

Summary of Trial Judgment in
Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj (KSC-BC-2020-07)

Please find below the summary of the Trial Judgment delivered by Trial Panel II, as read out by the Presiding Judge.

TRIAL PANEL II is sitting today to pronounce the Trial Judgment in the case of the *Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj*. This Judgment is pronounced in public, in the name of the people of Kosovo, and in the presence of the Accused.

I will now read a summary of the central findings of the Panel. This summary is not part of the Trial Judgment, nor is it authoritative. The written Judgment is the only authoritative account of the Panel's findings. Confidential copies of that judgment will be made available to the Parties, and a public redacted version will be made available to the public, following this hearing.

This case concerns the acts and conduct of the Accused **Hysni Gucati** and **Nasim Haradinaj** between 7 and 25 September 2020.

This case is important, because it reflects the very reason why the Specialist Chambers was created. This case concerns the proper administration of justice, the integrity and security of proceedings and, crucially, the safety, well-being and freedom from fear of hundreds of persons who have come forward to fulfil their civic duty as witnesses. Their protection from intimidation and harm lies at the very foundation of any system of criminal justice, be that domestic or international. Without witnesses, there can be no justice for victims or for society at large. The acts and conduct of the Accused challenged that very foundation.

The Events at Issue

The facts of this case can be summarised as follows.

On three days – 7 September, 16 September and 22 September 2020 – unknown persons delivered three sets of documents (“Three Sets”) to the premises of the Kosovo Liberation Army War Veterans’ Association (“KLA WVA”) in Prishtinë/Priština.

The documents related to the work and investigations of the Special Investigative Task Force (“SITF”) and the Specialist Prosecutor’s Office (“SPO”). After each delivery, the Accused called and hosted a press conference at which they discussed, and made available to journalists, the material that had been delivered to them (“Three Press Conferences”). In addition, the Accused also participated in over twenty media interviews, together, alone or in the presence of others, where they discussed, read from or described the contents of the Three Sets. They also re-published articles on social media regarding the Three Sets and made disparaging and insulting remarks regarding witnesses and potential witnesses whose names appeared in those documents.

A Single Judge of the Specialist Chambers, and the SPO, issued orders in an effort to stop the multiplication and dissemination of documents. Despite these orders, the Accused continued to make available to journalists the information contained in the Three Sets.

At trial, the Accused did not dispute that they had participated in the Three Press Conferences, and in the associated media appearances. Nor did they dispute that they had been in possession of the Three Sets and made available to the media much of the information contained in those sets. They claimed, instead, to have acted out of concern for the interest of the public and to have been entrapped by the SPO to undertake their actions.

The Charges

As a result, the Specialist Prosecutor charged the Accused with six counts of violations of the Kosovo Criminal Code (“KCC”):

- Counts 1 and 2, obstructing official persons in performing official duties, under Article 401 of the KCC;
- Count 3, intimidation during criminal proceedings, under Article 387 of the KCC;
- Count 4, retaliation, under Article 388 of the KCC; and
- Counts 5 and 6, violating the secrecy of proceedings, under Article 392 of the KCC.

The Specialist Prosecutor alleged that the Accused were individually criminally responsible for the offences through: commission, alone and/or in co-perpetration; attempt; agreement to commit; assistance; and incitement.

The law applicable to these offences and modes of liability is set out in detail in the Judgment.

The Panel’s Findings on the Three Sets and the corresponding Batches

The Panel is satisfied that the SPO seized from the KLA WVA, on three occasions, remnants of the Three Sets, which correspond to what the SPO described as Batches 1, 2 and 3. The SPO also received from a media outlet a Fourth Set, taken by a journalist at the first press conference on 7 September 2020. This corresponds to Batch 4.

The Batches contained a variety of sensitive information, including: requests for assistance addressed by the SITF to the competent Serbian authorities (“SITF Requests”), which contained the names and personal details of hundreds of witnesses; responses from the Serbian War Crimes Prosecution Office to the SITF Requests (“WCPO Responses”); and an internal SPO work product, analysing

evidence and related legal considerations in relation to five SPO suspects, which also contained the names of 150 witnesses and potential witnesses.

The Panel is satisfied that the material in question was authentic and belonged to the records of SITF or SPO investigations. The Panel is further satisfied that the material was treated as confidential by the SITF and the SPO.

The Panel's Findings on the Counts

The Panel will now summarise its findings on the counts. The Panel will address first whether the Accused are guilty of violating the secrecy of proceedings under Counts 5 and 6, then the allegations of intimidation and retaliation under Counts 3 and 4 and, lastly, the allegations of obstructing official persons in performing official duties under Counts 1 and 2.

Counts 5 and 6

I therefore turn now to **Count 5**, which concerns the offence set out in Article 392(1) of the KCC. That is the offence of revealing, without authorisation, "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".

The Panel is satisfied that the SITF/SPO is an authority competent to declare its records secret, within the meaning of Article 392(1) of the KCC. The Panel is also satisfied that the SITF Requests and WCPO Responses contained in Batches 1, 2 and 4, and the documents in Batch 3 qualify as information that has been declared secret by a competent authority.

The same material also qualifies, by virtue of Article 62 of the Law, as information which must not be revealed according to the law.

I will refer to these documents as "Protected Information".

The Panel is satisfied that the Accused revealed the Protected Information within the meaning of Article 392(1) of the KCC by: displaying the documents and allowing those present at the Three Press Conferences to inspect them; showing the documents to reporters; inviting or allowing those with cameras to film or photograph the documents; inviting or allowing those present to take documents with them; and introducing, describing or referring to the content of the documents during the Three Press Conferences and other media appearances. The Panel also finds that, for the purposes of this offence, journalists are members of the public.

The Panel is satisfied that the Accused acted with direct intent in revealing the Protected Information. This is apparent in particular from: their actions; their vows to continue to publish any documents received, stating that it was their duty to do so; their repeated encouragement of journalists to publish the documents; and their indications that more deliveries of such documents were welcome.

The Panel therefore finds that the SPO has established beyond reasonable doubt the offence under Count 5 in relation to both Accused.

Count 6 concerns both a basic and an aggravated offence. The basic form is the offence of revealing “information on the identity or personal data of a person under protection in the criminal proceedings or in a special program of protection” under Article 392(2) of the KCC. The aggravated form under Article 392(3) of the KCC applies when “serious consequences” result from revealing the identity of protected persons or when criminal proceedings are made impossible or severely hindered.

The Panel is satisfied that the witnesses and potential witnesses whose names and personal data were contained in the Protected Information qualify as persons “under protection in criminal proceedings” within the meaning of Article 392(2) of the KCC. The Panel notes that the SITF/SPO did not publicly disclose the names of these witnesses and potential witnesses in the framework of its investigations.

The Panel finds that the Accused revealed the identities and/or personal data of witnesses and potential witnesses under SITF/SPO protection in the same manner as they revealed Protected Information. In addition, the Accused pointed at the presence in the Three Sets of names, past and present residences, phone numbers, ethnicities, interview locations and contents of statements of witnesses. They also invited journalists to acquaint themselves with this information. Additionally, Mr Haradinaj named at least five witnesses or potential witnesses.

The Panel is further satisfied that the Accused acted with direct intent in revealing the names and personal data of witnesses and potential witnesses.

The conduct of the Accused resulted in “serious consequences” within the meaning of Article 392(3) of the KCC for two witnesses who were relocated, for witnesses who were subject to emergency risk planning and for at least one person who was publicly named as a witness. Both Accused were aware that such consequences could occur as a result of their actions and they acceded to that occurrence.

The Panel is however not satisfied that the Accused’s conduct made impossible, or severely hindered, SPO investigations.

The Panel therefore finds that the SPO has established beyond reasonable doubt the basic form of the offence under Count 6, and the aggravated form only as regards “serious consequences”, in relation to both Accused.

Counts 3 and 4

Count 3 concerns the offence of intimidation. Under Article 387 of the KCC, “whoever uses force or serious threat, or any other means of compulsion, a promise of a gift or any other form of benefit to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings” is guilty of that offence.

The Panel found that the Accused revealed the identity and/or personal data of hundreds of witnesses and potential witnesses contained in the Protected Information. In their public appearances, the Accused also drew attention to the large number of witnesses they identified in the documents and they publicly and repeatedly pointed at the presence of such names therein.

Approximately 70-80% of the Three Sets was disseminated in an indiscriminate manner and without meaningful precaution. The aim was to reach a large public. And the Accused left to chance where and in whose hands the revealed information would end up.

Moreover, the Accused expressly stated that the public, including any witnesses, now knew that others knew who they were. The Accused made repeated statements to the effect that this court was unable to guarantee the privacy and security of its witnesses, thereby further emphasising their vulnerability. And the Accused used the collective platform of the KLA WVA and their official functions within that organisation to carry out their deeds.

Furthermore, the Accused publicly questioned the veracity of the information provided by witnesses, calling them "liars" and claiming without any credible basis that they provided evidence to get benefits, or because they were coerced. The Accused also referred to witnesses and potential witnesses using derogatory and threatening language, calling them "traitors", "spies", "collaborators" and "Albanian-speakers", echoing a well-known rhetoric, which was intended to arouse hostility towards those who chose to cooperate with the SPO.

The message of the Accused to these witnesses was: now that everyone knows 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".

These acts and statements took place in a climate of witness intimidation. The Panel is aware that insidious forms of witness intimidation have repeatedly deprived victims of the truth concerning crimes committed against them, and have seriously impeded efforts at reconciliation in post-conflict societies. The authorities in Kosovo, and at the ICTY, have for years struggled to deal with a climate of witness intimidation that has severely affected investigations and prosecutions of crimes that took place in Kosovo. The Accused knew this full well.

The Panel finds that a serious threat stemmed from the Accused's acts and statements, which would have created serious fears and concerns for many witnesses or potential witnesses.

The Panel is further satisfied that the Accused used this serious threat with the direct intent to make witnesses and potential witnesses fearful and therefore hesitant to provide information in investigations concerning ex-KLA members. The Accused's conduct was a means to an end: to prevent the SPO from effective investigations and prosecutions of ex-KLA members. Simply put: without witnesses, there would be no trials; and without trials, there would be no convictions of those who were described by one of the Accused as "Kosovo's sons".

The Panel finds that the SPO has established beyond reasonable doubt the offence under Count 3 in relation to both Accused.

Count 4 pertains to the offence of retaliation. "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" is guilty of an offence under Article 388(1) of the KCC.

The Panel has found under Count 3 that the acts and statements of the Accused amounted to a serious threat. The same finding is relevant for the purpose of Count 4.

The acts and statements of the Accused amounted to “action harmful to any person” within the meaning of Article 388(1) of the KCC.

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 held this belief. The Panel notes, however, that the SPO adduced no evidence to contradict such statements. This in no way raises questions about the credibility of witnesses or potential witnesses whose names appeared in the Protected Information. Nonetheless, under Article 388(1) of the KCC, it is the SPO’s burden to show that the Accused were aware that the information of the witnesses was, at least to a certain extent, truthful. The SPO failed to establish that the Accused had such an awareness.

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 by them. The Panel therefore finds that the SPO has failed to establish beyond reasonable doubt the offence under Count 4 in relation to either Accused.

Counts 1 and 2

Count 1 concerns the offence of obstructing official persons by force or serious threat: “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” is guilty of an offence under Article 401(1) KCC. This is the basic form of this offence. An aggravated form of this offence applies where the basic form is committed against particular categories of persons, including “a judge, a prosecutor, [or] an official of a court”.

The Panel found under Count 3 that the acts and statements of the Accused amounted to a serious threat. The same finding is relevant for the purpose of Count 1. 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.

The Panel reiterates that the performance of official duties within the SC and SPO are critically dependent on the willingness and ability of witnesses to come forward and give their evidence freely.

The Panel has established that the Accused's conduct resulted in serious consequences for a number of witnesses or potential witnesses, but received no evidence that any of these persons or any other witnesses were in fact induced by the conduct of the Accused to no longer give evidence to the SC/SPO. The SPO has also not demonstrated any concrete and actual impediment to its investigations that could be imputed to the conduct of the Accused. 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 functions.

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 their official duties.

The Panel nonetheless recalls that the offence under Article 401(1) of the KCC can also be committed if obstruction is attempted but not completed. Having found that the acts and statements of the Accused amounted to a serious threat, the Panel finds that the Accused attempted to obstruct SC/SPO Officials in performing their official duties.

The Panel is satisfied that the Accused did so with direct intent. This is apparent from the claims by the Accused that it was their duty to reveal the Protected Information, in order to expose how, in their words, "scandalous", "shameful" and "unacceptable" the SC/SPO was for "collaborating" with Serbian authorities and unreliable witnesses, and for not protecting such witnesses. In performing what the Accused described as their "duty" to reveal the Protected Information, the Accused also professed that the collapse of the SC/SPO was inevitable. Both Accused made clear their intentions to disobey orders of the SC/SPO. Moreover, both Accused expressly declared that they wanted to stop or damage the SC/SPO proceedings, so that what they described as a "worthless" and "biased" court does not prosecute "Kosovo's sons".

The Panel finds that the Accused's acts and statements clearly reflect a desire to obstruct the collection of witness evidence by SPO investigators and prosecutors, which qualifies as an aggravated form of the offence.

The Panel therefore finds that the SPO has established beyond reasonable doubt the basic and aggravated form of the offence under Count 1 in relation to both Accused.

Count 2 concerns the offence of obstructing official persons by common action of a group. "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" is guilty of an offence under Article 401(2) of the KCC. Count 2 also encompasses the same aggravated form as under Count 1 and another aggravated form, which applies when a "leader or organizer of the group" commits the offence.

The Panel is satisfied that the Accused did not act alone in revealing Protected Information.

The evidence establishes that Mr Gucati, Mr Haradinaj and Mr Faton Klinaku acted as a group: dividing among themselves the tasks 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 about the revelation of Protected Information and the obstruction of the SC/SPO.

As established under Count 1, the Accused acted with direct intent to obstruct SC/SPO officials in performing their functions. The Panel considers that this finding also applies to Count 2, and finds that the Accused acted in a group with direct intent to obstruct, by common action, SC/SPO Officials in performing their functions.

The Panel is satisfied that Mr Gucati's authority as Chairman of the KLA WVA was relied upon as part of the efforts by the Accused and Mr Klinaku to reveal Protected Information and obstruct SC/SPO Officials in performing their functions. For these reasons, the Panel is satisfied that Mr Gucati acted as the leader of the group.

Mr Haradinaj acted under the authority of Mr Gucati, and had a significant role as a member of the group. The Panel is not satisfied that he acted as its leader or organiser.

The Panel therefore finds that the SPO has established beyond reasonable doubt the offence in Article 401(2) and (5) in relation to both Accused. The Panel also finds that the SPO has established beyond reasonable doubt the aggravated form of the offence in Article 401(3) of the KCC in relation to Mr Gucati.

Modes of liability

Turning to the question of the nature of the Accused's participation in these offences, 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. The Panel also finds that Mr Gucati and Mr Haradinaj individually perpetrated the offence under Count 2.

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.

Defences

I turn now to arguments raised by the Accused to justify their actions. As regards public interest, the Panel 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, or that the Accused's actions were justified by the pursuit of a claimed public interest.

The Panel further finds that neither Accused can be regarded as a whistle-blower and that their conduct falls outside the protection guaranteed to such persons under the European Convention on Human Rights and the law of Kosovo, including the Constitution of Kosovo.

Turning to the claim of entrapment, the Panel finds that the Defence was afforded a full and fair opportunity to put forward this claim based on the standards laid down by the European Court of Human Rights to which the Panel closely adhered. The Panel further finds that neither the Accused's contemporaneous statements nor their evidence at trial indicates an objective basis to believe that the Accused had been entrapped. The Panel has carefully assessed the propositions put forward by the Gucati Defence as circumstantial evidence of entrapment and finds that they do not provide a reasonable basis for an inference of entrapment. The Panel finds that the entrapment claim is wholly improbable and unfounded.

As regards mistake of law, the Panel is satisfied that during the Indictment Period the Accused knew that their conduct was prohibited and that, in any event, there were no justifiable reasons not to know that it was prohibited.

The Panel therefore finds that the Accused's criminal responsibility cannot be excluded by considerations of public interest, a claim of entrapment or a defence of mistake of law.

The Panel also finds that the Accused's criminal responsibility cannot be excluded by the defences of extreme necessity, mistake of fact and acts of minor significance.

Sentencing

I turn now to sentencing. The Accused are responsible for grave offences which imperil the proper administration of justice.

Despite the issuance of orders by the Single Judge and the SPO, the Accused continued to disseminate on a wide scale Protected Information, including the names of hundreds of protected witnesses, using organised press conferences and other media appearances. They did so repeatedly and enthusiastically, and they vowed to do so again. The Accused treated those who chose to cooperate with this court in its search for the truth with contempt and insults, and spoke in terms that could only have been intended to persuade them not to provide any further information to the SPO, nor to

testify in any future trial. The conduct of the Accused affected a large number of people and caused fear and concern among some of them.

The Accused showed no concern for the consequences or possible consequences of their actions. They acted brazenly, openly, indiscriminately and without regard for the rule of law or the authority of this court.

This judgment clearly paints those acts for what they are: criminal and not patriotic; a threat to justice and not the pursuit of any public interest.

The Panel finds that there are no further aggravating factors as regards the Accused's contribution to these grave offences.

The Panel considers as mitigating factors both Accused's family and/or health situation, and for Mr Gucati, his community work.

This completes the summary of the Panel's findings.

I shall now read out the disposition.

Disposition

Mr Hysni Gucati, please stand.

In the name of the people of Kosovo, for the reasons set out in the Judgment and summarised above, and 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 you, 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, 392(2) and (3) of the KCC.

The Panel finds you **NOT GUILTY** of Count 4, Retaliation.

You are hereby sentenced by this Panel to a single sentence of **four and a half 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.

Mr Gucati, you may be seated.

Mr Nasim Haradinaj, please stand.

In the name of the people of Kosovo, for the reasons set out in the Judgment and summarised above, and 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 you, 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, 392(2) and (3) of the KCC.

The Panel finds you **NOT GUILTY** of Count 4, Retaliation.

You are hereby sentenced by this Panel to a single sentence of **four and a half 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.

Mr Haradinaj, you may be seated.

The Registry shall now distribute the Trial Judgment in electronic form and provide certified copies of the English version to the Accused. The Albanian version shall be served on the Accused once it is ready.

The court stands adjourned.