Monday, 8 November 2021

[Open session]

[The accused entered court]

--- Upon commencing at 9.30 a.m.

PRESIDING JUDGE SMITH: Good morning, everyone. Welcome.

Madam Court Officer, please call the case.

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

PRESIDING JUDGE SMITH: Ms. Bolici, will you please introduce your team.

MS. BOLICI: Good morning, Your Honour. For the SPO are present today Matthew Halling, Associate Prosecutor; James Pace, Associate Prosecutor; Line Pedersen, Case and Evidence Manager; Molly Norburg, legal intern; and I am Valeria Bolici, Prosecutor with the SPO.

I want to anticipate, Your Honour, that Mr. Halling will have to leave the courtroom after addressing the Court in relation to point A because of other urgent work commitments.

Thank you.

PRESIDING JUDGE SMITH: No problem. Thank you very much.

Mr. Rees.

MR. REES: Your Honour, my name is Jonathan Rees, Queen's Counsel. I appear for Mr. Hysni Gucati. I am assisted by co-counsel Mr. Huw Bowden and Ms. Eleanor Stephenson; also assisted today by

team members Ms. Faye Wigmore, Mr. Vladimir Dashi, Mr. Joe Bowden, and Mr. Remi Halilaj.

PRESIDING JUDGE SMITH: Thank you, Mr. Rees.

Mr. Cadman.

MR. CADMAN: Good morning, Your Honour. Toby Cadman for Mr. Nasim Haradinaj. I'm joined today by Mr. Carl Buckley, Mr. Jonathan Worboys, and Ms. Miriam Boxberg rejoins us today.

PRESIDING JUDGE SMITH: Thank you.

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

The Panel issued an order on Friday with the agenda for the hearing today. We will start with the submissions on the Prosecution's certification request, which was filed last Friday. Then we will hear submissions from the Defence on the next steps in these proceedings. We will then address some intervening matters. And, finally, we will hear the accused's statements.

We'll start with the first point on our agenda.

On November 3, 2021, the Panel issued a confidential decision on the pending Rule 102(3) matters and set as deadline for disclosure for the SPO 5 November.

On 5 November 2021, the Prosecution requested certification of that decision and the suspension of the deadline just mentioned. The Panel extended the deadline for disclosure until the end of today. The Panel will now hear oral submissions on the matter.

Each Defence team has 15 minutes to respond. Then the SPO will

be given 15 minutes to reply. The Panel may also ask some questions.

While the 3 November decision and the SPO certification request were filed confidentially, the greater part of the issues raised can be discussed in public session. The parties can ask for private session if the specific content of any of the Rule 102(3) items needs to be discussed.

No written submissions will be entertained for this filing. The Panel will issue a written decision by the end of today.

Madam Court Officer will stand and let you know when there is five minutes left on your allotted time so that we can keep that schedule.

Mr. Rees, you have the floor.

MR. REES: Your Honour, I will do my best with the time. But I am conscious that, of course, the SPO have already submitted a written filing in relation to the original request.

We object to the request for leave to appeal. I begin with the legal framework adopting what is set out in the decision of the Pre-Trial Judge in this case, KSC-BC-2020-07 at filing F00169, paragraph 10 onwards.

In summary, a right to appeal arises only if the Panel is of the opinion that the standard for certification set forth in Article 45(2) of the Law and Rule 77(2) of the Rules has been met. Interlocutory appeals, which interrupt the continuity of the proceedings, are the exception. Considerations that an interlocutory appeal would address fundamental questions or would be to the benefit

of the Specialist Chambers do not, per se, warrant certifying the appeal.

Mindful of the restrictive nature of this remedy, the following specific requirements apply: A, whether the matter is an appealable issue; B, whether the issue at hand would significantly affect, one, the fair and expeditious conduct of the proceedings, or, two, the outcome of the trial; and, C, whether, in the opinion of the Pre-Trial Judge, or the Trial Panel, rather, an immediate resolution by the Court of Appeals Panel may materially advance the proceedings.

Only an issue may form the basis of an appealable decision. An issue is being described as an identifiable topic or subject, the resolution of which is essential for determination of the matters arising in the judicial cause under examination, and not merely a question over which there is disagreement or conflicting opinion. An appealable issue requires the applicant to articulate clearly discrete issues for resolution by the Court of Appeals Panel that emanate from the ruling concerned and do not amount to hypothetical concerns or abstract questions.

The first prong of the certification test contains two alternatives. The issue must have significant repercussions on either: One, the fair and expeditious conduct of proceedings; or, two, the outcome of the trial. Use of the term "significantly" in the wording of the first prong of that test indicates that an applicant must not only show how the issue affects, one, the fair and expeditious conduct of proceedings; or, two, the outcome of the

trial. The applicant must also demonstrate the significant degree to which these factors are effected.

The fair and expeditious conduct of proceedings is generally understood as referencing the norms of a fair trial. Fairness is preserved when a party is provided with the genuine opportunity to present its case to be apprised of and comment on the observations in evidence submitted to the Panel that might influence its decision.

THE INTERPRETER: The interpreters kindly ask the speaker to slow down when reading. Thank you.

MR. REES: Alternatively, the first prong of the certification test --

PRESIDING JUDGE SMITH: Mr. Reese, they've asked you to slow down a bit. I know that's difficult but please do your best.

MR. REES: I will do. I'm conscious of that 15 minutes, but I will do my best.

The first prong of the certification test may be met if the issue significantly affects the outcome of proceedings. Thus, it must be considered whether a possible error in an interlocutory decision would impact the outcome of the case.

The second prong of the test for certification is an additional limiting factor. Because of the test's cumulative nature, the failure of an applicant to establish the first prong of the test will necessarily exempt the Panel from considering whether the second prong has been met.

The second prong of the test requires a determination that

prompt referral of an issue to the Court of Appeals Panel will settle the matter.

Lastly, certification is not concerned with whether a decision is correctly reasoned but whether the standard for certification has been met.

Applying those principles, our first submission is that the issues, as drafted in paragraph 2 of the request, are not appealable issues.

They amount to attempts to manufacture appealable issues from conclusions of the Trial Panel which the SPO simply disagrees with. All of the issues raised amount to, in effect, mere disagreement and in a number of respects misinterpretation of the decision, which is impugned by the request. They are hypothetical and abstract questions.

Paragraph 2.1 assumes, as the basis for its hypothetical question, that materiality by the Trial Panel was assessed in the abstract. It was not. And that is perfectly clear from the scope and terms of the decision of the Trial Panel.

Paragraph 2.2 ignores the fact that both the Pre-Trial Judge, the Court of Appeals Panel, and, indeed, this Trial Panel on earlier occasions have agreed that the assessment as to whether entrapment allegations are wholly improbable are matters to be determined at trial, and disclosure is to be made where material is preparation -- is material to the preparation of the Defence or exculpatory for trial. No other condition to disclosure is set out in the rules.

Paragraph 2.3 again is a wholly hypothetical question drafted on the basis of an assumption that underlying allegations of entrapment are unsubstantiated and wholly improbable to the point of being fanciful.

I note in passing at this stage, and I will refer to this shortly, that the question seeks to introduce new thresholds of unsubstantiated and fanciful into the consideration of entrapment without any authority for that proposition. The only relevant assessment to be made at trial is whether a plea of incitement is wholly improbable, even if it is unsubstantiated and/or fanciful, which is not conceded in this case at all.

And if it is not wholly improbable, even if unsubstantiated or fanciful, then the burden falls upon the Prosecution to prove that there was no police incitement. But question at 2(iii) is a wholly hypothetical question drafted on the basis of an assumption that the allegation of entrapment is unsubstantiated and wholly improbable to the point of being fanciful.

And paragraph 2.4 does not amount to a discrete issue. Indeed, it's difficult to make any sense of the question as drafted. Countermeasures are not an alternative to disclosure, as the SPO appears to understand them. They are an alternative to non-disclosure. In the event that non-disclosure under Rule 108 is authorised, countermeasures are required to ensure fairness to the defendant. The scope of those countermeasures can only be what is required by fairness and not what is limited by the SPO.

The question about exceeding proposed countermeasures by the SPO is, again, hypothetical and drafted on the presumption that the entrapment claim is wholly improbable.

None of those hypothetical issues arise from the decision which is sought to be impugned. They were, as hypothetical and abstract questions, not essential to the determination made by the Trial Panel on disclosure, which looked at the specifics, both circumstances and facts as they were known, in relation to the present case.

The reference in paragraph 3 of the request to the Pre-Trial Judge's previous decision denying disclosure and the decision of the Court of Appeals Panel on that decision is a distraction and no more than that, because the Pre-Trial Judge and, indeed, the Court of Appeals Panel, never considered the material in question at this stage.

THE COURT OFFICER: Five minutes left, Your Honours. You have five minutes.

MR. REES: That's because the SPO had failed to include the same on any Rule 102(3) notice. The Court of Appeal never considered the material that the Trial Panel did.

The material concerned only appeared on a Rule 102(3) notice following the ruling of the Court of Appeal that the SPO had applied an inappropriately narrow approach to the issue of relevance.

At paragraphs 4 and 5 of the request, the SPO inaccurately refers to the Trial Panel as determining that the internal report was disclosable. As we read the finding of the Trial Panel, it ruled, in

fact, that the internal report was not disclosable, pursuant to Rule 108, but ordered counterbalancing measures to be put in place. The request is based on inaccurate submissions.

And in relation to paragraph 6 and the request for suspensive effect of the impugned decision until the application for certification is resolved. As we discussed on Friday, has no basis in the rules. Rule 171 does not permit suspensive effect until the application for certification is resolved but only provides for suspensive effect to be granted at the time of certification.

Let me deal then with the detail of the first issue. And I do so conscious that we are not, at this stage at least, in a position to argue the merits. But I make some submissions because looking in greater detail at these parts of the request, it demonstrates that the questions posed are questions based on a false premise; namely, it is asserted that the Trial Panel did not make a preliminary assessment of how a piece of information might advance an asserted issue in the case.

This is not correct even on the face of the request for certification, which quotes from the Trial Panel specifically setting out a detailed reason for the finding of materiality. That is set out in paragraph 7.

The Trial Panel set out in that decision, considering the circumstances of this case and the facts known, that the information was material under Rule 102(3), interpreted in its relevant context as it might suggest the SPO failed to take adequate investigative

steps to exclude the possibility that a member of its staff or someone under its control entrapped the accused by disclosing the impugned information. There is nothing abstract about that decision at all.

Rule 102(3), as the Trial Panel found, of course requires disclosure of all material which is deemed material by the Defence to its preparation. And in the decision on disclosure, the Trial Panel clearly set out how, in the circumstances of this case, the information was material to the preparation of the Defence. This is an example of the SPO attempting to manufacture an issue from a conclusion that they simply disagree with.

Dealing with paragraphs 10 to 13 and the paragraphs in the request dealing with what is described as the second issue. The Trial Panel were right that the question as to whether a plea of incitement is wholly improbable or not is a question of evidentiary assessment to be made after the evidence has been called at the end of the trial. The relevance of that question is not to disclosure. It is solely to the issue of determination of the relevant burden of proof. Where the plea of incitement is anything other than wholly improbable, it falls upon the Prosecution at trial to have disproved incitement.

I note, in passing, the assertion at paragraph 10 by the SPO that entrapment was factually and legally impossible, of course, makes little sense when the Trial Panel has already found that there is material in the SPO's possession from which it can be inferred the

SPO have failed to exclude the possibility of entrapment.

Paragraphs 11 to 13 contain a further number of inaccuracies. It is certainly not the case that on the accused's own version of events there was no contact between any SPO official and the accused and the process by which the batches were delivered to the KLA WVA. On the accused's case, as the Trial Panel knows, and, indeed, the SPO's case, the material was delivered by a person or persons unknown to the accused.

The accused does not know whether that individual or individuals was or were SPO officials or whether they were acting pursuant to earlier contact with an SPO official.

Without citing any authority for the proposition, the SPO, at paragraph 12, attempt to assert new requirements into the plea of police incitement. They attempt to insert a requirement that there was something other than a momentary exchange, a requirement that there was direct contact between the accused and official, a requirement that the will of the accused was overborne, and a requirement that the accused were acting other than deliberately and not of their own free will.

None of those purported requirements feature anywhere in any of the European case law on the scope of the plea of police incitement, and the SPO quotes no authority for those propositions. That they do cite them without authority demonstrates, we submit, that the SPO have no proper understanding of the nature of a plea of police incitement.

In the present case, it is our submission, and we think it is not controversial at all, that the alleged offences simply could not have occurred without the delivery of these materials by an unknown person or persons into the possession of the accused. And those deliveries came with the express incitement to make material available to the media.

If an official of the SPO was involved in that process, it is just as capable of amounting to police incitement as if a police officer had participated in the supply of a large quantity of Class A drugs to an individual who had never been involved in drug trafficking before. And where those drugs can be traced back to the possession and custody of a police department, there is an obvious question to be asked.

The proposition in paragraph 3 of the request that entrapment in the present circumstances is theoretically impossible is both nonsense and inconsistent with the finding of the Trial Panel that the SPO are in possession of material which might reasonably suggest they cannot exclude the possibility themselves.

Paragraphs 14 and 15 of the request state that the SPO is mindful that the wholly improbable nature of entrapment must be assessed differently when considering disclosure as opposed to the merits of a case at trial. It is beyond our ability to understand what the SPO means with that. Disclosure --

PRESIDING JUDGE SMITH: Mr. Rees, you're passed the limit a bit now, so please wrap it up.

MR. REES: I'm going to ask if I can continue because I'm sure that Mr. Cadman is going to be happy if I eat into some of his time.

PRESIDING JUDGE SMITH: Is that a fact, Mr. Cadman?

MR. CADMAN: I think that's a fair assumption to be made.

PRESIDING JUDGE SMITH: Okay. We will consider both of you together then on those time limits.

MR. CADMAN: I will have, in all likelihood, some additional remarks to make, but I'm quite happy --

PRESIDING JUDGE SMITH: You're close to the end, anyway, aren't you, Mr. Rees?

MR. REES: I'm certainly getting through it, Your Honour. I'm certainly getting through it.

PRESIDING JUDGE SMITH: That's not a very direct answer.

MR. REES: Well, I am trying to deal with an SPO filing in writing.

PRESIDING JUDGE SMITH: I know.

MR. REES: And we haven't had the opportunity --

PRESIDING JUDGE SMITH: All right. Go ahead.

MR. REES: I am grateful for the Trial Panel's tolerance.

PRESIDING JUDGE SMITH: Go ahead. We will bear in mind the time off of Mr. Cadman's limited time. Thank you.

MR. REES: Disclosure under Rules 102 and 103 does not require any sort of *prima facie* test or threshold that the Defence must establish in relation to any Defence or issue. It's not there on the face of the rules, nor does it make any sense, because if that were

so, the Prosecution could hold on to material in its sole possession which the Prosecution knew was, for example, exculpatory even though the Defence was unaware of the exculpatory nature of that material.

Indeed, even though the Defence might not be aware of the existence of the material and its possession in the hands of the Prosecution or the issue that it goes to at all because, of course, the Defence are not in possession of the material.

The conditions for disclosure under Rules 102 and 103 are those set out on the face of the rules themselves.

We note that the SPO does not challenge the approach of the Trial Panel that the credibility, reliability, and weight of the information is not to be considered for the purpose of disclosure. There is no challenge to that. What the SPO does challenge is that the Court should recognise the contours of the case before it. Well, I ask rhetorically: What on earth does that mean?

We are very conscious that there was a caution given to the SPO for the use of sophistry, and we say that that is a perfect example of sophistry in this case.

Paragraphs 16 to 18 of the request deal with what is described as the third issue.

Again, without citing any authority for the proposition, the SPO again attempts to assert new requirements into the plea of incitement. This time a requirement that the plea must not be fanciful or must be substantiated.

Well, authority establishes, and we have gone over these issues

many times now, that the plea of incitement, unless wholly improbable, even if, although not accepted to be the case here, but even if fanciful and unsubstantiated, the burden of proof falls on the SPO to prove that there was no police incitement. Information which could arguably suggest that the SPO failed to take adequate investigative steps to exclude the possibility of the entrapment allegations as the Trial Panel found is obviously material to that issue.

And if the SPO cannot exclude the possibility of entrapment, then the plea can hardly be aside to be wholly improbable. We note as well that the request does not seek to argue that the Trial Panel was wrong to conclude that the material arguably suggests that the SPO cannot exclude the possibility of entrapment.

Paragraphs 19 to 20 then deal with what is described as the fourth issue. Again, the approach of the SPO is founded on the incorrect assertion that counterbalancing measures are an alternative to disclosure. They are not. They are measures required when non-disclosure of material, which would otherwise meet the disclosure test, is ordered under Rule 108.

There is no suggestion in the request for certification that the Trial Panel's conclusion that the counterbalancing measures proposed fail to put the Defence in a position to ascertain the relevant context of the SPO's efforts to exclude the possibility of information having intentionally leaked by one of its staff being wrong. The request does not say that that finding was wrong.

Instead, the SPO seeks an issue framed on the assumed basis that the plea of incitement is wholly improbable. The issue is, again, hypothetical as drafted. Even though the Prosecution case is not yet finished and the Defence case has not even started, and it seeks to frame that hypothetical question in circumstances where the SPO is, and there is no challenge from them on this point, in possession of material which can arguably suggest that the SPO cannot exclude that possibility.

This is an attempt by the SPO to manufacture an issue from a conclusion that they do not like. Even if they do not and cannot disagree with it, this is simply attempt to manufacture an issue from a conclusion they do not like.

We say the issues, therefore, are not appealable issues and there would be no need to consider further the remaining limbs of the test for certification. But for the purposes of completeness, in relation to paragraphs 21 to 23 of the request, we say that this request will only affect the expeditious conduct of these proceedings adversely. The only consequence that this request will have, if granted, is to introduce unnecessary and unwanted delay. Unwanted and unwarranted.

The concern from the SPO as to the impact on other proceedings of the Trial Panel's decision on disclosure in these proceedings does not qualify for certification. Considerations, as the Pre-Trial Judge had previously found and, indeed, was simply adopting the decision of the Court of Appeals Panel in the earlier decision of

Thaci and others, in filing F00172 in that case. Considerations that an interlocutory appeal would address fundamental questions or would be to the benefit of the Specialist Chambers do not, per se, warrant certifying the appeal.

The pursuit by the SPO for finality on disclosure, as referred to in this section of the request, is inappropriate and again unwarranted. It is clear, and has been clear for some time, that the SPO finds its disclosure obligations burdensome, but Rule 112 of the rules spells out that those disclosure obligations are continuing obligations, and the SPO cannot reach finality on disclosure. It is a concept that is alien to the requirements of a fair trial.

The concern, repeated again by the SPO, as they have done on previous occasions, that they will be required to update the Rule 102(3) notice whenever they obtain new relevant information is only a complaint about the proper operation of Rule 102(3) as held by the Pre-Trial Judge, as held by the Court of Appeals Panel, and as held by this Trial Panel previously.

Simply repeating for, I think, the third or fourth time their unhappiness with the requirements of Rule 102(3) only reinforces the impression that the SPO regard their disclosure obligations as a matter to avoid rather than to engage with.

Moreover, we submit, the quoting of their own previous unsuccessful submissions as some form of authority, unpersuasive as it is, reinforces the impression, we say, of an arrogant Prosecution which simply cannot accept that the Trial Panel has rejected their

position and the request itself reeks of entitlement.

The only cause of delay in these proceedings has been the failure repeatedly by the SPO to engage with and make timely disclosure. Certification should be refused so that disclosure can be made and the trial can proceed without any further delay.

In relation to paragraph 24 and the assertion that granting leave to appeal would materially advance the proceedings, at the Trial Preparation Conference the meaning and consequences of the Appeal's ruling was not a contested issue. The meaning and consequences were perfectly clear. The SPO had employed an inappropriately narrow interpretation of relevance, which was roundly rejected by the Court of Appeal, and the SPO was required to prepare a new Rule 102(3) notice accordingly.

The SPO, on that occasion, attempted to manufacture an issue before this Trial Panel from the conclusion of the Court of Appeals decision that they simply disagreed with, and they are attempting to the same again with this disclosure decision.

PRESIDING JUDGE SMITH: Mr. Rees, you have to wrap it up.

MR. REES: I am reaching the conclusion.

PRESIDING JUDGE SMITH: Okay.

MR. REES: A further opportunity for the Court of Appeals Panel, as it's been described, to clarify the scope of disclosure obligations at issue is not required in the remainder of this relatively short trial. Whether it is required in other cases is a matter for those other trials and other proceedings. Considerations

that an interlocutory appeal would address fundamental questions or would be to the benefit of the Specialist Chambers do not, per se, warrant certifying the appeal.

The conclusion, then. The assertion in paragraph 26 of the request that the SPO has always been forthright about the evidence in its possession is risible. The SPO has gone out of its way to avoid the requirement in Rule 102(3) to provide a notice of all relevant material in its possession. In the first instance, seeking to ignore the requirement of a provision of a notice at all. Then the provision of a 13-item notice, which the Defence correctly protected at the time, was derisory. Then providing a further list which contained no material relevant to the process by which the material arrived at the KLA WVA. And then seeking to ignore the obvious meaning and consequences of the Court of Appeals decision on disclosure and relevance. This request is another example of the employment of sophistries which the Trial Panel has cautioned the SPO against employing.

The Trial Panel, in your decision, expressed concern about the Specialist Prosecutor's Office; specifically, at paragraph 48 of the decision, the Trial Panel said:

"The legal understanding advanced by the SPO in these proceedings causes the Panel to be concerned about the SPO's full compliance with its disclosure obligations."

This request, again, sadly reinforces that concern. It should be refused. Disclosure should be made as ordered. And the

Trial Panel can proceed swiftly.

PRESIDING JUDGE SMITH: Thank you, Mr. Rees.

Mr. Cadman.

MR. CADMAN: Thank you, Your Honour.

I'll be as brief as I can be. And I'll just highlight a couple of additional points.

Mr. Rees has set out the legal framework for certification and he's also set out the applicability of the defence of entrapment, so I don't need to go through that again. What I would say is that the Defence submits that the appeal certification ought not be granted and the application refused.

The application of the SPO is, in reality, just another example of seeking to circumvent its disclosure obligations and adopt the position or the position of an arbiter of what should or should not be disclosed, a position that we have set out previously.

It's important to note that disclosure, and the lack thereof, has been something that the Defence has had to fight and challenge from the very outset of these proceedings. What we're dealing with today is not something which is new to these proceedings. It's something which has been argued from the very beginning.

It is our view that the SPO has sought to obfuscate at each and every juncture and any delay that may have arisen in these proceedings, as Mr. Rees has set out, has been solely down to the actions or, rather, the inaction of the SPO. It's unclear as to the substantive basis for the implication of the previous position of the

Pre-Trial Judge, as the issue at that stage was entirely different in terms of the evidence being sought.

It must be recalled that the evidence, subject to the application, is evidence that supports the position of the Defence in that the defendants were entrapped in terms of the disclosures said to have occurred.

The SPO, at paragraph 3 of its application, seems to suggest that no evidence has been presented that would justify changing the decision of the Pre-Trial Judge on non-materiality. Mr. Rees has set out in some detail those points, and so I don't seek to rehearse them now.

But I do say that the SPO seeks to advance an argument that reverses the applicable legal framework and is effectively holding itself out as the arbiter of materiality.

The first issue, as Mr. Rees has set out, and I will merely say this: The submissions of the SPO are baseless, misconceived, and without any foundation. The SPO has consistently maintained throughout these proceedings that such matters are not relevant to these proceedings, that is not relevant, they are central, and they have been set out as being central from the outset of these proceedings.

There is nothing that is set out by the SPO that submits under the first issue demonstrating that the approach of the Trial Panel was incorrect, incompatible with either the Rules of Procedure or the established law. As Mr. Rees has said, they merely set out the

position that they disagree with the position that the Trial Panel has taken.

The second issue. The SPO are seeking to second-guess the position of the Defence prior to the defence being formally adduced through evidence. Mr. Rees has again set out when is the correct time for dealing with that point, and I won't labour on that now.

The third issue. The SPO have failed to acknowledge an essential issue. We set out in the substantive application for disclosure the position as set out in the case of Edwards and Lewis in the United Kingdom. I can certainly provide a copy, but it was set out in detail in our substantive submission on disclosure.

In particular, directing the Trial Panel to paragraphs 31 and 58, at paragraph 31, the Prosecution has a duty to disclose any material which has or might have some bearing on the offence charged. The position that the Defence takes now, and has taken previously in the substantive submission, is that when the Trial Panel, as the arbiter of fact, has seen that material, there is an obligation on that to be disclosed to the Defence to ensure that the proceedings are fair.

It is our view that it follows that the failure to disclose that material now to the Defence would result in a violation of Article 6(1) in this case.

The fourth issue. The SPO at paragraph 20 expresses their concern that the decision may lead to further requests for disclosure.

Let us remind the SPO that disclosure is an ongoing process and one that the SPO are obliged to keep under constant review. They seem to be oblivious to this particular obligation.

Whether further justified requests for disclosure are made is not something that the SPO can seek to prevent before they happen. And as per the submissions in the substantive request made by the Defence, the SPO is seeking to hold the Trial Panel to ransom by only agreeing to something if it is that no further applications can be made. Such a position cannot be supported by the Trial Panel. This runs entirely contrary to any principle of fairness.

The application ought to be refused. As we can say, no arguable ground of appeal has been advanced, and the entire application, in reality, is an example of the SPO merely disagreeing with a decision of the Trial Panel. Mere disagreement is not enough to satisfy the test of whether leave to appeal should be granted or otherwise.

And as Mr. Rees has stated, to grant leave at this juncture would unnecessarily delay proceedings further, noting that, given the issue, the trial would need to be suspended pending the outcome of any appeal. The timetable for how these matters proceed is relatively tight, as has currently been agreed, and granting leave for this appeal will inevitably cause significant delay to how these proceedings go forward.

Now, I merely conclude by adopting the remainder of these submissions that Mr. Rees has made. I don't feel the need to advance anything further at this stage. Unless there are any further points

Your Honours would like me to address, those are my submissions.

PRESIDING JUDGE SMITH: Thank you, Mr. Cadman.

Mr. Halling, you have the floor.

MR. HALLING: Thank you, Your Honours.

Just to hit a few general points off of those submissions at the top of my own.

First of all, this is a question about certification of a decision. It is not about whether the Trial Panel was incompatible with the statutory framework or that it was incorrect. Those are arguments that will be made on the substance of an appeal if it is granted. There were many submissions that you heard just now about the correctness of the impugned decision and whether the SPO didn't address those aspects in its application. That's not the place for a leave to appeal application to say those things. The merits of the appeal are determined later.

We, obviously, understand our disclosure rules in a particular way as an office, and we have been arguing throughout what those are, and there are aspects certainly where the Trial Panel disagreed with us in the impugned decision. We are entitled to seek leave to appeal of that decision. We aren't doing it to be disrespectful. We aren't doing it because we aren't going to comply with the ruling. We are going to comply with the ruling. But we are also allowed this legal avenue to challenge this decision on appeal.

Second. The finality of disclosure came up in the Defence submissions. The SPO can't argue that disclosure is final.

Disclosure is not final as a general proposition. We are only talking about disclosure of a specific type of materials and whether or not the disclosure path for those materials should continue to be kept open. And the finality of that is in question here.

So we aren't talking about a kind of this is the end of disclosure in this case. No submission to that effect was made nor should any be assumed on our application.

Third. Fundamental questions shouldn't govern whether or not leave to appeal should be granted. That is true in that fundamental or general questions can't be the reason why leave to appeal is granted. It has to be indexed to the concrete circumstances of the case, and the leave to appeal criteria set out a case-specific assessment. But that is different from saying that fundamental questions can have no relevance on whether it would, say, materially advance the proceedings to grant an interlocutory appeal.

This issue, or issues very similar to this, were already found to meet the leave to appeal criteria. An Appeals Panel judgement was rendered confirming the Pre-Trial Judge's decision that these materials were not material to the preparation of the Defence.

We appreciate that things have changed since then, but the importance of the issue that justified granting leave to appeal before is still present now, and it will have an impact on other cases. And for the reasons we explain in our filing, that is an additional reason to be considered alongside the standard criteria being met.

On this question of disagreements, finally, before going into the specific issues and the specific arguments made against them. Every application for leave to appeal is a disagreement, on some level. The mere disagreement language on whether or not something is an appealable issue is, in our understanding, an assessment as to whether or not it is a kind of general disagreement that was maybe not essential to the determination of a decision, or not arising from a decision, or for some other reason doesn't meet the criteria.

If disagreement alone were justification for rejecting leave to appeal, then leave to appeal would never be granted, because the only way you can meet the leave to appeal criteria is if there is an issue that was essential to the determination of the decision that is adverse. Because if it wasn't adverse, then the ruling would have no impact on the filing party.

Turning to these appealable issue arguments that were raised by the Defence.

Focusing on this first issue and about whether or not abstract questions are coming into play here. This is not an abstract question in our assessment. In paragraph 53 of the impugned decision, the Trial Panel set out that it was premature to consider the wholly improbable nature of an entrapment defence. It also says, in the course of the materiality test, the considerations of weight, credibility, reliability would not be considered. And when looking at the way the test was applied in relation to the report and the call data records at issue, there are findings that do not take into

consideration the potential viability of an entrapment defence.

And this is, in our assessment, the crux of the matter. We have been arguing throughout that you can't just say the words "entrapment" and receive disclosure. Whether or not this is assessed in the abstract or in a facts and circumstances based way is, to us, arising from the decision and is essential to its determination.

The same goes for the second issue. When talking about the factual and the legal impossibility, the Trial Panel did not reach these issues, and we are entitled to argue, in a leave to appeal application, that it is arising from the decision and that it's a potential error in that decision to be resolved on appeal.

As to the arguments of the Defence about how there's no proper authority at all for the propositions on entrapment made in the application, I would just draw to the attention of the Defence that in paragraph 47 of filing F00287, it says the following:

"Per Ramanauskas versus Lithuania, Grand Chamber, where an officer involved has exerted such influence on the subject so as to incite the commission of an offence that would otherwise not have been committed in order to make it possible to establish the offence, then entrapment may have been established."

That is, in our assessment, the test that we were arguing for entrapment in the leave to appeal application. That is a cite from the European Court of Human Rights, and it was a cite from the Haradinaj Defence in their submissions. And those Haradinaj submissions are cited in footnote 24 of our application.

So we don't consider ourselves to be making an aggressive argument in this application as to the definition of entrapment. Our argument is that on any reasonable definition of entrapment, this is wholly improbable and the wholly improbable nature of entrapment here should form part of the disclosure inquiry. Obviously, the Trial Panel felt differently. But the point now is whether or not certification of that is warranted.

Going to the third issue. Talking about seeking to introduce new thresholds, unsubstantiated or fanciful. And the Gucati Defence said this twice. If it's not wholly improbable, even if it's unsubstantiated or fanciful, it falls upon the SPO to prove no police incitement. That is an amazing sentence.

If something is unsubstantiated and fanciful, how could it possibly be wholly improbable? That is very revealing of the level of threshold the Defence feels like they need to meet in order to justify a finding of materiality to the preparation of the Defence. And this is precisely the issue that we would like to appeal in the decision as to whether that level, an unsubstantiated, fanciful threshold, is enough to justify disclosure.

On the fourth question. Exceeding the countermeasures is not a hypothetical question. The SPO set out an array of counterbalancing proposes. They were partially accepted. We are not arguing, in any way, that the Trial Panel can't exceed the SPO's counterbalancing measures. Of course the Trial Panel is allowed to evaluate counterbalancing proposals and exceed them as they see fit. It's how

and why those counterbalancing measures were exceeded in this instance which is the basis for our fourth issue identified in the certification application.

The Defence has argued that the SPO can't exclude the entrapment possibility and that is why it is pushing so hard to resist any disclosure of this material. The issue that we have had throughout this trial is that the Defence is asking us to prove a negative inference based on nothing. That is extraordinarily difficult to do. It's like trying to disprove that there are ghosts in the courtroom. If there is no indication of something happening, it is very difficult to present information, even at the level of disclosure, to prove that that didn't happen. And so this is the struggle that we have had throughout and, in our assessment, that is not the proper way to assess the materiality to the preparation of the Defence looking at the facts and circumstances of this case.

THE COURT OFFICER: Five minutes.

MR. HALLING: Sure. And I'll finish up short of that.

The last point I wanted to address is in relation to suspensive effect.

Now, on some level, the suspensive effect application, I think, has almost been overtaken by the subsequent ruling that the Trial Panel would rule on this matter today and that the disclosure deadline would be extended to today. So if suspensive effect is granted, it would be granted in the certification decision.

But I want to, in particular, highlight the Haradinaj Defence's

argument that this is going to suspend the trial until this appeal is heard. There is no reason why the trial needs to be suspended in order to hear an interlocutory appeal on these points.

The Trial Panel has already made previous findings that these disclosure matters could be deferred as evidence was presented. In the impugned decision itself, it acknowledged the possibility of re-calling witnesses as being a measure to be possibly considered once further disclosure was given.

The difference between deferring this for another month or two in order to get an interlocutory appellate ruling need not stop the progress of the trial and the fairness of it can be preserved. And given the importance of the issue, the fact that there was an Appeals Panel judgement on this already that seems to require further exposition on appeal, that these issues are not final and that they're not resolved, we think, justifies sending this up for another interlocutory appeal.

But we have not asked for suspensive effect of the whole trial. It wouldn't be warranted to do so, and it's not necessary. This is something that would happen alongside the trial. The only thing we've asked for suspensive effect for is the additional disclosure ordered as a result of the impugned decision.

So unless there are any further questions from the Judges, those are all of my submissions. Thank you.

PRESIDING JUDGE SMITH: Thank you, Mr. Halling.

There are some questions.

Judge Gaynor.

JUDGE GAYNOR: Thank you very much, Mr. President.

My questions are for the SPO.

The first question concerns the extent to which the SPO takes issue with the impugned decision, and it's quite clear that the SPO is not challenging all of the impugned decision. And your colleague, Mr. Pace, last Friday, asked for suspensive effect in relation to paragraph 95(b).

And I want to clarify with you, having read your request for certification, do you object to disclosure of what's described as extracts of item 191 as set out in the strictly confidential and *ex parte* annex to the decision?

You object to that; is that correct?

MR. HALLING: Yes, Your Honour. We do.

JUDGE GAYNOR: Do you object to disclosure of the summary of verifications in relation to items 195 to 200?

MR. HALLING: Yes, we do. And to anticipate, perhaps, your next question: We presented the counterbalancing measures as a package of measures. So in our assessment, in order to satisfy our alternative request, they needed to be granted en bloc. The Trial Panel obviously did not. They didn't have to. But that's why we're seeking leave to appeal the counterbalancing measures as a whole, rather than isolating them across.

JUDGE GAYNOR: And do you object to disclosure -- excuse me. Do you object to the Panel's order to the SPO to implement the measures

proposed in relation to item 201 and report back to the Panel by 12 November 2021?

MR. HALLING: No, on that we don't because no further disclosure is ordered as a result of that ruling, because item 201, in our understanding, has basically been deferred pending further information. In our assessment, there is no concrete issue to seek any appeal at this time.

JUDGE GAYNOR: So the decision for which you seek certification is the decision to disclose the *ex parte* annex to the impugned decision, number one; and the summary of verifications, number two; isn't that correct?

MR. HALLING: We are seeking leave to appeal of those things. As you can imagine, we would resist the idea that this leave to appeal is only about the differences in the counterbalancing proposal of the SPO and the counterbalancing measures ordered by the Trial Panel.

In our assessment, this is a disclosure path being opened or closed as a result of this, and it has issues that spread far beyond the differences in the counterbalancing proposals.

So for the reasons expressed in our filing, this has both present and future consequences which, spun together, meet the leave to appeal criteria.

JUDGE GAYNOR: But what you are seeking to certify is a decision, and I'm trying to clarify the exact bounds of the decision that you are seeking certification of.

In your certification request at paragraph 23, you say, and I quote:

"The SPO has argued that the disclosure in question threatens its mandate."

Is it your position that the Panel's decision to order disclosure of the two items I've discussed - the redacted version of 191 and the summary of verifications - that they threaten the mandate of the SPO?

MR. HALLING: If it was just those pages alone and nothing else, we might have argued it differently. But that's not the scope of the impugned decision. Your Honours actually did more than that. You made a general finding on materiality for this kind of information on the face -- of the level of substantiation given by the Defence, and the scope of what becomes possible following that ruling is inherent in the decision and, in our assessment, is part of why the leave to appeal criteria are met.

JUDGE GAYNOR: But would you accept that the decision itself is very restricted in terms of paragraph 95, where the disposition is very clear as to the extent to which the decision orders disclosure?

MR. HALLING: Paragraph 95 orders disclosure of certain counterbalancing information. As a predicate to paragraph 95, there needed to be a finding that the information was material to the preparation of the Defence. And those findings of materiality have consequences beyond the counterbalancing measures in the decision.

So paragraph 95 in and of itself has certain legal

considerations underpinning it which, in our assessment, affect the significance of the decision and its fundamental character for leave to appeal.

JUDGE GAYNOR: I want to move now to paragraph 14 of your certification request, and you state, and I quote:

"The SPO is mindful that the wholly improbable nature of entrapment must be assessment differently when considering disclosure as opposed to the merits of a case at the end of trial."

I want to focus on assessing the improbable, as you say, nature of entrapment at the end of trial. Let's focus on that. On what evidence do you wish the Trial Chamber to carry out that assessment?

MR. HALLING: My answer would be the totality of the evidence submitted in the case, so we wouldn't classify it by type. But whether or not it's wholly improbable would be based on a wholistic assessment of all of the evidence before Your Honours.

JUDGE GAYNOR: And is it relevant that the SPO has taken steps to rule out the involvement of its own staff in the disclosure of or delivery of information to the KLA War Veterans Association?

MR. HALLING: I would say no but on the facts of this particular case. I would never say never that the SPO's investigative methods might become an issue in the trial that would justify disclosure and would need to be addressed.

In the particular circumstances of this trial, there is so little information that justifies that disclosure that, in our assessment, that it can't possibly meet the material to the

preparation of the Defence threshold.

So we wouldn't say as an abstract proposition that the kinds of considerations the Trial Panel has ordered wouldn't justify disclosure. But if you do any sort of fact-specific assessment in this case, even at a *prima facie* level, in our assessment, it wouldn't be material.

JUDGE GAYNOR: Well, if the Panel is to carry out a fact-specific assessment of the evidence concerning entrapment, do you accept that that assessment should be based on adversarial proceedings where both the Prosecutor and the Defence have the opportunity to make submissions on the evidence in question?

MR. HALLING: Oh, of course. Yes. We definitely do. The only thing that I would say to that is that our -- well, that what Your Honour is asking is going to the merits of the impugned decision.

So we haven't argued in this application that the Trial Panel committed errors of law, abused its discretion in these terms. This isn't, in our assessment, a matter for the certification decision but rather a matter of whether all of the balancing interests were evaluated for an interlocutory appellate ruling.

JUDGE GAYNOR: I want to move to another part of your certification request, paragraph 20. And you stated, and I quote:

"Had the Trial Panel subjected the entrapment allegations to any scrutiny, as developed under other issues, the SPO's counterbalancing measures would not have been exceeded."

Now, the first question I have is: Is it the duty of the Panel or the SPO, or both, to subject the entrapment allegations to scrutiny?

MR. HALLING: It's an interesting question. My answer would be everyone has some obligation in this disclosure context to engage with the prospective viability of an entrapment defence when talking about whether disclosure should be ordered.

So in our assessment, the Defence need to make at least some basic *prima facie* showing. The SPO needs to talk, and the SPO did make submissions throughout this litigation, on why that *prima facie* showing wouldn't be met. And it would be for the Trial Panel to evaluate whether that *prima facie* showing would be made.

JUDGE GAYNOR: Let me ask you this, Mr. Halling. In assessing the entrapment or scrutinising, putting the entrapment allegations to scrutiny, as you suggest, it seems from the jurisprudence of the European Court of Human Rights, that Judge Mettraux will discuss in further detail, that the preference is very strongly in favour of hearing adversarial argument on the relevant material.

Now, is it not correct that the Panel can only hear adversarial argument about material --

THE COURT OFFICER: Albanian on English.

Sorry, Judge, to intervene. Just the interpretation switched channels. Thank you.

JUDGE GAYNOR: I'll start again.

Is it correct that the Panel can only hear adversarial argument

on material which is relevant to the question of whether the entrapment allegations --

THE COURT OFFICER: Apologies, Your Honour. Again, please, interpreters' attention, the channel is not going through.

JUDGE GAYNOR: If you can hear me now, I'll continue. And there was a slight problem with the interpretation, Mr. Halling.

My point is: How can the Panel hear adversarial argument on this material unless the SPO discloses it to the Defence?

MR. HALLING: Our understanding of this question is that it depends on the disclosure threshold being met. We have no objection to there being adversarial argument if a *prima facie* threshold can be established. But the implications of Your Honour's question is that without any basis at all, the Defence could just say the word "entrapment" and be entitled to disclosure for purposes of making an adversarial argument, even in cases where there was no such evidence to this effect.

This is a kind of gateway argument of people just saying anything that they would like in order to receive disclosure. Next time it will be, "We want all evidence that the SPO have improperly influenced witnesses. We have no indication that they have. We just want all of the evidence." Or "We want all evidence that shows it's suggestive prosecution. We have no basis for concluding that, but we would like all of the information."

Adversarial hearings are entitled to have reasonable limits. The disclosure framework at this court is setting limits on

disclosure. It's not open-book disclosure. There needs to be a finding of material to the preparation of Defence when applying the Rule 102(3) procedure.

So we would argue that, of course, it needs to be assessed adversarially. It's just that the basic *prima facie* threshold that needs to be met in order to have that adversarial conversation at the level of disclosure still needs to be met.

JUDGE GAYNOR: I'll round off with one final point, and I want you to correct me if my understanding is incorrect.

But from your certification request, we do not see that you point to any particular sentence in the redacted version of item 191, which is attached as an *ex parte* annex to the impugned decision, nor do you point to any sentence in the summary of verifications which would cause such catastrophic damage to the SPO either in this investigation or insofar as it is relevant in any other investigation.

That to me is an important point. You haven't really identified with specificity even one single sentence.

I invite your observation.

MR. HALLING: You're correct, we didn't, and I can't write one into the application now. But I would say that this is again going towards perceiving this application as being about the sentences in the counterbalancing measures.

We have been arguing throughout that this causes massive disclosure consequences, potential ones, for our office, and that

investigative developments that could arise at any moment on any number of topics might become potentially disclosable because of this ruling. And this is the first time we've had an opportunity to seek leave to appeal on these principles, because this is the first time that it became not abstract, not hypothetical, and that additional disclosure of some kind was actually made.

So we would ask the Court to consider the full consequences of the impugned decision. This is not about a difference of two pages between the SPO's proposal and what the Trial Panel ordered. It's about the fundamental principles underlying the ruling and what it could mean in this case and in other cases.

JUDGE GAYNOR: Yes, thank you, Mr. Halling.

Thank you, Mr. President.

PRESIDING JUDGE SMITH: Judge Mettraux has some questions.

JUDGE METTRAUX: Thank you, Judge Smith.

My first series of questions will go probably to you, Mr. Halling, but it pertains to the first issue for which you seek leave to appeal. And I will read paragraph 2 of your submission. It is:

"Whether, as a matter of law, an assessment of materiality to the preparation of the Defence can be done in the abstract or whether it requires assessing materiality in relation to the facts and circumstances of the case."

So I want to explore that a little bit with both parties. But before I do that, I want to give a little bit of background to the

Defence, so that you can maybe address these questions in an effective manner.

During the *ex parte* proceedings that we have had with the SPO, the Panel reminded the SPO, repeatedly, of the need for a heightened level of fairness due to the fact that the Defence was not participating in the proceedings. The Panel also invited the SPO, repeatedly, to focus its submissions on what this Panel was to decide rather than on the prospective appeal which the SPO referred to repeatedly as a possibility.

In that context, the SPO was asked on no less than three occasions to identify in the forensic report any sentence or section in relation to which disclosure was being challenged. Now, the SPO disinclined to engage in such an exercise, and I take note of the fact that, Mr. Halling, you have just declined to do so again in response to Judge Gaynor's question.

Now, what I want to ask you is this first, Mr. Halling: Do you accept that under Rule 102(3) the onus of establishing the non-materiality of an item is upon you? And I mean the SPO. Do you accept that?

MR. HALLING: For Rule 102(3), we are obliged to challenge materiality when the item is selected. We disagree with the Trial Panel's conclusion that this means that materiality to the preparation of the Defence means something different at this court than the other courts whose authorities we rely upon.

JUDGE METTRAUX: Just stop there, Mr. Halling. I really want

you to be as focused as you can to my question.

Do you accept that you have the onus of establishing non-materiality? Don't go into the test of what materiality means. Do you accept it is for you, under Rule 102(3), to establish that the item being sought is not material. Do you accept that?

MR. HALLING: Yes, we have to substantiate our challenge.

JUDGE METTRAUX: Now, can you tell us where you say that you have met that onus in relation to the item, the disclosure of which you are now resisting? And, again, be as specific as you can, please.

MR. HALLING: Just to make sure I am understanding Your Honour's question. Is this where our showing that the item is not material, where is it?

JUDGE METTRAUX: Yes.

MR. HALLING: Yes. It would be in the first challenge that we made on materiality. It's F00316 where all of the arguments on materiality are set out. That is our submission. And it was sort of resolved in the impugned decision, so I think it's part of the same record where all of our materiality submissions are mentioned.

I believe that's also the same filing where we indicated at the *ex parte* level what parts of the report would cause particular concerns if disclosed.

JUDGE METTRAUX: Well, let me read from the record, then. This is *ex parte* hearing 21 October 2021. There is nothing confidential there. And this is at page 1284, and it is me asking this of

Mr. Whiting:

"The question is whether there is information in there," and that's the forensic report, "that you could safely, as Judge Gaynor mentioned, take out if that gives you that concern, but that anything that is taken out is both necessary and proportionate to what is being attempted here? And, in particular, that section of the report, which seems to be of potential interest and, therefore, of potential materiality to the Defence."

Now the answer of Mr. Whiting, and I will paraphrase it, is basically to say, number one, that the entire report should not be disclosed "but we have come today and offer to disclose the part that we think is pertinent to the Defence and would assist the Defence."

Now, I'll ask my question again. Where in this transcript, or anywhere else in your submission, do we find an explanation from you as to these sections, the disclosure of which you are resisting now? Not any abstract, theoretical submission about the entire document. The very part, the disclosure of which are now being subject to a decision, where do we find that you have met your onus?

MR. HALLING: In terms of the onus on the potential issues with the disclosing the parts of the report implicated in Your Honour's question, this would be F00389, paragraph 15. And this was actually the citation I was trying to recall earlier. That is a series of points about the report that we consider to be damaging to our investigation if it were disclosed.

JUDGE METTRAUX: Well, again -- I mean, I'm sorry, Mr. Halling.

But don't mix up things. We're asking not about consequences on your investigation. I'm asking here about materiality. Those are two different issues. Something can be material but have consequences on your investigation, that's a separate issue.

What I'm interested in at this stage, and I'll come to the other issue, is where do we find this onus? Where do we go to look that you have made the case, that you've carried your onus under 102(3), that the material is not or that the information is not material? Is that the same place?

MR. HALLING: Those two filings, 316, 389, as well as the Status Conference combined, includes our materiality submissions.

But implicit in all of Your Honour's questions is that the SPO has an exclusive burden to prove the non-materiality of the information. And in our assessment, and maybe this is part of the disagreement that's causing the appellate application, is, in our submission, the Defence still has a burden to establish materiality.

JUDGE METTRAUX: I will come to the Defence.

MR. HALLING: Yes.

JUDGE METTRAUX: Worry not. But before I'll go to them, Mr. Halling, maybe I'll preface my question to the Defence with the same question to you. How do you expect the Defence to establish materiality in relation to items that they haven't seen? Do they have to guess or is there any other way for them to establish that?

MR. HALLING: They don't have to guess.

The way these entrapment cases at the ECHR seem to be unfolding

is that you have clear indications of an undercover operation and then the applicant challenges and wants disclosure and to present a defence, and so on, in relation to it. There is some indicator in the case.

By the way, an indicator that the accused should have, because they would be ones who were in contact and would be potentially influenced, and there is no such indication here.

So in terms of how can the Defence raise this defence, our answer to that would be: If they could make a *prima facie* case for disclosure, then this disclosure to present the defence could arise. But because it fails at that very initial hurdle, no disclosure should be ordered.

JUDGE METTRAUX: Back to my question, Mr. Halling. How do you expect the Defence to establish materiality in relation to this particular material, the disclosure of which you resist, since they haven't seen it? How?

MR. HALLING: They can present their defence. They can question Prosecution witnesses. And should any information arise which justifies disclosure in relation to potential entrapment, then it would be disclosed. But if there is no information anywhere, how could it be material to the preparation of the Defence to prove a negative based on nothing?

That would be my answer to your question.

JUDGE METTRAUX: Does the Defence want to comment on that? I'll go into other questions, Mr. Rees, in a moment, but do you want to

react on the question of materiality of this material; and, in particular, I'm interested to know whether, in your view, you are in a position to make a determination and effective submissions on that issue with the information that you have.

MR. REES: Well, of course, we're very conscious, and we've made submissions previously, about our concern regarding the *ex parte* hearings taking place. We are very alive, of course, to the use of *ex parte* hearings in the course of the rules, but we have, on previous occasions, referred to European Court authorities that refer to the handicaps that are placed upon the Defence in such circumstances.

I'm very grateful to the further information from Your Honour as to the degree to which the SPO were asked not simply to make objections in the abstract during the course of the *ex parte* hearing but to press them to address the specific facts and circumstances of this case and the material specifically.

We had suspected the same, because we can see that from the decision of the Trial Panel, which makes it perfectly clear, contrary to the proposed issue, as it's called, in paragraph 2(1) of the request, that the decision of the Trial Panel was, of course, a decision assessing the operation of Rules 102(3), 102, 103, and 108, very much with the facts and circumstances of this case in mind and not simply in the abstract.

The only other information that we have to address the Panel on materiality, of course, comes from the decision itself, a decision

which contains the finding that there is material in the SPO's possession that arguably suggests that the SPO cannot exclude the possibility of entrapment. That's a finding on the evidence that has been provided to the Trial Panel in an *ex parte* hearing, which the Defence do not have, and it's a finding which does not appear to be challenged. It's not challenged in the request by the SPO and nor is it challenged orally by Mr. Halling today.

That is a further indication, it seems to us, that there is material that is material to the preparation of the Defence, and it should be ordered for disclosure -- it should be disclosed in accordance with the decision on the Prosecution challenges to disclosure of items in the updated Rule 102(3) notice.

JUDGE METTRAUX: Mr. Cadman.

MR. CADMAN: Nothing really further to add. Just to reinforce the last point that Mr. Rees has made. The Trial Panel has already determined that there is information that could support such a defence.

JUDGE METTRAUX: Mr. Halling, I'm afraid I have more questions for you.

MR. HALLING: As many as you like.

JUDGE METTRAUX: Mr. Rees has been, maybe unkindly, suggesting that your submissions were a bit light on authorities for some of its propositions, so I want to pick your legal brain on some of these issues to tell us whether you can be of assistance here.

But are you aware of any precedent where an order for disclosure

was subject to successful leave to appeal? Are you aware of that, of any such precedent?

MR. HALLING: I cannot think of one off hand. There are, obviously -- oh, actually, the Banda and Jerbo OA 2 Judgement, if I remember correctly, was a Prosecution appeal granted with leave. I am not positive, Your Honour. But to mind, just thinking of examples where most appellate litigation is, indeed, at the level of the Defence seeking leave to appeal a decision denying disclosure. But there is no reason why the test can't be met when the Prosecution seeks leave to appeal a disclosure decision, and I believe that is an example where it happened.

JUDGE METTRAUX: I'm grateful, Mr. Halling. We'll get to that one.

There's something else that I want to explore with you. It's the suggestion that is made in several parts of your submissions, the written ones and the oral ones this morning, that the Panel, in deciding whether to grant leave to appeal, should consider what I can call, as a shorthand, extraneous considerations; other proceedings, the mandate of the SPO in general, or future cases.

Now, again, the same question. Do you have any authority for this proposition, that the determination on whether leave to appeal should be granted, should take into account issues that are extraneous to the proceedings in this case? Do you have any precedent that you can think of?

MR. HALLING: Your Honours, to that one I would say that the

very first leave to appeal decision at the ICC is authority for this proposition via -- this one I have the number. It would be ICC-02-04-01-05 and then 20, and then USEXP. And it's since been reclassified. That's 19 August 2005.

And at paragraph 54, it doesn't talk about how the impact on future proceedings can be the dispositive consideration for granting leave to appeal, but it does say that it can be considered as an argument and it provides further authorities.

So I would say this is actually a relatively long-standing proposition. Even the Gucati Defence's quoted authority said it doesn't per se warrant certification.

JUDGE METTRAUX: And I'm grateful for your candour in this matter, Mr. Halling. Can I take it that you accept the standard, therefore, that the test is to be met in relation to the case in question while, at the same time, extraneous consideration can weigh in one way or the other?

Is that a correct summary of your position?

MR. HALLING: Correct, Your Honour.

JUDGE METTRAUX: And I want to ask you as well whether you know of any precedent where leave to appeal was granted in relation to an *ex parte* process where, effectively, the underlying basis on which a decision was rendered was taken, for the most part, in an *ex parte* fashion? Do you know of any such precedent?

MR. HALLING: Your Honour, this happens a lot, actually. Whenever you have situations like an appeal against a decision on an

arrest warrant application, like the DRC-08 judgement at the ICC as an example, or a jurisdictional question that may predate a defence even existing, all of these would be potentially *ex parte*.

There are some appeals that might be confidential in the records of these institutions where you have an *ex parte* appeal coming up, but these are just some examples in the public record of how you could have an *ex parte* appeal.

I guess for the jurisdictional one, it would be an appeal as of right. But for other decisions of this kind, you might potentially be able to have a leave to appeal.

JUDGE METTRAUX: The reason I ask, Mr. Halling, is simply to figure out how an appeal in this case would unfold if leave was granted. And in particular, may I take it that you would resist the transcript of *ex parte* hearings being made available to the Defence for that purpose; correct?

MR. HALLING: Your Honour, the question of whether the *ex parte* hearing transcript can go to the Defence or not, we would say, is an issue that is independent of the leave to appeal application. If Your Honour was interested in considering that at any point, we would ask for an opportunity to propose redactions to that transcript. But that would be an issue that we can turn to, should Your Honours be so inclined.

JUDGE METTRAUX: Simply to make, perhaps, the obvious point. But you agree that if leave were to be granted, of course, the Defence would have to have an effective way to participate in that

appeal; correct?

MR. HALLING: Yes. If Your Honours think that the *ex parte* hearing transcript needs to be provided with redactions in order for Defence to argue these matters on appeal, we can propose redactions on whatever timetable the Court requires.

JUDGE METTRAUX: Now, I've been put on the spot by Judge Gaynor to ask you a few questions on the ECHR, and I will come to that in a second.

But simply as a preliminary question: Do I understand your submission correctly that you are inviting the Panel, at this stage, effectively to determine that the claim of entrapment advanced by the Defence is "fanciful," your words, and that therefore disclosure of the material should be refused?

Do I understand that premise correctly?

MR. HALLING: Yes. And I would further say we know that the Trial Panel does not feel the same way from the impugned decision. And so today, our application, we aren't challenging the correctness or not of Your Honours' determination. Just that that determination itself deserves an interlocutory appeal.

JUDGE METTRAUX: But let's assume for a second that you are correct. Back to a question Judge Gaynor asked you. What evidence would you say the Panel should consider to say that the claim of entrapment is fanciful?

MR. HALLING: For that, I would give a variation of my answer to Judge Gaynor. It would be all of the materials before the

Trial Panel.

Now, in this regard, we did not seek leave to appeal the determinations that this kind of information needed to be noticed and provided to the Trial Panel for a determination on disclosure. We're only seeking leave to appeal now about providing that information to the Defence. So the Trial Panel should always be in a position, even on our understanding, to be able to determine whether or not an entrapment allegation is wholly improbable on the basis of all relevant materials to the case.

JUDGE METTRAUX: So that would be a finding we would be invited to make before the Defence case, of course.

And may I perhaps ask you this: But in its pre-trial brief, the Defence listed, I think, 13 indications or circumstances which they considered to be relevant to that threshold. You are, therefore, suggesting that these items are either insufficient or that they've been disproven so that there is, in fact, no standard of wholly improbable that has been met.

That's the practical consequence of your submission; correct?

MR. HALLING: Correct, Your Honour. Even as a whole, the -- I mean, we've talked at points about sort of parts of these 13 points. If you like, I can go through them one by one. But even combined, we would say they don't meet the wholly improbable threshold for disclosure.

[Trial Panel confers]

PRESIDING JUDGE SMITH: Just so everybody knows, we will run

over the normal break time to try to finish up the questions, and then we'll take a break.

JUDGE METTRAUX: I just want to give you an opportunity also to comment quickly on one thing, Mr. Halling, and it's about the suggestion that you've agreed to, that we are basically inviting to make a finding at this stage about the standard of entrapment. And it's from a case Bannikova versus Russia. It's from a judgement of 4 November 2010. And it's paragraphs 57 and 58 that are of particular interest here, and it says the following:

"Whatever form of procedure the domestic court follows, the Court requires it to be adversarial, thorough, comprehensive, and conclusive on the issue of entrapment."

And then at paragraph 58, it adds:

"As regards the principle of adversarial proceedings and equality of arms, the case has found these guarantees to be indispensable in the determination of an agent provocateur claim, particularly in the context of non-disclosure of information by the investigative authorities."

Now, do you accept that standard?

MR. HALLING: Certainly, Your Honour. It would go back to my submissions to Judge Gaynor, that adversarial is something that is not absolute and that there are limits that can be imposed by, amongst other things, the KSC statutory scheme.

By the way, the Defence has had a full adversarial opportunity throughout this disclosure litigation to make its points, to argue

it. Even if leave to appeal was granted, they would have a full opportunity to make submissions. And as Your Honour foreshadowed, additional information can be given to them as needed to make those submissions.

JUDGE METTRAUX: But the part of adversarial, with respect, Mr. Halling, you seem to be missing here, is disclosure. It's not just adversarial in the sense of being heard. Isn't adversarial also about having information that puts you in a position, A, to make effective submission; and, B, as the case may be, to present your case?

MR. HALLING: Yes. But adversarial alone can't be enough to justify disclosure. If the only justification for disclosure was that it is necessary for an adversarial process without anymore, then Rule 102(3) wouldn't be written the way that it is. It wouldn't have thresholds and requirements that needed to be met.

It is not enough just to say "We want it to fight the Prosecution." There needs to be something beyond that. And that's the part that we would say is missing, and it's the part, we would say, the Trial Panel didn't consider in the impugned decision.

JUDGE METTRAUX: Let me give you another, and that's going to be my last question for you.

It's, if you want a summarised version of that, Mr. Halling, there's a guide to Article 6, Right To Fair Trial, (criminal limb), usefully provided by the ECHR, and that's paragraph 250 and 251, and it summarises the ECHR jurisprudence on the matter.

Paragraph 250, it says:

"In the application of the substantive and procedural test of entrapment, the Court must first satisfy itself that the situation under examination falls *prima facie* within the category of an entrapment case."

And then, move on to paragraph 251:

"However, if the Court's finding under the substantive test are inconclusive owing to a lack of information in the file, the lack of disclosure or contradictions in the Parties' interpretation of events, or if the Court finds on the basis of the substantive test that an application was subjected to incitement, it will be necessary for the Court to proceed, as a second step, with a procedural test of incitement."

I'll spare you the rest of it. But, again, isn't disclosure an integral part in this particular context of entrapment of the process of adversariality? Isn't that the case?

MR. HALLING: It is the case. But I would feel like I need to point out that Your Honours didn't actually do the assessment you just read in the impugned decision. Had there been a finding to a *prima facie* disclosure or consideration standard that it was impossible to determine whether it was wholly improbable or not and disclosure was justified on that basis, that would be a different ruling than the one that Your Honours made.

The one in the impugned decision is that this is all premature to be considered at this time. And so, again, it's not a matter --

Your Honours have made the ruling, so, I mean, I'm not going to convince you to the contrary.

But all I would say is that that is an important question. That's an important question worthy of an interlocutory appellate resolution, to what extent these things need to be considered at the disclosure level.

JUDGE METTRAUX: So we are, and I will summarise it here, we are to decide, according to you, whether it's wholly improbable, this defence, without you having disclosed material that could very much meet that threshold? In other words, you're asking us not to order the disclosure of what could put the Defence in a position to meet that threshold; correct?

MR. HALLING: I would only agree with part of that, Your Honour, if I may. It is disclosed to the Trial Panel. The Trial Panel has all of the information necessary to decide whether or not it would be wholly improbable that entrapment occurred here. That information is provided.

The report, all of these things, they are provided to the Trial Panel. So the Defence isn't able to make that determination. That's kind of the nature of disclosure litigation, it's information they don't currently have. But the Trial Panel had all the information that the SPO had in order to make this determination.

JUDGE METTRAUX: Thank you.

PRESIDING JUDGE SMITH: Judge Barthe.

JUDGE BARTHE: Thank you, Mr. President.

My hopefully brief questions, two brief questions, are also for the SPO.

Mr. Halling, could you please explain, maybe, once again, and for the last time today, how the issues raised in your certification request affect the fair and expeditious conduct of these proceedings and/or the outcome of this trial as opposed to other proceedings, investigations, or current or future trials, especially against the background that you argue that the documents sought by the Defence were not material to their case?

MR. HALLING: Thank you, Your Honour.

The answer to Your Honour's question would fall in paragraphs 21 to 23 of our application. We talk about both present and future effects in this case. It is discussed that the immediate disclosure that is ordered compromises the SPO's investigations. The fact that it keeps open a disclosure path means that potential future disclosure litigation would be caused whenever investigative developments in unrelated cases prompt disclosure, and that these issues combined, the present and future effects of the decision, significantly affect the fair and expeditious conduct of these proceedings.

So, indeed, the fact that it's not material to the preparation of the Defence, in our assessment, doesn't affect the outcome of the trial. And that is why, in our application, we didn't argue that limb of the test. It's only at the level of fairness and expeditiousness.

JUDGE BARTHE: Thank you, Mr. Halling.

My second question would be where, in the jurisprudence of the European Court of Human Rights, referred to by the Appeals Panel in its 29 July 2021 decision in footnote 115, can the Panel find support for your submission that disclosure in entrapment cases presupposes that the entrapment allegations are not wholly improbable or that, and I refer to your request in para 14, I quote, "the accused shall be required to make some *prima facie* showing of how entrapment could have occurred before broad disclosure is ordered."

In Ramanauskas, if I may say so, the European Court of Human Rights merely held that, and I quote, "it falls to the prosecution to prove," to prove, "that there was no incitement, provided that the defendant's allegations are not wholly improbable."

And further, the European Court of Human Rights made clear that, and I quote, "... in the absence of any such proof, it is the task of the judicial authorities to examine" to examine "the facts of the case and to take the necessary steps to uncover the truth in order to determine whether there was any incitement."

This is Ramanauskas versus Lithuania judgement, 5 February 2008, in paragraph 70.

My question is: Do you agree, Mr. Halling, that the letter, the letter is exactly what the Trial Panel is trying to do here?

MR. HALLING: Ramanauskas is, indeed, not a disclosure case. And, truth be told, this often is the case with European Court of Human Rights cases because they are from final judgements, and so the

disclosure issue is tied into whatever the ultimate resolution of the case is.

But the fact that the Appeals Panel cited to that in a disclosure ruling we draw meaning from, and the fact that the ICTY and ICC and other tribunals applying identical phrasing, "material to the preparation of the Defence," are interpreting it in the same way is what justifies our submissions on this point.

Now, of course, the Trial Panel used different authority in the impugned decision. But at the level of whether certification for appeal should be granted, we didn't argue in the application that we disagreed with Your Honours' legal interpretation. We just argued that this difference is important enough to justify an interlocutory appeal.

JUDGE BARTHE: Thank you, Mr. Halling. No further questions.

PRESIDING JUDGE SMITH: All right. We will take our regular break. Please be back here at 20 minutes till 12.00. And so we are adjourned until that time.

--- Recess taken at 11.11 a.m.

--- On resuming at 11.40 a.m.

PRESIDING JUDGE SMITH: So we now move on to the next topic.

The Panel asks the Defence to propose some estimates, to the extent that they are willing to share, as to the following: When they can file their respective motions to dismiss any or all charges; when they can file their list of witnesses and proposed exhibits, if the Panel finds that there is a case to answer; and when the Defence

Preparation Conference should be held.

The Defence was also invited to provide any details, as appropriate, as to whether any material changes are expected to the proposed witness lists and whether the Defence still intended to call the accused as witnesses.

Before I give the floor to the Defence, the Panel wants to clarify a matter. Pursuant to Rule 129, the SPO case is closed when there are no more witnesses to be called and no more evidentiary material to be presented as a part of the case of the Specialist Prosecutor.

The Panel notes that the SPO has no more witnesses to call. The Panel also recalls that on November 5, it issued an oral order on the admissibility of exhibits through Witness 4841. The Panel still needs to issue the written reasons on that, together with the classification of a number of exhibits.

What is also pending is the admissibility of the lesser redacted version of Batch 2, disclosed by the SPO on 5 November. The Panel will hear submissions on that today.

Once the Panel issues the written reasons just mentioned and rules on the classification and admissibility of Batch 2, all evidentiary matters forming part of the SPO case are finished. The Panel intends to issue a consolidated decision in this regard tomorrow.

The pending Rule 102(3) matters refer to the preparation of the Defence and not the SPO's case, so the Defence should keep this

timeline in mind when making their submissions.

So, Mr. Rees, you have the floor.

MR. REES: Thank you, Your Honour.

Can I just make a couple of observations. Very clear route forward set out by the Trial Panel. And we are conscious that there are ongoing disclosure issues, not least the application for certification that's been made this morning in relation to disclosure. And potential further cross-examination of three Crown witnesses, SPO witnesses, having been reserved pending further disclosure being made. And observing that, as part of the decision of the Trial Panel, F00413, on the recent Prosecution challenges to disclosure of items in the updated Rule 102(3) notice, at paragraph 53, the Trial Panel held that the Defence must be permitted to receive, as part of the disclosure process, relevant and disclosable information that could assist the entrapment allegations, to conduct effective investigations thereon, and to elicit evidence from those witnesses capable of testifying thereto.

To the extent that the SPO, in due course, will seek to suggest that they have met such a burden of proof as in accordance with Ramanauskas they are required to meet, we say that the SPO's case should involve, before closure, not only the opportunity to complete cross-examination of those three SPO witnesses in light of any further disclosure but also that the SPO ought to call, if only to tender as a witness as part of their case, a person who is able, capable of testifying to the investigations that have taken place

dealing with the entrapment allegations.

In that circumstance, we find it difficult to set out clear proposals in terms of actual dates for the matters set out at paragraph 4(b) and (c). But we do wish to be of assistance, so I will set out, as far as I can at this stage, how we envisage the next steps to be, even if it will fall to the Trial Panel to make the determination as to where in timetable those next steps will fit, as it were.

We do intend to file a motion to dismiss. We intend to file a motion to dismiss in relation to Counts 1, 2, 3, 4, and 5. We are conscious that the rules provide for the filing of any motion to dismiss within ten days from the close of the SPO case. We remain of the position that it's important for all parties, not least the accused, that the evidentiary proceedings in this matter complete by 17 December, and we are, therefore, willing to consider a curtailed period, if that is necessary, to allow that to happen. But we do, nevertheless, ask for some time to prepare what will be a detailed motion to dismiss. And a curtailed period, for example, to Wednesday, the 17th, may assist.

I'm conscious in suggesting that that we had previously been -- had considered whether the dates of the 15th and 16th, which are currently diarised for these proceedings, would be two days upon which the SPO would be able to make available any of the further witnesses for which cross-examination is to be concluded. And, indeed, we would say at least a witness capable of testifying to the

investigation of the process by which the materials were delivered to the KLA WVA would be made available to complete the SPO's case.

We are presently not sure where any proposed further cross-examination is intended to fall given the amended order last week. Obviously, there is, at present, at least, a hiatus on disclosure, but there is also the further inquiries for the Crown to make as part of the disclosure exercise for which they are to report back on 12 November, and the oral order in relation to requests for any further cross-examination of SPO witnesses was to provide some five days notice from receipt of all outstanding disclosure.

We are conscious that, thereafter, the rules provide for a provision of a file of lists of witnesses and proposed exhibits with a Defence Preparation Conference to follow seven days thereafter. Again, to assist the Court, it is our intention certainly to revisit our proposed witness lists with a view to ensuring that they are as short as possible, but it is difficult for us at this stage to give any further indication until we know the outcome of any motions to dismiss on the scope of the charges and, indeed, outstanding disclosure.

On the part of Mr. Gucati, it remains the intention, at this stage, at least provisionally, that Mr. Gucati will be called to give evidence. But I make no bones about it. I am of the view that it is inappropriate to require that decision from Mr. Gucati, final decision on it, until he is aware of the scope of any case to answer and full disclosure has been made to him so that he can take that

decision on proper advice with full knowledge of all matters that are relevant to his decision.

PRESIDING JUDGE SMITH: And we want to stress that we are not asking for a firm commitment from him at this time. We're just asking for an indication.

MR. REES: I'm grateful. And I hope I've given that clear indication.

PRESIDING JUDGE SMITH: You have.

MR. REES: So I suppose the best that I can do to assist in terms of time-tabling is that we would wish to be in a position to commence the Defence case on 2 December, which is the first hearing date in December, with only the dates of the 15th and 16th in between now and that date.

We will intend to make an opening statement. But, again, we'll carefully address that to make sure that we are as short as possible and appropriate in the circumstances.

How we reach the position from where we are today to 2 December, we find it difficult to spell out, because it seems to us that there are a number of matters of uncertainty that we cannot assist the Court with.

PRESIDING JUDGE SMITH: Are you suggesting that you want to -- that you were thinking of calling witnesses on December 2? Or -- we haven't discussed the 119 Defence Preparation Conference. That would have to happen before that time, obviously.

MR. REES: It would. So clearly in order to assist, we are

attempting to give as much assistance today as we can to the overall scope of the Defence case when we reach it. That obviously comes with the qualification of our outstanding disclosure issues, it comes with the qualification that there will be motions to dismiss five of the six charges which, whether it's successful in whole or in part, may change the scope of the Defence case. But we are attempting to be as helpful as we can so that the Trial Panel can properly plan forward.

If that's right, it does seem to us that a formal Defence Preparation Conference can be done at relatively short notice, and it can be relatively short. But I'm conscious that, again, because there are a number of matters of uncertainty, and there may be issues that the Prosecution wish to raise that they may have a different view as to a Defence Preparation Conference and how short it needs to be, for example. In order to try and finish the evidentiary proceedings by 17 December, we would propose having 2 December as that start date for, if necessary, a short Defence Preparation Conference, to move then straight into Defence opening statement. And then thereafter, into the calling of evidence for the Defence.

I hope that assists.

PRESIDING JUDGE SMITH: It does assist. And I appreciate the fact that you're willing to look at shortened timelines, and I think that's important given the circumstances, and we will do our best. And we will try to make a decision. Obviously, we have some decisions to make by today and possibly tomorrow, and we will keep

you advised.

MR. REES: We're certainly willing to look at shorter timetables, but not too short please, Your Honour.

PRESIDING JUDGE SMITH: [Microphone not activated].

Mr. Cadman.

MR. CADMAN: Your Honour, I certainly wouldn't put forward any different position as has been put forward by Mr. Rees. It's a matter that we have discussed and taken instructions. Certainly, I have taken instructions from Mr. Haradinaj who is obviously very keen for the matters to proceed as expeditiously as possible from here on. But as Mr. Rees has set out, there are still some matters that are outside of our control in terms of setting a fixed timetable.

Having discussed the matter with Mr. Rees and with Mr. Haradinaj, we certainly want to assist as far as we can. I certainly agree with the proposed timetable set by Mr. Rees for the filing of a motion to dismiss, and we certainly intend to fail a motion to dismiss, and we will endeavour to do it by that time, the 17th.

We are presently considering whether we will need to make an application for an extension, as I believe it's a 6.000 word limit. And based on the case presented so far, it will be a challenge to put it within 6.000 words, but we'll certainly do our best. It is certainly our intention, at this stage, provisionally also, to call Mr. Haradinaj to give evidence. But again, much of that depends on what happens from here on.

And certainly the current witness list, subject to the ruling on which witnesses we are going to be entitled to call, will also depend upon the outcome of certain matters being decided over the coming days and weeks, but certainly we will assist as much as we can.

What we have always set out, that there is a joint Defence list, and we will not -- and certainly we will not be replicating witnesses. To the extent that one or other of us may call that witness to serve the interest of both defendants, we will endeavour to assist the Court in that way. But certainly there are a number of matters that are outstanding, and it's simply impossible for us to give any clearer guidance than has already been given.

And certainly, as Mr. Rees has set out, there are still matters that need to be determined before the Prosecution case is formally closed. I'm afraid I'm not really able to give any more than that at this stage.

PRESIDING JUDGE SMITH: We appreciate your assistance, and we will put together an order that tries to carry all that through.

We will now address the SPO's new request for admission.

On 5 November 2021, the Panel invited the SPO to disclose an unredacted or lesser redacted version of P104 MFI, also known as Batch 2, and resubmit that material for admission.

On the same day, the SPO disclosed a lesser redacted version of six pages of P104 and requested their admission, together with English translations. Given that the same six pages also appear in Batches 1 and 4, the SPO also disclosed the corresponding pages from

these batches with identical redactions.

The SPO requests admission of these items for the same reasons set out in relation to P104 MFI. The SPO requests that the newly disclosed pages remain confidential.

I believe I've correctly stated that position of the SPO?

MS. BOLICI: Correct, Your Honour, thank you.

PRESIDING JUDGE SMITH: All right. And does the Defence object to this request?

Mr. Rees.

MR. REES: We do. There is no bar table motion in relation to these documents. They haven't been produced by a witness either.

PRESIDING JUDGE SMITH: [Microphone not activated].

MR. REES: There is no bar table motion in relation to these documents, nor are these documents produced by a witness. We object on that basis.

PRESIDING JUDGE SMITH: Mr. Cadman.

MR. CADMAN: We take the same position, Your Honour.

PRESIDING JUDGE SMITH: Does the SPO wish to respond?

MS. BOLICI: Yes, Your Honour. If it may clarify the matter, this request relates to a request of admission through the bar table for the same reasons highlighted at the last hearing, meaning that the additional six pages that have been disclosed have been disclosed pursuant to an order of the Trial Panel. The authenticity, thereof, has been established through the testimony of Witness W04841, who also highlighted all matters relevant to the authenticity of Batches

1 and 4, which contains the corresponding six pages to the pages of Batch 2.

As such, both matters of authenticity and relevance have been established; authenticity through the testimony of W04841, and relevance considering these are confidential materials, which the SPO alleges have been disclosed without authorisation by the accused.

[Trial Panel confers]

PRESIDING JUDGE SMITH: We will need to have new numbers attached to the additional requests. We only have P104 MFI right now.

[Trial Panel and Court Officer confer]

PRESIDING JUDGE SMITH: We will consider that request for admission and rule on it with our consolidated decision tomorrow.

MR. REES: Your Honour, can I just raise one additional matter.

Again, we have been trying to assist with time-tabling by, *inter alia*, giving an indication that, at present, we will be filing a motion to dismiss in relation to Counts 1 to 5. Even though there are ongoing disclosure issues, can I say that that indication is -- must be without prejudice to any -- to the right to file any motion that might arise once disclosure is complete. So, for example, a motion to exclude evidence under Rule 138(2) where evidence has been obtained by means of a violation of the law or the rules or standards of international human rights and any motion in relation to failures of disclosure, again leading to an unfair trial.

In short, we're happy to proceed even though there are

outstanding disclosure issues provided that we are not estopped, as it were, from -- at a later stage, once we receive full disclosure, making any motion, for example, that Count 6 as well should be dismissed on the basis that evidence in relation to these matters should be declared inadmissible pursuant to the entrapment allegations, for example.

PRESIDING JUDGE SMITH: You won't be precluded from making a motion at any time because of the fact that you've given us a timeline and we adopt it. So you may feel free to make those motions when they come up.

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

PRESIDING JUDGE SMITH: Anything else from anybody before we proceed with the statements of the accused?

Yes, Mr. Cadman.

MR. CADMAN: Just to give Your Honours an update on the additional expert report.

We're very grateful to Court Services for providing us with as many of the transcripts as possible so the expert could consider them. He has considered them over the weekend. He's doing his utmost to get the report drafted by tomorrow. I will obviously check in with him later today and will update the Panel on whether we are still able to comply with the close of tomorrow, but certainly we anticipate that it will be filed by the end of tomorrow, not by 4.00 p.m. but by the end of the day. But if there is any delay, I will inform the Panel and the parties.

PRESIDING JUDGE SMITH: Please do that. Thank you.

MS. BOLICI: [Microphone not activated].

PRESIDING JUDGE SMITH: Say again?

MS. BOLICI: Yes, if I may just intervene a moment.

In relation to the Gucati Defence's suggestion that the Prosecution brings additional witnesses as a consequence of any Rule 102(3) disclosure, I can confirm that the Prosecution does not intend to bring further witnesses, regardless of the results of the pending matters under Rule 102(3).

PRESIDING JUDGE SMITH: Thank you. You do understand that they may call some witnesses for further cross-examination though?

MS. BOLICI: Absolutely I understand. They were suggesting that the Prosecution calls additional witnesses. It's not our intention to call additional witnesses.

PRESIDING JUDGE SMITH: Thank you for that clarification.

MS. BOLICI: Thank you.

PRESIDING JUDGE SMITH: Mr. Rees, is your client ready to proceed with his statement?

MR. REES: Yes, Your Honour.

PRESIDING JUDGE SMITH: And, Mr. Cadman, is your client?

So we will begin with the unsworn statements of the accused.

Each of you will be given, Mr. Gucati and Mr. Haradinaj, each of you will be given 15 minutes to speak. These statements should focus on and be limited to matters that are relevant to these proceedings. So I ask the accused to refrain from any statement of a political

nature and to focus on issues that have a bearing on this case.

I also ask the accused to speak at a slow pace so the interpreters can translate your statements for us.

Mr. Gucati, we'll begin with you. The floor is yours.

THE ACCUSED GUCATI: [Interpretation] Thank you.

Dear participants, Representative of the Embassy of Kosovo, Yulka Geci, and members of the Trial Panel, I want to share my personal history with you.

I was born in a freedom-loving place of Kosovo, Drenica, in the village of Morine, Skenderaj municipality, a village that lost many people during the war. In 1997 and 1998, together with my father, we joined the ranks of the KLA to protect the basic human rights, such as the right to freedom and free and life and dignity in our own homes.

In 1999, during the NATO bombing, I was wounded by the Serbian forces, military and paramilitary and police forces, and as a result of the injuries sustained I am an invalid and unable to walk as all others do. As a peoples of the Balkans, we did not provoke Serbia and we did not occupy Serbia; but on the contrary, Serbia occupied us.

We are here for a year being held in custody in an unjust way. Just because we --

PRESIDING JUDGE SMITH: [Previous translation continues] ...

Mr. Gucati, I asked you not to go into details that we're not dealing with in this trial specifically. I've given you a little bit

of latitude, but I want you to avoid the rest of that conversation which I would characterise as political in nature. So just proceed with your discussion of this trial.

MR. REES: Your Honour, we submit, as we have done, that, of course, to use the shorthand, public interest is very much a part of this trial as a relevant issue. Mr. Gucati does not have much further to go with his statement, so I would ask for the Trial Panel to bear with him while he finishes it. He will be much shorter than the 15 minutes the Trial Panel has provided for.

PRESIDING JUDGE SMITH: Go ahead.

MR. REES: Thank you.

PRESIDING JUDGE SMITH: Sit down.

Go ahead, Mr. Gucati. But please bear in mind what I just said.

THE ACCUSED GUCATI: [Interpretation] Thank you.

We just used our right to freedom of speech and the rights that we won with a lot of sacrifice. Just during March, April, May, and June 1999, our people suffered more than 450 massacres committed by the Serbs.

During the last war in Kosovo, more than 1.400 people were killed, 20.000 women were raped, and many elderly who were unable to leave their homes were killed. To this date, we do not know the fate of 1.600 people. Not to mention the material damage that our nation, my nation suffered, and that was caused by the Serbian forces.

Therefore, it is my legitimate right to protect the legitimate rights of my nation, of the Kosovo Liberation Army, and of the

Republic of Kosovo, my state. And these values are all human. It is my duty to defend them, to defend the right to freedom of my people, the right to a free and rich life, just as the members of all other nations enjoy.

Thank you for your time and thank you for hearing me.

PRESIDING JUDGE SMITH: Thank you, Mr. Gucati.

Mr. Haradinaj, the floor is yours.

THE ACCUSED HARADINAJ: [Interpretation] Thank you very much, Your Honours.

Dear Panel members, dear representatives of my state that are listening to me today, I am forwarding these short remarks as a proud citizen of the Republic of Kosovo. I am being subject to a process which is selective and unfair. I wish to appeal to the judges of my country to give an end to this cause.

I have been treated with full humiliation by the Prosecution office, and I have to say that over the last weeks and months they have shown publicly that our hugest intimidation has, as a matter of fact, been fulfilled. So the SPO does not deserve for me to be present in this court of law. However, here I am, based on the principle of telling the truth, and there should be no hesitation to the truth at any time. Not only that, but we need to tell the truth and we need to oppose those that humiliate my country.

I decided to come here to tell the truth for the public interest, and I just wish to tell everyone that the behaviour of this Prosecution office does not only show the attitude of this

Prosecution office, but I am being kept in detention for 14 months while the SPO does not have a single evidence to substantiate the plea against me.

So not only that, but the way in how the Prosecution office wants to keep everything closed is also very embarrassing. This, in itself, is a testimony that I was right in what I was saying about the SPO and the KLA WVA.

I have always been on the side of justice, and I will never back anyone that has committed a crime during the Milosevic time, and I'm confident of the fact that those people have to be kept responsible, if they have committed a crime.

At the same time, I wish to make sure that the process itself is fair, is transparent, is not corrupt by politics and, above all, it should not be addressed towards the ones that have no responsibility in that matter. So it's the same persons that we are hearing in this court of law, is those persons that have blood in their hands, is those persons that the Prosecution office wishes to protect from the public in order for it to hide itself.

The Prosecutor Jack Smith told you, Dear Panel, that this has nothing to do with the KLA. So this is a lie. So we are talking about the Kosovo Albanians, and the Prosecution office is telling us that no case has been launched against the Serbians that caused the death of 11.000 Kosovar nationals.

So we have been suffering for many years, and my people says something that starts on a bad footing cannot end otherwise but on a

bad footing. Therefore, from the initiative for establishing these Chambers, based on slander, on the so-called organ trafficking, and Dick Marty, that was backed by Belgrade's government, a government that is composed of authors and perpetrators of the crimes of Milosevic, a series of crimes that have actually been identified by the countries that you come from. And he has been identified as the butcher of the Balkans.

So it's the same persons. So those have changed only the skin, but it's the same persons that are heading these cases. I have to say that they cannot hide the hatred of any other state other than my state, and that has been something that has been testified from generations. I think that there is no clear fact to testimony to the fact that there have been five wars of genocide and wars that have been staged all over the Balkans because of this nation.

It is exactly the same people today that have been accommodated in the government of Serbia. It's the same people that have provoked, have caused, and have led the war back then, and it's this same Prosecution office that is thanking these people for contributing to the proceedings of this Court.

I just wish to tell you that during the time that I was kept here, I have had ample time and I have made a comparison between the current Prosecutors and the Yugoslavia prisons back in 1980s. So that is something that we have suffered as a family. So starting with my father, my eldest brother, and even for me personally, before I was 18 years of age, I saw my other family members, including my

sisters and including my other siblings that were minors, that had to suffer of the Serbian authority.

So we were imprisoned, all of us, from the beginning to the end. So we were prohibited to attend education. So we were sent to torture premises, we were interned to prisons, and in documents that you have shown us it was clear that you have data about these people from the 1980s. So, therefore, it's clear, it's crystal clear on what the aim of the Prosecution office is.

So the prosecutors of that time were pushed by the Belgrade power authority, and they were given other ranks. So these are chambers and these -- the Prosecution office has been promoted by Dick Marty, and that was approved by the European Parliament.

And so on parallel, I have to say that the same was true in the old days. This Prosecution office has tried as well --

PRESIDING JUDGE SMITH: Mr. Haradinaj.

THE ACCUSED HARADINAJ: [Interpretation] -- to ensure sentences without making sure that light is put to the crimes that were committed by the Serbs.

PRESIDING JUDGE SMITH: Mr. Haradinaj.

THE ACCUSED HARADINAJ: [Interpretation] Your Honours, I believe that --

PRESIDING JUDGE SMITH: [Microphone not activated].

THE ACCUSED HARADINAJ: [Interpretation] That's what I'm talking about.

PRESIDING JUDGE SMITH: Mr. Haradinaj, we've given you a lot of

latitude, but we want you to talk about this case. We want you to talk about this case, not about --

THE ACCUSED HARADINAJ: [Interpretation] That's what I am talking about.

PRESIDING JUDGE SMITH: No, you're talking about the -- you're talking about history, and we'd like you to talk about the case that's going on today. I don't want to have to stop you, but I will if you continue on this line.

THE ACCUSED HARADINAJ: [Interpretation] I am talking about the present.

THE COURT OFFICER: Sorry. The interpretation channel was again over the English, so whatever you [indiscernible] ... the record hasn't been recorded.

PRESIDING JUDGE SMITH: Can you hear me now, Translator? Yes?

All right, Mr. Cadman.

MR. CADMAN: Your Honour, I believe Mr. Haradinaj has about another five minutes to speak. I think you should --

PRESIDING JUDGE SMITH: My directions were quite clear, and we've allowed him quite a bit of latitude. He needs to talk about the case that he's involved in. We don't want to have a discussion about the war or any alleged actions by anybody else. Just about this case. So please direct your client.

MR. CADMAN: Well, Your Honour, he's been given the opportunity to give an unsworn statement. He doesn't have to present that in any way dictated by the Court. I understand the position you're taking.

Mr. Haradinaj is setting out what he considers to be relevant to what has happened to him.

PRESIDING JUDGE SMITH: The rules are -- look at the rule on this statement. It has to be relative to the case.

MR. CADMAN: Which it is relevant to the case, Your Honour. If he could be given another five minutes just to finish what he has to say.

PRESIDING JUDGE SMITH: Please direct your client not to go into the detail that he's going into and I will give him the other five minutes.

You can use a normal tone of voice. You don't have to speak so loudly.

THE ACCUSED HARADINAJ: [Interpretation] Your Honour, this is my natural tone. This is my register of the voice.

PRESIDING JUDGE SMITH: Go ahead, Mr. Haradinaj. You've got five minutes.

THE ACCUSED HARADINAJ: [Interpretation] Thank you.

So I hope that this Panel, at least, is different from those of the past. At least I would ask for you to be patient and to hear us to the end.

So I won't talk just in vein, but I will just tell you that the same Prosecution office has got data from its coordinator in Belgrade, gets the evidence and the names that have been processed in the ancient times and after the law -- the war as well. And these persons, be them former defendants or former witnesses, are mentioned

here in this court of law.

I just wish to say that those testimonies have been taken during the wartime. So the Serbian prosecution office have put the knives to their throat, but they have modified their evidence, but they have approached their stance of providing asylum abroad or employment privileges. So they have been provided with amnesty so that they could have certain persons to give a testimony as witnesses of the SPO's. We have people that have been part of the list that are wanted persons from the Interpol.

So the SPO Prosecutors, so taking into account the high professional performance, I'm telling you that the SPO officers, those persons that they called here, they don't call those persons normally but they intimidate those persons and they put those persons under a lot of pressure.

So the Serbian prosecution office persecuted us because of two conditions. First, we had to be mono-ethnic, we had to be Albanians, and that is something that is shared with the SPO as well. And the second one was that they were selective, that we would not comply with robbery, and that's the same with the SPO again. So under the Belgrade regime, if evidence were not in place, they would manipulate those that they had in their hands just to make sure that their cause was substantiated.

The data that you see from the offices, that have leaked from your office, you have seen that the only documents are the Serbian documents. It's with the same names. I mean, there is one

coordinator that organises, Milovan Drecun, which is officially recognised as the most trustworthy persons of Milosevic. He is not simply the son of an officer, a security officer, but at the same time he has worked in those ranks as well, up until he got another task, and now this person is the coordinator of the war in Kosovo.

At the same time, you have given testimony to the fact that you have tried to collaborate with *[REDACTED] Pursuant to Post Session – Redaction Order F00425* that led to the murder of many people, including the elderly, children, and many of which are declared disappeared today.

I just wish to bring to your attention four cases that I think are of importance. So just to testify to you the concrete actions of Milovan Drecun, that there are at least two cases that he has been present. I wish to also add other massacres, such as that of Qerez, Likoshan, and hundreds of others all over Kosovo.

In Lubeniq village, in Peja commune, at least this place should not be unknown to the SPO because systemic massacres have been taken part there. In the 1980s, so someone called Mal Morina, was arrested by the secret services to interrogate him and he underwent systematic tortures, psychological pressure as well, just for him -- just because of the fact that he wanted to express his free -- his opinion, his free opinion.

So at the age of 23, this person was declared as having committed suicide. But the fact of the matter was that no one gave any explanation. There was no official saying anything about this person, but just saying that this person had committed suicide.

In the same village, in Lubeniq, the first massacre happened there where many villagers remained killed. However, no one ever took an interest, despite of the evidence that have been submitted and although the SPO has got evidence about this massacre in the same village. Again, in the village of Lubeniq, in 1999, at the beginning of 1999, there were elements with -- of genocide, of different massacres, and burning while the lives of many people was -- of 61 people, including the elderly and the young people and children as well.

Again, it was in this village in the commune of Peja in Lubeniq, the same year, that is in 1999, the same method was replicated as in the case of Mal Morina. The only difference in this case in question was the way on how his life was put to an end. And I am referring to Ukshin Hoti who - from Dubrava prison - was sent to this village and was executed. So this is an event that was eye-witnessed by one member of the Serbian forces.

Based on these facts and other facts, I am quite confident that there are eyewitnesss that have given testimonies before the international community that have told about the executors, and one of these can be the official -- the official of this Prosecution office, Mr. Milovan Drecun.

So he has said that the murder of the civilians was a normal reaction in the village. It was the same person that said that this is something normal, and this is someone that was named by Milosevic to deal with war propaganda, and he is one of the persons that I've

dealt with myself in terms of my statements.

Now in order for me to close it, I just wish to tell you that -- I wish to illustrate this with something. I just wish to give you this information. That is something that you can verify in five minutes. The Independent Association of Journalists in Serbia have filed a lawsuit against Mr. Drecun for manipulating the public opinion, for a deviation of the facts in Decan, and this person never went any problem or trouble, and we know that this person is a culprit. And this is the reason why the SPO has accepted this person as a coordinator. So the SPO is selective and this stems -- is not something out of nowhere.

Thank you very much for your attention. I really hope that this case will be dealt with as soon as possible by you, Your Honours.

Thank you.

PRESIDING JUDGE SMITH: Go ahead, Mr. Cadman.

MR. CADMAN: I'm just going to express my gratitude to the Panel for allowing Mr. Haradinaj to say what he thinks is important to this case.

PRESIDING JUDGE SMITH: No problem.

MR. CADMAN: I am grateful.

PRESIDING JUDGE SMITH: Thank you.

All right. As I said earlier, the Panel will issue a consolidated decision tomorrow on the admissibility and clarification of these items. Thereafter, the Panel will issue a Scheduling Order for the next steps in the proceedings. And thank you all for your

guidance. We will do the best to accommodate everyone's wishes and to keep the trial moving forward.

In this Scheduling Order, we will notify you all of the next hearing date. There is no hearing for the balance of today or tomorrow.

And this hearing is adjourned.

--- Whereupon the hearing adjourned at 12.31 p.m.