also* Transcript, 15 March 2022, pp 3610-3616.

¹¹⁶⁵ F567 Gucati Final Trial Brief, paras 53-55; F439, paras 61-63.

¹¹⁶⁶ F567 Gucati Final Trial Brief, para. 55(b); Transcript, 15 March 2022, pp 3610-3611; F439, para. 63(b).

¹¹⁶⁷ F566 Haradinaj Final Trial Brief, paras 140-141; Transcript, 16 March 2022, p. 3685; F440, paras 85-88; F260 Haradinaj Pre-Trial Brief, para. 22.

¹¹⁶⁸ F566 Haradinaj Final Trial Brief, para. 165; F440, para. 90; F260 Haradinaj Pre-Trial Brief, para. 116.

two individuals who were relocated because of the disclosures had been threatened or whether their relocation bore any relation to the present case.¹¹⁶⁹ Moreover, the Haradinaj Defence argued that Mr Haradinaj did not possess the required intent as he warned journalists not to publish names of witnesses and stated that he was aware that doing so would peril their lives.¹¹⁷⁰

2. The Panel's findings on *actus reus*

557. The Panel will assess below 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.¹¹⁷¹ The Panel notes that the SPO does not plead that the Accused used force, any other means of compulsion, a promise of a gift or any other form of benefit,¹¹⁷² and therefore these alternative elements shall not be addressed.

(a) "Serious threat"

558. In order to evaluate whether the conduct of the Accused amounted to or involved a serious threat within the meaning of Article 387 of the KCC,¹¹⁷³ the Panel will consider: (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.

¹¹⁶⁹ F566 Haradinaj Final Trial Brief, paras 170-171.

¹¹⁷⁰ F566 Haradinaj Final Trial Brief, paras 384-385; F440, paras 165-166.

¹¹⁷¹ See *supra* para. 109 (Applicable Law).

¹¹⁷² See also F74 Confirmation Decision, para. 115.

¹¹⁷³ See *supra* fn. 182 (Applicable Law).

i) Scope of revelation

559. The Accused revealed the identity and/or personal data of hundreds of Witnesses and Potential Witnesses contained in the Protected Information. The Accused drew attention to the large number of witnesses they identified by indicating that “the names of all the witnesses”¹¹⁷⁴, “all of them”¹¹⁷⁵, “a wide range of people”¹¹⁷⁶, “many names”¹¹⁷⁷, “various names”¹¹⁷⁸ “many, many other people”¹¹⁷⁹, “the majority of the witnesses”¹¹⁸⁰ were contained in the Three Sets.

560. The Panel is satisfied that the sheer number of revealed identities coupled with the Accused’s statements regarding their number would have caused fears and concerns for many of those who gave evidence to the SC/SPO or had been likely to do so.

ii) Public revelation and wide distribution

561. The Accused revealed the identity and/or personal data of the aforementioned witnesses by: (i) displaying and distributing the Three Sets during the Three Press Conferences; (ii) publicly and repeatedly pointing at the presence of names, past and present residence, phone numbers, ethnicity, interview locations and content of statements of witnesses, during the Three Press Conferences, at other media appearances and in Facebook posts; and (iii) allowing or inviting persons present at

¹¹⁷⁴ P1, p. 2 (Mr Haradinaj: “[...] in here are the names of all the witnesses who they say are under their protection”).

¹¹⁷⁵ P1, p. 4 (Mr Gucati: “The information received in 2013 [...] about witnesses, who were summoned and taken to Beograd, all of them”).

¹¹⁷⁶ P9, pp 6-7 (Mr Gucati: “We wouldn’t release the names [...] because I don’t know people [...]. There is a wide-range of people, there are Serbian, there are Roma, Turks...”).

¹¹⁷⁷ P18, p. 3 (Mr Haradinaj: “the first dossier contained many names...”).

¹¹⁷⁸ P35, p. 1 (Mr Gucati: “There are various people, various names whom we are not authorized to disclose”).

¹¹⁷⁹ P35, p. 3 (Mr Haradinaj: “there are names here on the basis of which they have raised those [...] indictments. [...] [t]he particulars of many people are mentioned here. The name of [...] is mentioned as are the names of many, many other people”).

¹¹⁸⁰ P59, p. 1 (Mr Gucati: “The files [...] include the names of the majority of the witnesses”).

the KLA WVA premises and the Three Press Conferences to look at the names and statements of witnesses and, generally, to read, inspect, review, photograph, film or take copies of the Three Sets or parts thereof.¹¹⁸¹

562. The Accused made available the Protected Information to journalists in full awareness that it contained the names of witnesses that they themselves considered to be protected.¹¹⁸² They did so despite judicial orders and SPO requests to desist from disseminating such information.¹¹⁸³ Moreover, the Accused repeatedly vowed to make public any new SC/SPO documents received without any distinction as to the content of such documents.¹¹⁸⁴

563. Furthermore, the manner in which the Protected Information was revealed resulted in 70-80% of the material received being disseminated. As a result, where and in whose hands the information revealed by the Accused would end up was left to chance.¹¹⁸⁵ Mr Haradinaj's statements are telling in this regard. He asked rhetorically "how can one guarantee protection to the witnesses when everyone can read these today",¹¹⁸⁶ thereby emphasising the vulnerability of witnesses resulting from their actions. He also observed that "nobody can stop these copies [...] now" and that "these files cannot be kept secret in Kosovo anymore".¹¹⁸⁷ He even admitted to making sure that the documents were distributed as widely as possible:

Well they can no longer make them disappear, ever..! Don't you worry, there are also another three copies that have been distributed and they have distributed them to some 10 other places, and it is the task of these 10 to further distribute another 3/copies/each, and the latter another 3 each...I have worked with the rule of 3 so that...see more.¹¹⁸⁸

¹¹⁸¹ See *supra* para. 521 (Count 6).

¹¹⁸² See *supra* para. 456 (Findings on the Batches).

¹¹⁸³ See *supra* paras 440-441 (Findings on the Batches).

¹¹⁸⁴ See *supra* paras 481-482 (Count 5), 530 (Count 6).

¹¹⁸⁵ See *supra* para. 535 (Count 6).

¹¹⁸⁶ P1, p. 5.

¹¹⁸⁷ P24, pp 3, 6.

¹¹⁸⁸ P80, p. 1.

564. The Panel is satisfied that these acts and statements created ample publicity as regards the revelation of the identity of Witnesses and Potential Witnesses contained in the Protected Information. The Accused also achieved a wide distribution of the Three Sets containing such information. In conjunction with the number of witnesses revealed, these acts would have further contributed to causing fears and concerns for many of those who gave evidence to the SC/SPO or were likely to do so.

iii) Witnesses are now “known” and cannot be protected

565. In conjunction with the public revelation and wide distribution of the identity of Witnesses and Potential Witnesses contained in the Protected Information, the Accused expressly stated that the public, including any witnesses, now knew that others knew who they were.¹¹⁸⁹

566. The Accused also made repeated statements to the effect that the SC/SPO was unable to guarantee the privacy and security of those witnesses, thereby further emphasising their vulnerability. Mr Gucati questioned whether anyone was protecting SC/SPO witnesses,¹¹⁹⁰ and claimed that the SC should be prosecuted for jeopardising its own witnesses,¹¹⁹¹ and that it had lost all of its credibility as a result of the revelation.¹¹⁹²

¹¹⁸⁹ See e.g. P1, pp 3 (Mr Haradinaj: “These notes, these names, these surnames, they must now know that they are known names and that no one is unknown”); P8, pp 30-31 (Mr Haradinaj: “It will totally collapse, because the witnesses, too, know now that others know who they are”); P9, p. 6 (Mr Gucati: “Our duty has been to let know”); P11, pp 64-65 (Interlocutor: “Yes, each witness that sees their name leaked is... they are going to ask questions of the Tribunal. Mr Haradinaj: No.... they might not see it at all, but they do know that they are witnesses, and will not help them”).

¹¹⁹⁰ P9, p. 5 (Mr 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?”)

¹¹⁹¹ P59, p. 1.

¹¹⁹² P28, p. 13.

567. Mr Haradinaj was especially vocal about the SC not being able to protect its own witnesses and leaving their names to be exposed.¹¹⁹³ In particular, he opined:

What is worse, they misled the witnesses by telling them that they would protect them. [...] These notes, these names, these surnames must now know that they are known names and that no one is unknown.¹¹⁹⁴

568. The Panel is satisfied that these statements, in conjunction with the public revelation of names and wide distribution of material containing such names, would have augmented the significant fears and concerns of many of those who gave evidence to the SC/SPO or were likely to do so.

iv) Derogatory and disparaging remarks

569. In conjunction with their claims that witnesses were now known and could not be protected, the Accused also made repeated derogatory and disparaging remarks in their regard. These comments were not new; as will be detailed below, they echoed similar remarks made by the Accused prior to the Indictment Period.

¹¹⁹³ P1, pp 2 (Mr Haradinaj: “how can you claim you are protecting the witnesses, given as the main reason to establish it abroad, while all the secret data about them, names, surnames, Albanians, Roma, Serbs, the date and place of every interviewed person are all [indicated here]?”), 5 (Mr Haradinaj: “how can one guarantee the protection to the witnesses when everyone can read these today or how can one be sure that these are not distributed in the street by the person who brought these to us?”); P2, p. 2 (Mr Haradinaj: “a great absurdity that from an important international institution and a prestigious one, [...] [s]upposedly for the safeguarding of people and communications [...] they do not even resemble some of the courts of the jungle, let alone those of Kosovo. They have tried to insult our justice, but it turns out that they are below our justice. They are not even at the level of our justice”); P7, p. 6 (Mr Haradinaj: “the Court [...] promised them confidentiality. It means keeping the files secret. So now they are intimidated in all kinds of ways. And now, in my opinion, these witnesses have been intimidated, they are intimidated. These witnesses cannot be used there”); P8, p. 26 (Mr 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?”); P21, p. 5 (Mr Haradinaj: “we have been surprised by the fact that the persistent reason given for this Court was that there could be no leak from there and that the witnesses would be protected. But there are names of witnesses, former witnesses, of everyone there, there’s a lot in there”). *See also* P8, p. 14; P11, p. 3; P17, p. 9; P18, pp 2, 7; P19, p. 3; P25, p. 2; P30, p. 12; P33, p. 1; P34, p. 2.

¹¹⁹⁴ P1, p. 3.

570. First, the Accused questioned the veracity of the information provided by Witnesses whose name and/or evidence was contained in the Protected Information. In particular, Mr Gucati described such witnesses as liars, asylum seekers or tools of political parties who fabricated their evidence;¹¹⁹⁵ thereby echoing derogatory statements he had made prior to the Indictment Period.¹¹⁹⁶ Mr Haradinaj described such witnesses as providing false,¹¹⁹⁷ “slandorous and concocted” evidence,¹¹⁹⁸ also echoing his comments made prior to the Indictment Period.¹¹⁹⁹ The Accused also

¹¹⁹⁵ P9, pp 11 (Mr Gucati: “I believe that some of the witnesses that took part have done it for the purpose of getting papers so they would be granted asylum in the West, to be able to get documents, to be granted asylum and to be able to remain there. [...] there are a lot of fabrications. It’s unbelievable. There are a lot”), 12 (“to find somebody and to put them in the dock, and to find an Albanian-speaker or a traitor, or a Serb, and they stand up and lie, saying that such and such have done this and that...”); P59, p. 2 (“We have said it publicly previously, several years before the files’ scandal occurred, that [...] [some witnesses] were asylum seekers and they made statements for the purpose of being granted asylum status, i.e. they lied in their statements against KLA. Yet another group of witnesses are tools of political parties and were urged to testify because of political rivalries”).

¹¹⁹⁶ P36, p. 1 (24 June 2020), (Mr Gucati: “We know that we have witnesses who are abroad, who have gone abroad and have lied in order to obtain documents in the West, in England, Germany or Switzerland. There are hundreds such witnesses. At the end of the day they will realise that they were wrong and they will regret it and they know that they will fail with their lies, which they have used to obtain some documents in the West”); P42, p. 1 (12 December 2018), (Mr Gucati: “/Show me/ a case, a war crime we could have been able to commit! These people represent the extended hand of Serbia, some witnesses that I think are made up”); P83, p. 34 (20 July 2019), Post on Mr Gucati’s Facebook account (“All indictments for the KLA members have been made by Serbia and its collaborators”); P83, p. 59 (4 July 2020), Post on Mr Gucati’s Facebook account (“would like to mention that 80% of those KLA members were acquitted by these trials, because the charges brought against them were based on lies and slanderous accusations”); P83, pp 63, 65 (26 April 2020), Post on Mr Gucati’s Facebook account (“[group of persons] who have the support of Serbia and its international friends, helped in arranging dozens and dozens of trials against the KLA, fabricating all types of stories and paid 70% of the witnesses to testify in these processes - this is well-known in public. [...] The Hague Tribunal, the Specialist Chambers, the local courts which have been even more severe than the Hague tribunal, have brought indictments against many KLA members, based on lies and fake evidence”).

¹¹⁹⁷ P25, p. 7 (Mr Haradinaj: “the ones that are giving false statements that are used to prepare an indictment, whoever they might be, then they are Serbian collaborators”).

¹¹⁹⁸ P8, p. 31.

¹¹⁹⁹ P49, p. 13 (30 October 2018), (Mr Haradinaj: “let’s not forget that they will completely fail with the witnesses, because, in order to be granted asylum, witnesses have also lied by painting a very bad situation in Kosovo. Only during that time I have interpreted for about thirty chauffeurs of Ibrahim Rugova, who at the time were seeking asylum for being Ibrahim Rugova’s chauffeurs, you know. [...] They were in such a bad financial situation that they would give a statement in exchange for documents somewhere abroad. And they... they think that this is a /witness/ statement. But it will soon become clear that those statements were false. I hope the witnesses enjoyed the benefits of their documents at

claimed that statements had been obtained through force or duress and could therefore not be believed.¹²⁰⁰

571. Second, the Accused referred to Witnesses and Potential Witnesses whose names appeared in the Protected Information as “spies”, “traitors”, “collaborators” and “Albanian-speakers”. They used these appellations interchangeably and within the same meaning as in their pre-Indictment statements.¹²⁰¹

572. Prior to the Indictment Period, Mr Haradinaj had described “spies” as those “paid to testify against the KLA”.¹²⁰² At a media appearance on 20 September 2020, Mr Haradinaj referred to Witnesses and Potential Witnesses whose names were in the First Set as “born spies” who “betray [their] people, [their] army, lie, concoct with evidence provided by the enemy”.¹²⁰³ Asked during his testimony who he was referring to when talking about “born spies”, Mr Haradinaj specifically named [REDACTED].¹²⁰⁴ Moreover, Mr Haradinaj tried to portray his statement as a humorous historical reference.¹²⁰⁵ The Panel is convinced, however, that Mr Haradinaj’s specific reference during that media appearance to “the first batch” points to the Witnesses and Potential Witnesses whose names were in the First Set.

least. [...] I am experienced with asylum seekers who are capable of doing anything in order to get leave to remain”).

¹²⁰⁰ See e.g. P1, p. 2 (Mr Haradinaj); P6, pp 25-26; P7, pp 5-6 (Mr Tomë Gashi and Mr Haradinaj); P8, pp 7, 31-32 (Mr Haradinaj); P17, p. 2 (Mr Haradinaj); P25, pp 5-6 (Mr Haradinaj); P59, p. 2 (Mr Gucati).

¹²⁰¹ P37, p. 5 (24 June 2020), (Mr Haradinaj: “everyone who has been against the KLA, every collaborator, every Quisling, every traitor, every spy and every family member of a spy is in favour of this tribunal, in favour of this kind of tribunal”); P83, pp 21-22 (13 November 2020), (Mr Haradinaj), 59 (4 July 2020), (Mr Gucati).

¹²⁰² P83, pp 21-22 (13 November 2019), Post on Mr Haradinaj’s Facebook account.

¹²⁰³ P8, p. 26.

¹²⁰⁴ DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2882. See also W04841 (Zdenka Pumper), Transcript, 20 October 2021, pp 1137, 1138, 1141 where Ms Pumper confirmed that [REDACTED] featured in Batch 1.

¹²⁰⁵ See DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, pp 2882-2885.

573. Prior to the Indictment Period, Mr Gucati defined a “collaborator” as someone who gave evidence against ex-KLA members,¹²⁰⁶ including a person who was called by the SC/SPO as a witness.¹²⁰⁷ At a media appearance on 7 September 2020, Mr Gucati stated that the First Set showed “a contrivance of the Special Court”, “a collaboration of a ring of Albanian-speaking people, and Serbia”.¹²⁰⁸ Mr Haradinaj used similar terms and described “collaborators” to be “the ones that are giving false statements that are used to prepare an indictment, whoever they might be”.¹²⁰⁹ At a media appearance after the Second Seizure, Mr Haradinaj opined that without collaborators the SC would not have been able to file indictments.¹²¹⁰ At another media appearance on 20 September 2020, he described those on whose evidence the SC raised the charges as “criminals, bloodsuckers, who gave orders... who did not only perpetrate, but also gave orders for violation, killings, destruction [of homes], persecution, and, in a way, for total genocide against a nation”.¹²¹¹ While claiming that the notion of “collaborators” was a mere historical reference,¹²¹² Mr Haradinaj affirmed during his testimony that accusing someone “that you're a collaborator of the secret Serbian services, that is [the] ultimate accusation you could level”.¹²¹³

574. Prior to the Indictment Period, Mr Gucati described an Albanian-speaker as someone who did “not wish well to [the] Kosovo Liberation Army”.¹²¹⁴ At a media appearance on 7 September 2020, Mr Gucati referred to the Witnesses and Potential

¹²⁰⁶ P83, p. 59 (4 July 2020), Post on Mr Gucati’s Facebook account: (“[d]uring the last 20 years there have been several indictments against the leading structures of the KLA, [...]. It became evident that these were politically motivated trials under the influence of the EU members who do not recognize Kosovo, Russia, Serbia and their allies. Moreover, those who testified in those trials were collaborators of the Serbian Secret or Military service”).

¹²⁰⁷ P40, p. 2 (12 December 2018), (Mr Gucati).

¹²⁰⁸ P9, p. 11.

¹²⁰⁹ P25, p. 7. *See also* P17, p. 3; P30, p. 2.

¹²¹⁰ P6, p. 14.

¹²¹¹ P8, p. 7.

¹²¹² DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2811.

¹²¹³ DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2749.

¹²¹⁴ P44, p. 1 (15 January 2019).

Witnesses whose names were in the First Set as “Albanian-speakers” and “traitors of our country”,¹²¹⁵ who “haven’t got the best interests of this country at heart, or the KLA”.¹²¹⁶ Asked during his testimony what he meant by the term, Mr Gucati said that it referred to only one specific person.¹²¹⁷ He further indicated that Albanian-speakers were “[t]hose who think and act against our country. People who have participated in offences, who have killed, massacred, raped, burned, protested”.¹²¹⁸ Similarly, prior to the Indictment Period, Mr Haradinaj stated that “Albanian-speaking lackeys” were not to be called Albanians, but “[l]ackeys, offspring of Titoism, Ranković, collaborators, fifth column”.¹²¹⁹ A post of another individual shared on Mr Haradinaj’s Facebook account prior to the Indictment Period mentioned the notion of “slanderous” or “special” “Albanian-speaking individuals” in conjunction with terms such as “dirty soldiers”, “scums” and “ultra-criminals”.¹²²⁰

575. The Panel is satisfied that the statements made by the Accused during the Indictment Period, echoing language previously used by the Accused to condemn, insult and castigate persons for giving evidence about alleged crimes of ex-KLA members, would have contributed to and augmented the fears and concerns of many persons who gave evidence to the SC/SPO or were likely to do so.

v) The Kosovo context

576. The Panel has received evidence regarding witness intimidation efforts in previous trials involving allegations of crimes by ex-KLA members. The Panel considers that it cannot evaluate the Accused’s acts and statements in a vacuum and that it must consider the context in which they occurred. The reason for this is that what might be threatening in one context might not be so in another. Accordingly, the

¹²¹⁵ P9, p. 12.

¹²¹⁶ P9, p. 12.

¹²¹⁷ DW1240 (Hysni Gucati), Transcript, 8 December 2021, pp 2366-2367.

¹²¹⁸ DW1240 (Hysni Gucati), Transcript, 8 December 2021, p. 2425.

¹²¹⁹ P37, pp 8, 11 (24 June 2020).

¹²²⁰ [REDACTED], Post of another person shared on Mr Haradinaj’s Facebook account, [REDACTED].

Panel shall evaluate the context in which the public revelation and wide distribution of Protected Information, the claims that witnesses were now known and could not be protected and the aforementioned derogatory remarks took place.

577. The evidence points at the existence of a prevalent climate of witness intimidation in Kosovo, in particular in respect of investigations/prosecutions of crimes attributed to ex-KLA members.¹²²¹ The Panel underscores that this climate has been prevalent for years. Mr Reid testified as to how it gravely affected proceedings before the ICTY in relation to the prosecution of ex-KLA members.¹²²² During his testimony, he confirmed an earlier statement he made in an interview:

Witness intimidation in the trials for Kosovo, I've really never seen anything like it before. I was a policeman for 20 years and I've worked here for 23 years, and I have never seen the intimidation like it. It was really quite frightening. And I'm not linking that to any individuals or any organisation. But just the fear that was engendered in the society, I've not seen any -- even in organised crime, I've never seen anything like it.¹²²³

578. In this context, Mr Reid also explained that being labeled as a witness cooperating with prosecution authorities in the investigation of alleged crimes by ex-KLA members was seen as an accusation of being a "traitor to the cause",¹²²⁴ which would produce an intimidating effect on witnesses.¹²²⁵ Witness intimidation also affected proceedings before Kosovo courts.¹²²⁶

579. Moreover, Mr Jukić testified that two or three emergency risk management plans were put in place in the two years before September 2020,¹²²⁷ apparently unrelated to the conduct of the Accused. This evidence suggests that witness protection has

¹²²¹ DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3305-3313; DW1253 (Robert Reid), Transcript, 28 January 2022, pp 3360-3361; P165, pp 5-6.

¹²²² DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3307-3313; DW1253 (Robert Reid), Transcript, 28 January 2022, pp 3359-3361. *See also* P166, para. 6.

¹²²³ P165, p. 5.

¹²²⁴ DW1253 (Robert Reid), Transcript, 24 January 2022, p. 3306.

¹²²⁵ DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3306-3310.

¹²²⁶ C2, pp 2-3.

¹²²⁷ W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1885-1886.

continued to be a live and critical issue in Kosovo. This evidence undercuts the Defence claim that witness intimidation was a thing of the past in Kosovo by the time of the alleged offences.¹²²⁸ In fact, the Accused repeatedly acknowledged that witness intimidation concerns were a primary reason for the creation of the SC.¹²²⁹

580. Moreover, also relevant to this context is that the Accused did not act in a private capacity. The Accused repeatedly stated that they were acting on behalf of the KLA WVA.¹²³⁰ They also made it clear that, through their acts and statements, they were protecting the members of the KLA WVA.¹²³¹ These actions were collectively and

¹²²⁸ Transcript, 15 March 2022, pp 3538, 3626. *See also* F566 Haradinaj Final Trial Brief, para. 252.

¹²²⁹ P1, p. 2 (Mr Haradinaj); P9, p. 5 (Mr Gucati). *See also* P18, p. 7; P19, p. 3.

¹²³⁰ P1, p. 1 (Mr Gucati: "The War Veterans Association has some news for the media, the citizens and everybody else, including Kosovo politicians and the Kosovo Parliament. [...] What the Veterans' Association has said has turned out to be true, it has come to light"); P6, p. 14 (Mr Haradinaj: "I'm not here on a private capacity. [Journalist] You're representing the Veterans. Mr Haradinaj. A representative, that's why..."); P9, p. 8 (Mr Gucati: "And as a result I believe that what the veterans organisation [unintelligible], as we have said for the last four or five years, we are against the Special Court, we are not against justice but against the Special Court"); P29, pp 1 (Mr Gucati: "these files must be coming to us because the KLA War Veterans Organisation has been and still is, against the Specialist Court. [...] And it must be for these reasons why we are receiving these files at the Veterans' Organisation, because we are against this Court"), 2 (Mr Gucati: "We will do the same, we will inform the Kosovo public and all Albanians around the world wherever they are. We will show them that the Specialist Court collaborates with the Serbian Courts, with the Serbian Supreme Court, they cooperate and receive materials from Serbia, against members of the Kosovo Liberation Army. So, for us it is essential to convince the citizens of Kosovo and to show them that this Court is worthless. The moment we say it is worthless is because they are working and cooperating with Serbian Prosecutors against members of the Kosovo Liberation Army"); P35, p. 4 (Mr Haradinaj: "We are in the capacity of war veterans and the War Veterans Association that represents solely the war veterans").

¹²³¹ P1, p. 2 (Mr Haradinaj: "The War Veterans Association would like to defend or at least wants that ... it is for the discovery of the crimes"); P28, pp 3 (Mr Gucati: "the very least that they could do is to beg forgiveness from the public and the citizens of Kosovo, and the veterans of the Kosovo Liberation Army, about their mistake in voting for the Special Court"), 4 (Mr Gucati: "they should ask the veterans of the Kosovan Liberation Army, especially the fallen, their children, and for the public, to ask for forgiveness, to admit that they made a mistake by not scrutinising what was included [in the draft act establishing the SC/SPO]"); P29, p. 1 (Mr Gucati: "I hope this Court is abolished as soon as possible and they stop all their activities against members of the Kosovo Liberation Army"); P34, p. 2 (Mr Haradinaj: "We are not interested in the names or anything; we are only interested in our members because we represent them; we defend them, the main thing is to protect them from injustice"); P35, p. 5 (Mr Haradinaj: "We are not protecting individual names, no matter who they are. We are protecting the members of the KLA Veterans Association. We are defending the members of the KLA Veterans Association. [...] We are defending because they have attacked the KLA selectively and we are defending the backbone that

formally approved by a decision of the KLA WVA's 23-person leadership committee on 14-15 September 2020 to publish SC/SPO material every time the organisation would receive it.¹²³² The acts and statements of the Accused therefore carried the sense that they were condoned by and done on behalf of an organisation that represented thousands of persons, some of whom could be subject to proceedings before the SC.

581. The Panel is thus satisfied that, in the aforementioned climate of witness intimidation, the acts and statements of the Accused as the principal representatives of thousands of KLA veterans would have contributed to and amplified the serious fears and concerns of many of those who gave evidence to the SC/SPO or who were likely to do so.

vi) Seriousness of the threat

582. The 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. The Panel underscores that the offence of intimidation under Article 387 of the KCC does not require proof that the impugned conduct had any particular effect on the person.¹²³³ Nonetheless, any such effect, if established, can inform the level and seriousness of the threat stemming from the acts and statements of the Accused.

583. In this regard, the Panel recalls its finding that the Accused's revelation of the identity and personal data of Witnesses and Potential Witnesses resulted in serious consequences within the meaning of Article 392(3) of the KCC for the Witnesses at

has enabled these deputies, these politicians to raise their hands, and you media to be free"); P59, p. 1 (Mr Gucati: "We are here to defend the values of [the] Kosovo Liberation Army").

¹²³² 1D4, para. 26; 1D8, para. 9; 1D9, paras 23, 29; 2D1, para. 73; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2746. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458, 2472-2473, 2475.

¹²³³ *See supra* para. 115 (Applicable Law).

Risk.¹²³⁴ The Panel further recalls that it refrained from making findings in respect of evidence the Defence could not test regarding concerns expressed by other Witnesses. Nonetheless, the Panel notes that this evidence shows at least that the actions of the Accused required the SPO to contact Witnesses and assess, in respect of some, whether the level of the resulting risk demanded the adoption of security measures in their respect.¹²³⁵

584. The Panel is satisfied that this evidence further confirms the seriousness of the fears and concerns that many persons who gave evidence to the SC/SPO or who were likely to do so would have had as a result of the acts and statements of the Accused.

vii) Conclusion

585. For these reasons, the Panel finds that the acts and statements of the Accused amounted to a serious threat within the meaning of Article 387 of the KCC and would have created serious fears and concerns for many persons who gave evidence to the SC/SPO or were likely to do so, thereby constituting a strong disincentive for such persons to provide (further) information about any crimes under SC jurisdiction.

(b) Any person making or likely to make a statement or provide information to the police or a judge

586. The Panel finds that the serious threats that stemmed from the Accused's acts and statements would have created serious fears and concerns for many Witnesses (*i.e.* persons who gave evidence to the SC/SPO) or Potential Witnesses (*i.e.* persons who were likely to give evidence to the SC/SPO), within the meaning of Article 387 of the KCC.

¹²³⁴ See *supra* para. 547.

¹²³⁵ See *e.g.* P130; P131, para. 4; P132, para. 2; P134, para. 2; P135, paras 2-4; P136, para. 3; P137, para. 1; W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1693, 1703, 1705-1707, 1714-1715, 1719, 1722, 1726-1728, 1731-1732, 1751-1752, 1761-1762.

(c) Conclusion

587. In light of the above, the Panel is satisfied that the *actus reus* of the offence of intimidation under Article 387 of the KCC has been established beyond reasonable doubt.

3. The Panel's findings on *mens rea*

588. The Panel will assess below whether the Accused used serious threats against any person making or likely to make a statement or provide information to the police, a prosecutor or a judge with the direct or eventual intent of inducing that person to refrain from making a statement or to make a false statement or to otherwise fail to state true information.

589. The acts of the Accused show that they wanted to achieve the widest possible distribution of the Three Sets. They called the Three Press Conferences for that purpose, which were all filmed and well attended. Their repeated media appearances also indicate that they wished to increase the publicity of their acts of revealing Protected Information. Their frequent public references to the presence of names in the Three Sets show that they wanted to attract attention to those names, even without specifically uttering them.¹²³⁶

590. In this regard, the Panel rejects the possibility that by not expressly naming Witnesses or Potential Witnesses listed in the Protected Information and by advising journalists of the same, the Accused wanted to protect these individuals. First, as found above, Mr Haradinaj did name at least five such Witnesses or Potential Witnesses.¹²³⁷ Second, the Accused never took any measures to limit the revelation of names. They continuously did so until at least 22 September 2020. They took no

¹²³⁶ P1, pp 2 (Mr Haradinaj), 4 (Mr Gucati), 5 (Mr Haradinaj); P8, p. 11 (Mr Haradinaj); P9, pp 6-7, 10 (Mr Gucati); P11, p. 30 (Mr Haradinaj); P18, p. 3 (Mr Haradinaj); P28, pp 2 (Mr Gucati), 11 (Mr Gucati); P29, p. 1 (Mr Gucati); P35, pp 1 (Mr Gucati), 3-4 (Mr Haradinaj), 13 (Mr Gucati).

¹²³⁷ See *supra* para. 520 (Count 6).

precaution to redact names or prevent the revelation of documents containing such names, as some journalists did.¹²³⁸ Instead, the Accused publicised the very fact that the Three Sets contained such information. In fact, it is clear from their statements that the Accused wanted to send a message to the Witnesses and Potential Witnesses they identified in the Protected Information: we know who you are and many others know who you are. As Mr Haradinaj put it:

They might not see [their name] at all, but they do know that they are witnesses, and will not help them.¹²³⁹

591. Furthermore, their statements as regards the SC/SPO's inability to protect its own witnesses carried another message for the Witnesses and Potential Witnesses they identified in the Protected Information: now that everyone knows who you are, no one can protect you. As put by Mr 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?¹²⁴⁰

592. The same message was echoed by Mr Haradinaj:

How can one guarantee the protection to the witnesses when everyone can read these today or how can one be sure that these are not distributed in the street by the person who brought these to us?¹²⁴¹

593. In this regard, the Panel rejects the possibility that the Accused merely wanted to caution Witnesses and Potential Witnesses whose names they found in the Protected Information that their identity was no longer safe. Such an inference is contradicted by the very acts of the Accused of distributing the Three Sets without any

¹²³⁸ See P125.1; p. 2 (1D11, pp 2, 3) excerpts of an SITF Request with name redacted; P129, p. 1 (1D2, pp 1, 9) with pictures of documents blurred; P129, p. 3 (1D2, p. 20) referring to the newspaper's policy towards publishing sensitive information: "On Monday, Infokus reported about these documents while making sure to preserve their confidentiality and any sensitive information in the documents, reports Infokus".

¹²³⁹ P11, pp 64-65. See also P1, pp 3, 5 (Mr Haradinaj); P8, pp 30-31 (Mr Haradinaj); P9, p. 6 (Mr Gucati).

¹²⁴⁰ P9, p. 5.

¹²⁴¹ P1, p. 5. See also P1, p. 2; P2, p. 2; P21, p. 5; P11, p. 3; P17, p. 9; P18, pp 2, 7; P30, p. 12; P33, p. 1.

distinction as to their content and without any redaction of names. It is also refuted by the Accused's repeated disparaging remarks towards such witnesses, which carried specific implications in Kosovo's climate of witness intimidation.¹²⁴² In other words: now that many others know who you are, no one can protect you, because you are a "traitor", a "spy", a "collaborator", an "Albanian-speaker" who does not have "the best interests of Kosovo and the KLA at heart".¹²⁴³ In Mr Haradinaj's words:

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?¹²⁴⁴

594. Based on the above considerations, the Panel also rejects the possibility that the Accused's statements were only meant to damage the credibility of Witnesses and Potential Witnesses for having cooperated with the SC/SPO. The Accused did not limit themselves to calling such witnesses "liars" and imputing improper motives to them, such as the intention to obtain asylum; instead, they deliberately and consistently used terms such as "spies", "traitors", "Albanian speakers", echoing a well-known rhetoric, meant to characterise witnesses as being against the interests of the KLA. As noted above, Mr Haradinaj even acknowledged during his testimony that being called a "collaborator" was the "ultimate accusation" in Kosovo.¹²⁴⁵

595. Moreover, the Panel rejects the possibility that the Accused used such derogatory terms without being aware of past instances of witness intimidation in the prosecution of ex-KLA members.¹²⁴⁶ First, Mr Gucati admitted during testimony that he had

¹²⁴² See *supra* paras 569-581.

¹²⁴³ See *supra* paras 569-574.

¹²⁴⁴ P8, p. 26.

¹²⁴⁵ Transcript, 11 January 2022, p. 2749 ("Accusing people of taking part in the law, that you're a collaborator of the secret Serbian services, that is the -- the ultimate accusation you could level").

¹²⁴⁶ P36, p. 1 (Mr Gucati: "No witness has come forward until today on the media or elsewhere to say 'I have been threatened!'. I have not heard anything personally. It has been 20 years since the war, and I have not heard any such things"); DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2310-2312; Transcript, 8 December 2021, pp 2343-2344. Mr Haradinaj, when asked about Mr Gucati's Facebook

followed ICTY proceedings in the *Ramush Haradinaj* case, but claimed – questionably – that he knew nothing of witness interference in that case because of personal reasons.¹²⁴⁷ Second, the Accused themselves linked the creation of the SC and its location outside of Kosovo to witness protection.¹²⁴⁸ The fact that they did so in order to deny the SC/SPO's ability to protect its witnesses does not negate their awareness of such an environment. Third, their repeated calls to journalists not to publish the names of witnesses and Mr Tomë Gashi's advice to that effect also indicated an awareness that putting names in the public domain could result in harmful consequences for those concerned.

596. Therefore, the Accused's acts and statements clearly indicate that those who were exposed for having "collaborated" with the SC/SPO were now at risk of harm. This was accompanied by a clear disregard on the part of the Accused for the possibility that harm could in fact occur. When it was drawn to Mr Gucati's attention that "many things could happen" because "the names may then come out", he replied: "Could happen...".¹²⁴⁹ Mr Haradinaj did not "bother about the issue of those witnesses of The Hague".¹²⁵⁰

597. What the Accused did clearly care about was the protection of all KLA WVA members from what they considered to be the injustice of their being brought to trial.¹²⁵¹ As Mr Haradinaj put it:

post and the allegedly killed witnesses, confirmed that he participated in debates [concerning that topic], see Transcript, 12 January 2022, p. 2899.

¹²⁴⁷ DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2310-2313; Transcript, 8 December 2021, pp 2343-2351. Mr Gucati also tried to evade his own statement that witnesses against KLA members had been killed. See Transcript, 8 December 2021, pp 2359-2363; P83, pp 63-67.

¹²⁴⁸ P1, p. 2; P9, p. 5; P18, p. 7; P19, p. 3; P21, p. 5.

¹²⁴⁹ P9, p. 8. See also para. 543 (Count 6).

¹²⁵⁰ P1, p. 5. See also P7, p. 2. See also para. 544 (Count 6).

¹²⁵¹ P1, p. 2 (Mr Haradinaj); P28, pp 3-4 (Mr Gucati); P35, pp 2 (Mr Gucati), 5 (Mr Haradinaj); P59, p. 3 (Mr Gucati).

We are only interested in our members because we represent them; we defend them, the main thing is to protect them from injustice.¹²⁵²

598. This goal included defending KLA WVA members from being convicted. In Mr Haradinaj's words:

Our duty is to ensure that Kosovo is not sentenced for crimes and that Kosovo's sons are not convicted as criminals.¹²⁵³

599. In order to protect KLA WVA members from what the Accused characterised as "injustice", the SC/SPO had to cease to exist. In the words of Mr Gucati:

I hope this Court is abolished as soon as possible and they stop all their activities against members of the Kosovo Liberation Army.¹²⁵⁴

600. In the view of the Accused, the seed of failure was already within the workings of the SC/SPO, because it "collaborated" with Serbian authorities and with witnesses who were, according to them, *inter alia*, "liars", "asylum seekers", "traitors" or "Albanian speakers".¹²⁵⁵ Mr Gucati was convinced of this long before the Indictment Period:

This court will always fail. The reason for their failure would be that they have called some witnesses, that I would call enemy "collaborators", and some witnesses that have not been in Kosovo at all. That is why I believe that this court will fail.¹²⁵⁶

601. Against this background, the Accused viewed the arrival of the Three Sets as a "miracle"¹²⁵⁷, because "[w]hat the Veterans' Association has said has turned out to be true, it has come to light"¹²⁵⁸: the names of all those they regarded as "collaborators" were there and they could finally be revealed. According to Mr Haradinaj, the persons whose names were revealed were "intimidated in all kinds of ways"¹²⁵⁹, and had a

¹²⁵² P34, p. 2.

¹²⁵³ P8, p. 6.

¹²⁵⁴ P29, p. 1.

¹²⁵⁵ *See supra* paras 569-574 (Count 3).

¹²⁵⁶ P40, p. 2 (12 December 2018).

¹²⁵⁷ P7, p. 2 (Mr Haradinaj); P35, p. 3 (Mr Haradinaj).

¹²⁵⁸ P1, p. 1 (Mr Gucati).

¹²⁵⁹ P7, p. 6 (Mr Haradinaj).

“sense of worry”,¹²⁶⁰ a “self-consciousness”¹²⁶¹ that “deserve[d] to be applauded”.¹²⁶²

This was seen as leading to the collapse of the SC/SPO:

[The SC/SPO] will totally collapse. From what I read ... the testimony on which it has been built. It will totally collapse, because the witnesses, too, know now that others know who they are.¹²⁶³

602. Accordingly, in the view of the Accused, the SC/SPO “has lost all credibility”¹²⁶⁴ for not being able to “protect their files” and for having “misled”¹²⁶⁵ its witnesses, and thus “no one can trust this Court, not today, not tomorrow not any other day”.¹²⁶⁶

603. The Panel is therefore satisfied that the serious threat that stemmed from the Accused’s acts and statements was intended to dissuade Witnesses and Potential Witnesses from giving (further) evidence to the SC/SPO. This was a means to an end, namely, to prevent the SC/SPO from effective investigations and prosecutions of ex-KLA members. Simply put: without witnesses, there would be no trials; without trials, there would be no convictions of “Kosovo’s sons”.¹²⁶⁷

604. The Panel is further satisfied that the statements of the Accused that the SC/SPO could not protect its witnesses were not only meant to point out the SC/SPO’s failures and incompetence and thus discredit it and undermine its legitimacy. These statements, intertwined with the disparaging and threatening remarks expressed by the Accused, were intended to make Witnesses and Potential Witnesses feel vulnerable. In fact, all 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 SC/SPO.

¹²⁶⁰ P11, p. 65 (Mr Haradinaj).

¹²⁶¹ P11, p. 65 (Mr Haradinaj).

¹²⁶² P11, p. 65 (Mr Haradinaj).

¹²⁶³ P8, pp 30-31.

¹²⁶⁴ P28, p. 13 (Mr Gucati).

¹²⁶⁵ P1, p. 3 (Mr Haradinaj).

¹²⁶⁶ P31, p. 2 (Mr Gucati).

¹²⁶⁷ P8, p. 6.

605. For these reasons, the Panel finds that the Accused acted with awareness of, and desire for, inducing Witnesses and Potential Witnesses who were identified in the Protected Information to refrain from giving (further) evidence to the SC/SPO.

4. Conclusion

606. In light of the foregoing, the Panel finds that the SPO has established beyond reasonable doubt the elements of the offence charged under Count 3 in relation to both Accused.

D. RETALIATION (COUNT 4)

1. Parties' submissions

607. The SPO alleged that during the Indictment Period, the Accused and their Associates took or attempted to take actions harmful to witnesses with the intent to retaliate for providing truthful information relating to the commission or possible commission of criminal offences to the SPO.¹²⁶⁸ They did so, the Indictment alleged, by using the same means and through the same actions as are said to be relevant to Count 3.¹²⁶⁹

608. The SPO submitted that the revelation of protected witness names qualifies as harmful action,¹²⁷⁰ because the Accused did so in order to shame, expose and marginalise those who had already cooperated with the SPO.¹²⁷¹ The SPO added that the action actually resulting in harm is not an element of the offence, but that nonetheless witnesses were harmed by: (i) feeling worried, stressed, threatened, afraid

¹²⁶⁸ F251/A01 Indictment, para. 31.

¹²⁶⁹ F251/A01 Indictment, para. 32.

¹²⁷⁰ F565 SPO Final Trial Brief, para. 220.

¹²⁷¹ Transcript, 14 March 2022. p. 3449.

and losing confidence that they and their families would be protected;¹²⁷² and (ii) in the case of two witnesses, being relocated as a result of the danger they were exposed to.¹²⁷³ The SPO asserted that the Accused neither made any efforts to ascertain the truth or falsity of the information, nor were they in a position to discern between persons who had provided truthful or untruthful information from the hundreds of identities they disseminated.¹²⁷⁴ As such, the SPO submitted that the Accused were aware that the accounts might be true and intended to retaliate against witnesses for giving truthful information,¹²⁷⁵ and that they were aware that exposing the identities of witnesses would cause concerns for their security and that of their families.¹²⁷⁶ In its Final Trial Brief, the SPO alleged that retaliation had also been committed against “government authorities who provided documentation establishing relevant crimes/perpetrators or facilitated contacts with those having such information”.¹²⁷⁷

609. The Gucati Defence submitted that there is no evidence that witnesses were caused any actual harm, or even that they were caused fear and lost confidence.¹²⁷⁸ It added that no evidence had been adduced as to: (i) the truthfulness or otherwise of the information provided by the alleged subjects of retaliation;¹²⁷⁹ (ii) the contents of the information;¹²⁸⁰ and (iii) the Accused’s belief that the information provided was truthful.¹²⁸¹ The Gucati Defence asserted that, on the contrary, the only evidence adduced shows that the Accused believed that false information had been

¹²⁷² F565 SPO Final Trial Brief, para. 222; Transcript, 14 March 2022, p. 3450; F181/A01 SPO Pre-Trial Brief, para. 189.

¹²⁷³ F565 SPO Final Trial Brief, para. 222; Transcript, 14 March 2022, p. 3450.

¹²⁷⁴ F565 SPO Final Trial Brief, paras 225, 228; Transcript, 14 March 2022, pp 3451-3452.

¹²⁷⁵ F565 SPO Final Trial Brief, para. 228; Transcript, 14 March 2022, pp 3452-3453. *See also* F447, para. 52; F181/A01 SPO Pre-Trial Brief, para. 192.

¹²⁷⁶ F565 SPO Final Trial Brief, para. 229.

¹²⁷⁷ F565 SPO Final Trial Brief, para. 221.

¹²⁷⁸ Transcript, 16 March 2022, p. 3641.

¹²⁷⁹ F567 Gucati Final Trial Brief, para. 62; F439, para. 70.

¹²⁸⁰ F567 Gucati Final Trial Brief, para. 62; F439, para. 70.

¹²⁸¹ F567 Gucati Final Trial Brief, para. 63; F439, para. 71.

provided.¹²⁸² Regardless, the Gucati Defence argued that the SPO's claim that the Accused thought that information "might have been true" is insufficient to establish the necessary *mens rea*.¹²⁸³

610. The Haradinaj Defence submitted that there is: (i) no evidence of the Accused's intent to retaliate;¹²⁸⁴ and (ii) no evidence that the alleged victims of retaliation provided truthful information.¹²⁸⁵ The Haradinaj Defence added that, in terms of the two witnesses who were relocated, the SPO has not established that the relocations were due to any acts of the Accused.¹²⁸⁶

2. The Panel's findings on *actus reus*

611. The Panel will assess below whether the Accused took any action harmful to any person in the context of that person providing information relating to the commission or possible commission of any criminal offence to police, an authorised investigator, a prosecutor or a judge.¹²⁸⁷

(a) "[A]ny person"

612. The Panel notes the SPO's allegation that the witnesses retaliated against included: (i) persons who gave interviews to the SPO or whose interviews were sought by the SPO; and (ii) government authorities who provided documentation regarding relevant crimes or perpetrators.¹²⁸⁸

613. As regards the first category, the Panel relied on Ms Pumper's definition of witnesses and potential witnesses, which it found to be consonant with Kosovo law

¹²⁸² F567 Gucati Final Trial Brief, para. 63; F439, para. 71.

¹²⁸³ Transcript, 16 March 2022, p. 3641.

¹²⁸⁴ F566 Haradinaj Final Trial Brief, paras 203-204; F440, paras 95-98.

¹²⁸⁵ F566 Haradinaj Final Trial Brief, para. 206; Transcript, 16 March 2022, p. 3695; F440, para. 100.

¹²⁸⁶ F566 Haradinaj Final Trial Brief, para. 225.

¹²⁸⁷ *See supra* para. 126 (Applicable Law).

¹²⁸⁸ F565 SPO Final Trial Brief, para. 221.

and the SC legal framework.¹²⁸⁹ On this basis, the Panel found under Count 6 that the Accused revealed the identity and/or personal data of Witnesses and Potential Witnesses under SITF/SPO protection, within the meaning of Article 392(2) of the KCC.¹²⁹⁰ The Panel notes that the SPO's allegation regarding retaliation against persons in the first category relies on the same acts and statements of the Accused as pleaded under Counts 3 and 6. The Panel considers therefore that the findings on those counts regarding the scope of the persons targeted are also relevant to the present count. That being said, the Panel notes that Article 388(1) of the KCC covers only persons who have provided or are in the course of providing the relevant information and not persons who are likely to provide information in the future.

614. As regards to the second category, the Panel notes that, in the Indictment, the charge was limited to "witnesses" and, notwithstanding the broad definition thereof, the SPO did not specify that the notion included "government authorities" who contributed to responding to SITF Requests. Therefore, this category falls outside the scope of what the SPO charged in the Indictment in respect of this count. In any event, the Panel found under Count 6 that only four Serbian officials qualified as Witnesses or Potential Witnesses and that the revelation of the identity of any other Serbian official fell under Count 5.¹²⁹¹

615. For these reasons, the Panel finds that the term "any person" under Count 4 covers Witnesses only, in the context of such witnesses having provided to the SITF/SPO information relating to the commission or possible commission of any crime or offence under SC jurisdiction.

¹²⁸⁹ See *supra* paras 511-512 (Count 6).

¹²⁹⁰ See *supra* paras 519-522 (Count 6).

¹²⁹¹ See *supra* para. 514 (Count 6).

(b) “[A]ny action harmful”

616. The Panel has already established under Count 3 that the acts and statements of the Accused amounted to a serious threat within the meaning of Article 387 of the KCC and would have created serious fears and concerns among those who gave evidence to the SC/SPO or who were likely to do so.¹²⁹²

617. The Panel reached that conclusion by taking into consideration: (i) the scope of the revelation;¹²⁹³ (ii) the public nature of the revelation and the wide distribution of Protected Information, including the identity and personal data of Witnesses and Potential Witnesses;¹²⁹⁴ (iii) the Accused’s statements that witnesses are now “known” and cannot be protected;¹²⁹⁵ (iv) the Accused’s derogatory and disparaging remarks towards witnesses;¹²⁹⁶ (v) the prevailing climate of witness intimidation in Kosovo;¹²⁹⁷ (vi) the fact that the Accused acted on behalf of the KLA WVA;¹²⁹⁸ and (vii) the seriousness of the threat as reflected in some of the consequences on witnesses.¹²⁹⁹

618. Given that the allegation of harmful action under Count 4 relies on the same acts and statements of the Accused as pleaded under Count 3, the Panel considers that the above findings also establish that element for the purpose of the present count.

619. For these reasons, the Panel finds that the acts and statements of the Accused amounted to harmful action within the meaning of Article 388(1) of the KCC.

¹²⁹² See *supra* para. 585 (Count 3).

¹²⁹³ See *supra* paras 559-560 (Count 3).

¹²⁹⁴ See *supra* paras 561-564 (Count 3).

¹²⁹⁵ See *supra* paras 565-568 (Count 3).

¹²⁹⁶ See *supra* paras 569-575 (Count 3).

¹²⁹⁷ See *supra* paras 576-579 (Count 3).

¹²⁹⁸ See *supra* para. 580 (Count 3).

¹²⁹⁹ See *supra* paras 582-584 (Count 3).

(c) Conclusion

620. In light of the above, the Panel is satisfied that the *actus reus* of the offence of retaliation under Article 388(1) of the KCC has been established beyond reasonable doubt.

3. The Panel's findings on *mens rea*

621. The Panel noted under Count 3 that the Accused's acts and statements targeted those who were thought to have "collaborated" with the SC/SPO.¹³⁰⁰ For this to qualify as an intent to retaliate within the meaning of Article 388(1) of the KCC, it must be shown that the Accused acted against certain Witnesses with the awareness that the information the Witnesses provided was, at least to some extent, truthful.¹³⁰¹ Establishing that the Accused knew that the information might be true or that they were indifferent as to the truth of the information is not enough for the purposes of Article 388(1) of the KCC.¹³⁰²

622. The Panel found under Count 3 that the Accused, in conjunction with revealing the identity and/or personal data of Witnesses and Potential Witnesses, publicly questioned the veracity of their accounts, accusing them of having lied or fabricated their evidence in exchange of benefits, as a result of force or duress or because they were "collaborators" or "Albanian speakers" who served the interests of the Serbian regime.¹³⁰³

623. The Panel emphasises that the claims of the Accused that the accounts of the Witnesses were untruthful do not establish, in themselves, that the Accused indeed held this belief. The Panel notes, however, that the SPO adduced no evidence to contradict such statements and to show that the Accused, or any of their Associates,

¹³⁰⁰ See *supra* paras 573, 590-596 (Count 3).

¹³⁰¹ See *supra* para. 138 (Applicable Law).

¹³⁰² See *supra* para. 138 (Applicable Law).

¹³⁰³ See *supra* paras 569-575 (Count 3).

were aware that the information of the Witnesses was, at least to a certain extent, truthful.

624. While the record shows that both Accused had a general awareness of the content of some of the witness accounts in the Protected Information,¹³⁰⁴ there is no indication that: (i) their awareness of the material was such as to enable them to assess the truthfulness of the information; and (ii) even if it was so, that they revealed those accounts to retaliate against the individuals having told the truth to the competent authorities. This is especially true in relation to Mr Gucati, whose awareness of the content of the Three Sets was more generic than that of Mr Haradinaj.¹³⁰⁵ In any event, it is also true in relation to Mr Haradinaj, who had a more detailed understanding of the Three Sets and who expressly identified at least five Witnesses whose names he had spotted in the Protected Information.

625. During the First Press Conference, Mr Haradinaj publicly identified [REDACTED].¹³⁰⁶ Mr Haradinaj named these individuals to point out his dismay regarding the cooperation of the SITF/SPO with Serbian authorities. The evidence does not show that Mr Haradinaj revealed these names in retaliation for these persons having provided truthful information. In fact, Mr Haradinaj made no mention of the content of the information these individuals may have provided and the record does not show whether he had any knowledge about that content. Instead, the revelation of Protected Information was indiscriminate.

626. [REDACTED], Mr Haradinaj publicly identified [REDACTED].¹³⁰⁷ The record shows that the name of this person appeared in Batch 3 [REDACTED].¹³⁰⁸ The evidence does not show, however, that Mr Haradinaj identified [REDACTED] to retaliate for

¹³⁰⁴ See *supra* paras 358-377 (Findings on the Batches).

¹³⁰⁵ See *supra* paras 362, 365, 368, 373-374, 377 (Findings on the Batches).

¹³⁰⁶ P1, p. 2.

¹³⁰⁷ [REDACTED].

¹³⁰⁸ W04841 (Zdenka Pumper), Transcript, 19 October 2021, p. 953; W04842 (Miro Jukić), Transcript, 4 November 2021, pp 1790-1793.

providing truthful information to the SITF/SPO. On the contrary, during his testimony, Mr Haradinaj described [REDACTED] as a person who was valueless,¹³⁰⁹ a “madman who wants to show off”.¹³¹⁰ When asked whether he made any efforts to ascertain the truth or falsity of what that person was saying, Mr Haradinaj stated that he did not read through the document to know fully what was said there.¹³¹¹

627. During his testimony, Mr Haradinaj described [REDACTED] as a “spy”¹³¹². Neither of the Accused specifically identified this person as a Witness during the Indictment Period, but the record shows that [REDACTED] appeared in Batch 1 and [REDACTED].¹³¹³ Mr Haradinaj [REDACTED].¹³¹⁴ There is no evidence that the [REDACTED] could have come from any other source than the Protected Information. In any event, there is no evidence that Mr Haradinaj or Mr Gucati revealed the Protected Information to retaliate against [REDACTED] for providing truthful information to the competent authorities.

628. Instead, the evidence shows that the Accused revealed the Protected Information indiscriminately, without any distinction as to its content or any individualised consideration on what had been said by any Witness or category of Witnesses. There is accordingly no direct or circumstantial evidence that the revelation of any of the above names was done to retaliate against these witnesses for having provided truthful information to the SITF/SPO.

629. For these reasons, the Panel finds that the SPO has failed to establish that the Accused acted with the requisite intent in respect of any Witness whose identity and/or personal data was revealed.

¹³⁰⁹ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2998.

¹³¹⁰ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2997.

¹³¹¹ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 2996.

¹³¹² DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, pp 2811-2812, 2882.

¹³¹³ W04841 (Zdenka Pumper), Transcript, 20 October 2021, p. 1137; [REDACTED].

¹³¹⁴ [REDACTED].

4. Conclusion

630. In light of the foregoing, the Panel finds that the SPO has failed to establish beyond reasonable doubt that either of the Accused committed the offence charged under Count 4.

E. OBSTRUCTING OFFICIAL PERSONS – BY SERIOUS THREAT (COUNT 1)

1. Parties' submissions

631. The SPO alleged that, during the Indictment Period, the Accused and their Associates, by serious threat, obstructed or attempted to obstruct SC Proceedings.¹³¹⁵

632. The SPO argued that the Accused repeatedly made the Confidential Information available and/or mentioned contents thereof to members of the press, television viewers and other members of the public.¹³¹⁶ According to the SPO, the Accused repeatedly threatened to continue disseminating information relating to confidential investigations, including witness identities, and to obstruct the mandate of the SC/SPO.¹³¹⁷ They also made disparaging comments about, and/or threats in relation to, witnesses.¹³¹⁸

633. The SPO also alleged that, due to the Accused's actions, witnesses felt threatened and intimidated and SPO resources and time were diverted, resulting in the SPO's ability to effectively investigate and prosecute crimes being threatened.¹³¹⁹ The SPO argued that the threats against witnesses were directed at preventing SC and SPO officials from continuing to carry out investigations and criminal proceedings by

¹³¹⁵ F251/A01 Indictment, para. 25; F565 SPO Final Trial Brief, para. 189; F447, para. 9; F181/A01 SPO Pre-Trial Brief, para. 97.

¹³¹⁶ F565 SPO Final Trial Brief, para. 189; F447, paras 9, 15; F181/A01 SPO Pre-Trial Brief, para. 98.

¹³¹⁷ F565 SPO Final Trial Brief, para. 189; F447, paras 9, 16; F181/A01 SPO Pre-Trial Brief, para. 99.

¹³¹⁸ F447, paras 9, 17; F181/A01 SPO Pre-Trial Brief, para. 100.

¹³¹⁹ F565 SPO Final Trial Brief, paras 189-191; F447, para. 18; F181/A01 SPO Pre-Trial Brief, para. 101. *See also* F565 SPO Final Trial Brief, paras 171, 173-174.

threatening that, otherwise, witness security and well-being would be seriously endangered.¹³²⁰

634. According to the SPO, the Accused: (i) intended to stop the SC/SPO from fulfilling its mandate;¹³²¹ (ii) publicly stated their intention to obstruct the work of the SC/SPO through the publication of the documents;¹³²² (iii) expressly acknowledged the potential consequences of their actions.¹³²³

635. The Defence argued that no evidence had been adduced that the SPO or SPO officials were obstructed by the Accused in performing official duties, nor that any threats, serious or otherwise, direct or indirect, were made at the SPO or SPO officials by the Accused.¹³²⁴ The Gucati Defence rejected the allegation of an intention to undermine the administration of justice on the part of Mr Gucati.¹³²⁵

2. The Panel's findings on the *actus reus* of the basic form of the offence

636. The Panel will assess below whether the Accused, by serious threat, obstructed or attempted to obstruct an official person in performing official duties.¹³²⁶ The Panel notes that the SPO does not plead that the Accused used force or that they compelled an official person to perform official duties,¹³²⁷ and therefore these alternative elements shall not be addressed. The Panel also recalls that the wording of Article 401(1) of the

¹³²⁰ Transcript, 14 March 2022, pp 3457-3458. *See also* F565 SPO Final Trial Brief, para. 190.

¹³²¹ F565 SPO Final Trial Brief, paras 175-182, 193. *See also* F447, paras 20-21, 27; F181/A01 SPO Pre-Trial Brief, para. 102; Transcript, 14 March 2022, pp 3453-3455.

¹³²² F447, paras 22, 25, 28; F181/A01 SPO Pre-Trial Brief, paras 104-130, 147-155, 168-172. *See also* F565 SPO Final Trial Brief, paras 183-188.

¹³²³ F447, para. 26; F181/A01 SPO Pre-Trial Brief, paras 156-167.

¹³²⁴ Transcript, 16 March 2022, pp 3645-3646, 3695; F567 Gucati Final Trial-Brief, paras 21-24; F566 Haradinaj Final Trial Brief, paras 65-66; F439, paras 29-32; F440, paras 24-25; F258 Gucati Pre-Trial Brief, paras 8, 192-193, 208; F260 Haradinaj Pre-Trial Brief, para. 227.

¹³²⁵ Transcript, 16 March 2022, p. 3646; F258 Gucati Pre-Trial Brief, paras 197, 200, 202, 223, 236, 241.

¹³²⁶ *See supra* para. 141 (Applicable Law).

¹³²⁷ *See also* F74 Confirmation Decision, para. 119.

KCC indicates that the offence is committed when the obstruction actually occurred or when it was attempted by the perpetrator.¹³²⁸

(a) “[O]fficial person in performing official duties”

637. The Panel recalls its finding that, within the SC legal framework: (i) an “official person” includes any person authorised to act on behalf of the SC or SPO, including a judge, a prosecutor, an investigator or any other SC or SPO official;¹³²⁹ and (ii) “official duties” and “official functions” relate to any responsibility or work of an SC or SPO official within the context of SC official proceedings, including SPO investigations.¹³³⁰

638. The Panel will therefore frame its assessment to verify whether the Accused, by serious threat, obstructed or attempted to obstruct any person authorised to act on behalf of the SC or SPO (“SC/SPO Official”) in the performance of any responsibility or work within the context of SC official proceedings, including SPO investigations (“SC/SPO Work”).

(b) “Serious threat”

639. The Panel notes at the outset that there is no evidence of the Accused having directly threatened any SC/SPO Official in the performance of SC/SPO Work. The Panel recalls, however, its finding that Article 401 of the KCC does not require that the serious threat be directed against the official person only and that a serious threat may be directed also against another person or object.¹³³¹

640. The Panel has already established under Count 3 that the acts and statements of the Accused amounted to a serious threat within the meaning of Article 387 of the KCC and would have created serious fears and concerns among those who gave

¹³²⁸ See *supra* para. 141 (Applicable Law).

¹³²⁹ See *supra* para. 146 (Applicable Law).

¹³³⁰ See *supra* para. 147 (Applicable Law).

¹³³¹ See *supra* para. 146 (Applicable Law).

evidence to the SC/SPO or who were likely to do so, thereby creating a potential disincentive for such persons to volunteer information about any crimes under SC jurisdiction.¹³³²

641. The Panel reached that conclusion by taking into consideration: (i) the scope of the revelation;¹³³³ (ii) the public revelation and wide distribution of Protected Information, including the identity and personal data of Witnesses and Potential Witnesses;¹³³⁴ (iii) the Accused's statements that witnesses are now "known" and cannot be protected;¹³³⁵ (iv) the Accused's derogatory and disparaging remarks towards witnesses;¹³³⁶ (v) the prevailing climate of witness intimidation in Kosovo;¹³³⁷ (vi) the fact that the Accused acted on behalf of the KLA WVA;¹³³⁸ and (vii) the seriousness of the threat as reflected in some of the consequences on witnesses.¹³³⁹

642. Given that the alleged serious threat under Count 1 relies on the same acts and statements of the Accused as pleaded under Count 3, the Panel considers that the above findings also establish that element for the purposes of the present count.

643. For these reasons, the Panel finds that the acts and statements of the Accused amounted to a serious threat within the meaning of Article 401(1) of the KCC.

(c) "[O]bstructs"

i) Importance of witnesses to criminal proceedings

644. The Panel notes at the outset that criminal proceedings in general and the SC/SPO Work in particular are critically dependent on the willingness and ability of

¹³³² See *supra* para. 585 (Count 3).

¹³³³ See *supra* paras 559-560 (Count 3).

¹³³⁴ See *supra* paras 561-564 (Count 3).

¹³³⁵ See *supra* paras 565-568 (Count 3).

¹³³⁶ See *supra* paras 569-575 (Count 3).

¹³³⁷ See *supra* paras 576-579 (Count 3).

¹³³⁸ See *supra* para. 580 (Count 3).

¹³³⁹ See *supra* paras 582-584 (Count 3).

witnesses to come forward and give evidence freely.¹³⁴⁰ The fundamental importance of witnesses to criminal justice was highlighted by Mr Jukić during his testimony:

[W]itness security is top priority. We know and we learn that without witnesses we don't have cases. And names of the witnesses are the highest priority for witness security officers, for me, and for our office.¹³⁴¹

645. Any attempt to cause a witness not to share relevant information with investigative or judicial authorities in respect of a criminal offence must therefore be addressed in a way that reflects the importance of keeping witnesses free of harm and intimidation.¹³⁴² The need to protect such individuals is particularly important in post-conflict situations, such as Kosovo, as the risk of intimidation and retaliation against witnesses and their families in such situations is even greater.¹³⁴³

646. A climate of witness intimidation exposes witnesses to the risk of harm and has a chilling effect on their willingness and/or ability to provide evidence, thereby undermining investigative and/or prosecutorial efforts. This was echoed by Mr Reid:

The leak of witness information is doubly detrimental in that it not only impacts the potential of your case but it impacts on the psychology of the particular witness. And [...] if the witness community find out about it, it also impacts upon other witnesses.

¹³⁴⁰ See e.g. [Council of Europe Recommendation on Witness Protection](#), Preamble: “[T]here is growing recognition of the special role of witnesses in criminal proceedings and that their evidence is often crucial to securing the conviction of offenders, especially in respect of serious crime”. See also [Council of Europe Recommendation Concerning Witness Intimidation](#); HRRP, [G.T. against EULEX Admissibility Decision](#), para. 36 (and references cited). See also HRRP, [F. and Others against EULEX Decision and Findings](#), paras 44-45; [Nazmi Maloku against EULEX Inadmissibility Decision](#), paras 24-26. [F. and Others against EULEX Decision and Findings](#), paras 44-45; [Nazmi Maloku against EULEX Inadmissibility Decision](#), paras 24-26.

¹³⁴¹ W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1702. See also DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3311-3313.

¹³⁴² See e.g. [Council of Europe Recommendation on Witness Protection](#), Preamble, noting that: “it is unacceptable for the criminal justice system to fail to bring defendants to trial and obtain a judgment because witnesses have been effectively discouraged from testifying freely and truthfully”.

¹³⁴³ See e.g. [Resolution on protection of witnesses in the Balkans](#), para. 4: “The Assembly is appalled to note that, in the region of the former Yugoslavia, several witnesses have been killed and numerous others have been intimidated, threatened or have had their identity revealed by people determined to obstruct the course of justice and conceal the truth. The Assembly regrets that, due to these threats, many witnesses finally decide not to testify because they fear for their lives or those of their families”.

So, you know, if ten other witnesses find out about it, there's a huge impact on your case. You don't just have one witness who you've got to be concerned about now. If it's leaked and it becomes public knowledge, then you've got ten to, say, 15 to 20 witnesses who it impacts upon.¹³⁴⁴

647. The Panel therefore considers that a serious threat towards one or more Witnesses or Potential Witnesses could, in principle, obstruct SC/SPO Work within the meaning of Article 401(1) of the KCC, as it could impede or hinder the ability of the SPO to investigate and prosecute crimes or prevent SC Panels from hearing evidence relevant to such crimes.

ii) Scope of assessment for the purpose of this case

648. While the Panel is acutely aware of these contextual considerations, it will assess the current charges based on the circumstances of the present case and the evidence on the record. Accordingly and further to the SPO's case under this count,¹³⁴⁵ the Panel will assess whether the evidence establishes that, as a result of the acts and statements of the Accused: (i) witnesses were intimidated; (ii) the SPO's ability to effectively investigate and prosecute crimes was thereby threatened; and (iii) SPO resources and time were diverted to address actual and potential consequences. The Panel will then assess whether any of the allegations, if proven, amounted to obstruction or attempted obstruction within the meaning of Article 401(1) of the KCC.

iii) Intimidation of witnesses

649. The Panel has already established under Count 6 that the acts and statements of the Accused caused serious consequences to the Witnesses at Risk.¹³⁴⁶ The Panel received, however, no evidence that any of the Witnesses at Risk were induced by the conduct of the Accused to no longer give evidence to the SC/SPO.

¹³⁴⁴ DW1253 (Robert Reid), Transcript, 28 January 2022, p. 3361.

¹³⁴⁵ F251/A01 Indictment, para. 28.

¹³⁴⁶ See *supra* paras 536-541, 547 (Count 6).

650. The Panel also took note of the evidence regarding fears and concerns expressed by other Witnesses,¹³⁴⁷ and found that it showed at least that the actions of the Accused triggered contacts between the SPO and Witnesses regarding their security.¹³⁴⁸ The Panel also received evidence that at least one Witness refused to engage with the SPO after the revelation of his or her name.¹³⁴⁹ Nonetheless, as noted above, the SPO opted not to call this or any of the other Witnesses to testify about the consequences of the Accused's actions upon them and the basis on which they formed their views regarding those consequences. The Defence had thus no opportunity to test effectively the claims of these Witnesses. Furthermore, the SPO led no evidence that the refusal of that one Witness to further engage with the SPO had any material impact on its ability to perform its duties effectively. Accordingly, as under Count 6, the Panel refrains from making any findings on whether any of these Witnesses were induced to no longer give evidence to the SC/SPO.

iv) Effect on the SPO's ability to investigate and prosecute crimes

651. The Panel reiterates that no witness testified about being induced to no longer give evidence to the SC/SPO. The Panel accepts, however, that securing the testimony of a witness who no longer wishes to interact with the SPO or who has been frightened by the revelation of Protected Information may raise particular challenges for the SPO. The SPO has not, however, demonstrated any concrete and actual impediment to its investigations that could be imputed to the conduct of the Accused.

v) Diversion of SPO resources

652. The Panel has already established under Count 6 that the SPO spent additional time and resources contacting and meeting with Witnesses affected by the revelation

¹³⁴⁷ See *supra* paras 539, 541 (Count 6).

¹³⁴⁸ See *supra* para. 583 (Count 3).

¹³⁴⁹ W04841 (Zdenka Pumper), 19 October 2021, p. 1012; W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1703; Transcript, 4 November 2021, p. 1905.

of Protected Information. While it is not clear from the record how much additional time and personnel was needed for these measures, the evidence shows that, without the Accused's actions, this use of investigative and prosecutorial resources would not have occurred. The expenditure of additional time and resources continued until approximately mid-December 2020. In addition, as found above, the SPO had to put in place a number of security measures in order to address the perceived threat to the Witnesses at Risk. Moreover, the SPO undertook three seizure operations for the retrieval of the Batches and one search and seizure operation at the time the Accused were arrested.¹³⁵⁰

653. The Panel notes, however, that the SPO has not pointed to any act that an SC/SPO Official was prevented, impeded, hindered or delayed in performing as part of his or her SC/SPO Work, as a result of the Accused's actions. There is also no indication that, as a result of the diversion of time and resources, the SPO was prevented from or delayed in carrying out its regular investigative functions.

654. The Panel notes, furthermore, that the use of resources by investigative or prosecutorial authorities to respond to criminal activity undermining their work is the normal, and expected, course of action. The use of such resources is not necessarily evidence of obstruction. In the present case, the Panel considers that the use of resources by the SPO is an indicator of the seriousness with which the SPO addressed the matter and diligence of the SPO in responding to it.

655. Accordingly, the Panel cannot conclude that the diversion of SPO resources was so significant that it led to the obstruction of SC/SPO Officials performing SC/SPO Work.

¹³⁵⁰ See *supra* para. 548 (Count 6).

vi) Conclusion

656. For these reasons, the Panel finds that the SPO has failed to establish that the acts and statements of the Accused obstructed SC/SPO Officials in performing SC/SPO Work within the meaning of Article 401(1) of the KCC.

(d) “[A]ttempts to obstruct”

657. The Panel recalls that the offence under Article 401(1) of the KCC can also be committed if the perpetrator only attempts to obstruct an official person in performing official duties. As found above, attempt requires that the perpetrator began to execute one or more material elements.¹³⁵¹ The Panel has already established that the acts and statements of the Accused amounted to a serious threat within the meaning of Article 401(1) of the KCC, which in principle could have resulted in the obstruction of SC/SPO Officials performing SC/SPO Work. Accordingly, the Accused fulfilled one of the *actus reus* elements of the present offence amounting to an attempted form of this offence.

(e) Conclusion

658. In light of the above, the Panel is satisfied that the *actus reus* of the offence of obstructing official persons in performing official duties under Article 401(1) of the KCC has been established beyond reasonable doubt.

3. The Panel’s findings on the *mens rea* of the basic form of the offence

659. The Panel will now assess whether the Accused acted with direct or eventual intent to obstruct SC/SPO Officials in performing SC/SPO Work. The Panel has found under Count 3 that one of the Accused’s goals was to protect all KLA WVA members

¹³⁵¹ See *supra* para. 201 (Applicable Law).

from what they perceived as an injustice.¹³⁵² This entailed trying to ensure that KLA WVA members would not be convicted for alleged crimes, which in turn meant undermining or obstructing the SC/SPO.¹³⁵³ These goals were repeatedly expressed by the Accused before and during the Indictment Period. Accordingly, the Accused repeatedly stated that they: (i) did not recognise the SC/SPO;¹³⁵⁴ (ii) were opposed to it;¹³⁵⁵ (iii) wanted it lawfully abrogated;¹³⁵⁶ (iv) did not accept its authority;¹³⁵⁷ (v) wanted to embarrass, discredit and undermine it;¹³⁵⁸ and (vi) were committed to working towards these goals.¹³⁵⁹

¹³⁵² See *supra* paras 597, 603 (Count 3).

¹³⁵³ See *supra* paras 597-605 (Count 3).

¹³⁵⁴ P5, p. 1 (Mr Haradinaj: “We, members of the organization, do not recognize this court because, according to our Constitution, its mandate has run out”); P7, p. 3 (Mr Haradinaj: “we do not recognize you”); P18, p. 1 (Mr Haradinaj: “We do not recognize that Court and that’s why we will reveal it”); P21, p. 3 (Mr Haradinaj: “we don’t recognize The Chambers, we don’t recognize the Tribunal, these Chambers and this Special Prosecutor”).

¹³⁵⁵ P9, pp 8 (Mr Gucati: “we have said for the last four or five years, we are against the Special Court”), 12 (Mr Gucati: “For us this Court has always been unacceptable, we have said it for a long time, still it is unacceptable”); P42, p. 1 (12 December 2018), (Mr Gucati); P43, pp 1-3 (10 December 2019), (Mr Gucati); P49, pp 1-2, (31 October 2018), (Mr Haradinaj).

¹³⁵⁶ P38, p. 1 (25 June 2020), (Mr Haradinaj: “our first request is: abrogate the court”); P46, p. 1 (25 October 2019) (Mr Gucati: “Albin Kurti would be my greatest hero if he managed to abrogate the Specialist Chambers”); P47, p. 1 (24 June 2020), (Mr Gucati: “We will sit down with the parliamentary groups, we will talk with them about the ways to cease the Specialist Chambers or abrogate it...”).

¹³⁵⁷ P26, p. 2 (Mr Haradinaj: “I will not follow the orders of this Court. I feel ashamed and I do not recognise it”); P32, pp 1-2 (Mr Haradinaj).

¹³⁵⁸ P2, p. 4 (Mr Haradinaj: “It is for us to demolish, in the sense, not demolition, but to discredit the real reason of this Court which is stating: ‘I am strong, I safeguard these, and I have accurate evidence.’ [...] And no one has discredited them more than it has discredited itself, allowing the leaks and information to come out”); P28, p. 9 (Mr Gucati: “my responsibility is to undermine the Special Court”); P30, p. 15 (Mr Haradinaj: “[The KLA War Veterans] are against the Court, they’ve always been against the Court and will do anything to embarrass this racist Court that is selective, political and against the Albanians, based on the information from the Serbs”); P34, p. 2 (Mr Haradinaj: “The truth is that it does not make any sense just to discredit them because they were discredited from the moment of their establishment, but we are doing this to discredit their so-called professionalism...”).

¹³⁵⁹ P15, p. 1 (Mr Haradinaj: “[W]e will be against this court as long as we live, as long as we can breathe. Full stop. We will work against this court. Full stop”); P26, p. 2 (Mr Haradinaj: “It is our duty to work against this Court, it is our duty to protect our members, this is our duty”); P39, p. 3 (30 June 2020), (Mr Haradinaj: “there will be an end to this court. We think and we will work... i.e. the War Veterans Association will also work to undo this court”).

660. The Panel notes at the outset that these statements and purposes are not in themselves unlawful and cannot be considered, on their own, as evidence of an offence. Nonetheless, where such statements are coupled with unlawful actions to achieve such goals, the statements may become relevant to an inference that the Accused acted with an obstructive purpose in mind.

661. The Panel found under Count 3 that the Accused's intent to intimidate witnesses was a means to an end, namely, to prevent the SC/SPO from prosecuting and trying ex-KLA members or undermine the effectiveness of those efforts.¹³⁶⁰ The serious threat that the Accused used to dissuade Witnesses and Potential Witnesses from giving (further) evidence to the SC/SPO consisted of and was accompanied by a series of statements; some of these were directed at these witnesses, others were aimed at the SC/SPO. The Panel will therefore assess whether these statements, in conjunction with the Accused's acts, translated into an intent to obstruct SC/SPO Officials in performing their SC/SPO Work.

662. The Panel recalls that the Accused revealed the identity and/or personal data of hundreds of Witnesses and Potential Witnesses.¹³⁶¹ Doing so, they also expressly drew attention to the large number of names they identified in the Three Sets.¹³⁶² In this context, the Accused claimed that it was their duty to reveal the Protected Information, without any distinction as to its content, in order to expose how "scandalous"¹³⁶³ "shameful"¹³⁶⁴ and "unacceptable"¹³⁶⁵ the SC/SPO was for "collaborating" with Serbian authorities and unreliable witnesses, and for not protecting its witnesses. Mr Gucati declared:

¹³⁶⁰ See *supra* para. 603 (Count 3).

¹³⁶¹ See *supra* para. 522 (Count 6).

¹³⁶² See *supra* para. 559 (Count 3).

¹³⁶³ P1, p. 3 (Mr Haradinaj).

¹³⁶⁴ P1, p. 3 (Mr Haradinaj).

¹³⁶⁵ P4, p. 8 (Mr Gucati).

It is in our interest to distribute [the documents] as much as possible in the media and to convince both the public and the media that this Court is unacceptable, and we have always been against it.¹³⁶⁶

663. Mr Haradinaj also indicated that “[w]e do not recognize that Court and that’s why we will reveal [the documents]”.¹³⁶⁷

664. In performing their “duty” to reveal the Protected Information, without any distinction as to its content, the Accused also professed that their actions showed how “worthless”¹³⁶⁸ the SC/SPO was and that its collapse was inevitable.¹³⁶⁹ In the view of the Accused, this was due to the fact that, once the Protected Information was revealed, the distribution of its content, including the names therein, could no longer be stopped, because everyone knew now the witnesses’ names and because the SC/SPO was unable to protect its own witnesses.¹³⁷⁰ Mr Haradinaj referred to the SC/SPO as equal to or worse than a “kebab-shop”,¹³⁷¹ a “sweetshop”,¹³⁷² a Serbian “patisserie”,¹³⁷³ or “poslastičara”¹³⁷⁴; worse than “the courts of the jungle”,¹³⁷⁵ and with a judge who has done “zero”.¹³⁷⁶ Mr Gucati stated that the revelation of information

¹³⁶⁶ P4, p. 8. *See also* P4, p. 8 (Mr Gucati: “We are interested in unmasking the Specialist Chambers. And in informing you about any material that comes to us here, we will show you because we are against the Specialist Chambers”); P28, p. 9 (Mr Gucati: “But I am not interested at all what somebody has done and who has got them out. What interests me is the fact that they made it to my office and my responsibility is [...] to undermine the Special Court and to show to the public and everybody that the Special Court is working with the Serbian Prosecutor”).

¹³⁶⁷ P18, p. 1.

¹³⁶⁸ P29, p. 2 (Mr Gucati).

¹³⁶⁹ P8, pp 30-31 (Mr Haradinaj: “It will totally collapse. From what I read.... the testimony on which it has been built. It will totally collapse, because the witnesses, too, know now that others know who they are, that they have”); P7, p. 6 (Mr Haradinaj: “I think this court is finished”); P11, pp 56 (Mr Haradinaj: “the leak of the documents, discredits them”), 65 (Mr Haradinaj: “because all of this work, all this effort, whatever you might want to say, has gone to waste”).

¹³⁷⁰ *See supra* paras 565-567 (Count 3).

¹³⁷¹ P17, p. 9; P18, p. 7; P19, p. 3; P34, p. 2.

¹³⁷² P25, pp 2, 8.

¹³⁷³ P19, p. 3.

¹³⁷⁴ P34, p. 2.

¹³⁷⁵ P2, p. 2.

¹³⁷⁶ P7, p. 6.

showed that the SC/SPO was “bound to fail”¹³⁷⁷, “lost all its credibility”¹³⁷⁸ and that “no one can trust this Court, not today, not tomorrow or not any other day”.¹³⁷⁹

665. The Accused also pointed out that, in any event, the witnesses whom the SC/SPO was unable to protect were unreliable, because they were “traitors”, “spies”, “collaborators” and “Albanian-speakers” served up by the Serbian authorities to the SC/SPO.¹³⁸⁰ In the view of Mr Gucati, this confirmed that the SC/SPO was “racist”¹³⁸¹, “degrading”¹³⁸², “mono-ethnic” and “biased”¹³⁸³. He stated that “the world has never witnessed a more unfair, racist and degrading court, with the exception of the trials during the period of the Inquisition”.¹³⁸⁴ Mr Haradinaj noted that the SC/SPO was “racist, mono-ethnic, selective”¹³⁸⁵. Mr Haradinaj believed that the SC/SPO picked up its “justice” from (Slobodan) Milošević; he emphatically declared that “/I crap/ on the justice that they picked up from Milošević!”.¹³⁸⁶

666. On this basis, both Accused made clear their intentions to disobey orders of the SC/SPO. Mr Gucati did so even before the Indictment Period, when he urged “all my friends” not to respond to SPO summonses.¹³⁸⁷ Furthermore, both Accused repeatedly vowed to make public any new SC/SPO documents received, despite judicial and SPO

¹³⁷⁷ P9, p. 11.

¹³⁷⁸ P28, p. 13.

¹³⁷⁹ P31, p. 2.

¹³⁸⁰ See *supra* paras 569-574571 (Count 3). See also P40, p. 2 (Mr Gucati: “This court will always fail. The reason for their failure would be that they have called some witnesses, that I would call enemy ‘collaborators’, and some witnesses that have not been in Kosovo at all. That is why I believe that this court will fail”).

¹³⁸¹ P4, p. 8 (Mr Gucati); P40, p. 1 (12 December 2018), (Mr Gucati); P59, p. 1 (Mr Gucati).

¹³⁸² P59, p. 1 (Mr Gucati).

¹³⁸³ P4, p. 8 (Mr Gucati); P40, p. 1 (Mr Gucati); P41, p. 1 (Mr Gucati); P59, p. 1 (Mr Gucati).

¹³⁸⁴ P59, p. 1 (Mr Gucati).

¹³⁸⁵ P21, p. 4. See also P1, p. 2; P2, p. 3; P17, p. 1; P38, pp 1-2 (25 June 2020); P49, p. 2 (31 October 2018).

¹³⁸⁶ P18, p. 6.

¹³⁸⁷ P40, p. 1 (12 December 2018); P41, p. 1 (14 January 2019).

orders to desist from disseminating such information.¹³⁸⁸ Moments before his arrest, Mr Haradinaj declared that he would not follow the orders of the SC/SPO.¹³⁸⁹

667. Moreover, both Accused expressly declared that they wanted to stop or damage the SC/SPO proceedings, so that such a “worthless” and “biased” court does not prosecute “Kosovo’s sons”.¹³⁹⁰ When asked whether he was aware that the revelation of information could damage the court process, Mr Haradinaj replied:

Wow, but that’s what I like /to happen/, that is what I like.¹³⁹¹

668. While initially denying that he intended to obstruct the SC/SPO,¹³⁹² Mr Haradinaj confirmed during his testimony that he was willing to obstruct the SC “[i]f [the] KSC is one that bases its work on the data and ideas of Milošević”.¹³⁹³

669. Mr Gucati also clearly expressed his wish to abolish,¹³⁹⁴ “get rid of”¹³⁹⁵ the SC/SPO in “five minutes”.¹³⁹⁶ He stated:

I hope this Court is abolished as soon as possible and they stop all their activities against members of the Kosovo Liberation Army.¹³⁹⁷

670. At trial, Mr Gucati claimed that he did not wish to undermine or obstruct the SC/SPO, “but advise it not to collaborate with war criminals but with people who are witnesses of fact”.¹³⁹⁸ This explanation is contradicted by the evidence of Mr Gucati’s acts and statements during the Indictment Period, which do not show any tendency towards making the work of the SC/SPO more encompassing, but were clearly geared towards preventing the prosecution and conviction of KLA WVA members.

¹³⁸⁸ P4, pp 3, 8; P6, pp 4, 14; P15, p. 2; P18, pp 1-2; P21, pp 3-5; P24, pp 7-8; P26, pp 4-5 (Mr Haradinaj); P28, pp 7, 11, 12-13; P29, p. 2; P31, p. 2 (Mr Gucati).

¹³⁸⁹ P26, p. 2.

¹³⁹⁰ P8, p. 6.

¹³⁹¹ P18, p. 5.

¹³⁹² DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, pp 2813-2814; 2D1, para. 130.

¹³⁹³ DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2877.

¹³⁹⁴ P29, p. 1.

¹³⁹⁵ P28, p. 11.

¹³⁹⁶ P28, p. 11.

¹³⁹⁷ P29, p. 1.

¹³⁹⁸ DW1240 (Hysni Gucati), Transcript, 8 December 2021, p. 2433.

671. For these reasons, the Panel finds that the Accused acted with awareness of, and desire for, obstructing SC/SPO Officials in performing SC/SPO Work.

4. Conclusion

672. In light of the foregoing, the Panel finds that the SPO has established beyond reasonable doubt the elements of the basic form of the offence charged under Count 1 in relation to both Accused. The aggravated form of this offence is discussed in paragraphs 711-713.

F. OBSTRUCTING OFFICIAL PERSONS—BY COMMON ACTION OF A GROUP (COUNT 2)

1. Parties' submissions

673. The SPO alleged that, during the Indictment Period, the Accused and their Associates, by common action, obstructed or attempted to obstruct SC Proceedings. Mr Gucati and Mr Haradinaj organised and coordinated the group committing such acts.¹³⁹⁹

674. The SPO submitted that the group included Mr Klinaku, Mr Tomë Gashi and other KLA WVA members.¹⁴⁰⁰ In the view of the SPO, the Accused coordinated and contributed to the actions of the group, along with their Associates, by: (i) organising and hosting the Three Press Conferences, also attended by other KLA WVA members including Mr Klinaku and Mr Cele Gashi;¹⁴⁰¹ (ii) participating in media appearances concerning the Three Deliveries, sometimes joined by Mr Klinaku or Mr Tomë Gashi and sometimes disseminating further Confidential Information;¹⁴⁰² (iii) publicly

¹³⁹⁹ F251/A01 Indictment, para. 25.

¹⁴⁰⁰ Transcript, 14 March 2022, pp 3458-3459; F565 SPO Final Trial Brief, para. 194; F447, paras 29-30; F181/A01 SPO Pre-Trial Brief, paras 8(b), 173-174; F251/A01 Indictment, paras 25-28, 48.

¹⁴⁰¹ Transcript, 14 March 2022, pp 3458-3459; F565 SPO Final Trial Brief, para. 195; F447, para. 33; F181/A01 SPO Pre-Trial Brief, para. 175.

¹⁴⁰² F565 SPO Final Trial Brief, para. 195; F447, para. 33; F181/A01 SPO Pre-Trial Brief, para. 175.

praising, together with Mr Tomë Gashi, the providers of the Three Deliveries and welcoming further deliveries;¹⁴⁰³ (iv) threatening to continue disseminating Confidential Information, including witness identities, and to obstruct the mandate of the SC/SPO;¹⁴⁰⁴ and (v) making intimidating comments about, and/or threats in relation to, witnesses.¹⁴⁰⁵ The SPO further alleged that the Accused were aware of, and desired to, participate in the group to obstruct SC/SPO officials in performing their official duties or, alternatively, were aware that, as a result of participating in this group, this prohibited consequence might ensue, and acceded to such occurrence.¹⁴⁰⁶ The SPO submitted that the intent of the other members of the group, specifically that of Mr Klinaku and Mr Tomë Gashi, mirrored that of the Accused.¹⁴⁰⁷ The SPO further submitted that both Accused led and organised the group in taking these actions.¹⁴⁰⁸

675. The Defence submitted that the Accused did not participate in the common action of a group to obstruct any SC/SPO officials in performing official duties and that the Accused should be acquitted of Count 2.¹⁴⁰⁹ The Defence argued that the SPO failed to adduce evidence of: (i) common action or attempted action to use force or serious threat against an official person;¹⁴¹⁰ (ii) obstruction;¹⁴¹¹ (iii) how the other

¹⁴⁰³ F565 SPO Final Trial Brief, para. 196; F447, para. 34; F181/A01 SPO Pre-Trial Brief, para. 176. *See also* Transcript, 14 March 2022, p. 3460.

¹⁴⁰⁴ F565 SPO Final Trial Brief, para. 196; F447, para. 34; F181/A01 SPO Pre-Trial Brief, para. 176.

¹⁴⁰⁵ F565 SPO Final Trial Brief, para. 196; F447, para. 34; F181/A01 SPO Pre-Trial Brief, para. 176.

¹⁴⁰⁶ Transcript, 14 March 2022, pp 3459-3460; F565 SPO Final Trial Brief, para. 197; F447, para. 35; F181/A01 SPO Pre-Trial Brief, para. 177.

¹⁴⁰⁷ Transcript, 14 March 2022, pp 3458-2459; F447, para. 35; F181/A01 SPO Pre-Trial Brief, para. 177.

¹⁴⁰⁸ F565 SPO Final Trial Brief, para. 194; F251/A01 Indictment, para. 48.

¹⁴⁰⁹ Transcript, 16 March 2022, pp 3646-3647; F567 Gucati Final Trial Brief, para. 37; F439, para. 45; F258 Gucati Pre-Trial Brief, paras 7-9, 15-16, 65, 350-352; F440, paras 26-27; F260 Haradinaj Pre-Trial Brief, paras 32(a), 203.

¹⁴¹⁰ Transcript, 16 March 2022, p. 3695; F567 Gucati Final Trial Brief, paras 34-35; F439, paras 41-42; Haradinaj Final Trial Brief, paras 55, 60-61, 69.

¹⁴¹¹ Haradinaj Final Trial Brief, paras 70-72, 99-100; F260 Haradinaj Pre-Trial Brief, paras 207-208, 276(b).

individuals allegedly constituting the “group”, though not indicted, were part of the alleged offence;¹⁴¹² and (iv) co-ordination by the Accused.¹⁴¹³

2. The Panel’s findings on the *actus reus* of the basic form of the offence

676. The Panel will assess below whether the Accused participated in a group which, by common action, obstructed or attempted to obstruct an official person in performing official duties.¹⁴¹⁴ The Panel also recalls that according to the wording of Article 401(2) of the KCC the offence is committed when the obstruction actually occurred or when it was attempted by the perpetrator.¹⁴¹⁵

(a) “[O]fficial person in performing official duties”

677. As noted under Count 1, the Panel frames its assessment to establish whether the Accused obstructed or attempted to obstruct any SC/SPO Official in performing SC/SPO Work.¹⁴¹⁶ These findings are applicable here *mutatis mutandis*.

(b) “[P]articipates in a group of persons which by common action”

678. The evidence on the record shows that the Accused did not act alone in revealing Protected Information, including the identity and/or personal data of Witnesses and Potential Witnesses. This is apparent from the following considerations.

679. First, the Accused and other persons undertook a number of joint actions in the preparation and conduct of the Three Press Conferences and in relation to the seizure of the Batches by the SPO. The Panel notes that not all of these actions are, in themselves, proof of criminal conduct. They do, however, reflect the joint nature of actions by and the division of tasks among the Accused and others. In particular, the

¹⁴¹² Haradinaj Final Trial Brief, paras 104-106, 111-119; F440, paras 69-71, 74-78, 81-82.

¹⁴¹³ F260 Haradinaj Pre-Trial Brief, para. 225.

¹⁴¹⁴ See *supra* para. 158 (Applicable Law).

¹⁴¹⁵ See *supra* para. 158 (Applicable Law).

¹⁴¹⁶ See *supra* para. 638 (Count 1).

Accused reviewed the material together with Mr Klinaku and “other friends”, *i.e.* other members of the KLA WVA.¹⁴¹⁷ The decisions to call the Three Press Conferences involved the KLA WVA leadership, including Mr Klinaku and Mr Cele Gashi.¹⁴¹⁸ At least for the first two press conferences, Mr Gucati instructed Mr Klinaku to inform the media thereof and invite them to attend.¹⁴¹⁹ At the Three Press Conferences, Mr Gucati presided over the conferences in his capacity as Chairman of the KLA WVA, made introductory remarks about the documents and gave the floor to Mr Haradinaj to describe the content of the documents.¹⁴²⁰ At the Second Press Conference and the Third Press Conference, Mr Klinaku was present.¹⁴²¹ Moreover, the handover of the First Set by Mr Klinaku to the SPO was authorised by

¹⁴¹⁷ First Set: P1, p. 1 (Mr Gucati: “Nasim [Haradinaj] is better informed about [the documents] as he has looked at them briefly. He looked at these and analysed them with Faton [Klinaku] and other friends”); 1D3, paras 13-17; 1D9, para. 14; 2D1, paras 50-51. *See also* DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2241, 2253; DW1245 (Cele Gashi), Transcript, 10 December 2021, pp 2583-2584, 2591, 2594-2600. Second Set: 1D3, para. 34; 1D4, paras 18, 20; DW1240 (Hysni Gucati) Transcript, 6 December 2021, p. 2190; DW1241 (Taibe Miftari), Transcript, 9 December 2021, p. 2457; DW1245 (Cele Gashi), Transcript, 10 December 2021, pp 2587-2589; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2740. Third Set: P35, p. 9 (Mr Gucati: “We did not hide them from the German KFOR, we showed them every page”); 1D3, para. 46; 1D9, para. 31; 2D1, paras 102-104; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2199-2200; DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2297.

¹⁴¹⁸ First Press Conference: 1D3, para. 17 (Mr Gucati: “The close members of the committee, as above, namely, Faton [Klinaku], Cele [Gashi], Nasim [Haradinaj], and I and perhaps two others held an urgent meeting. Given our position as regards the KSC/SPO, we decided that we should make the delivery of the documents public. This was because we suspected that these documents were from the KSC/SPO. We therefore decided to call a press conference”); 2D1, para. 52. *See also* DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2169; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2727. Second Press Conference: 1D3, para. 35; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2190-2191 (Mr Gucati making it clear that the decision on what to make with this material was, like the first time, subject to discussion and agreement among the KLA WVA leadership); Transcript, 8 December 2021, p. 2410 (involving Mr Gucati, Mr Haradinaj, Mr Klinaku, Mr Cele Gashi, Mr Kryeziu, and the other members of the close board). Third Press Conference: 1D3, para. 47; 2D1, para. 107; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2200; Transcript, 8 December 2021, pp 2410-2411 (Mr Gucati claiming that the decision involved the following people: himself, Mr Haradinaj, Mr Klinaku, Mr Cele Gashi, Mr Kryeziu and possibly Migjen Shala, although it is not clear what part if any, the last individual had in that decision).

¹⁴¹⁹ 1D3, para. 18; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2170, 2190-2191. *See also* 2D1, paras 56, 73; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2727.

¹⁴²⁰ P1, p. 1; P2, pp 1-2, 9; P35, pp 1-2, 14.

¹⁴²¹ 2D1, para. 80.

Mr Gucati.¹⁴²² Mr Klinaku signed the First Handover Note on the occasion of the First Seizure.¹⁴²³ Mr Klinaku also coordinated with the SPO prior to the Second Seizure,¹⁴²⁴ at which he, Mr Gucati, Mr Haradinaj, other KLA WVA members and later Mr Tomë Gashi were present.¹⁴²⁵

680. Second, on 14 or 15 September 2020, the KLA WVA's 23-person leadership committee took a decision to publish SC/SPO material every time the organisation would receive it.¹⁴²⁶ The Accused also repeatedly affirmed that they were acting on behalf of the KLA WVA.¹⁴²⁷

681. Third, the Accused, Mr Klinaku and Mr Tomë Gashi participated in a number of media appearances.¹⁴²⁸ On a number of occasions, Mr Tomë Gashi appeared in the presence of either or both of the Accused.¹⁴²⁹ Mr Klinaku and Mr Tomë Gashi also expressed their own views in a number of media appearances, which were consistent with the statements of the Accused.¹⁴³⁰

682. The Panel is satisfied that these actions demonstrate a joint endeavor to reveal the Protected Information. They also show that the Accused and others divided among themselves the task of organising the Three Press Conferences, presenting the information contained in the Three Sets, liaising with the SPO and expressing common views during media appearances. The commonality of their views and actions was

¹⁴²² See *supra* paras 231 (The Events at Issue), 308 (Findings on the Batches). See also 1D3, para. 28; 1D4, paras 15, 17; 2D1, para. 115; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2182-2183; Transcript, 8 December 2021, pp 2393-2394.

¹⁴²³ P56; P57; P92. See *supra* paras 231 (The Events at Issue), 308 (Findings on the Batches).

¹⁴²⁴ P33, p. 1; 2D1, para. 81.

¹⁴²⁵ See *supra* para. 257 (The Events at Issue).

¹⁴²⁶ 1D4, para. 26; 1D8, para. 9; 1D9, paras 23, 29; 2D1, para. 73; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2746. See also DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458, 2472-2473. See also *supra* para. 242 (The Events at Issue).

¹⁴²⁷ See *supra* para. 580 (Count 3). P1, p. 1; P9, p. 8; P29, pp 1-2; P35, p. 4.

¹⁴²⁸ See *supra* paras 233-296 (The Events at Issue). Mr Klinaku: P13, P23; Mr Tomë Gashi: P4, P7, P34.

¹⁴²⁹ P4 (Mr Gucati and Mr Tomë Gashi); P7 (Mr Haradinaj and Mr Tomë Gashi); P34 (Mr Haradinaj and Mr Tomë Gashi); P35 (Mr Gucati, Mr Haradinaj, with 2D1, para. 80 indicating that Mr Klinaku was present).

¹⁴³⁰ See *infra* paras 685-691. See also *infra* para. 904 (Defences).

formally acknowledged by the 14/15 September 2020 leadership committee decision and by their public declarations of acting on behalf of the KLA WVA.

683. That being said, the Panel underscores that the common action under Count 2 must be aimed at obstructing or attempting to obstruct SC/SPO Officials in performing SC/SPO Work. While the evidence above shows that several individuals other than the Accused participated in the joint endeavor to reveal the Protected Information, there is insufficient evidence to identify them all and outline in detail their actions and the extent of their contribution to this joint endeavor.

684. In any event, the Panel recalls that a “group” must consist of at least three persons.¹⁴³¹ The Panel is satisfied that both Accused participated in the joint endeavor to reveal the Protected Information. The Panel has also found under Count 1 that both Accused intended to obstruct SC/SPO Officials in performing SC/SPO Work.¹⁴³² The Panel is thus satisfied that the two Accused participated in the “group” for the purposes of the present count. As noted above, the Panel limits its consideration of non-indicted individuals’ actions to what is necessary for the assessment of the criminal responsibility of the two Accused.¹⁴³³ Accordingly, the Panel need only ascertain if the evidence establishes the participation of a third person.

i) Mr Klinaku

685. The Panel notes that the secretary of the KLA WVA,¹⁴³⁴ Mr Klinaku: (i) was present at the Three Deliveries and Three Seizures;¹⁴³⁵ (ii) participated in the review of

¹⁴³¹ See *supra* para. 161 (Applicable Law).

¹⁴³² See *supra* para. 671 (Count 1).

¹⁴³³ See *supra* para. 16 (The Charges). See also ECtHR, [Karaman Judgment](#), paras 40-44, 64.

¹⁴³⁴ 1D3, para. 18; 2D1, para. 66.

¹⁴³⁵ First Delivery: 1D3, para. 12; 2D1, para. 47; 1D4, para. 7; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2164, 2168; Transcript, 7 December 2021, p. 2297. First Seizure: 1D3, para. 28; 2D1, para. 115; 1D4, paras 15, 17; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2182-2183; Transcript, 8 December 2021, pp 2393-2394; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2760; Transcript, 13 January 2022, pp 2928-2929. Second Delivery: 1D3, paras 32-34; 2D1, paras 70-71; 1D4, para. 20; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2187, 2188-2189; DW1249

the Three Sets;¹⁴³⁶ (iii) participated in the decisions to hold press conferences and in the 14/15 September 2020 decision of the leadership committee;¹⁴³⁷ (iv) upon Mr Gucati's instructions, invited journalists to attend the first two press conferences;¹⁴³⁸ (v) was present during the Second Press Conference and the Third Press Conference;¹⁴³⁹ (vi) handed over Batch 1 to the SPO during the First Seizure and liaised with the SPO prior to the Second Seizure;¹⁴⁴⁰ (vii) participated in at least three media appearances in which he described the Protected Information and expressed views similar to those of the Accused;¹⁴⁴¹ and (viii) was present during the 25 September 2020 SPO search of the KLA WVA premises as representative of the organisation, authorised to act as such by Mr Gucati.¹⁴⁴²

686. Mr Klinaku's actions were condoned by Mr Haradinaj, who noted on two occasions that Mr Klinaku acted in conformity with the decision of the KLA WVA leadership committee.¹⁴⁴³

(Nasim Haradinaj), Transcript, 11 January 2022, pp 2740-2742; Second Seizure: 1D3, para. 40; 2D1, paras 81, 87; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2196-2197; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2761, 2764-2765. Third Delivery and Third Seizure: DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2198, 2202.

¹⁴³⁶ See *supra* paras 211, 246, 276-277 (The Events at Issue). See also 2D1, para. 51; DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2241, 2253, 2297; DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, p. 3007.

¹⁴³⁷ 1D3, paras 17, 35, 47; 1D4, para. 26; 2D1, paras 52, 73, 107; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2190-2191; Transcript, 8 December 2021, p. 2410; DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2727.

¹⁴³⁸ 1D3, para. 18; 2D1, para. 56; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2170, 2190-2191; Transcript, 8 December 2021, p. 2410. See also DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2727.

¹⁴³⁹ P2 video-clip, minutes 00:00:11, 00:14:01-00:14:36; 2D1, para. 80; P35 video-clip, minutes 00:00:27-00:03:23.

¹⁴⁴⁰ P56; P57; P89, para. 10; P92, para. 7. See also 2D1, paras 66-67; P33, p. 1 (Mr Haradinaj: "Yes, we are waiting as they called our Secretary last night sometime after 18:40 hrs and they [SC] asked for the files. [...] the Specialist Chambers last night asked us to hand them over").

¹⁴⁴¹ P13; P22; P23.

¹⁴⁴² 1D3, para. 55.

¹⁴⁴³ P6, p. 3 (Mr Haradinaj: "The secretary responded to them adequately, in line with the decision taken by the close presidency – we have a close presidency – which was supported by the extended one at a meeting they wanted to eavesdrop on. The decision was that we should not hand them over without the presence of someone from our state institutions or a lawyer"); P33, p. 1 (Mr Haradinaj: "The

687. On his part, Mr Klinaku repeatedly echoed the statements and views expressed by the Accused. At a media appearance shortly after the First Seizure, Mr Klinaku explained that the KLA WVA had handed over copies of the First Set to the media and advised them to “make multiple copies in order that everybody got [the documents]” because “for us the Specialist Chambers does not exist, and we never accepted it, and we do not accept it today”.¹⁴⁴⁴ During the same interview, he noted that the SC/SPO “should not keep those documents secret”.¹⁴⁴⁵ On 10 September 2020, at another media appearance, Mr Klinaku stated that:

[W]e do not trust the Specialist Chambers because they deal mainly with testimonies given to them by the Serb occupiers and for us the testimonies they have from the Serb occupiers are not valid.¹⁴⁴⁶

688. This statement was later commended by Mr Haradinaj.¹⁴⁴⁷

689. On 24 September 2020, at another media appearance, Mr Klinaku refused to accept that the Accused and him had revealed names of witnesses.¹⁴⁴⁸ When it was put to him that he should be prosecuted for “interfering in the process, for uncovering the witnesses, for pressure”, Mr Klinaku replied: “It is the Court who uncovered them, the sham Special Court which uncovered them and which cooperates with Serbia. The files have come out of the offices”.¹⁴⁴⁹

690. The Panel is satisfied that the acts and statements of Mr Klinaku show that he acted jointly with the two Accused, expressly echoing their views and performing functions relevant to their joint endeavor. These actions thus demonstrate that

Secretary made very clear the decision taken by the Association. We took that decision, because, ultimately, we do not recognise this Court. We did not recognize from the beginning”).

¹⁴⁴⁴ P13, p. 1.

¹⁴⁴⁵ P13, p. 1.

¹⁴⁴⁶ P22, p. 1.

¹⁴⁴⁷ P60, pp 23-24 (Mr Haradinaj: “Bravo, Faton!”).

¹⁴⁴⁸ P23, p. 6 (Mr Klinaku: “Who has published names? [Interlocutor]: You. You have distributed – Mr Klinaku: The names of whom? [Interlocutor]: You have distributed, you have distributed as many documents as you can. Mr Klinaku: Vukčević’s name. So we made public Vukčević’s name, right? [Interlocutor]: You have made them all public. Mr Klinaku: What you are saying is not true. No one has made names public. [Interlocutor]: All of them”).

¹⁴⁴⁹ P23, p. 7.

Mr Klinaku and the two Accused participated in a group that operated by common action, which, in principle, could have resulted in the obstruction of SC/SPO Officials performing SC/SPO Work.

ii) Mr Tomë Gashi

691. The Panel notes that there is evidence of Mr Tomë Gashi's participation, as a lawyer for the KLA WVA, in the joint endeavor to reveal the Protected Information. Nonetheless, having established that the two Accused and Mr Klinaku formed a group within the meaning of Article 401(2) of the KCC, the Panel need not ascertain whether the acts and statements of Mr Tomë Gashi would qualify him as a fourth member of that group.

(c) "[O]bstructs"

692. The Panel found under Count 1 that the SPO failed to establish that the acts and statements of the Accused obstructed SC/SPO Officials in performing SC/SPO Work within the meaning of Article 401(1) of the KCC.¹⁴⁵⁰ Given that the alleged obstruction under Count 1 relies on the same acts and statements of the Accused as pleaded under Count 2, the Panel considers that the above findings also apply for the present count.¹⁴⁵¹

693. For these reasons, the Panel finds that SPO failed to establish that the acts and statements of the Accused obstructed SC/SPO Officials in performing SC/SPO Work within the meaning of Article 401(2) of the KCC.

¹⁴⁵⁰ See *supra* para. 656 (Count 1).

¹⁴⁵¹ See *supra* paras 649-655 (Count 1).

(d) “[A]ttempts to obstruct”

694. The Panel recalls that the offence under Article 401(2) of the KCC can also be committed if the obstruction has only been attempted.¹⁴⁵²

695. As found above, attempt requires that the perpetrator begun to execute one or more of the material elements.¹⁴⁵³ The Panel has already established that the Accused participated in the common action of a group, within the meaning of Article 401(2) of the KCC,¹⁴⁵⁴ which, in principle, could have resulted in the obstruction of SC/SPO Officials performing SC/SPO Work. Accordingly, the Accused fulfilled one of the *actus reus* elements of the present offence.

696. For these reasons, the Panel finds that the participation of the Accused in a group’s common action amounted to attempted obstruction of SC/SPO Officials in performing SC/SPO Work within the meaning of Article 401(2) of the KCC.

(e) Conclusion

697. In light of the above, the Panel is satisfied that the *actus reus* of the offence of obstructing official persons in performing official duties under Article 401(2) of the KCC has been established beyond reasonable doubt.

3. The Panel’s findings on the *mens rea* of the basic form of the offence

698. The Panel found under Count 1 that the Accused acted with awareness of, and desire for, obstructing SC/SPO Officials in performing SC/SPO Work.¹⁴⁵⁵ Given that the alleged intent to obstruct under Count 1 relies on the same acts and statements of the Accused as pleaded under Count 2, the Panel considers that the above findings also apply for the present count, in respect of the two Accused.¹⁴⁵⁶

¹⁴⁵² See *supra* para. 158 (Applicable Law).

¹⁴⁵³ See *supra* para. 201 (Applicable Law).

¹⁴⁵⁴ See *supra* paras 678-691.

¹⁴⁵⁵ See *supra* para. 671 (Count 1).

¹⁴⁵⁶ See *supra* paras 659-670 (Count 1).

699. In addition, the actions described in paragraphs 678-683 demonstrate that both Accused intended to participate in the common action of a group to achieve their obstructive purpose. In particular, the congruent actions and the division of tasks in relation to organising the Three Press Conferences, presenting the information contained in the Three Sets, liaising with the SPO and expressing common views during media appearances show a clear intent to participate in the common action of a group. This intent is further confirmed by the 14/15 September 2020 leadership committee decision and by the Accused's repeated statements that they were acting as representatives of the KLA WVA.¹⁴⁵⁷

700. As regards Mr Klinaku, the Panel notes that his acts and statements as described in paragraphs 686-690 show a convergence of views with the Accused. The Panel further notes that Mr Klinaku's statements were made in his capacity as secretary of the KLA WVA and he explicitly indicated that he was acting under the authority of Mr Gucati.¹⁴⁵⁸ This shows his resolve to participate in the common action of a group encompassing the two Accused. Mr Klinaku also expressly supported the revelation of Protected Information,¹⁴⁵⁹ indicated his distrust of the SC/SPO,¹⁴⁶⁰ and pointed at the SC/SPO's "scandal" for leaking documentation when confronted with criticism for having sent "a threatening message to the witnesses" and "interfering with the judicial process".¹⁴⁶¹ The Panel is satisfied that Mr Klinaku's acts and statements show that, at a minimum, he acted with the awareness that, as a result of his participation in a group with the two Accused, the obstruction by common action of SC/SPO Officials performing SC/SPO Work could occur, and acceded to that occurrence. The Panel emphasises, however, that the above conclusions do not translate into a finding of

¹⁴⁵⁷ See *supra* para. 680.

¹⁴⁵⁸ P13, p. 1.

¹⁴⁵⁹ P13, p. 1.

¹⁴⁶⁰ P22, p. 1.

¹⁴⁶¹ P23, p. 2.

guilt for Mr Klinaku.¹⁴⁶² Instead, they are conclusions that are necessary for the assessment of the criminal responsibility of the two Accused.

701. For these reasons, the Panel finds that the Accused acted in a group with the awareness of, and desire for, obstructing SC/SPO Officials in performing SC/SPO Work by common action.

4. The Panel's findings on the aggravated form of the offence

702. The Panels recalls that Article 401(3) of the KCC criminalises and the SPO pleads an aggravated form for the leader or organiser of the group which commits the offence under Article 401(2) of the KCC. The Panel notes that the SPO pleads the aggravated form in relation to both Accused.¹⁴⁶³

703. The Panel found above that the group within the meaning of Article 401(2) of the KCC consisted of at least Mr Gucati, Mr Haradinaj and Mr Klinaku ("Group"). The Panel also noted the repeated declarations of the Accused that they were acting on behalf of the KLA WVA,¹⁴⁶⁴ and Mr Klinaku's indications that he was acting upon instructions of Mr Gucati.¹⁴⁶⁵

704. Within the KLA WVA, Mr Gucati was, *de jure*, the leader of the organisation as its Chairman.¹⁴⁶⁶ Mr Haradinaj acted as one of two deputy chairmen.¹⁴⁶⁷ Mr Gucati's *de jure* authority is also confirmed by being the addressee of the First Order, the Second Order and the SPO Order.¹⁴⁶⁸

¹⁴⁶² See *supra* para. 16 (The Charges).

¹⁴⁶³ F565 SPO Final Trial Brief, para. 194.

¹⁴⁶⁴ See *supra* para. 580 (Count 3); P1, p. 1; P9, p. 8; P6, p. 14; P35, p. 4; P29, pp 1-2.

¹⁴⁶⁵ P13, p. 1.

¹⁴⁶⁶ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2159-2160, 2217; 1D3, paras 9-10.

¹⁴⁶⁷ DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2217.

¹⁴⁶⁸ P52; P53; P54. See also P4, p. 3 (Mr Gucati: "I will show you a summons they have sent. The summons is addressed personally to my name – myself, as Chairman of the War Veterans").

705. The Panel notes that Mr Gucati's authority as Chairman is but one indication of his *de facto* leadership of the Group. His role as leader of the Group was on display and relied upon as part of the efforts of the Accused and Mr Klinaku to reveal Protected Information and obstruct SC/SPO Officials in performing SC/SPO Work. In particular, Mr Gucati's role is apparent from: (i) ordering Mr Klinaku to send invitations to journalists for the upcoming press conferences;¹⁴⁶⁹ (ii) agreeing to Mr Haradinaj having the main role at the press conferences;¹⁴⁷⁰ (iii) introducing the topic at the Three Press Conferences and then giving the floor to Mr Haradinaj,¹⁴⁷¹ who spoke under his authority;¹⁴⁷² (iv) instructing Mr Klinaku on handing over the remnants of the First Set to the SPO;¹⁴⁷³ (v) speaking at the Three Press Conferences and other media appearances in his capacity as Chairman of the KLA WVA;¹⁴⁷⁴ and (vi) authorising Mr Klinaku to act as a representative of the KLA WVA during the search of its premises on 25 September 2020.¹⁴⁷⁵

706. During his testimony, Mr Gucati confirmed that, in his capacity as the Chairman of the KLA WVA, he took the decisions and gave the instructions regarding the revelation of the Three Sets at the Three Press Conferences:

¹⁴⁶⁹ 1D3, para. 18; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2170, 2190-2191. *See also* 2D1, para. 56; DW1240 (Hysni Gucati), Transcript, 8 December 2021, p. 2410; Transcript, 11 January 2022, p. 2727.

¹⁴⁷⁰ 1D3, para. 20.

¹⁴⁷¹ P1, p. 1; P2, p. 1; P35, pp 1-2.

¹⁴⁷² 1D3, para. 48 (Mr Gucati: "I accept that [Mr Haradinaj] spoke with my authority and with the authority of the leadership").

¹⁴⁷³ 1D7, para. 20; P7, p. 3 (Mr Haradinaj: "the chairman ordered by phone saying, 'let them have it'"); P13, p. 1 (Mr Klinaku: "I act under, Hysni Gucati, the head, who said that a copy, which remained with us, because we were delivered four copies, and which was meant to be handed over to the Kosovo prosecution office, and it was the head's decision, it was decided to hand that copy over to the Specialist Chambers' investigators"); P17, p. 3 (Mr Haradinaj: "So he [the secretary] did not hand them over to them without the order from the chairman, who also happened to be on holiday"); P28, pp 6-7 (Mr Gucati); P57 ("since the Chairman decides to give it to them (phone contacts)").

¹⁴⁷⁴ P1, p. 1; P2, pp 1-2; P9, p. 1; P28, pp 1, 7; P29, p. 1.

¹⁴⁷⁵ 1D3, para. 55.

Only God can force me to do something. I'm the chairman of that organisation, and not a single person can force me to hold a press conference on certain issue. Only God can order me to do that, if you believe in God. [...]

I will say it again. I'm the chairman of WVA. I have two deputy chairmen. So nobody can convince me to do this or that. I can get the advice of friends from within the organisation or outside the organisation.¹⁴⁷⁶

707. The Panel is thus satisfied that Mr Gucati acted as the leader of the Group.

708. As regards Mr Haradinaj, the evidence shows that he acted under the authority of Mr Gucati. In particular, he asked and was authorised to have the main role at the press conferences and spoke after being given the floor by Mr Gucati.¹⁴⁷⁷ At other media appearances, he expressly acknowledged the authority of Mr Gucati.¹⁴⁷⁸

Following the arrest of Mr Gucati, Mr Haradinaj stated:

I was called by Mr Gucati, at their request, so I attended. He told me that 'I'm being transferred to The Hague'. I only set off because my Chairman asked me to do so and I had to do as he said.¹⁴⁷⁹

709. For these reasons, the Panel, while noting Mr Haradinaj's significant role as a member of the Group, is not satisfied that he acted as its leader.

5. Conclusion

710. In light of the foregoing, the Panel finds that the SPO has established beyond reasonable doubt the elements of the basic form of the offence charged under Count 2 in relation to both Accused. The Panel also finds that the SPO has established beyond reasonable doubt the aggravated form under Article 401(3) of the KCC in relation to Mr Gucati. The aggravated form under Article 401(5) of the KCC is discussed below.

¹⁴⁷⁶ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2216-2217.

¹⁴⁷⁷ P1, p. 1; P2, pp 1-2; P35, pp 1-2; 1D3, para. 20.

¹⁴⁷⁸ P7, p. 3.

¹⁴⁷⁹ P26, p. 2.

G. OBSTRUCTING OFFICIAL PERSONS – COMMON AGGRAVATED FORM

711. The aggravated form under Article 401(5) of the KCC applies to both offences under Counts 1 and 2 and requires that the offence is committed against, *inter alia*, a judge, a prosecutor or an official of a court.

712. The Panel notes that the definition of SC/SPO Officials necessarily includes SC judges and SPO prosecutors. The Panel further observes that both Accused expressed a wish to have the SC/SPO abolished, thereby implying a general resolve to obstruct or attempt to obstruct the work of all SC/SPO Officials, including judges, prosecutors and all officials of the SC/SPO. As regards SPO investigators and prosecutors, the Panel finds that the Accused's acts and statements, under both Counts 1 and 2, clearly reflect a desire to obstruct the collection of witness evidence by such SPO Officials.¹⁴⁸⁰ As regards SC judges, Mr Haradinaj expressed his hope that the revelation of Protected Information would affect the work and decision-making of the judge who confirmed indictments.¹⁴⁸¹ Nonetheless, in the absence of other conclusive evidence, the Panel cannot conclude that the above remarks establish beyond reasonable doubt that the Accused intended to obstruct any SC judge in performing his or her duties.

713. For these reasons, the Panel finds that the SPO has established beyond reasonable doubt the aggravated form of the offences under Counts 1 and 2 in relation to both Accused to the extent that they attempted to obstruct SPO prosecutors and investigators.

¹⁴⁸⁰ See *supra* paras 659-669 (Count 1), 699 (Count 2).

¹⁴⁸¹ P7, pp 6, 12-13; P34, p. 2.

VII. MODES OF LIABILITY

A. PARTIES' SUBMISSIONS

714. The modes of liability as charged have been set out in paragraph 8. In relation to the objective elements of the charged modes of liability, the SPO further submitted that: (i) the Accused committed the crimes charged and, in the alternative, for all charged offences except Count 5, the Accused attempted to commit these offences;¹⁴⁸² (ii) the Accused and their Associates committed the crimes in co-perpetration and/or agreed to commit them;¹⁴⁸³ (iii) the Accused incited the commission of the charged offences through the exertion of psychological influence on one another and other persons;¹⁴⁸⁴ and (iv) the Accused provided assistance to one another and other persons in the commission of the charged offences.¹⁴⁸⁵

715. In relation to the subjective elements of all charged modes of liability, the SPO submitted that the Accused's deliberate conduct establishes that they intended to commit the charged offences and to incite and assist the commission of those offences.¹⁴⁸⁶ The SPO also maintained that, when applicable for certain modes of liability, the same intentions were shared by other persons.¹⁴⁸⁷ In the alternative, the SPO submitted that the Accused and others, as applicable, were aware that the charged offences could occur as a result of their acts or omissions and acceded to their occurrence.¹⁴⁸⁸

716. The SPO requested the Panel to make findings on all charged modes of liability, even though they are charged in the alternative, to ensure the record on this point is

¹⁴⁸² F565 SPO Final Trial Brief, para. 277.

¹⁴⁸³ F565 SPO Final Trial Brief, para. 278.

¹⁴⁸⁴ F565 SPO Final Trial Brief, paras 279-281.

¹⁴⁸⁵ F565 SPO Final Trial Brief, para. 282.

¹⁴⁸⁶ F565 SPO Final Trial Brief, para. 275.

¹⁴⁸⁷ F565 SPO Final Trial Brief, para. 275.

¹⁴⁸⁸ F565 SPO Final Trial Brief, para. 276.

clear for purposes of any appellate proceedings. When the same conduct can be characterised under all modes of liability, the SPO requested that the Accused be convicted on whichever form of principal liability (direct or co-perpetration) the Panel considers as best reflecting the individual criminal responsibility of the Accused.¹⁴⁸⁹

717. The Gucati Defence submitted that where alternative modes of liability relate to the same (or essentially the same) set of facts, a conviction on the lesser mode of liability is subsidiary to the situations in which the greater is not established.¹⁴⁹⁰ The Gucati Defence further averred that the nature of the specific relationship (*i.e.* which is the greater and which is the lesser mode of liability) between co-perpetration and incitement will depend upon the rulings of the Panel as to the *mens rea* and *actus reus* for these modes of liability.¹⁴⁹¹ The Gucati Defence also added that no evidence has been adduced that would support the Accused's criminal liability for attempt, incitement, assistance, or agreement in the circumstances.¹⁴⁹²

718. The Haradinaj Defence submitted that the SPO appears to confuse direct perpetration, co-perpetration and forms of inchoate ability. It averred that the approach is not focused on the evidence and the specific allegations against the Accused.¹⁴⁹³ The Haradinaj Defence also submitted that by asserting that at least two non-indicted individuals are jointly responsible prejudices Mr Haradinaj in that he is not in a position to challenge any relevant evidence in this regard.¹⁴⁹⁴

B. THE PANEL'S FINDINGS

719. As with the counts, the Panel observes that the same set of facts and circumstances is relevant for multiple modes of liability. Given its responsibility under

¹⁴⁸⁹ F565 SPO Final Trial Brief, para. 322; Transcript, 14 March 2022, p. 3504.

¹⁴⁹⁰ F567 Gucati Final Trial Brief, para. 143.

¹⁴⁹¹ F567 Gucati Final Trial Brief, para. 144.

¹⁴⁹² F567 Gucati Final Trial Brief, para. 91; F439, para. 96.

¹⁴⁹³ F566 Haradinaj Final Trial Brief, paras 49-50. *See also* F260 Haradinaj Pre-Trial Brief, paras 257-272.

¹⁴⁹⁴ F260 Haradinaj Pre-Trial Brief, para. 106.

Rule 158(2) of the Rules, the Panel will address each mode of liability, but it will refer, where appropriate, to facts and circumstances discussed under other modes of liability.

720. As regards Counts 1, 2, 3, 5 and 6, the Panel found that the SPO established beyond reasonable doubt the elements of the respective charged offences in relation to both Accused. The Panel will address the modes of liability in respect of these charges.

721. As regards Count 4, the Panel found that the *mens rea* elements of that offence have not been fulfilled in relation to the Accused nor any of their Associates. As the Panel found that the SPO failed to establish beyond reasonable doubt that the Accused or any Associates possessed such a *mens rea*, the Panel shall not address any modes of liability in respect of this charge.

1. Co-perpetration

722. The Panel will address co-perpetration for Counts 1, 3, 5 and 6. For Count 2, direct perpetration as a form of commission shall be addressed in the next section.

723. In determining whether the Accused are criminally responsible as co-perpetrators for the offences charged under Counts 1, 3, 5 and 6, the Panel considered whether: (i) the Accused jointly (ii) participated in or substantially contributed in any other way to the commission of the offences with (iii) the required subjective element.¹⁴⁹⁵

(a) Joint conduct by the Accused

724. After each delivery of documents at the KLA WVA premises, the Accused, together with other persons, took common decisions to call a press conference and make the received documents public.¹⁴⁹⁶ Furthermore, on 14 or 15 September 2020, a

¹⁴⁹⁵ F74 Confirmation Decision, paras 82, 84.

¹⁴⁹⁶ See *supra* para. 679 (Count 2).

unanimous decision of the 23-member KLA WVA leadership committee (which included both Accused) was taken to publish any further documents of similar nature.¹⁴⁹⁷

725. In pursuance of these decisions, the Accused acted jointly in: (i) reviewing the material and allowing other persons at the KLA WVA premises to inspect the material;¹⁴⁹⁸ (ii) participating together at the Three Press Conferences;¹⁴⁹⁹ (iii) displaying the Three Sets on the table in front of them and allowing journalists to inspect, photograph, film and take away copies of the Three Sets;¹⁵⁰⁰ and (iv) making repeated statements, including in each other's presence,¹⁵⁰¹ reflecting a commonality

¹⁴⁹⁷ P9, p. 8 (Mr Gucati: "We discussed it with the committee, spoke with them"); 1D8, para. 9; 1D9, paras 23, 29; 2D1, para. 73. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458, 2472-2473, 2475; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2746.

¹⁴⁹⁸ *See supra* fn. 1417.

¹⁴⁹⁹ P1; P2; P35.

¹⁵⁰⁰ P1 video-clip, minutes 00:00:32-00:00:35 (Mr Gucati), 00:00:46-00:00:48 (Mr Gucati), minutes 00:01:14-00:01:18 (Mr Gucati), 00:14:20-00:14:35 (Mr Haradinaj), 00:14:44-00:14:49 (Mr Gucati), 00:15:55-00:16:03 (Mr Gucati), 00:16:35-00:16:52 (Mr Haradinaj); P1, pp 6-9 (Mr Haradinaj); P2 video-clip, minutes 00:00:58-00:01:10 (Mr Gucati), 00:11:14-00:11:16 (Mr Gucati), 00:11:44-00:11:46 (Mr Gucati); P35 video-clip, minutes 00:14:33-00:14:35 (Mr Haradinaj), 00:15:55-00:16:03 (Mr Haradinaj), 00:16:35-00:16:52 (Mr Haradinaj); P35, pp 2 (Mr Gucati), 14 (both Accused); P50 video-clip, minutes 00:15:55-00:16:19 (Mr Gucati); P50, p. 1 (Mr Haradinaj); 1D3, para. 49. *See also* W04866 (Halil Berisha), Transcript, 26 October 2021, pp 1519-1520.

¹⁵⁰¹ P1; P2; P35; P12.

of their views and actions not only regarding the revealing of the documents,¹⁵⁰² but also on witnesses¹⁵⁰³ and the impact on the SC/SPO.¹⁵⁰⁴

726. In light of the above, the Panel is satisfied that the Accused acted jointly when carrying out the acts that form the basis of the charges.

(b) Mr Gucati's participation in the joint commission

727. The Panel found that Mr Gucati was aware of the general content of all Three Sets, albeit to a lesser extent than Mr Haradinaj.¹⁵⁰⁵ The Panel also found that, at all times during the Indictment Period, Mr Gucati acted with an awareness that the Three Sets were authentic.¹⁵⁰⁶ Furthermore, the Panel held that Mr Gucati distributed the Three Sets and described information therein with the awareness that it included confidential information and the names of protected witnesses.¹⁵⁰⁷

¹⁵⁰² P1, p. 8 (Mr Haradinaj: "Had *we* wanted ... had *we* wanted, *we* would not have made these public at all") (emphasis added); P2, p. 4 (Mr Haradinaj: "Every time *we* receive them, *we* will make them public. And *we* do not hold any responsibility about it, and I am not bothered about this matter"); P4, p. 3 (Mr Gucati: "And *we* told them that 'any time *we* receive documents from the Specialist Chambers, *we* will make them public for the media'" (emphasis added); P35, p. 2 (Mr Gucati: "*we* will disclose them to Kosovo people, to our country, to everybody"); p. 3 (Mr Haradinaj: "We will publish everything we receive here, *we* will not keep anything secret. [...] *we* will do it. This is *our* duty"), p. 13 (Mr Haradinaj: "I am speaking on my behalf and *on the behalf of the whole presidium*. [Overlapping speakers] *We* are ready to face 300 years [in prison]. *We* are ready to die") (emphasis added).

¹⁵⁰³ P2, p. 4 (Mr Haradinaj: "And once more, those who think of intimidating anyone – they will say that *we* have files, that *we* know their names. They are anti-nationalist people and people who do not love Kosovo") (emphasis added); P35, p. 2 (Mr Gucati: "We will show the truth that these [mentioned] here tried and are trying to discredit the KLA by all means") (emphasis added).

¹⁵⁰⁴ P2, p. 6 (Mr Haradinaj: "Because *we* are from – as an association and organization, you know that *we* are against this Court") (emphasis added); P4, pp 3 (Mr Gucati: "the reason why *we* will make them public. *We* will prove our words spoken three years ago to the members of the Army and to the citizens of Kosovo") (emphasis added), 8 (Mr Gucati: "It is in *our* interest to distribute them as much as possible in the media and to convince both the public and the media that this Court is unacceptable") (emphasis added); P7, p. 6 (Mr Haradinaj: "The reason why *we* put this out is ... *we* put this out because *we* want to show to the judge that the job you have done is zero") (emphasis added); P18, p. 1 (Mr Haradinaj: "We do not recognize that Court and that's why *we* will reveal it") (emphasis added); P26, p. 2 (Mr Haradinaj: "it is *our* duty to work against this Court, it is *our* duty to protect our members, this is *our* duty") (emphasis added).

¹⁵⁰⁵ See *supra* para. 377 (Findings on the Batches).

¹⁵⁰⁶ See *supra* para. 421 (Findings on the Batches).

¹⁵⁰⁷ See *supra* para. 456 (Findings on the Batches).

i) Count 5

728. Mr Gucati reviewed the Three Sets and allowed other KLA WVA staff¹⁵⁰⁸ to inspect the contents of the documents.¹⁵⁰⁹ Further to a common decision to call a press conference after each of the Three Deliveries, Mr Gucati authorised Mr Klinaku, on at least two occasions,¹⁵¹⁰ to inform the media and invite them to attend.¹⁵¹¹

729. During the Three Press Conferences, Mr Gucati: (i) presided over the conferences in his capacity as Chairman of the KLA WVA, made introductory remarks about the Three Sets and gave the floor to Mr Haradinaj to describe their content;¹⁵¹² (ii) pointed at the availability of the documents on the desk in front of the Accused,¹⁵¹³ and invited or allowed those present to inspect the documents;¹⁵¹⁴ (iii) showed the documents to the reporters and/or invited those with cameras to focus on the documents;¹⁵¹⁵ (iv) invited and allowed those present to take documents with them;¹⁵¹⁶ (v) referred or cited to information in the documents, including names of SPO and Serbian officials;¹⁵¹⁷ (vi) encouraged journalists to publish the material;¹⁵¹⁸ and (vii) indicated that if more documents were brought, the KLA WVA will accept them in order to provide them to the media.¹⁵¹⁹

¹⁵⁰⁸ 1D3, paras 14-17; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2168; DW1241 (Taibe Miftari), Transcript, 9 December, pp 2455, 2457; 1D9, paras 13, 15, 31.

¹⁵⁰⁹ P9, p. 6; P35, pp 2, 14; DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2200; Transcript, 7 December, p. 2297. *See also supra* paras 211, 246, 276-277 (The Events at Issue).

¹⁵¹⁰ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2170, 2190-2191; 1D3, para. 18; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2727.

¹⁵¹¹ *See e.g.* 1D3, paras 16-18; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2168-2170; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2727.

¹⁵¹² P1, p. 1; P2, pp 1-2; P35, pp 1-2.

¹⁵¹³ P1 video-clip, minutes 00:00:32-00:00:35, 00:00:46-00:00:48.

¹⁵¹⁴ P35, pp 2, 14.

¹⁵¹⁵ P1 video-clip, minutes 00:01:17-00:01:18, 00:14:44-00:14:49, 00:15:55-00:16:03; P2 video-clip, minutes 00:01:00-00:01:08, 00:01:17-00:01:18, 00:11:14-00:11:16, 00:11:44-00:11:46.

¹⁵¹⁶ P2, p. 1; P35, p. 15.

¹⁵¹⁷ P2, pp 1-2; P35, pp 1-2.

¹⁵¹⁸ P35, p. 14.

¹⁵¹⁹ P2, p. 9.

730. Mr Gucati was present at a media appearance together with Mr Haradinaj, where Mr Tomë Gashi indicated on behalf of the KLA WVA that the organisation would inform the public every time they receive material relating to the SC/SPO.¹⁵²⁰

731. Mr Gucati also attended other media appearances, on his own or together with Mr Tomë Gashi.¹⁵²¹ At these media appearances, Mr Gucati: (i) read from or described the content of the documents;¹⁵²² (ii) repeatedly vowed to continue publishing any documents received;¹⁵²³ (iii) stated that it was his duty to share the documents with the media;¹⁵²⁴ and/or (iv) confirmed or vowed that copies were or would be made available to the media.¹⁵²⁵

732. During the Indictment Period, two posts that appeared on Mr Gucati's Facebook account shared:¹⁵²⁶ (i) a post of Mr Haradinaj welcoming the person who dropped off the First Set;¹⁵²⁷ and (ii) a media article featuring a screenshot of an SITF document.¹⁵²⁸

733. In addition, Mr Gucati acted at all times as Chairman of the KLA WVA. He confirmed during his testimony that he supported everything Mr Haradinaj had said.¹⁵²⁹

734. In light of the above, the Panel is satisfied that Mr Gucati participated in and substantially contributed to the revealing of Protected Information.

¹⁵²⁰ P12, p. 4.

¹⁵²¹ P9; P4 (with Mr Tomë Gashi); P28; P29, P31.

¹⁵²² P9, p. 5; P28, pp 10, 14; P29, p. 1; P31, p. 3.

¹⁵²³ P4, pp 3, 8; P28, pp 7, 11, 12-13; P29, p. 2; P31, p. 2.

¹⁵²⁴ P9, p. 6.

¹⁵²⁵ P9, p. 6.

¹⁵²⁶ Mr Gucati recognised the Facebook profile "hisni.gucati" as his own. DW1240 (Hysni Gucati), Transcript, 8 December 2021, pp 2354-2363, 2434.

¹⁵²⁷ P83, p. 49.

¹⁵²⁸ P83, p. 46.

¹⁵²⁹ DW1240 (Hysni Gucati), Transcript, 8 December 2021, p. 2374 ("I'm the chairman of the organisation. He's my deputy. We had a statement of what needs to be made to the media. We said that we have invited – we have invited journalists to a press conference. We had no idea what questions should be asked, so there's no authorisation or no need. So there has been no need to have that kind of authorisation, but I have supported everything that he's said").

ii) Count 6

735. In addition to the acts and statements described in paragraphs 728-733, Mr Gucati: (i) publicly indicated that the Three Sets contained “a wide range of people”¹⁵³⁰, “the majority of the witnesses”¹⁵³¹, “all of them”¹⁵³²; (ii) publicly pointed at the presence in the Three Sets of names, ethnicity, interview dates and locations and content of statements of witnesses, while affirming that they were not to be named;¹⁵³³ (iii) encouraged journalists to publish the names of witnesses and reproached some for not wanting to do so;¹⁵³⁴ and (iv) was present, and remained silent, when Mr Haradinaj made reference to the fact that the Three Sets contained names or other details of Witnesses or Potential Witnesses.¹⁵³⁵

736. Mr Gucati’s revelation of the identity and personal data of Witnesses and Potential Witnesses resulted in serious consequences within the meaning of Article 392(3) of the KCC for the Witnesses at Risk.¹⁵³⁶

737. In light of the above, the Panel is satisfied that Mr Gucati participated in and substantially contributed to the revealing of the identity and personal data of Witnesses and Potential Witnesses.

iii) Count 3

738. In addition to the acts and statements described in paragraphs 728-735, Mr Gucati publicly questioned whether anyone was protecting SC/SPO witnesses,¹⁵³⁷

¹⁵³⁰ P9, pp 6-7.

¹⁵³¹ P59, p. 1.

¹⁵³² P1, p. 4.

¹⁵³³ P9, pp 6-7, 10; P28, pp 1, 11; P35, pp 1-2, 13; P59, pp 1, 3.

¹⁵³⁴ P35, pp 13-14.

¹⁵³⁵ P1; P2; P35.

¹⁵³⁶ *See supra* para. 547 (Count 6).

¹⁵³⁷ P9, p. 5.

and claimed that the SC should be prosecuted for jeopardising its own witnesses,¹⁵³⁸ and that it had lost all of its credibility as a result of the revelation.¹⁵³⁹

739. At the same time, Mr Gucati publicly questioned the veracity of the witnesses' accounts, describing them as: (i) persons who lied¹⁵⁴⁰ or made "a lot of fabrications"¹⁵⁴¹ in their statements to be granted asylum in the West;¹⁵⁴² or (ii) "tools of political parties" who "were urged to testify because of political rivalries".¹⁵⁴³ He also claimed that witness statements had been obtained through force or duress and could not therefore be believed.¹⁵⁴⁴

740. Moreover, Mr Gucati described witnesses as: (i) "Albanian speakers"¹⁵⁴⁵ who were "on the Serbian side";¹⁵⁴⁶ (ii) "the ones that do not have the best interests of this country at heart, and the KLA";¹⁵⁴⁷ (iii) "a collaboration of a ring of Albanian-speaking people, and Serbia";¹⁵⁴⁸ (iv) "some traitors of our country" who "stand up and lie";¹⁵⁴⁹ (v) "lots of people in whom we trusted [...], we welcomed them in our houses, meetings...respected them...and the likes";¹⁵⁵⁰ and (vi) "collaborators".¹⁵⁵¹

741. Mr Gucati's remarks echoed comments he made prior to the Indictment Period,¹⁵⁵² when he affirmed that the SC/SPO would fail because of the "collaborator" witnesses.¹⁵⁵³ His statements carried the message that once everyone knew who the

¹⁵³⁸ P59, p. 1.

¹⁵³⁹ P28, p. 13.

¹⁵⁴⁰ P59, p. 2.

¹⁵⁴¹ P9, p. 11.

¹⁵⁴² P9, p. 11; P59, p. 2.

¹⁵⁴³ P59, p. 2.

¹⁵⁴⁴ P59, p. 2.

¹⁵⁴⁵ P9, pp 6, 13.

¹⁵⁴⁶ P9, p. 6.

¹⁵⁴⁷ P9, p. 6.

¹⁵⁴⁸ P9, p. 11.

¹⁵⁴⁹ P9, p. 12.

¹⁵⁵⁰ P9, p. 9.

¹⁵⁵¹ P9, p. 11.

¹⁵⁵² See *supra* paras 569-570, 573-574 (Count 3).

¹⁵⁵³ P40 (12 December 2018), p. 2.

witnesses were, no one could protect them, because they were “traitors”, “collaborators”, “Albanian-speaker” who did not have “the best interests of Kosovo and the KLA at heart”.¹⁵⁵⁴ Mr Gucati also accepted that things “could happen” to witnesses whose names were being made public.¹⁵⁵⁵

742. In light of the above, the Panel is satisfied that Mr Gucati participated in and substantially contributed to the offence under Count 3.

iv) Count 1

743. While carrying out the acts and making the statements described in paragraphs 728-740, Mr Gucati linked his decision, “interest”¹⁵⁵⁶ and “duty”¹⁵⁵⁷ to publish the Protected Information with his desire to “undermine”¹⁵⁵⁸ and “get rid of”¹⁵⁵⁹ the SC/SPO “in five minutes”¹⁵⁶⁰. He described the SC/SPO as “unacceptable”¹⁵⁶¹, “worthless”¹⁵⁶², “racist”¹⁵⁶³, “degrading”¹⁵⁶⁴, “mono-ethnic” and “biased”,¹⁵⁶⁵ because it relied on the evidence of “collaborator” witnesses.¹⁵⁶⁶ He expressed his hope that the SC/SPO would be abolished as soon as possible and it would stop all activities against members of the KLA.¹⁵⁶⁷

744. The Panel has found under Count 1 that the above acts and statements of Mr Gucati amounted to an attempt to obstruct within the meaning of Article 401(1) of

¹⁵⁵⁴ See *supra* paras 569-574 (Count 3).

¹⁵⁵⁵ P9, p. 8.

¹⁵⁵⁶ P4, p. 8.

¹⁵⁵⁷ P9, p. 6.

¹⁵⁵⁸ P28, p. 9.

¹⁵⁵⁹ P28, p. 11.

¹⁵⁶⁰ P28, p. 11.

¹⁵⁶¹ P4, p. 8.

¹⁵⁶² P29, p. 2.

¹⁵⁶³ P4, p. 8; P40, p. 1 (12 December 2018); P59, p. 1.

¹⁵⁶⁴ P59, p. 1.

¹⁵⁶⁵ P4, p. 8; P40, p. 1; P41, p. 1; P59, p. 1.

¹⁵⁶⁶ P40 (12 December 2018), p. 2.

¹⁵⁶⁷ P29, p. 1.

the KCC. His conduct also amounted to an attempt to obstruct SPO prosecutors and investigators within the meaning of Article 401(5) of the KCC.

745. In light of the above, the Panel is satisfied that Mr Gucati participated in and substantially contributed to the offence under Count 1.

(c) Mr Haradinaj's participation in the joint commission

746. The Panel found that Mr Haradinaj was aware of the content of the Three Sets to a detailed extent.¹⁵⁶⁸ The Panel also found that, at all times during the Indictment Period, Mr Haradinaj acted with an awareness that the Three Sets were authentic.¹⁵⁶⁹ Furthermore, the Panel held that Mr Haradinaj distributed the Three Sets and described information therein with the awareness that it included confidential information and the names of protected witnesses.¹⁵⁷⁰

i) Count 5

747. Mr Haradinaj reviewed all Three Sets and allowed other, unauthorised third parties, such as other KLA WVA staff and KFOR personnel present at the premises,¹⁵⁷¹ to inspect or photograph the contents of the documents.¹⁵⁷²

748. During the Three Press Conferences, Mr Haradinaj: (i) described extensively the content of the Three Sets, the type and nature of documents, and SPO and Serbian officials mentioned therein;¹⁵⁷³ (ii) invited or allowed those present to inspect the documents;¹⁵⁷⁴ (iii) showed the contents of some of these documents to the camera;¹⁵⁷⁵

¹⁵⁶⁸ See *supra* para. 377 (Findings on the Batches).

¹⁵⁶⁹ See *supra* para. 421 (Findings on the Batches).

¹⁵⁷⁰ See *supra* para. 456 (Findings on the Batches).

¹⁵⁷¹ P7, pp 7-8; P35, p. 9; 2D1, paras 85, 102-103, 108-109; DW1241 (Taibe Miftari), Transcript, 9 December, p. 2459; DW1249 (Nasim Haradinaj), Transcript, 11 January, pp 2777-2779.

¹⁵⁷² See *supra* paras 211, 246, 276-277 (The Events at Issue).

¹⁵⁷³ P1, pp 1-3, 6-7; P2, pp 2-3; P35, pp 2-3.

¹⁵⁷⁴ P1, pp 6-9; P35, p. 14.

¹⁵⁷⁵ P1 video-clip, minutes 00:14:33-00:14:35, 00:16:35-00:16:52; P2 video-clip, minutes 00:14:33-00:14:35, 00:16:35-00:16:52; P35 video-clip, minutes 00:14:33-00:14:35, 00:16:35-00:16:52.

(iv) vowed to give journalists as many copies as they wanted and encouraged them to take copies;¹⁵⁷⁶ (v) vowed to continue publishing any documents received,¹⁵⁷⁷ stating that it was his duty to do so;¹⁵⁷⁸ (vi) encouraged the journalists present to publish the documents and reproached some for not doing so;¹⁵⁷⁹ and (vii) indicated that if more documents were brought, the KLA WVA will accept them and welcomed the person who brought the Third Set to bring more.¹⁵⁸⁰

749. Mr Haradinaj was present at a media appearance together with Mr Gucati, where Mr Tomë Gashi indicated on behalf of the KLA WVA that the organisation would inform the public every time they receive material relating to the SC/SPO.¹⁵⁸¹

750. Mr Haradinaj also attended several other media appearances, on his own or together with Mr Tomë Gashi and others.¹⁵⁸² At these media appearances, Mr Haradinaj: (i) described the type, nature and/or content of the Three Sets,¹⁵⁸³ pointing at SPO and Serbian officials named therein;¹⁵⁸⁴ (ii) repeatedly vowed to continue publishing any documents received,¹⁵⁸⁵ stating that it was his duty to do so;¹⁵⁸⁶ (iii) confirmed or vowed that copies were or would be made available to the media;¹⁵⁸⁷ and (iv) repeatedly encouraged journalists to publish the documents and reproached some for not doing so.¹⁵⁸⁸

¹⁵⁷⁶ P1, pp 5-6; P2, p. 4; P50, p. 1; P35, pp 4-5, 15.

¹⁵⁷⁷ P2, p. 4; P35, p. 3.

¹⁵⁷⁸ P2, p. 4; P35, p. 3.

¹⁵⁷⁹ P1, pp 4, 5; P2, pp 2, 7; P35 pp 4-5, 12-13.

¹⁵⁸⁰ P2, pp 8-9; P35, pp 8, 10.

¹⁵⁸¹ P12, p. 4.

¹⁵⁸² P6; P7 (with Mr Tomë Gashi); P8; P11; P15; P16; P17; P18; P19; P21; P24; P25; P27; P26; P30; P32; P33.

¹⁵⁸³ P6, pp 19-20; P17, pp 2-4; P19, pp 2-3; P21, pp 4-5; P24, pp 7-8.

¹⁵⁸⁴ P18, pp 2-3; P19, pp 1, 3-4; P33, p. 2.

¹⁵⁸⁵ P6, pp 4, 14; P18, pp 1-2; P21, p. 4; P24, p. 7; P26, pp 4-5.

¹⁵⁸⁶ P21, p. 3; P24, p. 8; P26, p. 2.

¹⁵⁸⁷ P6, pp 17-18; P7, p. 7; P8, p. 10; P11; p. 4; P17, p. 6; P21, pp 3-4; P24, pp 3, 6.

¹⁵⁸⁸ P6, pp 6, 9, 18; P8, pp 21-22; P17, pp 6-7; P21, p. 5; P24, pp 2-3, 5, 10; P30, pp 5-8; P33, p. 3; P11, pp 4, 28-29.

751. During the Indictment Period, several posts that appeared on Mr Haradinaj's Facebook account¹⁵⁸⁹ republished media articles containing descriptions or screenshots of the documents.¹⁵⁹⁰

752. In light of the above, the Panel is satisfied that Mr Haradinaj participated in and substantially contributed to the revealing of Protected Information.

ii) Count 6

753. In addition to the acts and statements described in paragraphs 747-750, Mr Haradinaj: (i) publicly indicated that the Three Sets contained "the names of all the witnesses",¹⁵⁹¹ "many names"¹⁵⁹² and "many, many other people";¹⁵⁹³ (ii) publicly and repeatedly pointed at the presence of names, past and present residence, phone numbers, ethnicity, interview dates and locations, and content of statements of witnesses;¹⁵⁹⁴ (iii) publicly named five Witnesses or Potential Witnesses whose names appeared in the First and Third Sets;¹⁵⁹⁵ and (iv) encouraged journalists to publish the names from the documents and reproached some for not wanting to do so.¹⁵⁹⁶

754. Mr Haradinaj's revelation of the identity and personal data of Witnesses and Potential Witnesses resulted in serious consequences within the meaning of Article 392(3) of the KCC for the Witnesses at Risk.¹⁵⁹⁷

755. In light of the above, the Panel is satisfied that Mr Haradinaj participated in and substantially contributed to the revealing of the identity and personal data of Witnesses and Potential Witnesses.

¹⁵⁸⁹ DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2812; Transcript, 13 January 2022, p. 2929.

¹⁵⁹⁰ See *supra* fn. 1017. See also P60; P61; P62, P70; P72; P73; P74; P75; P77; P78; P79; P80; P82; P83.

¹⁵⁹¹ P1, p. 2.

¹⁵⁹² P18, p. 3.

¹⁵⁹³ P35, p. 3.

¹⁵⁹⁴ P1, pp 2-3, 5; P8, p. 11; P11, p. 30; P18, p. 3; P21, p. 5; P24, p. 8; P30, p. 4; P35, pp 2-3.

¹⁵⁹⁵ P1, p. 2; P11, p. 30; P35, p. 3; [REDACTED].

¹⁵⁹⁶ P2, p. 7; P6, p. 9; P35, p. 4. See also P25, p. 7.

¹⁵⁹⁷ See *supra* para. 547 (Count 6).

iii) Count 3

756. In addition to the acts and statements described in paragraphs 747-750 and 753, Mr Haradinaj was particularly vocal about the SC not being able to protect its own witnesses and leaving their names to be exposed, stating that no one could guarantee the witnesses' protection because everyone could read the Three Sets.¹⁵⁹⁸ Mr Haradinaj observed that "nobody can stop these copies from [becoming public] now".¹⁵⁹⁹

757. At the same time, Mr Haradinaj publicly questioned the veracity of the witnesses' accounts, describing such witnesses as providing false,¹⁶⁰⁰ "slanderous and concocted" evidence.¹⁶⁰¹ He also claimed that the witnesses provided statements under duress, violence or blackmail.¹⁶⁰²

758. Moreover, prior to and during the Indictment Period, Mr Haradinaj described witnesses as: (i) "poor morons, you fools, you born spies, you spies" who "betray [their] people, [their] army, lie, concoct with evidence provided by the enemy";¹⁶⁰³ (ii) "Serbian spies who were paid to testify against the KLA";¹⁶⁰⁴ (iii) "collaborators";¹⁶⁰⁵ (iv) "criminals, bloodsuckers, who gave orders";¹⁶⁰⁶ and (v) "Albanian-speaking lackeys".¹⁶⁰⁷ A post of another individual shared on Mr Haradinaj's Facebook account prior to the Indictment Period mentioned the notion of "slanderous" or "special" "Albanian-speaking individuals" in conjunction with terms such as "dirty soldiers", "scums" and "ultra-criminals".¹⁶⁰⁸

¹⁵⁹⁸ P1, pp 2, 5; P8, p. 26; P21, p. 5. *See also* P7, p. 6; P8, p. 14; P11, p. 3; P17, p. 9; P18, pp 2, 7; P19, p. 3; P30, p. 12; P33, p. 1; P34, p. 2. *See also supra* fn. 1193 (Count 3).

¹⁵⁹⁹ P24, p. 3.

¹⁶⁰⁰ P25, p. 7.

¹⁶⁰¹ P8, p. 31.

¹⁶⁰² P1, p. 2; P6, pp 25-26; P7, pp 5-6; P8, pp 7, 31-33; P17, p. 2; P24, p. 8; P25, pp 5-6.

¹⁶⁰³ P8, p. 26.

¹⁶⁰⁴ P83, pp 21-22.

¹⁶⁰⁵ P6, p. 14; P17, p. 3; P25, p. 7.

¹⁶⁰⁶ P8, p. 7.

¹⁶⁰⁷ P37 (24 June 2020), pp 8, 11.

¹⁶⁰⁸ [REDACTED], Post of another person shared on Mr Haradinaj's Facebook account, [REDACTED].

759. Mr Haradinaj also claimed that the SC/SPO will collapse “because the witnesses, too, know now that others know who they are”.¹⁶⁰⁹ His statements carried the message that once everyone knew who the witnesses were, no one could protect them, because they were “Albanian-speakers” and “[born] spies” who “betray [their people]”.¹⁶¹⁰ Mr Haradinaj candidly stated that he did not “bother about the issue of those witnesses of The Hague” and that he “would have loved to make all of them public”.¹⁶¹¹

760. In light of the above, the Panel is satisfied that Mr Haradinaj participated in and substantially contributed to the offence under Count 3.

iv) Count 1

761. While carrying out the acts and making the statements described in paragraphs 747-758, Mr Haradinaj expressly linked his decision to publish the Protected Information with his non-recognition of the SC/SPO.¹⁶¹² He described the SC/SPO as “scandalous”,¹⁶¹³ “shameful”,¹⁶¹⁴ either equal to or worse than a “kebab-shop”,¹⁶¹⁵ a “sweetshop”,¹⁶¹⁶ a Serbian “patisserie”¹⁶¹⁷ or “poslastičara”;¹⁶¹⁸ worse than “the courts of the jungle”;¹⁶¹⁹ and with a judge who has done “zero”.¹⁶²⁰ Mr Haradinaj noted that the SC/SPO was “racist, mono-ethnic, selective”.¹⁶²¹ He stated that their duty was to ensure that Kosovo was not sentenced for crimes and that Kosovo’s sons were

¹⁶⁰⁹ P8, pp 30-31.

¹⁶¹⁰ See *supra* paras 569-574 (Count 3).

¹⁶¹¹ P1, p. 5.

¹⁶¹² P18, p. 1.

¹⁶¹³ P1, p. 3 (Mr Haradinaj).

¹⁶¹⁴ P1, p. 3 (Mr Haradinaj).

¹⁶¹⁵ P17, p. 9; P18, pp 2, 7; P19, p. 3; P34, p. 2.

¹⁶¹⁶ P25, pp 2, 8.

¹⁶¹⁷ P19, p. 3.

¹⁶¹⁸ P34, p. 2.

¹⁶¹⁹ P2, p. 2.

¹⁶²⁰ P7, p. 6.

¹⁶²¹ P21, p. 4. See also P1, p. 2; P2, p. 6; P17, p. 1; P38, pp 1-2 (25 June 2020); P49, p. 2 (31 October 2018).

not convicted as criminals.¹⁶²² When asked whether he was aware that the revelation of information could damage the court process, Mr Haradinaj replied: “Wow, but that’s what I like /to happen/, that is what I like”.¹⁶²³

762. The Panel has found under Count 1 that the above acts and statements of Mr Haradinaj amounted to an attempt to obstruct within the meaning of Article 401(1) of the KCC. His conduct also amounted to an attempt to obstruct SPO prosecutors and investigators within the meaning of Article 401(5) of the KCC.

763. In light of the above, the Panel is satisfied that Mr Haradinaj participated in and substantially contributed to the offence under Count 1.

(d) Intentional participation by the Accused

764. The common decisions and concerted actions of the Accused as well as their personal acts and statements described in paragraphs 724-725, 728-744 and 747-762 establish beyond reasonable doubt that both intentionally participated and substantially contributed to the offences under Counts 1, 3, 5 and 6.

(e) Conclusion

765. In light of the above, the Panel finds that the Accused jointly participated and substantially contributed as co-perpetrators to the commission of the offences under Counts 1, 3, 5 and 6.

2. Individual perpetration

766. Mr Gucati personally carried out the acts and made the statements described in paragraphs 728-744. Likewise, Mr Haradinaj personally carried out the acts and made the statements described in paragraphs 747-762. These acts and statements form part of their participation and substantial contribution as co-perpetrators to the offences

¹⁶²² P8, p. 6.

¹⁶²³ P18, p. 5.

under Counts 1, 3, 5 and 6. For these reasons, the Panel will not consider individual perpetration as a separate mode of liability for the purpose of conviction in relation to these counts.

767. Given that the relevant facts and circumstances under Count 2 entail participation in a group's common action and thereby inherently imply joint conduct by the Accused, the Panel addresses the acts and statements of the Accused under this count as individual perpetration.¹⁶²⁴

(a) Mr Gucati

768. In addition to his acts and statements described in paragraphs 728-744, Mr Gucati also acted as a member and leader of the Group, which, by common action, attempted to obstruct SC/SPO Officials in performing SPO Work.¹⁶²⁵ In particular, Mr Gucati participated in and led the Group by: (i) ordering Mr Klinaku to send invitations to journalists for the upcoming press conferences;¹⁶²⁶ (ii) agreeing to Mr Haradinaj having the main role at the press conferences;¹⁶²⁷ (iii) introducing the topic at the Three Press Conferences and then giving the floor to Mr Haradinaj,¹⁶²⁸ who spoke under Mr Gucati's authority;¹⁶²⁹ (iv) instructing Mr Klinaku on handing over the remnants of the First Set to the SPO;¹⁶³⁰ (v) speaking at the Three Press Conferences and other media appearances in his capacity as Chairman of the KLA WVA;¹⁶³¹ and (vi) authorising Mr Klinaku to act as a representative of the KLA WVA during the

¹⁶²⁴ F74 Confirmation Decision, para. 87.

¹⁶²⁵ See *supra* paras 678-690, 704-707 (Count 2).

¹⁶²⁶ 1D3, para. 18; 2D1, paras 52, 56; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2170, 2190-2191. See also 2D1, para. 73; Transcript, 8 December 2021, p. 2410; Transcript, 11 January 2022, pp 2727, 2746.

¹⁶²⁷ 1D3, para. 20.

¹⁶²⁸ P1, p. 1; P2, pp 1-1; P35, pp 1-2.

¹⁶²⁹ 1D3, para. 48 (Mr Gucati: "I accept that [Mr Haradinaj] spoke with my authority and with the authority of the leadership").

¹⁶³⁰ 1D7, para. 20; P13, p. 1; P57.

¹⁶³¹ P1, p. 1; P9, p. 1; P2, pp 1-2; P28, pp 1, 7; P29, p. 1.

search of its premises on 25 September 2020.¹⁶³² Mr Gucati partook in the 14/15 September 2020 decision of the KLA WVA leadership committee to publish SC/SPO material every time the organisation would receive it.¹⁶³³

769. Mr Gucati's acts and statements establish that he intentionally perpetrated the offence under Count 2.¹⁶³⁴ His conduct also amounted to an attempt to obstruct SPO prosecutors and investigators within the meaning of Article 401(5) of the KCC.

770. In light of the above, the Panel finds that Mr Gucati individually perpetrated the offence under Count 2 and his conduct also meets the requirements of both aggravated forms of this offence.

(b) Mr Haradinaj

771. In addition to his acts and statements described in paragraphs 747-762, Mr Haradinaj also acted as a member of the Group, which, by common action, attempted to obstruct SC/SPO Officials in performing SPO Work.¹⁶³⁵ In particular, Mr Haradinaj participated in the Group's division of tasks by: (i) reviewing the Three Sets together with Mr Gucati, Mr Klinaku and others;¹⁶³⁶ (ii) describing extensively the content of the Three Sets, with the approval of Mr Gucati;¹⁶³⁷ and (iii) participating in several media appearances, on behalf of the KLA WVA, during which Mr Haradinaj, *inter alia*, described the nature and/or content of the Three Sets and repeatedly vowed to continue to publish any new SC/SPO documents received.¹⁶³⁸ Mr Haradinaj partook in the 14/15 September 2020 decision of the KLA WVA

¹⁶³² 1D3, para. 55.

¹⁶³³ P9, p. 8; 1D8, para. 9; 1D9, paras 23, 29; 2D1, para. 73. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458, 2472-2473, 2475; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2746.

¹⁶³⁴ *See supra* para. 671 (Count 1).

¹⁶³⁵ *See supra* paras 678-690 (Count 2).

¹⁶³⁶ *See supra* fn. 1417.

¹⁶³⁷ P1, pp 1-3, 6-7; P2, pp 2-3, 10-11; P35, pp 2-3; 1D3, para. 20.

¹⁶³⁸ *See supra* fn. 1585.

leadership committee to publish SC/SPO material every time the organisation would receive it.¹⁶³⁹

772. Mr Haradinaj's acts and statements establish that he intentionally perpetrated the offence under Count 2.¹⁶⁴⁰ His conduct also amounted to an attempt to obstruct SPO prosecutors and investigators within the meaning of Article 401(5) of the KCC.

773. In light of the above, the Panel finds that Mr Haradinaj individually perpetrated the offence under Count 2 and his conduct also meets the requirements of the aggravated form under Article 401(5) of the KCC.

3. Attempt

774. The Panel found that the Accused co-perpetrated the offences under Counts 1, 3, 5 and 6, and individually perpetrated the offence under Count 2. The Panel reiterates that the offences under Counts 1 and 2 are committed also when the obstruction was only attempted.¹⁶⁴¹

775. For these reasons, the Panel will not consider attempt as a mode of liability for the purpose of conviction and will not address it further.

4. Agreement to commit a criminal offence

(a) Agreement to commit an offence

776. As found in paragraph 724, after each delivery of documents at the KLA WVA premises, the Accused, together with other persons, took common decisions to call a press conference and make the received documents public. Furthermore, on 14 or 15 September 2020, a unanimous decision of the 23-member KLA WVA leadership

¹⁶³⁹ 1D8, para. 9; 1D9, paras 23, 29; 2D1, para. 73. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458, 2472-2473, 2475; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2746.

¹⁶⁴⁰ *See supra* para. 671 (Count 1).

¹⁶⁴¹ *See supra* paras 141, 158 (Applicable Law).

committee (which included both Accused) was taken to publish SC/SPO material every time the organisation would receive it.¹⁶⁴² The Accused, Mr Klinaku and other persons also undertook a number of joint actions in the preparation and conduct of the Three Press Conferences and in relation to the seizure of the Batches by the SPO. The Accused, Mr Klinaku and Mr Tomë Gashi participated in several media appearances where they expressed consonant views on the revelation of Protected Information, witnesses and obstruction of the SC/SPO.¹⁶⁴³

(b) Substantial act towards the commission of the offence agreed upon

777. The personal acts and statements of both Accused as described in paragraphs 728-744 and 747-762 include substantial preparatory steps towards the commission of the charged offences. In particular, as described in paragraphs 728-729, Mr Gucati reviewed all Three Sets, decided, with others, to call a press conference after each delivery, and instructed Mr Klinaku, on at least two occasions, to invite the media to the press conferences. Likewise, as described in paragraph 747, Mr Haradinaj reviewed the Three Sets in detail before the Three Press Conferences and partook in the decision to call the Three Press Conferences.

(c) With intent

778. The acts and statements of both Accused establish that both intentionally agreed to commit the charged offences.

(d) Conclusion

779. In light of the above, the Panel finds that the Accused agreed to commit the charged offences and both undertook substantial preparatory steps towards their

¹⁶⁴² 1D8, para. 9; 1D9, paras 23, 29; 2D1, para. 73. *See also* DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2458, 2472-2473, 2475; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2746.

¹⁶⁴³ *See supra* paras 678-691 (Count 2).

commission. Nonetheless, the Panel considers that this mode of liability forms part of and has already been accounted for in respect of the individual criminal responsibility of the Accused as co-perpetrators for the offences under Counts 1, 3, 5 and 6 and as individual perpetrators for the offence under Count 2.

780. For these reasons, the Panel will not consider agreement to commit as a mode of liability for the purpose of conviction.

5. Incitement

781. The Panel found that the third form of incitement, under Article 32(3) of the KCC, cannot be applied to any of the six counts.¹⁶⁴⁴ Accordingly, the Panel will only consider the first and second form of incitement (Article 32(1)-(2) of the KCC).

782. The Panel recalls that the SPO charged the Accused with incitement in relation to five categories of persons: (i) one another; (ii) Mr Klinaku, Mr Tomë Gashi and other members or representatives of the KLA WVA; (iii) persons who attended, observed or were otherwise informed of the Three Press Conferences and other media appearances; (iv) certain members of the press; and (v) persons in possession of or with access to confidential and non-public information relating to SC Proceedings.¹⁶⁴⁵

783. In relation to the first category, the Panel is not satisfied that the evidence establishes that either or both of the Accused incited one another to commit the charged offences. Instead, the Panel has already found that the Accused co-perpetrated the offences under Counts 1, 3, 5 and 6 and individually perpetrated the offence under Count 2. The Panel notes in that respect that such a claim was not put to either Accused by the SPO during their cross-examination.

784. In relation to the second category, the Panel is not satisfied that the evidence establishes that either or both of the Accused incited Mr Klinaku, Mr Tomë Gashi and

¹⁶⁴⁴ See *supra* para. 193 (Applicable Law).

¹⁶⁴⁵ F251/A01 Indictment, paras 41-43. See also F565 SPO Final Trial Brief, para. 275 (with different numbering of the categories).

other members or representatives of the KLA WVA. In relation to Mr Klinaku, the Panel has already established that he was part of the Group that included the Accused, which, by common action, attempted to obstruct the SC/SPO.¹⁶⁴⁶ The Panel also noted that Mr Klinaku repeatedly echoed the statements and views expressed by the Accused.¹⁶⁴⁷ No evidence shows that this was the result of the Accused's incitement. As regards Mr Tomë Gashi, the evidence shows that he advised the Accused and that his views were generally in consonance with those of the Accused.¹⁶⁴⁸ There is no evidence that this was the result of the Accused's incitement. As regards any other KLA WVA member, the evidence is insufficient to establish any act of incitement on the part of the Accused.

785. In relation to the third and fourth categories, the Panel notes at the outset that the circle of relevant persons was only generically defined by the SPO. The Panel found that the Accused made the Three Sets available to journalists and encouraged them to publish their contents.¹⁶⁴⁹ The Panel also found that, after each press conference, media articles appeared containing descriptions or screenshots of some pages of the Three Sets.¹⁶⁵⁰ Nonetheless, this in itself does not establish beyond reasonable doubt that encouragement, urging or pressuring on the part of the Accused created or strengthened the decision of unidentified members of the press to publish the aforementioned media articles. Nor does it establish that unidentified members of the press revealed confidential information with the requisite *mens rea*. The Panel is not satisfied either that the SPO has established beyond reasonable doubt that Mr Haradinaj's criticism of media or journalists for not publishing the information had any material effect on the decision of certain journalists to publish that material. Tellingly, such a suggestion was not put to Mr Berisha by the SPO and it is apparent

¹⁶⁴⁶ See *supra* paras 685-690 (Count 2).

¹⁶⁴⁷ See *supra* para. 687 (Count 2).

¹⁶⁴⁸ See *infra* para. 904 (Defences).

¹⁶⁴⁹ See *supra* paras 481-482 (Count 5).

¹⁶⁵⁰ See *supra* paras 225, 235, 252, 266-267, 278, 291-292 (The Events at Issue), 343, 356 (Findings on the Batches).

from his evidence that Mr Berisha decided to publish parts of this information out of a conviction that the public would benefit from it, rather than because he was incited to do so by the Accused. The Panel accordingly finds that the SPO failed to establish that the Accused incited any person in these categories to commit the charged offences. In any event, the Panel has already found that, in committing the offences under Counts 1, 2, 3, 5 and 6, the Accused encouraged journalists to publish the Three Sets and reproached some journalists for not having done so,¹⁶⁵¹ thereby seeking to widen the scope of distribution of Protected Information.¹⁶⁵² The Panel considers that these findings, which form part of the Accused's individual criminal responsibility as co-perpetrators and individual perpetrators, best reflect the evidence on the record.

786. As regards the fifth category, the Panel notes as above that the circle of relevant persons was only generically defined by the SPO. Furthermore, the evidence suggests that the Three Sets were delivered by three different persons.¹⁶⁵³ In any event, a claim of incitement can only apply to the persons who delivered the Second and the Third Sets, as the SPO does not claim that statements of the Accused prior to the Indictment Period may have incited the person who delivered the First Set. In this regard, no evidence was presented during trial that the persons who delivered the Second and the Third Sets did so as a result of psychological influence exerted upon them by the Accused. The Panel accepts that the Three Deliveries were made and that the Accused welcomed them or even encouraged further deliveries. Nonetheless, this in itself does not establish that the Accused's encouraging statements created or strengthened the decision of unidentified individuals to deliver documents to the KLA WVA. Their reasons for doing so have not been established and there is no indication that their conduct was in any way affected by what the Accused did or said. The Panel

¹⁶⁵¹ See *supra* paras 481-482 (Count 5), 729, 735, 748, 750, 753 (Modes of Liability).

¹⁶⁵² See *supra* paras 561-564 (Count 3).

¹⁶⁵³ P4, p. 6 (Mr Gucati indicating that the person who brought Batch 1 was different from the person who brought Batch 2); 1D4, p. 34 (Ms Miftari indicating that the person who brought Batch 3 was different from the two previous persons who brought Batches 1 and 2). See also P12, p. 3 (Mr Tomë Gashi: "A certain person, always a different one, comes and drops these documents off").

accordingly finds that the SPO failed to establish that the Accused incited any person in this category to commit or attempt to commit the charged offences. In any event, the Panel has already found that, in committing the offences under Counts 1, 2, 3, 5 and 6, the Accused indicated that if more documents were brought, the KLA WVA will accept them and that they invited the persons(s) delivering documents to bring more.¹⁶⁵⁴ The Panel considers that these findings, which form part of the Accused's individual criminal responsibility as co-perpetrators and individual perpetrators, best reflect the evidence on the record.

787. For these reasons, the Panel will not consider incitement as a mode of liability for the purpose of conviction.

6. Assistance

788. The Panel recalls that the SPO charged the Accused with assistance in relation to five categories of persons: (i) one another; (ii) Mr Klinaku, Mr Tomë Gashi and other members or representatives of the KLA WVA; (iii) persons who attended, observed or were otherwise informed of the Three Press Conferences and other media appearances; (iv) certain members of the press; and (v) persons in possession of or with access to confidential and non-public information relating to SC Proceedings.¹⁶⁵⁵

789. In relation to the first category, the Panel has already found that the Accused committed the offences under Counts 1, 2, 3, 5 and 6. Any assistance that the Accused may have given to each other forms part of their conduct as co-perpetrators and individual perpetrators.

790. In relation to the second category, the Panel reiterates that it limits its consideration of non-indicted individuals' actions to what is necessary for the

¹⁶⁵⁴ See *supra* paras 729, 748.

¹⁶⁵⁵ F251/A01 Indictment, para. 44. See also F565 SPO Final Trial Brief, para. 275 (with different numbering of the categories).

assessment of the criminal responsibility of the two Accused.¹⁶⁵⁶ The SPO's allegation in relation to the second category would require the Panel to make findings on the conduct of non-indicted individuals as principal perpetrators. Such a finding is not necessary for the determination of the criminal responsibility of the Accused, because the Panel has already found that they committed the offences under Counts 1, 2, 3, 5 and 6. In any event, the Panel notes that the SPO did not clearly outline what conduct of the Accused assisted which non-indicted individual, and in what way. Likewise, it is not clear to the Panel what conduct that was not already accounted for in respect of the Panel's findings on commission would constitute evidence of culpable assistance by the Accused. The Panel accordingly finds that the SPO failed to establish that the Accused assisted in the commission of the charged offences any person in the second category.

791. In relation to the third and fourth categories, the Panel reiterates that the circle of relevant persons was only generically defined by the SPO. The Panel found that the Accused made the Three Sets available to the journalists and encouraged them to publish their contents.¹⁶⁵⁷ The Panel also found that, after each press conference, media articles appeared containing descriptions or screenshots of pages of the Three Sets.¹⁶⁵⁸ The Panel therefore accepts that making available the Three Sets to the journalists could amount to a form of assistance in the commission of the offences under Counts 5 and 6. Nonetheless, this in itself does not establish that unidentified members of the press revealed Protected Information with the requisite *mens rea*, thereby committing as principal perpetrators the offences charged under Counts 5-6. Nor does it establish that unidentified members of the press committed as principal perpetrators any of the other offences charged. The Panel notes in that regard the SPO's concession that it is not part of its case that Mr Berisha committed a criminal offence. The Panel

¹⁶⁵⁶ See *supra* para. 16 (The Charges). See also ECtHR, [Karaman Judgment](#), paras 40-44, 64.

¹⁶⁵⁷ See *supra* paras 481-482 (Count 5).

¹⁶⁵⁸ See *supra* paras 225, 235, 252, 266-267, 278, 291-292 (The Events at Issue), 343, 356 (Findings on the Batches).

accordingly finds that the SPO failed to establish that the Accused assisted in the commission of the charged offences any person in these categories. In any event, the Panel has already found that, in committing the offences under Counts 1, 2, 3, 5 and 6, the Accused encouraged journalists to publish the Three Sets and reproached some journalists for not having done so,¹⁶⁵⁹ thereby seeking to widen the scope of distribution of Protected Information through the media.¹⁶⁶⁰ The Panel considers that these findings, which form part of the Accused's individual criminal responsibility as co-perpetrators and individual perpetrators, best reflect the evidence on the record.

792. As regards the fifth category, the Panel notes as above that the circle of relevant persons was only generically defined by the SPO. Furthermore, the evidence suggests that the Three Sets were delivered by three different persons.¹⁶⁶¹ The Panel found that the Three Deliveries were made and that the Accused welcomed them or even encouraged further deliveries.¹⁶⁶² Nonetheless, the Panel has heard no evidence suggesting that these statements of the Accused assisted in any form the individuals who delivered the material. In fact, no evidence was adduced as to the identity, conduct, awareness as to the nature of the material or culpable *mens rea* of these individuals. Likewise, the SPO repeatedly insisted that the delivery of the Three Sets was outside the scope of the case. The Panel also notes that the Three Deliveries caused fear in one KLA WVA employee and that Mr Klinaku tried to chase one of the individuals concerned, thereby further undermining the claim that those delivering the information were being assisted by the Accused. The Panel accordingly finds that the SPO failed to establish that the Accused assisted in the commission of the charged offences any person in this category. In any event, the Panel has already found that, in committing the offences under Counts 1, 2, 3, 5 and 6, the Accused indicated that if

¹⁶⁵⁹ See *supra* paras 481-482 (Count 5), 729, 735, 748, 750, 753.

¹⁶⁶⁰ See *supra* paras 561-564 (Count 3).

¹⁶⁶¹ P4, p. 6; 1D4, p. 34.

¹⁶⁶² See *supra* paras 253, 255, 270-272, 298 (The Events at Issue), 729, 748.

more documents were brought, the KLA WVA will accept them and that they invited the persons(s) delivering documents to bring more.¹⁶⁶³ The Panel considers that these findings, which form part of the Accused's individual criminal responsibility as co-perpetrators and individual perpetrators, best reflect the evidence on the record.

793. For these reasons, the Panel will not consider assistance as a mode of liability for the purpose of conviction.

7. Conclusion

794. In light of the above, the Panel finds that the Accused are criminally responsible as co-perpetrators for the offences under Counts 1, 3, 5 and 6 and as individual perpetrators for the offence under Count 2.

VIII. DEFENCES

A. OVERVIEW

795. As part of their case, the Accused put forward a number of justifications for their conduct. In particular, they argued that: (i) they acted in pursuance of a public interest;¹⁶⁶⁴ (ii) they were subject to "entrapment" by the SPO;¹⁶⁶⁵ (iii) they committed mistakes of law and/or mistakes of fact;¹⁶⁶⁶ (iv) they acted out of necessity;¹⁶⁶⁷ and/or (v) their conduct qualified as acts of minor significance.¹⁶⁶⁸

¹⁶⁶³ See *supra* paras 729, 748.

¹⁶⁶⁴ F567 Gucati Final Trial Brief, paras 95-97, 102, 104; F566 Haradinaj Final Trial Brief, paras 19, 131, 391, 441, 443, 477, 491, 497. See also F258 Gucati Pre-Trial Brief, paras 29-34; F260 Haradinaj Pre-Trial Brief, paras 277(d), 283-298.

¹⁶⁶⁵ F258 Gucati Pre-Trial Brief, paras 36-50; F260 Haradinaj Pre-Trial Brief, paras 277(a), 278-280.

¹⁶⁶⁶ F258 Gucati Pre-Trial Brief, para. 35(a) and (c); F260 Haradinaj Pre-Trial Brief, paras 277(b)-(c), 281-282.

¹⁶⁶⁷ F258 Gucati Pre-Trial Brief, para. 35(b).

¹⁶⁶⁸ F258 Gucati Pre-Trial Brief, para. 35(d).

796. Having found that the Accused are criminally responsible for the offences under Counts 1, 2, 3, 5 and 6, the Panel will now determine whether any of the raised defences exclude their criminal responsibility. Before addressing each of the aforementioned claims, the Panel will set out its interpretation of “defences” under the SC legal framework.

B. DEFENCES UNDER THE SC LEGAL FRAMEWORK

797. In accordance with Rule 95(5) of the Rules, the Defence may advance a defence of alibi or any other grounds excluding criminal responsibility, including that of diminished or lack of mental capacity, intoxication, necessity, duress and mistake of fact or law. The wording of that provision suggests that “defence” and “ground excluding criminal responsibility” have the same meaning, *i.e.* they exonerate conduct that is otherwise criminal. The Panel will therefore refer to these grounds as “defences”.

798. The Rules do not mention any other category of defences that may affect the individual criminal responsibility of the Accused.¹⁶⁶⁹ Neither Rule 95(5) of the Rules nor any other provision of the Law or the Rules indicates what body of law – domestic or international – applies to defences, grounds excluding criminal responsibility or any other justifications that may affect individual criminal responsibility.

799. In relation to offences under Article 15(2) of the Law, Article 16(3) of the Law provides that the individual criminal responsibility provisions contained in the KCC shall apply. Nonetheless, Article 16(3) of the Law does not expressly incorporate the provisions of the KCC governing defences. The Panel observes, however, that Rule 95(5) of the Rules expressly lists three of the defences raised by the Accused, *i.e.* necessity, mistake of fact and mistake of law, each of which is respectively defined

¹⁶⁶⁹ Rule 163(1)(a)(i) of the Rules provides that circumstances falling short of constituting grounds excluding criminal responsibility may be considered as mitigating circumstances.

in Articles 13, 25 and 26 of the KCC. The Panel further notes that Article 11 of the KCC governs another defence raised by the Accused, *i.e.* acts of minor significance. In this regard, the Panel is mindful that denying the availability of defences defined under the KCC in adjudicating offences under Article 15(2) of the Law could prejudice the rights of the Accused and result in inequality of treatment in their respect. The Panel will therefore consider these provisions when addressing the relevant defences.

800. Neither Rule 95(5) of the Rules nor any other provision of the Law or the Rules explicitly lists acts for the public interest or entrapment as grounds excluding criminal responsibility. For the reasons outlined below, the Panel will nevertheless address these claims.

C. PUBLIC INTEREST

1. Parties' submissions

801. The Gucati Defence did not claim that public interest would provide a defence in the technical sense, but suggested that the pursuit by the Accused of a legitimate public interest would be relevant to evaluating the lawfulness of their conduct when considered from the point of view of the exercise of their fundamental rights, in particular in respect of Counts 5 and 6.¹⁶⁷⁰ The Haradinaj Defence, in contrast, advanced the claim that the pursuit of a public interest would constitute an "active defence" against the charges – although its case on that point evolved.¹⁶⁷¹

802. The Defence claimed that the Accused's actions amounted to the lawful exercise of freedom of expression and of the right to have access to documents of public institutions and organs of state authorities, as guaranteed under the Constitution.¹⁶⁷²

¹⁶⁷⁰ F470, paras 45-48. *See also* F345, paras 20-22; Transcript, 1 September 2021, pp 461, 466.

¹⁶⁷¹ F342, para. 11; F260 Haradinaj Pre-Trial Brief, para. 277 (d); Transcript, 1 September 2021, p. 475. *See also* Transcript, 16 March 2022, pp 3690-3692.

¹⁶⁷² F258 Gucati Pre-Trial Brief, paras 21-24, 188, 259-263, 279-282.

On this basis, the Accused submitted that they acted in pursuance of a public interest.¹⁶⁷³ The legal bases upon which the Defence relied included: (i) Articles 22, 40, 41 and 42 of the Constitution; (ii) Article 200(2) of the KCC; (iii) Article 10 of the ECHR; (iv) Article 19 of the Universal Declaration of Human Rights (“UDHR”); and (v) Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”).¹⁶⁷⁴

803. The Gucati Defence submitted that informing the public of the “collaboration” of the SPO/SITF with Serbian authorities and certain Serbian state officials constituted a public interest to the extent that it raises concerns about the SPO’s independence and impartiality.¹⁶⁷⁵ The Haradinaj Defence claimed that the disclosure of the impugned documents, if proven, was justified because it was done in the public interest, and was necessary to bring to the knowledge of the public controversies surrounding the SC, thereby protecting “the public interest of the international and Kosovar public”.¹⁶⁷⁶ According to the Haradinaj Defence, the public disclosure of these facts was relevant to establishing the lack of independence and/or impartiality of the SPO and/or SC.¹⁶⁷⁷ The Haradinaj Defence also argued that Mr Haradinaj acted as a “whistle-blower” which, it said, provided a defence against the charges.¹⁶⁷⁸ To establish its case on that

¹⁶⁷³ F258 Gucati Pre-Trial Brief, paras 72-73, 76, 140, 161, 184, 190, 222, 231, 237, 240, 256, 284, 297, 321, 334, 358; F260 Haradinaj Pre-Trial Brief, paras 277 (d), 283-298. *See also* F567 Gucati Final Trial Brief, paras 95-97, 102, 104, 108; F566 Haradinaj Final Trial Brief, paras 19, 131, 391, 441, 443, 477, 491, 497.

¹⁶⁷⁴ F345, paras 20-21; Transcript, 1 September 2021, pp 462, 465.

¹⁶⁷⁵ F258 Gucati Pre-Trial Brief, paras 72, 91, 124, 140, 161, 184, 190, 196, 222, 231, 237, 240, 256, 284, 297, 321, 334, 358, 360-362. *See also* F567 Gucati Final Trial Brief, paras 95-97, 102, 104, 108; Transcript, 1 September 2021, pp 473-474; Transcript, 16 March 2022, pp 3648-3653.

¹⁶⁷⁶ F260 Haradinaj Pre-Trial Brief, paras 277(d), 296. *See also* F566 Haradinaj Final Trial Brief, paras 19, 131, 391, 441, 443, 477, 491, 497; Transcript, 16 March 2022, pp 3686, 3690-3692, 3696, 3701-3702, 3713-3714.

¹⁶⁷⁷ F260 Haradinaj Pre-Trial Brief, paras 277(d), 289; F566 Haradinaj Final Trial Brief, para. 442. *Similarly*, F258 Gucati Pre-Trial Brief, para. 76.

¹⁶⁷⁸ F301, paras 33-35; Transcript, 1 September 2021, p. 463. *See also* F566 Haradinaj Final Trial Brief, para. 477; Transcript, 16 March 2022, pp 3689-3690.

point, the Haradinaj Defence called Ms Myers as an expert.¹⁶⁷⁹ The Gucati Defence did not expressly include the “whistle-blower” concept in its public interest defence.¹⁶⁸⁰

804. In response, the SPO submitted that it did not accept that public interest constituted a defence against the charges and disputed that there was a public interest in publicising the cooperation between Serbia and the SITF/SPO. In the alternative, if there was such a public interest, the SPO argued that it would not justify the conduct attributed to the Accused.¹⁶⁸¹ The SPO rejected the claim that the Accused can be regarded as whistle-blowers or that this would provide a defence to the charges.¹⁶⁸²

2. Lawful exercise of constitutional rights and public interest

(a) Legal considerations

805. The Panel notes that the *absence* of public interest is not an element of any of the offences charged in this case. Therefore, the SPO does not have to prove that there was no public interest to establish the elements of any of the charged offences.¹⁶⁸³ The Panel also found in relation to Counts 5 and 6 that public interest considerations could not provide “authorisation” of revelation of information within the meaning of Article 392(1)-(2) of the KCC.¹⁶⁸⁴

806. The Panel observes that the Constitution refers to public interest in Articles 46 and 119, but in respect of issues not relevant to the present discussion. The Law does not contain a reference or definition of the notion of “public interest”. The Panel further notes that the Rules do not provide for a general defence of public interest nor for a definition thereof. Nevertheless, both the Law and the Constitution demand that

¹⁶⁷⁹ DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3102-3187.

¹⁶⁸⁰ DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3095-3096; 16 March 2022, pp 3724-3725.

¹⁶⁸¹ F312, paras 13-14; F341, para. 28; F388, para. 4; Transcript, 1 September 2021, pp 459-460. *See also* F565 SPO Final Trial Brief, paras 283-286, 290-294; Transcript, 14 March 2022, pp 3492-3496, 3516-3518.

¹⁶⁸² F565 SPO Final Trial Brief, paras 295-299.

¹⁶⁸³ *See contra* F345, paras 20-22; F342, para. 11.

¹⁶⁸⁴ *See supra* paras 487 (Count 5), 525 (Count 6).

the SC abide by and apply internationally recognised human rights standards, including those laid out in the ECHR.¹⁶⁸⁵ In this regard, the Panel notes that Article 40 of the Constitution and Article 10 of the ECHR guarantee the freedom of expression,¹⁶⁸⁶ and that the European Court of Human Rights (“ECtHR”) has determined that the exercise of the freedom of expression in pursuit of a public interest warrants particular protection.¹⁶⁸⁷ In light of Article 40 of the Constitution, Article 10 of the ECHR and the ECtHR case-law in respect of this provision, the Panel will address the Defence’s claim of public interest in the context of the Accused’s freedom of expression and as a potential justification that may affect their individual criminal responsibility.

807. The Panel found that the definition of public interest contained in Article 200(4) of the KCC was generally consistent with, and did not differ in substance from, the notion of public interest recognised by the ECtHR in relation to Article 10 of the ECHR.¹⁶⁸⁸ The Parties did not dispute the relevance of the definition provided in Article 200(4) of the KCC to the present proceedings.¹⁶⁸⁹ The Panel accordingly assessed the claim that the Accused acted in pursuit of a public interest within the normative framework set by the Constitution, relevant Kosovo legislation as cited above, as well as by the ECHR and associated case-law of the ECtHR.

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

[T]he claimed public interest in relation to which relevant evidence could be permissibly elicited is limited to evidence that would suggest that some of the material allegedly disclosed by the Accused contain indications of improprieties occurring in the context of

¹⁶⁸⁵ Articles 22 of the Constitution; Articles 1(2), 2, 3(2)(e), and 21 of the Law.

¹⁶⁸⁶ Article 40 of the Constitution; Article 10 of the ECHR.

¹⁶⁸⁷ See e.g. ECtHR, [Von Hannover \(no. 2\) GC Judgment](#), para. 109; [Leempoel Judgment](#), para. 68; [Standard Verlags \(No. 2\) Judgment](#), para. 46; [Von Hannover Judgment](#), para. 60. See also [Satakunnan Markkinapörssi Oy and Satamedia Oy GC Judgment](#), para. 171; [Castells Judgment](#), para. 43.

¹⁶⁸⁸ F470, para. 54.

¹⁶⁸⁹ F302, paras 9-10; F301, para. 34. See also Transcript, 1 September 2021, p. 469. The Haradinaj Defence pointed to a number of additional instruments in this context without identifying any other definition of “public interest” that would differ from or should prevail over that mentioned above. See also Transcript, 1 September 2021, p. 469; F300.

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.¹⁶⁹⁰

809. Neither Party challenged this finding. The Panel subsequently applied this definition,¹⁶⁹¹ and adopts it for the purpose of the present Judgment.

(b) The Panel's findings

810. Based on the above definition, the Panel will consider: (i) whether the Protected Information revealed by the Accused contained any indications of improprieties in the SITF/SPO investigations with Serbian authorities; (ii) assuming that it was reasonable for the Accused to believe that the Protected Information contained such indications, whether their actions were driven by public interest considerations; and (iii) assuming that such actions were, at least to some extent, driven by such considerations, whether the restriction of their rights was lawful. On this basis, the Panel will decide whether public interest considerations exclude the criminal responsibility of the Accused.

i) Indications of improprieties in the Protected Information

811. The Panel received evidence that, as part of their investigations, the SITF and the SPO cooperated with authorities of the Republic of Serbia to obtain contact details of witnesses and/or certain records relevant to the SITF/SPO investigations.¹⁶⁹² The Panel found that Batches 1, 2 and 4 included SITF Requests, WCPO Responses and Serbian Documents, which, in turn, contained, *inter alia*, names of Serbian officials.¹⁶⁹³ The

¹⁶⁹⁰ F470, para. 61.

¹⁶⁹¹ F502 Gucati Bar Table Decision, paras 28, 33. On 14 January 2022, the Haradinaj Defence was once again reminded of the definition of "public interest" adopted by the Panel and did not challenge that definition. *See* Transcript, 14 January 2022, p. 3041.

¹⁶⁹² P86, paras 5-12, 22-27; P88; P89; P90, Annex 1; P91, Annex 1; P93; P94; P95; P96; P97; P139; P140; P141; P142; P143; P144; P145; P146; P147; P148; P149; P150. *See also* Transcript, 18 October 2021, pp 860-867, 914-915; Transcript, 20 October 2021, pp 1060, 1075-1078; Transcript, 21 October 2021, p. 1207.

¹⁶⁹³ P90 (Annex 1 – Chart on Batch 1); P90 (Annex 3 – Chart on Batch 2); P91 (Annex 1 – Chart on Batch 4).

Panel also found that the Accused revealed Protected Information, which contained the names of Serbian officials.¹⁶⁹⁴ Furthermore, the Panel has received evidence that both Accused publicly identified a number of Serbian officials,¹⁶⁹⁵ and it found that Mr Haradinaj named four who qualified as Witnesses or Potential Witnesses.¹⁶⁹⁶ The Panel also received evidence that media outlets published screenshots or excerpts of SITF Requests or accounts of what such documents were deemed to contain.¹⁶⁹⁷

812. The Panel accepts that in any democratic society the public has a legitimate interest in knowing how institutions acting in their name function, and whether they function to an acceptable standard. Accordingly, the Panel accepts that there is, in principle, a legitimate public interest in exposing any serious improprieties in the manner in which the SITF and the SPO may have conducted their investigations.

813. The Panel observes that the cooperation between the SITF/SPO and Serbia was plainly a matter of public knowledge and one that had been in the public domain for quite some time prior to the events of September 2020.¹⁶⁹⁸ This was readily admitted by the Accused.¹⁶⁹⁹ In discussing the fact that the SITF/SPO had been cooperating with Serbia, the Accused therefore did not contribute to publicising something that was not already publicly known. The Panel accepts, however, the argument of the Gucati Defence that the fact that information has entered the public domain does not

¹⁶⁹⁴ See *supra* para. 514 (Count 6).

¹⁶⁹⁵ P1, p. 2; P2, pp 1-3; P11, pp 9, 30, 55-56; P14, p. 3; P15, p. 2; P17, p. 7; P18, p. 3; P19, pp 1, 4; P24, pp 8-9; P35, p. 3.

¹⁶⁹⁶ See *supra* paras 345 (Findings on the Batches), 514 (Count 6).

¹⁶⁹⁷ P86, paras 13-18, 36-74; P120; P121; P122; P123; P124, pp 2, 4, 6; P125AT, pp 1,4, 9, 11, 14 (P125; P125.1; P125.2; P125.3; P125.4); P128; P129, pp 1, 13-15; P155; P156; P157; P158; P159; P160; 1D2, pp 1, 9, 47, 50, 55, 61; 1D11; 1D12; 1D13; 1D14; 1D15; 1D16; 1D17; W04841 (Zdenka Pumper), Transcript, 19 October 2021, pp 973-996, 1001-1004; 20 October 2021, pp 1103-1115, 1119-1128, 1132-1133, 1143-1146; 26 October 2021, pp 1515-1517, 1537-1542, 1584, 1588, 1599-1609, 1612, 1627-1628.

¹⁶⁹⁸ C1, p. 6.

¹⁶⁹⁹ P7, pp 2, 13 (Mr Haradinaj: "He is not the only one who knows that they have collaborated with the Serbs. Even the cows in Kosovo fields know this"); P28, pp 2-3, 9-10; P42; P44; P59, p. 1; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, pp 2711, 2713-2714.

necessarily deprive it of “public interest” value.¹⁷⁰⁰ Other considerations may render the same information a public interest matter.

814. In this regard, the Defence claimed 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 tools of the Milošević regime. However, the Panel received no evidence that any of these individuals had been prosecuted for any of the alleged crimes, let alone convicted for any crime.¹⁷⁰¹ The fact that some of these individuals might have served in a succession of administrations (including at the time of the Kosovo conflict) is no basis to infer their complicity in a crime nor is it a valid ground to suggest that cooperation with such individuals would deprive an investigation of its legitimacy. Even if any of these individuals had been involved in the commission of a crime, the Panel received no evidence that the SITF/SPO were aware of that fact at the relevant time and, if they were aware of it, that they could have demanded to cooperate with other state officials on that basis. As regards Serbian officials with whom the SITF/SPO may have liaised in the performance of its functions, the Panel previously found that the SITF/SPO had no authority to and could not choose or cherry-pick the state officials in the Republic of Serbia with whom to cooperate in respect of the fulfilment of their mandates.¹⁷⁰² This finding is consistent with and supported by the evidence of Mr Reid.¹⁷⁰³ As regards the Serbian officials who qualified as Witnesses or Potential Witnesses, the Panel previously found that the SPO was free to collect evidence from any person of interest, including suspects or convicted persons.¹⁷⁰⁴ The mere fact that it interviewed or sought to interview a person who was alleged or thought to have committed, or who had been

¹⁷⁰⁰ Transcript, 1 September 2021, p. 471. *See also* Transcript, 21 January 2022, pp 3158-3159.

¹⁷⁰¹ F470, para. 60.

¹⁷⁰² F470, para. 59. *See also* Transcript, 1 September, 2021, p. 476; F302, paras 11-23; F301, paras 36-47.

¹⁷⁰³ DW1253 (Robert Reid), Transcript, 28 January 2022, pp 3362-3365.

¹⁷⁰⁴ F502 Gucati Bar Table Decision, para. 33.

convicted of, a crime did not amount to impropriety.¹⁷⁰⁵ Collecting evidence from such persons or collecting unreliable evidence in general would not necessarily mean that the SITF/SPO took the information at face value. As Mr Reid indicated, during an investigation evidence from a witness should always be verified and corroborated.¹⁷⁰⁶

815. The Accused also claimed that statements collected by the SITF and/or SPO might have been obtained by means of coercion or duress.¹⁷⁰⁷ These claims were based either on the argument that the interviews took place in Serbia or on the basis that some witnesses confirmed to the SITF/SPO an account that they might have given at the time of the conflict. The Panel considers that neither of these factors – even if proven – would demonstrate that the statements were obtained by means of coercion or duress in the context of SITF/SPO cooperation with Serbian authorities. There is simply no evidence in support of that claim.

816. Finally, the Accused claimed that witnesses had provided false statements during the investigation as a way to secure residency or asylum.¹⁷⁰⁸ The Panel notes that there is no evidence to substantiate the Accused's claims on that point.

817. The Panel therefore finds that there is no credible basis to conclude that the Protected Information revealed by the Accused contained indications of improprieties attributable to the SITF/SPO.

ii) The purpose of the Accused in revealing Protected Information

818. Assuming for the sake of argument that it was reasonable for the Accused to believe that the Protected Information contained indications of improprieties affecting SITF/SPO investigations, the Panel recalls its finding under Count 6 that the Accused revealed the names, past and present residence, phone numbers, ethnicity, interview

¹⁷⁰⁵ F502 Gucati Bar Table Decision, para. 33.

¹⁷⁰⁶ DW1253 (Robert Reid), Transcript, 28 January 2022, pp 3363-3364.

¹⁷⁰⁷ P1, p. 2; P6, p. 26; P7, pp 5-6, 9-10; P8, p. 7; P17, p. 2; P25, pp 5-6; P59, pp 2, 5.

¹⁷⁰⁸ P9, p. 11; P25, p. 7; P59, pp 2, 5. *See also* P37, pp 11-12; P49, p. 13.

locations and content of statements of witnesses.¹⁷⁰⁹ They also revealed names of would-be defendants, potential crime sites and a sensitive internal SPO work product.¹⁷¹⁰ The Panel also found that the Accused revealed Protected Information indiscriminately, without distinction to its content,¹⁷¹¹ and that they made efforts to achieve a wide distribution of the material.¹⁷¹² Such actions were accompanied by disparaging remarks towards Witnesses and Potential Witnesses and repeated affirmations of their desire to undermine the SC/SPO.¹⁷¹³

819. The Panel therefore finds that such actions go well beyond and belie any inference that the Accused's purpose was limited to exposing what they considered improprieties in the SITF/SPO's cooperation with Serbia.

iii) The lawfulness of the restriction of the Accused's rights

820. Assuming, again, for the sake of argument, that the Accused actions would nevertheless be partially covered by the claim of "public interest", the Panel will next consider whether, in such circumstances, the curtailment of their right to free speech and to access information by means of criminal prosecution was lawful.

821. The Panel notes that the Accused's right to freedom of speech (and access to relevant information) is not absolute.¹⁷¹⁴ In this regard, the Panel finds that, in line with ECtHR jurisprudence, the restriction of the Accused's rights resulting from their arrest, investigation and prosecution was prescribed by law, as it was based on provisions of the KCC (Articles 387, 388, 392 and 401) and the Law (Article 15(2)). Furthermore, the restriction of the rights of the Accused pursued a number of legitimate public interests, such as protecting witnesses from harm, enabling the SPO

¹⁷⁰⁹ See *supra* para. 520 (Count 6).

¹⁷¹⁰ See *supra* paras 362-371 (Findings on the Batches).

¹⁷¹¹ See *supra* paras 530 (Count 6), 628 (Count 4).

¹⁷¹² See *supra* paras 498 (Count 5), 564 (Count 3).

¹⁷¹³ See *supra* paras 569-574 (Count 3), 662-669 (Count 1).

¹⁷¹⁴ Article 40(2) of the Constitution; Article 10(2) of the ECHR.

to fulfil its mandate effectively, and maintaining public confidence in the integrity of proceedings before the SC.¹⁷¹⁵ Moreover, taking into consideration, on the one hand, the importance of witnesses for criminal investigations, and, on the other hand, the nature of the revealed information, the indiscriminate manner in which it was revealed, the large number of witnesses affected and the stated purposes of the revelation, the Panel is satisfied that the restriction was also necessary in a democratic society to protect a pressing social need and proportionate to the legitimate aims pursued.¹⁷¹⁶

822. The Panel further finds that the restriction of the Accused's rights resulting from their arrest, investigation and prosecution did not affect the essence of their rights. The Accused were permitted to exercise freedom of speech, *inter alia*, when questioning the legitimacy of the SC, criticising its actions, challenging the SITF/SPO's cooperation with Serbia and claiming that the SC was ethnically biased and calling for it to be closed down. Nonetheless, the actions of the Accused went well beyond a legitimate exercise of freedom of speech when they gravely interfered with other legitimate public interests protected by law, as outlined above.

823. The Panel finds that the interference with the Accused's rights that resulted from their arrest, investigation and prosecution was lawful and consistent with the effective protection of their fundamental rights.

¹⁷¹⁵ See e.g. ECtHR, [Bédat GC Judgment](#), para. 55; See also DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3172-3173. See also paras 644-647 (Count 1).

¹⁷¹⁶ See e.g. ECtHR, [Chap Ltd Judgment](#), para. 48; [Butkevich Judgment](#), para. 98; [Bédat GC Judgment](#), paras 56, 58; [Morice GC Judgment](#), para. 154; [Delfi GC Judgment](#), para. 133; [Amihalachioaie Judgment](#), para. 30; [Savva Terentyev Judgment](#), paras 82-84; [Campos Dâmaso Judgment](#), para. 35; [Tourancheau and July Judgment](#), para. 75; [Dupuis and Others Judgment](#), para. 44. See also DW1252 (Anna Myers), Transcript, 21 January 2022, p. 3173.

(c) Conclusion

824. In light of the foregoing and having considered, for the benefit of the Accused, all alternative explanations relevant to their claim, the Panel finds that their criminal responsibility cannot be excluded by considerations of public interest.

3. Whistle-blower defence

(a) Legal considerations

825. The Panel notes that the Law, the Rules and the KCC do not explicitly provide for a “whistle-blower” defence. Nevertheless, the protection of whistle-blowers, as defined below, comes within the SC legal framework through the Constitution and its commitment to apply the standards set out in the ECHR.¹⁷¹⁷ In this regard, the Panel notes 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.¹⁷¹⁸

826. The Haradinaj Defence also pointed to Law No. 06/L-085 on the Protection of Whistleblowers of the Republic of Kosovo (“Whistle-blowers’ Law”) as being relevant to these proceedings.¹⁷¹⁹ This law is not, however, directly applicable in the context of SC proceedings.¹⁷²⁰ Nonetheless, in order to ensure that the Panel’s interpretation of the notion of “whistle-blower” does not cause unfair prejudice to the Accused, the Panel has paid careful attention to this law in the context of interpreting the notion.

¹⁷¹⁷ Articles 22(2), 53 of the Constitution.

¹⁷¹⁸ ECtHR, [Guja GC Judgment](#), para. 70. See also ECtHR, [Marchenko Judgment](#), para. 46; [Heinisch Judgment](#), para. 63; [Goryaynova Judgment](#), para. 50.

¹⁷¹⁹ Transcript, 21 January 2022, p. 3096. See also Transcript, 1 September 2021, p. 469; F300; F301, paras 33-35.

¹⁷²⁰ Articles 3(2)(c) and (4), 6(2), 15(2) and 16(3) of the Law. See also DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3144-3145, 3147.

(b) The Panel's findings

827. As mentioned above, the Panel received the evidence of the Defence expert, Ms Myers, who put forward a definition of “whistle-blower” as adopted by the Special Rapporteur on Freedom of Expression, Mr David Kaye.¹⁷²¹ In particular, Ms Myers suggested that the requirement that the person concerned should have been an employee of the entity (public or private) to which the information belonged should not apply.¹⁷²² Similarly, Ms Myers suggested that the requirement that the whistle-blower acted in “good faith”, applicable under the case-law of the ECtHR, should not apply to the present context.¹⁷²³

828. The Panel notes that Ms Myers' purported definition of “whistle-blower” is questionable.¹⁷²⁴ Both the Whistle-blowers' Law and the case-law of the ECtHR require that, for a whistle-blower to benefit from specific protection, he or she must have been in a relation of employment with the entity concerned.¹⁷²⁵ Similarly, many domestic and international instruments limit whistle-blower protection to those who disclose information in the context of a relationship of employment.¹⁷²⁶ Furthermore, the Panel finds that Ms Myers' reliance¹⁷²⁷ upon the United Nations Convention Against

¹⁷²¹ Ms Myers defined whistle-blower “[...] a person who exposes information that he or she reasonable believes, at the time of disclosure to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud or harm to the environment, public health or public safety”. 2D6, para. 10 with corrections indicated during testimony: DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3112-3113, 3139-3142.

¹⁷²² DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3112-3119.

¹⁷²³ DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3123-3126, 3137, 3178-3180.

¹⁷²⁴ 2D6, paras 10-14, 16; DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3113-3115.

¹⁷²⁵ Articles 7(2.2-2.3), 24(4) of the Whistle-blowers' Law; ECtHR, [Medžlis Islamske Zajednice Brčko and Others GC Judgment](#), para. 80; [Bucur and Toma Judgment](#), para. 93, [Kudeshkina Judgment](#), para. 85; [Guja GC Judgment](#), para. 70; [Fuentes Bobo Judgment](#), para. 38, [Vogt GC Judgment](#), para. 53. See also Transcript, 21 January 2022, pp 3148, 3175-3177.

¹⁷²⁶ Articles 3(1.1) and (1.12), 20(2) of the Whistle-blowers' Law; UK Public Interest Disclosure Act 1998, Article 43B; [EU Whistle-blowing Directive](#), Article 4; [Council of Europe Recommendation on the Protection of Whistle-blowers](#), p. 6.

¹⁷²⁷ 2D6, para. 11; DW1252 (Anna Myers), Transcript, 21 January 2022, p. 3133.

Corruption is uncertain as it: (i) has not been ratified by Kosovo;¹⁷²⁸ and (ii) does not purport to define the notion of “whistle-blower”.¹⁷²⁹ Moreover, the definition adopted by Mr Kaye has not been endorsed by the ECtHR and does not appear to have been accepted by domestic courts. The Panel further notes that the case-law of the ECtHR requires that the whistle-blower should have acted in “good faith”.¹⁷³⁰ The Panel therefore finds no reason to depart from 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.

829. The Panel finds that the requirements for the Accused to qualify as whistle-blowers have not been met. Neither Mr Gucati nor Mr Haradinaj worked at the time for the SITF/SPO, the SC and/or the Republic of Serbia. Therefore, they were not in a relationship of employment with the entity from which the material may have originated. As such, neither of them is covered by the ECtHR definition of “whistle-blower”.

830. The Panel also considers that the Accused cannot be considered to benefit from whistle-blower protection as individuals “associated” with a whistle-blower. The Panel accepts Ms Myers’ suggestion that, unlike a whistle-blower, a person “associated” with a whistle-blower need not be in a work or employment relationship with the person or entity whose practices are being denounced.¹⁷³¹ Such a view is consistent, in particular, with the Whistle-blowers’ Law, which does not require that such a person him- or herself be in a working/employment relationship with the targeted person/entity.¹⁷³² Nonetheless, for there to be a person “associated” with a whistle-blower in the sense of Article 10 of the ECHR (and the Whistle-blowers’ Law),

¹⁷²⁸ [United Nations Convention Against Corruption](https://www.unodc.org/unodc/en/corruption/ratification-status.html), Signature and Ratification Status, <https://www.unodc.org/unodc/en/corruption/ratification-status.html> (last accessed on 13 May 2022).

¹⁷²⁹ See [United Nations Convention Against Corruption](#), Article 33.

¹⁷³⁰ ECtHR, [Guja GC Judgment](#), para. 77; [Heinisch Judgment](#), para. 69. See also DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3178-3180.

¹⁷³¹ 2D6, para. 16; DW1252 (Anna Myers), Transcript, 21 January 2022, pp 3117-3119, 3148-3149.

¹⁷³² Articles 3(1.12), 8, 24(1) of the Whistle-blowers’ Law.

there must be a whistle-blower within the meaning defined above, *i.e.* someone who is in an employment relationship with the person or entity whose conduct is being denounced. In the present case, there is no evidence that the leak of information was the result of the actions of a whistle-blower from the SPO or the Serbian authorities. In the absence of credible evidence that the material was leaked by an individual who would come within the notion of “whistle-blower”, in accordance with the definition adopted by the Panel, it is not possible for the Accused to be regarded as being “associated” with such an individual.

831. Moreover, even if the Accused were to qualify as whistle-blowers, the Panel is satisfied that, for the reasons set out above,¹⁷³³ 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 SC.

(c) Conclusion

832. In light of the foregoing, the Panel finds that neither Accused can be regarded as entitled to special protection as a whistle-blower and that their conduct falls outside the protection of whistle-blowers guaranteed under the Constitution, Kosovo law and the ECHR.

D. ENTRAPMENT

833. The Defence has claimed that the Accused were entrapped by SC/SPO officials to commit the charged offences (“Entrapment Claim”).¹⁷³⁴

¹⁷³³ See *supra* paras 820-822.

¹⁷³⁴ Transcript, 16 March 2022, pp 3666-3676; F567 Gucati Final Trial Brief, paras 120-141; F566 Haradinaj Final Trial Brief, paras 392-440; F258 Gucati Pre-Trial Brief, paras 36-50; F260 Haradinaj Pre-Trial Brief, paras 277(a), 278-280; Transcript, 1 September 2021, pp 442, 446-452, 457-458; Transcript, 2 September 2021, pp 594-595; Transcript, 31 January 2022, pp 3382-3385.

1. Legal considerations

(a) Parties' submissions

834. As regards the legal basis for the Entrapment Claim, the Gucati Defence pointed to Articles 3(2)(a) and (e) of the Law, 22(2) of the Constitution and 6 of the ECHR.¹⁷³⁵ The Haradinaj Defence argued that, while not expressly referred to as a defence in the KCPC, entrapment was “referred to within the Rules albeit not explicitly defined” and recognised by the ECtHR and, therefore, could be legitimately raised before the SC.¹⁷³⁶ The SPO submitted that the applicable legal regime at the SC did not provide for a defence of entrapment.¹⁷³⁷

(b) The Panel's findings

835. Neither the Law nor the Rules address the notion of entrapment. The KCC does not provide a defence of entrapment in respect of the offences charged. Nor does it address the effect, if any, of entrapment upon the charges and/or the admissibility of the evidence. The KCPC deals with the notion of entrapment only in the context of the implementation of an order for an undercover investigation, a simulated purchase of an item or a simulation of a corruption offence.¹⁷³⁸ Thus, Kosovo criminal procedural law does not provide for entrapment as a generic notion applicable in any circumstances.

836. As noted above,¹⁷³⁹ both the Law and the Constitution demand that the SC abide by and apply internationally recognised human rights standards, including those in the ECHR.¹⁷⁴⁰ The ECtHR defines entrapment as a situation where law enforcement

¹⁷³⁵ F288, paras 14-15. *See also* F288/RED. *See also* Transcript, 16 March 2022, p. 3667.

¹⁷³⁶ F566 Haradinaj Final Trial Brief, paras 392-394, 399, 428, *see also* paras 395-405; F287, paras 30-48.

¹⁷³⁷ F565 SPO Final Trial Brief, paras 283-286, 300; Transcript, 14 March 2022, pp 3484, 3516-3518; Transcript, 1 September 2021, p. 444; Transcript, 2 September 2021, confidential and *ex parte*.

¹⁷³⁸ Article 93(8.1) and (9) of the KCPC. *See also* Article 97 of the KCPC.

¹⁷³⁹ *See supra* para. 806 (Defences).

¹⁷⁴⁰ Articles 22, 40-41 of the Constitution; Articles 1(2), 2, 3(2)(e), and 21 of the Law.

officers, or persons acting under their direction or control, 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.¹⁷⁴¹ To assess whether the investigation was “essentially passive”, one must determine whether there were objective suspicions that the accused had been involved in criminal activity or was predisposed to commit a criminal offence.¹⁷⁴²

837. The ECtHR has developed a clear jurisprudence on the conditions under which Article 6 of the ECHR is complied with in case of entrapment, namely: (i) the conduct of undercover agents (who may be State agents or private parties acting under the instructions and control of State agents)¹⁷⁴³ must be subject to clear restrictions and safeguards and they do not incite the commission of crimes;¹⁷⁴⁴ (ii) the accused must be able to effectively raise the issue of entrapment during trial, whether by means of an objection or otherwise; general safeguards, such as equality of arms or the rights of the Defence, are not sufficient;¹⁷⁴⁵ (iii) evidence obtained as a result of entrapment must be excluded or a procedure with similar consequences applies;¹⁷⁴⁶ (iv) provided that the accused’s allegations are not wholly improbable, it falls on the prosecution to prove that there was no entrapment;¹⁷⁴⁷ (v) if a plea of entrapment is made and there

¹⁷⁴¹ ECtHR, [Ramanauskas GC Judgment](#), para. 55.

¹⁷⁴² ECtHR, [Bannikova Judgment](#), para. 38. See also ECtHR, [Guide on Article 6 of the ECHR](#), paras 242-247 (and references cited).

¹⁷⁴³ ECtHR, [Shannon Judgment](#).

¹⁷⁴⁴ [Guide on Article 6 of the ECHR](#), paras 232-233. See also ECtHR, [Khudobin Judgment](#), para. 128. The Panel notes the Gucati Defence’s argument that the [Ramanauskas GC Judgment](#) is authority for the proposition that action by a rogue agent (*i.e.* a person not acting under the direction or control of the police) could ground a claim of entrapment. The Panel considers however that the cited judgment supports no such claim.

¹⁷⁴⁵ ECtHR, [Ramanauskas GC Judgment](#), para. 69.

¹⁷⁴⁶ ECtHR, [Akbay and Others Judgment](#), paras 123-124; [Ramanauskas GC Judgment](#), para. 54; [Bannikova Judgment](#), para. 54.

¹⁷⁴⁷ See ECtHR, [Guide on Article 6 of the ECHR](#), para. 248.

is *prima facie* evidence of entrapment, the court must examine the facts of the case and take the necessary steps to uncover whether there was any entrapment, through an adversarial, thorough, comprehensive and conclusive procedure;¹⁷⁴⁸ (vi) in the context of non-disclosure of information by the investigative authorities, particular weight must be given to compliance with the principles of adversarial proceedings and equality of arms;¹⁷⁴⁹ and (vii) dismissal of a claim of entrapment must be sufficiently reasoned.¹⁷⁵⁰

838. The Panel also notes that a brief review of domestic jurisdictions demonstrates a wide variety of approaches regarding not only the existence of the notion of entrapment itself, but also, where it exists, its characterisation and consequences (e.g. a stay of proceedings,¹⁷⁵¹ a ground for exclusion of evidence,¹⁷⁵² or a factor in mitigation of sentence¹⁷⁵³).

(c) Conclusion

839. This brief overview of its case-law shows that the ECtHR has addressed the issue of entrapment through the lens of the fair trial guarantee. From that perspective, the Panel considers that 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.

¹⁷⁴⁸ ECtHR, [Bannikova Judgment](#), para. 57; [Ramanauskas GC Judgment](#), para. 70.

¹⁷⁴⁹ ECtHR, [Bannikova Judgment](#), para. 58.

¹⁷⁵⁰ ECtHR, [Tchokhonelidze Judgment](#), para. 52.

¹⁷⁵¹ See e.g. United Kingdom: [Crown Prosecution Service Legal Guidance](#) (last accessed 13 May 2022).

¹⁷⁵² See e.g. France: [French Cour de cassation Annual Report 2004](#), pp 141-152.

¹⁷⁵³ See e.g. Switzerland: Article 293(4) of the Switzerland Code of Criminal Procedure. See also Germany: leading to sentencing mitigation: BGHSt 32, 345 = NJW 1984, 2300; BGHSt 45, 321 = NJW 2000, 1123; BGHSt 47, 44 = NJW 2001, 2981; BGHSt 60, 238 = NStZ 2015, 541; BGH NStZ 2014, 277; BVerfG NJW 2015, 1083; but see leading to a procedural impediment BGHSt 60, 276 = NJW 2016, 91.

2. Fairness considerations

(a) Parties' submissions

840. The Defence argued that it was prevented from being able to effectively present its Entrapment Claim and that the Accused were therefore denied a fair trial.¹⁷⁵⁴ The SPO rejected this claim.¹⁷⁵⁵

(b) The Panel's findings

841. Throughout the proceedings, the Panel took numerous steps to ensure that the Defence was given every opportunity to present its Entrapment Claim.¹⁷⁵⁶ The Panel will retrace here the most salient steps.

842. First, the Panel heard submissions on disclosure and entrapment issues at the Trial Preparation Conference.¹⁷⁵⁷

843. Second, when deciding upon disclosure matters, the Panel always conducted a thorough and informed assessment of all Rule 102(3) items.¹⁷⁵⁸ The Panel was cautious to ensure in these *ex parte* reviews that the SPO did not withhold from the Defence any evidence which could arguably be tendered in support of the Entrapment Claim. In this regard, on several occasions, against the objections of the SPO, the Panel ordered the SPO to: (i) disclose to the Defence material identified as relevant to the Entrapment Claim;¹⁷⁵⁹ (ii) provide detailed, redacted or updated notices to the Defence of material

¹⁷⁵⁴ F566 Haradinaj Final Trial Brief, paras 399, 408-416, 430-436; Transcript, 16 March 2022, pp 3676, 3703-3704, *see also* pp. 3707-3708, 3710.

¹⁷⁵⁵ F565 SPO Final Trial Brief, para. 301; Transcript, 14 March 2022, pp 3463-3465, 3484.

¹⁷⁵⁶ Most of these steps are retraced in: Annex 1 to the Trial Judgment, paras 31, 46-50, 52-53, 55, 57, 59-61, 63-64, 67-68, 70-71, 74, 77-78, 85, 89, 93, 101-107.

¹⁷⁵⁷ *See* Annex 1 to the Trial Judgment, paras 45-47. *See also* Transcript, 1 September 2021, pp 442-443 (Order on updated Rule 102(3) Notice). Transcript, 2 September 2021, confidential and *ex parte*.

¹⁷⁵⁸ F304, paras 23-25; F413, paras 58-78; F435, paras 14-19; *see also* F479, paras 14-17; F533, paras 17-21; F541, paras 16-20. *See also* F413/RED; F435/RED; F546/COR. *See also* Transcript, 31 January 2022, pp 3381-3385; F543.

¹⁷⁵⁹ F413, para. 95(b). *See also* F413/RED; F423, para. 64 *referring to* F413, para. 95(b).

that appeared *prima facie* relevant and subject to disclosure;¹⁷⁶⁰ (iii) file further submissions on the factual basis underpinning the SPO's assertion that some of the items were not material to the Entrapment Claim;¹⁷⁶¹ and (iv) implement proposed measures and to report back to the Panel.¹⁷⁶² The Panel also ordered measures counter-balancing non-disclosure.¹⁷⁶³

844. Third, the Panel held *ex parte* hearings to question the SPO on: (i) the Entrapment Claim and the steps to take to ensure that the Defence can effectively and fully raise its claim;¹⁷⁶⁴ and (ii) the *effective* counterbalancing measures that could be adopted if non-disclosure was considered.¹⁷⁶⁵ During these hearings, a primary concern of the Panel was to ensure that no prejudice or unfairness was caused to the Defence as a result of the *ex parte* nature of these sessions. The Panel also considered all pertinent issues when deciding whether particular items of evidence could be relevant to the Entrapment Claim.

845. Fourth, when ruling upon the SPO challenges to disclosure, the Panel clarified the relationship between the disclosure regime and the Entrapment Claim.¹⁷⁶⁶ In particular, the Panel noted that "the Defence must be permitted to receive, as part of the disclosure process, relevant and disclosable information that could assist the Entrapment Claim".¹⁷⁶⁷ Further, the Panel made clear that a decision as to whether the Entrapment Claim was wholly improbable would only be rendered in the Judgment once all the evidence was heard.¹⁷⁶⁸ Moreover, the Panel deferred its decision on

¹⁷⁶⁰ Transcript, 2 September 2021, p. 638 (Order Regarding SPO Rule 102(3) List); F304, paras 23, 26; F361.

¹⁷⁶¹ F320.

¹⁷⁶² F413, paras 76-78, 95(c).

¹⁷⁶³ F413, paras 67-68, 73-74.

¹⁷⁶⁴ Transcript, 2 September 2021, confidential and *ex parte*.

¹⁷⁶⁵ Transcript, 4 October 2021, confidential and *ex parte*; Transcript, 21 October 2021, confidential and *ex parte*.

¹⁷⁶⁶ F413, paras 37, 51, 53-56.

¹⁷⁶⁷ F413, para. 53.

¹⁷⁶⁸ Transcript, 10 December 2021, p. 2608 (Oral Order on Defence Request to Further Cross-Examine SPO Witnesses W04841 and W04842). *See also* F546/COR, paras 20, 26; F413, para. 53.

outstanding disclosure matters to after having heard the evidence of Ms Pumper and Mr Jukić, because it considered at the time that, if these witnesses were in a position to give evidence on these matters, that may have affected its pending Disclosure Decision.¹⁷⁶⁹

846. Fifth, the Panel repeatedly stressed, for example when denying the SPO leave to appeal the Disclosure Decision, the importance of adversarial procedure in the context of non-disclosure of information in a claim of entrapment.¹⁷⁷⁰

847. Sixth, as regards witnesses, on the basis that the proposed evidence could be relevant to the Entrapment Claim, the Panel: (i) denied the SPO's request to exclude the testimony of Mr Qalaj and allowed the Defence to call some of the other proposed witnesses;¹⁷⁷¹ (ii) allowed the Defence to further cross-examine Ms Pumper and Mr Jukić on the basis that certain items for which the Panel had ordered disclosure reached the Defence after the close of the SPO case and could therefore not have been used by the Defence when initially cross-examining these witnesses;¹⁷⁷² (iii) allowed the Defence to question Mr Moberg about the claim that an SPO staff would have told the Accused that they could keep the content of Batch 1 for one month;¹⁷⁷³ and (iv) authorised the Defence to call Mr Cele Gashi in support of such claim.¹⁷⁷⁴

848. Seventh, as regards evidence, the Panel admitted in evidence, on the basis that it was relevant to the Entrapment Claim: (i) items relating to the Defence's claim of SPO

¹⁷⁶⁹ Transcript, 18 October 2021, pp 816-817. *See also* fn. 1756.

¹⁷⁷⁰ F423, paras 38-40, 61-62. *See also* Transcript, 8 November 2021, pp 1974-2029; *specifically* pp 2011, 2014-2015, 2020-2021, 2024-2026, 2028. *See also* Transcript, 8 November 2021, p. 2017 (Gucati Defence approving).

¹⁷⁷¹ *See e.g.* DW1242 (Elmedina Ballhazhi), DW1241 (Taibe Miftari), DW1244 (Metush Kryeziu), DW1246 (Rashit Qalaj): F470, paras 77-79, 88-90.

¹⁷⁷² Transcript, 10 December 2021, p. 2608 (Oral Order on Defence Request to Further Cross-Examine SPO Witnesses W04841 and W04842); F413, paras 79, 95.

¹⁷⁷³ W04876 (Daniel Moberg), Transcript, 5 November 2021, p. 1951.

¹⁷⁷⁴ *See* 1D9, para. 20. *See also* DW1245 (Cele Gashi), Transcript, 10 December 2021, pp 2602-2603.

investigative shortcomings in respect of the circumstances of the leak;¹⁷⁷⁵ and (ii) Mr Qalaj's statement and addendum (against the SPO's objection).¹⁷⁷⁶

849. Lastly, throughout the proceedings, the Panel: (i) overruled SPO objections to Defence questioning directed at eliciting evidence pertaining to the Entrapment Claim;¹⁷⁷⁷ and (ii) asked repeated questions regarding the Entrapment Claim.¹⁷⁷⁸

850. The Panel further notes that, at trial, the Defence did not: (i) clearly explain how the Accused had been entrapped; or (ii) tender evidence from which the Panel could reasonably infer that entrapment occurred.

(c) Conclusion

851. On the basis of the above, the Panel is satisfied that the Defence was afforded a full and fair opportunity to put forward its Entrapment Claim in compliance with the standards laid down by the ECtHR.

3. Assessment of the Entrapment Claim

(a) Parties' submissions

852. The Defence argued that it showed the entrapment not to be "wholly improbable" and that the SPO failed to prove that there was no entrapment.¹⁷⁷⁹ The Gucati Defence submitted that the Panel should either reject the charges on the ground that the Accused could not have a fair trial, stay the proceedings or pronounce a

¹⁷⁷⁵ F502 Gucati Bar Table Decision, paras 19-24.

¹⁷⁷⁶ Transcript, 14 January 2022, pp 3056-3057.

¹⁷⁷⁷ See e.g. Transcript, 20 October 2021, pp 1037, 1124, 1157; Transcript, 21 October 2021, pp 1168, 1217, 1226; Transcript, 4 November 2021, p. 1776; Transcript, 15 December 2021, pp 2624, 2628-2632; Transcript, 14 January 2022, pp 3056-3057.

¹⁷⁷⁸ See e.g. Transcript, 26 October 2021, p. 1478; Transcript, 28 October 2021, p. 1756; Transcript, 5 November 2021, p. 1958; Transcript, 2 September 2021, confidential and *ex parte*.

¹⁷⁷⁹ Transcript, 16 March 2022, pp 3666-3676, 3703-3704; F567 Gucati Final Trial Brief, paras 130-139; F566 Haradinaj Final Trial Brief, paras 406-440; F288, paras 17-19. See also *infra* para. 879 (Defences).

judgment of acquittal excluding the SPO evidence in its entirety.¹⁷⁸⁰ The Haradinaj Defence submitted that all evidence stemming from the entrapment had to be ruled inadmissible otherwise the entirety of the proceedings would amount to an “abuse of process”.¹⁷⁸¹

853. The SPO submitted that there was no basis on the record to support the Entrapment Claim and that it should be rejected as “wholly improbable”.¹⁷⁸²

(b) The Panel’s findings

854. In assessing the Entrapment Claim, the Panel duly considered all the circumstances raised by the Defence, and the evidence pertaining to them. The Panel also carefully reviewed the entire record to determine whether there was any other relevant fact or circumstance.

i) Attitude of the Accused

855. Prior to the Indictment Period, both Accused made several statements during interviews, television programs, or on Facebook, expressing hostility towards the SC.¹⁷⁸³ In the same vein, during the Indictment Period, the Accused repeatedly stated that they did not recognise the SC,¹⁷⁸⁴ were opposed to it,¹⁷⁸⁵ did not accept its

¹⁷⁸⁰ Transcript, 16 March 2022, p. 3676; F567 Gucati Final Trial Brief, para. 141; F288, paras 23-24.

¹⁷⁸¹ F566 Haradinaj Final Trial Brief, paras 399, 429, 439-440; F287, para. 48 *but see* Transcript, 16 March 2022, p. 3703.

¹⁷⁸² F565 SPO Final Trial Brief, paras 300-313; Transcript, 14 March 2022, p. 3484-3491, 3515-3516; Transcript, 1 September 2021, pp 444-446, 450; Transcript, 2 September 2021 confidential and *ex parte*.

¹⁷⁸³ P36; P37; P38; P39, pp 1, 3-4; P40; P41; P42, p. 1; P43; P44; P45; P46; P47; P48; P49, pp 3, 7, 13, 15; P83, pp 18, 42, 67, 80-84.

¹⁷⁸⁴ *See e.g.* P5, p. 1; P7, p. 3; P18, p. 1; P21, p. 3.

¹⁷⁸⁵ *See e.g.* P7, p. 3; P9, p. 12; P13, p. 1; P42; P43.

authority,¹⁷⁸⁶ wanted it abrogated,¹⁷⁸⁷ were committed to work towards undoing it¹⁷⁸⁸ and embarrassing it.¹⁷⁸⁹

856. After each of the Three Deliveries, the Accused repeatedly expressed satisfaction with the leak,¹⁷⁹⁰ described it as a miracle,¹⁷⁹¹ and praised the person behind it for doing what they viewed as an important patriotic act and a national victory.¹⁷⁹² The Accused discussed the origins of the Three Sets, entertaining the possibilities that the material might have come from Serbia,¹⁷⁹³ or might have been intentionally disclosed by the SPO,¹⁷⁹⁴ bought or stolen.¹⁷⁹⁵ The Accused repeatedly expressed indifference as to who the source of the Three Sets was, as what mattered to them was that they were authentic SITF/SPO material.¹⁷⁹⁶ Further, when asked why, in their views, the material had been disclosed to them, the Accused responded that it could have been the result of their public and vocal opposition to the SC.¹⁷⁹⁷ On 14 or 15 September 2020, the Accused took the collective and unanimous decision with the 23-member KLA WVA leadership committee to publish any new material that would be received.¹⁷⁹⁸ After

¹⁷⁸⁶ See e.g. 1D3, paras 57-58; 2D1, paras 18, 22.

¹⁷⁸⁷ See e.g. P32, p. 2; P38, p. 1; 2D1, para. 37; DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, pp 2861, 2863-2864. See *contra* 2D1, para. 17; Transcript, 12 January 2022, pp 2858, 2860, 2862; 1D3, para. 67.

¹⁷⁸⁸ P15, p. 2; P26, p. 2.

¹⁷⁸⁹ P30, p. 15.

¹⁷⁹⁰ See e.g. P1, p. 1; P2, p. 8; P8, p. 24; P17, p. 5; P18, p. 2; P25, p. 3; P34, p. 2; P35, p. 10.

¹⁷⁹¹ P7, p. 2; P30, pp 2-3; P35, p. 3.

¹⁷⁹² P2, p. 8; P6, pp 3, 30; P7, p. 2; P8, pp 2-4, 24, 29, 35 See also P7, p. 5 (Tomë Gashi in the presence of Mr Haradinaj).

¹⁷⁹³ P6, p. 32; P7, pp 13-14; P8, p. 14; P21, p. 4; P23, p. 9; P24, pp 5, 9; P28, p. 14; P30, p. 18.

¹⁷⁹⁴ See e.g. P1, p. 5; P11, pp 67, 69.

¹⁷⁹⁵ P2, p. 3; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2230-2231; Transcript, 8 December 2021, p. 2401. See also P8, p. 17; 2D1, para. 35.

¹⁷⁹⁶ See e.g. P1, pp 4-5; P6, p. 2; P8, pp 14, 17, 24; P11, pp 2-3, 39; P24, p. 5; P28, pp 9, 13; P30, pp 18-19; P33, p. 1.

¹⁷⁹⁷ See e.g. P2, p. 6; P8, p. 3. P29, p. 1. See also P4, p. 10 (Tomë Gashi).

¹⁷⁹⁸ See *supra* para. 242(The Events at Issue). See also 2D1, para. 73; Transcript, 11 January 2022, p. 2746.

disclosing the Three Sets, the Accused reiterated their willingness to publicise any other material of this sort that might be provided to them.¹⁷⁹⁹

857. In their testimony, the Accused went from alleging entrapment, to suggesting that the Three Sets might have been stolen from the SPO, to acknowledging that they did not know where the material came from.¹⁸⁰⁰ Mr Gucati said that, as the KLA WVA Chairman, nobody but God could force him to call the Three Press Conferences.¹⁸⁰¹

858. The Panel found under Count 1 that expressing hostility towards the SC/SPO is not in itself evidence of a criminal offence;¹⁸⁰² such statements constitute, to a certain extent, a legitimate exercise of the Accused's freedom of expression. Furthermore, while some of the above acts and statements could be relevant to determining a predisposition of the Accused to commit the offences charged, the Panel finds that, even if established, such a predisposition would not entirely exclude the possibility that the Accused were entrapped by someone to act as they did. That being said, the Panel finds that neither their contemporaneous statements nor their evidence at trial indicate an objective basis to believe that the Accused had in fact been entrapped.

ii) Origin of the leak and persons making the Three Deliveries

859. The Panel received no evidence regarding where the Three Sets had been obtained from and by what means. The Panel notes that Batches 1, 2 and 4 contained, *inter alia*, WCPO Responses and Serbian Documents, which had no ERNs and some of

¹⁷⁹⁹ See e.g. P2, p. 4; P4, pp 3, 9 (Mr Gucati, through Tomë Gashi); P6, pp 4, 14, 35; P7, p. 2; P8, pp 4, 6, 26; P12, pp 2-4 (Tomë Gashi); P15, p. 2; P17, p. 5; P18, pp 1-2; P21, pp 3-4; P24, p. 7; P26, pp 4-5; P28, pp 7, 11; P29, p. 2; P31, p. 2; P33, p. 1; P34, pp 2-3; P35, pp 2-3. See also DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2221-2222. See *contra* DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2222-2223, 2226, 2230-2232.

¹⁸⁰⁰ See e.g. 2D1, paras 34-35, 45, 54, 129, 135; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2180, 2215; Transcript, 7 December 2021, p. 2288; DW1249 (Nasim Haradinaj), Transcript, 11 January 2021, p. 2734; Transcript, 12 January 2022, pp 2841-2843.

¹⁸⁰¹ DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2215-2217.

¹⁸⁰² See *supra* para. 660 (Count 1).

which were written in Serbian, using Latin or Cyrillic script.¹⁸⁰³ This suggests that the First and Second Sets *could* have originated from the records of Serbian authorities cooperating with the SITF/SPO. However, these considerations are not sufficient to establish that these documents were leaked from a location in the Republic of Serbia, or with the knowledge or consent of the Serbian authorities. In any event, there is no indication that the First and Second Sets came from the SITF/SPO, or that either institution was involved in handing them over to the KLA WVA.

860. The Panel notes that the information contained in Batch 3 suggests that the Third Set must have come from the SPO records. In this regard, the Panel notes that [REDACTED].¹⁸⁰⁴ The report concludes that there is no evidence that a member of the SPO staff intentionally leaked it.¹⁸⁰⁵ The Panel is thus unable to determine how and by what means the Third Set came out of the SPO records. However, there is no indication that it was intentionally leaked by the SPO.

861. The Panel also notes that two media articles admitted in evidence claim that the information they were publishing came from a source in the SPO.¹⁸⁰⁶ The Panel finds that the basis for this claim has not been established and the truth of the assertion could not be verified.

862. The Panel received evidence that the Three Deliveries were carried out by three different individuals and that at least two spoke Albanian.¹⁸⁰⁷ The Panel received no evidence regarding the identity of these individuals; nor is there any evidence

¹⁸⁰³ The process of providing an electronic record number (ERN) was explained by Ms Pumper: W04841 (Zdenka Pumper), Transcript, 18 October 2021, pp 848-849. *See also* Transcript, 20 October 2021, pp 1046-1047; P88, para. 6. *See supra* paras 335-336, 347, 379-381 (Findings on the Batches).

¹⁸⁰⁴ 1D33, pp 1, 3.

¹⁸⁰⁵ 1D33, p. 2.

¹⁸⁰⁶ P155; P156.

¹⁸⁰⁷ P1, p. 1; P35, pp 10-11; P4, pp 3, 6-7; P6, pp 3-4; P8, pp 1-2, 4; P12, pp 2-3, 6; P17, p. 5; P25, p. 2; P28, p. 9; P33, p. 3; P35, p. 10. *See also* 1D4, paras 4, 6, 8, 22, 34; DW1241 (Taibe Miftari), Transcript, 9 December 2021, pp 2454-2455, 2459, 2474. *See supra* paras 209, 244, 275 (The Events at Issue).

connecting them to the SC/SPO.¹⁸⁰⁸ Identifying features noted by Ms Miftari or others who reviewed CCTV footages from the KLA WVA did not enable the identification of these individuals. The Accused repeatedly claimed to have no knowledge of their identity.¹⁸⁰⁹ There is no evidence before the Panel that would suggest that any of these individuals were staff of the SC/SPO and/or acted under their instructions or control.¹⁸¹⁰

iii) The SPO's investigative efforts

863. As regards the Defence argument that the purported inadequacy of the SPO's investigation into the leak supports the Entrapment Claim,¹⁸¹¹ the Panel acknowledges the SPO's resistance to disclose to the Defence material related to the Entrapment Claim on the ground that it could affect its ongoing investigations of the leak.¹⁸¹² That being said, the claim that the SPO failed to investigate the origin of the leak is contradicted by the evidence, which shows that the SPO took steps to identify those responsible for the leak by: (i) [REDACTED];¹⁸¹³ (ii) collecting CCTV footage recording the Three Deliveries;¹⁸¹⁴ and (iii) taking from one of the Accused photos of a car possibly related to the leak.¹⁸¹⁵

864. As regards the evidence pertaining to a blue Volkswagen car and the picture of an SPO staff member,¹⁸¹⁶ the Defence failed to show that the car and/or the SPO staff

¹⁸⁰⁸ See 1D19-1D30.

¹⁸⁰⁹ See e.g. P1, p. 1. See also P4, p. 3; 2D1, paras 45, 48, 71, 105; DW1249 (Nasim Haradinaj), Transcript, 11 January 2022, p. 2743; Transcript, 13 January 2022, p. 2963.

¹⁸¹⁰ W04841, (Zdenka Pumper), Transcript, 25 October 2021, pp 1478-1479; W04842 (Miro Jukić), Transcript, 28 October 2021, p. 1756; W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1957-1958.

¹⁸¹¹ F566 Haradinaj Final Trial Brief, paras 417-426.

¹⁸¹² F304; F354; F320; F420; F423, F435. See also F435/RED.

¹⁸¹³ 1D33.

¹⁸¹⁴ P136; P164; DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 3007-3015.

¹⁸¹⁵ DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2190; 1D3, para. 31.

¹⁸¹⁶ W04841, (Zdenka Pumper), Transcript, 20 October 2021, pp 1154-1157; Transcript, 21 October 2021, pp 1165-1179; Transcript, 25 October 2021, pp 1305-1310. See also 1D31; 1D32; 1D34.

member was in any way related to the events relevant to this case.¹⁸¹⁷ The Defence did not establish any connection between any other SPO staff and the leak that would have warranted investigation.¹⁸¹⁸

865. As regards the claim that a SPO representative suggested during the First Seizure that the KLA WVA could keep the material for a month,¹⁸¹⁹ the Panel notes that this was credibly disputed by Mr Moberg, who was present during the First Seizure.¹⁸²⁰ It was also contradicted by the SPO's prompt reaction to seize the material.¹⁸²¹ The Panel concludes that the SPO did not permit the Accused to keep the First Set for a month.

866. As regards the SPO's failure to take steps to obtain the material which it knew media outlets possessed and/or to seek to remove from the public domain press articles said to contain references to the leaked material,¹⁸²² the SPO has not explained why it refrained from doing so. However, the Panel considers that this does not lead to the inference of an entrapment.

867. Lastly, as regards the Defence claim that the SPO requested the Kosovo Police not to investigate the matter, it is clear from the evidence of Mr Qalaj that the decision that the Kosovo Police should not be involved came from the Prosecution Office in Kosovo, *i.e.* the SPRK.¹⁸²³ There is no evidence that the SPO had any part in that decision.

868. The Panel is therefore not convinced by the Defence arguments. In any event, even if the Panel were to find the SPO's investigation of the leak inadequate, this

¹⁸¹⁷ W04841, (Zdenka Pumper), Transcript, 20 October 2021, p. 1154; Transcript, 21 October 2021, pp 1165-1179; Transcript, 25 October 2021, pp 1305-1310.

¹⁸¹⁸ Transcript, 16 March 2022, p. 3675.

¹⁸¹⁹ F258 Gucati Pre-Trial Brief, paras 102, 133; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2196-2197; Transcript, 8 December 2021, pp 2398-2400; 1D3, para. 42; 2D1, para. 88; 1D9, paras 20, 22. *See also* DW1245 (Cele Gashi), Transcript, 10 December 2021, pp 2586, 2602-2603.

¹⁸²⁰ W04876 (Daniel Moberg), Transcript, 5 November 2021, pp 1936-1937, 1948.

¹⁸²¹ *See supra* paras 228-231, 256-258, 285 (The Events at Issue).

¹⁸²² Transcript, 16 March 2022, p. 3673; W04841 (Zdenka Pumper), Transcript, 20 October 2021, pp 1101-1109, 1128-1131, 1133. *See also* 1D10.

¹⁸²³ DW1246 (Rashit Qalaj), Transcript, 14 January 2022, pp 3071-3073.

would not indicate that the SPO entrapped the Accused. At best, it would constitute evidence of investigative failures and/or that the SPO accepted that some of the leaked information would remain in the public domain.

iv) Gucati circumstantial factors

869. Finally, the Gucati Defence argued that there was circumstantial evidence of entrapment of the Accused by the SPO,¹⁸²⁴ which the SPO rejected.¹⁸²⁵ The Panel, having examined each of the factors in turn, observes the following.

870. The Defence argued that the material contained in the Three Sets had been under the control of the SPO prior to the Three Deliveries, and that no other entity had access to the documents constituting the Third Set.¹⁸²⁶ Even if the material from the Three Sets had come from the SPO, this does not compel the inference that the leak was the result of an intentional plan to entrap the Accused, rather than the result of a security breach or malicious act.¹⁸²⁷ Likewise, the fact that the investigation into the KLA WVA was coordinated by the two most senior officers of the SPO¹⁸²⁸ is not indicative of entrapment.

871. The Defence argued that, although the SPO had been alerted of potential other deliveries after the First and Second Deliveries, it made no attempt to prevent further deliveries. The Defence inferred that the SPO wanted the Three Deliveries to be effective.¹⁸²⁹ The Panel considers that the inability of the SPO to prevent further deliveries does not compel the inference that it wanted, let alone orchestrated, them.

¹⁸²⁴ Transcript, 16 March 2022, pp 3667-3668; F567 Gucati Final Trial Brief, paras 134-137; F258 Gucati Pre-Trial Brief, para. 41; F288, para. 20. *See also* F260 Haradinaj Pre-Trial Brief, para. 278.

¹⁸²⁵ *See e.g.* F565 SPO Final Trial Brief, paras 308-311; Transcript, 14 March 2022, pp 3486-3490.

¹⁸²⁶ Transcript, 16 March 2022, p. 3668; F567 Gucati Final Trial Brief, para. 134(a); F258 Gucati Pre-Trial Brief, para. 41(b); F288, para. 20(c)(ii).

¹⁸²⁷ *See supra* paras 859-862 (Defences).

¹⁸²⁸ F567 Gucati Final Trial Brief, para. 134(b). *See also* Transcript, 16 March 2022, p. 3670.

¹⁸²⁹ Transcript, 16 March 2022, pp 3671-3672; F567 Gucati Final Trial Brief, para. 134(c); F258 Gucati Pre-Trial Brief, para. 41(c); F288, para. 20(c)(vi)(vii).

Further, this claim is contradicted by a request by SPO staff to the Accused that they should warn the SPO if they received new material *before* publicising it (which the Accused declined and failed to do).¹⁸³⁰

872. The Defence argued that the SPO deliberately left the First and Second Sets in the hands of the KLA WVA overnight after the First and Second Press Conferences.¹⁸³¹ The filing times of the two orders of the Single Judge demonstrate that the SPO acted swiftly to seek orders from him.¹⁸³² The Panel is therefore not convinced that the SPO did not react sufficiently promptly and, in any any event, fails to see how leaving the material in the hands of the KLA WVA overnight would be indicative of entrapment.

873. The Defence argued that there is evidence that KLA WVA members were placed under surveillance.¹⁸³³ Mr Gucati noticed a car following him in the days leading up to both the Second and Third Deliveries; he told the SPO, which showed no interest.¹⁸³⁴ The Defence claimed that the inference to be drawn was that the SPO was watching the Accused instead of the KLA WVA premises to prevent further deliveries.¹⁸³⁵ The Panel first notes that there is no indication that the said (unidentified) car had anything to do with the leak. Second, that the SPO staff member was perceived by the Accused as being “disinterested” does not indicate entrapment. The argument is unpersuasive and without evidentiary foundation. Even if accepted, the claim that the SPO would have been watching the Accused contradicts the claim that the SPO was not trying to identify the persons behind the leak.

874. The Defence argued that the Third Delivery was apparently foreseen by the SPO Order 13 days before it occurred as it referred to “internal work product”,

¹⁸³⁰ See e.g. DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2292.

¹⁸³¹ F567 Gucati Final Trial Brief, para. 134(d). See also Transcript, 16 March 2022, p. 3671.

¹⁸³² P52 (07/09/2020 20:16:0); P53 (Date original: 17/09/2020 08:24:00).

¹⁸³³ F567 Gucati Final Trial Brief, para. 134(e).

¹⁸³⁴ F288, para. 20(c)(ix)-(x).

¹⁸³⁵ F567 Gucati Final Trial Brief, para. 134(e).

suggestive of planning by the SPO.¹⁸³⁶ This claim has no foundation. The SPO has credibly explained that the initial date (9 September 2020), later corrected with the handwriting of an SPO staff member (to 22 September 2020), was a typo.¹⁸³⁷

875. The Defence argued that the Accused provided to the SPO the number plate of a car linked to the Second Delivery but that the SPO undertook no check until the end of November 2020 with no explanation.¹⁸³⁸ The fact that the SPO did not immediately conduct a check of the number plate does not compel an inference of entrapment and the reasons for the delay have not been established at trial. The claim that the SPO should have investigated more (promptly) this line of enquiry appears to have no relevance to the case.

876. The Defence argued that the SPO had shown little to no interest in recovering the Three Sets from others than the Accused, in particular the material still retained by media outlets.¹⁸³⁹ The fact that the SPO concentrated its efforts on retrieving the material from the KLA WVA does not, in the Panel's view, indicate entrapment.

877. The Defence argued [REDACTED].¹⁸⁴⁰ While it is accepted that the hypothesis of a deliberate leak by an SPO staff cannot be totally excluded, the Panel recalls that the report concluded that there was no evidence that members of the SPO deliberately leaked the Third Set [REDACTED].¹⁸⁴¹ In any event, the Panel does not accept that the hypothetical possibility of a deliberate leak by an SPO staff member provides a reasonable basis for an inference that the SPO entrapped the Accused.

878. The Defence argued that an SPO staff member was implicated as source of the leak, and has not been called by the SPO as a witness.¹⁸⁴² The Panel is satisfied that this

¹⁸³⁶ Transcript, 16 March 2022, p. 3672; F567 Gucati Final Trial Brief, para. 134(f); F258 Gucati Pre-Trial Brief, para. 41(d); F288, para. 20(c)(xi).

¹⁸³⁷ P54; F565 SPO Final Trial Brief, paras 309-310.

¹⁸³⁸ F567 Gucati Final Trial Brief, para. 134(g); F288, para. 20(c)(viii).

¹⁸³⁹ Transcript, 16 March 2022, p. 3673; F567 Gucati Final Trial Brief, para. 134(h).

¹⁸⁴⁰ Transcript, 16 March 2022, pp 3673-3675; F567 Gucati Final Trial Brief, para. 134(i).

¹⁸⁴¹ 1D33.

¹⁸⁴² F567 Gucati Final Trial Brief, paras 134(i), 137; Transcript, 16 March 2022, p. 3675.

allegation was highly speculative, has been credibly challenged by the SPO, and finds no reasonable basis to conclude that the staff member was implicated in any way in the leak. The Panel notes, furthermore, that the Defence did not seek to interview or call this individual as a witness.

879. The Defence argued that the SPO had the motive to carry out a “sting operation” against the KLA WVA and that it was far from wholly improbable that such an operation was designed to entrap the Accused.¹⁸⁴³ This claim is unsubstantiated and without foundation.

880. The Panel observes that some of the circumstances initially put forward by the Gucati Defence regarding the Entrapment Claim were not reiterated in its Final Trial Brief or during closing statements. The Panel will nevertheless address them below.

881. The Defence argued that the SPO had demonstrated that it would resort to leaking material for its own purposes by revealing to the public the existence of an unconfirmed indictment against Mr Thaçi and others, contrary to the Law and the Rules.¹⁸⁴⁴ There is no merit in this argument. The SPO had sought judicial authorisation from the Pre-Trial Judge to make this matter public.¹⁸⁴⁵ The SPO’s conduct was therefore lawful and provides no indication of entrapment.

882. The Defence argued that the SPO had used the circumstances surrounding the Three Deliveries against Mr Thaçi and others as a ground to resist their interim release, even though they faced no charges relating thereto.¹⁸⁴⁶ This claim is unsupported. Further, that the SPO would regard the leak as relevant to the issue of detention of certain accused is no evidence that it intentionally leaked the material to be able to make that submission.

¹⁸⁴³ F567 Gucati Final Trial Brief, para. 135-137; F258 Gucati Pre-Trial Brief, paras 42-43; F288, paras 20(c)(xii), 22. *See also* Transcript, 16 March 2022, p. 3673.

¹⁸⁴⁴ F258 Gucati Pre-Trial Brief, para. 41(a); F288, para. 20(c)(i).

¹⁸⁴⁵ KSC-BC-2020-06, F9.

¹⁸⁴⁶ F258 Gucati Pre-Trial Brief, para. 44; F288, para. 20(c)(xiii).

883. The Defence argued that the First Set was delivered by an unknown male with the instruction that it be made available to the media.¹⁸⁴⁷ This provides no circumstantial evidence of entrapment. Instead, it would demonstrate, at best, an intent to have the information further publicised.

884. The Defence argued that SPO officers subsequently invited the KLA WVA to keep the remnants of the First Set for up to one month.¹⁸⁴⁸ That claim has been addressed and rejected above.¹⁸⁴⁹

885. The Defence argued that, during the First Seizure, the SPO's attention was drawn to the fact that the CCTV footage could have assisted in identifying the individual who made the First Delivery, but that the SPO officers were uninterested. The Defence inferred that the SPO already knew the identity of the deliverer.¹⁸⁵⁰ The record contradicts the claim that the SPO was "disinterested", as it appears that the SPO did collect the material.¹⁸⁵¹

886. The Defence argued that the SPO made no contact with the journalist who recorded the Second Delivery in order to try to identify the deliverer, inferring that the SPO already knew who that person was.¹⁸⁵² This argument was explored during trial.¹⁸⁵³ The Panel observes that the footage was publicised online shortly after the events and could thus be readily obtained without the assistance of the journalist in question. The fact that the SPO did not contact the journalist does not compel the inference that the SPO "already knew the identity of the person making the delivery". Nor is there indication that viewing the footage would enable the identification of such a person.

¹⁸⁴⁷ F288, para. 20(c)(iii).

¹⁸⁴⁸ F288, para. 20(c)(iv)

¹⁸⁴⁹ *See supra* para. 865.

¹⁸⁵⁰ F288, para. 20(c)(v)

¹⁸⁵¹ P163; P164.

¹⁸⁵² F288, para. 20(c)(vii).

¹⁸⁵³ 1D5, para. 31; DW1242 (Elmedina Ballhazhi), Transcript, 9 December 2021, p. 2495.

887. The Defence argued that: (i) Mr Gucati provided to an SPO staff member an image of a car allegedly used by the individual who made the Second Delivery, but that the SPO staff member did not retain it; and (ii) the SPO conducted a “sham interview” of the car’s owner only on 18 December 2020.¹⁸⁵⁴ The Defence asserted that the inference to be drawn was that the SPO knew the identity of the person making the Second Delivery all along, and was not concerned about stopping a further delivery. The Panel considers that the claim that the SPO interview of the owner of a car thought relevant by the Accused was a sham is without basis. The fact that this interview was only conducted in December 2020 does not support an inference of entrapment, and the reasons for the delay were not explored or established at trial. Neither has it been established that the car in question, or its driver, had any part in the leak. It follows that the claim that the SPO should have investigated more (promptly) a line of enquiry on that point does not support an inference of entrapment.

888. The Panel finds that the propositions put forward by the Gucati Defence as circumstantial evidence of entrapment are unsubstantiated and hypothetical and, in any event, do not support, either individually or in their entirety, an inference of entrapment.

4. Conclusion

889. The Panel is 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. First, neither their contemporaneous statements nor their evidence at trial indicate an objective basis to believe that the Accused had been entrapped. Second, [REDACTED]. Third, while the SPO showed reluctance to engage fully with the Entrapment Claim out of an apparent concern for the confidentiality of its investigations, neither this nor any other facts or circumstances advanced by the

¹⁸⁵⁴ F288, para. 20(c)(viii). *See also supra* para. 875.

Defence provide a reliable foundation to conclude that entrapment occurred. Finally, there is no indication that any of the evidence which the SPO tendered was obtained or secured by means of entrapment.

890. The Panel therefore finds that the Entrapment Claim is wholly improbable and unfounded.

E. MISTAKE OF LAW

1. Parties' submissions

891. The Defence submitted that the Accused are not criminally responsible because they did not know that their conduct was prohibited.¹⁸⁵⁵ The Defence averred that the Accused acted under the belief, pursuant to Mr Tomë Gashi's legal advice, that they were acting lawfully.¹⁸⁵⁶

892. The SPO submitted that the Accused disagreeing that their actions should be classified as illegal is not the same as operating under a mistake of law.¹⁸⁵⁷ The SPO added that Mr Tomë Gashi's legal advice has no bearing because: (i) he was not appointed until after the Second Press Conference; and (ii) whatever legal advice he gave merely endorsed what the Accused had already been doing with the materials.¹⁸⁵⁸

2. Legal considerations

893. The Panel notes that, pursuant to Article 26(1) of the KCC, the defence of mistake of law requires that: (i) for justifiable reasons, (ii) a person did not know or could not have known that an act was prohibited.

¹⁸⁵⁵ F567 Gucati Final Trial Brief, para. 114; F258 Gucati Pre-Trial Brief, para. 35(a); F260 Haradinaj Pre-Trial Brief, para. 281; Transcript, 16 March 2022, pp 3704-3705.

¹⁸⁵⁶ F567 Gucati Final Trial Brief, para. 114.

¹⁸⁵⁷ F565 SPO Final Trial Brief, para. 288.

¹⁸⁵⁸ F565 SPO Final Trial Brief, para. 288; Transcript, 14 March 2022, p. 3491.

3. The Panel's findings

894. The Panel found that both Accused were criminally responsible for the offences charged under Counts 1, 2, 3, 5 and 6.¹⁸⁵⁹ The Panel will now assess whether the Accused's criminal responsibility can be excluded by a mistake of law.

895. The Panel found that the Accused distributed the Three Sets and described information therein with the awareness that it included confidential information and the names of protected witnesses.¹⁸⁶⁰ At the First Press Conference, Mr Haradinaj, in the presence of Mr Gucati, described the First Set as containing "all the secret data",¹⁸⁶¹ as "confidential and top secret"¹⁸⁶² and as "top, top secret".¹⁸⁶³ At the Second Press Conference, Mr Haradinaj, again in the presence of Mr Gucati, indicated that the matter of revealing the documents was discussed with their lawyer, who advised that "[n]othing is punishable if we do not mention names".¹⁸⁶⁴ Based on that advice, the Accused asserted that publicly revealing the cooperation between the SITF/SPO and Serbian officials or distributing the Three Sets, albeit they contained protected names, was not a criminal offence.¹⁸⁶⁵

896. The Panel will first assess whether the Accused knew or could have known that this conduct was prohibited. The Panel recalls that the First Order, the Second Order and the SPO Order required Mr Gucati, the KLA WVA and any other individual who was in possession of the documents and/or their content to refrain from copying in

¹⁸⁵⁹ See *supra* paras 501 (Count 5), 552 (Count 6), 606 (Count 3), 672 (Count 1), 710 (Count 2), 794 (Modes of Liability).

¹⁸⁶⁰ See *supra* para. 456 (Findings on the Batches).

¹⁸⁶¹ P1, p. 2.

¹⁸⁶² P1, p. 3.

¹⁸⁶³ P1, p. 5.

¹⁸⁶⁴ P2, p. 4 (Mr Haradinaj: "I am telling you, because we discussed it with our lawyer; we have hired a lawyer in relation to this, and he told us: 'Nothing is punishable if we do not mention names.' We are not mentioning names and the Netherlands did not mention names [...] I do not think that it is a criminal offence to reveal the names of the officials").

¹⁸⁶⁵ P6, p. 40 (Mr Haradinaj); P18, p. 3 (Mr Haradinaj); P28, pp 1-2 (Mr Gucati). See also *supra* para. 447 (Findings on the Batches).

whatever form, and further disseminating, by whatever means the documents and their content.¹⁸⁶⁶ The three orders also cautioned the same addressees that violations of their conditions could constitute an offence under the KCC.¹⁸⁶⁷ Moreover, an SPO investigator orally reinforced the Second Order during the Second Seizure.¹⁸⁶⁸

897. The Panel further notes that the Accused were aware of the prohibition contained in the orders. Mr Haradinaj shared a photo of the First Order on his Facebook account.¹⁸⁶⁹ Mr Gucati signed the Second Handover Note for the Second Seizure.¹⁸⁷⁰ During a media appearance immediately thereafter, in the presence of Mr Tomë Gashi, Mr Gucati stated that the SPO officials “told me clearly that these documents cannot be multiplied, distributed or the names of witnesses be published, as the lawyer said”.¹⁸⁷¹ Pointing at the Second Order, Mr Gucati said that “here it is written [...] ‘the multiplication cannot be done, as well as their distribution’, it says ‘it cannot be done’”.¹⁸⁷² During a media appearance on 19 September 2020, Mr Haradinaj showed a copy of the Second Order to the camera declaring: “[h]ere you have it, you have the lines in English and the obligations they tell us we have”.¹⁸⁷³ When the journalist commented that she trusted those obligations to be for the KLA WVA “not to publish” the material, Mr Haradinaj responded: “Yes, we do not need to publish them. We’ve given it out to those who can publish it”.¹⁸⁷⁴ Despite this understanding, the Accused revealed the Third Set on 22 September 2020.¹⁸⁷⁵

¹⁸⁶⁶ P52, para. 22(c); P53, para. 22(c); P54, p. 1.

¹⁸⁶⁷ P52, para. 25; P53, para. 25; P54, p. 1.

¹⁸⁶⁸ DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2292-2293, 2295.

¹⁸⁶⁹ P83, p. 1. *See also* P78, P79.

¹⁸⁷⁰ P55; 2D1, paras 94, 115; DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2291.

¹⁸⁷¹ P4, p. 8.

¹⁸⁷² P4, p. 8 (Mr Gucati added: “They asked the Veterans Organisation not to multiply these documents and not to keep them in the Organisation. We understand, it is not in our interest to keep them. It is in our interest to distribute them as much as possible in the media”).

¹⁸⁷³ P17, p. 6.

¹⁸⁷⁴ P17, p. 6.

¹⁸⁷⁵ *See supra* paras 279-283 (The Events at Issue).

898. At trial, the Accused reiterated their position regarding the lawfulness of their conduct,¹⁸⁷⁶ but they both conceded to understand their basic obligation not to multiply and/or distribute the Sets.¹⁸⁷⁷ Mr Gucati denied that this was relayed to him in writing, but admitted that an SPO investigator orally told him “that the photocopying and distribution is strictly banned”.¹⁸⁷⁸ Mr Haradinaj first stated that he “personally did not know” what was contained in the Second Order, but later replied: “If you're asking me about what was said there, it was said that we shouldn't print them, multiply them, and distribute them”.¹⁸⁷⁹

899. Furthermore, several journalists confronted the Accused with questions regarding the (un)lawfulness of their conduct.¹⁸⁸⁰ When discussing possible penal consequences with a journalist, Mr Gucati responded that he had no regrets about revealing the material “even if they were to give me five years in prison”.¹⁸⁸¹ Mr Haradinaj addressed these questions with responses such as: “[i]f I was to be arrested for these actions, I would be the proudest of people”;¹⁸⁸² “[i]n which case I will end up in prison, too. You are making me afraid now”;¹⁸⁸³ “[y]ou think you will scare me with ten years! Even if you sentence me to 300 years, I will still disclose them”;¹⁸⁸⁴ or “[w]e are ready to face 300 years [...]. We are ready to die”.¹⁸⁸⁵

¹⁸⁷⁶ See e.g. 1D3, paras 21-26, 36, 59-66; 2D1, paras 126-131; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2205-2206; DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, pp 2810-2814; Transcript, 13 January 2022, pp 3021-3022; Transcript, 14 January 2022, pp 3045-3047. See also F567 Gucati Final Trial Brief, paras 117-119.

¹⁸⁷⁷ DW1240 (Hysni Gucati), Transcript, 7 December 2021, pp 2288-2293; DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 2930-2935.

¹⁸⁷⁸ DW1240 (Hysni Gucati), Transcript, 7 December 2021, p. 2293.

¹⁸⁷⁹ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 2932, 2935.

¹⁸⁸⁰ See e.g. P6, p. 15; P11, pp 28-29; P28, p. 12; P30, p. 8; P35, pp 12-13.

¹⁸⁸¹ P28, p. 12.

¹⁸⁸² P25, p. 2.

¹⁸⁸³ P35, p. 12.

¹⁸⁸⁴ P35, p. 13.

¹⁸⁸⁵ P35, p. 13.

900. For these reasons, the Panel is satisfied that during the Indictment Period the Accused knew that their conduct was prohibited and could result in a prison sentence.

901. In any event, assuming that the Accused did not know or could not have known of the prohibited nature of their conduct, Article 26(1) KCC requires that their mistake be the result of “justifiable reasons”. The Panel notes that the Accused’s position regarding the lawfulness of their conduct appears to be based on the legal advice of Mr Tomë Gashi.¹⁸⁸⁶

902. The Panel notes that Mr Tomë Gashi’s legal advice was first mentioned by Mr Haradinaj at the Second Press Conference, meaning that the First Set was revealed without his guidance. Shortly after the Second Seizure, Mr Tomë Gashi himself explained his advice as follows:

Surely, [the War Veterans Association] have published them as they decided to do so. They think that the publication of these documents is not prohibited at all. But you must bear in mind that if you find information that contains names, surnames and other data of the witnesses, you are not allowed to make them public in any way. But, it is not prohibited to publish the relations between officials of the Specialist Prosecutor’s Office or Specialist Chambers with Serbia prosecution authorities.¹⁸⁸⁷ [...]

Mr. Gucati showed in -- stated in the capacity of the Chairman that every time they receive such materials they will publish them, so that the people understand clearly what kind of Court we are facing. And there is nothing wrong, and again I tell you, it is -- even if you have come and you have had access to these documents, it is strictly prohibited to publish the names of witnesses, because you yourselves can get into unpleasant situations.

But not Mr. Gucati or anyone else who has given you the opportunity to access and see the official -- inter-institutional -- communications between Serbia and the Specialist Chambers.¹⁸⁸⁸

903. The Panel observes that Mr Tomë Gashi’s advice appears to have first been given to the Accused before the Second Press Conference. This advice does not appear to have changed despite his being in full knowledge of the prohibition contained in the

¹⁸⁸⁶ P2, p. 4; P4; P7; P12.

¹⁸⁸⁷ P4, p. 3 (Mr Tomë Gashi). *See also* P7; P12.

¹⁸⁸⁸ P4, p. 9 (Mr Tomë Gashi). *See also* P7; P12.

Second Order, as: (i) Mr Tomë Gashi was present at the Second Seizure,¹⁸⁸⁹ and (ii) Mr Gucati stated in his presence, at the same media appearance where Mr Tomë Gashi summarised his advice, that pursuant to the Second Order and what the SPO staff said, he was not allowed to multiply or distribute the Second Set.¹⁸⁹⁰ Mr Tomë Gashi was also aware that “these are sensitive documents for [the SPO]”¹⁸⁹¹ and that “the leak of documentation is something very sensitive”.¹⁸⁹² This did not stop Mr Tomë Gashi from claiming that giving access to the documents was not unlawful and that only publishing witness names carried the risk of prosecution.

904. In any event, the evidence shows that the reasons why Mr Tomë Gashi gave such advice were connected with his own, personal views regarding the SC/SPO, which were in consonance with those of the Accused. In particular, Mr Tomë Gashi: (i) questioned whether witnesses were being effectively protected by the SC;¹⁸⁹³ (ii) stated that the protection of witnesses “is [the SC/SPO’s] problem and not ours”;¹⁸⁹⁴ (iii) praised the individuals who delivered the Three Sets;¹⁸⁹⁵ (iv) claimed that the Accused were acting out of an interest to expose the SITF/SPO’s collaboration with Serbian authorities and echoed the Accused’s commitment to continue publishing such material whenever they would receive it;¹⁸⁹⁶ (v) expressed the view that the

¹⁸⁸⁹ See *supra* para. 257 (The Events at Issue).

¹⁸⁹⁰ P4, p. 8.

¹⁸⁹¹ P7, p. 3.

¹⁸⁹² P7, p. 11.

¹⁸⁹³ P7, p. 5 (Mr Tomë Gashi: “Now the theory is being confirmed that witnesses cannot be protected in Kosovo, but are they really being protected in The Hague?”).

¹⁸⁹⁴ P4, p. 6.

¹⁸⁹⁵ P7, pp 4-5 (Mr Tomë Gashi: “we are grateful, if anything, to those two persons because it was not the same person who brought those documents to the KLA Veteran Association. That person, in my opinion, has done a patriotic job, for the common good, especially for the benefit of those who will be accused in the Specialist Chambers”).

¹⁸⁹⁶ P12, p. 2 (Mr Tomë Gashi: “we confirmed what we’ve known already, which is the collaboration between Serbia’s institutions and the Specialised Chambers. And I believe that Chairman Mr. Gucati, Mr. Haradinaj and others have always maintained that they will go public with whatever they receive and whoever brings them, in the sense that the Albanian public opinion at large will be informed on what is happening with the Specialist Chambers”).

Three Sets could be used to undermine the credibility of the SC if charges were to be brought;¹⁸⁹⁷ and (vi) expressed the hope that the revelation of the documents will make the SC Judge “think twice” before confirming an indictment against Mr Thaçi and others.¹⁸⁹⁸

905. Finally, the Panel notes that the conduct of the Accused did not materially change after they received Mr Tomë Gashi’s advice. That advice had, therefore, no demonstrable effect on the conduct of the Accused. They continued, as they had done before, to indiscriminately disclose material they knew to be confidential and containing names of protected witnesses.

906. The Panel is therefore satisfied that Mr Tomë Gashi’s legal advice cannot be considered “justifiable reasons” within the meaning of Article 26(1) of the KCC.

907. For these reasons, the Panel finds that the Accused’s criminal responsibility cannot be excluded by a defence of mistake of law within the meaning of Article 26 of the KCC.

F. EXTREME NECESSITY

1. Parties’ submissions

908. The Defence argued that the Accused acted only to avert an imminent and unprovoked danger to others (namely, malicious prosecution) which could not have

¹⁸⁹⁷ P12, p. 2 (Mr Tomë Gashi: “We are of the opinion that if at a later stage the indictments against the KLA members are confirmed these materials could be used to undermine the credibility of The Specialist Chambers, because the KLA’s Organization of War Veterans is here to defend its members, whoever they might be”).

¹⁸⁹⁸ P7, pp 16 (“Mr Tomë Gashi: “The publication of these documents, indeed, the news about thousands of documents delivered to the KLA Veteran Organization ... that judge must think again before deciding whether to confirm the indictment against President Thaçi and others. He must think twice whether to confirm something or not”), 17 (Mr Tomë Gashi: “we hope that the Court, also due to the leak of these documents, will not confirm the indictment against President Thaçi”).

otherwise been averted, and thus their conduct cannot amount to a criminal offence in the circumstances under Article 13 of the KCC.¹⁸⁹⁹

2. Legal considerations

909. The Panel notes that, pursuant to Article 13(2) of the KCC, the defence of extreme necessity requires that: (i) the person commits the act (ii) to avert an imminent and unprovoked danger (iii) for himself, herself or another person (iv) which could not have otherwise been averted, (v) provided that the harm created does not exceed the harm threatened.

3. The Panel's findings

910. The Panel received no evidence supporting a claim of "extreme necessity" as defined by Article 13 of the KCC.¹⁹⁰⁰ The Panel found that the Protected Information revealed by the Accused contained no indications of impropriety in SITF/SPO cooperation with Serbian authorities.¹⁹⁰¹ The Panel cannot ascertain whether information collected by the SITF/SPO was unreliable. In any event, even if the SPO had collected information that later proved to be unreliable, this is not an indicator that the SPO would use such information to initiate groundless and unjustified proceedings against any suspect or accused. No imminent and unprovoked danger of malicious prosecution stems from these considerations.

911. Furthermore, even if a risk of malicious prosecution had existed, there is no basis to claim that the revelation of Protected Information, in particular the names and personal data of Witnesses and Potential Witnesses, would have effectively helped avert the danger of such prosecution and that the harm thus created would not have exceeded the harm threatened.

¹⁸⁹⁹ F258 Gucati Pre-Trial Brief, para. 35(b). *See also* F567 Gucati Final Trial Brief, para. 94.

¹⁹⁰⁰ 1D3, para. 70; DW1240 (Hysni Gucati), Transcript, 6 December 2021, pp 2209-2210.

¹⁹⁰¹ *See supra* paras 811-817 (Defences).

912. For these reasons, the Panel finds that the Accused's criminal responsibility cannot be excluded by a defence of extreme necessity within the meaning of Article 13 of the KCC.

G. MISTAKE OF FACT

1. Parties' submissions

913. The Defence has argued, in the alternative, that if it was found that there was no imminent and unprovoked danger to others of malicious prosecution, the Accused mistakenly believed that such a risk existed and acted accordingly, and were therefore excused from liability pursuant to Article 25 of the KCC.¹⁹⁰²

914. The SPO rejected the Defence claim that the Accused acted under any mistake of fact.¹⁹⁰³

2. Legal considerations

915. The Panel notes that, pursuant to Article 25(1) of the KCC, the defence of mistake of fact requires that: (i) at the time of committing a criminal offence, (ii) a person is unaware of a characteristic of that act or (iii) he or she mistakenly believes that circumstances exist, which, had they in fact existed, (iv) would have rendered the act permissible.

3. The Panel's findings

916. The Panel notes that the Defence did not make any submissions or adduce any evidence regarding the Accused's lack of awareness of any characteristic of their acts, or of any mistaken belief in circumstances that would have made them believe that a malicious prosecution was imminent, and which would have rendered their conduct

¹⁹⁰² F258 Gucati Pre-Trial Brief, para. 35(c); F260 Haradinaj Pre-Trial Brief, para. 282.

¹⁹⁰³ F565 SPO Final Trial Brief, paras 287-289.

permissible. The Panel can only assume that this defence relates to the Accused's views of the SC/SPO, including its cooperation with Serbian authorities and its reliance on certain witnesses, whom the Accused perceived as criminals.

917. The Panel found that the Protected Information revealed by the Accused contained no indications of impropriety in SITF/SPO cooperation with Serbian authorities.¹⁹⁰⁴ The Panel also found that the SPO was free to collect evidence from any person of interest, including suspects or convicted persons.¹⁹⁰⁵ Collecting evidence from such persons or collecting unreliable evidence in general would not necessarily mean that the SITF/SPO took the information at face value,¹⁹⁰⁶ let alone that it would use it to initiate groundless and unjustified proceedings against any suspect or accused.

918. The Panel notes that the Accused's wish to obstruct or undermine the SC/SPO in order to prevent the prosecution of ex-KLA members does not translate into a *mistaken* belief that a malicious prosecution by the SC/SPO was imminent. In fact, the Accused were opposed to the SC/SPO because they perceived its cooperation with Serbian authorities and related collection of evidence as serving Serbian interests and biased against Kosovo.¹⁹⁰⁷ The Accused confirmed their views during their testimony.¹⁹⁰⁸

919. In any event, even if the Accused mistakenly believed that a malicious prosecution by the SC/SPO was imminent, there is no basis to claim that the Protected Information, in particular the names and personal data of Witnesses and Potential

¹⁹⁰⁴ See *supra* paras 811-817 (Defences).

¹⁹⁰⁵ See *supra* para. 814 (Defences).

¹⁹⁰⁶ See *supra* para. 814 (Defences).

¹⁹⁰⁷ See *supra* paras 662-665 (Count 1).

¹⁹⁰⁸ DW1240 (Hysni Gucati), Transcript, 8 December 2021, p. 2433 (Mr Gucati claimed that he did not wish to undermine or obstruct the SC/SPO, "but advise it not to collaborate with war criminals but with people who are witnesses of fact"); DW1249 (Nasim Haradinaj), Transcript, 12 January 2022, p. 2877 (Mr Haradinaj confirmed during his testimony that he was willing to obstruct the SC "[i]f KSC is one that bases its work on the data and ideas of Milošević").

Witnesses, would have provided an effective means to avert the danger of such prosecution without the harm thus created exceeding the harm threatened.

920. For these reasons, the Panel finds that the Accused's criminal responsibility cannot be excluded by a defence of mistake of fact within the meaning of Article 25 of the KCC.

H. ACT OF MINOR SIGNIFICANCE

1. Parties' submissions

921. The Defence has argued that, in the absence of admissible and probative evidence as to any adverse consequences, the Accused's conduct does not constitute a criminal offence in accordance with Article 11 of the KCC.¹⁹⁰⁹

2. Legal considerations

922. The Panel notes that, pursuant to Article 11 of the KCC, the defence of acts of minor significance requires that the danger involved in the accused's conduct be insignificant due to any of the following considerations: (i) the nature or gravity of the act; (ii) the absence or insignificance of intended consequences; (iii) the circumstances in which the act was committed; (iv) the low degree of criminal liability of the perpetrator; or (v) the personal circumstances of the perpetrator.

3. The Panel's findings

923. The Panel does not accept that the conduct of the Accused constitutes an act of minor significance within the meaning of Article 11 of the KCC.

924. The offences of which the Panel found the Accused to be criminally responsible incur significant custodial sentences. The Panel is also mindful of the importance of

¹⁹⁰⁹ F258 Gucati Pre-Trial Brief, para. 35(d).

the protected interests underlying those offences – in particular, protecting witnesses from harm, enabling the SPO to fulfil its mandate effectively, and maintaining public confidence in the integrity of proceedings before the SC. The Panel recalls that the SC was created in part to address challenges posed to the security of witnesses due to intimidation,¹⁹¹⁰ and witnesses are therefore particularly vulnerable in such an environment.¹⁹¹¹

925. The Panel found that the Accused disclosed the identity and/or personal data of hundreds of Witnesses and Potential Witnesses.¹⁹¹² The Panel also found that the Accused revealed Protected Information indiscriminately, without distinction to its content, and that they made efforts to achieve a wide distribution of the material.¹⁹¹³ Such actions were accompanied by disparaging remarks towards Witnesses and Potential Witnesses and repeated affirmations of their desire to undermine the SC/SPO.¹⁹¹⁴ In light of the gravity of these acts and statements, the danger involved in the Accused's conduct cannot be deemed insignificant.

926. For these reasons, the Panel finds that the Accused's criminal responsibility cannot be excluded by a defence of acts of minor significance within the meaning of Article 11 of the KCC.

I. CONCLUSION

927. In light of the foregoing, the Panel finds that the criminal responsibility of the Accused cannot be excluded by any of the defences raised.

¹⁹¹⁰ See *e.g.* Exchange of Letters.

¹⁹¹¹ W04842 (Miro Jukić), Transcript, 28 October 2021, pp 1699-1700, 1703-1705, 1758-1759; DW1253 (Robert Reid), Transcript, 24 January 2022, pp 3311-3313; Transcript, 28 January 2022, pp 3359-3361.

¹⁹¹² See *supra* paras 519-522 (Count 6).

¹⁹¹³ See *supra* paras 480-485, 498 (Count 5), 561-564 (Count 3).

¹⁹¹⁴ See *supra* paras 569-574 (Count 3), 662-669 (Count 1).

IX. STATUS OF INFORMATION IN THE BATCHES

928. The Panel noted early in the trial that the material that the Accused allegedly revealed contained names and details of various individuals connected to investigations carried out by the SITF or the SPO.¹⁹¹⁵ The Panel ordered that, until such time as it determined whether that material was confidential, the Parties could not make public reference to the information concerned.¹⁹¹⁶ The Panel reiterated this order later in the trial.¹⁹¹⁷

929. Having determined the scope of the Protected Information in this Judgment, the Panel finds that its previous orders regarding the classification of filings and exhibits remain in place. As regards the confidential version of the transcripts and audio-video recordings of the trial hearings, the Panel has considered the Parties' submissions in this regard,¹⁹¹⁸ and has taken into consideration the findings of this Judgment, the confidentiality of names of SPO staff members and information pertaining to internal SPO practices. In light of the foregoing, the Panel orders the partial reclassification as public of the confidential hearing transcripts and their corresponding audio-video recordings, as set out in Annex 3 of this Judgment.

X. SENTENCING

930. Having found Mr Gucati and Mr Haradinaj guilty under Counts 1, 2, 3, 5 and 6, the Panel will now determine the appropriate sentence in respect of each of them.

¹⁹¹⁵ Transcript, 7 October 2021, p. 781.

¹⁹¹⁶ Transcript, 7 October 2021, p. 781.

¹⁹¹⁷ Transcript, 6 December 2021, pp 2146-2147 (Oral Order on the Use of Names Mentioned in the Batches).

¹⁹¹⁸ F587; F588; F589.

A. PARTIES' SUBMISSIONS

931. The SPO submitted that the offences committed by the Accused were undoubtedly grave as their conduct constituted a direct challenge to the integrity of SC Proceedings.¹⁹¹⁹ It maintained that gravity did not refer only to the objective dimension of an offence, but also to the particular circumstances surrounding the case, the form and degree of the Accused's participation in the crimes, and the consequences of the Accused's actions.¹⁹²⁰ In this regard, the SPO submitted that the Accused's participation in the crimes was direct, systematic, persistent, deliberate and enthusiastic.¹⁹²¹ In the SPO's view, the fact that the Accused obstructed the work of an entire judicial institution, together with the timing, nature and extent of the information they made public, rendered the Accused's conduct particularly grievous.¹⁹²² Moreover, the SPO argued, the Accused's crimes had far-reaching consequences for witnesses.¹⁹²³

932. As to aggravating circumstances, the SPO submitted that the Accused abused their power or official capacity to commit the crimes (Rule 163(1)(b)(ii) of the Rules),¹⁹²⁴ committed or participated in the commission of crimes where there were multiple and particularly vulnerable or defenceless victims (Rule 163(1)(b)(iii)-(iv) of the Rules),¹⁹²⁵ and clearly indicated their intent to commit further crimes of the same nature.¹⁹²⁶ As

¹⁹¹⁹ F565 SPO Final Trial Brief, para. 341.

¹⁹²⁰ F565 SPO Final Trial Brief, para. 343.

¹⁹²¹ F565 SPO Final Trial Brief, paras 344-353. *See also* Transcript, 17 March 2022, p. 3784.

¹⁹²² F565 SPO Final Trial Brief, paras 354-365. *See also* Transcript, 17 March 2022, pp 3773-3774, 3790-3791, 3796-3798.

¹⁹²³ F565 SPO Final Trial Brief, paras 366-370. *See also* Transcript, 17 March 2022, pp 3777-3780, 3784-3790.

¹⁹²⁴ F565 SPO Final Trial Brief, paras 372-376.

¹⁹²⁵ F565 SPO Final Trial Brief, paras 377-383.

¹⁹²⁶ F565 SPO Final Trial Brief, paras 384-395. *See also* Transcript, 17 March 2022, pp 3775-3777, 3791-3793.

to mitigating circumstances, the SPO maintained that there are no factors which could mitigate the sentence to be imposed on the Accused.¹⁹²⁷

933. The SPO submitted that reasons of special and general deterrence warranted a custodial sentence for both Accused.¹⁹²⁸ The SPO therefore requested a single sentence for each Accused of six years' imprisonment and a fine of 100 Euros.¹⁹²⁹

934. The Gucati Defence submitted that the Accused had no involvement with the original leak of documentation from the SPO.¹⁹³⁰ In the Gucati Defence's view, the relevant documentation was made available to the professional press only and the Three Press Conferences were broadcast by the professional media only.¹⁹³¹ Moreover, the Gucati Defence submitted that the names mentioned in the Three Press Conferences were few in number, no violence was used or threatened, and no adverse consequence for any specific investigation or prosecution has been established.¹⁹³²

935. The Gucati Defence submitted that only matters proved beyond reasonable doubt are capable of amounting to aggravating circumstances, and that the same element should not be assessed once as a constitutive element of the crime and a second time as an aggravating circumstance.¹⁹³³ The Gucati Defence claimed that Mr Gucati is of good character, with no previous convictions, and is a family man with strong community ties.¹⁹³⁴ Moreover, the Gucati Defence argued, account should be taken of the fact that Mr Gucati has health issues and of the detention conditions in the context of a global pandemic.¹⁹³⁵

¹⁹²⁷ F565 SPO Final Trial Brief, paras 397-405. *See also* Transcript, 17 March 2022, pp 3775, 3794-3796, 3798-3804.

¹⁹²⁸ F565 SPO Final Trial Brief, paras 406-422. *See also* Transcript, 17 March 2022, pp 3772-3773, 3780-3781, 3798-3804.

¹⁹²⁹ F565 SPO Final Trial Brief, para. 426. *See also* Transcript, 17 March 2022, pp 3781-3783, 3843-3845.

¹⁹³⁰ F567 Gucati Final Trial Brief, para. 163(c).

¹⁹³¹ F567 Gucati Final Trial Brief, para. 163(d)-(e).

¹⁹³² F567 Gucati Final Trial Brief, para. 163(f)-(h).

¹⁹³³ F567 Gucati Final Trial Brief, para. 163(a)-(b).

¹⁹³⁴ F567 Gucati Final Trial Brief, para. 157.

¹⁹³⁵ F567 Gucati Final Trial Brief, paras 158-159.

936. The Gucati Defence drew the attention of the Panel to the fact that the offences under Articles 387, 392(1), 401(2) and 388(1) of the KCC are punishable by fine and that the Panel may suspend any sentence of imprisonment in accordance with Article 44 of the Law and Articles 48 and 49 of the KCC.¹⁹³⁶

937. The Haradinaj Defence submitted that Mr Haradinaj was fully cooperative and transparent.¹⁹³⁷ It cautioned the Panel against double punishment, where two distinct offences arose out of the same facts,¹⁹³⁸ and urged it to take into account that the sentence must be proportional to the gravity of the crimes and that Mr Haradinaj acted in the public interest.¹⁹³⁹ The Haradinaj Defence pointed to the facts that: (i) Mr Haradinaj was not involved in obtaining the documents from the SPO offices; (ii) the documents were not published by the Accused but only disseminated to professional journalists; (iii) no violence or specific threat of violence was made or used; and (iv) there was no evidence suggesting that individuals have suffered physical harm or that any investigation or prosecution was compromised as a result of the conduct of the Accused.¹⁹⁴⁰ The Haradinaj Defence also drew the attention of the Panel to the sentencing practice of international criminal tribunals in contempt cases.¹⁹⁴¹ Lastly, the Haradinaj Defence submitted that personal circumstances pertaining to Mr Haradinaj's family warranted mitigation of sentence.¹⁹⁴²

¹⁹³⁶ F567 Gucati Final Trial Brief, paras 153, 165. *See also* Transcript, 17 March 2022, pp 3809-3822, 3824-3825, 3829-3830.

¹⁹³⁷ Transcript, 17 March 2022, pp 3833-3835.

¹⁹³⁸ F570, para. 9

¹⁹³⁹ Transcript, 17 March 2022, pp 3835-3839; F570, para. 13.

¹⁹⁴⁰ F570, paras 11-12.

¹⁹⁴¹ F570, paras 31-61.

¹⁹⁴² Transcript, 17 March 2022, pp 3839-3842.

B. APPLICABLE LAW

1. Purpose of sentencing

938. The purposes of sentencing are, *inter alia*, deterrence (both individual and general), retribution and rehabilitation.¹⁹⁴³ The aim of individual deterrence is to impose a sentence in order to dissuade the convicted person from re-offending once he or she has served his or her sentence and has been released.¹⁹⁴⁴ General deterrence aims to dissuade other potential perpetrators from committing the same or similar offences.¹⁹⁴⁵ Retribution should not be understood as a way of expressing revenge or vengeance, but rather as an objective, reasoned and measured determination of an appropriate punishment which reflects the culpability of the convicted person.¹⁹⁴⁶ A sentence proportional to the gravity of the criminal conduct will necessarily provide adequate retribution and deterrence.¹⁹⁴⁷ Rehabilitation aims to reintegrate the convicted person into society after his or her release.¹⁹⁴⁸

939. The Panel is aware that international(ised) criminal courts and tribunals have consistently found that rehabilitation has a limited role in light of the inherent gravity of international crimes.¹⁹⁴⁹ However, the Indictment charged the Accused with offences under Kosovo law and the Panel therefore considers that all aforementioned purposes, including rehabilitation, are considerations relevant for sentencing. The Panel is also mindful that the primary goal of sentencing is to ensure that the final

¹⁹⁴³ Article 38 of the KCC. See also ICTY, [Krajišnik Appeal Judgment](#), para. 802.

¹⁹⁴⁴ See e.g. ICTY, [Krajišnik Appeal Judgment](#), para. 805; [Kordić and Čerkez Appeal Judgment](#), paras 1076-1078.

¹⁹⁴⁵ See e.g. ICTY, [Krajišnik Appeal Judgment](#), para. 805; [Kordić and Čerkez Appeal Judgment](#), paras 1076-1078.

¹⁹⁴⁶ See e.g. ICTY, [Kordić and Čerkez Appeal Judgment](#), para. 1075.

¹⁹⁴⁷ See e.g. ICTY, [Krajišnik Appeal Judgment](#), para. 777.

¹⁹⁴⁸ Article 10(3) of the ICCPR. See e.g. ECtHR, [Vinter and Others GC Judgment](#), para. 111-114; [Murray GC Judgment](#), para. 101. See also Rules 6, 102.1 and 103.8 of the European Prison Rules.

¹⁹⁴⁹ See e.g. ICTY, [Stakić Appeal Judgment](#), para. 402; [Kordić and Čerkez Appeal Judgment](#), para. 1079; [Čelebići Appeal Judgment](#), para. 806; [Popović et al. Trial Judgment](#), para. 2130.

sentence reflects the totality of the criminal conduct and the overall culpability of the convicted person.¹⁹⁵⁰

940. When determining an appropriate sentence for offences against the administration of justice,¹⁹⁵¹ the Panel must take into account the need to deter repetition by the Accused and similar conduct by others.¹⁹⁵²

2. Sentencing regime for offences under Article 15(2) of the Law

941. Pursuant to Article 44(4) of the Law, the punishment imposed for crimes under Article 15(2) of the Law shall be in line with the punishments for those crimes set out in the 2012 KCC.¹⁹⁵³ The Panel interprets this provision as requiring that the punishments provided for offences under applicable provisions of the KCC are complied with by the Panel.

942. When determining the sentence, by virtue of Article 3(2)(b)-(c) and (4) of the Law, the Panel shall apply the regime provided for under Articles 44(4)-(5) of the Law and Rules 163 and 165 of the Rules. The Panel will nevertheless take guidance from other relevant Kosovo provisions and case-law of international courts/tribunals, as detailed below.

¹⁹⁵⁰ See e.g. IRMCT, [Stanišić and Simatović Trial Judgment](#), para. 611; [Mladić Appeal Judgment](#), para. 545; ICTY, [Martić Appeal Judgment](#), para. 350; [Čelebići Appeal Judgment](#), para. 430.

¹⁹⁵¹ The Panel understands the term “offences against the administration of justice” to include also offences against the public order (such as those under Counts 1 and 2) when they refer to judicial proceedings.

¹⁹⁵² See e.g. IRMCT, [Nzabonimpa et al. Trial Judgment](#), para. 397; ICTY, [Šešelj Trial Judgment](#), para. 77.

¹⁹⁵³ The Panel notes that the sentencing ranges for the offences set out in Articles 387, 392(1)-(3) and 401(1)-(3) and (5) of the KCC are the same as those set out in the corresponding provisions of the 2012 KCC. See also fn. 122 (Applicable Law).

3. Identifying and balancing relevant factors

(a) Factors identified by the Law and the Rules

943. Article 44(5) of the Law provides that the SC shall take into account aggravating and mitigating factors, the gravity of the crime and its consequences, and the individual circumstances of the convicted person. Rule 163(1) of the Rules specifies that the Panel shall balance aggravating and mitigating factors.

944. Pursuant to Rule 163(1)(a) of the Rules, mitigating circumstances include circumstances such as: (i) those falling short of constituting grounds excluding criminal responsibility; and (ii) the convicted person's conduct after the act, including any efforts by the person to compensate the victims, voluntary surrender and any cooperation with the Specialist Prosecutor and the SC. The aggravating circumstances listed under Rule 163(1)(b) of the Rules are: (i) any relevant prior criminal convictions for crimes under the jurisdiction of the SC or of a similar nature; (ii) abuse of power or official capacity; (iii) commission or participation in the commission of a crime where the victim is particularly vulnerable or defenceless; and (iv) commission or participation in the commission of a crime with particular cruelty or where there were multiple victims. The lists of mitigating and aggravating circumstances are not exhaustive.

945. Rule 163(2) of the Rules mandates that an admission of guilt or a plea agreement shall result in a reduction of sentence. Rule 163(3) of the Rules provides that the criminal record of the convicted person submitted by the Specialist Prosecutor shall be considered in the determination of the sentence.

(b) Factors identified by the KCC

946. In identifying relevant aggravating and mitigating factors, the Panel, in the exercise of its discretion, will take guidance from Article 70 of the KCC. This provision lists aggravating circumstances, such as: the convicted person's high degree of

intention and/or participation in the criminal offence; the number of victims; the extent of the damage caused by the convicted person; the abuse of power or official capacity by the convicted person in the perpetration of the criminal offence; and any relevant prior criminal convictions of the convicted person.¹⁹⁵⁴

947. As to mitigating circumstances, Article 70 of the KCC refers to, *inter alia*: circumstances falling short of grounds for exclusion of criminal responsibility; the personal circumstances and character of the convicted person; the age of the convicted person; cooperation by the convicted person with the court; and any remorse shown by the convicted person.¹⁹⁵⁵

(c) Factors identified by the case-law of international courts

948. The Panel, in the exercise of its discretion, also takes guidance from the case-law of international(ised) courts/tribunals,¹⁹⁵⁶ which has identified potentially aggravating factors, such as: the accused's abuse of his or her superior position;¹⁹⁵⁷ the zealousness with which a crime was committed;¹⁹⁵⁸ the number of the victims, and the effect of the crimes upon them;¹⁹⁵⁹ the character of the convicted person;¹⁹⁶⁰ the circumstances of the

¹⁹⁵⁴ See Article 70(2) of the KCC.

¹⁹⁵⁵ See Article 70(3) of the KCC.

¹⁹⁵⁶ The Panel notes that all Parties agree that the practice of these jurisdictions can serve as non-binding guidance for the purpose of identifying aggravating and mitigating factors. See Transcript, 17 March 2022, pp 3806, 3816-3819, 3822-3823, 3833.

¹⁹⁵⁷ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 896, referring to [Blagojević and Jokić Appeal Judgment](#), para. 324; [Galić Appeal Judgment](#), para. 412; [Blaškić Appeal Judgment](#), para. 686. See also ICTY, [Jokić Sentencing Judgment](#), paras 61-62; [Stakić Appeal Judgment](#), para. 411; [Babić Sentencing Appeal Judgment](#), paras 80-81.

¹⁹⁵⁸ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 896, referring to ICTR, [Simba Appeal Judgment](#), para. 320; ICTY, [Kvočka et al. Trial Judgment](#), para. 705.

¹⁹⁵⁹ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 896, referring to [Blaškić Appeal Judgment](#), para. 686. See also ICTY, [Kunarac et al. Trial Judgment](#), paras 864, 866; [Kunarac et al. Appeal Judgment](#), para. 355; STL, [Ayyash Sentencing Judgment](#), paras 181, 198; [Akhbar Beirut S.A.L. and Al Amin Sentencing Judgment](#), para. 19; ICC, [Ntaganda Sentencing Judgment](#), para. 121.

¹⁹⁶⁰ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 896, referring to [Blaškić Appeal Judgment](#), para. 686. See also ICTY, [Čelebići Appeal Judgment](#), para. 788.

offences generally;¹⁹⁶¹ and overwhelming negative public discourse as a consequence of the Accused's conduct.¹⁹⁶²

949. As to mitigating factors, those identified by international case-law include, among others: co-operation with the prosecution;¹⁹⁶³ the expression of remorse;¹⁹⁶⁴ voluntary surrender;¹⁹⁶⁵ good character with no prior criminal convictions;¹⁹⁶⁶ comportment while in detention;¹⁹⁶⁷ personal and family circumstances;¹⁹⁶⁸ and poor health.¹⁹⁶⁹

(d) Balancing relevant factors

950. In the Panel's view, factors relevant to the determination of the sentence are to be addressed in three categories: (i) gravity of the offences; (ii) nature and extent of the Accused's involvement in the offences; and (iii) individual circumstances of the Accused.

¹⁹⁶¹ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 896, referring to [Blaškić Appeal Judgment](#), para. 686.

¹⁹⁶² See e.g. STL, [Akhbar Beirut S.A.L. and Al Amin Sentencing Judgment](#), para. 19.

¹⁹⁶³ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 897, referring to Rule 101(B)(ii) of the ICTY Rules; [Blagojević and Jokić Appeal Judgment](#), para. 344; [Vasiljević Appeal Judgment](#), para. 180; [Jokić Sentencing Judgment](#), paras 95-96; STL, [Al Khayat Sentencing Judgment](#), para. 18.

¹⁹⁶⁴ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 897, referring to [Strugar Appeal Judgment](#), para. 365; [Jokić Sentencing Judgment](#), para. 89; [Kunarac et al. Trial Judgment](#), para. 869; ICTY, [Erdemović Sentencing Judgment](#), para. 16(iii); STL, [Ayyash Sentencing Judgment](#), para. 200.

¹⁹⁶⁵ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 897, referring to [Jokić Sentencing Judgment](#), para. 73; [Plavšić Sentencing Judgment](#), para. 84; [Kupreškić et al. Appeal Judgment](#), para. 430; STL, [Ayyash Sentencing Judgment](#), para. 200.

¹⁹⁶⁶ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 897, referring to [Kupreškić et al. Appeal Judgment](#), para. 459; [Erdemović Sentencing Judgment](#), para. 16(i); STL, [Ayyash Sentencing Judgment](#), para. 200; [Al Khayat Sentencing Judgment](#), para. 19.

¹⁹⁶⁷ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 897, referring to [Jokić Sentencing Judgment](#), para. 100; [Nikolić Sentencing Judgment](#), para. 268; ICC, [Bemba Sentencing Judgment](#), para. 81; [Ntaganda Sentencing Judgment](#), para. 22.

¹⁹⁶⁸ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 897, referring to [Kunarac et al. Appeal Judgment](#), paras 362, 408. See also ICTY, [Simić et al. Trial Judgment](#), para. 1088; [Erdemović Sentencing Judgment](#), para. 16(i); ICC, [Ongwen Sentencing Judgment](#), para. 87.

¹⁹⁶⁹ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 897, referring to [Babić Sentencing Appeal Judgment](#), para. 43; [Blaškić Appeal Judgment](#), para. 696.

951. *Gravity of the offences.* The first category pertains to the nature and circumstances of the offences. This factor must always be assessed in view of the particular circumstances of each case.¹⁹⁷⁰ The Panel notes that offences against the administration of justice constitute a grave challenge to the security and integrity of judicial proceedings.¹⁹⁷¹ Such offences can undermine the discovery of the truth and impede justice for victims,¹⁹⁷² and for society as a whole. Accordingly, when assessing the gravity of offences against the administration of justice, the Panel examines the nature and scope of the offences and other relevant circumstances surrounding the case. Factors to be taken in consideration when assessing the gravity of such offences include: (i) the scope of the interference with the security and/or integrity of SC proceedings, in particular the repeated nature of the acts, the multiple witnesses concerned;¹⁹⁷³ (ii) the impact of the offences on the public confidence in the effectiveness of SC orders and decisions, including those relating to protective measures;¹⁹⁷⁴ (iii) the impact of the offences on the cooperation of the SC/SPO with third states or international organisations;¹⁹⁷⁵ (iv) the potential and proven personal and psychological consequences on those affected by the offences;¹⁹⁷⁶ (v) the number and vulnerability of those affected by the offences;¹⁹⁷⁷ and (vi) the means through which the criminal conduct was carried out.¹⁹⁷⁸

¹⁹⁷⁰ See e.g. ICC, [Bemba et al. Sentencing Judgment](#), para. 23; STL, [Ayyash Sentencing Judgment](#), para. 169.

¹⁹⁷¹ See e.g. IRMCT, [Nzabonimpa et al. Trial Judgment](#), para. 397.

¹⁹⁷² See e.g. ICC, [Bemba et al. Sentencing Judgment](#), para. 46.

¹⁹⁷³ See e.g. IRMCT, [Nzabonimpa et al. Trial Judgment](#), para. 398.

¹⁹⁷⁴ See e.g. ICTY, [Šešelj Trial Judgment](#), para. 80; [Margetić Trial Judgment](#), para. 87; [Hartmann Trial Judgment](#), para. 80; [Marijačić and Rebić Trial Judgment](#), para. 49; ICTR, [Nshogoza Trial Judgment](#), para. 219.

¹⁹⁷⁵ See e.g. ICTY, [Hartmann Trial Judgment](#), para. 80.

¹⁹⁷⁶ See e.g. ICTY, [Margetić Trial Judgment](#), para. 86.

¹⁹⁷⁷ See e.g. ICTY, [Margetić Trial Judgment](#), para. 86.

¹⁹⁷⁸ See e.g. ICTY, [Šešelj Trial Judgment](#), para. 78; [Haxhiu Trial Judgment](#), para. 34.

952. *Accused's involvement.* The second category pertains to the nature and extent of involvement of the Accused in the offences and any aggravating or mitigating circumstances stemming from that conduct.

953. *Accused's individual circumstances.* The third category pertains to the personal situation of the Accused, such as their age, health, education or character, and any individual aggravating or mitigating circumstances stemming therefrom. The Panel will address these factors for each Accused below.

954. The Panel also notes that an element of the offence or mode of liability cannot at the same time be considered as an aggravating circumstance of the same offence.¹⁹⁷⁹ Likewise, factors taken into consideration as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*.¹⁹⁸⁰

955. Aggravating circumstances must be proven beyond a reasonable doubt.¹⁹⁸¹ Mitigating circumstances must be established on a balance of probabilities.¹⁹⁸²

4. Determination of appropriate sentence

956. Pursuant to Rule 163(4) of the Rules, the Panel shall determine a sentence in respect of each charge in the Indictment under which each Accused has been convicted and shall impose a single sentence reflecting the totality of the criminal conduct of the Accused. The single sentence shall not be less than the highest individual sentence determined in respect of each charge. The Panel enjoys considerable discretion in

¹⁹⁷⁹ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 894; ICC, [Ntaganda Sentencing Judgment](#), para. 20; [Bemba et al. Sentencing Judgment](#), para. 25; STL, [Ayyash Sentencing Judgment](#), para. 181.

¹⁹⁸⁰ See e.g. ICTY, [Stanišić and Župljanin Trial Judgment](#), para. 894; ICC, [Bemba et al. Sentencing Judgment](#), para. 23; STL, [Ayyash Sentencing Judgment](#), para. 181.

¹⁹⁸¹ See e.g. ICTY, [Čelebići Appeal Judgment](#), para. 763; STL, [Ayyash Sentencing Judgment](#), para. 181.

¹⁹⁸² See e.g. ICTY, [Bralo Sentencing Appeal Judgment](#), para. 8; ICC, [Bemba et al. Sentencing Judgment](#), para. 24; STL, [Ayyash Sentencing Judgment](#), para. 200.

determining an appropriate sentence.¹⁹⁸³ The Panel must, however, tailor the sentence in such a way as to reflect the gravity of the crimes, the nature and extent of the Accused's involvement in the offences and the individual circumstances of each Accused.¹⁹⁸⁴

957. In determining the appropriate sentence, the Panel may—but is not required to—take into consideration domestic or international sentencing practices. However, because the determination of an appropriate sentence is highly dependent on the circumstances of each specific case, it is difficult to infer from the sentence that was imposed in one case the appropriate sentence in another.¹⁹⁸⁵

958. Pursuant to Rule 163(6) of the Rules, when imposing a sentence of imprisonment, the Panel shall deduct the time, if any, during which the Accused was detained prior to or during trial.

959. The Panel observes that the Law and the Rules are silent on alternative punishments, including the possibility to suspend a sentence. Article 46 of the KCC provides for such alternative punishments and Articles 47-49 of the KCC regulate the conditions for imposing a suspended sentence. The Panel notes that, by virtue of Article 3(4) of the Law, it is not bound by these provisions. The Panel considers, however, that, in line with basic human rights standards applicable before any domestic jurisdiction, alternative punishments must be taken into account when determining an appropriate sentence. Moreover, the Panel notes that the ICTY, notwithstanding a similar absence of regulation, has sometimes imposed suspended sentences.¹⁹⁸⁶ In light of these considerations, the Panel will consider whether the sentences imposed can be suspended as part of the exercise of its discretionary power.

¹⁹⁸³ See e.g. ICTY, [Krajišnik Appeal Judgment](#), para. 734; ICC, [Bemba et al. Sentencing Judgment](#), para. 36; [Lubanga Sentencing Appeal Judgment](#), paras 1, 34, 40.

¹⁹⁸⁴ See e.g. IRMCT, [Stanišić and Simatović Trial Judgment](#), para. 611.

¹⁹⁸⁵ See e.g. ICC, [Bemba et al. Sentencing Judgment](#), para. 38; [Lubanga Sentencing Appeal Judgment](#), para. 77.

¹⁹⁸⁶ See e.g. ICTY, [Bulatović Trial Decision](#), paras 18-19; [Rašić Appeal Judgment](#), para. 17. See also SCSL, [Bangura et al. Sentencing Judgment](#), paras 92, 101.

C. THE PANEL'S FINDINGS

960. The Panel has found Mr Gucati and Mr Haradinaj guilty for jointly committing the following offences: (i) violating the secrecy of proceedings (Counts 5 and 6), with direct intent; (ii) intimidation during criminal proceedings (Count 3), with direct intent; and (iii) obstructing official persons in performing official duties (Counts 1 and 2) with direct intent.¹⁹⁸⁷

961. In determining the appropriate sentences to be imposed in this case, the Panel has examined the evidence on the record and the submissions of the Parties. The Panel has considered all relevant factors, and has 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, while avoiding any double counting of elements of the offences or modes of liability.

1. Mr Gucati

(a) Gravity of the offences

962. For assessing the gravity of the offences of which Mr Gucati has been found guilty, the Panel examines the nature and scope of the offences and other relevant circumstances surrounding the case.

963. The offences of which Mr Gucati has been found guilty are grave for the following reasons.

964. First, the offences entail the revelation of hundreds of documents containing Protected Information, *i.e.* SITF Requests, WCPO Responses, SPO internal work product as well as the names and personal details of hundreds of Witnesses and Potential Witnesses.¹⁹⁸⁸ This massive amount of information was revealed in an

¹⁹⁸⁷ See *supra* paras 501 (Count 5), 552 (Count 6), 606 (Count 3), 672 (Count 1), 710 (Count 2).

¹⁹⁸⁸ See *supra* paras 335-355 (Findings on the Batches).

indiscriminate manner, without any effective precaution,¹⁹⁸⁹ such as redaction of names or selective revelation of information, and a general indifference to the possible consequences of such acts.

965. Second, this revelation, which Mr Gucati jointly committed with Mr Haradinaj, was carried out in the name of the KLA WVA,¹⁹⁹⁰ and was publicly condoned by at least one other member of the organisation.¹⁹⁹¹ The revelation of Protected Information and details of Witnesses and Potential Witnesses on the KLA WVA platform, in his and Mr Haradinaj's capacity as KLA WVA leaders, created the appearance that this information was being revealed on behalf and for the protection of thousands of members of the organisation, some of whom could be prosecuted before this jurisdiction. The Panel also observes that Mr Gucati considered the revelation of Protected Information to be his duty.¹⁹⁹²

966. Third, this revelation, which Mr Gucati jointly committed, was brazenly wide not only in relation to the amount of information revealed, but also as regards: (i) the number of affected people; and (ii) the number of persons with whom the documents were shared. As noted above, the material disclosed by the Accused contained the names and/or details of hundreds of Witnesses and Potential Witnesses. At Mr Gucati's invitation or with his approval, the revealed documents were filmed, photographed, copied or taken away by an unknown number of unidentified individuals.¹⁹⁹³ The ultimate effect of the manner in which these documents were shared is that the whereabouts of the disseminated material as well as the number and identity of its possessors will never be fully known. This makes the Witnesses and

¹⁹⁸⁹ See *supra* paras 480-485 (Count 5), 519-522 (Count 6).

¹⁹⁹⁰ See *e.g.* P1, p. 1; P4, p. 8.

¹⁹⁹¹ See *supra* paras 685-690 (Count 2).

¹⁹⁹² P9, p. 6.

¹⁹⁹³ See *supra* para. 729 (Modes of Liability).

Potential Witnesses whose names and personal data appeared in the Protected Information especially vulnerable.

967. Fourth, the acts of revealing Protected Information were repeatedly discussed in televised or online media appearances and in Facebook posts,¹⁹⁹⁴ in which disparaging comments regarding witnesses were made and the ability of the SPO to protect its witnesses was questioned.¹⁹⁹⁵ This further increased the pool of unknown individuals who became aware of the existence and general content of the material. Accordingly, the 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.

968. The revelation of Protected Information, including the identity and personal data of Witnesses and Potential Witnesses, was such as to be capable of causing negative personal consequences to those concerned. While their number cannot be established with precision, the record reflects that the Witnesses at Risk were significantly affected and that the SPO had to contact many other Witnesses to assess the level of the resulting risk.¹⁹⁹⁶ The evidence does not indicate whether names of particularly vulnerable Witnesses, such as minors, elderly persons, victims of certain crimes,¹⁹⁹⁷ persons with disabilities or other vulnerable categories,¹⁹⁹⁸ were revealed. Nonetheless, the magnitude and scope of this revelation of Protected Information could dissuade witnesses from engaging or continuing to engage with the SPO/SC investigative or judicial process.¹⁹⁹⁹ As such, these acts could have had the effect of

¹⁹⁹⁴ P1, P2, P4, P9, P12, P28, P29, P31, P35, P59, P83, pp 44-49.

¹⁹⁹⁵ See *supra* paras 738-741 (Modes of Liability).

¹⁹⁹⁶ See *supra* paras 536-541 (Count 6).

¹⁹⁹⁷ See Rule 2 of the Rules defining a victim as "[a] natural person who has suffered physical, material, or mental harm as a direct result of a crime alleged in an indictment confirmed by the Pre-Trial Judge".

¹⁹⁹⁸ Article 23(2) of the Law; Rule 80(4)(c) of the Rules; 2D13, p. 20. See also [ICC Protocol on Vulnerable Witnesses](#).

¹⁹⁹⁹ See *e.g.* W04841 (Miro Jukić), Transcript, 4 November 2021, p. 1905 (Member of the Panel: "in your experience as a witness protection officer, is the disclosure of an individual, and I should say witness name or personal detail, a potential cause to dissuade that person from further engagement with any

preventing the SC/SPO from fulfilling its mandate and could have resulted in victims of crimes under SC jurisdiction being denied their right to truth and to have access to justice. These rights are critically important to such victims, so any response of the SC/SPO to attempts to interfere with such rights must reflect their importance. Lastly, the Panel notes that the above occurred within a prevalent and long-standing climate of witness intimidation in Kosovo.²⁰⁰⁰

969. The Panel weighs these considerations against its finding that, ultimately, the SPO failed to establish that its ability to effectively investigate or prosecute crimes was actually obstructed.

(b) Nature and extent of involvement of Mr Gucati

970. The Panel attaches no weight to the consideration that Mr Gucati did not participate in the “original leak” or delivery of the Three Sets. The Panel notes that such an allegation never formed part of the charges and cannot play any role in the determination of an appropriate sentence. The absence of further criminal action(s) of the convicted person does not constitute a mitigating factor.

971. The Panel notes that, after each delivery of documents, Mr Gucati repeated the same acts: he reviewed the material; then instructed Mr Klinaku on at least two occasions to call a press conference, which he presided; he presented the topic of the press conference, giving some details about the Three Sets, and then gave the floor to Mr Haradinaj; he did not step in or intervene to correct or qualify anything said by Mr Haradinaj; he then participated in media interviews regarding the same topic.²⁰⁰¹ Mr Gucati repeated the sequence of these acts three times, even after being served two

investigation or prosecution?” Mr Jukić: “From my experience, I can say yes”. Member of the Panel: “And to the extent you are aware, of course, has this happened in relation to the leak of information in September 2020?” Mr Jukić: “Yes, that was happened during the -- this exercise”); DW1253 (Robert Reid), Transcript, 24 January 2021, pp 3306-3308.

²⁰⁰⁰ See *supra* paras 576-579 (Count 3).

²⁰⁰¹ See *supra* paras 728-733 (Modes of Liability).

orders from the Single Judge and one from the SPO demanding that he desist in disseminating the received information.²⁰⁰² The Panel accepts that, through this repeated conduct, Mr Gucati did not publicly name any witness and that he participated in fewer media appearances than Mr Haradinaj. Nonetheless, the evidence shows that Mr Gucati repeated his acts, despite three orders to desist, with considerable determination, consistently vowing to continue publishing material received from the SC/SPO.²⁰⁰³

972. The Panel finds that there are no further aggravating factors as regards Mr Gucati's contribution to the offences. Mr Gucati's role as a leader of the Group was considered under the aggravated form of Count 2, while his function as Chairman of the KLA WVA has been addressed as an indicator of the gravity of his offences.

973. The Panel notes that Mr Gucati did not make any direct threats involving death or serious injury in relation to witnesses. Furthermore, Mr Gucati did not directly threaten any SPO official and was cooperative during the seizure operations of the SPO. Nonetheless, the Panel notes that Mr Gucati did so in compliance with the orders of the Single Judge and the SPO. Moreover, as mentioned above, the absence of further criminal action does not constitute a mitigating factor.

(c) Individual circumstances of Mr Gucati

974. Mr Gucati is 55 years old,²⁰⁰⁴ and he is married with seven children.²⁰⁰⁵

975. The Panel considers as mitigating factors in determining Mr Gucati's sentence the facts that Mr Gucati: (i) worked at a school and has conducted extensive voluntary and humanitarian work for his community,²⁰⁰⁶ and (ii) suffers from serious health

²⁰⁰² P4, p. 8. *See also* P52, para. 22(c); P53, para. 22(c); P54, para. 2.

²⁰⁰³ *See supra* paras 728-731 (Modes of Liability).

²⁰⁰⁴ 1D3, para. 1.

²⁰⁰⁵ 1D3, para. 1; 1D42, paras 2-3, 7-8; 1D44, para. 2.

²⁰⁰⁶ 1D3, para. 11; 1D35, paras 16-18; 1D36, paras 3-4, 8; 1D37, paras 6-8; 1D38, para. 8; 1D39, para. 10; 1D40, paras 3, 5, 7; 1D41, paras 14, 16, 18; 1D43, paras 7-12; 1D44, para. 15.

concerns.²⁰⁰⁷ The Panel also considers Mr Gucati's family situation and the fact that any custodial sentence would be served away from his family and community, with associated financial and emotional hardship.²⁰⁰⁸

976. In determining an appropriate sentence, the Panel notes that Mr Gucati has no relevant prior convictions and there is thus no aggravating factor in this regard. Furthermore, given the disparaging comments made by Mr Gucati in relation to witnesses cooperating with the SITF/SPO,²⁰⁰⁹ the Panel does not consider that good character or a general motivation to act in the public interest or seek the truth should be considered in his case as mitigating factors. The Panel notes that Mr Gucati expressed no remorse regarding his actions and reiterated his vow to repeat such actions in the future.²⁰¹⁰ The Panel does not therefore consider that Mr Gucati's sentence should be mitigated on account of his behaviour after the offence.

977. While the Panel notes that the Covid-19 pandemic has resulted in limitation in family visits for Mr Gucati, this circumstance has affected many other detained persons globally and attracts little weight in the determination of an appropriate sentence.

²⁰⁰⁷ 1D3, paras 6-7; 1D35, para. 11; 1D38, para. 8; 1D39, para. 6; 1D41, paras 9-12; 1D42, paras 6-7; 1D44, paras 10-14, 17, 20.

²⁰⁰⁸ 1D42, para. 10; 1D44, paras 21-28; 1D46.

²⁰⁰⁹ *See supra* paras 569-574 (Count 3).

²⁰¹⁰ DW1240 (Hysni Gucati), Transcript, 6 December 2021, p. 2222 (Mr Gucati: "I am not afraid of saying anything. I'm not afraid for what I have done. I said every document that comes to my office to the detriment of my country, I will make it public"); Transcript, 8 December 2021, p. 2401 (SPO Counsel: "Do you have any remorse or regret for the actions you stand trial for?" Mr Gucati: "I have never had a chance to regret in the 54 years of my life, 30 years of work, and so on and so forth. Where I make a mistake, I apologise. There is no need for me to apologise for anything. I did not steal these documents and take them to the WVA headquarters. If I'd done that, I would apologise for that burglary. I have not committed any burglary, I have not offended anyone, I haven't insulted any witness or anyone else. There is absolutely no reason for me to apologise because I have not caused harm to anyone". SPO Counsel: "Would you do it all over again?" Mr Gucati: "I said it earlier as well yesterday and the day before. I'm not a guardian of anyone, so of this institution or of the offices here in The Hague. I look after the work for which I'm paid. So please do not provoke me with questions regarding this documentation"). *See also* Transcript, 7 December 2021, p. 2266.

978. The Panel also notes that no mistake of law has been established,²⁰¹¹ so the Panel will not address whether any such mistake was avoidable within the meaning of Article 26(3) of the KCC, warranting a reduced punishment.

(d) Determination of the sentence for Mr Gucati

979. The Panel takes note of the range of sentences imposed on persons convicted of similar offences at international courts or tribunals.²⁰¹² Nonetheless, as indicated in paragraph 957, it is difficult to infer from the sentence that was imposed in one case the appropriate sentence in another case. The offences for which Mr Gucati is 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. For these reasons, the Panel considers that the sentence for Mr Gucati should take into consideration the facts and circumstances of this and no other case.

²⁰¹¹ See *supra* para. 907 (Defences).

²⁰¹² See e.g. ICTY: [Marijačić and Rebić Trial Judgment](#), para. 53: the Accused were each sentenced to a fine of 15,000 EUR; [Jović Trial Judgment](#), para. 27: the Accused was sentenced to a fine of 20,000 EUR. STL: [Akhbar Beirut S.A.L. and Al Amin Sentencing Judgment](#), p. 8: Akhbar Beirut S.A.L was sentenced to a fine of 6,000 EUR and Mr Al Amin was sentenced to a fine of 20,000 EUR. [Al Khayat Sentencing Judgment](#): Ms Khayat was sentenced to a fine of 10,000 EUR. IRMCT: [Nzabonimpa et al. Trial Judgment](#), paras 407-408: Mr Nzabonimpa, Mr Ndagijimana and Ms Fatuma were sentenced to time served (11 months) and Mr Ngirabatware was sentenced to two years imprisonment.

980. The Panel notes that the punishments under the relevant provisions of the KCC are: (i) a fine or imprisonment up to one (1) year (Article 392(1));²⁰¹³ (ii) imprisonment of up to three (3) years (Article 392(2)); (iii) imprisonment of six (6) months to five (5) years (Article 392(3)); (iv) a fine of up to one hundred and twenty-five thousand (125,000) EUR *and* imprisonment of two (2) to ten (10) years (Article 387); (v) imprisonment of three (3) months to three (3) years (Article 401(1)); (vi) a fine or imprisonment of up to three (3) years (Article 401(2)); (vii) imprisonment of one (1) to five (5) years (Article 401(3)); and (viii) imprisonment of one (1) to five (5) years (Article 401(5)).

981. Having: (i) weighed and balanced all factors set out above, including the gravity of the offences; and (ii) considered the aforementioned purposes of sentencing, the Panel has determined the following sentences for Mr Gucati in respect of each charge in the Indictment:

- a. For Count 5, one year's imprisonment;
- b. For Count 6, including the aggravated form, two years' imprisonment;
- c. For Count 3, a fine of 100 EUR and four years' imprisonment;
- d. For Count 1, committed in attempted form and taking into account the aggravated form, one year's imprisonment; and
- e. For Count 2, committed in attempted form and taking into account both aggravated forms, one year's imprisonment.

982. As regards Count 3, the Panel recalls that Article 387 of the KCC requires the imposition of a fine. Considering that a fine would have little retributive or deterrent

²⁰¹³ See Article 42(1) of the KCC, according to which the punishment of imprisonment may not be imposed for a term shorter than thirty (30) days. See also Article 43(1) of the KCC, according to which a fine may not be less than one hundred (100) EUR. These provisions are applicable by virtue of Article 44(4) of the Law.

effect in this case, the Panel is of the view that a symbolic amount of **100 EUR** is appropriate.

983. As regards Counts 1 and 2, the Panel has taken into account that Mr Gucati has been convicted under both counts and that he might have been convicted under only one of these counts under a different regime of cumulative conviction.²⁰¹⁴

984. Having determined these sentences, the Panel imposes a single sentence of **four and a half (4.5) years**, reflecting the totality of the criminal conduct of and the multiple offences committed by Mr Gucati.

985. As regards credit for time served, the Panel notes that Mr Gucati was arrested on 25 September 2020 and has been detained since then. The Panel accordingly deducts from the imposed sentence the time Mr Gucati spent in detention since 25 September 2020.

986. As regards the suspension of sentence, the Panel takes note of Articles 47 and 49(4) of the KCC, according to which the purpose of a suspended sentence is to not impose a punishment for a criminal offence that is not severe, when a reprimand with the threat of punishment is sufficient to prevent the perpetrator from committing a criminal offence. Having: (i) established the gravity of the offences in this case; (ii) balanced all aforementioned factors; and (iii) considered all purposes of sentencing, the Panel is of the view that a suspended sentence in this case is not appropriate, as a reprimand with the threat of punishment would not be sufficient to prevent Mr Gucati from committing offences similar to those for which he has been convicted and which he has vowed to repeat.

²⁰¹⁴ See *supra* paras 165-170 (Applicable Law).

2. Mr Haradinaj

(a) Gravity of the offences

987. For assessing the gravity of the offences of which Mr Haradinaj has been found guilty, the Panel examines the nature and scope of the offences and other relevant circumstances surrounding the case.

988. The offences of which Mr Haradinaj has been found guilty are grave for the following reasons.

989. First, the offences encompass the revelation of hundreds of documents containing Protected Information, *i.e.* SITF Requests, WCPO Responses, SPO internal work product as well as the names and personal details of hundreds of Witnesses and Potential Witnesses.²⁰¹⁵ This massive amount of information was revealed in an indiscriminate manner, without any effective precaution,²⁰¹⁶ such as redaction of names or selective revelation of information.

990. Second, this revelation, which Mr Haradinaj jointly committed with Mr Gucati, was carried out in the name of the KLA WVA,²⁰¹⁷ and was publicly condoned by at least one other member of the organisation.²⁰¹⁸ The revelation of confidential information and details of witnesses on the KLA WVA platform, in his and Mr Gucati's capacity of KLA WVA leaders, created the appearance that this information was being revealed on behalf and for the protection of thousands of members of the organisation, some of whom could be prosecuted before this

²⁰¹⁵ See *supra* paras 335-355 (Findings on the Batches).

²⁰¹⁶ See *supra* paras 480-485 (Count 5), 519-522 (Count 6).

²⁰¹⁷ See *e.g.* P1, p. 1 (Mr Haradinaj: "We, the Veterans Association, were pleasantly surprised"); P15, p. 2 (Mr Haradinaj: "It does not mean that it has to be only me, Mr. GUCATI, Mr. Faton KLINAKU who will do it ... even the lowest ranked KLA member here will carry out that task"); P35, p. 4 (Mr Haradinaj: "We are in the capacity of war veterans and the War Veterans Association that represents solely the war veterans").

²⁰¹⁸ See *supra* paras 685-690 (Count 2).

jurisdiction. The Panel also observes that Mr Haradinaj considered the revelation of Protected Information to be his duty.²⁰¹⁹

991. Third, this revelation, which Mr Haradinaj jointly committed, was brazenly wide not only in relation to the amount of information revealed, but also as regards: (i) the number of affected people; and (ii) the number of persons with whom the documents were shared. As noted above, the material disclosed by the Accused contained the names and/or details of hundreds of Witnesses and Potential Witnesses. At Mr Haradinaj's invitation or with his approval, the revealed documents were reviewed, filmed, photographed, copied or taken away by an unknown number of unidentified individuals.²⁰²⁰ The ultimate effect of the manner in which these documents were shared is that the whereabouts of the disseminated material as well as the number and identity of its possessors will never be fully known. This makes the Witnesses and Potential Witnesses whose names and personal data appeared in the Protected Information especially vulnerable.

992. Fourth, the acts of revealing Protected Information were repeatedly discussed in several televised or online media appearances and in Facebook posts,²⁰²¹ in which disparaging comments regarding witnesses were made and the ability of the SPO to protect witnesses was questioned and the leak of such information mocked.²⁰²² This further increased the pool of unknown individuals who were aware of the existence and general content of the material. Accordingly, the evidence of this broad dissemination of information via televised or online platforms contradicts the Accused's argument that the information was revealed only to professional journalists and the professional media.

²⁰¹⁹ See e.g. P26, p. 2; P11, p. 1; P24, p. 8. See also P34, p. 2.

²⁰²⁰ See *supra* paras 747-748 (Modes of Liability).

²⁰²¹ P6; P7; P12; P18; P19; P21; P24; P33; P8; P11; P15; P16; P17; P25; P26; P27; P30; P32.

²⁰²² See *supra* paras 757-761 (Modes of Liability).

993. The revelation of Protected Information, including the identity and personal data of Witnesses and Potential Witnesses was such as to be capable of causing negative personal consequences to those concerned. While their number cannot be established with precision, the record reflects that the Witnesses at Risk were significantly affected and that the SPO had to contact many other Witnesses to assess the level of the resulting risk.²⁰²³ The evidence does not indicate whether names of particularly vulnerable Witnesses, such as minors, elderly persons, victims of certain crimes, persons with disabilities or other vulnerable categories,²⁰²⁴ were revealed. Nonetheless, the magnitude and scope of this revelation of Protected Information could dissuade witnesses from engaging or continuing to engage with the SPO/SC investigative or judicial process.²⁰²⁵ As such, these acts could have had the effect of preventing the SC/SPO from fulfilling its mandate and could have resulted in victims of crimes under SC jurisdiction being denied their right to truth and to have access to justice. These rights are critically important to such victims, so any response of the SC/SPO to attempts to interfere with such rights must reflect their importance. Lastly, the Panel notes that the above occurred within a prevalent and long-standing climate of witness intimidation in Kosovo.²⁰²⁶

994. The Panel weighs these considerations against the fact that, ultimately, the SPO failed to establish that its ability to effectively investigate or prosecute crimes was actually obstructed.

(b) Nature and extent of involvement of Mr Haradinaj

995. The Panel attaches no weight to the consideration that Mr Haradinaj did not participate in the “original leak” or delivery of the Three Sets. The Panel notes that

²⁰²³ See *supra* paras 536-541 (Count 6).

²⁰²⁴ See *supra* fn. 1998.

²⁰²⁵ See *e.g.* W04841 (Miro Jukić), Transcript, 4 November 2021, p. 1905; DW1253 (Robert Reid), Transcript, 24 January 2021, pp 3306-3308.

²⁰²⁶ See *supra* paras 576-579 (Count 3).

such an allegation never formed part of the charges and cannot play any role in the determination of an appropriate sentence. The absence of further criminal action(s) of the convicted person does not constitute a mitigating factor.

996. The Panel notes that, after each delivery of documents, Mr Haradinaj repeated the same acts: he reviewed the material; he attended a press conference presided by Mr Gucati, during which he described in detail the content of the Three Sets; he then participated in multiple media interviews regarding the same topic.²⁰²⁷ Mr Haradinaj repeated the sequence of these acts three times, even after having been made aware of orders demanding that Mr Gucati and the KLA WVA desist in disseminating the received information.²⁰²⁸ The Panel notes the particular zeal with which Mr Haradinaj repeated his conduct and the virulence of some of the comments he directed towards witnesses. He not only publicly named at least five Witnesses or Potential Witnesses during his repeated conduct,²⁰²⁹ but he also participated in a high number of media appearances.²⁰³⁰ Furthermore, the evidence shows that Mr Haradinaj repeatedly vowed to continue publishing material received from the SC/SPO.²⁰³¹ He also stated that he made sure that the documents were widely distributed.²⁰³²

997. The Panel finds that there are no further aggravating factors as regards Mr Haradinaj's contribution to the offences.

998. The Panel notes that Mr Haradinaj did not make any threats involving death or serious injury in relation to witnesses. Furthermore, Mr Haradinaj did not directly threaten any SPO official and, when present, was cooperative during the SPO seizure

²⁰²⁷ See *supra* paras 747-750, 753 (Modes of Liability).

²⁰²⁸ P17, p. 6; P83, p. 1; 2D1, para. 87; DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 2926-2932.

²⁰²⁹ P1, p. 2; P2, pp 1, 3; P11, p. 30; P18, p. 3; P35, p. 3

²⁰³⁰ P6; P7; P12; P18; P19; P21; P24; P33; P8; P11; P15; P16; P17; P25; P26; P27; P30; P32.

²⁰³¹ See *supra* paras 748, 750 (Modes of Liability).

²⁰³² P60, p. 25.

operations. That being said, absence of further criminal action does not constitute a mitigating factor.

(c) Individual circumstances of Mr Haradinaj

999. Mr Haradinaj is 58 years old,²⁰³³ and he is married with five children.²⁰³⁴

1000. The Panel considers as mitigating factors in determining Mr Haradinaj's sentence the facts that Mr Haradinaj's wife and brother suffer from serious health concerns.²⁰³⁵ The Panel also considers Mr Haradinaj's family situation and the fact that any custodial sentence would be served away from his family, with associated financial and emotional hardship.²⁰³⁶

1001. In determining an appropriate sentence, the Panel notes that Mr Haradinaj has no relevant prior convictions and there is thus no aggravating factor in this regard. Furthermore, given the repeated and virulent disparaging remarks made by Mr Haradinaj in relation to witnesses cooperating with the SITF/SPO,²⁰³⁷ the Panel does not consider that good character or a general motivation to act in the public interest or seek the truth should be considered in his case as mitigating factors. The Panel notes that Mr Haradinaj expressed no remorse regarding his actions and reiterated his vow to repeat such actions in the future.²⁰³⁸ Taking into further account Mr Haradinaj's attitude at the time of his arrest, the Panel concludes that

²⁰³³ 2D1, para. 1.

²⁰³⁴ 2D1, paras 5, 8; 2D17, para. 5.

²⁰³⁵ 2D17, paras 17, 21-24.

²⁰³⁶ 2D17, paras 17-18, 20-32; 2D20; 2D18, p. 4.

²⁰³⁷ See *supra* paras 571-574 (Count 3), 758-759 (Modes of Liability).

²⁰³⁸ DW1249 (Nasim Haradinaj), Transcript, 13 January 2022, pp 3021 (Mr Haradinaj: "About the thing that I accepted that I did, I do not feel any remorse. I accept what I've done because I think it's in the interest of transparency and public interest. So I only fulfilled an obligation that I had -- I felt I had to fulfil, and that was taking those documents and moving them from here to there"), 3024 (Mr Haradinaj: "If you bring them, I will act the same, because I am convinced that I acted rightly and I did it in the interest of informing the public and for the sake of transparency. I think that, I have that conviction, that it was appropriate").

Mr Haradinaj's sentence cannot be mitigated on account of his behaviour after the crime.

1002. While the Panel notes that the Covid-19 pandemic has resulted in limitation in family visits for Mr Haradinaj, this circumstance has affected many other detained persons globally and attracts little weight for the determination of an appropriate sentence.

1003. The Panel also notes that no mistake of law has been established,²⁰³⁹ so the Panel will not address whether any such mistake was avoidable within the meaning of Article 26(3) of the KCC, warranting a reduced punishment.

(d) Determination of the sentence for Mr Haradinaj

1004. The Panel takes note of the range of sentences imposed on persons convicted of similar offences at international courts or tribunals.²⁰⁴⁰ Nonetheless, as indicated in paragraph 957, it is difficult to infer from the sentence that was imposed in one case the appropriate sentence in another case. The offences for which Mr Haradinaj is 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. They encompass: (i) dissemination on a wide scale; (ii) with the use of an organisational platform and a large number broadcasted media appearances; (iii) through repeated conduct and consistent vows to distribute widely the Protected Information and 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. For these reasons, the Panel considers that the sentence

²⁰³⁹ See *supra* para. 907 (Defences).

²⁰⁴⁰ See *supra* fn. 2012.

for Mr Haradinaj should be imposed taking into consideration the facts and circumstances of this and no other case.

1005. The Panel noted above the punishments set out by Articles 387, 392(1)-(3) and 401(1)-(3) and (5) of the KCC.²⁰⁴¹

1006. Having: (i) weighed and balanced all factors set out above, including the gravity of the offences; and (ii) considered the aforementioned purposes of sentencing, the Panel has determined the following sentences in respect of each charge in the Indictment:

- a. For Count 5, one year's imprisonment;
- b. For Count 6, including the aggravated form, two years' imprisonment;
- c. For Count 3, a fine of 100 EUR and four years' imprisonment;
- d. For Count 1, committed in attempted form and taking into account the aggravated form, one year's imprisonment; and
- e. For Count 2, committed in attempted form, and taking into account one aggravated form, one year's imprisonment.

1007. Under Count 2, the Panel imposed the same sentence for both Accused, although only the aggravated form under Article 401(5) of the KCC was established for Mr Haradinaj. This is due to the fact that the aforementioned gravity of his offences and his involvement therein – such as Mr Haradinaj's prominent role during the Three Press Conferences, the virulent and vehement nature of his statements in the course of his frequent media appearances and the amount of Protected Information he personally revealed – render Mr Haradinaj's conduct as serious as Mr Gucati's.

1008. As noted above, Article 387 of the KCC requires the imposition of a fine. Considering 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. The Panel has

²⁰⁴¹ See *supra* para. 980.

also taken into account that Mr Haradinaj has been convicted under Counts 1 and 2 and that he might have been convicted under only one of these counts under a different regime of cumulative conviction.²⁰⁴²

1009. Having determined these sentences, the Panel imposes a single sentence of **four and a half (4.5) years** reflecting the totality of the criminal conduct of and the multiple offences committed by Mr Haradinaj.

1010. As regards credit for time served, the Panel notes that Mr Haradinaj was arrested on 25 September 2020 and has been detained since then. The Panel accordingly deducts from the imposed sentence the time Mr Haradinaj spent in detention since 25 September 2020.

1011. As regards the suspension of sentence, the Panel takes note of Articles 47 and 49(4) of the KCC.²⁰⁴³ Having: (i) established the gravity of the offences in this case; (ii) balanced all aforementioned factors; and (iii) considered all purposes of sentencing, the Panel is of the view that a suspended sentence in this case is not appropriate, as a reprimand with the threat of punishment would not be sufficient to prevent Mr Haradinaj from committing offences similar to those for which he has been convicted and which he has vowed to repeat.

²⁰⁴² See *supra* paras 165-170 (Applicable Law).

²⁰⁴³ See *supra* para. 986.

XI. DISPOSITION

1012. For the foregoing reasons, having considered all of the evidence and the arguments of the Parties, the Panel, pursuant to Articles 43 and 44 of the Law and Rules 158-159, 163 and 165 of the Rules, finds Mr Gucati **GUILTY** of:

- a) Count 1, Obstructing Official Persons in Performing Official Duties by serious threat, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 401(1) and (5) of the KCC;
- b) Count 2, Obstructing Official Persons in Performing Official Duties by participating in the common action of a group, under Articles 15(2) and 16(3) of the Law and Articles 17 and 401(2)-(3) and (5) of the KCC;
- c) Count 3, Intimidation During Criminal Proceedings, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 387 of the KCC;
- d) Count 5, Violating Secrecy of Proceedings through unauthorised revelation of secret information disclosed in official proceedings, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 392(1) of the KCC; and
- e) Count 6, Violating Secrecy of Proceedings through unauthorised revelation of the identities and personal data of protected witnesses, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 392(2)-(3) of the KCC.

1013. The Panel finds Mr Gucati **NOT GUILTY** of Count 4, Retaliation.

1014. Mr Gucati is hereby sentenced to a **single sentence of four and a half (4.5) years of imprisonment**, with credit for the time served, and to a **fine of one hundred euros (100 EUR)**, to be paid by **18 July 2022**.

1015. The Panel finds Mr Haradinaj **GUILTY** of:

- a) Count 1, Obstructing Official Persons in Performing Official Duties by serious threat, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 401(1) and (5) of the KCC;
- b) Count 2, Obstructing Official Persons in Performing Official Duties by participating in the common action of a group, under Articles 15(2) and 16(3) of the Law and Articles 17 and 401(2) and (5) of the KCC;
- c) Count 3, Intimidation During Criminal Proceedings, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 387 of the KCC;
- d) Count 5, Violating Secrecy of Proceedings through unauthorised revelation of secret information disclosed in official proceedings, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 392(1) of the KCC; and
- e) Count 6, Violating Secrecy of Proceedings through unauthorised revelation of the identities and personal data of protected witnesses, under Articles 15(2) and 16(3) of the Law and Articles 17, 31 and 392(2)-(3) of the KCC.

1016. The Panel finds Mr Haradinaj **NOT GUILTY** of Count 4, Retaliation.

1017. Mr Haradinaj is hereby sentenced to a **single sentence of four and a half (4.5) years of imprisonment**, with credit for the time served, and to a **fine of one hundred euros (100 EUR)**, to be paid by **18 July 2022**.

1018. The Panel **DIRECTS** the Registrar to reclassify as public parts of the transcripts of the trial proceedings, as provided in Annex 3, in all languages and including the corresponding audio-video material in all languages.



Judge Charles L. Smith, III
Presiding Judge



Judge Christoph Barthe



Judge Guénaél Mettraux

Dated this Wednesday, 18 May 2022

At The Hague, the Netherlands

SEPARATE OPINION OF JUDGE BARTHE

1. I concur fully with the conviction and sentencing of Mr Gucati and Mr Haradinaj. While I agree with my colleagues, I cannot follow them on two discrete points. They concern: (i) the interpretation of the subjective element of the offence of intimidation, as set out in Article 387 of the 2019 Kosovo Criminal Code (“KCC”),¹ charged as Count 3 of the Indictment; and (ii) the specific reasoning applied for convicting the two Accused of the offence of obstructing official persons in performing official duties by participating in a group pursuant to Article 401(2), (3) and (5) in addition to the offence of obstructing official persons in performing official duties by serious threat under Article 401(1) and (5),² charged as Counts 1 and 2 of the Indictment. Both points, however, do not affect my overall agreement with the outcome of the Judgment.

A. INTERPRETATION OF THE SUBJECTIVE ELEMENT OF ARTICLE 387 KCC

2. My colleagues opine that the offence of intimidation (Article 387) can be committed with either direct or eventual intent.³ I disagree with the finding that the offence can be committed with eventual intent for the following reasons. Indeed, Article 21 contains the two forms of “intent”⁴ and their definition applicable to the various

¹ All articles mentioned in this opinion without reference to the legal instrument are those of the KCC. It is recalled that 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. *See also* F147/RED, paras 28-34.

² Here committed in co-perpetration, Article 31.

³ *See* Judgment, paras 122-124. For the position of the Parties, *see* Mr Gucati: DW1240 (Hysni Gucati), Transcript, 16 March 2022, pp 3633, 3715-3719; Transcript, 8 September 2021, pp 660, 671-672; Mr Haradinaj: F342, para. 32; SPO: Transcript, 14 March 2022, pp 3499-3502; F341, para. 21 and fn. 37.

⁴ Intent is composed of two elements: the cognitive element and the volitional element. In the English language, “intent” or “intention” is at times used as a generic reference to the two constitutive elements or as a reference to the volitional element, *see* Ambos K., *Treatise on International Criminal Law*, Volume I, Oxford 2013 (“Treatise I”), p. 266: “Intent can be understood either in the general sense, embracing the cognitive and volitional aspects of the mental element, [...] or in a mainly volitional, purpose-based sense”. Which of the two meanings is relevant, depends on the specificities of the provision concerned.

offences set forth in the KCC.⁵ Yet, the requisite *mens rea* of an offence must be determined for each offence separately and in light of its wording. Article 21 cannot be construed to apply to “all offences in the KCC, without distinction and regardless of whether an offence also requires a specific purpose”.⁶ The use of the words “to induce” in Article 387 indicates a specific purpose- or goal-oriented activity, namely that the purpose or goal of the use of force or serious threat etc. was *to induce* another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge.⁷ I also find support for this interpretation in a contextual reading of Article 387 against Articles 386⁸ and 388,⁹ and the grave nature of the offence as reflected in the prescribed severe punishment.¹⁰ These considerations compel me to reach the conclusion that, in light of the principle of legality (*nullum crimen, nulla poena sine lege [stricta]*),¹¹ the law requires

⁵ See Judgment, para. 119.

⁶ See *contra* Judgment, para. 120.

⁷ This understanding is supported by the Albanian version of Article 387 that uses the expression “*për të*” which can be translated as “*to, in order to*”, or “*with the intent/purpose of*”, confirming the meaning that “something is done or attempted on purpose/intentionally”. Likewise, the Serbian version of said provision uses the expression “*da se*” which can also be translated as “*to, in order to*”. I also take note of the judgment of the Basic Court of Gjilan, which appears to confirm direct intent for the offence of intimidation. See Kosovo, [L.T. et al. Judgment](#), p. 7, first paragraph (on the interpretation of Article 395 of the 2012 KCC). See also Kosovo, [Medicus Supreme Court Judgment](#), paras 65 and 71 stating that eventual intent is not compatible with specific (direct) intent crimes such as smuggling of migrants, trafficking in persons or organised crime (cf. Articles 170, 171 and 283 of the 2012 KCC).

⁸ Article 386, which is considered to be a “direct intent offence”, penalises conduct that obstructs, *inter alia*, the collection of evidence in court proceedings by concealing, destroying, damaging or rendering unserviceable property or documents that may be used as evidence. See also *Salihu et al.*, Article 394(1) of the 2012 KCC, mn. 12, p. 1121 and Article 394(3) of the 2012 KCC, mn. 3, p. 1123.

⁹ Article 388, which the Panel considers to require “specific intent” indicating an element of purpose (see Judgment, paras 136-137), penalises conduct that interferes with persons after they have provided information to the competent authorities. Indeed, one can argue that Articles 387 and 388 are “two sides of the same coin”. See e.g. *Salihu et al.*, Article 396 of the 2012 KCC, mn. 3, p. 1125 setting out the relationship between Articles 396 and 394 of the 2012 KCC, which correspond to Articles 388 and 386.

¹⁰ The prescribed punishment in Article 387 is a fine of up to EUR 125,000 and imprisonment of two (2) to ten (10) years.

¹¹ See Article 2(3) KCC and Article 33(1) of the Constitution of the Republic of Kosovo. See also Ambos, *Treatise I*, p. 88 stating that the *lex stricta* component may be regarded as the “equivalent” of the rule of strict construction or interpretation, as developed in English law.

a strong volitional element in the sense that the perpetrator must have desired the intimidating effect of his or her conduct.

3. That being said, as my colleagues and I are convinced that the two Accused acted with such an intent, further explanations on this point are not necessary.¹²

B. ARTICLE 401 KCC: INDIVIDUAL AND/OR GROUP OBSTRUCTION

4. My colleagues entered a conviction of the Accused on two legal bases,¹³ namely for personally obstructing official persons in performing official duties (Article 401(1)) and for having participated in a group which by common action obstructs or attempts to obstruct an official person in performing official duties (Article 401(2)). My colleagues accepted the applicability of both provisions on the basis that each provision involved has a materially distinct element not contained in the other, requiring proof of a fact not required by the other.¹⁴

5. While I agree to convict the two Accused on the basis of the two legal provisions, I regret to be unable to subscribe to the reasoning adopted in the Judgment. The aforementioned test, relied upon by my colleagues, is borrowed from international case-law involving the prosecution of international crimes. However, this test is not the only available test in order to determine the relationship between two criminal

¹² In particular, it can remain open whether, in the interest of the purpose and the protected legal value of Article 387, the perpetrator who acts with direct intent can be equated with the perpetrator who has foreseen with virtual certainty the intimidating effects of his or her actions, as the SPO has argued (*see* Transcript, 14 March 2022, pp 3499-3502; F565 SPO Final Trial Brief, para. 214), since in the case of the latter the lack of the strong volitional element is compensated by an equally strong cognitive element. Conversely, eventual intent, as approved by the majority of the Panel, would mean that the perpetrator, on the cognitive side, merely has the awareness that his or her actions *can* induce another person to refrain from making a statement etc., and who on the volitional side must only *accede* to this (potential) consequence. The fact that “any perpetrator who intentionally uses force or serious threat against witnesses in a criminal trial with the accepted, but not necessarily desired, consequence that witnesses would refrain from testifying, would go unpunished” (Judgment, para. 122), may be regrettable; however, it is not for a criminal court to close or remedy loopholes in the law that were – consciously or unconsciously – left open by the legislator through excessive interpretation.

¹³ *See* Judgment, para. 1012 (Mr Gucati) and para. 1015 (Mr Haradinaj).

¹⁴ *See* Judgment, paras 167-170.

provisions. In the present instance, the Panel is asked to pass judgment on the Accused's conduct under Kosovo domestic law,¹⁵ as incorporated into the Law.¹⁶ In this specific context, I endorse our finding to refer to relevant Kosovo case-law, which, albeit not binding, enables the Panel, if possible, to construe the applicable law in a manner similar to that adopted by Kosovo courts adjudicating the same offences.¹⁷ Ultimately, such an approach allows the Judgment in the present case to be embedded in the legal tradition of Kosovo.

6. My colleagues reject the rules of concurrence applied by the Kosovo Court of Appeals in the *M.I. et al. case*¹⁸ in the context of obstructing official persons in performing official duties on the basis that (i) it did not sufficiently explain the legal basis for relying on this theory; (ii) the Parties in the present case accepted that it is within the Panel's discretion to take guidance from the cumulative convictions test applied by international tribunals; and (iii) the legal elements of Article 401(2) are distinct from those in Article 401(1).¹⁹

7. The Kosovo Court of Appeals held:

Obstructing Official Persons in Performing Official Duties (Article 316.1 and 3 CCK)²⁰ consists of obstructing an official person in performing official duties of public security, order and policing by use of force or threat of immediate use of force and is punishable

¹⁵ See also Judgment, para. 939 ("However, the Indictment charged the Accused with offences under Kosovo law [...]").

¹⁶ Cf. Articles 3(2)(c), 6(2), 15(2) and 16(3) of the Law.

¹⁷ See Judgment, para. 67.

¹⁸ Kosovo, *M.I. et al. Appeal Judgment*, section 6.3, pp 28-29.

¹⁹ See Judgment, paras 165-169.

²⁰ The abbreviation "CCK" is used in the judgment of the Kosovo Court of Appeals in reference to the previous Criminal Code of Kosovo, see UNMIK, Provisional Criminal Code of Kosovo, UNMIK/REG/2003/25, 6 July 2003, later renamed and amended by Law No. 03/L-002, in force until 31 December 2012. Article 316(1) of the CCK reads: "Whoever, by force or threat of immediate use of force, obstructs an official person in performing official duties falling within the scope of his or her authorisations or, using the same means, compels him or her to perform official duties shall be punished by imprisonment of three months to three years". Article 316(3) of the CCK reads: "When the offence provided for in paragraph 1 or 2 of the present article is committed against an official person performing his or her duties of maintaining public security, the security of Kosovo or public order or apprehending a perpetrator of a criminal offence or guarding a person deprived of liberty, the perpetrator shall be punished by imprisonment of three months to five years".

with imprisonment of 3 months to 3 years. This provision covers the situations in which there is evidence of individual specific actions of obstruction performed by the perpetrator. *Participation in a Group Obstructing Official Persons in Performing Official Duties* (Article 318.1 CCK)²¹ consists in participating in a common action of a group to obstruct or attempt to obstruct an official person in performing official duties or to force him/her to execute official duties and is punishable with fine or imprisonment of up to 3 years. This provision covers the situations in which there is evidence that the perpetrator was in the group and took part in the common actions, but it is not possible to establish the specific individual actions of obstruction committed by him/her. The rationale behind this lesser punishment for actions aimed to produce the same result in violation of the same protected value lies in the fact that the gravity of the offense is lower when [it] is not proven that specific acts against public authority were committed by the perpetrator. The appellate panel finds that these provisions are in a relation of ideal concurrence in the modality of implicit subsidiarity. The lesser offense is subsidiary to the situations in which the greater offense is not established. [...] Therefore[,] the appellate panel is of the opinion that the punishment for both criminal offenses, as decided by the appellate panel, would not be admissible because they are not in a relation of real concurrence.

8. Contrary to the view of the majority of the Panel, I see no compelling reason to categorically exclude the test applied by the Kosovo Court of Appeals.

9. First, reading the judgment in its entirety, it becomes clear that the Court of Appeals relied on the provision of the CCK which governs the so-called concurrence of criminal offences (*concursum delictorum, concours de qualifications/d'infractions, concurso de leyes/delitos, concorso di reati, Konkurrenzen*), namely Article 71(1) CCK,²² now Article 76(1).²³ That the Kosovo Court of Appeals does not explicitly refer to the said provision in that part of its judgment,²⁴ or that the terms “ideal” and “real

²¹ Article 318(1) CCK reads: “Whoever participates in a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties or in a similar way forces him or her to execute official duties shall be punished for participation by a fine or by imprisonment of up to three years”.

²² Article 71(1) CCK reads: “If a perpetrator, *by one or more acts*, commits 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” (emphasis added).

²³ Article 76(1) is identical to Article 71(1) CCK (*see* Judgment, fn. 266). On the former Yugoslav criminal law, *see* Article 48 SFRY Criminal Code (1976) and Munda in Mezger, E. *et al.* (eds.), *Das ausländische Strafrecht der Gegenwart*, Berlin 1955, p. 399.

²⁴ However, the Court of Appeals addresses Article 71 CCK on p. 31 of its judgment in the context of the alleged erroneous determination of punishment.

concurrency” are not expressly mentioned in Article 71 CCK (or elsewhere in the CCK or the KCC), is of no significance.

10. Second, while it is true that neither Article 76 nor its predecessor, Article 80 of the 2012 KCC, are expressly incorporated into the Law, Article 44(4) of the Law requires the Panel to ensure that the “punishment imposed on persons adjudged guilty of crimes under Article 15(2) shall be in line with the punishments for those crimes set out in the Criminal Code of Kosovo 2012 [...]”. This provision can be interpreted to include not only the sentencing ranges of the offences set forth in the KCC (which have been incorporated and, therefore, are applicable by virtue of Article 15(2) of the Law), but also to allow for the application of such fundamental legal principles that are inextricably linked with the imposition of punishments (such as the concurrence of crimes) and which would apply in similar cases before the criminal courts in Kosovo.

11. Third, the fact that the “Parties have accepted that it is within the Panel’s discretion to take guidance from the cumulative convictions test applied by international tribunals”²⁵ or that they might have failed to “identify any other legal basis that would provide for a different test”²⁶ is irrelevant, since it is ultimately for the Panel to identify the correct legal standard (*iura novit curia*) and to apply this standard to the facts of a case.²⁷

12. Fourth, while it is true that each of the two offences concerned has a materially distinct element not contained in the other, this does not prove, without more, that

²⁵ Judgment, para. 167 referring to the so-called *Čelebići*- or *Blockburger*-test. See United States of America, [Blockburger Judgment](#); ICTY, [Čelebići Appeal Judgment](#), paras 412-413. Critical of the *Čelebići*-test, especially in international criminal law cases, Fernández-Pacheco Estrada in JICJ 15 (2017), pp 689-712. Another aspect to be considered in this context is that other international tribunals, such as the ICTY, ICTR, ICC and SCSL, adjudicating cases of offences against the administration of justice, do so on the basis of international legal instruments, and not on the basis of, or by reference to, domestic law.

²⁶ Judgment, para. 168.

²⁷ In any event, I note that the Gucati Defence did refer to the [M.I. et al. Appeal Judgment](#) and explicitly stated that “Article 401(2) KCC is the less serious offence and is subsidiary to situations on which the greater offence [*i.e.* Article 401(1)] is not established”. (F567 Gucati Final Trial Brief, para. 146). See also Judgment, fn. 268.

Article 401(2), compared to Article 401(1), “criminalises a different form of obstruction” and/or that the former offence cannot be subsidiary or inapplicable if the latter has been established.²⁸

13. After all, the question of whether the provisions concerned can be applied cumulatively²⁹ or whether only one of them is applicable³⁰ is a matter of interpretation, taking into account their structure and protected legal value. In this respect, the following can be noted.

14. Article 401(2) is neither an aggravated form of Article 401(1), nor its privileged form as the former does not include all constituent elements of the latter, plus an additional element that increases or reduces the wrongfulness of the conduct delineated in Article 401(1). Both offences do not stand in a relationship of *genus ad*

²⁸ See *contra* Judgment, para. 169. According to Stuckenberg, the “basic idea” of subsidiarity is that “one of two interfering offences operates as a residual clause – either by explicit enactment or by way of construction (‘tacit subsidiarity’) – in relation to another, usually because one offence describes a less intensive form [...] of the same type of criminal conduct, and is therefore assumed to apply only if the other offence does not” (cf. Stuckenberg in Stahn, C. (ed.), *The Law and Practice of the International Criminal Court*, Oxford 2015, pp 843-844). That these principles appear to be enshrined in the criminal law of Kosovo is not only evident from the above-referenced Kosovo Court of Appeals judgment, but also from the Commentary on the 2012 KCC (*Salihu et al.*, Article 80 of the 2012 KCC, mn. 1b)b), p. 276) that explicitly refers to the *lex primaria derogat legi subsidiariae* principle. For the theory of concurrence see e.g. Kosovo, [Medicus Supreme Court Judgment](#), paras 80-83; [R.R. et al. Appeal Judgment](#), paras 148-151; [J.D. et al. Appeal Judgment](#), p. 50, fn. 34 referring to “[i]deal or real, homogeneous or heterogeneous” concurrence.

²⁹ In the civil-law tradition, this situation of norm competition is traditionally known as “ideal” or “true concurrence” (*bashkimi ideal i veprave penale, concours de qualifications/concours idéal d’infractions, concurso ideal, concorso ideale/formale di reati, Idealkonkurrenz*), or, if the offences were violated by several acts, as “real concurrence” (*bashkimi real i veprave penale, concours réel d’infractions, concurso real, concorso materiale di reati, Realkonkurrenz*). For further details see Stuckenberg in Stahn, C. (ed.), *ibid.*, pp 844-845.

³⁰ If one act which violates several criminal provisions at once but results in only one conviction, because only one provision will be applied and not all, this type is known as “apparent” or “false concurrence” (*bashkimi fiktiv ideal i veprave penale, concours apparent d’infractions, concurso aparente de leyes, concorso aparente di norme, Gesetzeskonkurrenz/-einheit*) in Continental European doctrine (Stuckenberg in Stahn, C. (ed.), *ibid.*, pp 843-844). If separate acts violate different provisions of criminal law, considerations similar to “false concurrence” situations may apply; in some legal orders these are known as “*actos anteriores/posteriores impunes/copenados*” or “*mitbestrafte Vortat/Nachtat*” (Stuckenberg in Stahn, C. (ed.), *ibid.*, p. 845).

speciem or logical inclusion³¹ (*marrëdhënia e specialitetit, merger of offences/unilateral speciality, especialidad, specialità, Spezialität, lex specialis derogat legi generali*).

15. The fact that Article 401(2) and Article 401(1) protect the same legal interest, namely the unhindered performance of official duties and, as a “corollary” of such protection, the official person him- or herself,³² and that the former has a lower sentencing range than the latter could argue in favour of an “apparent” or “false” concurrence in the form of (implicit) subsidiarity (*marrëdhënia e supsiaritetit, subsidiariedad, sussidiarietà, Subsidiarität, lex primaria derogat legi subsidiariae*). On the other hand, the Kosovo Court of Appeals’ consideration that Article 401(2) is the “lesser offence” *vis-à-vis* Article 401(1) is not convincing. This is because the risks emanating from the “common action” of a group may be indeed as high as or, in many cases, even higher for the protected legal interest than those emanating from an individual obstruction.³³

16. Moreover, there is in fact a substantial difference if an accused has only obstructed official persons in performing official duties under Article 401(1), or if he or she has also been part of a group of persons that by common action engages in obstruction. A perpetrator who, by using force or serious threat, individually obstructs and, through the same conduct, partakes in the “common action” of a group, commits an additional criminal wrong that must be adequately reflected in the conviction. To disregard the perpetrator’s involvement in the activity of the group is not justified. It would privilege him or her over the offender who solely commits the crime of obstruction by him- or herself.

17. Conversely, in the case that an accused merely participates in the common action of a group of persons by other means than force or serious threat, the lower range of

³¹ For these two terms see Stuckenberg in Stahn, C. (ed.), *ibid.*, p. 843.

³² *Salihu et al.*, Article 409 of the 2012 KCC, mn. 2, pp 1164-1165.

³³ See also Kosovo, [R.R. et al. Appeal Judgment](#), para. 138 stating that “the reason to have an autonomous criminal offence [in Article 318(1) CCK] was to make sure, to facilitate, the protection of the juridical value, given that a group has a different dynamics by itself, which increases the dangerousness”.

punishment in Article 401(2), compared to Article 401(1), namely a fine (instead of a minimum term of imprisonment of three (3) months) or imprisonment of up to three (3) years, seems appropriate.

18. Since tacit subsidiarity does not arise for other reasons either,³⁴ I come to the same conclusion as my colleagues, however, through a different avenue of reasoning, *i.e.* by relying on the interpretation of the KCC rather than a test borrowed from international case-law. The conviction of the two Accused for the offence of obstructing official persons in performing official duties by participating in a group pursuant to Article 401(2) in addition to the offence of obstructing official persons in performing official duties by serious threat under Article 401(1) in Counts 1 and 2 of the Indictment can thus stand.

C. IMPACT ON THE JUDGMENT

19. Finally, even if the Accused had not been convicted of obstructing official persons in performing officials duties by participating in a group (in the case of Mr Gucati as a leader of the group pursuant Article 401(3)), I am convinced that this would not have had any impact on the sentencing in view of the fact that the “single” sentence imposed under Rule 163(4) of the Rules is rather moderate compared to the number of offences the Accused committed.



Judge Christoph Barthe

Wednesday, 18 May 2022

At The Hague, the Netherlands

³⁴ For example, if one of the two offences criminalises only a “transitory stage” of the other (*Durchgangsdelikt*), or if one offence requires the actual violation of the protected legal value (*Verletzungsdelikt*), whereas for the other it suffices that the offender merely causes danger to the same protected legal value (*Gefährdungsdelikt*).