

1 Wednesday, 8 September 2021  
2 [Prosecution Preparation Conference]  
3 [Open session]  
4 [The Accused Haradinaj not present]  
5 --- Upon commencing at 9.30 a.m.

6 JUDGE SMITH: Good morning and welcome everyone.  
7 Madam Court Officer, could you please call the case.

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

11 JUDGE SMITH: Thank you.

12 I'd kindly ask the parties to inform us, rather than introducing  
13 everybody again, if there's anybody new in your group.

14 Prosecutor, anything?

15 MR. HALLING: Good morning, Your Honours. One change from last  
16 week from the appearances. Line Pedersen is not in the courtroom  
17 today and in her place is Clemence Volle-Marvaldi, Associate  
18 Disclosure Officer.

19 JUDGE SMITH: Thank you.

20 Mr. Rees, anybody to add?

21 MR. REES: Yes, Your Honour. I am additionally assisted today  
22 by Ms. Faye Wigmore and Mr. Muharem Halilaj.

23 JUDGE SMITH: Mr. Cadman.

24 MR. CADMAN: Only one change. Mr. Buckley, who is not with us  
25 today, will not be with us tomorrow.

1           And just for the record, Mr. Haradinaj wanted me to convey to  
2           the Court that whilst he takes no issues with the Trial Panel, he  
3           still has very serious concerns as to the conduct of the Prosecutor  
4           and so he is not attending. He is refusing to attend today and  
5           tomorrow.

6           JUDGE SMITH: Thank you.

7           I note that Mr. Gucati is in the courtroom today, and we do note  
8           for the record that Mr. Haradinaj has waived his right to be present  
9           at the hearing.

10          As you all know, last week the Panel held the Trial Preparation  
11          Conference in this case. We issued a number of oral orders for the  
12          next steps. Meanwhile, the Panel has issued two written decisions,  
13          one on its reasons for denying the protective measures requested by  
14          the SPO for its witnesses and one on the Rule 102(3) updated notice.

15          Pursuant to Rule 116(2) of the Rules, a Preparation Conference  
16          for the SPO must be held within 30 days of the Trial Preparation  
17          Conference or as directed by the Panel. In this case, the Panel,  
18          after hearing the parties, scheduled this conference within a week of  
19          the Trial Preparation Conference for, I think, reasons that we  
20          mentioned last week.

21          A written agenda was issued on 6 September 2021, and we will be  
22          following that today. It's our hope and our intention to try to  
23          finish this conference yet today and not have to use the extra day  
24          tomorrow, but it is available if it comes up.

25          Now, let's start with the first topic on the ongoing issues of

1 disclosure.

2 Mr. Prosecutor, in the past few days your office disclosed new  
3 packages, numbers 42 to 44. The Panel understands that packages 43  
4 and 44 are related to the SPO's request to add one witness to its  
5 list and are subject to a request for adding them on the exhibit  
6 list, and we'll get back to that later on.

7 As for package 42, it seems to contain the declaration of an SPO  
8 staff member who declares never having said that the documents could  
9 be kept by the KLA WVA for a month.

10 THE INTERPRETER: Could you please slow down.

11 JUDGE SMITH: Sure. I've been asked to slow down.

12 And you have submitted this under Rule 102(3). So we take it  
13 that you do not plan to request the addition of this document to your  
14 exhibit list; is that correct?

15 MR. HALLING: It is, Your Honour.

16 JUDGE SMITH: All right. Any other or any further disclosures  
17 expected before the SPO case should begin?

18 MR. HALLING: None are currently anticipated, Your Honour. We  
19 are mindful of the Rule 102(3) notice decision from yesterday. We're  
20 evaluating our options following that ruling. But otherwise, there  
21 is no outstanding disclosure anticipated.

22 JUDGE SMITH: Thank you.

23 MR. HALLING: Oh, with the one exception of I mentioned last  
24 week already, that there is a pending third party request. However,  
25 it's still pending.

1 JUDGE SMITH: Right.

2 MR. HALLING: We have not received any information.

3 JUDGE SMITH: Right. We understand that.

4 Does the Defence wish to raise any outstanding disclosure issue?  
5 Mr. Rees.

6 MR. REES: Yes, I do, Your Honour.

7 We've obviously received the order of the Trial Panel yesterday  
8 in relation to the Rule 102(3) notice and the requirement for a  
9 detailed notice dealing with those matters which the Court of Appeal  
10 had previously identified as relevant.

11 We will await to see what we receive in relation to that order  
12 at the close of play tomorrow, and I think the order requires the  
13 redacted Rule 102(3) notice in accordance with the confidential annex  
14 that was annexed to the order. So I don't say anything more about  
15 that as a specific topic, but I do wish to revisit the Rule 102(3)  
16 notice in its entirety, so not restricted to the matters that were  
17 subject to the Court of Appeals decision; in particular, the process  
18 by which the information arrived at the KLA WVA premises, but the  
19 Rule 102(3) notice in general.

20 That notice, of course, is required to list all relevant  
21 material in the possession of the Prosecutor. I won't go over that  
22 issue, because the principle is firmly established now both by the  
23 ruling of the Pre-Trial Judge, confirmed by the Court of Appeal Panel  
24 and, of course, applied by Your Honours in the ruling yesterday.

25 But it does seem to us that there is real concern as to whether

1 the SPO have been applying that principle.

2 Your Honour has just referred to Disclosure 43, for example.  
3 Disclosure 43 was made on 3 September 2021. It refers to an  
4 interview -- witness interview that took place on 25 March 2021 and a  
5 series of exhibits produced by that witness during the course of that  
6 interview.

7 JUDGE SMITH: Judge Mettraux would like to intervene at this  
8 point.

9 THE INTERPRETER: Microphone.

10 JUDGE SMITH: Judge Mettraux has asked permission to intervene  
11 at this point for just a moment.

12 JUDGE METTRAUX: Mr. Rees, just to indicate I had the same  
13 assumption as you as regards the date. It appears it's a mistake on  
14 the top of the document. If you look at it at the next few lines,  
15 you will see that it says 25 August and the footer of the same  
16 document says the same. So I was under the same apparent  
17 misapprehension as you are, but it does seem that it is, in fact, a  
18 record of an interview that took place on 25 August. I just wanted  
19 to bring that to your attention.

20 MR. HALLING: Yes. If it helps, for the record,  
21 Judge Mettraux's accounting is correct.

22 MR. REES: The point remains the same. We had no notice of that  
23 until the service of the material on 3 September.

24 I do raise the question whether, in fact, the SPO have properly  
25 listed all relevant material under the Rule 102(3) notice. The

1 Rule 102(3) notice of course, requires, notification of all relevant  
2 material as soon as possible, as soon as the material is in the  
3 possession of the Prosecution. That hasn't been done in this case,  
4 and I do urge the SPO to undertake a root-and-branch review of the  
5 material they hold in their possession to see whether there are any  
6 outstanding matters that should go on the Rule 102(3) notice in  
7 addition to the matters that have been raised in the order dealt with  
8 by the Trial Panel yesterday.

9 JUDGE SMITH: Thank you, Mr. Rees.

10 Mr. Cadman.

11 MR. CADMAN: Thank you, Your Honour.

12 As with Mr. Rees, I had been prepared to deal with the  
13 disclosure issues today. But in light of Your Honours' ruling, we  
14 will wait to see what is served by the Prosecution.

15 I do share Mr. Rees' concerns. And in particular, one point  
16 that we may need to get to at a later stage, it may not be the most  
17 appropriate time to deal with it now, but last week Mr. Halling for  
18 the SPO had indicated on a number of occasions that the contact notes  
19 with witnesses did not include any interview transcript or any  
20 statements taken. In fact, that interviews were not conducted of  
21 those witnesses, and there was a general flitting between whether  
22 they were or were not witnesses.

23 Just to bring Your Honours' attention. In previous hearings,  
24 certainly in January of this year, the SPO had stated, in very clear  
25 terms, that they were interviewing witnesses. And as Mr. Rees has

1 indicated on a prior occasion, there was an indication that up to ten  
2 witnesses, which we believe were witnesses of fact, these witnesses  
3 that were being interviewed at that time, were likely to be presented  
4 and statements served.

5 I only raise it now because it does cause some concern as to  
6 whether statements were taken, whether these witnesses were  
7 interviewed, or whether they are now merely relying just on the  
8 contact notes. It is an issue of concern as to what has previously  
9 been put before the Court and what was put before the Court last  
10 week. I only request clarification, as we may need to make a further  
11 request for disclosure to the SPO based on the position that's been  
12 put forward.

13 JUDGE SMITH: Does the SPO wish to respond?

14 MR. HALLING: Briefly, Your Honour, in relation to what both  
15 Defence teams have said.

16 The Gucati Defence presents no basis for revisiting the  
17 Rule 102(3) notice. There is one aspect of the Rule 1202(3) notice  
18 that the Trial Panel is very well aware of. Disclosure Package 43  
19 does not create any new apparent issue. This was an interview  
20 conducted on 25 August 2021. Within a week of that interview, a  
21 transcript had been prepared, standard redactions had been applied,  
22 and it had been disclosed. There was no undue delay.

23 The Official Note referenced by Your Honour was disclosed under  
24 Rule 102(3), so when the SPO does have additional Rule 102(3)  
25 material to disclose, it is disclosing that material, even to this

1 day.

2 In relation to the Haradinaj Defence on the interviews with  
3 witnesses. If you look on the list of exhibits, there are some  
4 interviews with witnesses transcripts that are on the list of  
5 evidence. They are not submitted at this time. We are waiting for  
6 the resolution of the bar table motion to decide whether to retain  
7 reliance on those items, but what counsel is saying is not  
8 inconsistent with anything that I said last week or the SPO's  
9 position in general.

10 JUDGE SMITH: Thank you, Mr. Halling.

11 Anything from the Judges? Okay.

12 We can move on to the next topic which concerns points of  
13 agreement between the parties on fact and law. And I note in this  
14 regard that the Defence indicated in their respective pre-trial  
15 briefs, and the SPO confirmed in a separate filing, that the Gucati  
16 Defence agreed to 13 facts and the Haradinaj Defence agreed to three  
17 facts. No agreement as to matters of law have been recorded.

18 Has this changed in any respect, Mr. Rees?

19 MR. REES: No it hasn't, Your Honour.

20 JUDGE SMITH: All right. Mr. Cadman?

21 MR. CADMAN: No, Your Honour.

22 JUDGE SMITH: All right. Anything to add, Mr. Halling?

23 You might want to continue to review that. It seems to me that  
24 in all of this material there might be something else that could be  
25 agreed on that would make our hearing more expeditious without



1     violating anybody's rights. I hope that's an ongoing search, and  
2     maybe some discussion.

3             All right. Connected to this --

4             MR. REES: Sorry, Your Honour.

5             JUDGE SMITH: Yes.

6             MR. REES: I can assist in one respect. There is some agreement  
7     that became clear from Mr. Halling's oral submissions last week. In  
8     that in -- contrary to the Pre-Trial Judge's position on -- let me  
9     just find the right count. Contrary to the Pre-Trial Judge's  
10    interpretation of the offence of retaliation, the SPO appears to  
11    agree with the Defence position that Count 4, that's Count of  
12    Retaliation, is one of specific intent; wherein, an indirect intent  
13    or eventual intent is insufficient. The SPO spelt that out at  
14    transcript page 490, line 25. So to that extent, there is some  
15    additional agreement.

16            But it does seem to us that the elements of the offences will  
17    have to be gone through with real care, and there is likely to be  
18    real dispute, I'm afraid, in relation to those matters, save for that  
19    one aspect on Count 4.

20            JUDGE SMITH: We're going to be dealing with that a little  
21    later, so today.

22            MR. REES: Yes.

23            JUDGE SMITH: Mr. Halling, is that a correct statement for an  
24    agreement?

25            MR. HALLING: I don't think so. Because the

1 Confirmation Decision does acknowledge the specific intent in  
2 Count 4. It's in paragraph 136 of the Confirmation Decision. So to  
3 the extent that the Defence is deviating from the approach taken in  
4 the Confirmation Decision, it may not be in agreement. We are  
5 forever optimists on this point. If there is a legal discussion  
6 today that shows further agreements, we may pursue.

7 JUDGE SMITH: Thank you.

8 Now I give the floor to Judge Barthe who will have some  
9 questions in relation to two of the elements that have just been  
10 discussed briefly.

11 Judge Barthe.

12 JUDGE BARTHE: Thank you, Mr. President.

13 The purpose of my questions today is to obtain some  
14 clarifications to better understand your respective positions. If  
15 the Defence is not prepared to answer these questions today and/or  
16 would prefer to address them later, the Panel encourages the Defence  
17 to consider addressing them at a later stage.

18 Having said that, my first questions are for the Prosecution in  
19 relation to Count 1 of the charges, namely, the offence of  
20 obstructing official persons in performing official duties by force  
21 and/or serious threat, pursuant to Article 15(2) of the Law and  
22 Article 401(1) and (5) of the Kosovo Criminal Code 2019.

23 My question is: Are you, Mr. Prosecutor, arguing that both or  
24 only one of the accused personally used force or serious threats and,  
25 if so, against whom exactly; and through what specific act or acts?

1 MR. HALLING: Thank you, Your Honour.

2 This question I will answer in relation to what is pled in the  
3 indictment.

4 The Specialist Prosecutor's Office is alleging serious threats,  
5 because that is the finding that is made in the  
6 Confirmation Decision. It is made in relation to both accused, and  
7 you can see in paragraph 30 of the indictment exactly the itemised  
8 list of conduct that is charged for obstructing -- I'm sorry, I gave  
9 the wrong paragraph. If you look at paragraph 26 of the indictment,  
10 you can see the conduct that is itemised there, and you can also see  
11 paragraphs 27 and 28 of the indictment for the description of the  
12 accused's conduct that we are charging that falls under this count.

13 JUDGE BARTHE: Mr. Prosecutor, of course the Panel is aware and  
14 has read the indictment, and, of course, appreciate your references  
15 to the indictment, but could you please try to specify this a bit  
16 more instead of just relying or just presenting the references to the  
17 Panel?

18 Thank you.

19 MR. HALLING: I'm happy to.

20 So what the SPO is alleging that the accused have done that  
21 constitutes obstruction within the meaning of Count 1: They've  
22 disseminated the confidential information, they have declared that  
23 their purpose in disseminating the information was to obstruct the  
24 proceedings, and they encouraged members of the public in possession  
25 or with access to that information or certain members of the press to

1 further disseminate and publish that information.

2 And then in the context of the first and third disclosure  
3 specifically, certain further information was, indeed, disseminated.  
4 So in terms of what the actual obstruction is -- in terms of what the  
5 actual obstruction is, we allege it in three parts: Witnesses were  
6 intimidated by what the accused did, the SPO's ability to effectively  
7 investigate and prosecute those crimes was thereby threatened, and  
8 the SPO resources were diverted.

9 To clarify, there were some questions from Judge Gaynor last  
10 week where my answer was in relation to what is legally sufficient to  
11 prove the obstruction counts in relation to Count 2 in particular,  
12 and it goes to this discussion of direct and eventual intent. Our  
13 case, just to be clear, extends to direct and eventual intent for  
14 Count 1, and so the conduct is specified here in all of its branches,  
15 which apply to both Counts 1 and 2. So our case encompasses all of  
16 this conduct.

17 But as I was stating last week, there are certain aspects of the  
18 elements that have alternatives, and the Trial Panel need not  
19 necessarily reach all findings on all parts in order to enter a  
20 conviction.

21 JUDGE SMITH: You can sit down for a moment.

22 Since Mr. Rees brought up the matter of challenging the elements  
23 and the mode of liabilities in these cases, I'm going to ask the  
24 Defence, we'll start with Mr. Rees, that if they do challenge the  
25 elements of the offences and the modes of liabilities, could you

1 please tell the Panel exactly which elements of the offences and  
2 modes of liability you specifically challenge as stated?

3 MR. REES: Yes. The specific order that the Trial Panel made  
4 for the last preparation hearing last week referred to paragraphs 33  
5 to 97 of the decision on the confirmation of the indictment  
6 specifically and the legal analysis that was set out there in the  
7 Pre-Trial Judge's decision.

8 So I've gone through those paragraphs paragraph by paragraph,  
9 and perhaps the best way of answering it so that -- answering  
10 Your Honour's question so there's some structure is if I go through  
11 those paragraphs. That will obviously take some time if I was to  
12 argue the point on each of the paragraphs, but it may help if I just  
13 to set out the position for them as opposed to argue them.

14 JUDGE SMITH: Yes, I think that's a good -- telling us what  
15 you're -- I'm looking for that, what your specific challenge is. Not  
16 necessarily all the argument about it.

17 MR. REES: Absolutely. So the first section in the  
18 Pre-Trial Judge's analysis was violating the secrecy of proceedings.

19 It seems to me that paragraphs 33 and 34 of the  
20 Pre-Trial Judge's decision were unobjectionable [Realtime transcript  
21 read in error: "An objection"] they effectively just rehearsed the  
22 contents of the charges in Article 39(2) of the Kosovo Criminal Code.

23 Paragraphs 35, 36, and 37, we will -- we do not accept in those  
24 paragraphs the Pre-Trial Judge was effectively interpreting  
25 Article 392(1), but without the reference to any authority, he

1 appeared to be making his own interpretation and that, of course, is  
2 not binding on the Trial Panel. And we will submit in due course  
3 that his interpretation was too wide and that the interpretation of  
4 "offence" in accordance with the Kosovo Criminal Code should always  
5 be interpreted narrowly as opposed to taking a wider interpretation.

6 JUDGE SMITH: We'd like to interrupt you for just a moment.  
7 Judge Mettraux had a question or a comment.

8 MR. REES: Of course.

9 JUDGE METTRAUX: Apologies to interrupt you, Mr. Rees.

10 MR. REES: Not at all, Your Honour.

11 JUDGE METTRAUX: Apologies to interrupt you, Mr. Rees. The  
12 record of the transcript, page 13, line 13, suggests that you said in  
13 reference to paragraphs 33 and 34 that these paragraphs were "an  
14 objection." I heard you to say they were unobjectionable.

15 Could you clarify this?

16 MR. REES: Unobjectionable, yes. And they -- as I said, they  
17 essentially just appeared to rehearse the article itself, the  
18 Article 392(1).

19 So paragraphs 35, 36, and 37, we do not accept. And using the  
20 shorthand, it's interpretation by the Pre-Trial Judge without any  
21 authority, and we say that in those circumstances the Trial Panel  
22 will have to make its own resolution on those matters.

23 Paragraphs 39 to 40 we will submit that for both forms of intent  
24 the perpetrator under Article 392(1) must have knowledge that the  
25 information was secret, and we draw authority for that proposition

1 from the Kosovan case in the Court of Appeal in Kosovo MZ reference  
2 PAKR336/16, judgement of 13 December 2016.

3 We note as well that within the analysis of Article 392(1) the  
4 Pre-Trial Judge says nothing there about authorisation. And it is,  
5 of course, an essential element to the offence that any revelation of  
6 information is without authorisation. We say the Prosecution will  
7 have to prove absence of authorisation, and we will submit in due  
8 course an authorisation in that context should include disclosure  
9 where disclosure is in the public interest, and we say that the  
10 public interest element is part and parcel of Article 392(1) when  
11 looking at the issue of authorisation or not.

12 The Pre-Trial Judge then went on to look at the other aspect of  
13 Article 392 for these purposes. Article 392(2) and 392(3), the  
14 unauthorised revelation of the identity or personal data of protected  
15 persons and the aggravated offence where there are serious  
16 consequences for the person under protection or that criminal  
17 proceedings are made impossible or severely hindered.

18 Again, paragraphs 41 and 42 of the Pre-Trial Judge's decision  
19 appear unobjectionable in the sense that they rehearse the content of  
20 those articles.

21 Paragraphs 43 to 46, we do not accept. Again, it's  
22 interpretation by the Pre-Trial Judge without authority.

23 Paragraph 50 we specifically do not accept. In that paragraph,  
24 the Pre-Trial Judge suggested that the perpetrator must have known or  
25 had reason to know, he put forward as an alternative, that he or she

1 was revealing the identity or personal data of protected persons.

2 Again, we will submit that for the purposes of Article 392(2)  
3 and (3) as well as for (1), sub-article (1), the perpetrator must  
4 have known that, in this case, the identity or personal data was  
5 protected. And, again, we draw that proposition from the same  
6 authority, the Kosovan Court of Appeal case of MZ, the reference  
7 previously given, at page 7 of that decision. The Panel noted that  
8 in order to violate the identity of a protected witness, the  
9 perpetrator should have known about the existence of the order and  
10 its content. The order and its content being, in that case, the  
11 order protecting identity or personal data and, indeed, the content  
12 of the order, the extent to which it was protected. In the absence  
13 of that knowledge, the perpetrator could not be found guilty.

14 The Pre-Trial Judge then turned to retaliation, the offence of  
15 retaliation: Whoever takes any action harmful to any person,  
16 including interference with lawful employment or livelihood of any  
17 person, with the intent to retaliate for providing truthful  
18 information relating to the commission or possible commission of any  
19 criminal offences to police and authorise an investigator, a  
20 prosecutor or a judge shall be fined and punished.

21 Again, paragraph 51 simply rehearses the content of  
22 Article 388(1).

23 In relation to paragraph 52, the Pre-Trial Judge missed the  
24 important element that needs to be proved. That is, that the  
25 perpetrator acts with the intent to retaliate for providing truthful



1 information.

2 Paragraph 53 is not accepted. Again, it's interpretation by the  
3 Pre-Trial Judge without any authority in support. We do not accept,  
4 for example, that harm should be interpreted in the case of  
5 Article 388(1) to extend to including interference with well-being,  
6 privacy, or dignity as the Pre-Trial Judge suggested, again, without  
7 authority.

8 The content of paragraph 54 is not accepted. The  
9 Pre-Trial Judge again missed the important element. Not only that  
10 the perpetrator must act with the intent to retaliate for providing  
11 truthful information, but the Pre-Trial Judge missed the important  
12 element that the information provided must be truthful. That is an  
13 element of the offence that the Prosecution must prove.

14 Paragraphs 55 and 57 are not accepted again. In those  
15 paragraphs, despite acknowledging that there was a specific intent,  
16 the Pre-Trial Judge nevertheless went on to say that a direct intent  
17 and an eventual intent would suffice. We say that an eventual intent  
18 will not suffice for the offence under Article 388(1), as the intent  
19 to retaliate for providing truthful information is explicit. It's an  
20 offence of specific intent, and we will submit that only a direct  
21 intent in those circumstances will suffice for Article 388(1).

22 THE INTERPRETER: The interpreters kindly ask the speaker to  
23 slow down. Thank you.

24 MR. REES: We had thought that the SPO had agreed with the  
25 Defence --

1 JUDGE SMITH: Mr. Rees, slow down for the interpreters.

2 MR. REES: We had thought that the SPO agreed with that  
3 proposition in light of the submissions made by Mr. Halling again at  
4 transcript page 490, line 25, but perhaps it looks like we had  
5 misunderstood the SPO's position. Perhaps they can clarify that.

6 The Pre-Trial Judge then turned to intimidation. Under  
7 Article 387 of the Kosovan Criminal Code, which provides: Whoever  
8 uses force or serious threat or any other means of compulsion, a  
9 promise of a gift or any other form of benefit to induce another  
10 person to refrain from making a statement or to make a false  
11 statement or to otherwise fail to state true information to the  
12 police, a prosecutor, or a judge when such information relates to  
13 obstruction of criminal proceedings shall be punished.

14 Paragraph 58 of the Pre-Trial Judge's analysis is not accepted.  
15 Article 387 requires force or serious threat or any other means of  
16 compulsion or promise of a gift or any other form of benefit. For  
17 these purposes, I'll continue to use "requires force or serious  
18 threat," et cetera, as it were. The article requires force or  
19 serious threat, et cetera, to induce another person to refrain from  
20 making a statement.

21 That is, it requires, we say, that a person is induced to  
22 refrain from making a statement or otherwise failing to state true  
23 information, and so on. But, again, for shorthand purposes, I'm  
24 going to concentrate on "making a statement."

25 So we say this is an offence which requires proof of

1 consequence, that a person was induced to refrain from making a  
2 statement. We do not accept the proposition from the  
3 Pre-Trial Judge, without authority, that the force or serious threat,  
4 et cetera, can be directed at a person making or likely to make a  
5 statement. We do not accept that that's sufficient.

6 Article 387 also requires that the information which was to be  
7 provided, and wasn't, as a result, of the force or serious threat, it  
8 requires that that information relates to the obstruction of criminal  
9 proceedings. That is an element that the Pre-Trial Judge has missed  
10 entirely in his analysis.

11 Paragraph 59 is not accepted. Article 387 does not prohibit, as  
12 the Pre-Trial Judge said, any conduct that may have or is expected by  
13 the perpetrator to have an impact or influence on the statement or  
14 information to be given by the person. We will submit that  
15 Article 387 only prohibits the use of force or serious threat or any  
16 other means of compulsion, a promise of a gift or any other form of  
17 benefit, and, as I've already raised, that it requires another person  
18 to be induced to refrain from making a statement or to otherwise fail  
19 to state true information.

20 The Judge's analysis in paragraph 60 is not accepted. And I do  
21 add the caveat that I acknowledge that the definition in Article 113  
22 of the Kosovan code of "force," the word "force," the term "force,"  
23 appears to be comprehensive in that it defines "force" for the  
24 purposes of the code. So Article 113, the definitions article,  
25 begins:

1           "For the purpose of this Code, the terms below have the  
2 following meanings ..."

3           And "force," at sub-article 15, is given the meaning:

4           "The implementation of hypnosis or other means of intoxication  
5 for the purpose of bringing a person against his or her will into a  
6 state of unconsciousness or incapacitating him or her full  
7 resistance ..."

8           That's the definition given in Article 113.

9           If "force," for the purposes of Article 387, and despite what is  
10 said in the definitions section, is said to include the use of some  
11 other form of physical violence, we nevertheless draw attention to  
12 the definition requiring the person being brought into a state of  
13 unconsciousness or incapacitation.

14           We will submit, therefore, that the offence in Article 387  
15 should be interpreted, both in the use of force and in the use of  
16 serious threat, to relate to the actual or threatened use of serious  
17 force which has the consequences set out in Article 113(5).

18           JUDGE SMITH: Watch your speed again, Mr. Rees. You kind of  
19 accelerate once in a while. It makes it difficult.

20           And also can you give us an estimate of how much more you have  
21 on this subject?

22           MR. REES: The same length again.

23           JUDGE SMITH: Okay.

24           MR. REES: You did ask, Your Honour.

25           JUDGE SMITH: Go ahead.

1 MR. REES: And I do my best to help.

2 JUDGE SMITH: Yes, go ahead.

3 MR. REES: The fact is we do not accept the analysis that the  
4 Pre-Trial Judge has set out, and we say that there are a number of  
5 aspects in relation to each of the offences --

6 JUDGE SMITH: Understood. And I don't want -- I'm not limiting  
7 you. I just want you to -- don't go into the argument as much.  
8 Point out the positions that you're going to take.

9 MR. REES: Very well.

10 Paragraph 61, we do not understand what the Pre-Trial Judge  
11 meant by a potential witness in the circumstances of an offence under  
12 Article 387.

13 Paragraph 62 is not accepted. As I've already said, we will  
14 submit that the offence requires proof that the aforementioned acts  
15 do have a particular effect on the person. Namely, that they induce  
16 another to refrain from making a statement.

17 The Pre-Trial Judge made a comparison then between Article 386  
18 and 387, which is a useful exercise, but the Pre-Trial Judge, we will  
19 submit, got that analysis wrong.

20 The Pre-Trial Judge did accept that Article 386 requires proof  
21 of consequence. He spells that out in footnote 42. Like  
22 Article 387, the Article 386 offence can be committed by bribery,  
23 making a promise or offering a benefit, the -- threat, violence, or  
24 other form of compulsion. There is a considerable overlap between  
25 "offence" under Article 386 and 387. Article 386 requiring proof of

1 consequence, and we say Article 387 does also.

2 We note, and the Pre-Trial Judge did not observe, did not  
3 comment on this, that the maximum penalties, both prescribed  
4 punishments and maximum punishments, for Article 387 are more severe  
5 than Article 386, which would make little sense if Article 386  
6 required proof of consequence but Article 387 did not.

7 We say the aggravating feature and the distinction between the  
8 two offences of Article 386 and Article 387 offences is that the  
9 Article 387 offence must occur in relation to proceedings for an  
10 Article 386 offence. It's aggravating because it demonstrates a  
11 persistence to obstruct not only the original proceedings, the  
12 Article 386 offence, but proceedings for obstructing the original  
13 proceedings, and we say that's the Article 387 offence.

14 Paragraphs 63 to 65 on intent are also not accepted. We say the  
15 offence is an offence of specific intent. That is, the purpose or  
16 desire, the direct intent required is to induce a person to refrain  
17 from making a statement. We say that the perpetrator can only have a  
18 direct intent for the purposes of the offence.

19 In relation to obstructing official persons in performing  
20 official duties, paragraphs 67 and 68 are not accepted, and that's  
21 because they relate -- the Pre-Trial Judge referred the reader back  
22 to his analysis of force and threats and other means in relation to  
23 earlier passages of his analysis.

24 We say that serious threat, in this context, means serious  
25 threat of force.

1           We will also submit that Article 401(1) does require the force  
2   or serious threat to be directed against the official person. The  
3   Pre-Trial Judge in setting out a contrary position had no authority  
4   for the proposition that it does not, and he noted that the wording  
5   in 401 does not refer to using force or serious threat against the  
6   official person but, in fact, the article does.

7           In Article 401(5), the aggravated offence, the words  
8   specifically refer to when the offence is committed against a judge  
9   and the other official roles, but I'll for shorthand purposes,  
10   against a judge during the exercise of their official functions. We  
11   say that makes it clear, if it was not already clear, frankly, from  
12   the face of Article 401(1), that the force or serious threat needs to  
13   be directed against the official person.

14          Paragraphs 67 and -- sorry, 69 and 70 are examples, again, of  
15   the Judge making interpretation of the article without authority.

16          In relation to paragraph 73, that's not accepted. We say that  
17   the prohibited consequence for the purposes of Article 401(1) and (5)  
18   is the obstruction or attempted obstruction of an official person by  
19   the use of force or serious threat. It is not enough for eventual  
20   intent that the defendant is aware that an official person might be  
21   obstructed.

22          We will submit that the defendant must use force or serious  
23   threat against an official person, must be aware that the obstruction  
24   of an official person in performing his official duties by that force  
25   or serious threat can occur and that he accedes to that occurrence.

1 JUDGE SMITH: I'm going to ask you to wrap it up in five  
2 minutes.

3 MR. REES: Your Honour.

4 The obstruction of an official person itself is not prohibited.  
5 It can, of course, occur through lawful means. And we also add that  
6 when the offence is one of an attempt, which is alleged on the  
7 indictment, that only an direct intent will suffice for an attempt.

8 The Judge then moved to obstruction of official persons by  
9 participation in a group.

10 We do not accept paragraph 75. We will submit the common  
11 action, as referred to in Article 401, must refer to common action to  
12 use force or serious threat. Otherwise, on the Pre-Trial Judge's  
13 analysis, otherwise perfectly lawful joint activity, such as class  
14 litigation, would be penalised, and we will submit that that cannot  
15 be right.

16 We do not accept paragraph 76 for the same reasons, as we will  
17 make submissions in relation to Article 401(1).

18 In relation to paragraphs 78 and 80, they are not accepted. The  
19 intention required, we will say, is a direct intention; namely, the  
20 desired use of force or serious threat by three or more persons. The  
21 use of the word "common" makes it clear that only a shared direct  
22 intention by three or more persons will suffice.

23 In relation to modes of liability, therefore, to the extent that  
24 I haven't dealt with anything thus far, we do not accept paragraph 82  
25 where the Pre-Trial Judge submitted that an eventual intent was



1 sufficient for all charges.

2 In relation to paragraphs 84 to 87, they're not accepted either.  
3 We will say that co-perpetration, a form of perpetration where  
4 several persons, each of them fulfilling required elements for a  
5 perpetrator, knowingly and wilfully commits certain criminal acts,  
6 that requires specific intent. It's there in the Pre-Trial Judge's  
7 definition of "co-perpetration." That is, knowledge and wilfulness  
8 is required.

9 We will also submit that the actions of the co-perpetrators must  
10 be concerted in the course of perpetration of the offence.

11 JUDGE SMITH: Thank you, Mr. Rees. And I'm sorry to have to cut  
12 you off, but some of these same points are going to be covered by  
13 Judge Barthe so you'll get another shot at it anyways.

14 MR. REES: Your Honour.

15 JUDGE SMITH: Mr. Cadman, anything further?

16 MR. CADMAN: Your Honour, nothing really further from me that I  
17 need to add. I have the, I would say, the rather luxury of having to  
18 follow Mr. Rees on his points.

19 JUDGE SMITH: Yes, and as I said Judge Barthe is going to be  
20 asking some questions so you'll have another chance.

21 Anything you want in response? Bear in mind that Judge Barthe  
22 is going to be running through some of this same information.

23 MR. HALLING: Understood.

24 Very briefly. Just to say we had no notice of the Defence  
25 presenting the full exposition that they just gave. We would like an

1 opportunity to respond to it in writing. It's impossible on the fly  
2 to respond point by point in the moment.

3 So my suggestion would be, for the Court, whatever questions the  
4 Judges have, we're prepared to answer today and to state our  
5 position. And if the Judges would like further submissions  
6 responding to what the Gucati Defence has just said, we would like an  
7 opportunity in writing to do that.

8 JUDGE SMITH: Let's see how this goes with Judge Barthe's  
9 questions because they're quite extensive and cover the territory as  
10 well.

11 So I'll just give the floor to Judge Barthe and he can continue.

12 JUDGE BARTHE: Thank you, Mr. President.

13 We're still dealing with the charge -- or Count 1; namely, the  
14 offence of obstructing official persons in performing official  
15 duties.

16 My question again to you, Mr. Prosecutor, simply put: Are we or  
17 are you saying that both accused used explicit threats or just  
18 implicit threats?

19 Could you please clarify this for the Panel.

20 MR. HALLING: We're saying that the threats that they made  
21 constitute serious threats within the meaning of the provision. It  
22 includes the conduct that they said. The conduct that they said  
23 sometimes is explicitly threatening and sometimes it is implicit in  
24 their statements.

25 So we're actually charging both, but both meet the code

1 provision.

2 JUDGE BARTHE: Thank you. Maybe, Mr. Prosecutor, again for the  
3 purpose of clarification, the Panel notes that in paragraph 97 of  
4 your pre-trial brief it is stated that the accused's actions, and I  
5 quote, "were carried out directly, by serious threats directed at the  
6 SPO, and indirectly, by serious threats to witnesses and others,  
7 against SPO officials, including Prosecutors, investigators, and  
8 other staff members, during an exercise of their official functions,  
9 specifically, the SPO's ongoing criminal investigations."

10 Mr. Prosecutor, there is no need, of course, to reveal names of  
11 members of the SPO to answer this question. But please, could you  
12 explain whether you allege that specific members of the SPO were  
13 specifically threatened by one or both accused? And if so, which  
14 acts of the accused amount to serious threats against -- specifically  
15 against SPO staff.

16 Thank you.

17 MR. HALLING: The serious threats alleged are directed towards  
18 witnesses within the meaning of the provision. The effect of that  
19 had an effect on the SPO's office. There is no one particular  
20 official within the office that was obstructed differently than the  
21 others, but the effect of the accused's conduct obstructed official  
22 persons in the course of their duties.

23 So this is why the indictment, for instance, doesn't charge any  
24 particular named official but does charge that the accused's conduct  
25 obstructed the official person.

1 JUDGE BARTHE: Thank you, Mr. Prosecutor. That helped.

2 My next question is also for the Prosecution, and it concerns,  
3 again, the offence of obstructing official persons performing  
4 official duties. Could you please explain how, and this is a  
5 follow-up question, actually, to what you just said, how the work of  
6 the Specialist Chambers and/or SPO officials was affected and/or  
7 delayed as a result of the actions of the accused or the alleged  
8 actions of the accused? In particular, what official duties were  
9 performed or not performed?

10 Of course, Mr. Halling, the Panel is aware that you indicated  
11 that one of your witnesses will testify in this regard, but maybe  
12 it's possible just to sum up or to summarise your position on this.

13 Thank you.

14 MR. HALLING: Thank you, Your Honour. And the Court is correct  
15 that W04842's testimony does go to this point, amongst others.

16 The way in which it obstructed was because witnesses were  
17 intimidated, the SPO's ability to effectively investigate crimes was  
18 thereby threatened from that intimidation, and that resources were  
19 diverted to address the actual and potential consequences to the  
20 witnesses and also to KSC proceedings as a whole.

21 So this is a summary of the conduct that we are describing as  
22 being obstructing within the meaning of Counts 1 and 2.

23 JUDGE BARTHE: Thank you, Mr. Prosecutor.

24 My next, actually, three questions are for the Defence, and I  
25 apologise in advance to Mr. Rees that maybe I miss some of the points

1     you mentioned and maybe you will have to repeat yourself in this  
2     regard.

3             So my first question to both, of course, Defence counsel is,  
4     starting with Mr. Rees, did I understand you correctly that you don't  
5     agree with the Pre-Trial Judge's finding in paragraph 68 of the  
6     Confirmation Decision that the crime or the offence of obstruction,  
7     Article 401(1) of the Kosovo Criminal Code, does not require that the  
8     force or serious threat is directed against the official person? And  
9     that, rather, the force or serious threat may be directed against one  
10    or more other persons as long -- and I quote, I cite the  
11    Pre-Trial Judge here, "as long as it results in the obstruction or  
12    attempted obstruction of an official person in performing official  
13    duties."

14            Of course, Mr. Rees, you touched upon this, I believe, but you  
15    don't -- or, as a matter of fact, you don't have to repeat yourself  
16    or you don't have to repeat all the arguments, but just to clarify.  
17    Can you clarify this.

18            MR. REES: Yes, we do not accept that. We will submit that  
19    Article 401(1) does require the force or serious threat to be  
20    directed against the official person.

21            As I say, the Judge's interpretation is an interpretation that  
22    he had no authority for, and he did not observe that Article 401(5),  
23    in particular, states that the offence is to be committed against a  
24    judge and other official person, judge, et cetera, during the  
25    exercise of their official functions.

1           So we say that the threat or serious force -- sorry, the force  
2           or serious threat must be directed against the official person.

3           JUDGE BARTHE: Thank you.

4           Mr. Cadman.

5           MR. CADMAN: Your Honour, our position is exactly the same. And  
6           we -- to all of these points, we will be submitting upon direction in  
7           the fullness of time justification for all of the challenges that  
8           Mr. Rees has set out.

9           JUDGE BARTHE: Thank you, Mr. Cadman.

10          My next question is also for the Defence. I think, Mr. Rees, at  
11          least I cannot remember that you have touched upon this question, so  
12          maybe it's a new question, I hope.

13          Does the Prosecution - this is my question - have to prove that  
14          the actions of the accused were directed against the performance of  
15          specific official duties; for example, against a specific  
16          investigative measure, such as the execution of a search warrant or  
17          the seizure of evidence?

18          Mr. Rees, you have the floor.

19          MR. REES: Can I reflect upon that point? Thank you.

20          JUDGE BARTHE: Mr. Cadman.

21          MR. CADMAN: I imagine that we will be jointly reflective of  
22          that point, and one or either of us will respond to that at a later  
23          time.

24          JUDGE BARTHE: Thank you. Of course, the Prosecution as well.

25          Do you want to comment or do you have a position on this,

1 Mr. Prosecutor?

2 MR. HALLING: We do, Your Honour. It's similar to the answer to  
3 the previous question. It doesn't have to be proven that specific  
4 investigative measures were affected in order to prove Count 1.

5 JUDGE BARTHE: Thank you, Mr. Prosecutor.

6 My last question also, especially to the Defence, is -- last  
7 question on Count 1, actually. Are there any other legal  
8 requirements not expressly foreseen in Article 401(1) of the Kosovo  
9 Criminal Code, such as the requirement of simultaneity, meaning that  
10 the force or threat has to be simultaneous with the official act  
11 which the official person undertakes within his or her powers.

12 And I refer to a commentary on the Kosovo Criminal Code 2012  
13 published by Salihu/Zhitija/Hasani in 2014. More specifically, to  
14 Article 409(1), margin number 4.

15 I don't expect both parties to have a specific view on this, but  
16 if you want to take the floor this is your chance, Mr. Rees.

17 MR. REES: Your Honour, I'm grateful for Your Honour raising the  
18 matter. Again, we'd like to reflect on that point as well, please.  
19 Thank you.

20 MR. CADMAN: Same thing. We'd like to consider the commentary  
21 and then certainly come back.

22 JUDGE BARTHE: Mr. Prosecutor.

23 MR. HALLING: I guess we'll take the same opportunity.

24 The answer to Your Honour's question depends on what that word  
25 "simultaneity" means. And so after consulting the commentary, we can

1 give a more considered response.

2 JUDGE BARTHE: Thank you, Mr. Prosecutor.

3 I'm now moving to Articles 401(2), (3), and (5) of the Kosovo  
4 Criminal Code 2019. This is Count 2 of the indictment, the offence  
5 of obstructing official persons in performing official duties by  
6 participating in the common action of a group, in relation to which I  
7 have a question for the Prosecution.

8 I note that the case law or that case law on this offence  
9 relates primarily to instances of mob violence, in which the persons  
10 committing the obstruction could not be identified or, in the words  
11 of the Kosovo Court of Appeals in the case of MI et al of  
12 28 May 2014, this is case number PAKR513/2013, it was not possible to  
13 establish the specific individual actions of obstruction.

14 In that context, I would like to ask you what the relationship  
15 is between paragraphs 1 and 2 of Article 401 of the Kosovo Criminal  
16 Code. And more specifically, is your position that both paragraphs  
17 are jointly applicable in the present case?

18 Mr. Prosecutor.

19 MR. HALLING: My answer to the last question is easiest, because  
20 it's yes. The way that we've charged the case, both of them are  
21 charged at the same time.

22 We are mindful of Kosovo cases addressing Count 2 in the context  
23 of mob violence. It is our position that that is not the only  
24 context to which these elements apply. And that if you do have a  
25 situation where obstruction occurs through participation in a group



1 of persons doing this by common action, such as the way pled in the  
2 indictment, that that also meets the elements of this offence.

3 JUDGE BARTHE: Thank you, Mr. Prosecutor.

4 Mr. Rees and Mr. Cadman, would you like to comment on this?

5 MR. REES: Yes, Your Honour.

6 As I set out earlier, we submit the relationship between  
7 Article 401(1) and 401(2) requires the common action to refer to  
8 common action to use force or serious threat.

9 We say that the much wider interpretation applied by the  
10 Pre-Trial Judge cannot be right, because on the Pre-Trial Judge's  
11 analysis otherwise perfectly lawful joint activities - I gave the  
12 example earlier of class litigation - would be penalised and that  
13 cannot be right. We say that common action in Article 401(2) refers  
14 to common action to use force or serious threat, and we say that the  
15 use of the word "common" makes clear that the group can only act in a  
16 common action where they share the specific direct intention shared  
17 by three or more persons.

18 That's the submissions that we will make in relation to  
19 Article 401(2) and (3).

20 JUDGE BARTHE: Thank you, Mr. Rees.

21 Mr. Cadman.

22 MR. CADMAN: Nothing further to add, Your Honour.

23 JUDGE BARTHE: Thank you, counsel.

24 Let us now go to Article 387 of the Kosovo Criminal Code. This  
25 is Count 3, the crime of intimidation. I think we already touched

1 upon this, whether this crime is a specific intent crime as well or  
2 not. The Panel is, in this regard, interested in both party's  
3 positions on the reasons for the respective positions, whether it is  
4 or whether it is not a specific intent crime.

5 I would like to start with the Prosecution, Mr. Halling.

6 MR. HALLING: Thank you, Your Honour.

7 Our position is that there is no specific intent within this  
8 provision, and the reason why is just an exercise of statutory  
9 construction.

10 If you compare it to Count 4, which is where the specific intent  
11 was identified by the Pre-Trial Judge, that provision indicates  
12 whoever takes any action harmful to any person, including  
13 interference with lawful employment or livelihood of any person, with  
14 the intent to retaliate for providing truthful information. There is  
15 no equivalent language in Article 387, and so in our assessment the  
16 Pre-Trial Judge was correct in setting out the objective and  
17 subjective elements without reference to a specific intent here.

18 JUDGE BARTHE: Thank you, Mr. Prosecutor.

19 Mr. Rees.

20 MR. REES: We say that the wording in Article 387 makes it clear  
21 that it is an offence of specific intent. The use of force or  
22 serious threat must be to induce. The purpose of it is to induce.  
23 That imports a specific intent, a direct intent only.

24 JUDGE BARTHE: Thank you, Mr. Rees.

25 Mr. Cadman, nothing further?

1           Let's move on. My question on this count -- or my next  
2           question, actually, on this count is again to the Defence. Maybe I  
3           missed that, Mr. Rees. Could you please repeat whether you agree or  
4           not agree with the Pre-Trial Judge's finding in paragraph 62 of the  
5           Confirmation Decision, that for Article 387 the SPO will not have to  
6           prove that the acts of the accused had any particular effect on  
7           potential witnesses.

8           Thank you.

9           MR. REES: We will submit that Article 387 does require proof  
10          that the aforementioned acts have a particular effect on the person;  
11          namely, that another person was induced to refrain from making a  
12          statement relating to an offence under Article 386.

13          The Pre-Trial Judge's analysis - again, without any specific  
14          authority. But his analysis drew on a comparison with Article 386,  
15          which he did accept in footnote 40. He did set out that Article 386  
16          does require proof of consequence. He didn't look at Article 386 in  
17          a greater detail, and we submit that if one does carry out a proper  
18          analysis of the two offences, it does support our position that proof  
19          of consequence is required for 387 also.

20          Article 386, the offence can be committed, like Article 387, by  
21          use of force, serious threat, forms of compulsion, promise of a gift  
22          or any other form of benefit. It covers the same conduct in that  
23          regard, the two offences.

24          We note -- the Pre-Trial Judge didn't, but we note that the  
25          prescribed and maximum punishments for Article 387 are more severe

1     than under Article 386, which we submit would make little sense if,  
2     as on the Pre-Trial Judge's analysis, Article 386 required proof of  
3     consequence but Article 387 did not.

4             So we say that the elements of the offence are, to a large  
5     degree, overlapping. The aggravating feature, though, of  
6     Article 387, the element that makes it a separate offence, missed by  
7     the Pre-Trial Judge, is that proceedings for an Article 387 offence  
8     must relate to inducing another person to refrain from making a  
9     statement relating to the obstruction of criminal proceedings.

10            So the words of Article 387 of the Kosovo Criminal Code set out:

11            "Whoever uses force or serious threat or any other means of  
12     compulsion, promise of a gift or any other form of benefit to induce  
13     another person to refrain from making a statement or to make a false  
14     statement or to otherwise fail to state true information to the  
15     police, a prosecutor, or a judge, when such information relates to  
16     obstruction of criminal proceedings shall be punished."

17            Obstruction of criminal proceedings is the offence under  
18     Article 386. The Article 387 aggravated offence is where an offender  
19     demonstrates persistence to obstruct not only the original  
20     proceedings. That's an Article 386 offence. But proceedings for  
21     obstructing other proceedings. That is the Article 387 offence.  
22     Both require proof of consequence. Article 387 requires proof of  
23     consequence that a person was induced not to make a statement in  
24     proceedings for an Article 386 offence.

25            JUDGE BARTHE: Thank you, Mr. Rees.

1           Mr. Cadman, anything further? Or the SPO? First Mr. Cadman,  
2       sorry.

3           MR. CADMAN: Your Honour, nothing further, and only just to say  
4       that this is a point that Mr. Rees and I have considered at some  
5       length. And the proof of consequence has to naturally flow from  
6       that, as Mr. Rees has quite properly set out. The sentencing for the  
7       two provisions means that it has to be interpreted in that way.

8           JUDGE BARTHE: Thank you, Mr. Cadman.  
9       Mr. Halling.

10          MR. HALLING: It does not have to be interpreted that way. The  
11       difference between the sentencing ranges in the two provisions can  
12       also be explained that Article 387 talks about conduct including  
13       force or serious threats including by means of compulsion; whereas,  
14       Article 386 doesn't have that same kind of aggravating conduct.

15          The Defence's reading requires the Trial Panel to ignore a  
16       contextual reading of this part of the Kosovo Criminal Code. The  
17       fact that Article 386 talks about causing a particular result and  
18       Article 387 does not talk about causing the same result is, indeed,  
19       meaningful. Were Article 387 to include consequences within it, then  
20       it would be redundant with Article 386.

21          So the distinction between the two provisions is in the nature  
22       of the conduct being sufficient - whereas, it's sufficient for 387  
23       and not for 386 - but the conduct itself has more gravity in  
24       Article 387. And that is the only reconcilable reading between these  
25       two different provisions.

1 And, by the way, it matches the way that the sentencing schemes  
2 are set out for each.

3 JUDGE BARTHE: Thank you, Mr. Prosecutor.

4 I am now moving to questions relating to Count 4, the offence of  
5 retaliation. My only, I have to say, remaining question on this  
6 count is to the Defence and it serves the purpose of clarification.

7 Mr. Rees, I think you already touched upon this. Am I correct  
8 that your position is that the SPO has to prove that the person  
9 concerned provided truthful information. My question is here that  
10 you already said this. Are you saying that the truthfulness of the  
11 information is part of the *actus reus* and/or *mens rea* of the offence  
12 of article -- or in Article 388 of the Kosovo Criminal Code?

13 MR. REES: Both.

14 JUDGE BARTHE: I thought so. Thank you.

15 Mr. Cadman, anything further?

16 Mr. Prosecutor?

17 MR. HALLING: Yes, on this we did want to make a submission.  
18 That the way that the co-provision is written, it's actually a  
19 subjective element.

20 We are mindful that the Confirmation Decision discussed this in  
21 the context of the objective elements of the offence. However, the  
22 co-provision clearly says that it acts with the intent to retaliate  
23 for providing truthful information relating to the commission or  
24 possible commission of any criminal offence.

25 The Pre-Trial Judge did correctly state the element though. And

1 if you look later in the Confirmation Decision, that is applied to  
2 the facts in a way where no assessment of the truthfulness or not of  
3 the information was done. And in our assessment, that assessment is  
4 correct in interpreting Article 388 of the Kosovo Criminal Code.

5 This is in relation to the object of the harmful action. And,  
6 therefore, it is a *mens rea* element.

7 Thank you.

8 JUDGE BARTHE: Thank you, Mr. Prosecutor, for the clarification.

9 My next question for the Defence is in relation to Count 5,  
10 violating the secrecy of proceedings, through unauthorised revelation  
11 of secret information; Article 392(1) of the Kosovo Criminal Code.

12 And I also apologise, Mr. Rees. Maybe I missed that. But also  
13 in order to clarify or for the purpose of clarification, am I correct  
14 that you don't agree that protected information within the meaning of  
15 Article 392(1) includes, and I quote, "any material pertaining to SPO  
16 investigations, including cooperation with other entities, as well as  
17 any documents marked or referred to as 'confidential' or 'internal,'"   
18 as the Pre-Trial Judge stated in paragraph 37 of the  
19 Confirmation Decision?

20 The floor is yours.

21 MR. REES: I don't accept that. The wording of Article 392(1)  
22 is specific. It refers to information disclosed in any official  
23 proceedings which must not be revealed according to law or has been  
24 declared to be secret by a decision of the Court or a competent  
25 authority.

1           The scope of those words, as I understand the Pre-Trial Judge's  
2       decision, was a matter for his own interpretation. He applied a wide  
3       interpretation and he did so without any authority to draw upon. We  
4       will say in those circumstances that the Trial Panel has to look  
5       afresh at those words. We will invite them to be interpreted  
6       narrowly, because that's consistent with the approach that is  
7       required in the Kosovo criminal procedure -- in the Kosovo Criminal  
8       Code, and the Trial Panel will have to define the scope of those  
9       words itself.

10          JUDGE BARTHE: Thank you, Mr. Rees.

11          Mr. Cadman, anything further?

12          Mr. Prosecutor.

13          MR. HALLING: Just briefly, Your Honour. I could read the same  
14       element back and emphasise the "according to the law" part, which in  
15       and of itself is sufficient to meet the elements.

16          The Pre-Trial Judge gave a detailed exposition about what law  
17       applies in the paragraph cited by Your Honour, and it's our position  
18       that that's correct on all counts.

19          JUDGE BARTHE: Thank you, Mr. Prosecutor.

20          Moving on to a question to all parties in relation to Count 6,  
21       which is violating the secrecy of proceedings, through unauthorised  
22       revelation of the identities and personal data of protected  
23       witnesses.

24          The question is as follows: Does Article 392(2) of the Kosovo  
25       Criminal Code, which provides in relevant part that "whoever without



1 authorisation reveals information on the identity or personal data of  
2 a person under protection in the criminal proceedings or in a special  
3 programme of protection shall be punished by imprisonment of up to  
4 three years" also protect persons whose identity and/or personal data  
5 appear in material provided to the SPO by third parties?

6 And I refer to paragraph 44 of the Pre-Trial Judge's  
7 Confirmation Decision.

8 Mr. Prosecutor, you have the floor.

9 MR. HALLING: Thank you, Your Honour.

10 Our answer to your question is yes. Paragraph 44 sets out the  
11 requirements in the Confirmation Decision. And when we talk about  
12 protected witnesses in Count 6, that needs to be read with the  
13 definition of witnesses provided in the indictment which, as  
14 discussed in our filing on a previous occasion, goes beyond merely  
15 persons being called by the Specialist Prosecutor's Office.

16 So all people falling within this paragraph and falling within  
17 the definition of a witness, as explained by the SPO, fall under the  
18 count.

19 JUDGE BARTHE: Thank you, Mr. Prosecutor.

20 Mr. Rees, anything? Any comments?

21 MR. REES: Again, Your Honour, I make the general -- set out the  
22 general position that we will, in effect, require the Trial Panel to  
23 look at this afresh. The Pre-Trial Judge makes an interpretation, a  
24 wide interpretation of the meaning of those words without authority.  
25 We will, in due course, invite the Trial Panel to look at those words

1 again, the scope of them will have to be determined within this  
2 context by the Trial Panel, and we will urge a narrow approach to be  
3 taken in accordance with the Kosovo criminal procedure code.

4 There are other aspects of the analysis in relation to  
5 unauthorised revelation of the identity or personal data of protected  
6 persons that we also take issue with. As I've said earlier, we will  
7 submit the perpetrator must know that the identity or personal data  
8 was protected, referring to the Kosovan Court of Appeal case of MZ,  
9 where they said the perpetrator should have knowledge about the  
10 existence of the order that protected the witness and its content.

11 And we also note that there is no analysis within the  
12 Pre-Trial Judge's decision about authorisation and the absence of it  
13 for the purposes of this offence, which is, of course, a necessary  
14 part of the offence.

15 JUDGE BARTHE: Mr. Cadman, anything further from your side?

16 MR. CADMAN: Just to emphasise and endorse the position that, as  
17 we've stated, the Pre-Trial Judge had taken a very broad  
18 interpretation. The Trial Panel is going to have to -- we are going  
19 to invite the Trial Panel to consider these matters afresh. And,  
20 again, in the fullness of time, we will be submitting our full  
21 position on this.

22 JUDGE BARTHE: Understood. Thank you, all.

23 MR. REES: Your Honour, before we leave that offence, there is  
24 actually one other matter or one other issue that I should raise.

25 The words of Article 392(3), the aggravated offence, refer to

1 criminal proceedings being made impossible or severely hindered. We  
2 take issue with the -- what we would say is a watering down of that  
3 high hurdle that occurs in the analysis carried out by the  
4 Pre-Trial Judge in relation to the issue of consequences and the  
5 extent. I raise that as well.

6 JUDGE BARTHE: Thank you, Mr. Rees.

7 These were my questions in relation to the elements of the  
8 crimes. Unless my colleagues have other questions on this topic, I  
9 will move on to questions pertaining to the modes of liability.

10 Thank you, Mr. President.

11 My first question in relation to the modes of liability is a  
12 very -- or a generic question and it's for all parties. Namely, what  
13 is the relationship between the different modes of liability  
14 contained in the indictment, in particular the relationship between  
15 co-perpetration and incitement?

16 I will give the floor to you first, Mr. Prosecutor.

17 MR. HALLING: The relationship between the modes of liability  
18 charged is set out most clearly in the statement of crimes at  
19 paragraph 47 in the indictment. They are alternative modes of  
20 liability specified in relation to the counts, as enumerated in that  
21 paragraph.

22 As concerns co-perpetration and incitement specifically, and as  
23 found in the Confirmation Decision, the elements of those two modes  
24 of liability are different. In particular, it is noted that  
25 incitement actually has variations in the Kosovo Criminal Code that

1 do not appear in relation to joint perpetration. So there are  
2 distinctions made by the Pre-Trial Judge that, in our submission,  
3 explain why these are alternatives that are set out separately in the  
4 indictment.

5 JUDGE BARTHE: Mr. Rees.

6 MR. REES: Well, the indictment, of course, is a matter for the  
7 Prosecution. We have also wondered what the relationship is between  
8 the modes of liability alleged. We have -- the only conclusion we  
9 could form was that the Prosecution throw all alternatives at  
10 Mr. Gucati and Mr. Haradinaj.

11 We will reflect further. But for my part, there was little  
12 further assistance in understanding the Prosecution's case from the  
13 observations just made by the SPO.

14 JUDGE BARTHE: Thank you, Mr. Rees.

15 Mr. Cadman? Nothing further.

16 Thank you, all. My next question, or next questions, actually,  
17 are for the SPO, for the Prosecution, again, in relation to  
18 incitement pursuant to, in this case, Article 32(2) of the Kosovo  
19 Criminal Code. My question is: Which specific offences were only  
20 attempted but not committed, be it by the accused and/or by members  
21 of the media and/or other persons?

22 Mr. Prosecutor, you have the floor.

23 MR. HALLING: Thank you, Your Honour.

24 As I was specifying, these are stated as alternative modes of  
25 liability. So in terms of what is charged in relation to

1 Article 32(2), it would be all of the counts as specified in  
2 Article 47(5) of the indictment, which is inciting the commissions of  
3 crimes of obstructing official persons in performing official duties,  
4 intimidation during criminal proceedings, retaliation, and violating  
5 the secrecy of proceedings.

6 The conduct alleged is the same. It depends on how the  
7 Trial Panel finds the facts in this case. Certain alternatives may  
8 become activated and other alternatives may become unavailable. We  
9 have set the scope of the accused's liability in the indictment, and  
10 that has been confirmed and it has withstood a preliminary motion  
11 arguing defects in the indictment. So that is our position on this.

12 Incidentally, when I speak of alternative modes of liability,  
13 that is a different question as to whether convictions can be entered  
14 on inchoate offences, some of which are listed as modes of liability  
15 here. This is a submission that we were intending to make in writing  
16 at a later time.

17 JUDGE BARTHE: Thank you, Mr. Prosecutor.

18 Anything from the Defence? Mr. Cadman, no? Thank you.

19 My next question is also for the Prosecution. Mr. Prosecutor, I  
20 note that Article 32, again, incitement, 32(3) of the Kosovo Criminal  
21 Code, states that, I quote: "Whoever intentionally incites another  
22 person to commit a criminal offence punishable by imprisonment of at  
23 least five years ... shall be punished for attempt."

24 Given that none of the crimes with which the accused are charged  
25 has a minimum sentence of five years imprisonment, Mr. Prosecutor, do

1     you consider that this article, namely, Article 32(3), might not be  
2     applicable in the present case?

3             The floor is yours, Mr. Prosecutor.

4             MR. HALLING: Our position is that the sentencing range in  
5     Article 32(3) is indexed to the sentencing range for the other  
6     offences. So if one of the crimes charged has a sentencing range  
7     that can exceed five years, even if not the minimum sentence, if it  
8     can cross five years, then it is eligible under this provision.

9             And this is not just our understanding but it's also the  
10    understanding of the Pre-Trial Judge, which confirmed this mode of  
11    liability on that understanding.

12            JUDGE BARTHE: Just a follow-up question. If you look at,  
13    Mr. Prosecutor, Article 28(2) of the Kosovo Criminal Code, there the  
14    wording is used "a punishment may be imposed."

15            So my question is: Do you see a difference between these two  
16    provisions, Article 32(3) and Article 28(2), in relation to the  
17    wording?

18            MR. HALLING: I don't know if I'm answering Your Honour's  
19    question, but there is a difference in the way which the offences  
20    charged fall within each of these provisions. Because one of the  
21    offences charged exceeds three years but is less than five, you can  
22    see that the indictment charges it differentially because of this  
23    point.

24            So it's not our position that these provisions are giving an  
25    interpretation that clash with each other in relation to what I just

1 told you, but because they set out different sentences that need to  
2 be hit by the sentencing ranges charged, that does affect when we are  
3 charging attempt and when we are charging Article 32(3), incitement.

4 JUDGE BARTHE: Thank you, Mr. Prosecutor.

5 Anything further?

6 MR. REES: It's a very good point, Your Honour. I'm happy to  
7 adopt it.

8 MR. CADMAN: Likewise, Your Honour.

9 JUDGE BARTHE: Thank you, counsel. Those were my questions.

10 Thank you, Mr. President.

11 JUDGE SMITH: We would acknowledge receipt of the Defence  
12 submissions on the definition of public interest, legal basis relied  
13 upon for entrapment, jurisprudence, and legislation. The Panel is  
14 grateful for your submissions on these topics, and we will take them  
15 into consideration.

16 We will take a break until 11.30 in just a moment. I just want  
17 to thank everybody for their candour and preparation in addressing  
18 these complicated issues, and it was very instructive and, I think,  
19 helpful to us and helpful to all of you as well.

20 So we will be in adjournment until 11.30.

21 --- Recess taken at 10.55 a.m.

22 --- On resuming at 11.30 a.m.

23 JUDGE SMITH: We move on to the next topic, which is the number  
24 of SPO witnesses. I note in this regard that the SPO has submitted,  
25 on 6 September, a request to add one witness to its list and a number

1 of connected exhibits to its exhibit list.

2 I'm going to give the floor to Judge Mettraux. But before I do  
3 that, I have a note that I want to share or I want to at least tell  
4 you about.

5 The Panel has observed that some of the SPO filings contain  
6 substantive submissions in the footnotes, and we remind all parties  
7 that any substantive matter be addressed in the body of the filing  
8 rather than in the footnotes so that the risk of missing out on any  
9 relevant part of the submissions is reduced. It will help us  
10 greatly.

11 Now, I give the floor to Judge Mettraux.

12 JUDGE METTRAUX: Thank you, Judge Smith.

13 We will give the floor first to the Defence, which was ordered  
14 to respond during the conference last week to the SPO's request to  
15 add a witness to its current list, and we wanted to give you the  
16 opportunity to address the matter orally now.

17 So, Mr. Rees, and then I will come to Mr. Cadman in a second.

18 MR. REES: Thank you.

19 My request at this stage is for some further assistance from the  
20 Specialist Prosecutor as to the nature of this witness's evidence.  
21 And I preface that by referring back, as Judge Barthe did this  
22 morning, to that part of the indictment that alleges the commission  
23 of crimes by others and at the incitement, it is alleged, of  
24 Mr. Gucati and his co-accused.

25 So paragraph 47 at (4), paragraph 47(4) of the indictment, as



1 Mr. Halling referred to this morning, specifically alleges that the  
2 accused incited and insisted in the commission of the crimes of  
3 obstructing official persons in performing official duties,  
4 intimidation during criminal proceedings, retaliation of violating  
5 the secrecy of proceedings.

6 In relation to [REDACTED] *Pursuant to Oral Order of 08/09/2021*

7 [REDACTED] *Pursuant to Oral Order of 08/09/2021*

8 [REDACTED] *Pursuant to Oral Order of 08/09/2021* But

9 I want to understand --

10 MR. HALLING: Apologies. Before continuing, please, the filing  
11 in relation to this witness is currently confidential, and we would  
12 request redactions in relation to the name at this time.

13 JUDGE SMITH: [Microphone not activated].

14 MR. HALLING: Witness 04866. That witness --

15 JUDGE SMITH: One moment. Do we need to correct the transcript  
16 to remove the name?

17 All right. Go ahead, Mr. Rees.

18 MR. REES: Well, do we need to go into private session now then?  
19 Because, clearly, I need to refer to material that's in the  
20 disclosures. I mean, there's been --

21 JUDGE SMITH: Just, the only thing you're wanting protected in  
22 the name?

23 MR. HALLING: That's correct, Your Honour.

24 JUDGE SMITH: Do you need -- so you can use -- and the pseudonym  
25 is --

1 MR. REES: Can I just say in passing that we were conscious  
2 that, firstly, that there was no application for protective measures  
3 in relation to this witness and, indeed, the document that was  
4 disclosed to us and is referred to in the SPO's note, where they file  
5 requesting permission to add this witness to the exhibit. In the  
6 note referred to, the witness makes it perfectly clear that he's got  
7 no issue with his name being referred to in public.

8 But be that as it may --

9 JUDGE SMITH: Just hold on, Mr. Rees. I think the Prosecutor  
10 wanted to respond.

11 MR. HALLING: Just in relation to that, Mr. Rees is correct that  
12 we are not seeking protective measures of this witness if he is added  
13 to the witness list. Our position that it draws unnecessary  
14 attention to him up and until that request is granted. So for the  
15 moment, we were just -- we filed it confidentially for this reason.  
16 And just that his name and anything that would identify him just be  
17 not discussed in open session, but everything else can be said  
18 without defeating the purpose of the classification.

19 JUDGE SMITH: Well, we'll proceed using the pseudonym.

20 MR. REES: Thank you, Your Honour.

21 So the witness produces articles that he is responsible for.  
22 They are open-source articles. They are publicly available on the  
23 internet, as I understand it. During the course of those articles,  
24 he refers to, *inter alia*, the cooperation between the investigative  
25 task force and Serbian authorities to collect evidence regarding

1     alleged crimes committed during the war, which are now being  
2     investigated by the Special Court. Documents show very clearly how  
3     the task force cooperated with the Serbian authorities. They contain  
4     correspondence in between them and exchange of letters. The system  
5     used here is mostly through requests to collect evidence given by  
6     former police officers and chiefs of police stations with the  
7     instruction to locate --

8           THE INTERPRETER: Slow down, please.

9           MR. REES: And to gather as much evidence as possible --

10          JUDGE SMITH: Slow down, Mr. Rees.

11          MR. REES: -- about the cases and alleged crimes. The files  
12     contain names of numerous names of witnesses, most of them Serbs, but  
13     there are also Albanian, Roma, Ashkali names as well, reports  
14     In Focus [phoen]. In Focus will not publish any of those names.  
15     However, this article will show the mode of cooperation between the  
16     task force and Serbian authorities.

17          How did the cooperation between the task force and Serbian  
18     authorities work? We learned from the correspondence in these  
19     letters that a key role was played by virtually the Serbian entire  
20     state structures --

21          JUDGE METTRAUX: Mr. Rees, right now the application that's  
22     before us is exclusively an application for leave to add a witness  
23     and a number of associated exhibits to the SPO's list. So can we ask  
24     you to focus on that particular matter and to leave aside any issue  
25     of substance or merit, as the case might be or not, of the material

1 for a later stage? We'd be grateful.

2 MR. REES: Your Honour, I do focus my submissions because how --  
3 whether the SPO tell us, do they allege [REDACTED] *Pursuant to Oral*  
4 *Order of 08/09/2021* is one of  
5 those persons who committed criminal offences that we are said to  
6 have incited? That is a relevant matter that I wish to consider  
7 before I say whether I consent or object to the admission of that  
8 witness to their witness list.

9 I was referring to the article because Your Honours will have  
10 already noted that there is material there that I've already read  
11 that is complained about in the indictment and in the Prosecution  
12 pre-trial brief. There's particulars that in relation to Mr. Gucati  
13 and Mr. Haradinaj, the SPO make complaint about.

14 The article continues by naming Vladimir Vukcevic, former chief  
15 war crimes prosecutor, but also Milovan Drecun. Again, names that  
16 were mentioned in the first press conference, to some criticism from  
17 the SPO, and it forms part of the SPO's case against these accused.

18 Does the SPO -- and this ties in with the question asked by the  
19 Trial Panel earlier this morning. Does the SPO allege that  
20 [REDACTED] *Pursuant to Oral Order of 08/09/2021* is one of those  
21 individuals presently unnamed -- sorry.

22 MR. HALLING: Yes, Your Honour, in relation to the name, and  
23 also when counsel was reading parts of the article that's available  
24 on open source, we would request redaction to this as well.

25 JUDGE SMITH: You request what?

MR. HALLING: Apologies, Your Honour. We would request  
redaction to that from the public transcript as well.

1 MR. REES: Your Honour, in relation to that, firstly, I  
2 apologise for the reference to the name of the witness. But in  
3 relation to the other names, last week the SPO made their position  
4 clear on open-source material. Mr. Halling said it absolutely clear  
5 that they will not seek redactions on any information that is  
6 available on open-source material.

7 I can take us -- I can take the Trial Panel back to the  
8 transcript, if the Trial Panel wishes.

9 JUDGE SMITH: This isn't a debate.

10 Just, do you have a response?

11 MR. HALLING: Yes, Your Honour. What's identifying here is that  
12 this is a journalist and he's reading from the contents of a  
13 particular article. The names of the people Mr. Rees is naming now  
14 he can do in a different context, but with the frame that he's  
15 selected now that is what's identifying.

16 JUDGE METTRAUX: I mean, Mr. Rees, just on this, again, we'll  
17 ask you to focus. We understand the underlying nature of your  
18 submissions. I don't think it is of assistance to us for you to read  
19 out the material that we have in our possession or to name other  
20 individuals for the reasons that have been explained a moment ago.

21 So if I can ask you again to please focus your submission on the  
22 merit.

23 But maybe before I do that, I will simply ask the Prosecution to  
24 clarify whether in response to your invitation whether that's part of  
25 their case, that the proposed witness is one of the individuals

1     alleged to have been incited by the accused.

2             Mr. Halling.

3             MR. HALLING: No. The way that the -- the summary in the annex  
4     to Filing 299 mentions the paragraphs of the indictment that we are  
5     using this witness for. Paragraph 47(4), which is mentioned by the  
6     Gucati Defence, is not in that list. I would also note that this  
7     person was interviewed as a witness and not as a suspect.

8             Thank you.

9             JUDGE METTRAUX: I think the point that I understood Mr. Rees to  
10    be raising is not whether there was any indication of your proposed  
11    witness having committed an offence but whether it was part of your  
12    case that he had been incited by the conduct that you attribute to  
13    either or both of the accused. That was my understanding of their  
14    submissions.

15            MR. HALLING: Thank you, Your Honour. I'll clarify.

16            We are submitting that this person is incited by the conduct of  
17    the accused. But as you correctly pointed out, we are not alleging  
18    that any crimes were committed by this person.

19            JUDGE METTRAUX: So, Mr. Rees, you have your answer. Can we  
20    have your position on the application.

21            MR. REES: Sir, I'm grateful on the clarification that there is  
22    nothing criminal in the disclosure of the information that's set out  
23    in the exhibits to [REDACTED] *Pursuant to Oral Order of 08/09/2021*  
24    statement. That having been  
25    clarified, I'm grateful. There is no objection to him being added.

                                  [Trial Panel Confers with Court Officer]

1 JUDGE SMITH: For the record, I have signed redaction orders, as  
2 previously mentioned in two instances.

3 JUDGE METTRAUX: I have a few more questions for you,  
4 Mr. Halling, and I think you've answered probably most of them at an  
5 earlier point today in the submissions.

6 May we take it that the Official Note taken of the proposed  
7 witness, which you refer in footnote 9, I believe, of your  
8 application, was indeed disclosed to the Defence. Is that  
9 understanding correct?

10 MR. HALLING: It is, Your Honour.

11 Just while I have the floor, just to make sure that there's no  
12 misapprehension by the Gucati Defence. We are alleging -- we are  
13 using this as incriminating evidence in the case, and we just didn't  
14 want to make sure there was any misunderstanding of what we were  
15 submitting and what we were not submitting. But I wanted to clarify  
16 that independently of your question.

17 JUDGE METTRAUX: I think the way I have understood Mr. Rees to  
18 formulate his submission, he will suggest, as I understand, that  
19 there is a conflict in your position between what you say your  
20 witness has done and what you allege the accused have done. But I'll  
21 leave that to you to address, if and when.

22 MR. REES: Well, Your Honour, there's no conflict in the sense  
23 that Mr. Halling has rightly clarified that they do not allege that  
24 [REDACTED] Pursuant to Oral Order of 08/09/2021 committed any  
criminal offence in the publication of the  
25 matters contained within the exhibits. He's clarified that. I'm

1 grateful.

2 I don't, in the circumstances, object to him being added as a  
3 witness.

4 There is one aspect of the application that I do challenge,  
5 which is in relation to the exhibits. It's suggested that the  
6 interview of the witness be added to the exhibit list. I don't  
7 understand the purpose of that when the Prosecution are proposing to  
8 call the witness to give evidence orally. I don't understand and  
9 there's no justification given for the admission of his interview  
10 into the exhibit list when they are proposing to call him to give  
11 oral evidence.

12 JUDGE METTRAUX: Thank you.

13 And, Mr. Rees, may we ask you again to be mindful of the use of  
14 names here.

15 But may I just ask Mr. Cadman as well if he shares the position  
16 of the Gucati Defence, that there is no objection to the proposed  
17 witness being added to the Prosecution list? I should have done that  
18 before, and I apologise, Mr. Cadman.

19 MR. CADMAN: Your Honour, between us we had discussed seeking  
20 the clarification. Now that the classification has been made, we  
21 would support the position of Mr. Rees. That we do not object.

22 JUDGE METTRAUX: We're grateful for that indication.

23 Mr. Halling, briefly two matters of clarification. I think  
24 Mr. Rees committed the same mistake as I did in relation to the date  
25 of the interview. Can you confirm that the date of the interview of



1 the proposed witness is, indeed, 25 August 2021 and not 25 March, as  
2 I think appears on the top of the record in question?

3 MR. HALLING: You are correct, Your Honour. Given the mistake,  
4 we will file a corrected transcript on this.

5 JUDGE METTRAUX: We're grateful for that.

6 Two outstanding issues. I think one that you have made clear.  
7 There is no plan, as we understand at this stage, for you to seek  
8 protective measures; is that right?

9 MR. HALLING: That's correct, Your Honour.

10 JUDGE METTRAUX: And lastly, but perhaps most importantly, may  
11 we take it that you have conducted a review of your records right now  
12 with a view to ensure that all material relevant to this particular  
13 individual, should leave be granted, has been disclosed to the  
14 Defence?

15 MR. HALLING: Yes, Your Honour. Everything that we are aware of  
16 related to this witness.

17 JUDGE METTRAUX: Thank you.

18 I see Mr. Cadman wanting the floor, yes.

19 MR. CADMAN: The only additional question, which Your Honour has  
20 now addressed, and, obviously, we anticipate the SPO doing a proper  
21 search as to any previous interaction with this particular witness,  
22 that was going to be my question: Is this the first time that this  
23 witness has been spoken to by the SPO, or are there previous?  
24 Because from the material that has been disclosed, it would indicate  
25 that there have been prior interactions with this witness. I think

1 we're entitled to know what those interactions were and whether a  
2 prior statement or prior record of interview was ever taken with this  
3 witness.

4 JUDGE METTRAUX: Well, there's at least one other that we know  
5 of, Mr. Cadman. It's the note that the Prosecution has referred to  
6 of 28 January 2021. So that would be the other one. And I am sure  
7 that the Prosecution will be mindful in reviewing their records and  
8 disclose anything that would constitute a statement of the witness,  
9 if they haven't done that already. But I'm grateful, Mr. Cadman.

10 JUDGE SMITH: Anything from any of the Panel?

11 JUDGE GAYNOR: Mr. Halling, just to clarify. I didn't hear your  
12 response to the objection from the Gucati Defence to the admission of  
13 the interview transcript to the exhibit list. What's your position  
14 on that?

15 MR. HALLING: Yes, Your Honour. We are systematically adding  
16 all interview transcripts and declarations to our exhibit list. This  
17 is just something that we do because of the vagaries of criminal  
18 proceedings. We don't know when we might want to tender those  
19 statements into admission.

20 I can tell the Trial Panel now there is no intention to use  
21 Rules 153 or 154 in relation to that statement. If the witness  
22 appears as we expect and gives the expected testimony, we will not  
23 tender that statement.

24 JUDGE GAYNOR: So could I just clarify, what's the purpose of  
25 adding it to the exhibit list?

1 MR. HALLING: If, for instance, there is -- I mean, this is just  
2 speaking hypothetically. If there were a situation where it might  
3 become apparent that this witness becomes subject to interference  
4 such that Rule 155 may become engaged down the line if subsequent  
5 facts dictated as much, we would need to add it to the list of  
6 evidence in order to tender it under something like that provision.

7 It is something we are doing with all of the statements and  
8 declarations of our witnesses in this case. It doesn't mean that we  
9 are currently tendering them or planning to tender them, but it is to  
10 help put the Defence on notice that, depending on how the trial  
11 unfolds, that this is a potential exhibit of the SPO.

12 JUDGE GAYNOR: Thank you, Mr. Halling.

13 No further questions, thank you.

14 JUDGE SMITH: All right. Now let's move on to the next topic,  
15 which is the date for the opening of the SPO case and the opening  
16 statements.

17 Last week I indicated that we planned to open the case on  
18 Thursday, 7 October 2021, and hear on that day the SPO's opening  
19 statement. The Defence also indicated last week that they do not  
20 intend to make an opening statement immediately after the  
21 Prosecution. Both Defence teams indicated that. But they are  
22 considering making one before any Defence case.

23 Mr. Prosecutor, does 7 October work for you to open your case  
24 and make your opening statement?

25 MR. HALLING: It does, Your Honour.

1 JUDGE SMITH: Mr. Rees, Mr. Cadman, do you stand by your  
2 indication that you do not wish to make an opening statement  
3 immediately after the SPO; and would 7 October work for you for the  
4 SPO to make its opening statement?

5 Mr. Rees?

6 MR. REES: Yes, thank you, Your Honour.

7 JUDGE SMITH: Mr. Cadman.

8 MR. CADMAN: Yes, Your Honour.

9 JUDGE SMITH: All right. Before I ask the SPO about the length  
10 of your opening statement, Mr. Rees and Mr. Cadman, can you indicate  
11 whether you want the Prosecution to read out the entire indictment at  
12 the opening or only the part on the charges, which are paragraphs 47  
13 and 48 of the indictment?

14 Mr. Rees.

15 MR. REES: We think the entire indictment should be read out in  
16 public. The trial is a public trial. The indictment, as a whole,  
17 spells out the allegations and how the SPO set them out.

18 JUDGE SMITH: Mr. Cadman.

19 MR. CADMAN: Your Honour, I would support that.

20 JUDGE SMITH: So, Mr. Prosecutor, you now know what you're going  
21 to have to add to your opening statement. How long do you think your  
22 opening statement will last, all told?

23 MR. HALLING: Thank you, Your Honour. The SPO envisages an  
24 opening statement of around two to three sessions, which would be  
25 about four hours, in which audio-visual materials would be played and

1 the case would be presented in all necessary contexts. The SPO can  
2 present its opening statement in whatever timeframe the Trial Panel  
3 requires.

4 JUDGE SMITH: Do you believe we can finish this opening  
5 statement within the day of 7 October?

6 MR. HALLING: With the caveat that the entire indictment is now  
7 going to be read, it will be close but I think it is possible.

8 JUDGE SMITH: Okay.

9 Can you give the Defence -- you're going to use some proposed  
10 exhibits then, I take it, in your opening?

11 MR. HALLING: That's correct.

12 JUDGE SMITH: And can you give the Defence and the Panel 24-hour  
13 notice of which exhibits or which proposed exhibits you want to use  
14 for this purpose and with relevant time for if it relates to a video?

15 MR. HALLING: We can, Your Honour. Just to make sure that I  
16 understand the direction. The notice of the relevant time in  
17 relation to the video, you mean the time stamps --

18 JUDGE SMITH: Yes.

19 MR. HALLING: -- of the video?

20 JUDGE SMITH: Yes.

21 MR. HALLING: Yes, we can do this.

22 JUDGE SMITH: Thank you. The Panel will issue an order in this  
23 regard later today.

24 This leads us to the next point, which is the time available and  
25 a provisional schedule for the SPO case. I note that the SPO time

1 estimate for its two witnesses is 15 hours of direct examination.  
2 That is, ten hours for Witness 04841 and five hours for  
3 Witness 04842, and I'm using a number today just for convenience.

4 For the additional witnesses, were the Panel to grant the  
5 request, the estimate is three hours of direct examination.

6 Last week I indicated that we planned to hear evidence in the  
7 weeks of 18 and 25 October, which we would in all possibility -- the  
8 possibility is for four days of each of those weeks of testimony.

9 In what order do you intend to call your witnesses,  
10 Mr. Prosecutor, and how many days do you envisage their direct  
11 examination were to take, assuming that we will be sitting for four  
12 days a week from 9.30 to 4.00 p.m.? And is it an option for you to  
13 call Witness 4866, the new named witness, last if the Panel grants  
14 your request?

15 MR. HALLING: Thank you, Your Honour.

16 You've correctly set out the estimates. They're still our  
17 estimates for all of these witnesses. W04841 is a Rule 154 witness  
18 and the others would be entirely viva voce. If you add up the  
19 examination estimates, you get about four days of direct examination  
20 given the sitting schedule indicated previously by the Trial Panel.  
21 So that would be our estimate.

22 The order that we were envisaging was to call 4841, 4866, and  
23 4842, in that order. Your Honour has just indicated a possible  
24 different order, where 4866 would appear last. And it's as the  
25 Trial Panel wishes on this.

1 JUDGE SMITH: The reason we listed them, we were suggesting them  
2 to be listed last was because of the late date of naming him. It  
3 would give the Defence more time to contemplate his projected  
4 testimony.

5 MR. HALLING: Yes. In a longer trial, this is a bigger issue.  
6 Where all three witnesses are basically appearing contemporaneously,  
7 we have no problem with proceeding as the Trial Panel indicates.

8 JUDGE SMITH: All right. Thank you.

9 Mr. Rees, last week you offered a maximum estimate of 12 days  
10 for cross-examining the two additional witnesses of the SPO. How  
11 would this estimate change if the Panel granted your request to add a  
12 third witness -- or, not your request, granted the request for adding  
13 a third witness; and taking into consideration the answer of the  
14 Prosecution and the availability of the eight hearing days that I  
15 mentioned, how far do you think we can get with your  
16 cross-examination? Ideally, we wanted to try to finish the  
17 Prosecution's case in those two weeks that we have available to us.

18 So we ask your estimate of that wish on our part.

19 MR. REES: Additional cross-examination in relation to the third  
20 proposed witness, for my part, will be relatively short. Perhaps no  
21 more than a session. So it doesn't greatly alter the time estimates  
22 that I provided last week.

23 I did make it clear that I was being pessimistic, I was erring  
24 on the worst-case scenario. I, nevertheless, do think, although we  
25 can certainly try to complete the Prosecution case by the end of that

1 second week at the end of October, I still think that's unlikely.

2 JUDGE SMITH: Mr. Cadman, do you have any other opinion or the  
3 same?

4 MR. CADMAN: Nothing much to add to that. Just to re-emphasise  
5 the point that was made last week upon the invitation of the  
6 Trial Panel, that much of the cross-examination is not going to be a  
7 question of Mr. Rees asking a number of questions and me standing up  
8 and asking them. We're going to try and combine as much as we can  
9 through cross-examination. But I do share Mr. Rees' pessimism in  
10 getting it done within that two-week slot.

11 JUDGE SMITH: Thank you. We continue to encourage you to  
12 continue to have discussions about joining your cross-examination as  
13 much as possible, and we realise that it's not always a perfect  
14 scenario. Thanks.

15 MR. HALLING: Your Honour, is it possible to respond on the  
16 Defence estimates on this point --

17 JUDGE SMITH: Certainly.

18 MR. HALLING: -- before continuing?

19 JUDGE SMITH: Certainly it is.

20 MR. HALLING: Thank you.

21 The Defence are entitled to a fair opportunity to question SPO  
22 witnesses. But it is noted that, as the Haradinaj Defence just  
23 noted, the Defence teams have very similar interests in this case and  
24 the examination limits set should reflect that.

25 And, two, the estimates given last week - seven days for 4841,



1 five days for 4842 - are clearly excessive. Having examination  
2 limits is meaningless if parties are advancing such a  
3 disproportionate amount of time to examine witnesses.

4 In this regard, we note the terms of Rule 143(4), which gives  
5 the Presiding Judge the authority to exercise control over  
6 questioning to make the questioning and presentation effective for  
7 the ascertainment of the truth, avoid repetition, undue consumption  
8 of time and resources, and avoid harassment or intimidation of  
9 witnesses.

10 We ask that reasonable time limits be set such that the  
11 examination of the three SPO witnesses finishes by the end of October  
12 in that envisaged timeframe.

13 Thank you.

14 JUDGE SMITH: Thank you. Part of the process of deciding  
15 whether to impose those limits involves hearing everyone's estimate  
16 so that we can start taking into consideration what's being  
17 requested, and we will seriously consider everything that has been  
18 stated here and make a decision ourselves on that and share it with  
19 you as soon as possible.

20 MR. REES: Well, can I respond quickly to that, Your Honour?

21 JUDGE SMITH: Yes.

22 MR. REES: Very quickly.

23 JUDGE SMITH: And you don't have to do much. You said it was  
24 your pessimistic estimate and I took it as that.

25 MR. REES: I'm grateful. And it was pessimistic trying to come

1 up with -- erring on the side of caution but, nevertheless, realistic  
2 approach as to the cross-examination of two witnesses, one of whom  
3 produces a schedule that has nine columns, approximately 400 rows of  
4 material that has not been disclosed to the Defence.

5 And I -- the only thing I can do is propose -- I'm conscious  
6 that there is still an outstanding motion and we may not have to deal  
7 with it at trial because the admissibility of that is in dispute, one  
8 of which is -- one issue of which is the difficulty the Defence have  
9 posed in trying to challenge it in those circumstances. But if it  
10 goes in I will have to go through that schedule line by line, column  
11 by column with that witness.

12 JUDGE SMITH: Thank you. And we're conscious of that. You  
13 brought it up last week, and we do understand your objection, and  
14 it's noted.

15 [Trial Panel and Court Officer confer]

16 JUDGE SMITH: For the record, another redaction is authorised  
17 for an in-court statement using a name of a witness.

18 Now, I want to ask the parties an estimate for finishing the  
19 trial. As you know, Rule 118 requires the Panel to set a target date  
20 for closing the entire case. As discussed last week, ideally, and I  
21 think everyone agreed ideally, this would happen before the end of  
22 the year.

23 Would mid-December, which is the end of the year for the Court,  
24 be a realistic provisional date for the time being? Of course, this  
25 can be adjusted, as necessary.

1 Mr. Halling.

2 MR. HALLING: Your Honour, at least as regards the SPO's  
3 evidence presentation, and depending on questioning and the bar table  
4 request, we should be able to finish by the end of October. And so  
5 that would give all of November and into December for examination of  
6 Defence evidence.

7 JUDGE SMITH: All right. Thank you.

8 Mr. Rees, I take it you agree?

9 MR. REES: My position remains the same as it was last week,  
10 Your Honour.

11 JUDGE SMITH: And yours?

12 MR. CADMAN: The same, Your Honour.

13 JUDGE SMITH: The same. All right. Thank you. We will issue  
14 an oral order in this regard setting out all those dates.

15 We've reached the end of our agenda as sent to you. The Panel  
16 wants to address an issue in relation to the SPO's submission on the  
17 classification of exhibits, which is an extra item. Judge Mettraux  
18 will handle those questions.

19 You have the floor.

20 JUDGE METTRAUX: Thank you, Judge Smith.

21 Very briefly. And the question will be for the Defence,  
22 primarily. But on 6 September 2021, the SPO filed an application for  
23 classification of proposed exhibits, and the SPO identifies three  
24 categories of information in relation to which redaction is being  
25 sought. It includes, number one, images of content of material said

1 to have been unlawfully disclosed by the accused; under number two,  
2 names of staff of the SPO other than the two proposed witnesses that  
3 will be called by the SPO; and under number three, letters to and  
4 from organisations in respect of investigative cooperation.

5 Now, briefly, before we hear the Defence, these categories,  
6 Mr. Rees and Cadman do seem, *prima facie*, to be reasonable to the  
7 extent that the material has been given to you without those  
8 redactions, of course, and that redactions are being sought  
9 exclusively in relation to the general public. So that it would  
10 appear, at least *prima facie*, that they would not interfere with your  
11 ability to fulfil your mandate and responsibilities effectively.

12 Of course, we are mindful that the proof will be in the pudding,  
13 so to say, and that it's the implementation in practice of these  
14 proposed redactions that might be problematic.

15 So the proposal that we would have for you is for the Defence to  
16 discuss with the Prosecution the nature, scope/extent of the proposed  
17 redactions that would be made on the basis of that application with a  
18 view to try to reach an agreement between the parties as to what  
19 could be redacted and to notify the Chamber or the Panel whether such  
20 an agreement has been reached and, if not, the extent to which there  
21 remains a disagreement.

22 Would that be agreeable as a matter of process to you, Mr. Rees,  
23 and you, Mr. Cadman?

24 MR. REES: We're certainly content to try to resolve matters  
25 *inter partes* with the SPO, and we will do our best.

1 MR. CADMAN: Absolutely, Your Honour.

2 JUDGE METTRAUX: We're grateful for that indication.

3 May we take it, Mr. Halling, that you share the warm and good  
4 spirit of cooperation on that issue?

5 MR. HALLING: Always, Your Honour.

6 JUDGE METTRAUX: Thank you.

7 JUDGE SMITH: Well, the Panel will indeed order the parties to  
8 discuss this issue *inter partes* together to endeavour to come up with  
9 an agreement and to inform the Panel of such agreement of any  
10 unresolved issues by 20 September, and the Panel will issue an oral  
11 order in this regard at the end of the conference with a view to  
12 expedite the matter.

13 So we will be taking a 20-minute break in order to consider the  
14 oral orders and get them in order for you. So just be back here at  
15 12.30 and we will try to be ready to proceed and then wrap up for  
16 today.

17 We are adjourned.

18 --- Recess taken at 12.07 p.m.

19 --- On resuming at 12.29 p.m.

20 JUDGE SMITH: The Panel issues the following oral orders.

21 First oral order.

22 Having carefully considered the arguments raised by all parties  
23 in relation to the SPO request to add one witness to its witness  
24 list, and noting that the Defence did not object to this, the Panel  
25 hereby grants the request.

1           The decision on adding the 29 connected items to the SPO exhibit  
2     list will be decided by the Panel in due course after receiving the  
3     SPO request for adding revised transcripts to its exhibit list as  
4     ordered on 2 September 2021.

5           Pursuant to Rule 118(1)(a), the Panel determines that the SPO  
6     may call three witnesses for the presentation of its case - namely,  
7     Witness 4841, Witness 4842, and Witness 4866. The Panel further  
8     orders the SPO to call Witness 4866 as their last witness so as to  
9     allow ample time for the Defence to prepare.

10          The SPO shall file on 1 October 2021 a list of its witnesses in  
11     the order in which they will be called and in compliance with the  
12     Panel's future order on the conduct of proceedings to be issued  
13     shortly.

14          This concludes this oral order.

15          The second oral order.

16          After having heard the parties and pursuant to Rule 118(3), the  
17     Panel sets the date of the opening of the case to 7 October 2021.

18          Further to Rule 124(2) and the submissions of the Defence, on  
19     the occasion of the opening of the case, the SPO shall read the  
20     corrected version of the indictment, as filed on 5 January 2021.

21          The SPO shall deliver its opening statement on 7 October 2021  
22     and shall endeavour to finish such statement in one hearing day.

23          The SPO shall also provide to the Panel and the Defence 24 hours  
24     before the opening of the case a list of proposed exhibits, if any,  
25     on which it intends to rely during the opening statement, indicating

1 the relevant timestamp for any video to be played.

2 The presentation of the SPO case shall start on 18 October 2021.

3 The SPO shall endeavour to finalise its direct examination of  
4 its three witnesses within four hearing days.

5 The Panel shall not set a time limit for the Defence  
6 cross-examination of the SPO witnesses but reserves the possibility  
7 of doing so should this be necessary to avoid repetition and  
8 guarantee the expeditiousness of the proceedings.

9 Throughout the SPO case, the parties shall comply with the  
10 requirements set out in the Panel's future order on the conduct of  
11 proceedings to be issued shortly.

12 Furthermore, having heard the parties, the Panel sets as target  
13 date for the closing of the SPO case 9 November 2021. The Panel also  
14 sets as target date for the closing of the entire case  
15 17 December 2021. The latter two dates may be amended as the trial  
16 unfolds.

17 And this concludes this oral order.

18 Apparently I misstated the date of the corrected version of the  
19 indictment. It's correctly stated as 5 July 2021 in the corrected  
20 version.

21 I'll say it again. Apparently I misstated the date of the  
22 corrected version of the indictment. It's correctly stated as  
23 5 July 2021.

24 That concludes the second oral order.

25 The third oral order.

1           The Panel orders the parties to discuss the issues pertaining to  
2   the classification of exhibits in the SPO bar table request, to  
3   endeavour to reach an agreement regarding the nature and scope of the  
4   proposed redactions.

5           By 20 September 2021, the parties shall inform the Panel of any  
6   agreement reached on this issue and of unresolved matters, if any.

7           This concludes this oral order.

8           The fourth oral order.

9           The Panel orders the parties to file further written  
10   submissions, if they so wish, on the elements of offences and modes  
11   of liability. In particular, on the specific questions related to  
12   the offence of obstruction and the relationship between the modes of  
13   liability charged which were deferred during the proceedings.

14          In the real time transcript, that's page 24, lines 24 to 25, to  
15   page 25, lines 1 to 6; page 25, lines 1 to 15; page 42, lines 16  
16   to 18; page 43, lines 20 to 21.

17          The parties are instructed not to repeat submissions made during  
18   the hearing unless strictly necessary for the logic of the argument.  
19   Submissions shall be filed by 30 September 2021.

20          This concludes the fourth oral order, and this concludes our  
21   proceedings for today.

22          Mr. Rees, did you have something?

23          MR. REES: Please, purely administrative matter, but it would  
24   assist with planning for the forthcoming trial, if we were to know,  
25   firstly, in relation to that two-week period at the end of October



1     which day of each of those two weeks we will not be sitting on?

2           JUDGE SMITH: Right now, our plan would be that we would meet  
3     Monday through Thursday, not meeting on Friday both weeks. And the  
4     only reason we do it that way -- well, there is many reasons. But we  
5     could potentially go into part of Friday, if absolutely necessary, to  
6     finish something up. We leave that open. But our primary thoughts  
7     are Monday through Thursday.

8           MR. REES: I'm grateful. And then in relation to the period  
9     thereafter, the two days a week that we will have available to us.  
10    Do we have an indication at this stage which two days of the week  
11    that is likely to be, or will that ...

12          JUDGE SMITH: Yes, in consultation between me and the Presiding  
13    Judge in Trial Panel I, we have mapped out November and December  
14    because there are some times when people aren't available also. So  
15    we will endeavour to get that to you as soon as possible so everyone  
16    can start making plans accordingly.

17          MR. REES: I'm very grateful.

18          JUDGE SMITH: There are some weeks where we might get two days,  
19    and I think there is one other week where we might get four full  
20    days. And that would be in December, if necessary.

21          So we will try to get that finalised and submitted to everybody  
22    so you have an idea of where we're going with these days. It's  
23    complicated with two Panels using this room and fitting in,  
24    especially since the Pre-Trial Judge has to have it available to him  
25    on a regular basis too. So we'll get that to you as soon as

1 possible.

2 MR. REES: Thank you.

3 JUDGE SMITH: Thank you very much for your attendance today.  
4 Once again, thank you for your good preparation, for your candour,  
5 for your courtesy, we appreciate all that, and we'll be seeing you  
6 all again soon.

7 This hearing is adjourned.

8 --- Whereupon the Prosecution Preparation  
9 Conference adjourned at 12.38 p.m.

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