

1 Friday, 21 January 2022

2 [Open session]

3 [The accused entered court]

4 --- Upon commencing at 9.30 a.m.

5 PRESIDING JUDGE SMITH: Madam Court Officer, please call the
6 case.

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

10 PRESIDING JUDGE SMITH: Thank you.

11 Good morning and welcome, everyone. First, we'll take the
12 appearances.

13 Mr. Pace.

14 MR. PACE: Good morning, Your Honour, and to everyone here and
15 joining us remotely. For the SPO today, we have Valeria Bolici and
16 Matt Halling, Prosecutors; Line Pedersen, Case and Evidence Manager;
17 Ruth del Pino Bleijerveld, legal intern. And I am James Pace,
18 Associate Prosecutor.

19 PRESIDING JUDGE SMITH: Thank you, Mr. Pace.

20 Mr. Rees.

21 MR. REES: Your Honour, I appear on behalf of Hysni Gucati. I
22 am assisted by co-counsel Mr. Huw Bowden and Ms. Eleanor Stephenson.
23 I am also assisted by Ms. Faye Wigmore, Mr. Joseph Bowden, and
24 Mr. Remi Halilaj.

25 PRESIDING JUDGE SMITH: Thank you.

1 Mr. Cadman.

2 MR. CADMAN: Good morning, Your Honours. I appear on behalf of
3 Mr. Nasim Haradinaj who appears in person today. I am assisted by
4 Mr. Soliman, Ms. Rodio, and Ms. Frivet.

5 PRESIDING JUDGE SMITH: Thank you, Mr. Cadman.

6 I also note that Mr. Gucati and Mr. Haradinaj are both present
7 in court. I note that Judge Mettraux is once again participating via
8 Zoom.

9 And, Mr. Rees, we welcome you back.

10 Prior to starting with the testimony of the first witness, there
11 are a few housekeeping matters to deal with, starting with the
12 timeline for the next detention review.

13 Last week, Mr. Cadman, you told us that you and Mr. Halling had
14 agreed to request, and I quote from the transcript, "a ten-day
15 deferral of the Panel making that decision in order to allow the
16 Appeals Chamber to make a ruling as they have done in Case 06."
17 Mr. Halling confirmed this. The Gucati Defence stated that it would
18 be content with the proposed amended schedule.

19 Now, in Case 06, the Pre-Trial Judge varied the time limit for
20 Defence to provide their submissions on detention no later than ten
21 days after the notification of the Court of Appeals Panel decision.
22 The Panel also notes that in that case the Defence filed their
23 submissions first and the SPO responds, while in our case the SPO
24 goes first.

25 I also note that if your request is that the Panel defers its

1 decision with only ten days, that means your submissions will have to
2 come before us within those ten days and, in fact, within probably a
3 week from the appeal decision.

4 So we need some clarification on what exactly you're requesting.

5 MR. CADMAN: Your Honour, the question was put to me by
6 Mr. Halling because of the decision taken in Case 06. I indicated I
7 had no objections following the same course of action.

8 I understand that the way in which detention is dealt with in
9 this case is different, as you've already indicated. I think the
10 position is that it is difficult for us to put in those submissions
11 until such time as the Appeals Panel had made their decision. If
12 it's seven days, if it's ten days, we're ready to proceed. We're
13 just awaiting the decision of the Appeals Panel.

14 PRESIDING JUDGE SMITH: [Microphone not activated].

15 THE INTERPRETER: Microphone, please.

16 PRESIDING JUDGE SMITH: Pushed the wrong button.

17 And then the SPO will make their report within ten days, and
18 then how much time do you need?

19 MR. CADMAN: Well, Your Honour, if the SPO is going to put in
20 their submissions within ten days, I would say we would require
21 limited time. I wouldn't ask for much more than three or four days.

22 PRESIDING JUDGE SMITH: Okay. Agreed?

23 MR. PACE: Yes, Your Honour.

24 PRESIDING JUDGE SMITH: All right. We'll enter an order later
25 today.

1 I'm sorry, I didn't ask the Gucati Defence about that. Is there
2 any objection to that process? I know you did not appeal --

3 MR. REES: Well, I'm slightly confused about what is being
4 proposed.

5 PRESIDING JUDGE SMITH: Okay. The --

6 MR. REES: I understand, in general, the concern that with an
7 appeal against detention outstanding, there's an element of -- one
8 doesn't want the decision of the Court of Appeal being prejudged by a
9 further decision on detention in the interim. But saying that, I am
10 concerned about the mandatory period for a review of Mr. Gucati's
11 detention slipping in the meantime.

12 There would be less concern if we had some indication as to the
13 timeframe within which the Court of Appeals Panel is likely to
14 provide a decision on the appeal. And if, of course, that was within
15 the period -- or would precede the next mandatory review or, indeed,
16 be at least close to it, then I wouldn't have any concern and I would
17 simply be content to follow the proposals from the SPO and
18 Mr. Haradinaj's team.

19 But I would be concerned if -- having an open-ended period,
20 agreeing to postpone any further reviews of Mr. Gucati's detention
21 without any indication as to how long that's going to take.

22 PRESIDING JUDGE SMITH: [Microphone not activated].

23 MR. REES: We didn't.

24 THE INTERPRETER: Microphone.

25 PRESIDING JUDGE SMITH: I'm sorry. I keep pushing the button

1 wrong.

2 MR. REES: We didn't. Although, of course, there is a corollary
3 effect of the appeal being made by Mr. Haradinaj which, if it was
4 successful, would undoubtedly have an impact upon the detention
5 review for Mr. Gucati.

6 PRESIDING JUDGE SMITH: Have you discussed this at all with the
7 Prosecution?

8 MR. REES: No.

9 PRESIDING JUDGE SMITH: Perhaps you should do that and then get
10 back to us and we will make a ruling.

11 Is that okay, Mr. Pace?

12 MR. PACE: That would be okay, Your Honour. I would just like
13 to point out that our understanding is that the last time this was
14 discussed in open court, the Gucati Defence actually agreed to this
15 procedure. So now we seem to be revisiting something that was agreed
16 on.

17 But, yes, we can discuss if that's necessary.

18 PRESIDING JUDGE SMITH: Because Mr. Rees wasn't here at that
19 time, and you've asked permission to bring the matter up, I would
20 suggest you talk it over with the Prosecution. Perhaps there's a
21 solution.

22 MR. REES: Your Honour, I am not raising an objection, nor am I
23 going back behind what was said last week. I am simply raising the
24 concern that we don't want this to be an open-ended process which
25 defers a further detention review for Mr. Gucati without any

1 indication as to how long it's going to be until there is a further
2 review.

3 PRESIDING JUDGE SMITH: Unfortunately, we don't have any control
4 over that situation. So I think your point is well raised, that it
5 needs to be discussed.

6 MR. REES: Okay. Thank you.

7 PRESIDING JUDGE SMITH: So if you will all get back to me with a
8 submission perhaps by Friday?

9 MR. REES: Yes, we'll do that, Your Honour.

10 PRESIDING JUDGE SMITH: All right. Thank you.

11 Moving on to the second housekeeping matter.

12 The Registry informed us that the second expert witness,
13 Mr. Reid, will be available to testify via Zoom on Monday,
14 24 January, from 8.00 a.m. until noon. So once again, we will be
15 opening court for that session at 8.00 a.m. on the 24th. We are
16 grateful for the efforts of the Registry and the cooperation of the
17 Australian authorities.

18 I now turn to the Haradinaj application requesting the Panel to
19 authorise the advanced disclosure of a number of documents to the
20 second expert witness, Mr. Reid; that is, filing F524.

21 Since the witness is due to testify on Monday, 24 January, at
22 8.00 a.m., the Panel will now issue a short oral order with written
23 reasons to follow.

24 On January 18th, the Haradinaj Defence filed its application to
25 the expert witness prior to his testimony.

1 On January 20th, further to a reduced time limit, the SPO
2 responded.

3 The Panel notes that the Haradinaj Defence requests the
4 disclosure of the following material: All unredacted transcripts and
5 all declarations of SPO Witness Pumper, Jukic, and Moberg; all
6 declarations of an SPO investigator; four handover forms relating to
7 the seizure or receipt of batches; and a video recording of the SPO
8 search conducted 25 September 2020 at the WVA premises.

9 The Panel considers this request to be untimely,
10 unsubstantiated, and improper. Untimely, because the Haradinaj
11 Defence has had access to the handover notes, all declarations of
12 Witness 4841, and the video recording of the search since the
13 pre-trial stage, so it could have requested this disclosure before
14 the report was prepared.

15 The confidential transcripts have been available at the end of
16 each day of testimony. Also, the testimony of Witness 4841 was
17 finalised on 26 October 2021. The expert report was filed on
18 9 November 2021. The Haradinaj Defence never explained why the
19 material requested now were not flagged before the report was filed
20 or why a request to amend the report has not been filed shortly after
21 its submission.

22 The Haradinaj Defence could have also requested the disclosure
23 as soon as it was notified of the Court of Appeal's decision.

24 The application is also unsubstantiated because no reasons are
25 provided for this late request. It is further improper because it

1 inappropriately seeks to expand the scope of the proposed expert
2 evidence beyond the scope of the report and beyond what has been
3 authorised by the Court of Appeals Panel.

4 These reasons are further explained in the decision which will
5 follow.

6 That being said, this Panel wants to give the full effect to the
7 decision of the Court of Appeals Panel, which is to allow the
8 evidence of Mr. Reid for the limited purpose of challenging the
9 evidence of SPO Witness 4841. The Panel also wants to guarantee that
10 the right of the accused to a fair trial is not negatively affected
11 by the belated nature of this application.

12 So the Panel reviewed the merits of this request and decides as
13 follows.

14 The transcripts and declaration of Witnesses 4842 and 4876, the
15 declarations of SPO investigator, and the search video of
16 25 September 2020 fall outside the scope of Mr. Reid's report and
17 outside the scope of the testimony as allowed by the Court of
18 Appeal's Panel, so their disclosure is denied.

19 The handover forms are available in public redacted versions and
20 three of them have already been shared with the witness. The Panel
21 sees no good cause in disclosing the confidential versions, and the
22 Defence has provided no cogent reasons for it.

23 All public transcripts of the testimony of Witness 4841 have
24 been available on the Court's web site since 11 November 2021, so the
25 Panel is at a loss in understanding how these could not have been

1 provided to the witness.

2 As for the confidential unredacted transcripts, the Panel found
3 only one private session on 19 October 2021 that could be relevant to
4 and falls within the scope of the expert report. The Panel,
5 therefore, directs the Registry to disclose to the witness by end of
6 today the confidential transcript of 19 October 2021 under the
7 following conditions.

8 The private session on pages 953 to 961 should be unredacted
9 save for a name in line 21 of page 953. All other private sessions
10 in that transcript should be redacted. The witness is ordered to
11 maintain the confidentiality of the disclosed portion of the
12 transcript, and counsel for Mr. Haradinaj is ordered to inform him
13 accordingly.

14 As for the declarations of Witness 4841, the Panel found that
15 some of the admitted declarations are partly relevant to and within
16 the scope of the expert report. Nonetheless, the Panel found no good
17 cause for disclosing the confidential versions of these declarations,
18 and the Defence has offered no cogent reasons for it.

19 It is noted, however, that the Panel already approved proposed
20 redactions to the public versions of these declarations, which are
21 due to be uploaded on 31 January of this year.

22 For these reasons, the Panel orders the SPO to provide the
23 Haradinaj Defence by 8.00 p.m. today the following declarations under
24 the following conditions: Paragraphs 1 to 12 and 19 to 35 of P86,
25 public redacted version; P88 in full, this one is public; paragraphs

1 1 to 13 of P89, public redacted version; P90 and the first page of
2 Annexes 1 and 3, all in public redacted version; P91 and the first
3 page of Annex 1, both in public redacted version.

4 The Haradinaj Defence is ordered to transmit these documents to
5 the witness by 9.00 p.m. today, The Hague time. The Panel approves
6 this limited disclosure with the following strict directions: The
7 witness will not be allowed to give evidence in his
8 examination-in-chief on any matter that goes beyond the scope of
9 paragraphs 9 to 25, 27, 29, and 31 of his report, indicated by the
10 Court of Appeals Panel as permissible for the purpose of challenging
11 the testimony of Witness 4841.

12 Any line of questioning arising from the disclosed material will
13 be limited to eliciting explanations of the analysis provided in the
14 aforementioned paragraphs. The witness will be directed to answer
15 such questions with a view to explaining, but not exceeding, the
16 analysis he provided in the aforementioned paragraphs of his report.
17 The witness will also be directed to be mindful of not disclosing
18 confidential matters in public hearings.

19 Any questions regarding the disclosed confidential transcript
20 should focus on the procedures described therein in view of the
21 analysis provided in the report and should not reveal confidential
22 information. In any event, the Haradinaj Defence is ordered to
23 notify the Panel and the parties by Sunday, January 23rd, 2022, at
24 10.00 a.m., Dutch time, of any line of questioning arising from the
25 disclosed material and any clarifications the witness provided upon

1 reading the disclosed material. Failure to do so could lead to the
2 Panel's refusal to allow any such questions during the witness's
3 testimony.

4 Depending on the aforementioned notice from the Haradinaj
5 Defence, or the scope of the direct examination, the SPO is invited
6 to request more preparation time for the uploading of its
7 presentation queue or cross-examination but with a view to finalising
8 the testimony on 28 January.

9 This concludes this oral order.

10 Before we begin, Mr. Cadman and Mr. Bowden -- before Ms. Myers
11 begins, I should say, Judge Mettraux has some questions for you about
12 the case so far as it pertains to the proposed evidence of Ms. Myers.

13 Judge Mettraux, the floor is yours.

14 JUDGE METTRAUX: [via videolink] Thank you, Judge Smith. And
15 good morning to all in the courtroom.

16 Before Ms. Myers is brought in, I would like to seek some
17 clarifications from Defence counsel, and perhaps first to Mr. Rees or
18 to Mr. Bowden.

19 Am I to understand that the claim of whistleblowing is part only
20 of the Haradinaj case or is it also a part of your case, the Gucati
21 case?

22 MR. REES: Your Honour, the public interest issue is very much a
23 live part of the defence of Mr. Gucati. We await to hear the
24 evidence of Ms. Myers with interest, and we take the view - at this
25 stage, at least - that we anticipate that that evidence will be

1 relevant to the defence of Mr. Gucati, the public interest matters,
2 as we have described them. And we anticipate that we will
3 incorporate and make references to Ms. Myers' evidence in our final
4 trial brief and closing statements.

5 It is, we anticipate, evidence that will be called this morning
6 that will be evidence in the case as a whole, and we will be making
7 submissions in relation to the evidence as a whole, including
8 Ms. Myers' evidence in due course. I hope that assists, Your Honour.

9 JUDGE METTRAUX: [via videolink] It does, and I'm grateful,
10 Mr. Rees.

11 Mr. Cadman, now, we do understand that it is a part of your case
12 that your client, Mr. Haradinaj, acted as a whistleblower; is that
13 correct?

14 MR. CADMAN: That is correct.

15 JUDGE METTRAUX: [via videolink] And is it also the case that the
16 legal basis upon which you rely for that claim is made up of the Law
17 No. 06/L-085 of 18 December 2018 and the European Convention of Human
18 Rights? Is that the basis on which you rely for that claim?

19 MR. CADMAN: That is correct.

20 JUDGE METTRAUX: [via videolink] Now, turning first briefly to
21 the issue of European Convention of Human Rights. And, as you know,
22 according to the case law of the court, freedom of expression carries
23 with it certain duties and responsibilities and any person who
24 chooses to disclose information must, and I quote, "carefully verify,
25 to the extent permitted by the circumstances, that it is accurate and

1 reliable ..."

2 Now, what I want to understand from you is whether it is,
3 indeed, your case that your client took steps before publicising that
4 information to ensure that the information in question was accurate
5 and reliable, consistent with the jurisprudence of the court.

6 MR. CADMAN: Well, Your Honour, obviously these are certain
7 points that Ms. Myers will be able to comment upon to the extent that
8 that is required and what steps need to be taken to verify the
9 accuracy of the information.

10 Your Honour will have heard Mr. Haradinaj's evidence and
11 Mr. Gucati's evidence to the extent as to whether they considered the
12 information to be accurate and reliable. But, of course, these are
13 matters that are going to be put to the witness in order for her to
14 determine or to set out what are the requirements that come from the
15 various different rulings that she refers to in her report.

16 But certainly, as you've heard from Mr. Haradinaj, the steps
17 that were taken -- there was obviously a very quick review of the
18 material. They had requested verification. They never received that
19 verification from the SPO as to the reliability or authenticity of
20 that material. But, of course, that is one of the points that I will
21 be putting to Ms. Myers as to the extent to which an individual is
22 required to carry out a verification process before making public
23 that information.

24 JUDGE METTRAUX: [via videolink] Well, just maybe a
25 clarification. I'm asking what your case is, not what the law is,

1 which you can, of course, discuss with Ms. Myers when she's here.
2 What I want to understand is whether it is part of your case that
3 your client took steps consistent with the jurisprudence of the court
4 to verify that the information in question was accurate and reliable.
5 Is that part of your case? In other words, your case is consistent,
6 you say, with the jurisprudence of the court on that point?

7 MR. CADMAN: We say it's consistent with the jurisprudence. We
8 say that it falls squarely within those principles set out. And to
9 the extent that they were able to verify that information, that is
10 the steps that were taken prior to the publication.

11 JUDGE METTRAUX: [via videolink] And one more question, if I may,
12 about the law of 18 December 2018. And again, of course you are
13 aware of that, that Article 3(1)(iv) of that law defines disclosure,
14 for the purpose of the law, as "making information public."

15 Now, what I want to clarify is whether you accept that your
16 client made the imputing information public, again, consistent with
17 that piece of legislation?

18 MR. CADMAN: Again, as you will have heard from Mr. Haradinaj's
19 evidence -- and this was one of the issues that came up during
20 cross-examination as to making something public or publishing
21 information. The point that was made in Mr. Haradinaj's evidence was
22 that by making that available during the press conferences that
23 information has been made public.

24 JUDGE METTRAUX: [via videolink] Thank you, Mr. Cadman.

25 MR. CADMAN: Thank you.

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1 JUDGE METTRAUX: [via videolink] No further questions.

2 Thank you, Judge Smith.

3 PRESIDING JUDGE SMITH: All right. Now we're ready to start
4 with the Expert Witness 1252, Ms. Anna Myers.

5 Madam Usher, would you please bring the witness in.

6 [The witness entered court]

7 PRESIDING JUDGE SMITH: Please put on your headset, Ms. Myers.

8 Good afternoon, Ms. Myers. We will start now with your
9 testimony. The Court Usher will first provide you with the text of
10 the solemn declaration that you are asked to take pursuant to
11 Rule 149(5) of the Rules.

12 Please proceed and read it aloud.

13 THE WITNESS: Thank you. Conscious of the significance of my
14 testimony and my legal responsibility, I solemnly declare that I will
15 perform my expert analysis conscientiously and to the best of my
16 knowledge, and that I will state my findings and opinion accurately
17 and completely.

18 WITNESS: ANNA MYERS

19 PRESIDING JUDGE SMITH: You can be seated.

20 THE WITNESS: Thank you.

21 PRESIDING JUDGE SMITH: I have some preliminary material first,
22 Mr. Cadman.

23 Ms. Myers, as you may know, we are hoping to hear your testimony
24 by the end of today. If we are not finished by the end of the day,
25 we will hear the rest of your testimony on January 24th in the

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1 afternoon starting at 2.30.

2 Now, the counsel for Mr. Haradinaj, Mr. Cadman, will go first in
3 asking you questions. Once he's done, the Gucati Defence, seated
4 over here, may have some questions for you. Then it will be the
5 Prosecution's turn to cross-examine you, and the members of the Panel
6 may have some questions as well.

7 The estimate of Mr. Cadman for your length of examination is two
8 hours. The Gucati Defence estimate is one hour. And the SPO
9 estimate is up to four hours. The Panel may allow redirect
10 examination as well if conditions for it are met.

11 Please try to answer the questions clearly with short sentences.
12 If you don't understand a question, feel free to ask counsel to
13 clarify or repeat the question. Also, speak into the microphone and
14 wait a few seconds after the question to allow the translators to
15 keep up with your testimony.

16 While you are giving evidence in this court, you are not allowed
17 to discuss with anyone the content of your testimony. If any person
18 asks you questions about your testimony, please let us know. Please
19 also base your answers on your experience and expertise and respond
20 to questions within the limits set by this Panel.

21 We take it that the counsel for Mr. Haradinaj has informed you
22 of the following. The Panel will not allow answers on paragraphs 23
23 to 25, 32, the second and last sentences of 34, paragraph 36 - the
24 second sentence, and paragraph 40 entirely of your report. The Panel
25 will not allow comments on evidence tendered in these proceedings or

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1 comments on how your legal analysis would apply to the facts of the
2 present case.

3 The Panel will, however, allow answers and comments about the
4 general legal standard that you believe is applicable and relevant to
5 a claim of whistleblowing. This is the gist of our decision as
6 regards to your anticipated evidence.

7 Mr. Cadman, keeping in mind what I just said, the floor is
8 yours.

9 MR. CADMAN: Your Honour, just one additional point. I know
10 that the SPO had objected to paragraph 18. I have no objection to
11 the words between the two commas being taken out. That does refer to
12 some of the same matters that Your Honour has just discussed.

13 PRESIDING JUDGE SMITH: All right.

14 MR. CADMAN: It doesn't affect Ms. Meyers' testimony.

15 PRESIDING JUDGE SMITH: No, it only -- only in the admissibility
16 of the report. I understand.

17 And I understand also, while we're on the subject, in your
18 response to the initial report, Mr. Pace, you made no objections to
19 her expert status. And I take it you still do not. Is that correct?

20 MR. PACE: Yes, Your Honour. That's correct. And pursuant to
21 the Trial Panel's communication yesterday, we also consulted with
22 counsel for Mr. Haradinaj and we confirmed as much. We, of course,
23 noted that while we may challenge the credibility in relation to
24 certain aspects, we are not challenging the expert's qualifications
25 as an expert as such.

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1 PRESIDING JUDGE SMITH: So I take it that some of those proposed
2 exhibits that you had that dealt with her expertise are no longer
3 necessary; is that correct?

4 MR. CADMAN: Your Honour, I will not be referring to any of
5 those exhibits or seeking to tender them into evidence as there's no
6 challenge to her qualifications as an expert.

7 PRESIDING JUDGE SMITH: Thank you very much for your cooperation
8 on that, both of you.

9 And now you may proceed.

10 MR. CADMAN: Your Honours, also, Ms. Myers has requested, just
11 so there is no confusion as to what she can or can't say, I
12 appreciate that Your Honour has just read out the paragraphs, but
13 just so that Ms. Myers is mindful as to what she can and cannot say,
14 we have prepared her report with highlighted in pink the areas that
15 she is not to refer to.

16 I have shown it to the Prosecutor. With Your Honours' leave, I
17 intend to have Ms. Myers have this so that she can be mindful of what
18 she can or can't say.

19 PRESIDING JUDGE SMITH: Any objection, Mr. Pace?

20 MR. PACE: No, Your Honour.

21 PRESIDING JUDGE SMITH: Thank you. You may go ahead and hand it
22 to the usher.

23 MR. CADMAN: Can I ask, before I begin, that -- for the benefit
24 of everybody else in the courtroom, that Ms. Myers' report, which is
25 DNH0313 to DNH0332, is made available.

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1 PRESIDING JUDGE SMITH: Thank you.

2 Examination by Mr. Cadman:

3 Q. And once you have that, Ms. Myers, can I just ask you to confirm
4 that that is, in fact, your report.

5 A. Yes, it is.

6 Q. Can I ask you to turn to the last page, which is DNH0332, and
7 confirm that that is your signature.

8 A. Yes, it is.

9 Q. And that your report is dated the 15th --

10 THE INTERPRETER: The interpreter's note: Can you please pause
11 between question and answer, and please do not speak too fast. Thank
12 you.

13 MR. CADMAN:

14 Q. Can I ask you to confirm, Ms. Myers, that the date of your
15 report is 15 October 2021?

16 A. I don't see the date on here.

17 MR. CADMAN: Perhaps that could be just shown on the screen.

18 THE WITNESS: Yes, I see it. I do confirm.

19 MR. CADMAN:

20 Q. And can I ask you to confirm that no changes have been made to
21 your report since that time?

22 A. Yes, I can confirm no changes have been made.

23 Q. And apart from the formatting of the report, can I confirm that
24 that is the report that you prepared?

25 A. Yes, it is.

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1 Q. Can you confirm that the contents of the report are true to the
2 best of your knowledge or belief?

3 A. Yes, I can confirm.

4 Q. And it accurately reflects what you will say during the course
5 of your examination-in-chief or your direct examination?

6 A. Yes.

7 MR. CADMAN: Can we put up on the screen DNH1236 to DNH1239.

8 THE INTERPRETER: The interpreters kindly ask Ms. Myers to speak
9 up. Thank you.

10 MR. CADMAN:

11 Q. Sorry, Ms. Myers, the interpreters are asking if you could just
12 speak a bit louder.

13 Can I ask you to confirm that document refers to your
14 instruction as an expert in this matter?

15 A. Yes, I can confirm.

16 Q. Can I ask you to turn to DNH1238, at the bottom of the page,
17 where it refers to three matters -- three documents that you were
18 provided with.

19 A. Yes, I can confirm.

20 Q. Now, due to the limitations of what the Court has ruled you're
21 allowed to give your testimony on today, I'm not going to be asking
22 you any questions about those reports. But just to confirm that
23 those are reports that you received in the compilation of your
24 report?

25 A. Yes, I can confirm.

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1 Q. Can I ask you to confirm -- even though there is no challenge to
2 your qualifications, I just briefly want to go through a couple of
3 matters with you. What is your current occupation?

4 A. I am the executive director of the Whistleblowing International
5 Network.

6 Q. And can I ask if you are also legally qualified?

7 A. Yes, I am a lawyer and I am a solicitor of the Law Society of
8 England and Wales.

9 Q. And for how long have you been a member of the Law Society of
10 England and Wales?

11 A. Since 1998.

12 Q. And the Whistleblowing International Network, for how long have
13 you been the executive director of that organisation?

14 A. Of the formal organisation, I have been the executive director
15 since 2018.

16 Q. And prior to your work with the Whistleblowing International
17 Network, can I ask where you were prior to that?

18 A. With relation to this field of expertise, I was a legal officer
19 and then deputy director of the Public Concern at Work, a legal
20 advice centre in London, which is now called Protect. I was also the
21 chief executive of the Government Accountability Project in
22 Washington for a year in 2015, 2016. I have been an evaluator and
23 then a member of the staff of the Council of Europe Group Against
24 Corruption, GRECO, and I have done consultancy both for the UN,
25 United Nations, as well as the World Bank on whistleblowing. And I

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1 was -- I'm trying to think of some of the things that I've done. But
2 prior to becoming the executive director of the Whistleblowing
3 International Network, I was also doing various bits of work that
4 were done free for the Committee on Legal Co-operation for the
5 Council of Europe, so I was the advisor on the development of the
6 draft recommendation on the protection of whistleblowers. And
7 currently, I am doing a report evaluating the effectiveness for the
8 committee as well to review.

9 Q. We'll come back to that in a moment. So you've mentioned your
10 area of expertise. Could you just specify, for the benefit of the
11 Court, what is your particular area of expertise?

12 A. My particular area of expertise is on the legal practice and
13 theory of whistleblowing protection. So as a legal director, deputy
14 director of the Public Concern at Work, now called Protect, it was a
15 legal advice centre recognised by the bar and the Law Society of
16 England and Wales, and we provided advice within the confidential
17 legal relationship to those who were concerned about wrong-doing and
18 who didn't know whether or how to raise it.

19 We also worked with parliament policymakers, regulators, and
20 competent authorities in the UK to ensure that they understood the
21 value and importance of protecting whistleblowers and to watch the
22 field. And so, in general, that was my -- beginning of my expertise.
23 And since then, particularly because the interest internationally in
24 the area of whistleblowing has grown, and while at Protect we were
25 being contacted by civil society organisations and experts from

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1 around the world who were interested in this issue, and that is how
2 the network started informally, legal advice centres around the world
3 and others interested in this issue wanting to share expertise and
4 practice.

5 And so eventually this is what turned into the Whistleblowing
6 International Network, which was formally recognised as a charitable
7 organisation in Scotland in 2018. And this is to continue to share
8 this practice and to, one hopes, encourage more of the legal
9 community to provide advice on public interest whistleblowing to
10 whistleblowers around the world, but also to help support the
11 capacity of the organisations that support whistleblowers, which are
12 many at the moment, but we want to encourage more to provide legal
13 and direct support. But there's obviously interest for the
14 organisations that are protecting the independence of the press and
15 journalists as well as anti-corruption organisations and those
16 interested in ensuring that information flows around climate change
17 and around food safety and compliance.

18 So the field has not -- certainly has not been restrictive in
19 any sense, and it is becoming more of a -- sorry, excuse me, a live
20 issue around the world.

21 Q. I see. You mentioned GRECO, your work with GRECO. That is the
22 Group of States Against Corruption?

23 A. Yes.

24 Q. You mention in paragraph 5 of your report the protection of
25 whistleblowers recommendation. What was your role within that?

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1 A. So the recommendation is a Committee of Ministers
2 recommendation. So while I was actually working at the Group of
3 States Against Corruption, that was separate. I was asked while I
4 was there to be the adviser to the Committee on European Legal
5 Cooperation, which was the drafting committee for the Committee of
6 Ministers to draft the recommendation. And so that's what I was
7 doing while I was also at GRECO.

8 Q. I'd like you to turn to paragraph 7 of your report. You refer
9 to Government Accountability Project. Can you explain what that is?

10 A. The Government Accountability Project is a non-profit
11 organisation that has been in existence since 1977, so it is
12 considered one of the longest established whistleblower advice
13 organisations in the world, and certainly the whistleblower
14 protection laws began to be put on to the books in the US before it
15 was really picked up anywhere else.

16 And so that is the organisation that has sort of led the field
17 over the years, and I was there for a year doing some work as the
18 chief executive. And they are -- they were really begun post the
19 Pentagon Papers, issues around holding government to account. They
20 focus a lot on the federal position in Washington advising
21 whistleblowers, but they provide information and advice to
22 whistleblowers all over the US. And they take a view very much that
23 whistleblowing is an issue that relates that -- often is restricted
24 to the workplace, but they are willing and able to support anyone who
25 is raising concerns about wrong-doing and wants some support and

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1 advice.

2 Q. And understanding that a lot of the work that you do is not
3 necessarily in the public domain, to the extent that you're able to,
4 can you explain to the Court what you're currently engaged in.

5 A. Certainly. So just at the moment I'm doing a report for the
6 Committee on Legal Cooperation to help them consider how the
7 recommendation has been picked up by Member States and what -- and
8 whether they want to continue to review it.

9 Q. And that's the recommendation that you referred to previously,
10 the protection of whistleblowers?

11 A. The Council of Europe was one of the first European bodies to
12 really start to examine whistleblower protection within the wider
13 European community. So as the Court may know, there are 47 Member
14 States of the Council of Europe. They started to look at, and this
15 was through the Parliamentary Assembly Committee on Legal Affairs --
16 Human Rights and Legal Affairs, and they did -- had a Special
17 Rapporteur, Pieter Omtzigt, who is the Dutch -- a Dutch MP and also a
18 member of the Parliamentary Assembly, looking at that from 2010.
19 Eventually, the recommendations and resolutions of the Parliamentary
20 Assembly Committee urged the Committee of Ministers to draft a legal
21 instrument, and that is what the European Committee of Cooperation
22 was looking to do, which was to draft the recommendation, and that
23 was adopted by the assembly and by the Committee of Ministers in
24 2014. So it was, in fact, the first sort of pan-European legal
25 instrument. It was relied on and continues to be relied on by -- as

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1 a part of the European acquis, and the European Union since has
2 adopted a draft -- not adopted a draft, sorry, adopted the directive
3 on the protection of whistleblowers, reporting persons on
4 European Union law, and that was expected, and is expected, and
5 Member States are obliged to transpose that into their national legal
6 systems. They were due to do that by 17 December of this past year.
7 Many haven't done that yet, but that is now a law in Europe.

8 Q. And forgive me, I should have asked you this question at the
9 outset, just in the interest of full transparency. Whilst you and I
10 have not met before --

11 A. No.

12 Q. -- we have worked on whistleblowing cases previously.

13 A. Yes, we have.

14 Q. Do you consider that affects your ability to appear as an
15 independent expert witness in these matters?

16 A. I do not.

17 Q. I want to go into your level of experience as providing expert
18 testimony. Can you tell the Court whether you have provided expert
19 testimony before with particular reference -- I can turn you to
20 paragraph 8 of your report.

21 A. Yes, I have. I would acknowledge that not within a formal legal
22 case. So this is my first time providing it here. But I have
23 provided it within the context of parliamentary hearings, certainly
24 into legal parliamentary inquiries into what were the -- are legal
25 cases against doctors in the -- sorry, in the United Kingdom. In

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1 particular, I think I put in here the UK's Committee on Standards in
2 Public Life, the inquiry into the activities of the serial killer
3 Dr. Shipman. That was in 2004 when I was deputy director at Public
4 Concern at Work. And the three inquiries into Drs. Ayling, Neale,
5 and Kerr/Haslam. I have provided legal expertise to the Council of
6 Europe's Committee on Legal Affairs and Human Rights, both in 2009
7 and in 2014, both of which resulted in which I was mentioned in -- in
8 the reports that were adopted in 2010 and 2015 respectively.

9 More recently, in the -- well, actually, it wasn't that recent,
10 in 2014, in the Canadian inquiry by Honourable France Charbonneau, a
11 judge sitting on the Quebec Superior Court who was looking into
12 corruption in Quebec involving the awarding of public contracts, as
13 well as the Canadian Parliamentary Committee who was looking at
14 reviewing the Public Servants Disclosure Protection Act in 2017.

15 So those are my -- much more my formal hearings, but I've also
16 advised governments and other bodies on their whistleblower policies
17 but also on how they approach whistleblowing protection.

18 Q. And in individual cases involving whistleblowers themselves, to
19 what extent have you been involved in that process?

20 A. Well, certainly when I worked at Public Concern at Work and
21 Protect, I was on a legal advice line, and we worked with
22 whistleblowers daily, giving them advice. And it was particularly
23 important that they had access to early advice so that they were
24 considering what their options were before they raised concerns. We
25 would draft letters on their behalf to employers. And then if they

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1 were in positions where they needed to take a claim, we would give
2 them that early advice and we would offer to work with their lawyers
3 or, indeed, with their trade union representatives if needed.

4 At the Government Accountability Project, obviously in the
5 position of chief executive I was working with the lawyers and
6 discussing their cases within the legal context. They were the ones
7 taking the cases forward. And in the context of my position as
8 executive director at the Whistleblowing International Network, we do
9 advocacy, we talk to and work in support groups that include
10 litigating lawyers and lawyers who can give the advice but within the
11 context we are supporting them and giving them also and their lawyers
12 advice around the issues that affect them.

13 Q. Thank you. Now, moving on to your understanding of the various
14 definitions of -- that fall within your area of expertise. What is
15 your understanding of the working definition of "whistleblower"?

16 A. So I refer in my expert opinion to the definition that David
17 Kaye, the Special Rapporteur, the former UN Special Rapporteur on
18 freedom of expression and opinion at the United Nations uses. And
19 that one is "a person who exposes information that he or she
20 reasonably believes at the time of disclosure to be true or to
21 constitute a threat or harm to a specified public interest, such as a
22 violation of national, international law, abuse of authority, waste,
23 fraud or harm to the environment, public health or public safety."

24 So that is what I would consider a very sound definition of a
25 whistleblower.

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1 Q. And in your expert professional opinion, is that a definition
2 that is widely used within your field?

3 A. Yes.

4 Q. I want to take you to paragraph 11 of your report. In your
5 opinion, what would you say is the difference between workplace
6 whistleblowing or workplace whistleblowers and those that fall
7 outside of the general employee definition?

8 A. So I think this is an important area to discuss. It's one that
9 we are discussing all the time at the international level and at
10 the -- within the legal communities. A workplace whistleblower is
11 someone who has come across harm or information that causes them
12 concern and who has -- by virtue of that relationship is in a
13 particularly vulnerable position.

14 So one of the key aspects of working in this field is to really
15 look at what are the risks that people run when they speak up. And
16 certainly when, for instance, the Public Concern at Work where I
17 worked, from 2000 to 2008, in 1993, when it was first set up, what
18 they were focusing on was the concern that there wasn't particular
19 protection for those within work, that their contracts or duties of
20 loyalty were stopping them from properly raising concerns outside the
21 workplace in order to deal with corruption or risk that had a public
22 interest impact.

23 And so a lot of focus has been on ensuring that those
24 whistleblowers, workplace whistleblowers, are able to avail
25 themselves of protection even though they are in this particularly

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1 difficult position.

2 This is by no means restrictive in terms of who should be able
3 to raise concerns, and it is also very interesting and clear that
4 organisations themselves often -- particularly larger ones will make
5 sure that not only they can hear from their own staff but throughout
6 the supply chains that they run and from the public on matters of
7 their activities where they are -- they're at risk at causing harm.

8 So certainly you need to look at what the risks are that the
9 individuals who raised concerns are running and respond within the
10 legal framework to those risks. And clearly, workplace
11 whistleblowers needs specific protections but so do the others that
12 do speak up.

13 So often, just to clarify, I will be asked to speak on the range
14 from workplace witness -- workplace whistleblowing to witness
15 protection to journalist sources and, certainly within my network,
16 protecting the NGOs that work with whistleblowers.

17 Q. And specifically the legal protections for non-workplace
18 whistleblowing activities, just explain that in a little bit more
19 detail for us.

20 A. So those tend to be found in other areas of law, but -- and
21 that's where whistleblower protections tend to look at the
22 employments -- the employment situation but also data protection,
23 looking at the criminal law, looking at areas of protections in terms
24 of what the criminal system and the civil system provide. So, for
25 example, when the organisation that I used to work for was -- Public

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1 Concern at Work was first considering how to promote a law within the
2 UK, they were also looking at having a self-standing tort.

3 So one of the things that has been happening, and I would almost
4 say it's a circular motion, that we're going back to looking at
5 protecting individuals who speak up in terms of defamation, and that
6 is -- and other parts of the criminal law because if those who are
7 speaking up are being pursued that way, then those are areas in which
8 we are also interested in ensuring that when they do speak up about
9 wrong-doing, they are able to have a defence.

10 Q. And to be clear, the advice that you provide that you mentioned
11 relates to workplace and non-workplace whistleblowing activities?

12 A. Yes.

13 Q. Can you provide an example? I can take you to paragraph 15 of
14 your report. But is that an example of the non-workplace
15 whistleblowing activities?

16 A. Yes, particularly with respect to my -- to the network that I'm
17 running. We are working with NGOs, some of whom are organisations
18 that provide support to whistleblowers, and some of them provide
19 legal advice, others works on campaign and advocacy, so they will
20 work with individual cases. And, therefore, their ability to do
21 their jobs is clearly one of our key missions, is to protect them and
22 to build their capacity.

23 And so la Plateforme pour la Protection des Lanceurs d'Alerte,
24 PPLAAF, is a member of our -- of the network and so, therefore, we
25 will intervene when they need support.

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1 Q. When you say a member of your network, is it the case, and
2 please correct me if I'm getting this wrong, but a number of other
3 NGO, civil society groups are part of your network?

4 A. Yes. So we at the moment have 14 members. Those are
5 organisations that provide legal advice. So they will provide some
6 of them early advice, some of them will do litigation, but all have a
7 support and advice service where individuals can seek legal advice.
8 The rest of the -- and they are part of our governance structure. So
9 they have rights to and must form a majority of our board of
10 trustees, and that's so that the ethos of the network very much are
11 those who work daily with whistleblowers and are dealing with the
12 myriad of issues that arise.

13 The other organisations are organisations working in fields
14 where they have a long-term commitment to the support of
15 whistleblower protection. So they are working in, as I mentioned,
16 the protection of journalists, anti-corruption fields, so a number of
17 Transparency International chapters are part of our organisation.
18 And those that protect whistleblowers -- sorry, protect journalists
19 and are interested in from a protection of sources perspective,
20 unions as well who work with whistleblowers both inside organisations
21 but themselves can be -- although many of them are organisations in
22 which they need to deal with whistleblowing separately. So there a
23 number of those as well.

24 Q. And speaking generally on the protection to whistleblowers in a
25 non-employer-employee relationship, what are the reporting channels

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1 that are available to those individuals?

2 A. In a non-employment protect -- if they're in a non-employment
3 situation, well, obviously, they can still go to organisations that
4 are running the risk and let them know about those risks, but they
5 tend to be ones who will either go to the authorities if they can or
6 they will go public with their information if they -- if they feel
7 that it's not being addressed.

8 Q. So looking at a hypothetical situation, if an individual has
9 sought to raise concerns with those organisations, as you've
10 mentioned, and there has been no response, then going public would be
11 an acceptable route for them to take?

12 A. Sure. I think what is -- yes, sorry. But also I think there
13 is -- you can go to a journalist and provide it to journalists who
14 then have their own due diligence and ethics around how they will
15 publish the information. And that is one way in which whistleblowers
16 or individuals will get their information out.

17 Obviously, they can do it directly, but that is also -- and so
18 they can do that themselves on social media. That has caused an
19 interesting discussion within the media side of things with
20 journalists. But those are the options, really, on how people go
21 public.

22 Q. Now, turning to paragraph 16 of your report. I'd like to ask
23 you what is your understanding of whistleblower protection for those
24 who assist or facilitate a disclosure.

25 A. From the perspective of the work I do, those are the NGOs that

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1 will work with whistleblowers both within those that provide specific
2 legal advice and those who provide advocacy support and other types
3 of support. Some of them will also do research and be relying on
4 sources. So the facilitators can be those who are -- certainly
5 within my network are organisations that are working with
6 whistleblowers.

7 In terms of the framework and facilitation, that can be also
8 within the workplace unions and various parties that are not directly
9 the individuals that are speaking up but are facilitating those
10 disclosures. They can be family members. They can be associates and
11 colleagues.

12 Q. And if the disclosure is being facilitated by a third party, and
13 the first party, the whistleblower, is not known to them, would it
14 still fall within that description?

15 A. Yes.

16 Q. And what source would you rely upon in order to come to that
17 conclusion?

18 A. Well, certainly it has come up with -- and I would say probably
19 the most obvious examples are still within the journalists' field.
20 So journalists are relying on certain of their -- certain aspects of
21 their stories from anonymous sources, and competent authorities as
22 well are increasingly ensuring that they can get information, and
23 some of that information will be where the individual has not
24 identified themselves.

25 For the NGOs that are in our network, that will happen certainly

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1 as well. And then what that does, I think, is very much put more
2 onus on those organisations to deal with the information.

3 Q. Now, at paragraph 16 you make reference to two provisions, one
4 of Law No. 06/L-085, and that's to be found at DNH0573, DNH0574.
5 Dealing with Article 8, does that fit within what you have just
6 described?

7 A. So to be clear, the reason that I included those are to show the
8 Court that what has been happening in the evolution of whistleblower
9 law is an extension of the protections. So importantly, in these two
10 laws you can see that those who are facilitating workplace
11 whistleblowers tends to be because the laws tend to be focused on
12 that are also being protected, but they are not necessarily within
13 those workplaces.

14 And this is, I think, in my opinion, over the years of working
15 with governments and policymakers, are attempts to fill the gaps
16 where people are falling through and it doesn't make legal sense and
17 it doesn't make sense in a common sense way to policymakers in
18 particular that those who support whistleblowers are then able to be
19 targeted because that will have a chilling effect on individuals, the
20 whistleblowers themselves and other people from speaking up.

21 Q. And have you, you or your organisation, provided advice or
22 opinion concerning the protection of those who elect a specific
23 reporting channel?

24 A. Sorry, can you repeat that?

25 Q. Sure. Have you or your organisation provided advice to

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1 individuals who elect a particular reporting channel? Let's say by
2 disclosing it publicly.

3 A. Sure, yes. Certainly as someone who has the legal framework in
4 mind, it will be -- I have advised on all the channels. And I think
5 one of the very important aspects of whistleblower protection
6 generally is to ensure that the -- that the channels are the
7 voluntary choice of the individual depending on the circumstances of
8 the case.

9 One of the other important sort of definitions of
10 whistleblowing, really, is to ensure the free flow of information for
11 institutional accountability and, therefore, if there are blocks
12 where the information is not able to get to where it needs to go, and
13 ultimately the public has a right to understand what is happening
14 that could affect them, then we will advise on going public and what
15 the ramifications are for that.

16 Q. And when do you consider it necessary for a whistleblower to
17 choose the public channel in terms of reporting?

18 A. So I would -- and I'm assuming that everyone can understand that
19 going public is often -- we would refer to it as the nuclear option
20 or the option that is the most difficult to manage, but it is also an
21 incredibly, incredibly important one. So when someone is considering
22 going public, we would certainly consider advising them and asking
23 them to really consider whether -- what the other options are and to
24 ensure, for the sake of accountability, if they can, and, again, this
25 really is dependent on the circumstances, that those who ought to be

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1 able to address it have the information and that -- but you don't
2 necessarily wait if they're slow or ignoring the information, and you
3 certainly don't continue down that road if they're not handling the
4 information.

5 So there will be a number of factors that you will take into
6 account around how long you stay at any of those stages. If you can
7 give notice to those who ought to address it and have powers and
8 responsibility to address it, that is important because it shows
9 where accountability is failing. But under most laws, you can go
10 directly to a competent authority, and competent authorities, I
11 think, would be -- it's within their remit to address these issues,
12 so they want to have the information.

13 And I would just add here that certainly when I've been in
14 different parts of the world advising competent authorities, they
15 will often rely on stories in the press to help them actually
16 understand what some issues are that they might not have had direct
17 information about from the organisations or the sector that they're
18 meant to be controlling.

19 And so those are the -- the advice really is if there is an
20 alternative route, to explore that fully and -- but if you can't use
21 that, then going public is your option.

22 Q. So would it be fair to say that exploring the effectiveness of
23 those other channels would be a consideration in whether it is
24 justifiable in making those disclosures public?

25 A. Yes. And it would impact on your reasonable belief about which

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1 areas you need to explore and where you should go.

2 Q. We may come back to the "reasonable belief" in a moment, but the
3 reasonable belief, is that a factor that you would take into account
4 when making that determination?

5 A. Yes.

6 Q. Can you explain what you mean when you refer, at paragraph 19 of
7 your report, by whistleblowers by proxy?

8 A. It is interesting, and, again, it's part of this field where the
9 options for where people can reasonably go to raise concerns over the
10 years that I've been working in the field have changed and some
11 people would have seen as absolutely available to them 20 or 30 years
12 ago have become less available.

13 And so in terms of who then is the target because they have the
14 information has been changing. And so the people who are supporting
15 whistleblowers or the organisations particularly in my field of the
16 non-profit civil society organisations who have the information, more
17 and more they are being targeted because whistleblowers and
18 individuals who are concerned may not feel that they're in a strong
19 enough position, and so they will go to those civil society
20 organisations. They will also go to the press, and journalists again
21 have duties of confidentiality that are perhaps more clearly defined,
22 but NGOs are very careful, certainly within our -- from my experience
23 in our field, are realising that they are now the target and we are
24 working together so that they aren't alone because they become, by
25 proxy, by the fact that they're handling the information, the target

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1 of retaliation.

2 Q. And when determining that definition that you have just referred
3 to, what source would you go to? If it helps you, at paragraph 21 of
4 your report.

5 A. In terms of the source? So the source, obviously, is my
6 experience working in the field. But in terms of official sources,
7 the most recent Parliamentary Assembly report, which the rapporteur
8 on that was Sylvain Waserman, the French MP, and that's again the
9 Committee on Legal Affairs and Human Rights, has said that they are
10 urging the Committee of Ministers and the Council of Europe to
11 consider protecting legal entities who blow the whistle or by virtue
12 of their position are quasi-whistleblowers, they got the information
13 and they should have that -- that protection should extend to them.

14 Q. And then before we go on to some of the general principles of
15 criteria, when determining whether a disclosure should be protected,
16 to what extent is the person who is seeking to release that
17 information into the public domain required to verify the accuracy of
18 that information?

19 A. So much will depend on their position of knowledge. And so one
20 of the areas that, again, legally has been under some scrutiny, for
21 example, in the early laws in the UK, the term "good faith" that you
22 had -- that you'd raised a public interest concern in good faith.
23 And for most lawyers, good faith is -- it means that you did it
24 honestly, not that you couldn't be mistaken, and not that you had
25 necessarily expert analysis.

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1 Unfortunately, at the employment tribunals, it often was used to
2 have a long discussion on the motives of the whistleblower, in which
3 case -- or the motives of the individual, and it was then used as a
4 bar to even looking at whether or not they paid a public interest
5 disclosure.

6 And, again, if the purpose of the law is to ensure that the
7 public information is -- the public interest information gets to the
8 right place, the idea that you focus on the individual first was
9 undermining the law. And so even though the court in Guja in 2008
10 used -- said that good faith is one of the requirements or one of the
11 conditions to be reviewed by the court, it is very interesting, and I
12 would put to the Court and to you, that it's important to take into
13 account that good faith is being removed and has been removed from
14 the legal instruments.

15 So the Council of Europe's recommendation said that all that
16 should be required is that you have a reasonable belief in the truth
17 of the information to the best of your knowledge at the time. The
18 EU's directive similarly has not included good faith.

19 Q. And so would it be fair to say that that individual would not be
20 required to conduct extensive analysis? If that person had a
21 reasonable belief, that would be sufficient?

22 A. Yes, and that would be looked at by the courts.

23 Q. I would like to take you now to paragraph 28 and onwards.

24 MR. CADMAN: And, Your Honours, just for the reference that
25 Ms. Myers referred to, Guja, that is the ECHR case which is mentioned

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1 at paragraph 26, which is at DNH0358, DNH0388. I don't intend to go
2 through it in any detail, but just for the reference.

3 PRESIDING JUDGE SMITH: Thank you.

4 MR. CADMAN:

5 Q. Now, what are the criteria or principles in order to determine
6 whether a public disclosure should be protected?

7 A. So the -- as mentioned, the Guja decision are the ones at the
8 European Court of Human Rights level. Different laws have been
9 looking at it slightly differently. And as I said, nationally and at
10 the regional legal instrument level, good faith has been -- is not
11 part of the discussion in the same way.

12 But generally, what the European Court of Human Rights did pick
13 up on -- and, again, because of my work at Public Concern at Work, I
14 tend to focus on the UK system. But under the Public Interest
15 Disclosure Act, again, some of the issues that will be looked at for
16 whether a public disclosure -- having -- would be protected, so
17 people would still qualify would be the seriousness of the
18 information and as well the -- the detriment -- the detriment to the
19 employee I'll come back to.

20 But in looking at the -- sorry, I'm just making sure that I've
21 got the right order of pages here. Oh, it's been -- sorry. We've
22 discussed earlier whether the whistleblower, the individual, had at
23 his or her disposal alternative channels, and that will be explored a
24 bit further about how effective those channels would be or how
25 accessible they would be to the individual. Obviously, the public

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1 interest in the information. But in the Public Interest Disclosure
2 Act, it will look at whether or not in disclosing that information
3 other public interest rights, human rights, were being violated. So,
4 again, there's some -- certainly some onus on the individuals to take
5 some -- to look at that, whoever is making it public, whether they
6 are writing the article or disclosing it directly.

7 And the authenticity of the information disclosed. Again, in
8 most of the laws now, that will be in the reasonable belief of the
9 individual, not as a completely objective exercise that anyone -- but
10 for someone in a similar position with a similar experience would
11 have.

12 Q. So in assessing the reasonable belief, you would have to look at
13 the individual, that person's particular circumstances, and whether
14 it is reasonable to say that it was a reasonably held belief of that
15 individual?

16 A. Yes, at that time.

17 Q. Now, you refer to six principles. And I know that you have
18 referred to the Public Interest Disclosure Act from the UK
19 legislation. I want to take you through those principles. But would
20 you say that the information that you have set out in your report
21 with reference to UK legislation, would that nonetheless represent
22 recognised principles outside of the United Kingdom?

23 A. Yes.

24 Q. So looking at principle 1. And when I take you through the
25 principles, I would just ask you to be mindful of not comparing it to

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1 the facts of this case but to stick to the principles in general.

2 A. Yes.

3 Q. So looking at principle number 1, where you refer to at
4 paragraph 33 of your report, what would you say constitutes the
5 trigger for the protection?

6 A. I'm sorry, I don't quite understand what you mean by "the
7 trigger."

8 Q. Well, perhaps you could just explain for us what principle 1 is
9 first.

10 A. Right. Thank you. So this principle is -- again, at the
11 European Court of Human Rights, you're looking at public disclosures,
12 so you're already in that context, and whether or not they had
13 another avenue available to them other than making it public. So
14 that really is -- the trigger is having gone public and whether they
15 were able to avail themselves of others routes.

16 Q. And again, the trigger for that would be, and correct me if I'm
17 wrong, but even if other options were open to them, it could be
18 argued that they were not practical, they were not successful, and
19 that has necessitated the public?

20 A. Yes. So it is where they haven't heard. So they have used it
21 and nothing has happened. They have used it and were found -- you
22 know, that the information was -- was dismissed, or - and this is
23 where I will compare it to the workplace, but I think these are
24 general principles - where you've seen others use those -- those same
25 routes and again nothing has happened or they have been attacked for

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1 using them or retaliated against in some way. And that is something
2 that's in the Public Interest Disclosure Act of the UK as well.

3 So it is this -- this particular clause will very much be are
4 there competent authorities that are trustworthy that are available
5 to the individual, and that is very, very circumstantial about -- and
6 it will require some examination of what that individual thought was
7 the case at the time.

8 Q. So in your expert opinion, if I had, in the hypothetical
9 situation, if I had taken this to the state authorities and no action
10 had been taken, or, as you said, if I had been attacked or criticised
11 for taking certain action, then the public disclosure would then be
12 protected and justified?

13 A. Yes. And I would like to say that in my experience
14 internationally, so both as a lawyer who worked in the UK but being
15 asked to speak about whistleblowing, one of the elements that I've
16 been very aware of is in different countries -- so if I'm talking
17 about it, or at least originally 20 years ago, about employment
18 protection in the UK and I was invited to speak about whistleblowing
19 in Nigeria, and I did do a workshop there, people were talking about
20 physical threats and they weren't talking about their employment
21 protection.

22 And so depending on the different circumstances in the countries
23 as well, both the policymakers and the individuals will be looking at
24 what are the reasonable trusted -- the routes that people can go.
25 And to mention just that in terms of some of the laws in Latin

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1 America, being able to go public or being able to go directly to
2 competent authorities and having a choice of which one you can go to
3 is very keenly part of their whistleblowing laws that cover,
4 particularly, corruption.

5 Q. And is it your evidence that those protections against a lack of
6 success or the risk of attack or criticism would be equally
7 applicable in the non-workplace whistleblowing?

8 A. Yes.

9 Q. Now, going to principle 2, which you'll find at paragraph 34 of
10 your report, how do you explain the public interest in the disclosed
11 information? Again, without making reference to the facts of this
12 case. On a general level, how do you explain principle 2 in that
13 way?

14 A. So you're asking me to look at paragraph 34 and principle 2,
15 meaning the public interest in the information?

16 Q. Yes.

17 A. So this is -- and I -- there is a -- one of the things that has
18 come up in -- particularly in the European Court of Human Rights
19 cases is looking at the independence of the competent authority. And
20 in some cases, that will be the judicial system and the prosecutorial
21 authorities. And where there are concerns about how those are
22 running, then obviously the protections for going public will be
23 triggered and the discussion will be whether or not that -- the fact
24 that it is so important that these cornerstones of democracy and
25 judicial independence are covered, that it is important that that

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1 information gets out so that those -- all of this is about
2 accountability and institutional competence, good administration,
3 independence, and so this is about being able to shore up these
4 organisations as much as it is to ensure that anything that is
5 undermining them is understood so they can be addressed. And if the
6 information is not able to go public, then the courts will take these
7 into account. So it is one of the aspects of exploring whether or
8 not it was reasonable and whether or not it is in the public interest
9 to go public.

10 Q. So would it be fair to say that if an individual held a
11 reasonably held belief that a particular institution lacked judicial
12 independence or that there were concerns as to the independence of a
13 prosecutorial authority, that going public, raising those concerns
14 would fall within that principle?

15 A. Certainly. And you need to look at -- so you're looking at the
16 individual from a subjective-objective point of view. And so from
17 their point of view in the reasonable belief and their position, if
18 you were a witness or understood that to be the case and -- someone
19 in your position, it's very understandable that they would think
20 that, then that is going to provide them with a -- a more protective
21 position.

22 Q. Now turning to principle 3, that's where we deal with the
23 authenticity of the information, which we've dealt with in part.
24 Perhaps you could just expand as to what the principle actually sets
25 out in relation to the authenticity of the information.

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1 A. So this, again, as my understanding of what the courts have
2 looked at, is the -- in the reasonable belief of the individual,
3 again, that the information that they are revealing is true.
4 Obviously, if they are -- I think this is one of the interesting
5 things that has come up in, say, making disclosures to competent
6 authorities, where in some cases the discussion has been on whether
7 or not the individual should have ever made that disclosure. And
8 really, the competence and the knowledge rests with the authority.

9 So the individuals have been found to -- like a witness, you're
10 not expected to prove the crime in order to be a witness. You
11 provide information to those who can look at it. And so in these
12 cases, you need to look at the person's position, their professional
13 expertise, and someone in that position whether or not they would
14 think that this was authentic, because they are allowed to be
15 mistaken. But, obviously, if they are -- you know, they are allowed
16 to be genuinely mistaken about what they do, but it needs to be
17 reasonable.

18 Q. So if that person had a reasonably held belief that the material
19 in question was authentic, again, going back to what you've already
20 said, they wouldn't need to conduct an extensive analysis of that but
21 they could, in fact, be mistaken?

22 A. They can be mistaken. And, obviously, within all societies
23 there is responsibilities on individuals who and how they impart
24 information. But looking at their level of expertise and their
25 position will be part of that exploration in cases where that is

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1 being looked at.

2 Q. Now, moving on to principle 4, which you go through at
3 paragraphs 35 to 37. Perhaps you could explain to the Court what
4 that principle sets out.

5 A. So this is obviously within the context of the Guja case, where
6 there was an employer. In the Guja case, the employer, though, was a
7 public body, so it wasn't looking at just reputational damage. It
8 was looking at the public interest of the service that the employer
9 was providing. And, again, this also reveals the importance of a
10 reverse burden of proof, and this comes up particularly in the
11 employment context, that once that you show that you've made a
12 disclosure of public interest information and that there's been a
13 detriment, it switches to the organisation that's taking the
14 detriment to show that the detriment was unrelated to the disclosure.
15 Because it is very much seen as akin to discrimination law, that you
16 can show that this is what happened but you can't prove what was in
17 the mind of the employer, and it's only the organisation with access
18 to the information they have who can show that they took responsible
19 action and that it was separate and independent from the
20 whistleblowing.

21 And so that's where the reverse burden of proof comes up in the
22 Guja case, because the individual in that case was an employee of the
23 organisation.

24 Q. And staying with principle 4 just for a moment, what is
25 recognised as a protected disclosure?

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1 A. This is, again, going back to David Kaye's definition,
2 information that's in the public interest that could cause harm,
3 wrong-doing, so it can be a breach of a law, and it can be a breach
4 of administrative law. It can be any duty that the organisation
5 holds towards its -- well, there is obviously in the private sector
6 customers, but in the public sector to the population at large, to
7 the citizenry, and anything in which they think something's been
8 breached or could potentially cause harm or, indeed, has caused harm.

9 So it will be looking at in the realm -- one of the things to be
10 reminded of again, the reason to promote public interest
11 whistleblowing is to also prevent harm. So you don't want to wait
12 until there is harm, and that is why laws have covered those who have
13 information where they want to report things, where they, in their
14 opinion, can see that harm will be caused, and they will be then
15 protected within many of the employment work-related laws.

16 Q. And just going back to, as you mentioned, David Kaye, the UN
17 Special Rapporteur. In your mind, where does his definition emanate
18 from?

19 A. Well, he also looked at the UN Convention against Corruption and
20 there is no work-related definition there. They're saying anyone who
21 reports corruption to the authorities needs to be protected. And
22 the -- and this is, again, I know it's not a test, but the
23 explanatory parts of the UN convention has made it quite clear that
24 it's the indices of corruption as well. So suspicions and indicators
25 need to also be protected.

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1 MR. CADMAN: Your Honour, mindful that we are two minutes to
2 11.00, I do intend to go through the last two principles. It's
3 obviously going to take more than two minutes to do the next one. It
4 might be a convenient moment to stop.

5 PRESIDING JUDGE SMITH: Okay. We'll break at this time. We'll
6 break at this time. Please be back at 11.30.

7 We are adjourned. You may escort the witness out.

8 [The witness stands down]

9 --- Recess taken at 10.58 a.m.

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

11 PRESIDING JUDGE SMITH: Madam Usher, you may bring the witness
12 back into the courtroom.

13 [The witness takes the stand]

14 PRESIDING JUDGE SMITH: You can be seated, Ms. Myers.

15 All right, Mr. Cadman.

16 MR. CADMAN:

17 Q. Now, Ms. Myers, before the break, we were finishing up on
18 principle 4, detriment to the employer. I just want to come back on
19 that just for a brief moment before we move on.

20 Now, you mentioned the reversal of the burden of proof on that.
21 Just explain what that actually means.

22 A. This is how it has operated within the workplace whistleblowing
23 laws, because -- and it is very much to show that the information, so
24 the -- it's a *prima facie* case that the claim that -- the claimant or
25 plaintiff has to make, which is to say that they have raised a

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1 concern of information that's within the public interest and a
2 detriment has followed, and then it will switch the legal burden --
3 the reverse burden of proof onto the employer to show that the
4 detriment was not unfair and that it was due to a separate and
5 independent basis.

6 Q. So to be clear, as you say in paragraph 35, that once a
7 *prima facie* case has been established of a protected disclosure
8 having been made and that he has suffered -- the individual in
9 question has suffered a retaliation as a result of that, it will be
10 for the employer - and, again, not straying into the facts of this
11 case - even in a non-employer situation, that entity would have to
12 establish harm?

13 A. Yes, either harm or that the action they took is unrelated and
14 therefore is unrelated to having made a disclosure, so it is
15 independently -- so, for instance, in the EU directive, they've made
16 it clear that you have -- that the whistleblowers have civil and
17 criminal immunity and, therefore, it will be up to -- if the -- if
18 they are charged or if they're taken to court, it will be up to the
19 organisation taking them to court to actually -- that it's not
20 related at all to the whistleblowing.

21 Q. And if it is directly related to the whistleblowing activity,
22 they would have to show that they had suffered some harm, thereby the
23 disclosure outweighs --

24 A. Yes.

25 Q. -- on balance the interest of the employer.

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1 A. Yes. And the harm test has been most elaborated through
2 European Court of Human Rights jurisprudence, and what the court has
3 said it has to be in order to -- in order for the employer or the
4 organisation to show harm, they have to show that it is real and
5 substantive in order to justify that the public interest in the
6 disclosure, the benefit of that, is outweighed by the harm.

7 Q. And turning to paragraph 36 of your report, conscious of the
8 second sentence has been struck out, as we established at the
9 beginning of your evidence, here is where you're saying that it is up
10 to the court to determine where the public interest in disclosure
11 outweighs the confidentiality of the information, and that's where
12 that finding would come from?

13 A. Yes. Just one other point that I think is perhaps good
14 background is that the Public Interest Disclosure Act, when the
15 organisation Public Concern at Work was established there was no law
16 on public interest disclosures, and one of the elements that they
17 sought a legal opinion on was this common law principle - and, again,
18 this may not be relevant - on confidentiality, and the principle that
19 there is no confidentiality in iniquity. And this was, again, within
20 the employer confidentiality. But what it is, what the individual
21 owes, there is no confidentiality if there is wrong-doing. And I
22 think that principle has been applied differently in different cases
23 but the general principle applies.

24 Q. So in circumstances where the employer, in this case another
25 entity, has failed to establish any harm by virtue of that not being

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1 evidenced, the individual who has made the protected disclosure would
2 be able to rely on the public interest defence?

3 A. Yes.

4 Q. Now moving on to principle 5. And, now, we've dealt with this
5 to a certain extent. This deals with the reasonable belief. Again,
6 with reference to principle 5, looking at paragraph 38 of your
7 report, just in very lay terms, how is that assessed?

8 A. So it is -- you look at the persons subjectively, what they
9 thought, but in relation to someone of a similar position with
10 similar access to information and similar expertise.

11 Q. So would it be fair to look at, from a historical perspective,
12 matters that were relevant to that person in forming -- in
13 determining whether there was a reasonable belief? Would these be
14 considerations that would be relevant to your assessment?

15 A. Yes.

16 Q. And as you'd said earlier, looking at principle 5 and looking at
17 paragraph 38 of your report, the reasonable belief test has replaced
18 the good faith test?

19 A. Yes, good faith is no longer part of most of the legal
20 instruments or laws that are being developed and adopted and passed.

21 Q. And so it would be a reasonable belief, as you say in your
22 report, in the truth or accuracy of the information at the time of
23 the disclosure? That would be what the court would have to access?

24 A. Yes.

25 Q. Now, finally, turning to principle 6 at paragraph 39 of your

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1 report. Just talk us through the severity of the sanction which you
2 refer to at the beginning of 39.

3 A. So this refers again to one of the criteria and just one of the
4 criteria that the Guja court had set, which is to look at whether --
5 having as one of the elements in looking at the necessity of the
6 interference is whether what -- what level of sanction has been taken
7 and whether it's reasonable in the circumstances for that to have
8 happened and be part of determining the necessity in a democratic
9 society.

10 Q. And when considering principle 6, would you look at the other
11 principles -- you wouldn't look at principle 6 in isolation?

12 A. No.

13 Q. So you could consider what you've already said about
14 principle 4, you could consider the reasonable belief test in
15 principle 5, and then the severity of the sanction in principle 6?

16 A. Yes.

17 Q. Ms. Myers, I don't have any further questions at this time.

18 MR. CADMAN: Your Honours, we seek to tender the expert report
19 into evidence.

20 PRESIDING JUDGE SMITH: Pursuant to the paragraph 4 of the Rules
21 of 149, that can only be tendered at the end of the questioning and
22 the cross-examination.

23 MR. CADMAN: I'm grateful.

24 PRESIDING JUDGE SMITH: So we will hold off on that for the time
25 being.

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1 MR. CADMAN: Certainly.

2 PRESIDING JUDGE SMITH: Mr. Rees, do you have any questions?

3 MR. REES: No, thank you, Your Honour.

4 PRESIDING JUDGE SMITH: All right.

5 Mr. Pace, you have the floor.

6 Cross-examination by Mr. Pace:

7 Q. Good morning, Ms. Myers.

8 A. Good morning.

9 Q. My name is James Pace, and I will be asking you a few questions
10 on behalf of the SPO this morning and this afternoon.

11 At paragraph 10 of your report, you opine that the best
12 definition of a whistleblower is that provided in a report by a
13 Special Rapporteur; correct?

14 A. Yes.

15 Q. And you repeated the same this morning; right?

16 A. Yes.

17 Q. Yes, I see that the Court Officer has already called up your
18 report.

19 MR. PACE: And if we can turn to paragraph 10, which starts at
20 the end of page DNH0318 and goes on to the next page. Yes. And if
21 we go on to the next page, which is the end of paragraph 10.

22 Q. We can see you have a footnote 13, and at the bottom of the
23 page, you are citing to the report of the Special Rapporteur; is that
24 right?

25 A. Yes, that's correct.

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1 Q. And are you aware that in your report and this morning you
2 misstated the definition as put forward by the Special Rapporteur in
3 the report that you cite in this report of yours?

4 A. Sorry, that I misstated?

5 Q. That's correct. That's in paragraph 10 where you purport to
6 reproduce that definition there is an error. Are you aware of that?

7 A. No, I'm not.

8 MR. PACE: Okay. In that case, I'd like to call up side by side
9 with this item, the Special Rapporteur's report, and that is DNH0289
10 to DNH0312. And we'll have a look at paragraph 28, which is at page
11 DNH0301. Yes.

12 Q. So we can see, Ms. Myers, on the left of your screen, you'll
13 agree with me that that is the report you are citing; correct?

14 A. Yes.

15 Q. And in particular, you're citing to paragraph 28, which is at
16 the top of the left of your screen?

17 A. Yes.

18 Q. Now, I'm going to read the definition provided in paragraph 28
19 of the Special Rapporteur's report, and it reads as follows:

20 "... a whistleblower is a person who exposes information that he
21 or she reasonably believes, at the time of the disclosure, to be true
22 and to constitute a threat or harm to a specified public interest
23 ..."

24 Now, Ms. Myers, if we look at your reproduction or purported
25 reproduction of this definition, we'll see a key difference, in our

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1 submission, is that you use "or to constitute." Do you see that
2 discrepancy now?

3 A. Yes, I do.

4 Q. And can you tell us how that change from the Special
5 Rapporteur's report to yours happened?

6 A. That was an error on my part.

7 Q. So you'd like to correct your report to the extent to reflect
8 that --

9 A. Yes.

10 Q. -- correct? And let's continue to focus on paragraph 28 of the
11 Special Rapporteur's report for a minute, and that's still at the
12 left-hand side of your screen. We see that the Special Rapporteur
13 noted that "international authorities and national jurisdictions
14 adopt a variety of definitions of whistle-blowing." You'll agree
15 with that; right?

16 A. Yes.

17 Q. And sticking with the same paragraph, the Special Rapporteur
18 also noted:

19 "In the present report, the Special Rapporteur adopts a broad
20 definition ..."

21 You'll agree; right?

22 A. I agree.

23 Q. Again in the same paragraph, the Special Rapporteur explicitly
24 states that the definition he provides is "for the purposes of the
25 present report"; right?

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1 A. Yes.

2 Q. And to your knowledge, the definition set out in this Special
3 Rapporteur report has not been explicitly adopted verbatim in any law
4 that would be enforceable before this court; is that correct?

5 A. I apologise for not knowing exactly what is enforceable before
6 this court, but it has not been adopted verbatim in other laws to do
7 with whistleblowing.

8 Q. We'll turn to the law in force before this court shortly.
9 Before that, I'd ask whether you would agree with me that a
10 whistleblower or public interest defence has to be based in law. Do
11 you agree with that assertion?

12 A. Yes.

13 Q. And you just mentioned a few moments ago that you're not too
14 familiar with the law that applies at this court; is that correct?

15 A. Yes.

16 Q. Now, can I ask whether when you prepared your report you
17 consulted the law which governs this institution, which is
18 Law No. 5/L-53 on Specialist Chambers and Specialist Prosecutor's
19 Office?

20 A. I did not.

21 Q. So you didn't read that law at all at the time of your report?

22 A. I did not.

23 Q. And not after in preparation for this testimony?

24 A. No.

25 MR. PACE: I'd like to call up the law, Madam Court Officer,

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1 please. It can replace the documents currently on our screen. And
2 that is at SPOE00316093 to 00316150. And if we could turn to
3 Article 3 which starts at page 316094.

4 Q. I'll just give you a moment to read that, Ms. Myers, and then
5 we'll turn to the next page, because it continues over there.

6 A. Yes.

7 MR. PACE: We can turn to the next page, Madam Court Officer.

8 Q. And I'd like you, Madam Witness, to read up to subparagraph 4,
9 please.

10 A. Yes.

11 Q. So I will myself read out paragraph 4 because I have a question
12 based on that. And paragraph 4 -- and just a reminder that I'm
13 reading from Article 3 of the KSC SPO law, and the title of that
14 article is Foundational Principles. Article 3, subparagraph 4, reads
15 as follows:

16 "Any other Kosovo law, regulation, piece of secondary
17 regulation, other rule or custom and practice which has not been
18 expressly incorporated into this Law shall not apply to the
19 organisation, administration, functions or jurisdiction of the
20 Specialist Chambers and Specialist Prosecutor's Office. This Law
21 shall prevail over any and all contrary provisions of any other law
22 or regulation."

23 Now, I take it that you never read that particular subarticle
24 either; right?

25 A. Not until today.

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1 Q. So having now read this, and having it before you, you'll agree
2 with me that no report, law or legal provision cited in your expert
3 report is deemed to be applicable at this institution; right?

4 A. I do not necessarily agree.

5 Q. And could you tell me why that is?

6 A. Because I was providing information based on my knowledge and
7 expertise in whistleblowing law, and I was also referring to the
8 European Court of Human Rights jurisprudence.

9 Q. But you were instructed in relation to this specific case.
10 You'll agree with that; right?

11 A. I was instructed to -- in relation to my expertise on looking at
12 whistleblowing.

13 Q. Was it explained to you that it is in relation to the case
14 against Hysni Gucati and Nasim Haradinaj at the Kosovo Specialist
15 Chambers --

16 A. Yes, I was.

17 Q. -- or not? Right. And you make reference to European Court of
18 Human Rights, which, of course, as we read in the same article, does
19 apply, and I will agree with you that your report does refer to that.
20 And we'll turn to that momentarily.

21 But your report does refer to the following laws or documents.
22 And, again, having read this Article 3, in particular subarticle 4,
23 you'll agree with me that the law that you cite, the Kosovo Law on
24 Protection of Whistleblowers, does not apply legally before the
25 institution we are in today; is that right?

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1 A. Based on reading what you've shown me, not directly, no.

2 Q. And we can say the same about another law you cite in your
3 report, which is the UK Public Interest Disclosure Act 1998. That
4 can have no application before this court; right?

5 A. Those were referred to in terms of my expertise in the area of
6 whistleblowing law and what has informed the Council of Europe
7 recommendation, which in turn has been taken into account by the
8 European Court of Human Rights.

9 Q. So neither in your report nor now are you suggesting that these
10 laws are somehow enforceable in the case in which you are now
11 testifying; correct?

12 A. I am not.

13 Q. Can we say the same about the Council of Ministers
14 recommendation which you cite, that that has no direct legal
15 application to the case we are in today?

16 A. It is not directly applicable except through the European Court
17 of Human Rights jurisprudence.

18 Q. And that is the European Court of Human Rights jurisprudence
19 interpreting Article 10; right?

20 A. Yes.

21 Q. One other law or form of law that you cite in your report is the
22 EU directive on the protection of persons who report breaches of
23 Union law, and that, again, you will agree with me it has no direct
24 application before this court; right?

25 A. It was referred to in relationship to my expert expertise.

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1 Q. So just to be clear, when you cited these, putting aside for a
2 moment the European Convention on Human Rights and the jurisprudence,
3 you are citing them as principles that you think should be adopted or
4 which are positive or good principles, but you are not asserting nor
5 do you assert now that they legally apply to this institution. Is
6 that a fair statement?

7 A. Yes, it is.

8 Q. Now, turning briefly to Article 10 of the European Convention on
9 Human Rights.

10 MR. PACE: And, Madam Court Officer, if we could call this up.
11 It is item 104683-104716.

12 Q. And I'm sure you in particular and many others will be familiar
13 with the provision in Article 10, but we'll just have it for the sake
14 of everyone who can follow.

15 MR. PACE: And the page is 104690, please.

16 PRESIDING JUDGE SMITH: Mr. Pace, slow down just a little bit,
17 please.

18 MR. PACE: I'll do my best, Your Honour.

19 Q. So we can see Article 10 of the European Convention on Human
20 Rights on your screen, and I'd like to read now from Article 10(2),
21 which, of course, is referring to the freedom of expression, and it
22 states as follows:

23 "The exercise of these freedoms, since it carries with it duties
24 and responsibilities, may be subject to such formalities, conditions,
25 restrictions or penalties as are prescribed by law and are necessary

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1 in a democratic society, in the interests of national security,
2 territorial integrity or public safety, for the prevention of
3 disorder or crime, for the protection of health or morals, for the
4 protection of the reputation or rights of others, for preventing the
5 disclosure of information received in confidence, or for maintaining
6 the authority and impartiality of the judiciary."

7 And you don't disagree with this subarticle; right?

8 A. No.

9 Q. We mentioned a little earlier the Kosovo Law on Protection of
10 Whistleblowers, and you agreed that, in particular, because I
11 referred you to the law of this institution, this does not directly
12 apply here; correct?

13 A. Yes.

14 Q. And just to be --

15 MR. REES: Your Honour, of course, that is ultimately a matter
16 for Your Honours, not for a matter to be put in cross-examination.

17 PRESIDING JUDGE SMITH: Agreed. I'll sustain the objection.

18 MR. PACE: Yes, Your Honour. The question was based on the
19 witness having now read the applicable law. And, of course, I am not
20 purporting her views override yours in any way.

21 PRESIDING JUDGE SMITH: Yes, we can read the law.

22 MR. PACE:

23 Q. And, Madam Witness, despite the fact that, for present purposes,
24 you and I agree, this may not apply in this court, which of course,
25 as counsel for Mr. Gucati said, is ultimately for the Panel to

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1 decide --

2 MR. REES: I thought Your Honour had sustained the objection to
3 this line of questioning.

4 PRESIDING JUDGE SMITH: I did.

5 MR. PACE: It's not clear to me, Your Honour, what exactly I'm
6 not allowed to say. The witness has agreed that based on the article
7 this doesn't apply here. So, of course, we're not in any way
8 overriding Your Honours' authority.

9 PRESIDING JUDGE SMITH: She answered before Mr. Rees had an
10 opportunity to interpose his objection. So I sustained the
11 objection. That answer will not be considered by the Court, and you
12 can move on.

13 MR. PACE: Okay. Understood, Your Honour.

14 Q. So sticking to this law, the Kosovo Law on Protection of
15 Whistleblowers, is it correct that that applies in the context of an
16 employment relationship?

17 A. As I understand it, yes.

18 Q. And that law also refers to a "person associated with the
19 whistleblower," but in such cases, given that the whistleblower
20 definition relates to an employment relationship, then the person
21 associated also is, in a way, bound to this employment relationship
22 or related thereto. Do you agree?

23 A. Not necessarily. If I can expand?

24 Q. Please.

25 A. This idea of facilitator - and I do agree, I haven't looked at

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1 any of the case law under the Kosovo law, but it is now part of the
2 EU directive - is linked to individuals who are raising concerns or
3 may talk to the facilitator and who the facilitator will help raise
4 concerns. So the original source may be within the workplace, but
5 it's not clear that the facilitator themselves has to be in the
6 workplace.

7 Q. But would you agree that the person this facilitator is
8 assisting has to be a whistleblower as defined in this law; right?

9 A. No, I don't agree or I can't agree if it hasn't been tested.
10 And also, this is within the EU directive. Yes, the original source
11 of the information is someone working for the organisation. Whether
12 the facilitator is associated with the organisation will likely be
13 the case but it hasn't been tested.

14 Q. Let's have a look at what the Kosovo law actually says.

15 MR. PACE: If the Court Officer could call up SPOE00316078 to
16 00316092.

17 PRESIDING JUDGE SMITH: Mr. Cadman.

18 MR. CADMAN: I'm a little bit confused, because the Prosecution
19 has said that the law is not applicable, and now he's putting
20 questions to the witness based on that law. I'm just a little bit
21 confused.

22 PRESIDING JUDGE SMITH: Let's wait and see what the question is
23 first.

24 MR. PACE: And if we could first turn to -- we are on that page,
25 Article 3.

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1 Q. We see under 1.1, it reads:

2 "Whistleblower - is any person who reports or discloses
3 information on threat or damage to the public interest in the context
4 of own employment relationship in the public or private sector."

5 So this is the link of the whistleblower necessarily being in an
6 employment context; right?

7 A. Within the context of this law, yes.

8 MR. PACE: And if we can then turn to the next page, I'd like to
9 look at the definition at 1.12.

10 Q. Which reads as follows:

11 "Person associated with the whistleblower - is the person who
12 assists the whistleblower or can provide evidence related to
13 whistleblowing or any other person that may be harmed due to any
14 association with the whistleblower."

15 That's the end of the quote. So the link here is between the
16 person and the whistleblower. And as we saw earlier, the
17 whistleblower in this law entails an employment relationship. Do you
18 agree with that?

19 A. No, I read that as someone who assists. It's not clear that
20 they're saying the person who assists is within that working
21 relationship as it could be someone who is any association with the
22 whistleblower. That can be family, friends, other colleagues or
23 people outside the workplace.

24 Q. I agree with you there. But what I'm trying to focus on is that
25 the person, the whistleblower, remains, nevertheless, someone who has

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1 to be in an employment relationship. Not the person assisting but
2 the whistleblower.

3 A. But it -- sorry to be contradicting, but it -- or it can provide
4 evidence related to whistleblowing. To me, there is room here in the
5 definition, and it's only my opinion, that someone who can provide
6 evidence related to whistleblowing isn't necessarily -- is
7 independent, perhaps, of the whistleblower but is associated in some
8 way with the whistleblower.

9 Q. Okay. And I'd like to turn to page 316087 of this same law, and
10 we're going to look at Article 20(2). Yes. I'll read it out loud:

11 "A whistleblower who discloses information to the public in
12 accordance with this law is obliged to respect the principle of
13 presumption of innocence of the accused person, the right to the
14 protection of personal data, and not obstruct the operation of court
15 proceedings."

16 So this Kosovo law, as we're seeing here, obliges the person who
17 discloses information to the public to respect, *inter alia*, the right
18 to the protection of personal data and not obstruct the operation of
19 court proceedings. Do you agree with me?

20 A. I agree that is what the Kosovo law says.

21 Q. And were you aware of this particular provision, Article 20(2),
22 when you prepared your report?

23 A. No, I was not asked to examine the Kosovo law.

24 Q. Is it not correct that this is the same Kosovo law that you
25 referred to in --

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1 A. Yes --

2 Q. -- your report?

3 A. -- I reviewed the law and I saw this, but I wasn't -- I didn't
4 include it in my report.

5 Q. So you were aware that the Kosovo law you cited for other
6 reasons has this provision in relation to the need to respect
7 personal data and not obstruct court proceedings, but you didn't
8 include it in your report; is that correct?

9 A. Yes. Yes, sorry, I didn't say that loud enough.

10 Q. And did you not deem this particular issue of relevance to the
11 overall tenor of your report concerning what constitutes a
12 whistleblower and public interest and what does not?

13 A. I reviewed it with respect to the European Court of Human Rights
14 jurisprudence.

15 Q. Turning to the --

16 MR. PACE: We can take this exhibit off the screen, Madam Court
17 Officer.

18 Q. Turning to the UK Public Interest Disclosure Act 1998, that also
19 only applies to disclosures by a worker and in certain circumstances
20 as specified in the act; is that right?

21 A. Yes, and they have extended it to those who are not in formal
22 employment relationships, but we don't have to get into the detail
23 necessarily.

24 Q. Thank you for that.

25 MR. PACE: Madam Court Officer, could we please call up

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1 SPOE00317329 to 00317339. And if we could turn to page 317330,
2 please.

3 Q. And, Madam Witness, I'm going to read out from Article 43B(3) of
4 this act, and this is the act that you cite in your report; right?

5 A. Mm-hm, yes.

6 Q. So Article 43B(3) provides that:

7 "A disclosure of information is not a qualifying disclosure if
8 the person making the disclosure commits an offence by making it."

9 So the UK Public Interest Disclosure Act 1998 which we're
10 looking at does not afford protection to disclosure of information if
11 the person making that disclosure commits an offence by making the
12 disclosure; is that right?

13 A. Yes.

14 Q. And, again, were you aware of this provision of the law when you
15 prepared your report for this case?

16 A. Yes.

17 Q. And what is the reason you chose not to mention it in your
18 report?

19 A. Again, I was looking at how the European Court of Human Rights
20 jurisprudence examined this for public disclosures, as I was aware
21 the court wouldn't be examining in detail all the principles of all
22 the laws around the world that protect whistleblowing.

23 MR. PACE: And this can be taken off the screen, Madam Court
24 Officer.

25 Q. I'll turn now to the Council of Ministers recommendation which

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1 you cite in your report. And, again, that defines the concept of
2 whistleblower in relation to a workplace relationship; is that
3 correct?

4 A. Yes. And, again, just to perhaps just expand the notion. This
5 definition of "whistleblower" as a word, the word "whistleblower"
6 tends to be a much more informal word anyway. The Public Interest
7 Disclosure Act, for example, in the UK does -- is called the Public
8 Interest Disclosure Act and not the whistleblowers law and does apply
9 to workplace whistleblowing. But yes, the Committee of Ministers
10 recommendation on the protection of whistleblowers does look at it
11 within a workplace relationship.

12 Q. And I'll turn to just one more law or legal provision that you
13 cite in your report, and that is the EU directive on the protection
14 of persons who report breaches of Union law. That's the one that you
15 cite in your report; right?

16 A. Yes.

17 Q. And is it correct that this directive only applies in relation
18 to persons reporting breaches of European Union law concerning
19 financial and related issues? And I'm saying financial and related a
20 little bit broadly, but that is the tenor of the provisions it
21 relates to; right?

22 A. It relates to provisions to do with those who come across
23 wrong-doing at work. Some of the protections are extended to family
24 and associates and facilitators as well. Just to clarify the
25 individual whistleblower is not always directly employed.

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1 Q. But just for us to be clear, when we look at the material scope
2 of the directive, it is concerning whistleblowing in relation to
3 Union law, and then Union law as specified in the directive which is
4 primarily financial and related to financial concerns; right?

5 A. No. The EU directive is one -- it is part of the surprise, I
6 think, that they were able -- because at first they said there was no
7 legal basis, and then the legal basis is -- are very broad. So it
8 covers food safety compliance, banking, financial, all the areas or
9 most of the areas of EU competence.

10 Q. Yes, let's take a look at the specific provision.

11 MR. PACE: If we can call up SPOE00314896 to 00314935. And
12 we'll take a look at Article 2, which is at pages 314913 and on to
13 the next page. Thank you, Madam Court Officer.

14 Q. So here we can see the first part of Article 2, which says
15 "Material scope," and I'm reading from the first paragraph. It says:

16 "The Directive lays down common minimum standards for the
17 protection of persons reporting the following breaches of Union
18 law ..."

19 I'll pause there. You'll agree with me that, because it
20 enumerates them, the following breaches are what this applies to;
21 right?

22 A. Yes.

23 Q. And you can see on this page that we have things such as public
24 procurement, financial services, product safety, transport safety,
25 consumer protection; right?

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1 A. Yes.

2 MR. PACE: And if we can turn to the next page for the remainder
3 of the same article.

4 Q. We have breaches affecting financial interests, breaches
5 relating to internal market; is that correct?

6 A. Yes.

7 Q. So you'll agree that this article circumscribes the
8 applicability of this directive; right?

9 A. To EU Union law, yes.

10 MR. PACE: Thank you, Madam Court Officer. This can be removed.

11 Q. You'll agree with me that information disclosed by a
12 whistleblower has to relate an actual improper act in order to
13 warrant whistleblower protection; right?

14 A. As I explained earlier, it can cover indications of an improper
15 act. It does not have to be -- you cannot be in a position of
16 determining that an improper act has happened. You are, in a sense,
17 a witness, and you are ensuring the information is getting out. Just
18 in terms of what is covered under these laws.

19 Q. But there is always the requirement, in your opinion, that it
20 has to relate to an improper act, not to a, let's say, proper act, to
21 take the opposite; right?

22 A. Sure. Worries and risk of harm, and worries and risks of
23 improper acts.

24 Q. And if we look, for example, at some of the jurisprudence
25 referred to in your report and earlier, and I'm thinking of the -

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1 I'll pronounce it the way you did, I mispronounced it to myself but
2 I'm sure you know better - the Guja case.

3 A. I'm hoping that that's how it's pronounced, but yes.

4 Q. We'll agree to pronounce it that way.

5 A. Yes.

6 Q. In the Guja case, it also talks about the wrong-doing which the
7 person intended to uncover; right? So that aspect of wrong-doing is
8 also present in the relevant European Court of Human Rights
9 jurisprudence; correct?

10 A. Yes. And wrong-doing is a bit larger than an actual breach that
11 you're certain of. Wrong-doing is areas of concern, and they can
12 include risks of harm.

13 Q. And you'll agree with me that a public interest is not the same
14 thing as one person's or some person's disagreement with, for
15 example, a policy or law; right?

16 A. Again, I do think this is something that courts grapple with to
17 some extent because -- because there can be indications of
18 violations. Yes, I would agree to the extent that if it is a matter
19 of my own personal position and I'm angry at how somebody is acting
20 towards me, that tends not to be covered. But there is a wide range
21 of public interest, and it often is up to the court to determine
22 exactly whether it's in the public interest. The laws try to define
23 it to some extent without being too restrictive so courts have some
24 room to use their discretion around public interest information.

25 Q. In your opinion, can one person's or some person's disagreement

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1 with a law, a law which is publicly available and known --

2 MR. CADMAN: Asked and answered. Objection, asked and answered.

3 MR. PACE: Your Honour, I haven't even asked the question.

4 MR. CADMAN: The question has been put and the witness has given
5 an answer.

6 PRESIDING JUDGE SMITH: Overruled.

7 Go ahead.

8 MR. PACE:

9 Q. Ms. Myers, I was saying, in your opinion, can one person's or
10 multiple persons' disagreement with a law which is publicly known
11 ever be used to invoke whistleblower protection or public interest
12 protection as such?

13 A. That's a big hypothetical. Probably not but I can't rule it
14 out. Someone's opinion of a law may -- it's unlikely to be the issue
15 at stake but is unlikely to be covered.

16 Q. And one of the relevant factors in this is that a law which is
17 public as such, let's put it -- to put it one way, you can't really
18 blow the whistle on something that is known; is that correct?

19 A. I disagree.

20 Q. How about can you blow the whistle on something that is not
21 denied by the employer or by the institution?

22 A. Yes.

23 Q. You can. And then why would that warrant protection as such?

24 A. It is about the risk of harm. It is -- so for an example, and,
25 again, I'm very aware that the Public Interest Disclosure Act does

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1 not apply to this court, but one of the principles in it clearly
2 states that it does not matter if it is known to the employer because
3 often the individual doesn't know what is known to other people.

4 Q. And if, for example, the employer has made public assertions
5 about the matter which the whistleblower is making public, is that a
6 relevant factor in your opinion?

7 A. That may be a relevant factor for them taking the concern
8 elsewhere. These are factors that come into play in many
9 whistleblowing cases and many cases where there's been an
10 interference with someone's freedom of expression.

11 Q. And again, going back a little bit on to what we said before but
12 to relate it to what we're talking about now, there still has to be
13 this element of impropriety, correct, in what is being disclosed?

14 A. In the reasonable belief of the individual making the
15 disclosure, yes. Just to be clear, in one of the cases that, again,
16 the Court may be aware of, is the LuxLeaks case, and the original
17 view was that it was not illegal, the tax agreements that were
18 being -- that were released publicly, and Antoine Deltour was
19 eventually acquitted for making the disclosures to the media, but
20 eventually it was found and examined, because it hadn't been looked
21 at, by the European authorities to have been illegal. So at the time
22 of the disclosure, it wasn't necessarily considered by many people to
23 have been and many authorities to have been an illegal practice.

24 Q. But you're not going back on what you agreed with me earlier
25 which is there has to be a link to impropriety. I believe you said

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1 it doesn't have to be improper but there has to be a link to or a
2 belief in impropriety?

3 A. In the -- the individuals who disclosed the information
4 reasonably believed they were wrong to do the practice.

5 Q. And earlier today you referred to public disclosures as the
6 nuclear option; right?

7 A. Yes.

8 Q. You also described it as the option that is the most difficult
9 to manage; correct?

10 A. Yes.

11 Q. And you also said you would advise to consider other options
12 before pursuing this public disclosure aka nuclear option; right?

13 A. Yes, in the sense of taking into account whether at that time
14 whether there has been earlier attempts to raise the concern. So it
15 doesn't have to be that every concern you have, you have to raise it
16 elsewhere. In terms of -- and, again, this my opinion, in terms of
17 the advice, because it can go to the reasonable belief of not -- that
18 it wouldn't be effective if you said, "I'd already tried" or "other
19 people have already tried and it's not worth trying again with this
20 new information," perhaps.

21 Q. Would you agree with me that the public disclosure, this nuclear
22 option, should only take place as a last resort then?

23 A. I would agree that I would advise that, doesn't mean that -- but
24 I also agree that sometimes you can go directly public.

25 Q. Reasonable attempts to raise the issue with relevant authorities

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1 should be made before going public. Would that be fair?

2 A. You are hitting on a point that was a huge amount of discussion
3 and debate during the negotiations around the European Union's
4 directive, and one of the things that was finally agreed is, yes, in
5 principle, there is a lot of encouragement for people because you
6 want - and most people do - you want organisations to work, you want
7 competent authorities to work, so those are the places and people who
8 are responsible and will be held to account and one would hope would
9 want to learn about issues early enough to address them.

10 But it is very clear that -- and the Council of Europe
11 recommendation doesn't have a hierarchy and says it's due to the
12 circumstances. What was in the end agreed in the final version of
13 the EU directive is that you can go to any -- you can go directly to
14 a competent authority, and you can ultimately go directly public.
15 There are some conditions put on that, but you can. That's still
16 available to you. And one of the conditions is where you have either
17 tried to raise it and nothing was done or it's the risk is high and
18 you need to go directly.

19 Q. But let's focus a little bit on this, the trying to raise it and
20 nothing is done. In order to merit some form of protection, what you
21 are trying to raise, again, let's think back on what you said, has to
22 have a degree or a link to impropriety; right?

23 A. Yes, a concern about impropriety.

24 Q. Would it be fair to say that the person making a public
25 disclosure, this nuclear option as you described it, needs to do so

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1 in a manner which would cause the least harm?

2 A. I would advise that you take care when you make public
3 disclosures.

4 Q. And why would you advise that?

5 A. Again, because you can unwittingly cause harm. But I think
6 again courts will look at the individual's position and how much they
7 ought to know or did know about the harm they might cause. Sometimes
8 it will be very much unwitting. And, again, those who have
9 expertise, who understand, will be put under -- say, professional
10 individuals who understand what the risks are, they will probably be
11 put under a higher responsibility or duties than other individuals.
12 Again, the courts will take it into account.

13 Q. And this harm which you're referring to, is it correct that that
14 would include - or perhaps most importantly include - harm to
15 innocent third parties?

16 A. Yes.

17 Q. And would the fact that innocent third parties could be harmed
18 by a public disclosure factor into your analysis of whether the
19 person making such a disclosure warrants protection as a
20 whistleblower or as a public interest defence or argument?

21 A. Again, if they're seeking my advice, they're seeking some
22 professional advice, so it would be probably a higher level of duty
23 of care that would be involved in decision-making. I think one of
24 the things -- again, an example that is used, say, from the UK Public
25 Interest Disclosure Act is, you know, revealing patient data to make

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1 concerns, again, publicly. Again, some of this, when it shows what
2 the harm is can be acceptable but that will be so linked to the facts
3 of each case.

4 But there are duties that you would have to, of course, take
5 into account and that people have found themselves having to really
6 explain why they made the decision they made. And it will be
7 reviewed by the courts.

8 Q. And to put it, perhaps, a little more bluntly or directly, the
9 fact that someone, for example, might be killed as a result of the
10 information which the person is making public, that would matter in
11 your assessment as to whether the person making that information
12 public could invoke a whistleblower defence or public interest
13 defence, would it not?

14 A. Again, the risk of harm, there will probably be two areas or two
15 parties that are questioned on this, is in the reasonable belief of
16 the individual what the harm might be. But also if you are going to
17 say that the interference is justified, then some of that harm side
18 of things would have to be presented by the parties that are arguing
19 that there's a harm. And this has come up in a number of cases.

20 Q. But you agree that this is a very relevant factor, the damage or
21 potential damage to innocent third parties is a very relevant
22 consideration in the assessment as to whether somebody warrant --
23 merits protection; is that right?

24 A. Yes.

25 MR. PACE: Your Honour, if you allow me just a moment to confer

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1 with my colleagues, please.

2 [Specialist Prosecutors confer]

3 MR. PACE:

4 Q. Thank you, Ms. Myers. I have no further questions at this
5 stage.

6 PRESIDING JUDGE SMITH: [Microphone not activated].

7 MR. CADMAN: Just a couple of questions, Your Honour.

8 Re-examination by Mr. Cadman:

9 Q. Ms. Myers, when dealing with the question of whether an
10 individual -- I think the term we used was the whistleblower proxy.
11 Would it fall within that if the information that was being disclosed
12 came from an employer of that entity that had provided that
13 information to a third party, would that fit within that description
14 that you've referred to?

15 A. Yes.

16 Q. And I'm being very careful how I word my question. So if an
17 employee, for example, of a prosecuting authority had leaked
18 information to a third party, and that third party had made those
19 disclosures public, that would fall within that narrow description?

20 A. Yes.

21 Q. Mr. Pace asked you about the applicable legal framework, and I
22 think it's fair to say that much of your report and your evidence
23 focuses on principles that are generally applicable. Would you agree
24 that what you have told us today are principles that are -- I don't
25 want to use the words "universally applicable," but that they are

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1 generally accepted principles outside of a single jurisdiction?

2 A. Yes. And just to comment on some of the cases that the European
3 Court of Human Rights have involved those who have been working for
4 prosecutorial authorities and the issue is very much on the -- the
5 information rather than the fact that they worked for those
6 authorities.

7 Q. And I asked you the question about David Kaye specifically as to
8 where the legal basis for the definition came from. Now, Mr. Pace
9 has taken you through some of the domestic legislation. But would it
10 be fair to say that the legal basis is to be found in the European
11 Convention on Human Rights?

12 MR. PACE: Your Honour, before the witness answers, please. I
13 object to this question. It does not arise from the
14 cross-examination. The report that Mr. Cadman is citing was fully
15 available to the Defence. He took her through it. So I don't see
16 anything arising from cross-examination here. If it's something that
17 was missed in direct examination, that's not a good reason to address
18 it at the moment.

19 And I also object to the leading nature of the way this question
20 is put. I didn't stand up for earlier ones, but this is also
21 leading.

22 PRESIDING JUDGE SMITH: It is leading but I'll allow the
23 question.

24 You did bring up David Kaye's statements earlier, so you may ask
25 the question. Go ahead. Rephrase the question, please.

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1 MR. CADMAN:

2 Q. Taking into account what you have said so far, what legal basis
3 do you consider there to be, particularly with reference to the
4 Special Rapporteur's opinion?

5 A. So like the European Court, the European Convention on Human
6 Rights which applies to all persons having a right to freedom of
7 expression and opinion, of which some of the case law has focused on
8 workplace whistleblowers but other cases haven't, that is one of the
9 bases. Obviously, he looked at the Convention in his report, or he
10 mentions it, but he also looked at the United Nations Convention
11 Against Corruption. And in some of the law, as I've seen, for
12 instance, in Slovenia, the anti-corruption agency deals with
13 workplace retaliation but it can also receive reports from anyone
14 around corruption.

15 So if you're looking at it from an informational point of view,
16 everyone has the rights through the conventions and the UN convention
17 on human rights and anti-corruption to speak up and to raise concerns
18 about wrong-doing, and certain -- it's the harm that will be
19 addressed to the -- sorry, it's the retaliation or the punishment for
20 doing that that will be addressed by different laws including what
21 are so-called whistleblower laws tend to focus on the workplace but
22 some of them have, called whistleblowers laws as well, in America,
23 certainly the Organisation of American States, talks about persons.
24 So it's really the harm to the individuals that you address in those
25 laws to provide particular protections, and workplace whistleblowers

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1 have been given particular protections because of their particular
2 positions in an employment relationship. As I said, it's extending.

3 Q. And Mr. Pace also asked you whether in your expert opinion you
4 thought that on the basis of a law, objections to that law could have
5 a form in the basis. Now, if -- and again with reference to
6 reasonable belief, if there was a reasonably held belief that that
7 law was unlawful, could that form the basis for a challenge?

8 A. Yes.

9 Q. And if the concern was on a particular prosecutorial policy, and
10 there was a reasonably held belief that that policy was unlawful,
11 could that form the basis?

12 A. Yes.

13 MR. PACE: Objection, Your Honour. That's the same nature of
14 the question just asked. So one question may have arisen from my
15 line of questioning, but a series of questioning did not.

16 PRESIDING JUDGE SMITH: You may finish your question.

17 Overruled.

18 MR. CADMAN: I'll re-ask the question.

19 Q. If the objection was over a prosecutorial policy that the
20 individual held a reasonable belief that that policy was unlawful,
21 exposing that, could that be protected?

22 A. Yes.

23 Q. Or improper policy?

24 A. Yes.

25 Q. So either if it was unlawful or improper policy, that could fall

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1 within the protection?

2 A. Yes, it falls within the nature of public interest information.

3 Q. And just as a final point, Mr. Pace took you through the risk of
4 harm to third parties. Now, going back to what we said this morning
5 in relation to principle 4, in order for that to be relied upon,
6 would the authority or the entity have to establish actual harm?

7 A. Yes, that is -- there are some duties and obligations to do for
8 yourself, obviously, as a member of society, to try not to cause harm
9 to other members of society. But depending on what the interference
10 is, the actual risk of harm, if that's being relied on, needs to be
11 shown by the parties who say the harm has occurred if there's public
12 interest value in the information.

13 Q. And I think that you said that the assessment would differ if
14 you are dealing with a professional rather than a lay individual. Is
15 that fair?

16 A. Absolutely.

17 Q. And just one last question. Mr. Pace has put the point to you
18 on more than one occasion about the impropriety. My question is, is
19 the impropriety based on a reasonable belief?

20 A. Yes.

21 Q. Thank you, Ms. Myers. I don't have any further questions.

22 PRESIDING JUDGE SMITH: [Microphone not activated].

23 I have just a couple of questions and some of the other Judges
24 may have some questions. I'm merely trying to make sure I understand
25 the totality of your testimony.

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Questioned by the Court

1 Questioned by the Trial Panel:

2 PRESIDING JUDGE SMITH: You cite three cases in support of your
3 report, *Guja v. Moldova*, *Bucur and Toma v. Romania*, and
4 *Heinisch v. Germany*. Those are the only three cases you cited. In
5 each these cases, the so-called whistleblower is an employee; is that
6 correct?

7 A. Yes.

8 PRESIDING JUDGE SMITH: You obviously are advocating and have
9 advocated for a broadened definition of whistleblower to get out of
10 just the workplace situation and go to other people, and I understand
11 that. My question is has that broadened definition of whistleblower
12 been adopted by any domestic or international court in a judgement to
13 the best of your knowledge and belief?

14 A. I'm not trying to be difficult at all, but because there are
15 many, many laws that will apply to individuals who are not in the
16 workplace, what has been defined or sort of understood, actually, not
17 defined, globally around workplace is whistleblowing is often
18 internal to the organisation's sources of information.

19 But in terms of the -- again, the extension is happening with
20 the EU directive and with the Council of Europe recommendations to
21 legal entities, it really is looking at ensuring the free-flow of
22 information. So I would say whistleblower tends to be understood --
23 and whistleblower is not a legally defined -- tends to be workplace.

24 PRESIDING JUDGE SMITH: Okay. But that's -- they tend to be
25 workplace, but I'm asking you specifically is there a case in

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1 domestic law or international law where this broadened concept has
2 been adopted in language, language used to adopt it as part of the
3 decision?

4 A. No.

5 PRESIDING JUDGE SMITH: Okay.

6 A. As far as I know.

7 PRESIDING JUDGE SMITH: That's all the questions I have. Thank
8 you.

9 JUDGE GAYNOR: Thank you, Judge Smith. I have a few questions
10 starting with the EU directive, which is Directive 2019/1937. I want
11 to understand the scope of the directive.

12 And we see from Article 3 -- we can bring it up. You're
13 probably familiar with it. It reads, and I quote:

14 "This Directive shall not affect the application of Union or
15 national law relating to any of the following:

16 "(a) the protection of classified information ..."

17 And it goes on to refer to some other categories.

18 Now, in the very lengthy preamble to this directive, at
19 paragraph 25, you might recall that it states:

20 "This Directive should also be without prejudice to the
21 protection of classified information which Union law or the laws,
22 regulations or administrative provisions in force in the Member State
23 concerned require, for security reasons, to be protected from
24 unauthorised access."

25 You said in your evidence there had been a huge amount of

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1 discussion and debate about this directive. Do you recall why
2 confidential information was deliberately carved out of the
3 directive?

4 A. Well, it's not within my understanding, and I'm not an EU lawyer
5 in particular, but my understanding is that national security is not
6 within their competence. So it's a competency issue rather than
7 trying to carve out particular areas of confidentiality because the
8 confidentiality, it is saying that you have protections, for
9 instance, civil and criminal law protections and against -- so you
10 can't be seen to be -- you cannot be followed through the courts for,
11 say, breaching trade secrets, and it makes particular reference to
12 that, because -- and you would have immunity if what you are saying
13 is in the public interest.

14 So they have said that confidentiality and professional business
15 secrecy is not sacrosanct for the law. They don't have competency
16 over national security, so they couldn't -- they weren't allowed to
17 talk about it. And I thought there is a paragraph saying it doesn't
18 stop Member States from extending it if they so desire, but that's
19 not --

20 JUDGE GAYNOR: Right. Can I just stop you there for a moment.
21 National security is dealt with in Article 3.2.

22 A. Yeah.

23 JUDGE GAYNOR: I'm talking about Article 3.3 --

24 A. Of official secrets, yeah.

25 JUDGE GAYNOR: Right. They refer to classified information.

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Questioned by the Court

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1 What's your understanding of the expression "classified information"?

2 A. That it is sort of an -- more -- classified is information
3 marked as classified, as I understand it, and it's not again in --
4 this is very different, say, from the UK situation, which is official
5 secrecy rather than classification. So they may be trying to cover
6 where Member States have a classification system and an official
7 secret system.

8 JUDGE GAYNOR: If we could move now just to the jurisprudence of
9 the European Court of Human Rights. Do you accept that there is a
10 legitimate public interest in protecting the identities of insider
11 witnesses and police informants?

12 A. Yes.

13 JUDGE GAYNOR: And would you accept that there is a legitimate
14 public interest in protecting the confidentiality of an ongoing
15 criminal investigation?

16 A. Yes.

17 JUDGE GAYNOR: And where an individual is in an employment
18 relationship with the police, such as where the person claiming
19 whistleblower status is a police officer or former police officer,
20 would you say that the ambit of protected whistleblowing encompasses
21 the public release of the identities of insider witnesses or police
22 informants?

23 A. Yes, for -- if you're -- are you saying that the individual
24 who's releasing it is also within that organisation and has those
25 duties?

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1 JUDGE GAYNOR: I would say could a police officer or former
2 police officer release to the public the identity of a police
3 informant or a confidential witness?

4 A. I think that would be taken very seriously and should be taken
5 very seriously.

6 JUDGE GAYNOR: Now, where an individual who is not in a
7 relationship of employment with the police or with the law
8 enforcement authorities, generally speaking, is provided with or
9 otherwise comes across information such as the identities of insider
10 witnesses or police informants, does the ambit of protected
11 whistleblowing cover the public release of the identities of those
12 protected persons?

13 A. I'm not saying it should or does in all cases. I think that the
14 issue is -- and we've had some of these cases. And the discussion
15 will tend to go yes as an -- yes, that's not okay. So, yes, I agree
16 that it's not within the ambit, but it doesn't mean it won't
17 sometimes be discussed of whether there was actual harm caused. But
18 I agree that those kind of issues are not often acceptable to the
19 courts as a protected disclosure.

20 JUDGE GAYNOR: I'd like to move now to the nature of the
21 information disclosed. So I think we can agree that the nature of
22 the information disclosed is a highly relevant factor in determining
23 whether the person is entitled to whistleblower protection.

24 A. Yes.

25 JUDGE GAYNOR: Now, in the cases that you have relied upon,

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1 Judge Smith just referred to the three of them, Guja and the case of
2 Heinisch against Germany as well as the third case. Am I correct in
3 understanding that the applicants in those cases disclosed
4 information which cannot be qualified or described as information
5 which reveals the content of a confidential ongoing criminal
6 investigation?

7 A. Forgive me, I'm not sure. At the time of Guja's disclosures, I
8 think the investigation had been dropped. But it was -- those were
9 letters that were discussing a case and that seemed to indicate that
10 there was interference with a decision about carrying on with a case.

11 JUDGE GAYNOR: Right. Now, in paragraph 3 of the decision in
12 Guja, what the court says is that:

13 "The applicant alleged a breach of his rights as a result of his
14 dismissal from the Prosecutor-General's Office for divulging two
15 documents which, in his opinion, disclosed interference by a
16 high-ranking politician in pending criminal proceedings."

17 Now, throughout the Guja decision, I may be wrong, but it does
18 not appear that the applicant at any stage disclosed information
19 which revealed the content of an ongoing criminal investigation.
20 Rather, his concern seemed to be about political interference in an
21 ongoing criminal investigation.

22 A. He disclosed the letters, so I don't know what was -- what the
23 details were in the letters. But from what I've read, you could
24 infer what you have said, that it wasn't details about the ongoing
25 investigation, but I just don't know what the letters themselves

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1 substantively said.

2 JUDGE GAYNOR: And are you aware of any decision of the European
3 Court of Human Rights where the court has found there to be a
4 violation of Article 10 of the Convention in respect of the public
5 disclosure of the identities of protected witnesses or police
6 informants or the content of an ongoing criminal investigation?

7 A. I am not aware.

8 JUDGE GAYNOR: Thank you very much for your answers.

9 Thank you, Judge Smith.

10 PRESIDING JUDGE SMITH: Judge Mettraux has some questions.

11 JUDGE METTRAUX: [via videolink] Yes, thank you, Judge Smith.

12 And good afternoon to you, Ms. Myers.

13 A. Good afternoon.

14 JUDGE METTRAUX: [via videolink] As I understand your evidence,
15 Ms. Myers, you are inviting this Panel to adopt a definition of the
16 notion of whistleblower, that I will refer to it as the David Kaye
17 definition, that does not encompass the requirement that the person
18 concerned was employed by the entity to which the information
19 disclosed belongs; is that right?

20 A. I'm presenting my opinion that that is something the Court can
21 consider.

22 JUDGE METTRAUX: [via videolink] But do you accept that such a
23 position, your position, is not consistent with the one that has thus
24 far been taken by the European Court of Human Rights? Do you accept
25 that?

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1 A. I accept that when they've reviewed cases where there isn't or
2 they haven't found a workplace relationship, they've dealt with it
3 under other aspects of the European -- they haven't followed,
4 necessarily, the criteria of Guja. So they have looked at some of
5 the elements but not all.

6 JUDGE METTRAUX: [via videolink] And, in fact, all of the cases
7 that have dealt with this claim, the claim of whistleblower
8 successfully, they are all working relationship cases. I mean, we've
9 heard of Guja, of Bucur, of Heinisch, but there is also a whole
10 series of cases that involve state officials; is that correct?

11 A. Yes.

12 JUDGE METTRAUX: [via videolink] And, of course, I want to also
13 be fair to you there. Are you aware of the guide, the Court's guide
14 on Article 10 that is prepared by the Registry of the European Court
15 of Human Rights? Are you aware of this document?

16 A. I'm aware of it. I haven't read it in detail.

17 JUDGE METTRAUX: [via videolink] Then I will just put to you --
18 and to be fair to you, of course, this is not a binding document, but
19 it's prepared by the registry of the court, and it says at
20 paragraph 380, it says:

21 "Firstly," talking of the whistleblower claim, "the status of
22 whistleblower necessarily implies a work-based relationship ..."

23 Now, are you aware that this is a part of the case law of the
24 ECHR, at least as understood by its Registry?

25 A. No. I do -- there is a case that I didn't put in here, and I'm

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1 happy not to refer to it, but there is a case of an NGO and they were
2 not found to be covered, but there were six judge dissents. So it's
3 an issue being examined by the European Court of Human Rights.

4 JUDGE METTRAUX: [via videolink] But so far the law is limited in
5 its application of the whistleblower claim or defence, to use a loose
6 term, to cases of employment; correct?

7 A. Work related, yes.

8 JUDGE METTRAUX: [via videolink] Yes. Now, I have a question,
9 and, again, if you feel this is not within the scope of your
10 expertise, please say so. But since you are inviting us to adopt the
11 David Kaye definition, on what legal basis do you propose that it
12 would become applicable to this jurisdiction?

13 A. From the -- well, David Kaye was reviewing the UN Convention
14 Against Corruption, and that is also -- does not refer to a workplace
15 relationship.

16 JUDGE METTRAUX: [via videolink] But do you accept -- I mean,
17 first, accept it if you can, but do you accept that the corruption
18 convention, for example, is not applicable in Kosovo? Are you aware
19 of that?

20 A. No, I haven't looked at the list of all those that have signed
21 the treaty.

22 JUDGE METTRAUX: [via videolink] And you accept, of course, also
23 that it has -- it doesn't purport to define whistleblowing. It
24 purports to refer to persons reporting acts of corruption,
25 Article 33; correct?

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1 A. Yeah.

2 JUDGE METTRAUX: [via videolink] It does not provide a definition
3 of whistleblower.

4 A. No. And I just again refer to the fact that whistleblower is
5 not -- it has been used in some laws, but a lot of laws do not call
6 themselves whistleblower laws. They talk about public interest
7 disclosures, but most of them do relate to work-related protections.

8 JUDGE METTRAUX: [via videolink] So back, perhaps, to my
9 question: How would you suggest this definition would become
10 relevant to this jurisdiction? And, again, if you feel this is
11 unfair or beyond your expertise, please say so, Ms. Myers.

12 A. Yes, I don't feel that I'm able to comment beyond what I've put
13 in my opinion, that the facilitation of whistleblowing and the fact
14 that the courts will deal with whistleblowing that comes from outside
15 and not necessarily call them whistleblowing would provide the Court
16 with some basis to explore this issue further.

17 JUDGE METTRAUX: [via videolink] And as I understand your
18 evidence, and again correct me if I've misunderstood it, you are
19 inviting this Panel to adopt a definition of whistleblowing that does
20 not include a requirement of good faith; is that correct?

21 A. To not look at good faith in the manner in which it was -- yes,
22 to look at it from the point of view of a reasonable belief in the
23 truth.

24 JUDGE METTRAUX: [via videolink] But do you accept again that
25 this definition that you put forward would, again, be broader in

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1 nature than the one that was adopted by the ECHR in Guja or in
2 Heinisch? Do you accept that?

3 A. Yes.

4 JUDGE METTRAUX: [via videolink] Now assume for a second, and I
5 understand it's not your favourite position, legally speaking, but
6 assume for a second that the requirement of good faith applies. I
7 want to read to you a passage from the Heinisch decision at
8 paragraph 80, where the European Court of Human Rights pointed to
9 Resolution 1729 of the Parliamentary Assembly of the Council of
10 Europe.

11 Now, I should perhaps first ask you if you are familiar with the
12 resolution?

13 A. Yes, I am.

14 JUDGE METTRAUX: [via videolink] Now, this is what the court
15 cited. It says:

16 "... a whistleblower should be considered as having acted in
17 good faith provided he or she had reasonable grounds to believe that
18 the information disclosed was true, even if it later turned out that
19 this was not the case, and provided he or she did not pursue any
20 unlawful or unethical objectives."

21 Now, do you accept this definition to be the one that has been
22 adopted by the court in relation to good faith?

23 A. I accept that was in Heinisch. I haven't -- so, yes, I accept
24 that that was in Heinisch, and that I know that the reasonable belief
25 in the truth is what they focus on. And Heinisch went on to say the

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1 issue around not pursuing an unlawful purpose.

2 JUDGE METTRAUX: [via videolink] But you accept that under the
3 ECHR case, one of the requirements to the applicability of this
4 whistleblower defence is that the individual concerned would have had
5 to have had reasonable grounds to believe that the information they
6 disclosed was authentic and true? Do you accept that?

7 A. Yes.

8 JUDGE METTRAUX: [via videolink] Now, there is another concept,
9 and, again, Ms. Myers, please do not feel that you have to answer
10 something that you think is beyond your expertise. But are you
11 familiar with the notion of abuse of rights, and specifically under
12 the European Court of Human Rights case law? Are you familiar with
13 that?

14 A. I haven't examined that in great detail, no. In terms of the
15 case law.

16 JUDGE METTRAUX: [via videolink] But are you aware of what the
17 concept implies --

18 A. Yes.

19 JUDGE METTRAUX: [via videolink] -- Article 17 of the convention?

20 A. Yes.

21 JUDGE METTRAUX: [via videolink] And is it fair to suggest that
22 this concept, or as defined by the court, is that the harmful
23 exercise of a right in a manner that is manifestly inconsistent with
24 or contrary with the purpose for such a right is granted is not
25 covered by the convention? Do you accept that?

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1 A. Yes.

2 JUDGE METTRAUX: [via videolink] And do you accept also that this
3 applies, of course, not just to freedom of expression but, among
4 others, to the exercise of freedom of expression?

5 A. Yes.

6 JUDGE METTRAUX: [via videolink] And, again, do you accept that
7 in order to establish whether a particular conduct amounts to an
8 abuse of rights under Article 17 of the convention, the court
9 scrutinises the aims which the applicant pursues when relying on the
10 convention and the compatibility of these actions with the values and
11 purpose of the convention? Do you accept this to be the test?

12 A. I accept that this will definitely be taken into account.

13 JUDGE METTRAUX: [via videolink] Now, I'm going to go in the
14 business of asking you for a hypothetical as my colleagues have
15 before. But in your view, Ms. Myers, someone whose stated purpose
16 would be to discredit, obstruct or undermine a criminal
17 investigation, would that person be acting in a manner consistent and
18 compatible with democracy and the fundamental values of the
19 convention? Again, in your opinion.

20 A. When you say "stated," do you mean that the individual stated
21 that that's their purpose?

22 JUDGE METTRAUX: [via videolink] Yes.

23 A. I think that, again, and I'm not trying to say -- these things
24 always need to be examined fully. I think that will be definitely a
25 factor taken into account by the courts.

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1 JUDGE METTRAUX: [via videolink] But I'm asking you, not the
2 courts. In your view and opinion, would someone whose stated purpose
3 is one of those that I've listed, would that person be acting in a
4 manner compatible with democracy and the fundamental values of the
5 convention?

6 MR. REES: Your Honours, would that not depend on whether the
7 criminal investigation was lawful, unlawful, proper, improper? It
8 would be --

9 JUDGE METTRAUX: [via videolink] Mr. Rees --

10 MR. REES: -- it would be surely fact specific and can only be
11 fact specific.

12 JUDGE METTRAUX: [via videolink] Mr. Rees, if you wish to
13 follow-up with questions with Ms. Myers, you will be given an
14 opportunity to do so afterwards. For the time being, could Ms. Myers
15 answer the question as asked.

16 MR. REES: Your Honour, I do appreciate that it's unusual to
17 raise an objection to a question from the Court, but I do, and that's
18 my objection. It does seem to me that the question depends on
19 whether the criminal investigation is lawful, unlawful, proper,
20 improper. It's fact specific and the answer can only be.

21 PRESIDING JUDGE SMITH: We'll give you the opportunity to ask
22 those questions.

23 You may answer the question, Ms. Myers.

24 THE WITNESS: [Interpretation] So I am returning to my expertise
25 and working over the years with many individuals who have wanted to

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1 raise concerns, and I think that they may state certain things. That
2 doesn't mean that that is actually their purpose. So do I think that
3 it is fact specific, that that -- that you have to look behind the
4 words to see if that's actually what they were engaged in, because
5 the frustration -- and, again, this is purely my experience. The
6 frustration of someone at times makes them say things that are not
7 actually accurate about their full position. But, again, only in my
8 opinion.

9 JUDGE METTRAUX: [via videolink] Well, the same question, and
10 again assume it to be the case, but if someone were to disseminate
11 the names of protected witnesses in a criminal case, and again I'm
12 asking you for your opinion, would that be under the ECHR test, and
13 I'm asking you to apply it, compatible with democracy and the
14 fundamental values of the convention as you understand them?

15 A. Those are aspects that a court would look very seriously at if
16 they were ever to say that the public interest value of the
17 disclosure and the benefit of it was -- the interference in that
18 right would be based on facts such as you are alluding to.

19 JUDGE METTRAUX: [via videolink] Now, as I think you've alluded a
20 moment ago in response to my previous question, there might be more
21 than one purpose being pursued by an individual who claims such
22 protection; correct?

23 A. Yes.

24 JUDGE METTRAUX: [via videolink] Now assume, as a hypothetical,
25 that a person pursues at once a legitimate purpose, a public

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1 interest, and an interest that is not provided protection under the
2 convention. Let's say someone wants to inform the public and at the
3 same time intimidate someone, for example. What protection would you
4 say that person would receive as a would-be whistleblower? Would it
5 be correct to suggest that the person would only get protection
6 insofar as pursuing a public interest, or are you saying that he or
7 she would also benefit of that protection insofar as he or she
8 pursues a not legitimate purpose?

9 A. Certainly I agree that there can be more than one purpose, and
10 one of the examples, again, legally and how that has been addressed,
11 but not at the European Court of Human Rights, and not within that
12 context, is that the changes to the United Kingdom's Public Interest
13 Disclosure Act, again, workplace whistleblowing, that were made
14 removed good faith with respect to being able to have the discussion,
15 so qualifying for protection and having the discussion about whether
16 it -- the information had a public interest benefit all the rest of
17 it, and whether then to get to the interference. They did put it in
18 respect to the sanction and said that if a tribunal thinks that
19 despite being a protected disclosure that there was bad faith, they
20 can reduce the sanction or -- sorry, reduce the protection or the --
21 actually in that case, whatever the court says is your recompense by
22 up to 25 per cent.

23 JUDGE METTRAUX: [via videolink] Thank you. Those would be my
24 questions.

25 Thank you, Judge Smith.

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1 PRESIDING JUDGE SMITH: [Microphone not activated].

2 JUDGE BARTHE: Thank you, Judge Smith.

3 I've just one question for you, Ms. Myers, which is you said --
4 if I'm not mistaken, you said earlier that whistleblower protection
5 could be granted to persons who reasonably believe that a
6 prosecutorial policy was improper; is that correct?

7 A. Yes.

8 JUDGE BARTHE: So my question is what is your understanding of
9 an improper policy of a prosecution as opposed to an unlawful policy,
10 for example? Can you give us an example of an improper policy of a
11 prosecution?

12 A. I wasn't -- again, I think these were general -- I was
13 responding in a general way to how prosecution and any authority runs
14 itself. There will be aspects that are legally binding, and there
15 will be aspects of policy that may be -- that are issued and that may
16 not have the same weight. And those policies, if they're improper,
17 so the way that they are -- the policies are applying how they fulfil
18 their legally binding duties, then that may come into play.

19 JUDGE BARTHE: Ms. Myers, what I still have difficulties or what
20 I still don't understand is what you understand of an improper policy
21 as opposed to unlawful policy.

22 A. So an --

23 JUDGE BARTHE: So what would be improper, from your point view?
24 For example, if you can just give us an example of what your
25 understanding is of an improper policy of a prosecution.

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1 A. Well, I can only, I guess, refer, in my experience, to policies
2 from the Crown Prosecution Services in the UK, and there could be
3 policies to do with -- it can be any work -- any of the policies that
4 the lawyers apply, and it can even be the public interest test,
5 because that is a policy of the Crown Prosecution Service on how they
6 deal with cases, and it is up to the Crown Prosecutor to define those
7 policies. It could be challenged. It would be difficult. But
8 somebody could say that it is not applying it properly.

9 JUDGE BARTHE: Well, maybe I would like to ask another question
10 in this regard. If it's -- because I still, as I said, have
11 difficulties to understand that, what your understanding is of
12 "improper." I mean, the prosecution is certainly bound by law or by
13 legal standards; is that right?

14 A. Yes.

15 JUDGE BARTHE: So if the Prosecution respects these legal
16 standards, is there room, in your view, for improper conduct when it
17 comes to prosecution --

18 A. Again, I think --

19 JUDGE BARTHE: -- the prosecution of cases?

20 A. Yes, I think we're getting into detail of what the information
21 is. It could be someone is challenging a policy on how the
22 prosecution service operates that they believe would potentially
23 undermine their legal standards, and it could be how they are talking
24 to witnesses, it could be how they're -- again, it could be a policy
25 on how they do that, and someone saying, "Actually, with respect to

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1 our legal standard, this does not fulfil it." And that could be
2 considered by a court in the public interest to be improper.

3 JUDGE BARTHE: Thank you, Ms. Myers.

4 PRESIDING JUDGE SMITH: I promised Mr. Rees an opportunity to
5 ask the question that he brought up during his objection.

6 MR. REES: No, I don't think I need to given the answers that
7 were given.

8 PRESIDING JUDGE SMITH: All right.

9 Now, Mr. Cadman.

10 MR. CADMAN: Perhaps I could be permitted to ask one question in
11 response to what Judge Barthe had said as a point of clarification.
12 It's a very short question.

13 PRESIDING JUDGE SMITH: All right. That will be it, though.
14 One question.

15 MR. CADMAN: Certainly. And I'll try and keep outside of the
16 facts of the case.

17 Further Re-examination by Mr. Cadman:

18 Q. When we deal with an improper prosecutorial policy, if we're
19 dealing with a conflict situation, and the policy is the reasonably
20 held belief by the individual concerned that the investigation and
21 prosecutorial policy of that entity is discriminatory, and it
22 coordinated with individuals from one side of the conflict who are
23 accused of having committed war crimes, crimes against humanity
24 themselves, could that, in the reasonably held belief, could that
25 constitute an improper policy, prosecutorial policy, that would fall

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1 within, potentially, hypothetically, the protection?

2 MR. PACE: Your Honour, before the witness answers, I do object
3 to this question. It falls outside of the guidance we received from
4 the Trial Panel. I understand there is a distinction between what
5 the parties can ask a witness and what the Panel can ask, and in this
6 case what Mr. Cadman is asking falls outside of what was permissible,
7 which the Prosecution also stayed away from.

8 Other than that, the question starts with the reference to
9 "improper prosecutorial policy," which, as we heard from the witness,
10 we were unable to determine what her understanding of that is. So I
11 don't know where this will lead us.

12 PRESIDING JUDGE SMITH: I'm going to sustain the objection. The
13 question is almost impossible to answer. It assumes facts that no
14 one else was able to question because of our previous rulings, and
15 we're not going to get into that. So the objection is sustained.

16 MR. REES: I understand the ruling. I don't seek to challenge
17 it. Your Honours ruled. But so that I can I have my say, as it
18 were, I do support Mr. Cadman seeking to re-examine on this point.

19 We understand that the ruling in paragraph 32 previously, but it
20 did seem to us that the Trial Panel asked the question specifically
21 of the witness as to an example of an improper prosecutorial policy,
22 and there is an example provided in the witness's report at
23 paragraph 32, which I understand the witness had been led to believe
24 she couldn't refer to and therefore couldn't answer the question of a
25 request for an example.

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1 But I understand Your Honours' ruling. That would have been the
2 submission that I would have made.

3 PRESIDING JUDGE SMITH: Well, it isn't that she was led to
4 believe that she couldn't answer. She was ordered not to answer.

5 MR. REES: No, indeed. Indeed.

6 PRESIDING JUDGE SMITH: The ruling stands. This question is not
7 necessary. I understood her answer. You understood her answer. We
8 don't need anymore.

9 MR. CADMAN: I was merely trying to assist the Court so she
10 could give a proper answer to Judge Barthe's question, but I take
11 your ruling.

12 PRESIDING JUDGE SMITH: I think she did her best.

13 MR. CADMAN: The only point that remains is that we seek to, and
14 now that her examination has concluded --

15 PRESIDING JUDGE SMITH: Yes, I believe we previously ruled on
16 most of the paragraphs. We did not rule on 18, which was raised by
17 Mr. Pace. And you have conceded that those five words between the
18 two commas, which begin with the word "as" and end with the word
19 "case" will be excluded, and that is the order of the Court.

20 Would you please assign a number to the report, Madam Court
21 Officer.

22 THE COURT OFFICER: Your Honours, the expert report will receive
23 number 2D6.

24 PRESIDING JUDGE SMITH: 2D6 is admitted, as modified, by the
25 Court. And we have a good deal of other stuff that was referred to

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1 today. Are you offering anything else --

2 MR. CADMAN: Yes.

3 PRESIDING JUDGE SMITH: -- other than this document?

4 MR. CADMAN: Your Honour, I had indicated that, although we're
5 making reference to the European Court jurisprudence, I am not
6 seeking to tender that. There are, of course, a number of other
7 reports that have been referred to. I know that there's an objection
8 by the Prosecution because they are not the full reports, which is
9 what I had indicated. We're more than happy to tender the full
10 reports. We haven't because we referred to just to particular parts
11 of them. It has been notified. The Prosecution has very helpfully
12 set out the items with the ERN range and their view.

13 Just to start with DNH --

14 PRESIDING JUDGE SMITH: Excuse me, just a second.

15 Mr. Pace, you understand my question then, and you're involved
16 in this as well, is there some reason why you need to have the entire
17 document entered?

18 MR. PACE: Yes, Your Honour. So I need to draw a distinction.
19 For some documents the objection was both because it's incomplete and
20 because it's irrelevant. For a few of the documents, it's just
21 because it was incomplete.

22 So, for example, if the Court were to find that you would like
23 to admit certain laws, we would want those laws to be admitted in a
24 complete version. The Defence has disclosed certain versions, for
25 example, of one -- I believe it's the Kosovo law that I referred to,

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1 which only sets out the front page and the article specifically
2 referred to by the witness which, in our submission, is not the best
3 way to proceed.

4 We have, on our presentation queue included the full version.
5 So whether or not -- if Your Honours do want, for example, publicly
6 available laws and jurisprudence admitted, our submission in that
7 case would be that it's submitted and admitted in full so that the
8 record is clear and arguments can be made.

9 PRESIDING JUDGE SMITH: We're trying to avoid entering a
10 120-page document when only one page was ever referred to.

11 MR. PACE: Yes, Your Honour, but in that case it depends again
12 what we are talking about. So, for example, the lengthier documents
13 are the ones which go to the witness's professional experience which,
14 I believe, the parties are in agreement about and will not be sought
15 for admission.

16 MR. CADMAN: We've already indicated that we are not relying on
17 those documents.

18 MR. PACE: So what would be more helpful is if we can narrow
19 down what exactly we're arguing about.

20 PRESIDING JUDGE SMITH: Let's go through the documents, then,
21 one at a time.

22 MR. CADMAN: So the first document, we had DNH0001 to DNH0046.
23 There is no objection to that document.

24 The next document is 0289 to 0312, which is the UN whistleblower
25 report. There is no objection to that.

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1 We then have 0614 to 0723, which is the UN Convention Against
2 Corruption. Again, we don't consider that there's any need to refer
3 to the entire document. Again, we don't need to tender that. It's
4 been referenced, but --

5 PRESIDING JUDGE SMITH: [Microphone not activated].

6 THE INTERPRETER: Microphone, please.

7 PRESIDING JUDGE SMITH: I don't think that was ever dealt with
8 in the examination or cross-examination, was it?

9 MR. PACE: Not to my knowledge, Your Honour, and this was one of
10 the items we objected because it was only referred to as part of the
11 witness's experience and also it's not relevant.

12 PRESIDING JUDGE SMITH: Yes, we won't be admitting that
13 document.

14 MR. CADMAN: The next document is the EU directive, which is at
15 0556 to 0561. Again, it's an incomplete version. If the Court wants
16 a complete version, then that can be uploaded.

17 Then 098 --

18 PRESIDING JUDGE SMITH: Just a second. How many pages is the EU
19 directive? Any idea?

20 MR. CADMAN: It's not an extensive document.

21 PRESIDING JUDGE SMITH: All right. Any objection to that?

22 MR. PACE: No objection to it being admitted in a complete
23 version, Your Honour.

24 PRESIDING JUDGE SMITH: All right. Go ahead.

25 MR. CADMAN: Then we have 0982 to 0991. Again, more than happy

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1 to provide the full report.

2 PRESIDING JUDGE SMITH: Mr. Pace.

3 MR. PACE: Your Honour, I'm sorry, if counsel could assist with
4 what -- which this document is.

5 PRESIDING JUDGE SMITH: It's the protection of whistleblowers.
6 It's towards the end of your list.

7 MR. PACE: I have a different ERN for that. Isn't that the same
8 as DNH0001?

9 MR. CADMAN: I do apologise. It is the same document. I do
10 apologise. It's duplicated.

11 PRESIDING JUDGE SMITH: Say it louder.

12 MR. CADMAN: Sorry. It's duplicated. It's my error. It's the
13 same document. We don't need to refer to that.

14 PRESIDING JUDGE SMITH: All right.

15 MR. CADMAN: And then the last one is 0579 to 0580 which is
16 Public Interest Disclosure Act. Again, we don't need to have the
17 entire act. It's quite extensive. We only need to have what's
18 already been filed.

19 MR. PACE: On that Your Honour, we do object. This is one of
20 the instances in which the Defence filed only part of the law, but
21 other relevant parts of the law which I did in fact put to the
22 witness are not contained in that exhibit. So if the Panel would
23 like to admit the law, we would request that it be admitted in full.
24 This is already on our presentation queue, so we don't even need to
25 create a new exhibit. That version can be admitted.

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1 PRESIDING JUDGE SMITH: It will be admitted in full.

2 MR. CADMAN: That's it, Your Honour.

3 PRESIDING JUDGE SMITH: All right. We'll have to have a list of
4 the exhibit numbers then.

5 MR. PACE: And perhaps I could assist the Court Officer with at
6 least one of the items. The Public Interest Disclosure Act, and, of
7 course, the Defence can verify, which we put in full on our list, is
8 SPOE00317329. And, of course, the Defence can review and then say if
9 that's correct, that it's in full. So that's one relevant ERN.

10 I could also provide the ERN --

11 PRESIDING JUDGE SMITH: [Microphone not activated].

12 [Trial Panel and Court Officer confers]

13 PRESIDING JUDGE SMITH: I think the easiest method for doing
14 this would be to -- since it's your offer, and you have stated on all
15 of them that he offered that as long as it's the full document you
16 have no objection, send us the list, the Court Officer will then
17 assign a number, and we will enter an order admitting them. All
18 right.

19 MR. REES: Your Honour, there's a very brief related matter that
20 I would wish to raise, just for clarification purposes, but I'm very
21 conscious that the witness is sat in the witness box. She doesn't
22 need to be detained any further, it seems to me.

23 PRESIDING JUDGE SMITH: [Microphone not activated].

24 MR. CADMAN: Sorry, Your Honour. Just we hadn't included Law
25 No. 06/L-85, the Kosovo law. Obviously, that needs to be entered as

1 well. That's 0573 to 0574. But we will, of course, upload the
2 entire law.

3 PRESIDING JUDGE SMITH: [Microphone not activated].

4 THE INTERPRETER: Microphone, please.

5 PRESIDING JUDGE SMITH: Thank you, Ms. Myers, for being with us
6 today. Your testimony is finished. The Court Usher will escort you
7 out of the room.

8 THE WITNESS: Thank you very much, Your Honour.

9 [The witness withdrew]

10 MR. REES: Very briefly, Your Honour.

11 I understand that the discussion that was taking place
12 laterally, perhaps in a different category than the general position,
13 because the witness was called as an expert witness and dealt with
14 some specific instruments. But the general position we have
15 understood to be that we do not need to exhibit, and really we
16 shouldn't be exhibiting, law reports, statutory law. That,
17 obviously, notice is required and, if necessary, we can make copies
18 available when we come to deal with them in due course to the
19 Trial Panel if they're not otherwise available.

20 But there is no need to exhibit, for example, judgements of the
21 European Court of Human Rights. Nor a need to exhibit legal
22 instruments that are passed down properly by the parliament of
23 Kosovo, for example. They're matters that we can refer to in due
24 course when we come to final trial brief and closing statements
25 without having to exhibit those reports and legal instruments.

1 PRESIDING JUDGE SMITH: The Court can certainly take notice of
2 any of those items --

3 MR. REES: Yes.

4 PRESIDING JUDGE SMITH: -- without having it admitted.

5 MR. REES: No.

6 PRESIDING JUDGE SMITH: It also could be offered --

7 MR. REES: Right.

8 PRESIDING JUDGE SMITH: -- if somebody wishes to.

9 MR. REES: So --

10 PRESIDING JUDGE SMITH: So we're being flexible here.

11 MR. REES: I understand. So in due course, obviously, if we are
12 referring to judgements or pieces of law, we will give notice of
13 them, they will be in our final trial brief and our closing
14 statements and, if necessary, we can make them available as well to
15 assist the Trial Panel.

16 But we are not, I understand, I hope correctly, bound to only
17 refer to matters that have been admitted as exhibits.

18 PRESIDING JUDGE SMITH: Correct.

19 MR. REES: We are not restricted in that way.

20 PRESIDING JUDGE SMITH: Correct.

21 MR. REES: Yes.

22 PRESIDING JUDGE SMITH: We can look up the European Court of
23 Human Rights decision --

24 MR. REES: Yes.

25 PRESIDING JUDGE SMITH: -- on a stated case and read it

1 ourselves.

2 MR. REES: Indeed. Thank you.

3 PRESIDING JUDGE SMITH: So your understanding is correct,
4 Mr. Rees. Just to be perfectly clear.

5 MR. REES: I'm grateful, Your Honour. Thank you.

6 PRESIDING JUDGE SMITH: All right. Having heard the parties,
7 the Panel admits the expert report in evidence with the exceptions of
8 paragraphs 23, 25, 32, the second and last sentence of paragraph 34,
9 paragraph 36 - the second sentence, and paragraph 40. Those are the
10 exceptions to the admission.

11 The Panel finds that paragraph 18, I've already ruled upon.

12 Given that this is an expert report, the Panel orders the
13 Haradinaj Defence to submit by Monday, 24 January, a redacted version
14 blacking out or removing the excluded paragraphs and phrases. It is
15 this redacted version that will be admitted into evidence and become
16 a part of the record.

17 The classification will be public.

18 And I believe that's all. And we've got the other evidence
19 dealt with.

20 MR. PACE: Your Honour, just one point of clarification, if I
21 may.

22 PRESIDING JUDGE SMITH: Sure, Mr. Pace.

23 MR. PACE: I understand from, at least, the written transcript,
24 it took down "paragraphs 23, 25," but I understand from the ruling
25 that it is 23 until 25.

1 PRESIDING JUDGE SMITH: I'm sorry. You're absolutely correct.
2 I misstated that. It is 23 to 25 and 32 and the others.

3 So I believe we are finished here today. We will back here on
4 Monday at 8.00 a.m. I'm reminding you once again of that.

5 Mr. Cadman, you're on your feet. Do you have something?

6 MR. CADMAN: Just on paragraph 34, it was certainly my
7 understanding that it was just the first sentence that was redacted,
8 not the --

9 PRESIDING JUDGE SMITH: [Microphone not activated].

10 MR. CADMAN: Sorry, the second sentence.

11 THE INTERPRETER: Microphone, please.

12 MR. CADMAN: Yes.

13 PRESIDING JUDGE SMITH: Second and last sentence.

14 MR. CADMAN: I'm grateful.

15 PRESIDING JUDGE SMITH: So we are adjourned until Monday.

16 MR. REES: Your Honour, Mr. Bowden is back in charge on Monday.

17 PRESIDING JUDGE SMITH: Okay, fine. Thank you for being with
18 us.

19 --- Whereupon the hearing adjourned at 1.18 p.m.

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