Wednesday, 16 March 2022

[Open session]

[Closing Statements]

[The accused entered court]

--- Upon commencing at 9.30 a.m.

PRESIDING JUDGE SMITH: Good morning, everyone.

Will the Court Officer please call the case.

THE COURT OFFICER: Good morning, Your Honours. This is KSC-BC-2020-07, The Specialist Prosecutor versus Hysni Gucati and Nasim Haradinaj.

PRESIDING JUDGE SMITH: Thank you.

The appearances, Ms. Bolici.

MS. BOLICI: The same composition for the SPO, Your Honour. We have no legal intern joining us today. Thank you.

PRESIDING JUDGE SMITH: Thank you.

Mr. Rees.

MR. REES: No change, Your Honour.

PRESIDING JUDGE SMITH: Thank you.

Mr. Cadman.

MR. CADMAN: Just one change, Your Honour. Ms. Bernabeau is not with us today.

PRESIDING JUDGE SMITH: Thank you.

I also note that Mr. Gucati and Mr. Haradinaj are present in the courtroom.

Today we will continue with the closing statements.

Before I give the floor to Mr. Rees, I just want to inquire with Mr. Cadman. Do you have an estimate of how long your closing statement will be? I'm not trying to limit you. I just want to give a heads-up to everybody.

MR. CADMAN: I believe we can deal with it in one session. Certainly, I don't expect -- if we go to the first break with Mr. Rees, and then I'm sure I can finish within the second session.

PRESIDING JUDGE SMITH: Thank you. Thank you very much. Thank you for the efficiency.

Well, Ms. Bolici, in case the Defence finishes that early, do you want to start your responses immediately, or do you prefer to wait until tomorrow morning?

MS. BOLICI: Your Honour, we were planning to address the Court according to the schedule set by the Trial Panel. But if the Trial Panel's preference is that we provide our responses today, we will be ready to do so.

PRESIDING JUDGE SMITH: Thank you very much.

I would suggest be prepared for that.

One more question for the Defence. Do you have any objection to the Panel asking questions of both counsel at once? In other words, letting you finish and both of you be eligible for the questions rather than us taking you one by one?

MR. REES: No, I have no objection.

PRESIDING JUDGE SMITH: Some questions are going to apply to both of you, obviously, and some will not.

MR. REES: I have no objection to that.

PRESIDING JUDGE SMITH: Mr. Cadman, do you agree?

MR. CADMAN: I have no objection.

PRESIDING JUDGE SMITH: All right, Mr. Rees. You may continue.

MR. REES: Your Honours, I'll turn to the counts now. And, of course, I'm conscious that in our final trial brief we have made some detailed submissions about the counts and the elements of them, and I do not intend to rehearse what is in the final trial brief. There will be parts of the content of the brief that I obviously will touch upon, perhaps to elucidate or to add to. But if I don't touch on any parts, obviously I ask the Trial Panel to give full consideration to the trial brief as a whole.

Count 3, then, is an offence under Article 387. The title of the offence is intimidation, although it is noticeable that intimidation does not itself appear in the offence itself under Article 387. It's not an element of the offence and, indeed, not necessary in a general sense either because the offence under Article 387 can be committed through the use of a promise of a gift, for example.

So intimidation itself, and references to intimidating effects, are neither sufficient as a consequence or, indeed, as an intention, because the offence is set out in Article 387, it's 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, and so on.

We say there are two key elements to the offence. The first is

that a person is induced to refrain from making a statement or making a false statement or to otherwise fail to state true information. That's the target. And the second key element is that it relates to -- the statement refrained from being made or the false statement made or the information failed to be stated relates to the obstruction of criminal proceedings which, itself, is a separate offence, contrary to Article 386 of the Kosovan criminal code 2019.

Both the offence under Article 386 and the offence contrary to 387 can be committed through force or threat or other means of compulsion or, indeed, bribery, promise of a gift, or benefit. Like Article 387, the offence under Article 386 covers acts of intimidation of witnesses, if you want to call it that, including, indeed, acts of intimidation of witnesses which result in bodily injury.

Both the offences contrary to Article 386 and 387 require proof of consequence; namely, that a person is introduced to refrain from giving a statement or to make a false statement or to otherwise fail to state information to the police.

The distinction, we say, between the two offences is that, unlike Article 386, an offence is only committed under Article 387 where a person is induced to refrain from giving a statement or to make a false statement or to otherwise fail to state the information to the police, in relation to an offence under Article 386, the antecedent offence.

That doesn't create any sort of lacuna or failure of the law to

cover acts of witness intimidation. They're covered by the offence under Article 386 in all investigations or prosecutions, rather. But the Article 387 offence, with the higher maximum, relates to those more serious cases where there is obstruction in relation to an investigation into obstruction.

And that was a -- charging under Article 386 was open to the Prosecution to do in this case, and it's no part of the trial process, no part of the role of the Trial Panel, to, if you like, correct any errors if they are perceived to be errors that are made in charging decisions by the Prosecution. And the fact, as Mr. Halling says, that the Prosecution can point to two first-instance decisions in which convictions were entered under Article 387 without an antecedent offence under Article 386, I'm afraid is neither here nor there. They're two first-instance decisions. The points are not argued. They are neither binding nor are they persuasive.

Can I make some additional remarks in relation to the intention that's required. The offence under Article 387 is an offence of specific intent, we say. Eventual intent under Article 21(3) of the Kosovan criminal code 2019 will not do. It's a specific intent offence which requires the deliberate use, in this case, of force or serious threat, with the specific purpose being to induce another to refrain from making a statement or to make a false statement or to fail to state true information to the police.

And obviously the best evidence of intention are the words and

deeds of a person. There is no evidence in this case that a single person was subjected to the use of force or received a direct threat, and I made submissions about that yesterday, which I won't repeat. The only alleged comment from Mr. Gucati, and he's made no admission, never made any admission, about an intention to deliberately use force or serious threat with the specific purpose to induce another to refrain from making a statement or to make a false statement or to fail to state true information to the police. The only alleged comment from Mr. Gucati that the SPO in their final trial brief identifies as a possible, as they put it, intimidating comment about and/or threat in relation to a witness, which is identified at footnote 586 to paragraph 197 of the Prosecution final trial brief, that comment, in fact, does not come close to proving beyond reasonable doubt a specific intent on Mr. Gucati's part.

That comment is, Madam Court Officer, at P9-ET, page 8 of 14.

At lines 22 to 29, we see the newscaster, the journalist, in the middle of a discussion with Mr. Gucati, say the words:

"Because here ... because there are names ... the names may then come out, and many other things could happen?"

Mr. Gucati says:

"Could happen ..."

Although you may recall from the footage itself that, although the transcript neatly breaks it down into sequence question answer, question answer, of course, at the time both parties are talking over each other.

And the newscaster says:

"Who is going to be -- to take responsibility?"

Mr. Gucati says:

"We ... names ... we didn't put them out there, those were leaked, where from? ... we don't know - but this material was brought to the KLA WVA. We didn't do anything, we don't work at the Special Court."

Even on its terms, as the Prosecution put it, an acknowledgement that things could happen does not come close to evidence of a specific intent on Mr. Gucati's part. And, indeed, of course, it was an exchange that took place in the context, as we have seen, of Mr. Gucati repeatedly saying the witness names, private person names should not be made public. And you will recall his explanation in evidence that the presenter and he were talking over each other at that point, not entirely clear to him what was being said. He doesn't recall it. He certainly did not have anything sinister in mind. What he wanted to raise was the question about his concern, how the documents came to the office, why they were delivered to the office, who leaked them. He never wanted anybody to come to any harm, something else that he has said repeatedly.

Mr. Gucati's stated intent has always been to expose the degree of cooperation that exists between the Specialist Prosecutor's Office and Serbia. We went through that evidence yesterday. And, indeed, during the time of the indictment period, he specifically rejected any suggestion that his aim was to intimidate witnesses, as he

described it, an unfounded and cliche allegation. That's at P59-ET, for Your Honours' references.

Mr. Haradinaj, in the presence of Mr. Gucati, at P35-ET, the third press conference, stated:

[As read] "I want to reiterate that our aim is not to cover up crimes, if there are any crimes or to defend someone who is criminal."

And in his evidence, Mr. Gucati, at transcript page T2372, said:

[As read] "No, I never thought that I was threatening any single witness. I have never done that throughout my life. Hysni Gucati has never threatened anyone."

Contrary to what is suggested in the Prosecution final trial brief at paragraph 212, Mr. Gucati has never said or suggested that he wanted to punish those who spoke to the SITF and the SPO as enemies of Kosovo. He's never said that. There have been references to enemies of Kosovo, such as, as the SPO put it, notorious Serbian officials that have been named by the press as participants in the massacre of civilians in Kosovo, but those references are explained because those people are enemies of Kosovo, not because they are witnesses or because they have cooperated with the SPO.

Your Honour Judge Gaynor sought clarification from Mr. Gucati at transcript 2437, please.

At line 15, Your Honour asked:

"So does it follow from what you've said that a witness who collaborates with the SPO, which is collaborating with Serbia, is a

witness who is collaborating with the enemy? Is that how you see it?

"No. What I'm saying, Your Honour, is with reference to those who have been our own opponents and who are well known. I mentioned a name there."

And Your Honours will see in the back of the transcript that there had been earlier questions about a particular name.

"I have not extended this to every -- every other witness, ... I meant this particular witness. This particular witness whose name I mentioned ..."

That's in the evidence moments before, not during the indictment period.

"This particular witness whose name I mentioned, and I am always referring to these witnesses."

And Ms. Bolici had sought to address this topic also.

If we look at T2354, please.

At line 11 there -- so the context of this exchange was that Ms. Bolici had been asking about Exhibit P40, which was a recorded interview that Mr. Gucati gave, I think, in 2018, so well before the indictment period, where he made similar remarks about the enemy, as it were. Ms. Bolici asked this, and she's quoting from the transcript of -- at P40:

"'They've called some witnesses that I would call enemy, collaborators and some witnesses that have not been in Kosovo at all. This is why I believe this Court will fail.'"

That's a quote from Mr. Gucati from 2018.

"My question is," she asked at the bottom of the page, "are you stating, back in 2018, that the witnesses of the SPO and of this Court are enemies and collaborators?"

And Mr. Gucati's answer over the next page was:

"We all know that Serbia is our enemy and that you have collaborated with Serb criminals and some others that have been associated with them. This is true. I meant the enemies of our country, centuries-old enemies who have occupied us for over 100 years and that have perpetrated massacres in Kosovo."

And Ms. Bolici said at line 6:

"So is it correct, Mr. Gucati, that you are addressing people who provide evidence to this Court as enemies?"

And Mr. Gucati's answer is:

"The people who are real people, I wouldn't call them enemy. I call enemies even those who protested against NATO bombing Serbia. These are enemies. Those who protested in Kosovo in 1999 when NATO was launching its air strikes against Serbia, for me, they are enemies against my nation and my country."

The point that Mr. Gucati was making and has made throughout is that you can be an enemy of Kosovo who is a witness, and we have seen examples of that. It does not follow that every witness is an enemy.

As I stated earlier, intimidation or intimating effect, in any event, whether as a consequence or as an intention, is not sufficient.

Acknowledging, as Mr. Gucati did, at T2265, please, lines 12

to 14. Could we fit to screen, please. Well, I've made a mistake with the reference. But Your Honours will recall the quote, because it's used -- or heavy reliance is placed on it by the SPO.

Acknowledging as Mr. Gucati did that:

[As read] "If a name was released by myself, by the presidency of the KLA WVA, of course, then we would have harmed in a way the witnesses."

Although, he went be on to say, well, we never did that.

But acknowledging that "we would have harmed in a way the witnesses" is not, in any event, sufficient. "Harmed in a way" meets no ingredient of Article 387 of the Kosovan criminal code 2019, and nor is it right to ignore what Mr. Gucati said in the very next breath:

[As read] "But we have not disclosed any such thing. Therefore, there is no reason for them to be harmed. This is what I'm telling you. This is strictly prohibited."

There must be an intent to induce, to refrain from making a statement or to make a false statement or to fail to state true information to the police.

There is no direct evidence of either a serious threat or any admission of a specific intent, and Rule 143 of the Kosovo Specialist Chambers rules applies to both serious threat and specific intent. In respect of circumstantial evidence, the rule says a standard of proof beyond reasonable doubt is only satisfied if the inference from that evidence is the only reasonable one that could be drawn from the

evidence presented. If the evidence allows for other reasonable conclusions to be drawn, the standard of proof beyond reasonable doubt is not satisfied.

In the Prosecution's own case, there is an alternative inference as to intent that they ask you to draw. That is, that the accused's actions were directed at those who had already provided a statement or information to investigators. We, of course, reject that as an alternative inference. But we say that another reasonable conclusion, another reasonable conclusion to be drawn as to his purpose was that it was, as he repeatedly stated, to expose the extent of cooperation between the SPO and Serbia.

As we have asserted in the final trial brief, we say that in relation to Count 3 a finding of acquittal should be entered in relation to each applicable mode of liability.

In relation to Count 4, retaliation, Article 388(1) again makes it clear that this is an offence of specific intent. The intent being to retaliate for providing truthful information. We submit that this is an offence which, again, requires consequence, proof of consequence, in this case, that some actual harm was caused. The words of the article being: Whoever takes any action harmful to any person, including interference with lawful employment or livelihood of any person, make it clear that the harm is not restricted to physical harm. It can include financial or economic harm, interference with lawful employment or livelihood, but it requires some actual harm to be caused. And we submit that there is, for the

reasons I went through yesterday, no admissible evidence that witnesses, as a matter of fact, were caused any actual harm. Indeed, no admissible evidence that they were, as a matter of fact, caused fear or lost confidence as asserted by the Prosecution's final trial brief at paragraph 222. And that is the highest that the Prosecution put harm, in any event.

In relation to the specific intent, the intent to retaliate against that person for providing truthful information, it follows that the intent required is an intention both to cause harm to retaliate against that person for providing truthful information. If the information provided was false or the perpetrator believes that the information provided was false, no offence is committed under Article 388(1), because the target is retaliation for providing truthful information, not false information or information that might or might not be true.

It is not enough that the defendant thought that information provided by a witness might have been true, as the Prosecution, at paragraph 225 of the final trial brief, say in relation to Mr. Gucati. And they put his intent no higher than that, that the information provided by a witness might have been true. Not sufficient because the offence is one of specific direct intent.

The Prosecution are required, at the very least, that to prove beyond reasonable doubt that the perpetrator believe that the information provided by the subject of retaliation was truthful. We say that there's the objective measure as well, the information

should be truthful. But in relation to intent, at the very least, to prove beyond reasonable doubt that the perpetrator believed that the information provided by the subject of retaliation was truthful.

And the Prosecution put Mr. Gucati's intent no higher than a belief that the witness might have been given true information because, of course, the overwhelming evidence is that Mr. Gucati is sceptical of allegations of criminal conduct during the war on the part of those defending Kosovo from attack.

He has said that he has no issue, of course, with the truth being told, and at paragraph 21 of Exhibit 1D3-ET, Mr. Gucati said this:

[As read] "I have no issue with a person telling the truth to the SPO. If a person had been mistreated by a member of the KLA and spoke to the SPO about it, I'd have no issue with that. However, if a person spoke to the SPO and gave a false account as part of an effort to get relocated by the SPO, I suspect this has happened, then I consider them a liar."

And, indeed, the offence under Article 388(1) is not concerned with any defendant who acts believing that the person has provided untruthful information.

Mr. Gucati has, as we saw yesterday, repeatedly asked for all crimes to be investigated. The suggestion by the SPO that assertions on the part of the Defence in relation to the public interest presuppose that the information itself was believed to be true misunderstand what it is the Defence say was true. And that

assertion is at paragraph 225 of the Prosecution final trial brief.

It's a misunderstanding as to what the Defence say was true. What the Defence say is true about the information is the extent and nature of cooperation between the SPO and Serbia, rather than the content, or otherwise, of any witness account.

We say again in relation to the offence under Count 4 that there's no direct evidence of harm being caused and no admission of specific intent on Mr. Gucati's part. And, accordingly, Rule 143 of the KSC rules applies again to both harm and specific intent. That is, in respect of circumstantial evidence, a standard of proof beyond reasonable doubt is only satisfied if the inference from that evidence is the only reasonable one that could be drawn from the evidence presented. If the evidence allows for other reasonable conclusions to be drawn, the standard of proof beyond reasonable doubt is not satisfied.

And I make the point again in passing that, indeed, the Prosecution's own case is that there is an alternative reasonable inference as to Mr. Gucati's intent; that is, that the accused's actions were directed at persuading some persons not to make a statement at all or provide information to investigators in the future.

We, of course, reject that as an inference; but we say, in any event, that there is another reasonable conclusion that can be drawn on the evidence, that the evidence allows to be drawn, and that is that his specific intention was, in fact, as he repeatedly stated.

He acted only to expose the extent of cooperation between Serbia and the SPO, that the SPO is, as he puts it, one-sided.

When considering both Counts 3 and 4 and the specific intents therein in particular, we ask the Trial Panel to bear in mind that what Mr. Gucati did and said, as the SPO acknowledge, he did in full view of the public. And, indeed, the full view of the gaze of the SPO. As the remarks from 2018 demonstrate, he had done exactly the same for some time without any suggestion that he'd committed offences of intimidation or retaliation then. The fact that he did what he did, that he said what he said, openly, and in full view of the public, and the SPO, and their gaze, undermines, we say, the suggestion that he had any such sinister intent.

Let me turn, then, to Count 1. And I am taking them in these orders, because I think this was the order that the SPO addressed them. This is the offence of obstructing official persons in performing official duties. We say that the aim of Article 401 is to protect official persons performing official duties against violent or threatening acts, and we draw support for that from the Court of Appeal decision in M.I. *et al* before the Kosovo Court of Appeals, reference PAKR 513/2013 at section 6.3.

Serious threat, in the context of Article 401, we say means serious threat of force in keeping with the aim of Article 401. It is consistent with the wording and the purpose of Article 401, as described by the Kosovo Court of Appeals in M.I. *et al*, that the offence requires the force or serious threat of force to be directed

against an official person. Indeed, the aggravated offence under Article 401(5) specifically requires the offence to be committed against an official person during the exercise of their official functions. Those words make it clear that, for the purposes of Article 401, the Prosecution has to prove that the use of force or serious threat was concurrent or simultaneous with the official action obstructed. The use of force or serious threat must be directed at the person when they are performing official duties.

And in the final trial brief, we provide -- there is support for that from the academic commentary, Salihu, under this 2014 commentary on the Kosovo criminal code.

The threat or use of force, as the article requires it to be concurrent or simultaneous with the official action obstructed, the threat must be of immediate use of force. And, again, we draw the Court's attention to paragraph 6.3, or section 6.3, I think it is, in support of that in the judgement of the Kosovo Court of Appeals in M.I. *et al*.

In the present case, no evidence has been adduced of the use of force or serious threat against an official person. The Trial Panel has not even heard of any complaint from an official person that they've been subjected to the use of force or have received a serious threat, whether if force, as we say, is required, or indeed of any other type of threat for that matter. No evidence was adduced that an attempt was made by the accused or anyone else to use force or serious threat against an official person or, indeed, any evidence of

incitement or agreement to do so.

In relation to the intent, the mental element required here is either a desire to obstruct an official person by the use of force or serious threat, we say of force, or awareness that an official person would be obstructed by the use of force or serious threat of force. An intention to obstruct the work of the SPO, as the SPO put it, in paragraph 193 of their final trial brief, that is not enough. That is not -- doesn't form any part of the ingredients of the offence under Article 401(1). An intention to obstruct the work of the SPO is not enough.

Nor, indeed, is there any admissible evidence of the work of the SPO actually being obstructed. What official duties have the SPO actually been unable to perform, as a result of Mr. Gucati's actions? This is not a case, for example, of the obstruction of a search or seizure. No evidence, for example, of an obstruction of an arrest.

We have heard about SPO officers exercising their duties but doing so without obstruction, in fact. And as I submitted yesterday, there is no evidence here of any specific investigation or prosecution even being adversely affected. The evidence of Mr. Jukic only demonstrates at its highest SPO witness handling officers performing their duties without obstruction. And as we submit in the final trial brief, a finding of acquittal should be entered in relation to Count 1 also.

Count 2 is the obstruction of an official person in performing their official duties by common action. It is the offence under

Article 401(2), and that common action clearly relates, we submit, to the use of force or serious threat that is referred to in Article 401(1).

As the SPO concede, peaceful and lawful activity falls outside the scope of this provision. There must be some boundary implied to demarcate peaceful and lawful means from non-peaceful and unlawful means. And that boundary, we say, it is perfectly obvious from Article 401, is the use of force or serious threat.

And for the reasons that we have just set out, and we set out in the final trial brief, there is no evidence of the offence under Article 401(1) being committed. Certainly no proof beyond reasonable doubt. And it follows that whatever role Mr. Gucati played with other colleagues at the KLA WVA, it cannot be that evidence insufficient for an offence under Article 401(1) becomes sufficient for an offence under Article 401(1)(ii) simply through the use of common action.

For the reasons that we set out in the final trial brief, a finding of acquittal should be entered in relation to Count 2 also.

That leaves Counts 5 and 6. Counts 5 and 6 are the offences of violating the secrecy of proceedings under Articles 392(1) and 392(2). Both require any revelation to be unauthorised. That is the nature of the offences under Article 392, revelation of material without authorisation.

If there was a legal basis for revealing that information, any information that is revealed, no offence would have been committed.

And we give an example of the case of necessity as the academic commentary on the Kosovo criminal code, Mr. Salihu *et al*, provides as an example.

Disclosure of confidential information that's in the public interest, that is where such interest outweighs the individual interest in non-disclosure is, and must be, a legal basis under, we say, Articles 22 and 40 of the constitution of the Republic of Kosovo. And I know that Your Honours have looked at those provisions, and I won't take Your Honours to them.

We refer to Article 204 of the Kosovo criminal code 2019 only because it sets out neatly therein the definition of the public interest which, of course, is a general definition and perfectly unobjectionable as the SPO, I think, accept; that is, the public interest lies where the welfare of the general public in making disclosure outweighs the individual interest in non-disclosure. Whereas, Article 200(4) specifies certain types of confidential information, the disclosure of which will be in the public interest per se, as Mr. Halling referred to on Monday, it doesn't delimit the scope. It does not provide any boundary on the scope of the public interest in making disclosure. They are examples where disclosure will be in the public interest per, se, but that article does not restrict public interest disclosures only to those cases.

The law cannot prohibit the revelation of information which it is in the public interest to disclose. It would be absurd if the reverse proposition were true. And, as I understand it, the SPO do

not suggest that the reverse proposition is true, that the law can prohibit the revelation of information which actually is in the public interest to disclose.

The words which must not be revealed according to law in Article 392(1), to the extent that they have any application in this case where Count 5 is specifically particularised as the revelation of secret information, and I'll turn to that in a moment, those words which must not be revealed, according to the law, if they have any application in this case, must be interpreted in a manner which acknowledges that the law cannot prohibit the revelation of information which it is in the public interest to disclose.

Likewise, we say, that the Prosecution must prove that any declaration by a court or competent authority that the information was secret, and we say those words do apply because of the way in which Count 5 is particularised, the Prosecution must prove that any such declaration was lawful. And it must follow, must it not, that a court or competent authority cannot lawfully declare secret information which it is, in fact, in the public interest to disclose.

It's that analysis that leads us to the position, we submit is the correct position, and we have submitted this from the outset, that we raise public interest not as a defence to any offence but we say that it is part and parcel of the Prosecution's obligation to prove, in Counts 5 and 6, that information was revealed without authorisation was unlawful, as it were. The Prosecution, accordingly, must prove beyond reasonable doubt that the disclosure,

any disclosure that they rely on, was not in the public interest.

Now, Your Honours at an earlier stage during, I think, the course of the Defence Preparation Conference at the beginning of December, 3 December 2021, acknowledged that an issue of public interest would be raised by otherwise -- what would otherwise appear to be lawful cooperation between Serbia and the SITF or the SPO, whether as evidence of improprieties that would affect the independence or impartiality or the integrity of the SITF/SPO's investigations. And that reflects, of course, the concern that Mr. Gucati's expressed, that other journalists have expressed, we saw this yesterday, that the SPO, because of its lack of power in -- outside Kosovo is beholden to Serbia, the state that aggressively waged the war in Kosovo between 1998 and 2000, which is very much the jurisdictional historical period and event that this Specialist Chambers is concerned with, it is, nevertheless, beholden to that aggressive party for any cooperation in Serbia, and that places the SPO and its evidence at an obvious risk of interference and manipulation at the hands of Serbia.

Your Honours' acknowledgement that evidence of improprieties that would affect the independence, impartiality, or integrity of the SITF/SPO investigations is an acknowledgement that that concern that Mr. Gucati has raised and journalists have raised is a legitimate concern but not one that we have been able to explore further during the course of this trial. And certainly the Prosecution cannot say that they have proved beyond reasonable doubt that the material in

Batches 1, 2, and 3 does not contain any evidence of impropriety that would affect the independence, impartiality, or integrity of the SITF/SPO's investigations because they have not put that evidence before Your Honours.

We have not been able to explore that, because we have not had full disclosure of the contents of those batches, and they haven't adduced the full content of those batches before Your Honours to demonstrate, to prove beyond reasonable doubt, that there is no such evidence of impropriety that would affect the independence, impartiality, or integrity of their investigations. They could only do so if Your Honours were able to show -- to see the content of any interactions. Not just the references to requests being made for assistance to Serbian officials, but actually to see the content of what they were being asked to do and, indeed, how they reacted in their responses and what they did and how they did it. That would be the only way for the Prosecution, in these circumstances, to demonstrate beyond reasonable doubt that there was nothing in those batches that would affect the independence, impartiality, or integrity of their investigations.

The review by Ms. Pumper involved identifying names. She did not consider the content of the documentation any further. She did not consider what actions those names may have undertaken in the context of cooperation between the Republic of Serbia and the SPO or how they may have affected the independence, impartiality, or integrity of the SPO's investigations. So her evidence does not

assist at all on this point.

We have referred to the law on classification of information and security clearances, Law number 3L178 dated 1 July 2010. And the point we make is that what is set out there in the law on classification of information and security clearances is simply only a reflection of what the constitution requires; namely, that all public authorities, and in particular courts as well, pay special attention to the essence of the right limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose to be achieved, and the view of the possibility of achieving the purpose with a lesser limitation when that right -- all such fundamental rights that are necessary to fulfil the interest of Kosovo as an open, democratic society are otherwise sought to be restricted.

So, for example, if any limitation was imposed on the right of -- to access or to otherwise reveal, once access had been granted, information, if any limitation on that was imposed to conceal unlawful conduct or an abuse of authority or inefficiency or administrative error or to prevent embarrassment to a person, to the SPO as an organisation, or to prevent or delay the release of information, which is not otherwise clearly related to security considerations, then the SPO, no doubt, would agree that that limitation was unlawful, whether the terms of the law on classification of information and security clearance, as Law number 3L178 applies, directly or not. They must surely agree that if they

had imposed any limitation on the scope of disclosure of information to conceal their own unlawful behaviour or abuse of authority or inefficiency or to prevent them being embarrassed or simply to delay the release of information, which is not clearly related to security, they would agree that that was unlawful.

And, again, in the absence of proof as to the contents of Batches 1, 2, and 3 in their full extent, and without the assistance of Ms. Pumper to give any further assistance on the content of the documentation, what actions it shows, for example, SPO officers undertaking, and, indeed, the responses received by Serbian officials, the Prosecution has not proved beyond reasonable doubt that any limitation that they seek was imposed was, in fact, lawful.

Ms. Pumper's review, in fact, was a cursory review. I don't mean that with any disrespect to her, because that was the limited scope of her instructions. She was not, in the first instance, asked to verify the authenticity of the documents she was provided with. And, of course, if the documents were not authentic, then there could be no suggestion of confidentiality attaching to them, because false documents cannot lawfully be confidential. She did, of course, as she went through the documents, ascertain their presence on the SPO database. So her evidence was that, *de facto*, there was an aspect of authenticity being confirmed. But when she was asked about when she'd completed that exercise, her answer was:

[As read] "I've not completed the review of authenticity to this date."

That was the date of being asked.

[As read] "I've not completed it, meaning I've not checked every single document whether it's authentic."

She did not consider, and the reference for the last answer is at T1069. Can we look, please, at transcript T1059.

We see the exchange there, beginning at line 8 onwards, that she did not, as part of her review, consider where she saw the word "confidential" marked on the document, whether there was any proper authority to classify that document as confidential. She couldn't assist on that. She did not consider whether the process of classification that might have led to a document being marked as confidential, whether that was lawful. And she did not consider whether the classification of confidentiality was necessary.

Now those matters, of course, ultimately, in the context of this case, at least, are matters for the Trial Panel. And I concede that where pages have been provided, you will be able to look at them and consider those questions for yourself. But, of course, Ms. Pumper was being asked about this because there are many, many pages, the Prosecution say, that we have not seen, and no one else is able to assist with those questions in relation to those unseen documents, those unseen pages, because Ms. Pumper could not because she didn't consider any of those matters. She didn't consider at any point whether the classification of confidentiality was necessary. And, of course, confidentiality should not be imposed where unnecessary. Nor did she consider whether there was any suggestion or with any

evidence that a classification was being used to conceal abuse of authority or whether it was lawful or just to hide the SPO's embarrassment, for example. And she didn't consider the duration or term of any classification of confidentiality, or whether any steps were taken to declassify or reclassify any information, either by the SPO or by the Court or by the SITF or by, indeed, Serbia.

She herself was not able to classify documents as confidential. That's at T1056, line 19.

So, Your Honour, I think there, at line 19, Your Honour pointed out to her -- to me, rather, that I might want to ask her if it was within her scope of authority to make a decision on what is or is not confidential. And we'll see, if we go to page T1058, she confirmed it wasn't within her scope of authority. So at line 8:

[As read] "... do you regard yourself as having the authority to classify documents as confidential or not?

"I do not."

So in relation to those documents that the Trial Panel hasn't seen, one can't rely on Ms. Pumper to have made any sort of assessment on confidentiality. It was not within the scope of her authority to do so and she didn't ask the questions that are necessary to that assessment in her review.

And interestingly, she said she didn't know who within the SPO did have the authority to make classifications of confidentiality. That's at T1070. And she said she was not aware of the process; that's at line 11 to 20. So at line 19:

[As read] "Can I ask about the process for classification of confidentiality within the SPO. Are there designated persons with the authority to make such classification?"

And she answered:

"I don't know ..."

She was not aware of the process before confidentiality was designated to any document. That's at T1071.

So over to the next page, please, at line 11. She was asked:

[As read] "You're not aware of whether there is a specific process through which an evaluation of necessity takes place before confidentiality is designated?"

And then down at line 19, her answer was:

"I'm not involved in this process and I'm not aware of it."

And then she'd never seen a document recording reasons for designation of another document as classified, and she acknowledged that not all the information within the batches could be confidential. And she did so by reference to an example, T1075, line 10. It may be a trite example, but it's a clear one. It demonstrates the point:

"... the address of the SITF, where it was based ..."

Sorry. Information contained within one of the documents she was saying was confidential, that was public knowledge. That information on the page, the address was not confidential, even though the document was. The contact e-mail for the SITF, again, publicly available knowledge. I believe so, yes. The web site

address of the SITF publicly available, I believe so, yes.

That information, of course, could not be confidential, wasn't confidential, even though contained within the batches.

She made no checks as to whether the public status of a witness or otherwise of any of the names contained within the documentation. No checks on that issue at all, Your Honours will recall at page T1321, she said.

And it cannot be the case that all documents that the SPO have are confidential and all the information contained within SPO documents is confidential and that there is no need to consider the detail of any document as claimed by the SPO as one of its documents. That cannot be the case because, of course, we went through yesterday, there is undoubtedly material that is confidential and not confidential within any document or batch of documents that may be described as confidential.

Indeed, we saw the distinctions that Mr. Berisha made, and we saw the publication of information from documents. And Mr. Berisha committed no offence in revealing that information from the batches. The SPO agrees and we agree.

Of the letters reviewed, those that Your Honours have seen, that Your Honours have been provided with, have not been marked as confidential. We saw yesterday, P93, the exhibit, that -- well, I won't refer to the names.

If Madam Court Officer can pull up P93.

The document has, at the end of the first paragraph, those two

names. It has those names. But the document itself, the letter itself, is not marked confidential. It refers and makes a distinction to a list of witnesses that it attaches, which is confidential, but the letter itself with those two names, paragraph 1, not marked as confidential.

Can we look at Exhibit P94 briefly, please.

Another coordination request, this time number 30. Again, if we can go to -- fit to page, please, for these documents. We can see that this is not a letter that is marked confidential.

And can we look, please, at P95. Exhibit P95, please.

Again, this is an exhibit, a letter. This is dated 1 July 2014 from the lead Prosecutor to the Office of the War Crimes Prosecutor, for the attention of the former war crimes prosecutor. And this does have the details of a person in the coordination request. It's a request to collect information from a citizen, and there's a name referred to.

This is a name not mentioned by Mr. Gucati or in his presence. At least not until during the course of the trial he was asked questions about the name, I think. But this was a document that was published in the press, no doubt because, again, this document is not marked as confidential.

Can we look at P96, please.

Again, this is a document -- we saw this yesterday, 11 June 2015, coordination request No. 112. We looked at this yesterday. Published by Mr. Berisha. Not marked as confidential.

And then P97, please.

This document, now coordination request No. 41. At the end of the first paragraph, there is a reference to a name.

Could we reduce scale to fit, please.

And we can see, again, that document not marked as confidential.

Can we pull up, please, Exhibit P123-ET in relation to this letter. Because, of course, it's in Serbian, we don't have a translation of this, although it's an SITF document. It's a request prepared by the SITF but in Serbian. And that letter was the subject of an article -- in fact, a video-clip which we saw, which is P123, but we've got a transcription of the content of that video-clip that was published by Kohavision TV channel.

[As read] "the Specialist Chambers have collaborated with the person responsible for the Meja Massacre against the KLA."

There's a date marking the day when 376 civilians, including women and children, were murdered in Meja.

[As read] "Children from one-and-a-half years old as well as women initially executed and then burned inside a house by the Serb forces."

And then there was a subtitle.

[As read] "The Specialist Chambers requested the assistance and collaboration of the former militia commander in *[REDACTED] Pursuant to In-Court Redaction Order F576RED.* district."

And then there's the name that was in the Serbian, in the coordination request "against the KLA," the narrator continued.

And then they actually showed the document that we looked at,

the coordination request No. 41, in full on TV. And the conclusion from -- in this video, the video being marked with the words *Gazeta NewBorn*, but the conclusion was that that man:

"The person responsible for the Meja massacre, the murder of 372 Albanian civilians ... should be in prison" and is instead collaborating with the Specialist Chambers.

But, no doubt, going through those Berisha distinctions, distinctions Mr. Berisha made, that was published in full by *Gazeta NewBorn*, again, a document not marked as confidential.

From Batch 2, the Trial Panel has seen six pages.

Can we look, please, at P104. And if we go to page 615.

Now, obviously this is a much bigger exhibit, but the SPO have been very clear their case in relation to Batch 2 relates only to the six pages. And we find them beginning at page 615 of 937.

So if you actually enter in -- if you see at the top, Madam Court Officer, if you enter in -- where it says 600, if you enter in 615, it should take us directly to the page.

THE COURT OFFICER: Unfortunately, the computer is not responding. Just one second.

MR. REES: It is now. So 615, please.

Coordination request No. 61. This has redactions to the case number. And then two redactions simply to the two dates in September 2014 that mark the period that the coordination request relates to, but nothing else redacted on this page.

It makes a distinction again by referring to a list of witnesses

that was attached that was confidential, but the letter itself not marked as confidential.

If we go to the next page, 616 is, I think, the Serbian copy of the same letter -- or, rather, that same letter but in the Serbian language. And then if we go to page 617, we get then this time coordination request No. 74. And, again, not marked confidential, although refers to, at the bottom of the page, I think in Serbian, it refers to a list of witnesses attached. That list being confidential but not the letter itself.

And if we go on to page 618. This is a letter relating to logistical security coordination. We saw the name of the person to whom the letter is addressed and, indeed, the name that appears in the first line of the first paragraph. Yesterday those were names that were mentioned, because there were copies of this letter in Batch 1 as well as in Batch 2.

And although that letter refers to the confidentiality of the investigation, the letter itself is not marked as confidential. And the reference there to confidentiality of the investigation, the investigation is the investigation that has that reference number at the top of the page, which has not been redacted. I won't read it out, but Your Honours will see it. The point I make is it's a specific reference to the confidentiality of that investigation. We don't know why, but it's that investigation. But the letter itself not marked confidential. And then finally the last two pages of these six pages of Batch 2. It's 619 and 620, Serbian letter.

Again, not marked as confidential.

Now Ms. Pumper, in fact, accepted when she gave evidence that the majority of those letters, correspondence between the SPO or the SITF and Serbian authorities, that the letters that demonstrate the extent and nature of the cooperation between Serbia and the SITF or the SPO, they were not marked as confidential. So those letters, the very letters that were the target, the focus, the purpose of Mr. Gucati's actions and words, what he wanted to reveal, the full extent, the nature and extent of the cooperation between Serbian officials and the SITF or the SPO, those letters were not marked as confidential, and the press had published them as well, no doubt for that reason.

As I've submitted, it cannot be the case - it's not the case - we know from the example of Mr. Berisha, that all SPO documents are confidential and all the information within documents are confidential. We need to consider the detail. And this trial, because of the decisions of the SPO, have been unable to consider the detail. And the Prosecution has been unable to meet the criminal standard and their burden of proof.

The SPO, of course, refers to Article 62 of the law. My submission is that Article 62, in fact, has no direct application in the circumstances that we're dealing with. Article 62 deals with how a third party can apply for access to records which they're not in possession of.

Article 392 of the Kosovo criminal code 2019 under, which

Counts 5 and 6 are charged. Article 392, on the other hand, deals with what can and can't be done with information which has been disclosed to a person in official proceedings.

Insofar as Article 62 of the law provides any assistance as to the position once a third party has access to records, it does not support the general proposition that the SPO seek, that all its records are covered by a blanket confidentiality which attaches without anything further. I say that because it instead refers only to maintaining any confidentiality and protections granted to any person by either the Specialist Chambers or the Specialist Prosecutor's Office. It does not support the proposition that all records the SPO have are covered by a blanket confidentiality that attaches without anything further.

We've set out in our final trial brief, then, our analysis for Counts 5 and 6, and we say that acquittals should be entered in relation to both those counts.

The only additional specific submission that I make is this. The Specialist Prosecutor's Office, of course, focus on, as they put it at paragraph 252 of their final trial brief, information that pertains to SITF/SPO confidential criminal investigations and proceedings, and they say that information which pertains to those matters must not be revealed according to law.

But we say that, again, as the SPO do, that they create a new test that actually -- a form of words that finds no place, actually, in the words of Article 392 and the operation of it. There's no

element of the offence, no essential ingredient which matches the suggestion that information which pertains to SPO confidential criminal investigations and proceedings is enough.

And, again, in relation to Article 6 we have made submissions in the final trial brief, and we invite, as we do in the final trial brief, Your Honours to pay care to the - and I'm sure Your Honours will - to the statutory language which sets out the ingredients of the offences charged under 5 and 6, rather than the alternative tests that the SPO have created.

So, for example, in relation to Count 6, the SPO concentrate on their own definition of a witness. They say a witness is a person who may have had information about a crime within the jurisdiction of the KSC. Likely to. Well, that may qualify a person as a witness or a potential witness. Whether it does or not is neither here nor there, because what we're concerned with with Count 6 is whether a person is under protection in the criminal proceedings or in a special programme of protection.

As I observed yesterday, every one of us in this room would meet the SPO's definition of a witness or potential witness, but it does not qualify any of us in this room as a person under protection in criminal proceedings or in a special programme of protection for the purposes of Article 392(2).

I'm moving on because I'm conscious I gave an indication of how long I'd be yesterday, which I've already exceeded. So I'm doing my best. But I ask Your Honours to look in detail at the submissions in

full on Counts 5 and 6 in the final trial brief, which I know Your Honours will.

Can I deal, then, with two, I think two final matters. Although -- and I will hope to be brief with them, although that does not mean that I in any way -- that indicates that I place any less reliance on them at all.

We've raised mistake of law because this is a defence under Article 26 of the Kosovan criminal code, and we say that it is perfectly clear from the evidence that we went through yesterday as to Mr. Gucati's understanding of the law why we say that was justifiably reinforced by the conduct of others, including legal advice.

If we are wrong in our analysis at all, that his conduct was lawful, and Your Honours find that otherwise his conduct was unlawful, we do rely on the fact that he did not know that his conduct was unlawful. He acted according to his understanding of the law and is not, therefore, criminally liable under Article 26 of the criminal code.

The SPO say that that defence -- or, rather, it's not a defence as such. It's a ground for excluding criminal responsibility is how the criminal code puts it. They say that's not available because that hasn't been specifically incorporated into the regime that this Court applies. Well, in our respectful submission, that is simply wrong, because Article 12 of the law requires the Specialist Chambers to apply the substantive criminal law of Kosovo unless it conflicts

with customary international law. And as in the present case, we are dealing with offences under Kosovan law and not offences under international law, customary international law has no application, and the Specialist Chambers is, therefore, required to specifically apply Article 26 of the Kosovo criminal code and, indeed, all the other provisions under the Kosovo criminal code, the substantive criminal law of Kosovo by Article 12. It is specifically incorporated.

We make this further point in relation to Article 26(1). The words of Article 26(1), a person who, for justifiable reasons, did not know or could not have known that an act was prohibited is not criminally liable. Those words do not require, for Article 26(1) to apply, that a person for justifiable reasons did not know and could not have known, as the SPO, I think, have suggested, although not directly. The words are clear. It is enough for that section to apply if a person, for justifiable reasons, did not know that an act was prohibited.

In those circumstances, the person is not criminally liable for his actions, and we rely on the evidence that I went through yesterday in relation to Article 26 and its application.

That takes me, finally, to the plea of incitement, which we raise further. And if contrary to what I have suggested yesterday and today and in our final trial brief, that Your Honours find any part of the accused's conduct to otherwise be unlawful, we do raise the plea of incitement.

We have set out in some detail, not only in the final trial brief but at earlier stages, detailed submissions as to what we say are the applicable legal regime in relation to a plea of incitement. And I do not intend to rehearse those now, but I do ask the Trial Panel to give full consideration to those submissions.

It was certainly a surprise to me to the suggestion that arose on Monday that we have only raised this as an issue belatedly. We have raised this issue from, I think, the first Status Conference before the Pre-Trial Judge, and it's been repeatedly raised throughout Status Conferences and Prosecution Preparation Conferences and Defence Preparation Conferences and throughout the trial itself when, as Your Honours know, there were ongoing disclosure matters that continued up to and after the close of the Defence case for Mr. Gucati and onwards. We have raised this from the outset.

And we say that there is clear evidence of incitement. We have said that from the outset. The clear evidence of incitement is inherent in the deliveries that were made, deliveries made of documents with both the express, on the first occasion, and implied, thereafter, incitement to make the contents available to the media. That is an act of incitement.

The only issue for the plea of police incitement is whether an officer or officers of the SPO, or persons acting on their instructions, were involved in that and those acts of incitement. We say that such evidence, as the Trial Panel has heard, suggests, *prima facie*, that an officer or officers of the SPO or persons acting

on their instructions were so involved, and there is no evidence relied upon by the SPO to the contrary.

The material said by the SPO to be contained within Batches 1, 2, and 3 is also said to have been under the control of the SPO prior to the deliveries; in particular, in relation to Batch 3, under the apparent control of the leadership of the SPO. And I've given the references and the transcript for the evidence there.

The assertion that arose at paragraph 303 of the SPO's final trial brief, that not all pages were in the SPO's possession to provide to another person, is, again, an assertion on this aspect of the case that is made without any evidence. It's not based on any evidence. No Prosecution witness gave that evidence. It's just an assertion from counsel again.

What Ms. Pumper said, at lines T1028, line 4, to T1029, line 2, was that there were -- well, we'll look at the transcript, if we may, so we see it exactly, rather than me paraphrase.

So there was a document, she said, that she had not located in the SPO's ZyLAB database. You can see that at line 5.

[As read] "... does that mean it's a false document?

"That means I don't know whether it's genuine or false.

"And that's because, with the best will in the world, the SPO's recording systems will not record every document they come into possession of," she was asked.

And she said: [As read] "I have not confirmed that we got -- that we had possession of this document before it was leaked. I just

said that I didn't find it in the database:

[As read] "yes, right, so you may have been in possession of it before or may not have been in possession of it before?"

"I could not locate it in the database. That would suggest to me that we don't have it, if it's not a technical glitch and the system couldn't find the document. But I'm not an IT person."

"No. And, of course, it would require one, there's the IT issue, you're not an IT person; but, also if a document is not submitted to the system by an individual, then it wouldn't be a surprise if you couldn't find it on the system?

"That's correct, absolutely.

"So if an SPO officer receives a piece of paper and doesn't submit it ZyLAB, then you won't find it on ZyLAB, will you?

"Clearly not," she said.

"Clearly not. And, likewise, with the other systems?

"Yes, that is correct."

And, in fact, there was a similar document where she could find a version of it in the documents labelled Batch 1 on the ZyLAB database.

So it was not her evidence that not all pages were in the SPO's possession to provide to another person. They were a small number, I think, if not one, that she couldn't find on the database, but she couldn't exclude, of course, that they were in possession of it and it just had not made its way to ZyLAB, or at least not made its way to her being able to find it on ZyLAB.

We were told by Ms. Pumper after initially she did not know who was asked to coordinate the investigation into the KLA WVA. She then gave the evidence, I think after making inquiries overnight, that it was, indeed, the Specialist Prosecutor and the Deputy Specialist Prosecutor who was responsible for coordination of the investigation.

There is something of a juxtaposition, one might think, that has not been explained between the evidence that we heard from Mr. Moberg and, indeed, the orders themselves that allowed up to five days to deal with the orders, and we say the evidence of Mr. Moberg we do rely on, as part -- as an indicia, as it was put, that an officer or officers were involved in the deliveries because there was an obvious lack of urgency. And, again, a juxtaposition between the Specialist Prosecutor and Deputy Specialist Prosecutor being -- coordinating the investigation and Mr. Jukic's evidence that it was the -- the witness security handling team were not concerned. They had little discussions about what took place on the 7th and the 16th September, and they didn't take any action on the 7th -- after the 7th and 16th September. And it was only until after the arrests of Mr. Gucati and Mr. Haradinaj were they asked to conduct that exercise by Mr. *[REDACTED] Pursuant to In-Court Redaction Order F576RED.* on a list of names that we don't know the basis upon which it was produced.

And despite that high level of supervision, coordination, apparently, according to Ms. Pumper, and although it was obvious to all from the press conferences, and would have been to the SPO, that

there was potential for further deliveries being made after the delivery of Batch 1 and after the delivery of Batch 2, no attempts were made to physically prevent the further delivery of any more information. If they were truly -- if the SPO truly wished those deliveries not to take place, it would have been very simple to have stopped it. The obvious tactic, we say, of placing the entrances to the KLA WVA under observation with officers in place to seize any further batches before delivery was effective. We say that the inference to be drawn is that the SPO did want further deliveries to be effective.

As I say, we continue to rely upon the evidence that the documents were deliberately left in the hands of the KLA overnight, KLA WVA overnight, after delivery of Batches 1 and 2, and we rely on the evidence of lack of urgency that we -- that I went through yesterday. Cele Gashi, Mr. Gucati, Mr. Haradinaj, all stating the SPO officers implied that they were content to wait. There may have been some inconsistency over the dates between them, but nothing is marked as the inconsistencies over dates that Mr. Jukic's records demonstrated, an inconsistency which is waved aside by the SPO.

And Mr. Moberg, too, confused over dates. Again, waved aside by the SPO.

Inexplicably - inexplicably - the SPO refused to call the only SPO officer who could help with what was actually said on the second and third visits. It is non-controvertible, we say, that there was an apparent lack of urgency on the SPO's part after the first and

second deliveries. And, indeed, Mr. Jukic said so. Whereas, there were no attempts made to physically prevent the further delivery of batches, there is evidence that officers of the KLA WVA were instead placed under surveillance between the deliveries.

Ms. Pumper confirmed in evidence, and the references are in the final trial brief, that if she was -- if she'd been asked to undertake action, that is what she would have done. It's the obvious thing to do.

PRESIDING JUDGE SMITH: Mr. Rees, I don't want to restrict you. You can close when you want. But if you're going to go on much longer, we need to take a break.

MR. REES: If I may, can we finish and then we take a break?

PRESIDING JUDGE SMITH: How long will it be?

MR. REES: I hope by quarter past.

PRESIDING JUDGE SMITH: [Microphone not activated].

MR. REES: Thank you. I'm very grateful.

We've referred to the apparent, on the face of it, reference to the internal work product and internal work product being delivered to the KLA WVA on a document that was dated 13 days before that delivery was actually effected, actually occurred. That document was prepared again by the same SPO officer that the SPO refused to call, the only officer that would have been able to have assisted us in relation to what was said on the second and third visits. Again, the Trial Panel might have wished to have been assisted by that officer being called to give evidence.

We rely upon the fact that the documentation, which has been published by the press, the SPO has shown little or no interest in recovering it from the accused. They know that Mr. Berisha and his colleagues have still got copies of the documentation. They were never asked for it. We know that there are copies of documentation still publicly available on the internet. They never asked for it to be taken down, or they never asked for any order for it to be -- those web site pages to be redacted. They show little or no interest and little or no actual concern when properly analysed in that material having been provided to the KLA WVA and, indeed, made available to the press. And we haven't seen the full details of it to make any sort of assessment as to why that might be the case.

Belatedly, we were told that there was some investigation that had been undertaken within the SPO to look at the circumstances on which the Batch 3 document had left its possession. That report that we were disclosed and has been adduced in evidence as an extract makes it clear that the body that carried out that report could not exclude the possibility that someone at the SPO, who had access to the compromised file, deliberately leaked it to an external party.

It couldn't find any positive evidence of that taking place. But then again, it didn't find any positive evidence to demonstrate -- to point one way or the other how it did leave the SPO's possession. The report simply adds up to: We looked at this, and we found no evidence of anything. They certainly couldn't exclude what we say is the obvious inference, given what the

Prosecution say the nature of that document was and who had access to it, the possibility that someone at the SPO who had access to that document deliberately leaked it to an external party. And the extent of the investigation carried out by that body is unclear, but it certainly didn't appear to be thorough. It was, inexplicably, limited. So, for example, of the witnesses that came, none of them had been contacted by this body.

Mr. Jukic, who was a team leader of witness security, somebody you might have thought they would be interested in speaking to, they had not spoken to him. They'd not asked him any questions. There'd been no interview with him. They'd not asked to look at his e-mails. They'd not asked to look at his computer. They'd not asked to look at the documents, the digital documents he told you that he kept outside of the SPO system, his USB sticks that he used to keep documents, he told us, and the references are in the final trial brief. They'd not asked to look at his phone or any of his communications. He'd had no contact with them.

And Ms. Pumper, she had had no contact with them either. They'd not asked to look at her phones. They'd not asked to look at her e-mail accounts. They'd not asked to look at her computers or any digital devices from her.

So it might well, perhaps, not be a surprise that they didn't find any positive evidence as to how that document actually left the SPO's possession and could not exclude the possibility that someone in the SPO deliberately leaked it to an external party, because their

investigation appears to have been inexplicably limited.

And there was evidence that the Trial Panel heard that did implicate a named serving SPO officer. The evidence, Mr. Jukic accepted -- this is the only evidence on it. Mr. Jukic was asked when he was re-called after the disclosure of that report, or the extract of it:

[As read] "Are you aware that on 28 September a witness implicated a named SPO officer ..."

And the name said.

"... as a source of the official documents?"

And Jukic said that he'd seen that Official Note.

So that is the evidence.

There may have been other documents that have been revealed to the Trial Panel. There may have been other evidence -- documents that have been disclosed, none of which form part of the trial record or the evidence. That is the evidence that a serving SPO officer, a named SPO officer, who, in fact, Ms. Pumper agreed was available and was in The Hague at the time she was giving evidence and had been re-called and could have been called by the SPO, that named officer was implicated as a source of the leak of the documents.

Now we've set out in our final trial brief, and previously, what we say the SPO's motive may have been for entrapping Mr. Gucati and Mr. Haradinaj in this matter, and we maintain those submissions. We maintain there is an obvious motive that they had to do so.

We say that in those circumstances, based on the evidence that

the Trial Panel has heard on the record, it is not wholly improbable as an allegation. And where an allegation of police entrapment is not wholly improbable, it falls to the Prosecution to prove that there was no police incitement, and the SPO have not done that. They have not even engaged. They've sat back and they have not proved beyond reasonable doubt that there was no police incitement. And we say that that demonstrates, that amounts to, consistent with the jurisprudence of the European Court of Human Rights which we have cited and which we know the Trial Panel has looked at so I won't go into it in detail, but it's consistent with amounting to a violation of Article 6 of the European Convention on Human Rights, and as Mr. Halling, eventually, I think, conceded on the part of the SPO, of course Article 6 operates in these matters. And a violation of Article 6, according to the jurisprudence of the European Court of Human Rights, has to have a remedy, and the remedy that we propose, and the SPO now concede is available to the Trial Panel, is a stay of proceedings.

We submit then, for those reasons, and for the reasons as set out in the final trial brief, that verdicts of acquittal should be entered in relation to each of the counts, or otherwise the proceedings should be stayed under Article 6 of the Convention.

PRESIDING JUDGE SMITH: Thank you, Mr. Rees.

We will adjourn. We will reconvene at 11.45 to hear Mr. Cadman's presentation on behalf of Mr. Haradinaj.

We're adjourned.

--- Recess taken at 11.13 a.m.

--- On resuming at 11.45 a.m.

PRESIDING JUDGE SMITH: All right, Mr. Cadman, the floor is yours.

MR. CADMAN: I'm grateful, Your Honour.

I appear before you on behalf of Mr. Haradinaj today. Mr. Haradinaj is charged with six counts concerning alleged offences against the administration of justice or offences against public order.

Mr. Haradinaj has been detained for approximately 18 months. He has been criticised and dismissed for saying what he believed and exposing what he considers to be the truth when others that the SPO favours clearly have not.

We say, on his behalf, that there is a complete lack of evidence to substantiate the broad and unclear allegations that the SPO has made and that this is a case that should not have been brought.

In addition, we say that there have been shortcomings with disclosure that have meant that Mr. Haradinaj, or even counsel representing him, have not had access to documents that will, one way or another, and despite what the Prosecution says, form the basis of any conviction. I make no apology for not shying away from this point and repeating it again. It is my duty to do so. We are of the view that the failure to provide this evidence constitutes a fair trial issue, among other matters. Mr. Haradinaj has not had an effective or proper opportunity to cross-examine and test the

evidence.

Your Honours, you have our final trial brief, which I will direct you to in due course. I do not intend to repeat that. The final trial brief was set out in detail in order to shorten the oral submissions that need to be made. You also have submissions throughout these proceedings in relation to the defences that have been raised and the elements of crimes and modes of liability. Again, I will not deal with these in great detail but will respond at the conclusion to the inevitable questions that I am sure you will have.

You've also received comprehensive submissions from Mr. Rees yesterday and today on behalf of Mr. Gucati, which I adopt and I submit are equally applicable to Mr. Haradinaj. I will not repeat those submissions. Certainly before the closing statements were scheduled, Your Honours had already indicated that they didn't want to hear me to repeat the same matters that Mr. Rees has already set out. I do accept, as Mr. Rees has set out, that he is acting on behalf of Mr. Gucati. I act on behalf of Mr. Haradinaj. But there are, obviously, matters that have been set out, as far as the law and evidence is concerned, that apply equally to both accused.

I will try to divide my submissions into four main parts. In part one, I will make some remarks on the evidence, which we say is wholly lacking. Part two, I will discuss the Prosecution case. Part three, I will address in summary form the defences that have been advanced. And in part four, I will try to respond to some of the

points made by the SPO in the final trial brief and its closing.

But before I venture into the substance of my submissions, I just want to make a few preliminary remarks.

First, at the outset of Mr. Rees's closing, he rightly said that this is a case where the Prosecution must prove its case beyond all reasonable doubt. I equally make this point, which is, of course, accepted, as it must be, by the Prosecution. This is, therefore, a case where the Prosecution cannot bluntly refer to evidence or events and ignore the detail of the law. It is equally not a case where Mr. Haradinaj, or any other accused, need to prove their innocence. The Prosecution must prove all of the counts and allegations. Nothing less will suffice. And as one of the first cases before the Specialist Chambers, this Court has, as we had set out in our opening statement, a very grave responsibility.

Your Honours, I'm not wearing my headphones, so if there is a request to slow down, I'd be grateful for any indication.

PRESIDING JUDGE SMITH: Mr. Cadman, just a point of clarification too. I should have said it before. But you will be given the full hour and a half before we break for lunch, so we'll go until quarter after 1.00.

Go ahead.

MR. CADMAN: Of course, the Trial Panel will be aware of its duties, but these are important points that I wanted to remind everyone so that they're at the forefront of everyone's minds when determining and deciding this case. I have full confidence, as does

Mr. Haradinaj, in this Trial Panel applying its mind to these basic principles and considering the evidence of both parties fairly and justly, despite what the Prosecution has said in its closing statement.

And moving on to that. In its closing, the Prosecution took a very aggressive approach. It spent a large portion of its time criticising the Haradinaj final trial brief and the Gucati brief, and I will respond to specific SPO comments in the final part of my submissions.

For now, I do wish to make one observation. While I openly accept that there were three references in our brief to documents that were not admitted into evidence, and I do not wish to shy away from that, the SPO has also suffered from the same issue where they refer to matters, such as a news report, that was not in evidence.

I do not wish to dwell on this point. But it's simply to say that although the SPO criticises the Defence, it doesn't come with clean hands. The Trial Panel should bear in mind when reviewing the evidence carefully, as I know you will, and as I have just said, when deciding on this case.

Third, as to the law, the Haradinaj Defence has previously submitted a submission, as I've already outlined, on the elements of crimes and modes of liability. The Haradinaj Defence still relies on this document as part of its legal submissions in conjunction with its final trial brief.

We further submit that the position between the two Defences is

the same or materially the same as to the law. To the extent that there are divergences between the two Defence positions, which I say there is not, we adopt the position set out by the Gucati analysis and ours in the alternative. I can certainly address that later on if there are any questions in relation to the correct test that needs to be applied.

Fourth. As to the context and importance of this case, the following must be said. Because despite perceptions throughout this trial, this Court represents the people of Kosovo and all victims. The Trial Panel will be mindful of this.

I wasn't able to present the opening statement on behalf of Mr. Haradinaj due to ill health. But in the opening statement, it was stated that it is notable that courts try cases but occasionally cases try courts, and we have said there's no truer statement of that than in this case. This case will undoubtedly set the tone for all future cases that come before the Specialist Chambers. It is the first case that will go to conclusion. And that is notable. And that is the grave responsibility which falls on prosecuting counsel, on Mr. Rees, on me, and the Trial Panel.

We submit that this case is about much more than the fate of the two men that stand before you. It has far-reaching consequences that extend past the four walls of this court building. At points throughout this case, we have heard from the Prosecution as to the importance of the institution and how the case is about the protection of individuals, about justice, about accountability, and

about the rule of law. We have heard this is about the victims of the Kosovo war.

The SPO is correct, of course, about each of these points. However, conspicuous by its absence is the reference to the victims of Serbian or Kosovo Serb aggressors. This case is about the future of the Kosovo and the people of Kosovo. It is about justice and it is about justice denied to the thousands of victims of aggression.

This institution has jurisdiction over all crimes committed over the conflict by all perpetrators. However, this Court is only hearing cases at this time of crimes allegedly committed by one party. I don't say that as a political statement. It's not about a just war. It's not about the impunity gap. It is a statement of fact and one that was confirmed during the Prosecution case.

If anyone deserves justice, then everyone deserves justice. The Prosecution acknowledged, through Ms. Pumper, that there are, in fact, no ongoing investigations into Serbian perpetrators or Kosovo Serb perpetrators for that matter, that should fall under the jurisdiction of this Court. What that means is there are no ongoing investigations or inquiries into the numerous massacres committed by Serbian or Kosovo Serb military or paramilitary forces, some of whom now find themselves on Interpol red notice warrants, as we've already heard, and some of whom take pride in publicly acknowledging themselves as the driving force behind some of the cases that this Court will hear. I'm not going behind the Court ruling by mentioning their names. But during this trial, we've heard who they are. We

heard yesterday. Mr. Rees took us through those names.

Now, you may consider that this is not relevant to these proceedings, as the Prosecution has set out. Mr. Haradinaj, however, believes that this is directly relevant and is central to one of the main thrusts of his defence. He is accused of undermining the process of justice. He is accused of seeking to bring down this institution. That is, of course, not accepted.

Mr. Haradinaj has been clear. He's stated that everyone who has committed a war crime in Kosovo should be prosecuted and should face justice, no matter who they are, whether they are members of the KLA, whether they are Serbian officials, Kosovo Serb, or any other citizen or ethnicity within the Republic of Kosovo. He has stated that no one should be shielded from justice.

When he became the vice-chairman alongside Mr. Gucati as the chairman, they made one thing very clear: Those persons being summonsed by the SPO should cooperate. This changed the previous position of the WVA. They should cooperate because they have nothing to hide and nothing to fear. That is what he stated in his evidence. The point is that they should stand with pride and with honour and answer any allegations that were presented.

When Mr. Haradinaj launched a campaign that has received some comment from the SPO, receiving over 150.000 signatures, it was not an attempt to undermine a process aimed at truth, justice, and lasting reconciliation. When he petitioned the national assembly to have the Law on the Specialist Chambers amended, it was not to bring

down the institution. When he spoke out against the Specialist Chambers, as he has done prior to September 2020, again, this was not to obstruct. These were steps taken to ensure that the SPO and the Specialist Chambers applied justice equally to ensure that all victims saw justice and not a process that he considers to be one-sided, selective, and discriminatory in its intent.

Mr. Haradinaj has dedicated his life to the independence and physical integrity of Kosovo. He must be viewed, and his actions must be viewed, through such a lens of aggression that he has been subjected to. There is a grave responsibility on this Trial Panel to do justice to this process and ensure that the process does not seek to rewrite history and, above all, is fair. That is what Mr. Haradinaj seeks.

In this case, each and every one of the documents that are said to have been disclosed are believed to have come from the Specialist Prosecutor's Office. Mr. Haradinaj did not take these items, an issue that the Specialist Prosecutor has explicitly confirmed. In his opening speech, the Specialist Prosecutor said that Mr. Haradinaj is not alleged to have been responsible for the leak or the theft of any documents.

The Prosecution allowed for this material to be leaked and still to this day do not appear to know how. One must inquire as to why.

The Prosecution seeks to present almost its entire case on what we say is inadmissible and largely hearsay evidence, evidence over which the witnesses presented have no direct knowledge. We say their

case lacks transparency and credibility. It is a case that should never have reached this far.

He has spent a year and a half in jail waiting to reach this stage. He accepts that he's been critical of the Specialist Prosecutor's Office, criticising its entirely opaque approach to justice. He has criticised what he considers to be a mono-ethnic and discriminatory approach to justice. He has the absolute right to take this position, again, as the Specialist Prosecutor confirmed.

Not once prior to September 2020 did any member of the Special Prosecutor's Office or the Specialist Chambers ever seek to address these concerns with Mr. Haradinaj or any other member of the WVA. But again, I stress, he has the absolute right to take a position. This is indicative of the fundamental rights and freedoms that every citizen of Kosovo enjoys.

He is alleged to have disclosed, threatened, or intimidated, or sought to retaliate against certain individuals. As we've heard over the last day and a half, there were no threats and there was no obstruction. There was no interference and there was no retaliation. It is of note that at no stage has the Prosecution identified any witness that has been intimidated or threatened by the alleged actions of Mr. Haradinaj or, for that matter, his co-accused, Mr. Gucati.

The SPO has not identified specifically who he's said to have retaliated against, making the allegation in general, global terms. In short, it is our position that the SPO is unable to prove any of

the charges in the indictment.

Mr. Haradinaj, which I will get on to shortly, has argued that any of the acts he is shown to have undertaken are matters of international public interest. And in this instance, unlike what Mr. Halling sought to set out, the balance of public interest is clear and falls squarely within Mr. Haradinaj's favour.

Over the past day and a half, you have heard from Mr. Rees extensively looking at the evidence in this case. Moreover, our final trial brief comprehensively goes through the evidence when making its submissions. As I said at the outset, I do not wish to repeat evidence that has already been cited or to take you to the evidence in any great depth. I adopt entirely what Mr. Rees has set out over the last day and a half.

I do wish to make the following points on aspects of the evidence that the Trial Panel has heard through the course of this trial.

The first point that I want to deal with is the evidence on the investigative standards and the chain of custody, matters that we consider are central to this case and central to the credibility of the case that the SPO has presented.

First, Mr. Bob Reid provided expert evidence, which has a direct bearing on the authenticity of Batches 1, 2, and 3. I do not need to remind the Court, and it was not challenged, that he is considered to be an expert in the field of a number of years over three decades as an national and international investigator. He testified that the

delivery notes in relation to the operations, certainly of the 8th and 17th that he had seen, were not, in his opinion, a sufficient basis when seizing material of this nature. The reference for that is -- I don't intend to put it up on the screen, but the reference for that is his evidence of 24 January, transcript 3249, line 1 to line 6.

Specifically, what he said, quoting from lines 6 to 11 of the same page:

[As read] "You know, absent an inventory, you don't know what documents has been taken. In fact, you don't even know how many pages have been taken, and you don't know what happened to them, where they've gone, or anything like that."

He used the phrase that the delivery note, "it just looks like a receipt to me."

He then went on to describe the principle of maintaining a chain of custody. At transcript 3223, lines 9 to 12, he described the principle of maintaining a chain of custody when he said that the chain of custody is pretty basic and simple. It's the minute the document comes into your possession, you must know where it is 24 hours a day, seven days a week, even when it's in your evidence unit.

He then went on to describe what happens when there is a failure to maintain an unbroken chain of custody. He basically said that you're leaving yourself open to challenge. And, importantly, when you get to court, which is the whole reason why you're seizing documents, the integrity of the document collection has been called

into question. He said:

[As read] "If you follow these guidelines and the chain of custody guidelines," he accepted, "you'll probably still be called out on it by the Defence, but you can prove the integrity of the collection."

Looking at Batch 1, we heard from Daniel Moberg, the SPO operational security officer, where he gave an account of how he seized the documents on 8 September. He confirmed after they were seized they were taken to the SPO offices in Prishtine, where he said they were scanned in order to send them to The Hague directly. What he wasn't able to say is when those documents were seized, that they were placed in an evidence bag, sealed and signed by the participants, and that there was an inventory made at that time. And the record of the documents seized on 8 September is important because, as you will recall, having seen the delivery note, it effectively says one stack of documents printed. Documents delivered to the KLA WVA. It provides no information on the number of pages, the size of the stack, the content of the documents, and it makes no reference to a numbered evidence bag.

Similarly, regarding Batch 2, seized on 17 September. Documents brought to WVA by unknown man, 16 of 9th 2020.

To be clear, the reference for the delivery note on 17 September is P00055, and the one already mentioned on 8 September is P00092.

Daniel Moberg also stated that he was present on 17th and 22nd September, but he had some difficulty in differentiating between

these two events. The delivery document of 17 September gives no description and no detail as to the content. And, again, nor does it specify the number of documents, the type of documents, or, again, number of an evidence bag.

Regarding Batch 3, the summary given by Mr. Moberg regarding the seizure of Batch 2 applies equally to Batch 3. Neither the order of the Specialist Prosecutor, dated 22 September, nor the acknowledgement of delivery form for the order of the same date records which documents were, in fact, seized or produced or, indeed, whether any were. Neither document states whether any documents seized were placed in an evidence bag nor what evidence bag they were placed in.

I'd like to move on now to the evidence of Ms. Anna Myers. Ms. Anna Myers gave evidence on 21 January. Again, a recognised expert in her field; a recognised expert in the field of whistleblowing and public interest. Noting that her credentials and status as a recognised expert was accepted by both the Trial Panel and the SPO.

In her evidence, she referred to the definition given by Mr. David Kay, the former UN Special Rapporteur. I accept that she was corrected on the text in her statement as to the definition that had been given when questioned by the SPO, which was very clearly a typographical error that did not affect her evidence in any way.

One of the issues that Ms. Myers dealt with was whether one could be considered a whistleblower in a non-employment environment.

What she said was that if information that was being disclosed came from an employer of that entity that had provided the information to a third party, that being referred to as whistleblower by proxy. She went on to confirm that whistleblower by proxy would also apply if an employer of a prosecuting authority had leaked information to a third party and that third party had made those disclosures public. As such, it is our submission that it must follow that Mr. Haradinaj should be considered a whistleblower by proxy in the present case.

I'd like to turn now to the evidence of Mr. Haradinaj, who gave evidence in his own defence. Now, it's accepted that Mr. Rees has dealt with some of the key evidence that Mr. Haradinaj gave in terms of disclosures being made in the public interest, and he drew effective contrast in the treatment of Mr. Halil Berisha, despite the same reasoning applying to Mr. Haradinaj. You will recall that Mr. Rees went through, in some detail, the fact that Mr. Berisha had provided or given access to the material to a number of other journalists, four journalists and his editor, at his place of employment. It is of fundamental importance and a key aspect of this case that Mr. Berisha is treated differently to Mr. Haradinaj and Mr. Gucati.

I, of course, wish to adopt what Mr. Rees said, and I will not repeat it. However, I do wish to draw out some points through Mr. Haradinaj's own oral evidence.

First, his reasons for acting in the way he did. You will recall that he repeatedly made clear that his actions were driven by

or pursuant to the public interest, and he set out what he considered that public interest to be. There was no ambiguity in his statement. He repeated the position many, many times during his evidence. He said he was acting in the public interest, and he was acting transparently.

Whether Mr. Haradinaj was in favour of justice for all. Clearly he was. This, again, was repeated throughout his testimony.

He was asked whether he was against the Specialist Chambers. You will recall at one stage he drew a distinction between the existence of the Specialist Chambers and the policy of the Specialist Prosecutor.

Despite cross-examination, he stated that he was not against the Specialist Chambers, that he was not in favour of abrogation, and any concerns regarding abrogation of the Specialist Chambers arising out of his efforts to petition Parliament were explained as being focused on amendment. He wanted to see this institution, primarily the Specialist Prosecutor, acting according to the law based on a principle of equal justice.

Whether Mr. Haradinaj released names of witnesses. He was quite clear in his evidence that he did not release names of witnesses, and I do not want to rehearse Mr. Rees' submissions on distinction, but that was quite clear in Mr. Haradinaj's evidence equally. He referred to names that were released of those of public and well-known officials. He further stated that names should not be published. These points are vital importance because they frame and

shape the evidence that Mr. Haradinaj gave.

Moreover, as will be explained in part four, the reality is that the narrative and evidence that Mr. Haradinaj gave is fundamentally different to that as portrayed by the SPO. Again, it is not that Mr. Haradinaj is against justice. It is not the case that he was hell-bent on bringing down this institution. And it is certainly not the case that he mentioned protected witness names. Instead, he was careful and conscious of what he was doing. He was at all times acting, in his own words, in the interest of the public, which he believed was right and proper. He acted transparently, and everything that he did was in public.

As Mr. Rees stated at the outset of his closing statement, I would encourage the Trial Panel to take the same approach and look at the whole of the evidence rather than select edited parts and take a view on the issues that are before the Court.

As to the Prosecution evidence. We've dealt with this in our final trial brief, and it was comprehensively dealt with by Mr. Rees yesterday and, in part, today. Like I said previously, I do not wish to repeat myself. However, I do wish to make a few general observations regarding the evidence that was provided.

I would also make the general comment that this case is conspicuous by the absence of those SPO officers that had a direct role in the matters arising out of the three seizure operations and the discussions that took place.

But dealing, first of all, with Mr. Moberg. As he made clear

during the interactions that were attended by the officer, who has previously been referred to as Officer X, who was present, who was responsible for the seizures, and who spoke Albanian, Mr. Moberg was unable to understand what was being discussed at that time as there was no translation available from the Albanian language for him. You will also recall that he had difficulties to distinguish between events of the 17th and the 22nd of September. And overall, he came across as a confused witness. But, again, he was clear on one point, and that was the chain of custody and the use of evidence bags.

Mr. Berisha. Mr. Berisha, a journalist who published documents, in his own words, in the public interest, and in doing so, had the same *actus reus* and *mens rea* as Mr. Haradinaj and received no criticism from the SPO. In fact, he received endorsement. They made it clear that his actions did not warrant prosecution. This is, of course, a cause for some concern.

Ms. Zdenka Pumper. Similarly to Mr. Jukic, no evidence was adduced as to how the incident in question led to her being obstructed and/or unable to focus on other facts or other tasks. In fact, Ms. Pumper confirmed in evidence that she was engaged in other investigations and that her role in the present case was limited to a document review process.

Her evidence, as we've heard already from Mr. Rees, was replete with acceptance of not undertaking checks, both in terms of whether the information was in the public domain, whether the names of individuals were in the public domain, and further whether the

documents said to have been seized were, indeed, from the SPO. She appeared to suggest that the process of validation in terms of the provenance of the documents, as Mr. Rees set out earlier, was begun but stopped prior to it being complete.

In our brief, we deal extensively with the evidence of Mr. Jukic. It is our submission that the entirety of his evidence lacked credibility. We drew attention to the misunderstanding with regards to the SPO office in Prishtine and what was meant was that there was no permanent SPO office in Prishtine. It is unclear why he would make such a fundamental error in his evidence. We submit it undermines his evidence.

Mr. Rees has provided further over the limits in his evidence in his submissions that I do not intend to go through again. I adopt what Mr. Rees had said yesterday.

Regarding the Prosecution case, there is little for me to say that will add much to the final trial brief. As Your Honours will be aware, the essence of the Prosecution case is that confidential material ended up at the KLA WVA, that the material, following the three press conferences, were provided to members of the media, and that disclosure on conduct gives rise to six counts.

Like I've already said, and as Mr. Rees has made clear, the Prosecution bears the burden of proving each of the charges, each of the elements of those offences, and it must do so beyond reasonable doubt.

Drawing the Court's attention, by way of summary, to the

following points. Looking at Counts 1 and 2, based on the indictment, there is no evidence of the use of force or serious threat against an official person. There are no complaints to this effect from official persons. The SPO, on Monday, criticised the Haradinaj Defence for not dealing with attempt and that a quote in the final trial brief was selective. The same point is true, though. There has been no evidence of the use of force or of serious threat against an official person, and we maintain what is set out in the final trial brief.

Count 3. There is no evidence of a common action to use force or serious threat against an official person, nor is there any evidence of attempted common action to use force or a serious threat.

Count 4. There is no basis to show factual retaliation, which the Haradinaj Defence says is part of the element of the crime. Moreover, an essential part of this offence is that any information provider has been identified by providing truthful information relating to the possible commission of a crime. Mr. Rees has dealt with that in some detail today. No witness has been identified in these proceedings that has been proved to have been providing truthful evidence in this case.

Count 5. There is simply no evidence that a document was, in fact, secret apart from on the say-so of the SPO. Mr. Rees has already set out this morning those documents that were made public by journalists where there is no confidential marking. We say that is insufficient and particularly problematic when the Defence hasn't

seen those documents.

Count 6. An essential ingredient to the offence is that a person was under the protection at the time of the offence. No evidence has been put forward to satisfy this limb. Overall, and as to intent, because Mr. Haradinaj always acted in the public interest, it can never be said that he had the necessary intent to commit any of these offences.

Sorry, wearing a three-piece suit in the court with a gown probably wasn't the most sensible choice today. I may need some more water.

One of the central limbs of the defence case is that of investigative standards and that the investigation is fundamentally flawed.

Looking first of all at the leak. The SPO has consistently maintained that both the process by which the documents came to be delivered to the WVA offices is irrelevant. We say it is wholly relevant. It is a fundamental feature of this case.

To the extent that the SPO has suggested that these allegations are being made at a late stage, just to confirm, as Mr. Rees confirmed earlier in relation to another matter, in relation to entrapment, these have been a central feature of this case from the outset.

Further, and somewhat surprisingly, the SPO has also sought to maintain the position that its investigation into the circumstances behind the leaks and the investigation into the alleged behaviour of

Mr. Haradinaj is simply irrelevant. Again, the investigation, or lack thereof, undertaken by the SPO, is relevant to the indictment and, therefore, the offences with which Mr. Haradinaj has been charged.

Dealing with the leaks themselves, and I'm conscious not to go over material that Mr. Rees has mentioned this morning, the SPO, throughout the duration of these proceedings, has steadfastly refused to disclose details of its investigation, up to and including the consistent applications made before the Trial Panel, to prevent the Defence from considering any evidence that any individual has offered to the SPO concerning those leaks and who was responsible. The SPO has accused, particularly the Haradinaj Defence, of seeking to relitigate matters that have come up through the proceedings and have which been dismissed by the Trial Panel. They are raised as they are a fundamental aspect of this case and a fundamental aspect of whether Mr. Haradinaj has or will receive a fair trial.

But what is clear: Following the leaks themselves, the SPO took no meaningful preventive steps and, to our knowledge, no surveillance was undertaken, despite it being clear that a second or subsequent delivery was likely. In fact, you will recall the evidence that the mystery man or men dropping off the material made it quite clear that he or she would be returning with more material. As Mr. Rees set out earlier, Ms. Pumper had indicated, in her view, it would have been a sensible strategy to take -- to ensure surveillance of the premises. But that wasn't her decision.

Again, seemingly no steps were taken to discover the driver of the vehicle used, and no steps were taken to secure and seize the plethora of CCTV cameras in the area. Matters that I put to Ms. Pumper in cross-examination, that there were a number of properties opposite the WVA and whether any inquiries were made to secure that CCTV footage, or, in fact, whether any witness was questioned in relation to the drop-offs, to which there was not.

Extraordinarily, not even questioning those persons present at the WVA. At any time. It's an entirely legitimate question to ask why no steps were undertaken. It seems in extreme to be an odd position to take, but what it has done is prevented the Defence from investigating and advancing the defence of entrapment as fully as it might have been. It is also indicative, in our view, of the overall investigative failures of the SPO throughout this case.

What does fall to be considered, though, is the complete lack of adherence to any investigative standards by the SPO throughout its evidence collection that forms the basis of this case, and this point has taken on new importance, in view of Judge Gaynor's questions regarding Rule 39(4), which we say is now put in issue by the Judge of his own initiative.

The simple point that we understand His Honour Judge Gaynor to be making is that there was no inventory as is required by the rules. This is a position that Mr. Halling himself even seemed to accept in questioning.

Not only was there no inventory taken at the time of the

seizures, there was no subsequent inventory that was taken and confirmed with either of the defendants or any other person at the WVA, as you'll recall Mr. Reid stating would have been the case if there were reasons for not being able to prepare an inventory at the time. We say there was no reason why an inventory could not have been prepared at that time. And, again, to the extent that there were objections from the SPO as to the timing of this point being made, first of all, we would say that it is a central theme to the Haradinaj Defence from the outset of these proceedings, but also the Trial Panel members retain discretion to take up new points when they arise as part of its inherent jurisdiction.

And Rule 39(4) simply reflects international standards for investigations that the Judges have an inherent jurisdiction to exclude evidence based on a failing of such a fundamental principle, such as chain of custody, and we have argued this since the very beginning. We maintain the chain of custody is clearly an important and a necessary part of any prosecution case. The Prosecution has presented evidence on the seizure of the three batches, their transfer to the SPO in The Hague, and the verification process by Ms. Pumper. What it has not provided is documentation supported by testimony that establishes an unbroken chain of custody throughout this period. We consider that to be a fundamental problem to their case.

When it was clear that they needed to call additional witness testimony, they put forward Mr. Moberg, who had limited memory of the

events, is not an investigator, and was, in fact, not the officer who had conducted the seizures for Batches 2 and 3.

As to the first batch, the record of the documents seized is, in our submission, inadequate. Again, the only information is that documents were delivered to the KLA WVA and described as one stack of documents printed.

For that, we can go to Exhibit P00056 and is in the testimony of Ms. Pumper on 20 October at transcript T1052, line 17 to line 23.

Again, the delivery document provides no information on the number of pages, the size of the stack, or the content of the documents, and it makes no reference to any numbered evidence bag. And no evidence bags were put in evidence. It is unclear for what period of time, under whose custody the documents were held, when they were moved, supposedly from the WVA to the SPO office in Prishtine, and then to the SPO office in The Hague.

Again, the second batch, the chain of custody is also flawed. No inventory of the documents and no clear record of what was seized.

The third batch. There is no evidence that, as far as the third batch is concerned, any documents seized were put in an evidence bag and sealed, nor was it recorded what evidence bag they were placed in and when. That is plainly insufficient from any investigative point of view.

It must follow that the chain of custody is flawed. No inventory of what was seized has been completed. We can't say with certainty what was seized. We can't say with certainty that which

was seized was that which was transported to the SPO offices. We do not know how many people looked or considered the documents that were seized. We don't know if all the documents that had been seized are copies of documents held by the SPO, as no complete side-by-side comparison was undertaken. And we cannot be sure as to the use of evidence bags, whether they were sealed; and, if so, when that they were placed in evidence bags.

The Trial Panel is being asked, as with much of the SPO case, to accept a position purely on the basis that the SPO advanced it. Not because there was evidence to substantiate that which is being asserted. This, with respect, is nowhere near sufficient to demonstrate that the evidence is untainted and to avoid a reasonable doubt.

In short, the entirety of the SPO case has fallen so far short of proving its case beyond a reasonable doubt that it can and should be summarily dismissed.

Public interest has been a key feature of the Haradinaj Defence and, for that matter, the Gucati Defence since the very beginning of these proceedings. Based on the evidence, it has always been clear that Mr. Haradinaj acted in the public interest, and that has been the driving force for his actions. I've indicated some of the key evidence regarding public interest during this trial set out in our trial brief. And especially in light of Mr. Rees' comprehensive submissions over the last day and a half, I will say that when the entirety of the evidence is considered, as I know this Court will do,

it's clear that Mr. Haradinaj has always acted in the public interest, and that was his guiding principle. It is clear that he acted in a way that is comparable, even less so, than that of Mr. Berisha, and it's unclear why Mr. Haradinaj stands here today and, for that matter, Mr. Gucati. This is not a case where Mr. Haradinaj has acted in a way determined to bring an end to this institution, like the Prosecution has contended. That is wrong and strongly denied. Moreover, as we've heard in relation to Mr. Berisha, it is clear that there was a strong public interest in disclosing the documents. This is in and of itself enough to reject the claim and should lead to the end of the matter.

We've heard this morning, and I will just mention it briefly, Article 200(2) and Article 200(4) of the Kosovo criminal code.

The first reference. A person is not criminally liable if he or she disclosed the confidential information in the public interest if such interest outweighs the interest in the non-disclosure of the confidential information.

The definition of public interest is clearly stated under Article 200(4), and it means the welfare of the general public outweighs the individual interest.

The disclosure of confidential information is in the public interest if it involves plans, preparation or the commission of crimes against the constitutional order or territorial integrity of the Republic of Kosovo or other criminal offences that will cause great bodily injury or death to another person.

The concept that disclosure of confidential information is in the public interest outweighs the interest in non-disclosure can also be found as a legal basis under Article 22 of the constitution of the Republic of Kosovo, which provides a list of international agreements and instruments that are guaranteed by the constitution, such as the ECHR.

Article 40 of the constitution also refers to freedom of expression; but, nonetheless, this right includes the right to express oneself, to disseminate and receive information and opinions and other messages without impediment.

I may come back to public interest after the lunch break.

Entrapment has also been raised as a defence in these matters and has been raised from the outset of these proceedings. Where entrapment or incitement is established, it results, as Judge Mettraux has identified previously, a permanent stay of proceedings. It is understood that in different jurisdictions it is -- the remedy is effectively differently applied. But a violation of Article 6(1) of the ECHR occurs when simply -- where evidence is obtained through incitement and when the accused is not able to raise an issue during trial. We submit there is no material difference between the positions of the Defence as has been suggested previously and that the parties are merely saying the same thing.

For convenience, I will say that we adopt Mr. Rees' submissions on entrapment that are made in their final trial brief. I would, however, add that we maintain the argument that the procedural aspect

of entrapment or police incitement is violated because the Haradinaj Defence has not been able to raise incitement properly due to a lack of meaningful disclosure regarding the leak and the identity of the perpetrators.

As to the substantive arm, I reject the submission of Mr. Halling that the limbs are being confused, but I do adopt the points raised by Mr. Rees in his final trial brief.

Moreover, and in accordance with Edwards and Lewis v. The United Kingdom, as was argued in our filing F00404, and has been argued in a number of filings by the Defence, if it is that the Trial Panel's had sight of the evidence in question, then that same evidence must be disclosed to the Defence so as to accord with Article 6 of the ECHR.

Now, we are, of course, not entirely clear on what the Trial Panel has or has not seen in this instance. But we had sought disclosure on that basis in order to be able to put forward the plea of entrapment. Now, Mr. Rees has dealt with this extensively. We maintain the position as set out in our final trial brief, and I won't dwell on the matter any further.

Moving on to mistake as to law. Yesterday Mr. Rees's traversing of the evidence in the press conferences showed clearly throughout his actions both Mr. Gucati and Mr. Haradinaj considered and believed that they were acting in accordance with advice and acting in accordance with the law. The Defence supports this argument. And it was certainly a theme through Mr. Haradinaj's evidence, his live

evidence, and the clear effect of these statements is that Mr. Haradinaj considered that he was acting lawfully and this is what he believed.

If need be, we can come back after lunch with the references where Mr. Haradinaj sets out that position. But at this stage, I would simply urge the Panel to read the entirety of Mr. Haradinaj's evidence, as I am sure it will, to see it was clear under what basis he was acting.

Your Honours, I'm mindful of the time, and I do wish to be as brief as I possibly can. But there are some points that the SPO made in its final brief and closing statement on Monday that I will need to address.

PRESIDING JUDGE SMITH: Just to recall that we're going until 1.15.

MR. CADMAN: Oh, 1.15, okay.

Looking at the overstatements from the SPO themselves. Now, I don't wish to dwell on the overstatements or mischaracterisations from the SPO. It is, of course, fundamentally important that the Panel consider the totality of the evidence. It is important for me to say some remarks on points that the SPO made, because they are unfair or inaccurate representations of Mr. Haradinaj. This list, of course, is by no means exhaustive, but I wish to highlight a few of what we consider to be the most relevant points.

So at paragraph 1 of the final trial brief, the SPO states that:

"The factual allegations underlying the charges were not highly

contested in the course of the trial as they are, in fact, unchallengeable."

This is wrong. Whilst Mr. Haradinaj has not contested what took place at the three press conferences, the underlying reasons and the basis are highly contested. More crucially, the Defence has not had access to the batches that form the basis of this case, so it is wholly improper to say that the facts are unchallenged.

The Defence has had no opportunity to challenge key parts of the evidence. At paragraph 9 of its brief, the SPO states that:

"A conviction must not be based solely or decisively on the statement of a witness whom the Defence had no opportunity to examine," clearly taking this from the jurisprudence of the European Court of Human Rights.

The impression that the SPO seeks to create is that there is nothing wrong with the fairness of these proceedings and that it has undertaken a careful balancing act or balancing exercise. We submit that that is far from the truth. The SPO has continued its case in the knowledge that underlying evidence has not been provided to the Defence and that any conviction must be based upon second, third-hand evidence that the Defence has not had a meaningful opportunity to challenge or, indeed, cross-examine because it has not seen the underlying documents.

Paragraph 21 of its brief, the SPO says that:

"Since the establishment of the KSC, the KLA WVA has challenged its legitimacy and opposed its mandate and that the accused publicly

expressed their position and undertook initiatives to terminate or amend their mandate."

This point was made by the SPO throughout its brief; paragraphs 176, 179, and 180.

Again, this is a misrepresentation of Mr. Haradinaj's position. Mr. Haradinaj has concerns about the SPO and the manner in which it has operated. Indeed, that is the basis for his disclosure in the public interest. Moreover, he has made clear on multiple times during his evidence that he's in favour of justice and is, effectively, seeking to make the process fair and applying equal justice. Transcript 2844 of 12 January, lines 19 to 25; transcript 2865, lines 11 to 17; transcript 2874, lines 12 to 17. He makes this point abundantly clear.

At various points during its final trial brief, paragraphs 29, 56, 59, and 68, the SPO seeks to create the impression that Mr. Haradinaj reviewed the documents for long periods of time, perhaps even studied them. Again, this is not accepted and is contrary to the evidence that Mr. Haradinaj gave at trial. Transcript T3003, lines 12 to 21; 3004, lines 6 to 13.

His evidence that he's unable to read English and that he simply looked at the material briefly. The impression the SPO seeks to create is that he took care to review the documents in detail. This is wrong and misleading.

At paragraph 71, the SPO seeks to present its investigative steps as without flaw. This is clearly a gross exaggeration of what

happened based on what I've already said about the investigative process and what is contained in the trial brief.

We consider that the standards applied to this case were poor and grossly inadequate.

More to the point, Mr. Haradinaj's evidence is clear that the SPO had no regard for the documents, did not come to collect them, and even when they did they treated the documents without adequate protection. Transcript 2789, lines 3 to 15; 2790, lines 4 to 8.

And Mr. Haradinaj asked for the building to be protected to either prevent any further disclosures or to identify the person who was making those disclosures. Transcript 2773, lines 8 to 16.

Throughout its final trial brief, looking at paragraph 87, the SPO seeks to present Mr. Haradinaj as wanting to attack and deter victims with references to words, such as spies. The Court should not accept the SPO's submission in this regard and view the statements in their proper context. This is because Mr. Haradinaj was clear in his evidence that names should not be mentioned. Those that he had mentioned, going back to what Mr. Rees said of the distinction between public and private, the only persons that Mr. Haradinaj sought to mention were those officials who he considered to have participated or been responsible for crimes committed in Kosovo during the conflict, those Serbian officials and Kosovo Serbian officials, who he considered should face justice. In his words, that is who he was referring to. We can look at transcript 2737, lines 19 to 21; 2751, lines 18 to 24; 2752, lines 14

to 25; 2775, lines 19 to 25; 2776, lines 1 to 3; 2784, lines 4 to 18.

And, again, any reference to spies are to actual spies from the Yugoslav regime. That was his evidence.

At paragraphs 136 to 141 of its final trial brief, the SPO presents its own witnesses as giving clear, consistent, and credible testimony. Paragraphs 137 and 140, the SPO present their key witnesses as highly experienced and trustworthy. Like we have explained in our final trial brief, and Mr. Rees has already covered over the last day and a half, this is very clearly not a position that we agree with or accept.

In our trial brief, we set out what we considered to be very real concerns as to the credibility and reliability of the witnesses that have been put forward.

At paragraph 142 of its final trial brief, the SPO says that the accused used their testimony to advance the anti-KSC agenda which motivated their criminal conduct. Again, this is simply not true. In his evidence, Mr. Haradinaj remained firm in his view that there are problems with the KSC, but his overriding message was that he was not against justice, if it was for all. Transcript 2844, lines 19 to 25; 2865, lines 11 to 17; 2874, lines 12 to 17.

And, again, the reason for his disclosure was that it was in the public interest.

At paragraph 145 of the final trial brief, the SPO says that caution should be present wherever the accused attempts to distance themselves from publicly made statements. Mr. Haradinaj has not

attempted to distance himself from publicly made statements in this instance. Instead, we submit that he has explained his position regarding the motivations for disclosure in more detail and elaborated what he did at that time.

At paragraph 146, the SPO says that Mr. Haradinaj was steadfast in his lack of remorse or resolve to reveal confidential materials. This entirely misrepresents and ignores Mr. Haradinaj's position. Like I've said repeatedly, and as Mr. Haradinaj has said repeatedly, he is in favour of justice. His motivation for disclosure was clearly said to be in the public interest.

In its trial brief, at paragraphs 166 to 169, on Monday, the SPO made complaints about the extent of fair trial complaints that have been made by the Haradinaj Defence. Now, I don't wish to give the SPO point more credibility than it deserves, but there is one important point that I would like to make.

One of the core complaints is, as we understood His Honour, Judge Gaynor, explained in one of his questions to the SPO on Monday, is that the batches have not been tested by the Defence properly, and the Defence has not had an opportunity to meaningful cross-examine those that have presented the evidence. It is impossible to effectively cross-examine someone on a document that counsel has not seen as the content is not known. There may be a number of problems or contradictions in those documents, or chains or inquiry that lead to challenge. The counterbalancing measures that the SPO refer to are simply insufficient.

Your Honours will be mindful that in national security cases, it is common, where we are dealing with sensitive material, that special advocates can be appointed who are independent. No effective counterbalancing measures were applied in this case.

It's also insufficient to say that documents are secret or confidential merely because the SPO says so, and there is no need to review the evidence. That still deprives the Defence of an opportunity to effectively challenge and test assertions or even to effectively cross-examine based upon the material contained therein.

Your Honours, there are still a couple of matters that I do want to put. I would like to finish now, if Your Honours will allow me to. I don't expect to be, after lunch, much more than 30 minutes at most.

PRESIDING JUDGE SMITH: After lunch you want 30 more minutes?

MR. CADMAN: Yes.

PRESIDING JUDGE SMITH: Okay. Are you going to go until the time or do you want to stop?

MR. CADMAN: No. I'm asking now if we can rise now. There are a couple of matters that I need to check before I conclude.

PRESIDING JUDGE SMITH: All right. We will break for lunch and be back at 2.30.

We're adjourned.

--- Luncheon recess taken at 1.08 p.m.

--- On resuming at 2.30 p.m.

PRESIDING JUDGE SMITH: You may proceed, Mr. Cadman.

MR. CADMAN: I'm grateful for the additional time, Your Honour. There are just a couple of matters that I just need to finalise on.

The first point, just to be clear, in case it wasn't clear in my earlier submissions. When dealing with Mr. Berisha, there was certainly no suggestion on my part that we consider that he committed any criminal offence. We completely accept the position that has been put forward by Mr. Rees and adopted by the SPO, that Mr. Berisha did not commit any criminal offence. So nothing that I said earlier should be construed in any other way.

I wanted to address one point that was raised by the Prosecution in relation to a suggestion as to the source of the leak.

And just to summarise the position very briefly. As we've heard, the SPO's confirmed that the defendants are not alleged to have been responsible for the leak. It is the position of the Defence that the SPO had inadequate security measures, and when considering whether an institution can protect that data, it's not the defendants to which we should be looking but rather whether the SPO have had that ability or otherwise. Not forgetting that without the abject failures of the SPO, none of us would be sitting here today.

The Prosecution allowed for the material to be leaked and still to this day do not appear to know how or why.

There's no logical explanation of the facts consistent with the theory that this leak was done by someone trying to assist the accused or potential accused. We say the opposite is true because

this would inevitably rebound against the Defence.

Moreover, if this had been done by or on behalf of the accused, surely they would want to keep the facts secret that they had access to Prosecution material and not make them public in the way that Mr. Haradinaj did. There is no reasonable interpretation of the evidence that is consistent with the documents having been dumped on the WVA in an effort to help the accused.

They were, quite obviously, or at the very least probably, obtained by either the SPO itself in an attempt to discredit the WVA on the basis of the criticisms that it had made prior to September 2020, to silence any opposition to the exercise of its mandate, or by an individual or agency hostile to the KLA accused.

The second key point is that all the evidence points to the conclusion that the SPO's evidence management systems were insecure and subject to penetration. Now, I'm not suggesting that there is evidence of this, but there could be no greater public interest in exposing what was at the core of this process.

The Prosecutor's Office opened its case high and alleged that the defendants have carried out a number of acts. We raised the issue in our final trial brief and make reference to an agency, potentially, that has penetrated the SPO. And I summarise the point in this way.

There is no evidence before the Court to suggest that what happened was the result of an external hack into the SPO's computer system. But if it had been, it's entirely reasonable to infer that

it would require the sophistication of a state agency to penetrate a secure evidence management system. Certainly, the Prosecution has produced no evidence to the Defence, or even to the Court, to establish that this was not the action of a state intelligence service. Which begs the question: Which state or states might have the technical capability or the motive for harming the Defence?

What we can say for sure is that the obvious inference from the facts is that a state agency may have been responsible for such a staggering breach of security. I raise it again, not suggesting that there is evidence of this having occurred, because we have no evidence before the Court as to the source of the leak and how the system was penetrated.

They have provided you, the Judges, with no evidence whatsoever to disprove the obvious inference being drawn. Why would the Prosecutor choose to keep the results of this investigation secret, the way the leak happened, who may have been responsible? But it certainly shows that Mr. Haradinaj had every reason to be concerned that there was something very wrong with this process.

I only raise it now as it was raised by the SPO in their closing, that this being an outlandish suggestion, but it is my duty, as Defence counsel, to get at the truth in my client's best interests. But it is also his determined objective that we should get to the truth about what has occurred. I make no further comment in that regard.

It, therefore, falls upon me now to conclude the closing

statement on behalf of Mr. Haradinaj by drawing reference to the trial brief and the other written submissions that have been submitted in dealing with the six counts that he faces.

It is my submission that in respect of each and every count there is insufficient evidence to substantiate the elements of the offences, and for that reason we invite you, the Trial Panel, to review the evidence carefully, fully, and justly, and return a verdict of acquittal in relation to each and every count on the indictment.

Mr. Haradinaj, as I've said at the outset, has great faith in you doing that, and I have great faith in you applying yourself to the evidence both presented by the Prosecution and the Defence fairly and passionately and justly.

Your Honours, I'd like to thank you very much for your time.

PRESIDING JUDGE SMITH: Thank you, Mr. Cadman.

We will begin with the questions from the Bench, beginning with Judge Barthe.

Please make sure we direct to one or the other or both.

JUDGE BARTHE: Thank you, Judge Smith.

I have some questions for you, Mr. Rees, in relation to the crimes of intimidation and retaliation.

MR. REES: Your Honour.

JUDGE BARTHE: My first question is: Why do you think that Article 387 of the Kosovo criminal code cannot be committed with eventual intent? What are the legal reasons for your assumption

that, as you said earlier this morning, the target of the perpetrator must be to induce another person to refrain from making a statement, et cetera? Is it the wording of the provision, especially the word or the words "to induce," or are there other reasons for your interpretation of that offence?

MR. REES: The words of the article provide require use of force to induce, use of force or serious threat to induce.

My submission is that those words make clear that that is a specific intent. It is a specific direct intent that's required. There needs to be deliberate use of force with the purpose of inducing another. It is to induce another. I say that is a specific direct intent rather than eventual intent which -- so awareness of a consequence of your action might be that a person, for example, refrains from making a statement or makes a false statement is not enough, because your actions have not been for the purpose of, they have not been to induce.

So that's my submission in relation to Article 387(1) and the requirement, as I submit, of a specific direct intent.

JUDGE BARTHE: Thank you. I understand.

Now, Mr. Rees, if you look at Article 388 of the Kosovo criminal code, the crime of retaliation. If I remember correctly, you said this -- that this offence requires as a subjective element a specific intent to retaliate for providing truthful information.

MR. REES: Yes.

JUDGE BARTHE: Is that correct?

MR. REES: That is correct, Your Honour.

JUDGE BARTHE: And in your view, would it be possible to argue that the different wording of the two provisions - namely, on the one hand, "to induce another person to refrain from," in Article 387 of the criminal code; and "with the intent to retaliate for," in Article 388 of the Kosovo criminal code, on the other hand - also allows for a different interpretation of the provisions in terms of intent?

MR. REES: If the Kosovo criminal code was drafted with any particular routine or standard approach, then perhaps. But it's clear, in our submission, that the code does not approach questions of drafted in any particular systematic or routine way. Our submission is that one has to look at the words of any particular offence, and there's little, in fact, to be gained by making a cross-comparison between different articles because there is not a particular systematic approach that's taken.

Looking at the words, retaliation does, under Article 3 -- sorry.

JUDGE BARTHE: 388?

MR. REES: If Your Honour bears with me just for a moment.

JUDGE BARTHE: Yes.

MR. REES: Under Article 388(1) does use the words "with intent to." Article 387 makes it clear, we say, that there is a similar intent required by referring to carrying out an action to induce another. That is a specific intent.

JUDGE BARTHE: And my last question also for you, Mr. Rees. You

told us this morning that the goal or the aim of your client was to expose the extent of cooperation between the SPO, on the one hand, and Serbia, on the other hand. Is that goal or aim not a or maybe one of the motives Mr. Gucati might have had? And why should that aim or motive, one, for a general criminal law perspective be relevant; and, two, why should it exclude a finding that your client also acted with a specific intent to intimidate persons who were willing to testify and to retaliate against persons who had already testified against members of the KLA, as the Prosecution has argued?

MR. REES: The Prosecution bear the burden of proof in this matter. They are required to prove a specific intent beyond reasonable doubt.

There is no direct evidence of an intent which the Prosecution sets out to prove by way of an admission on Mr. Gucati's part. They have to then look at the rule on circumstantial evidence. And the rule on circumstantial evidence requires the Prosecution to exclude - not for the Defence, but for the Prosecution to exclude - all other possible reasonable inferences. And if there is more than one that is allowed by the evidence, then they have not met that standard of proving beyond reasonable doubt the intent.

I do not advance, and I, in my submission, am not to required to, I do not advance that Mr. Gucati's words and his stated intent to expose the true extent and degree of cooperation between Serbia and the SPO excludes all other possible inferences to be drawn as to his intent. I do not have to do that. The Prosecution are required,

however, to exclude the fact that his stated intent is not one of the stated intents that is sufficient for any of these counts.

JUDGE BARTHE: So if I understood you correctly, you're only relying on the evidence that is before us, not on general principles of law or criminal law? You're relying on Rule 143.

MR. REES: At trial, Your Honour, I can only rely on evidence that's before Your Honours. I cannot rely on anything else because the evidence what the evidence is. But this is a case in which there's no direct evidence that the Prosecution has to prove whatever intent they are required to prove. They set out to do so through circumstantial evidence.

Your Honour asked me about Mr. Gucati's stated intent and asked whether that excludes all other intents, and my answer is that I am not required to do that. His words are not required. He's not required to prove, to the exclusion of all other possible inferences, what his intent was. The Prosecution, on the other hand, are required to.

And if his intent was as he's said it was throughout consistently, then that is not sufficient to prove any of the counts. And unless they can exclude that as an intent on his part to the exclusion of all others, then they have not met their burden to establish beyond reasonable doubt a criminal intent.

JUDGE BARTHE: I understand. Thank you very much.

No further questions. Thank you.

PRESIDING JUDGE SMITH: All right. Judge Mettraux.

JUDGE METTRAUX: Thank you, Judge Smith.

Mr. Rees, I'll start with you, if I may. And, Mr. Cadman, of course, if you feel you have to address the questions, you will be given an opportunity to do so.

I want to seek a number of clarifications from submissions you've made yesterday and today to us. The first one is you've drawn a distinction in your submission between what you call private persons and public persons. And I want to make sure that we understand exactly what the difference you invite us to draw between these persons.

And what I want to understand in particular is if you suggest that the status of an individual as a public person, as you put it, or an official person, is incompatible with the status as a witness? In other words, if you are a state official, are you disputing the fact that you can also be a witness?

MR. REES: Your Honour, the first thing to say is that it's not my distinction that I draw. It's Mr. Berisha's distinction. He gave evidence about it. That was part of the distinctions that he drew when he looked at the material he had to see what he could publish or not.

And his answer was that for public officials, they were not confidential. It was in the public interest to publish, as he did, the identities of those Serbian public officials, and we saw them yesterday.

Now, I agree with the SPO that Mr. Berisha has committed no

criminal offence. I have set out in our analysis of Counts 5 and 6 why the Prosecution do not meet their required elements of, for example, without authorisation or information declared to be secret, nor that the information was disclosed to Mr. Gucati in any official proceeding.

All of those I say are relevant, necessary ingredients to the offence that were not established in relation to Mr. Berisha, and that's why he hasn't committed any criminal offence. And part of that is the way in which he approached the material. We heard that from Mr. Halling himself, that part of their assessment that he'd committed no offence is the way in which he approached the material, and that included making a distinction between private persons and public officials.

There are other elements that are missing in relation to Mr. Berisha, like the fact the material wasn't disclosed to him in any official proceeding, like it hasn't been proved to be declared secret by a decision of the Court or a competent authority. Those points apply equally to Mr. Gucati as they do to Mr. Berisha. And it's on that basis that we entirely agree with the SPO that Mr. Berisha has committed no criminal offence under Counts 5 or 6.

JUDGE METTRAUX: Maybe I should have phrased the question slightly differently and really to direct it to a legal question.

You are not suggesting, therefore, that, as a matter of law, there would be a difference between a witness who is a private person or a witness who is an official of the state? In other words, you

are not making the submission that, as a matter of law, a state official would not be entitled to protection as a witness if --

MR. REES: Of course, any person, in whatever capacity, can be a witness. As I submitted earlier today and yesterday, on the Prosecution's analysis, their definition of a witness, potential witness, every person in this courtroom, whether Judge or counsel or security guard, could be a witness under that definition. Of course it can. But that definition forms no part of assessing whether the elements of Count 5 or Count 6 are made out.

JUDGE METTRAUX: The second clarification I would like to get from you, and, again, it's simply to make sure that we have understood your submission properly, but do you accept that journalists are members of the public or are you taking issue with that?

MR. REES: A journalist is a profession. It's a professional. He or she will have their own obligations, ethical standards to apply as part of their profession, which does make a -- distinguish them from other members of the public who do not.

And, obviously, again, we can look at our own position here, Your Honour. But, of course, I am here in my professional capacity as counsel. Of course, I am a member of public as well. But when I am acting as a professional as counsel, I am acting under the obligations that I have as counsel, and there can be no suggestion that I do not have such obligations. A journalist is a professional that has their own professional obligations, and they are

particularly well versed in identifying what they can publish and what they can't, what is confidential and what isn't, what the public interest -- where the public interest lies.

JUDGE METTRAUX: So would it be fair to say journalists are members of the public with specific rights and obligations, in summary?

MR. REES: They're members of the public who, as professionals, have additional obligations, professional obligations, ethical considerations that are attached to them in their role as a journalist.

JUDGE METTRAUX: I want to ask you about something else.

You made some submission in relation to Mr. Tome Gashi, in particular, his relationship as counsel to the KLA WVA. And I want to be sure that I understood what you said.

Are you saying that your client's conduct was informed by Mr. Gashi's advice before 17 September 2020?

MR. REES: Yes, I do.

JUDGE METTRAUX: And the evidence you rely upon is the one that you've mentioned to us, the reference of your client to --

MR. REES: So Mr. Gucati initially gave evidence that Mr. Gashi was instructed after the first press conference. And, in fact, he said, of course, that he'd had contact with Mr. Gashi both before and after he was formally instructed as legal advisor.

At a later stage, I accept, there was an inconsistency in that he suggested that it was after the second press conference when he

was cross-examined. But I direct Your Honours to consider the contemporaneous record of the second press conference itself in which his advice is referred to during the course of the second press conference, which confirms, in my submission it corroborates, his initial position.

JUDGE METTRAUX: You will recall that at the time of Ms. Myers' testimony, I asked you a question and you very elegantly evaded it. My question was whether you were relying, as Mr. Cadman does for his client, on a defence of whistleblower. And your response, from memory, was to say that you would wait and see and that, in any case, you relied upon or you could rely upon Ms. Myers' evidence for your broader argument of public interest.

So I go back to my question: Are you asking this Panel to make findings, if we were to reach that point, of course, in relation to a claim of whistleblower in relation to your client?

MR. REES: Obviously, the evidence in the case that you've heard is evidence in both cases of Mr. Gucati and Mr. Haradinaj, and I can't ask you to exclude evidence that's been heard in one defendant's case from the greater record, as it were.

We have throughout raised public interest. I do not raise it as a specific defence. I don't suggest it's a statutory defence. I do say, of course, and we have, we submit, been consistent throughout in this, say that it plays part and parcel of the Prosecution's obligations to prove that any revelation of material was without authorisation and was unlawful.

To the extent that Dr. Myers, I think she was, assisted with the general position in relation to the operation of Article 10 of the European Convention and general evidence about public interest, then, obviously, I do rely on that and I do say that general evidence assists, but I do so in the context of it being, we say, part of the Prosecution's burden to prove its case on Counts 5 and 6 rather than suggesting that there's any statutory or separate defence to an offence that would otherwise be made out.

I hope that is more clear than it was previously, Your Honour. If not, I can -- tell me, and I will help again.

JUDGE METTRAUX: I shall confirm it is clearer. I have the response and I'm grateful for it, Mr. Rees.

The last question for you, and, again, of course, it's for you, Mr. Cadman, if you feel that you should address it. But you've made the submission today that Article 62 was inapplicable or at least did not provide a legal basis or an adequate basis on which to claim that the material was covered by confidentiality.

And assuming this to be the case, I would like to know from you what you say the legal basis is on which the SPO, the Prosecution, could make or determine its material to be confidential, or if it is your position that they have no such power?

MR. REES: So focusing on the counts as particularised.

Count 5 is particularised by reference to secret information. Under Article 392(1) of the Kosovo criminal code 2019, disclosure -- the revelation of material that's being disclosed in any official

proceeding to a person and has been declared to be secret by a decision of the Court or a competent authority shall be punished.

Obviously, as a matter of law, if the SPO is a competent authority to declare information as secret, then it can do so. But it hasn't. Or at least the Prosecution haven't proved in this case that they have made any such declarations that evidence is secret. And I do suggest that the word "secret" is a term of art which must relate back to the general law on classification of security that governs all public bodies in Kosovo and sets out a very clear table of classifications of which secret and, above it, top secret are two specific classifications.

And there's been no evidence, in this case, the Prosecution haven't sought to call any evidence, of the declaration by either a court or any other competent authority, whether the SPO or not, of any information being declared to be secret.

In relation to Count 6. Again, Count 6 and Article 392(2) specifically deals with the identity or personal data of persons under protection in the criminal proceedings or in a special programme of protection.

Now, there has been some reference to protected witnesses being declared by or protection being granted by measure by a court. Although, that's the SPO's interpretation. We invite you to consider that actually no witnesses have been declared to be protected under any specific protective measure by the Court.

There have been requests made, although they had not been

granted at that stage, or at least, I think, in one case there may have been an order for protection, but that order had not been made public, and it's part and parcel of Article 392(2). We say that you have to have awareness of the order of protection, and we refer to the case of M.Z., PAKR 336/16.

So we say even in that one case, even if there had been an order of the Court granting protective measures in relation to a witness or witnesses, that order had not been made public, so Mr. Gucati could not have been aware of it. And the offence, in accordance with MZ, that degree of awareness of the order is not satisfied.

In terms of any wider position, well, Your Honour, the scope of the powers of the SPO are a matter for them, and as is proof of their case. And we say that, in this case, their attempt to simply rely on the bold assertion that every document that we have in our possession must be confidential and all the information contained in it must be confidential falls far below meeting the required standard of proving beyond reasonable doubt the specific elements of Count 5 and Count 6, which, of course, is the only reason why we're here in a criminal trial.

JUDGE METTRAUX: I'm grateful, Mr. Rees.

And the next two questions will be for you, Mr. Cadman.

The first one might also touch upon you, Mr. Rees, so feel free to stand, if you feel.

But, Mr. Cadman, my first question, and, again, for clarification purposes, has to do with paragraph 94 of your final

trial brief. And I'll briefly read from it. You make the following submission:

"The position does, however, go even further when we consider the fact that the SPO has engaged and sought the assistance from individuals that are subject to an Interpol red notice for their involvement in the commission of war crimes and/or crimes against humanity in Kosovo, and either knew or ought to have known of the existence of Interpol requests and yet took no steps to inform Interpol of their whereabouts."

And you repeated that submission, in essence, today at page 54, Mr. Cadman.

There's a couple of things that I want to ask you. The first one is my understanding of these submissions is that the relevance is towards establishing what you say is an impropriety on the part of the SPO. Is that correct?

MR. CADMAN: Yes, Your Honour.

JUDGE METTRAUX: And if that is the case, what do you say to the evidence of your witness, your Defence expert, Mr. Reid, who seemed to recall suggesting, A, as a matter of course, an investigative body could collect information from people suspected or even convicted of a crime, number one; and number two, the fact that he confirmed that some of the individuals with whom he and his office dealt are the same individuals who you say the SPO should have steered clear from and that, according to you, is a cause of impropriety.

So what do you say to the evidence of your witness on this?

MR. CADMAN: Your Honour, I think there are two parts to the assertion. The first part is it's having spent time in national and international tribunals, as we all have, it's not uncommon for insider witnesses to be used in the formulation of a criminal case. It's not uncommon for agreements on immunity to be granted for information to be provided, and Mr. Rees dealt with this, I believe, yesterday.

But there is a distinction between, as it was explained yesterday, an insider providing information in relation to a case in which they are accused, and individuals providing information, as in the current situation, against individuals in other cases for which they have no relation.

The individuals who were cited are not providing information to the SPO to uncover crimes in which they were involved and which they may have participated in or may have had associates that participated in them. So my submission is that there is a distinction between those two sets of circumstances.

The other issue, and the question was put to Ms. Pumper, as to what checks were made to identify whether those individuals were subject to an Interpol red notice or, indeed, warrants from any other jurisdiction. The issue that's being raised is that that was a failure on the part of the SPO to make such inquiries.

And so I think the situation is slightly different to that of using insider witnesses. And certainly what Mr. Reid was speaking about, from his years of experience, was in relation to insider

witnesses providing information in relation to the cases that were under investigation.

JUDGE METTRAUX: And what about the fact that he dealt with the same officials? Would that be a concern to you? Are you pressing that point, that impropriety is evidenced, you say, by the fact that he dealt in terms of cooperation with some, at least, of the same individuals as the SPO has dealt with? Is that a point you continue to press?

MR. CADMAN: The point that was being made was -- and the one individual who we have been permitted to refer to in open court, the former war crimes prosecutor in Belgrade, I mean, certainly there is the issue of cooperation between the SPO and that individual.

But the other individuals that have been collaborating, cooperating with the SPO are those individuals that certainly Mr. Haradinaj has concerns with because of their involvement in matters in Kosovo. And, obviously, those matters were read out and put to Mr. Haradinaj, and his concern was the fact that there had been no investigations into those matters. Relying on those individuals was seriously problematic in his view and amounted to improper conduct of the Prosecutor.

Now, in my submission, yes, and I do maintain that submission, but the point is and the test is what was the state of mind of the individual, Mr. Haradinaj, at the time he took the steps he took. What was his state of mind in relation to those individuals who have been very vocal on the situation in Kosovo, and there is at least an

inference of their involvement in those same massacres in Kosovo. That was the issue that was being put forward.

Not that it is improper in all circumstances to cooperate with the authorities of another state.

MR. REES: [Microphone not activated].

Your Honour, we agree, as a point we made yesterday, is that Mr. Reid was talking about working in a system that fairly and impartially investigated and followed the evidence whichever direction it pointed. And sometimes that would point to the investigation of people who were being used by one group of investigators as victims but, at the same time, they were also being investigated and prosecuted for crimes.

We are in a different situation here because the SPO's not in that position. It cannot undertake that fair and balanced and impartial approach. That's the distinction between Mr. Reid's position in the ICTY and the position of the Specialist Prosecutor. It is that unfairness, that distinction that is at the very heart of the complaint, the concern that's been expressed by Mr. Gucati and Mr. Haradinaj and, indeed, many others in Kosovo, including the press.

I also agree with Mr. Cadman that this evidence that's referred to in paragraph 94 and the other evidence we've heard of -- that we heard during the course of the trial of a similar nature, where the press has published allegations, serious allegations of involvement in war crimes of the most serious nature against identified

individuals that the press published is relevant to the mental state of the defendants, of Mr. Gucati, for example.

And, indeed, that particular article, where individuals who were wanted by Interpol, according to the article, were collaborating and cooperating with the SPO, it was those individuals that, in fact, was referred to in that part of the cross-examination that we looked at this morning, I think, where Mr. Gucati was talking about the enemies of Kosovo. And there was the named -- do you recall there was a reference in the transcript to a named individual, and, in fact, on the -- if we'd gone back a couple of pages, we didn't have time because I was running short, we would have seen the name of the individual. He was one of the persons that the press had publicly declared was wanted by Interpol and was still on the run, as it were.

So it's important to look at that evidence because that was evidence that was publicly published that Mr. Gucati was aware of. And, again, this ties back in with what Your Honour was asking about Dr. Myers evidence. Part of her evidence was to describe that, obviously, for whistleblowers, one can't require the whistleblower to have an omnipotent understanding of the true position. It was enough that the belief was reasonable.

Now, Mr. Gucati had read publicly in respected professional press articles that the SPO was cooperating with people who were wanted by Interpol. And it's in those circumstances perfectly understandable to say that was an enemy of Kosovo, an enemy of Kosovo that may be a witness. It does not follow that all witnesses are

enemies.

JUDGE METTRAUX: Stay standing, Mr. Rees. You made the decision to stand, and I will take advantage of that to ask you the follow-up question.

Am I right, therefore, from the submission you've just made, that you are not relying on these press articles for the truth of their content? In other words, you are not claiming that an Interpol red notice exists, but you are relying upon it to say, if I understand properly, that this is information that was in the public domain and that formed the mind of your client?

And there's a subquestion, if your answer to that is no, is: If the answer is no and you are actually seeking to rely on the truth of the content of these articles, well, is it your case that you are relying on these articles for the truth of their content; and, if so, what evidence you say is there of the actual existence of these Interpol red notices? Where do they come from? Who issued it?

Or are you simply, and I go back to my first point, relying on these articles to show not that these Interpol red notices exist but that your client believed they existed?

MR. REES: Certainly the latter. I certainly rely on the fact that it's perfectly reasonable for Mr. Gucati, as many other people in Kosovo were entitled, to have a reasonable belief in the accuracy of those articles. They're published articles published by the professional press in Kosovo, and I'm sure that Mr. Gucati is far from alone in believing them.

But in relation to the first part of Your Honour's question, whether I rely on the truth of the contents of the article, that is, do I rely on it as true, my answer is to refer back to the burden of the standard of proof. The Prosecution are required to prove their case beyond reasonable doubt. And my submission to Your Honours is that part and parcel of Count 5 and 6 and the Prosecution's obligation is to prove that any classification of the information as either secret, as we say is required by Count 5 as it's particularised, or Count 6 in relation to protected witnesses or witnesses under a special programme of protection, and the absence of authorisation, is for the Prosecution to prove that the matters that they rely on as being revealed were lawfully, properly considered either secret or witnesses protected or under a special programme of protection or -- and for these purposes, I don't accept that this is sufficient for Count 5 as it's particularised, but on the SPO's position, not to be revealed otherwise in accordance with the law.

So it's for the Prosecution to prove, in effect, the unlawfulness or the lawfulness for the protection they claim for this information. They have, as part of that case, adduced these articles. These are Prosecution exhibits. I did not apply to adduce them under the ASA provisions. They were adduced by the Prosecution as their exhibits.

And in doing so they raise, do they not, obvious questions, obvious concerns. Concerns that Mr. Gucati shared during the time of the indictment. Concerns that, no doubt, many other people in Kosovo

shared. And concerns, in my respectful submission, that should be raised in this courtroom during the course of the trial that the Prosecution have not addressed.

They could have. They could have called evidence on the point. They could have adduced evidence to say that this is not true. That those people who were named are not wanted by Interpol. Or they could have called evidence to say: They are wanted by Interpol, but we're not harbouring these people. We're not protecting them from Interpol. We have passed on to Interpol where they are. We've taken statements from them or we've taken information from them, but doing the right thing, like Mr. Reid would have done at his time in the ICTY, we have made sure that they will be properly investigated. And if the evidence confirms that they have, indeed, been involved in the murder of 362 women and children, for example, they will be prosecuted and they will face the consequences of that even if we are ourselves seeking to rely on them either for the provision of intelligence or, indeed, for evidence.

So I refer back to the burden of proof. I rely on these articles because they raise an obvious evidential issue as to the lawfulness or otherwise of the SPO's conduct, and it has not been addressed. They have not sought to address it in evidence.

JUDGE METTRAUX: I'm grateful, Mr. Rees.

And the last question is for you, Mr. Cadman.

It has to do with paragraph 20 of your brief in which you make the following submissions:

"The Prosecution had promised a safe and secure environment and had promised to protect the physical integrity of its witnesses. It had promised that to its donors and its constituents, the people of Kosovo. It had failed."

So those are your submissions at paragraph 20 of your brief. And I want to ask you whether you accept, or whether we must read this submission as an acceptance, that the leak of that information created, to use your words, an unsafe and unsecured environment? Is that the inference we must draw from those submissions?

MR. CADMAN: If you recall during Mr. Haradinaj's evidence, and it's certainly in his statement as well, he was not aware, had no knowledge of how wide the leak was, whether other individuals would have access to that information. And one of the reasons why he wanted to -- or he took the steps that he took was to, effectively, expose two matters that the SPO had created.

The suggestion is not that it is through Mr. Haradinaj's actions that there has been a creation of -- as is stated in that paragraph, because that's taken from Mr. Haradinaj's own words. That those -- those were concerns that he had raised, that it was the SPO that was responsible for a massive security breach, and he was making that public through his actions.

JUDGE METTRAUX: My question is maybe broader than that. But do you -- here your submissions are not about the acts of the accused but it's about what you say is a failure of the SPO to keep a safe and secure environment, your words.

What I'm asking is whether you accept that the environment in which these events took place is unsafe or unsecure, or whether this would be a misunderstanding of your submissions.

MR. CADMAN: I think it may be a clumsy choice of words. Certainly we're not suggesting that any act that Mr. Haradinaj took created an unsafe environment.

What he was exposing, as I've said, and as he's said in his evidence, that highlighting what had occurred. And, of course, as we know, he was not involved in any way with the actual leaking of that data. And he had been very clear in his evidence as to warnings to those who had the material not to publish any details that could effectively expose witnesses.

JUDGE METTRAUX: I'm grateful. And no further questions.

Thank you, Judge Smith.

PRESIDING JUDGE SMITH: Judge Gaynor.

JUDGE GAYNOR: Thank you, Judge Smith.

I have three questions for Mr. Rees.

But, of course, Mr. Cadman feel free to also provide responses, if you wish.

The first one, Mr. Rees, concerns public interests and the burden of proof. At paragraph 104 of the Gucati final brief, and again today, you stated that the burden of proof is on the SPO to prove beyond reasonable doubt that the material allegedly disclosed by the accused did not contain indications of improprieties occurring in the context of cooperation between the SPO or the SITF and Serbia.

Now, I'm interested in why the burden of proof is on the SPO. And, in particular, we know that the SPO has an ongoing duty to disclose exculpatory evidence under Rule 103. This absence of impropriety is certainly not an element of the offence, and it was the Defence who raised the public interest argument.

So why is it not the burden on the Defence to show, based on the statements of the accused at the three press conferences and at the associated press appearances, why isn't the burden on you rather than on the SPO?

MR. REES: So my answer is to go back to Count 5 and Count 6.

Count 5 requires the Prosecution to prove that any revelation of information was without authorisation, and although I do not accept that it applies in this case because of the way the count is particularised, under Article 392(1) there's an alternative basis that it must not -- the information must not be revealed according to law; or, and this does apply, because the way Count 5 is particularised, has been declared to be secret by a decision of the Court or a competent authority.

Now, just concentrating on Count 5 for the moment, although I think the point is effectively the same for Count 6. There can be no doubt that it is upon the Prosecution to prove without authorisation or that the information revealed was either information 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.

And as part of that exercise, proving that, it must follow that

must not be revealed according to the law, well, that speaks for itself. It must be lawfully restricted according to the law, because otherwise it wouldn't make sense, would it? If the restriction was unlawful, then it wouldn't be in accordance with the law.

And, again, it cannot be any doubt that, for example, information which purely embarrasses a competent authority, for example, or is information revealing unlawful conduct, or reveals that that competent authority has abused its authority or its power, could not, lawfully, be restricted. That would be absurd. That's my proposition.

And I would dare the SPO to take the opposite position, to suggest that they could, for example, hide material that demonstrates that their acting unlawfully or abusing their authority by saying it's protected by law. That cannot be right. The law cannot operate in that way.

And, indeed, to the credit of the SPO, in their final trial brief they do acknowledge that, for example, public whistleblowers do have an important role to play in society. So they acknowledge that there is a public interest element that must come into play in considering whether, for example, the revelation of any information is unauthorised or contrary to the law.

Now, my submission is that material that the public interest requires to be disclosed, because the interest of the general public, the welfare of the general public in disclosure of the information outweighs any interest in non-disclosure for an individual. The law

must say, must it not, that that can't be revealed. I can't use the law to prevent the disclosure of material that it is in the welfare of the general public outweighing the interest of the individual in non-disclosure. It can't be that the law can stop the publication of that material.

So then we get to the burden of proof, Your Honour. And as it falls unquestionably under Count 5 for the Prosecution to prove that any disclosure was unauthorised or was of material that was properly declared secret, lawfully declared secret by a court or a competent authority. Not unlawfully, because that wouldn't make sense. But lawfully. Or must not be revealed according to the law. It falls on them to prove as part of that that that material was properly, for example, declared to be secret, or the law properly requires it not to be disclosed.

That is why I say that the burden of proof falls on the Prosecution to demonstrate, to prove beyond reasonable doubt that the public interest does not outweigh the individual interest of the individual in non-disclosure.

JUDGE GAYNOR: Very well. Thank you.

The second is on the issue of eventual intent and specific intent.

Now, are you putting forward, as a general proposition, that eventual intent cannot apply to a specific intent crime?

MR. REES: Yes, I do.

JUDGE GAYNOR: And do you have any authority, whether from a

court of Kosovo or an international court, that supports that assertion?

MR. REES: No. It is my submission that a specific intent -- well, perhaps I could put it a different way.

It depends -- whether an eventual intent will suffice depends on the consequences and the nature of the act. Where we have, in the case of Counts 3 and 4, offences which have, in my respectful submission for Count 3, the specific intent to use force or serious threat to induce another person, one would have to ask: Well, what could the consequence be that awareness of it would be sufficient for an eventual intent to suffice?

Well, the consequence as prohibited is acting to induce another to refrain from making a statement or to make a false statement. Well, that is as good as saying that person desires it, because he has to be aware that he is acting to induce a person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police.

So in relation to Count 5, I say it's a specific intent and eventual intent cannot suffice. It doesn't make sense because the offence requires the person to act for that purpose.

JUDGE GAYNOR: Now, in Article 21, it does appear to be clear on its terms, especially 21(1), that a criminal offence may be committed with direct or eventual intent. Specific intent crimes are not expressly addressed in the Kosovo criminal code.

So it may be that the Panel decides that it is obliged to apply

21 to all of the crimes. Do you see any legal barrier to the application? Apart from the argument of logic that you've made, is there any legal barrier to the application of eventual intent to all of the crimes charged?

MR. REES: Well, Article 21, if I can just turn to it. Article 21(2) sets out what the direct intent is. I would say that where you have a specific intent offence, where what is required by the offence is to act for, for example, the purpose of inducing another person to refrain from making a statement or to retaliate for the provision of truthful information, Article 21(3) and the definition there of an eventual intent is only circular. It only takes you back to the specific purpose that's set out in the offence itself, because the prohibited consequence is acting with that specific intent.

So you're simply asking yourself the question, for an eventual intent, is that person aware that he's acting for a specific purpose? Well, if he is, then that falls within Article 21(2).

So I suppose I would put it this way: Whether or not Article 21(3) applies doesn't take you anywhere, because you have the specific intent that's required by the facts, by the ingredients of the offence itself.

JUDGE GAYNOR: Could you clarify whether you, in your submission, both Article 387, which is intimidation, and 388, which is retaliation, are both specific intent crimes? You made a response to Judge Barthe about this, and I just couldn't quite follow if

you're suggesting that both of them are specific intent.

MR. REES: I do. Although retaliation has the specific words "with intent to." However, Article 387 provides that purpose, that specific intent, by requiring the use of force or serious threat to induce another person. There is a specific purpose, a specific intent inherent there in those words.

You could add, if you wish, the words "with intent to," but it's superfluous. The meaning is the same whether you -- whether it uses force or serious threat with intent to induce, or uses force or serious threat to induce. The purpose is the same.

JUDGE GAYNOR: I want to move now to the question of truthful information and Article 388.

Earlier today at page 14, you submitted that the offence under Article 388(1) is not concerned with any defendant who acts believing that the person has provided untruthful information.

And just prior to that, you read out a statement by Mr. Gucati in which he said:

"I have no issue with a person telling the truth to the SPO. If a person has been mistreated by a member of the KLA and spoke to the SPO about it, I'd have no issue with that. However, if a person spoke to the SPO and gave a false account as part of an effort to get relocated by the SPO, I suspect this has happened, then I consider them a liar."

MR. REES: Yes.

JUDGE GAYNOR: So I want to put to you somewhat in the abstract

how 388 operates, whether it's both truthful and untruthful information which is released into the public domain.

So if you don't mind, I'll put a hypothetical to you, and I want to hear your observations on it. A person puts confidential information concerning the commission or possible commission of crimes into the public domain. He accepts that there might be some truthful information in that body of information. He makes no effort to filter out truthful information from untruthful information. He makes hostile statements against witnesses who have cooperated with the police or with the prosecution service. In doing so, he knows and accepts that this can result in harmful action to some of those witnesses, including, for example, that some of them might lose their jobs.

In those circumstances, is the offence of retaliation established?

MR. REES: No.

JUDGE GAYNOR: And why is that?

MR. REES: Because the specific intent in Article 388(1) is with the intent to retaliate for providing truthful information.

If it was intended to cover the scenario that Your Honour has just hypothesised, it would simply be an intent to retaliate for providing information relating to the commission or possible commission of any criminal offence to police. It is specific in relation to an intent to retaliate for providing truthful information.

And, forgive me, Your Honour, in that I am not in a position at this stage to, for example, make any observations about whether the degree of harm or the consequence of your hypothetical scenario, whether that would suffice, nor am I in a position to say whether, for example, there might be other offences within the Kosovan criminal code that might cover that scenario.

But my submission is it's perfectly clear on the face of Article 388(1) that the offence of retaliation therein is not made out, because it requires a specific intent to retaliate for providing truthful information.

Whether the information might be true or not does not meet that specific intent. Because, again, the words are not "with intent to retaliate for providing information which might be true or might not be true," it's for providing truthful information.

As I say, my submission as to the duties of the Trial Panel is not to see, not to remedy any potential defects or lacuna as Mr. Halling called it in the scope of the Kosovan criminal code to deal with conduct that they suggest ought to be penalised.

And I don't know, because we haven't done an exhaustive analysis of the Kosovan criminal code whether there may well be other articles within it that might cater for exactly the sort of scenario that Your Honour has hypothesised. But Article 388(1) is not the article that covers that conduct.

JUDGE GAYNOR: But would you accept that 388(1) covers a person who has provided both truthful and untruthful information, or is your

position that the information has to be truthful 100 per cent; and, if it's not, then no offence is established under that article?

MR. REES: So in the first instance, Your Honour touches upon whether the information itself has to objectively be truthful, and I submit it does.

But returning to the subjective nature of the specific intent. The intent to retaliate for providing truthful information is exactly what it says it is. Now, it may be the case -- the Prosecution are required to prove beyond reasonable doubt that the perpetrator in an offence under Article 388 retaliates -- intending to retaliate for the provision of truthful information. Whether that requires the Prosecution, in a hypothetical situation, to prove that the defendant believed everything that was said was true, well, that's a hypothetical question. They certainly haven't set out to do that in this case, but they have to prove that there was an intent to retaliate for the provision of truthful information.

And the way they put it in their final trial brief is not to suggest that there is that intent but to put it no higher than a belief on Mr. Gucati's part that information may or may not have been true. That's how they put it. And they put it that way because a the overwhelming evidence is that Mr. Gucati is greatly sceptical about any complaints of wrong-doing committed by the KLA. There's no doubt about that. That is the overwhelming effect of the evidence.

So they can't put his intent any higher than an intent to retaliate, they would say, for the provision of information which

might be true. That is not enough. That is not sufficient on the face of Article 388(1).

JUDGE GAYNOR: Thank you very much.

Mr. Cadman, please feel free to address us, if you wish, on any of the questions I asked.

MR. CADMAN: I don't think there's anything in particular that I could add that Mr. Rees hasn't already stated.

JUDGE GAYNOR: Thank you, Mr. Cadman.

Thank you, Judge Smith.

PRESIDING JUDGE SMITH: All right, Mr. Halling. It looks like you got ready and we're going to run out of time. I think it's probably best if we put your response off till tomorrow, your reply off until tomorrow, so that the questions can come right after that.

I assume you're going to have a reply?

MR. HALLING: We are going to have a reply. If it helps for the timing, we expect it to take about 30 to 45 minutes.

PRESIDING JUDGE SMITH: Good. Sounds like tomorrow then. All right. We will adjourn until 9.30 tomorrow. Thank you, everyone, for your cooperation and attendance today.

We are adjourned and we'll see you tomorrow morning.

--- Whereupon the hearing adjourned at 3.39 p.m.