

Wednesday, 1 September 2021

[Trial Preparation Conference]

[Open session]

[The accused not present]

--- Upon commencing at 10.00 a.m.

JUDGE SMITH: Good morning and welcome everyone.

Madam Photographer, you may proceed.

Madam Court Officer, you may 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.

JUDGE SMITH: Now I would ask the parties to introduce themselves, starting with the Specialist Prosecutor's Office.

MR. HALLING: Good morning, Your Honours. My name is Matt Halling, Associate Prosecutor. Appearing also with me on behalf of the SPO is Deputy Specialist Prosecutor Alex Whiting, Prosecutor Valeria Bolici, Associate Prosecutor James Pace, Case Manager Line Pedersen, and intern Francesca Girardi. Thank you.

JUDGE SMITH: I now turn to the Defence, Mr. Rees.

MR. REES: Your Honour, my name is Jonathan Rees. I am assisted today by Mr. Huw Bowden and also by Ms. Ellie Stephenson.

JUDGE SMITH: Thank you.

Mr. Cadman, please.

MR. CADMAN: Good morning, Your Honours. Toby Cadman for Mr. Nasim Haradinaj. I am assisted today by Mr. Carl Buckley,

1 co-counsel, Miriam Boxberg, legal associate, and Ms. Zixuan Qu,  
2 Case Manager.

3 JUDGE SMITH: Thank you, Mr. Cadman.

4 Now we'll turn to the Registry. Mr. Roche.

5 MR. ROCHE: Good morning. Thank you, Your Honours. My name is  
6 Ralph Roche, Head of Judicial Services Division, together with the  
7 Registrar, Fidelma Donlon. Thank you.

8 JUDGE SMITH: I also note that the accused have waived their  
9 right to be present at the hearing.

10 And for the record, I am Charles Smith. I am the Presiding  
11 Judge for this Panel, and my colleague Judges are: From my left,  
12 Christoph Barthe; to my right, Guenael Mettraux; and to my far right,  
13 Fergal Gaynor.

14 Before we start, I would like to recall that this Trial Panel  
15 was assigned to this case upon the transmission of the case file by  
16 the Pre-Trial Judge on 16 July. Pursuant to Rule 117, upon receipt  
17 of the case file, the Trial Panel must hold a Trial Preparation  
18 Conference with the parties. To this end, on 21 July the Trial Panel  
19 issued an order in which it requested written submissions on certain  
20 matters, convened this Trial Preparation Conference, and set out the  
21 agenda to be followed during this hearing.

22 As for today's session, we will take a break around 11.00 a.m.,  
23 we will resume at 11.30 until about 1.00 p.m. We will then take a  
24 lunch break and we'll be back in court around 2.30 in the afternoon,  
25 and we will adjourn the hearing for today at 4.00 p.m. And, if need

1 be, we will continue tomorrow.

2 Just as an advance notice and during the trial of this case, the  
3 hours in this Court will be as follows: First session in the morning  
4 is from 9.30 until 11.00; second session, from 11.30 to 13.00; third  
5 session, from 14.30 to 16.00; and only if exceptionally needed, a  
6 last session from 16.30 until finished. Tomorrow we will start  
7 at 9.30 rather than 10.00.

8 I would also like to remind everyone that a few rules must be  
9 observed at all times in order to make for an effective courtroom  
10 with an accurate record. Please remember the previous warnings you  
11 were given in relation to the use of your microphones. I am not  
12 going to go over them at this time. Also bear in mind the necessity  
13 of a good translation, which takes a bit of a delay sometimes. If  
14 you are in the courtroom, please rise to ask permission to speak. If  
15 you're participating -- I don't think we have anybody participating  
16 video-link, do we? I don't believe so. Okay.

17 What is said in this hearing is transcribed in real time and  
18 will be reflected in a transcript available to the parties and to the  
19 public after the hearing. I also remind the parties to give prior  
20 notice should any submission require the disclosure of confidential  
21 information so that we can go into private or closed session.

22 We'll start today's hearing with follow-up questions on the  
23 written submissions that we have received. We will then continue  
24 with the issues set out to be discussed during the hearing, and  
25 questions may come from any of my colleagues. I ask you to please

1     refrain from repeating yours or your colleague's submissions; be that  
2     written or oral. I can tell you that we have read them all.

3             And please remember the Panel's instruction to limit your oral  
4     submissions to a total of five minutes per issue and to be concise  
5     and focused in your arguments.

6             So we'll now start out with follow-up questions on the  
7     protective measures requested by the SPO. And I'm going to first  
8     give the floor to my colleague, Judge Barthe.

9             JUDGE BARTHE: Thank you, Judge Smith.

10            As directed in the Panel's 21 July order, the SPO filed on  
11     23 August the request for protective measures for its two witnesses.

12            Given that this is the first application before this Panel in  
13     respect of protective measures, we wish to ask some specific  
14     questions regarding the standard to be applied and the implications  
15     of the requested measures.

16            The SPO requests the Trial Panel to authorise two protective  
17     measures for its two witnesses; namely, first, assigning pseudonyms  
18     throughout all public proceedings; and, secondly, redacting the  
19     witness names and identifying information from the Court's public  
20     records.

21            The SPO submits that these two measures are consistent with the  
22     accused's rights and notes that the accused already know the witness  
23     identities and will have access to their complete testimony.

24            The SPO further submits that these protective measures are  
25     necessary to ensure the safety of the two witnesses and of the

1 persons they interact with, as well as the integrity of ongoing and  
2 future investigations.

3 The SPO notes that the requested measures extend only to  
4 protecting identification by the broader public. In other words, the  
5 two witnesses identifiable by pseudonym will be seen and heard by the  
6 public when testifying.

7 The Haradinaj Defence responds that the requested measures  
8 amount to anonymity and, as a result, Mr. Haradinaj is being denied  
9 the right to face his accuser, thereby being placed at a significant  
10 disadvantage which amounts to a violation of the equality of arms  
11 principle. It further submits that there is no evidence to suggest  
12 that any employee of the SPO requires protection.

13 The Gucati Defence indicated that it wishes to respond orally  
14 during this conference.

15 Mr. Rees, you have the floor.

16 MR. REES: Thank you, Your Honour.

17 I am conscious that full written submissions have been submitted  
18 on behalf of Mr. Haradinaj. I adopt those submissions and I will  
19 adopt the submissions made orally in supplementary form today by  
20 Mr. Cadman.

21 JUDGE BARTHE: Thank you, Mr. Rees.

22 Mr. Cadman, do you want to add anything at this point?

23 MR. CADMAN: Your Honours, we have set out our position in  
24 written submissions, and I am mindful of the direction not to repeat  
25 that.

1           What we have set out deals with the question of anonymity. We  
2   recognise that the identity of those two witnesses are unknown to us.  
3   There are, of course, aspects of their evidence that deals with other  
4   witnesses who are not known to us and that we do not have the  
5   opportunity to cross-examine. The issue, of course, is whether all  
6   professional witnesses, as these two are, on behalf of the  
7   Prosecution, should be entitled to such anonymity. And it is our  
8   position that there is no proper basis under the rules for granting  
9   the protective measures in the way that has been requested by the  
10   SPO.

11           Your Honours, I don't want to belabour the point. We've set out  
12   what our position is in written submissions. I am happy to expand  
13   upon any point that is not clear or requires greater clarification.  
14   But that certainly is our position, is that under the applicable  
15   legal and regulatory framework there is no basis for providing such  
16   protective measures to all professional witnesses from the Specialist  
17   Prosecutor's Office.

18           But just to make the final point, Your Honour, before you  
19   interrupt. We do recognise that these are not anonymous witnesses in  
20   the strict sense of the meaning, because the identities are, of  
21   course, known to counsel, and counsel will have the opportunity to  
22   cross-examine them on that basis. But there are certain aspects of  
23   their evidence that -- we'll be dealing with anonymous witnesses that  
24   puts us at a significant disadvantage.

25           JUDGE BARTHE: Thank you, Mr. Cadman.

1           We'll now give the floor again to Mr. Rees, please, in order to  
2   clarify whether you also agree with the statement of counsel for  
3   Mr. Haradinaj, that you recognise that the identities of both  
4   witnesses are also --

5           MR. REES: [Overlapping speakers] ... I know the identities of  
6   the two witnesses.

7           JUDGE BARTHE: Yes.

8           MR. REES: Absolutely. But I nevertheless support the  
9   submissions made by Mr. Cadman in writing and orally.

10          JUDGE BARTHE: Okay. Thank you, Mr. Rees.

11          And I'll give the floor to the Prosecution. Mr. Prosecutor or  
12   Madam Prosecutor, do you want to add anything at this point?

13          MR. HALLING: Briefly, Your Honour.

14          They are not anonymous within any sense of the word. As  
15   acknowledged by both Defence counsel, they do know the identities of  
16   the witnesses. The Kostovski case cited by the Haradinaj Defence in  
17   their submissions is completely different facts from what we are  
18   alleging here. In Kostovski, it was a situation where the applicant  
19   and the counsel were actually not heard at the moment in the trial  
20   where the witnesses were testifying and when their statements were  
21   taken. Nothing equivalent to that is happening here.

22          There may be elements of unknown persons that are discussed in  
23   the testimony of these witnesses, but those persons are not within  
24   the scope of the protective measures request that we have filed. The  
25   protective measures request only concerns the two witnesses in

1 question and they are not anonymous.

2 Thank you.

3 JUDGE BARTHE: Thank you, Mr. Prosecutor.

4 So my next question is also for the Prosecution. In your  
5 request, Mr. Prosecutor, you referred, *inter alia*, to Article 23 of  
6 the Law on Specialist Chambers and Specialist Prosecutor's Office,  
7 also on Rule 80 of the KSC Rules of Procedure and Evidence, according  
8 to which protective measures can be ordered for the safety, physical  
9 and psychological well-being, dignity and privacy of the witnesses  
10 and others or of witnesses and others at risk on account of testimony  
11 given by witnesses, provided that such measures are consistent with  
12 the rights of the accused.

13 Could you please, Mr. Prosecutor, or Madam Prosecutor, clarify  
14 or specify why you are of the opinion that these conditions are met  
15 in relation to the two witnesses, especially how the safety, physical  
16 or psychological well-being, the dignity, or privacy of each witness  
17 would be affected if their names were not redacted?

18 If you consider it necessary to go into private or closed  
19 session before you answer, please let us know. You have the floor.

20 MR. HALLING: Thank you, Your Honour. I will try and answer the  
21 question in a way that we can stay in open session.

22 As developed in our request, these witnesses have activities  
23 that, were their names to become known, would make it more difficult  
24 for them to conduct their activities, including their safety when  
25 conducting those activities. So the protective measures sought are



1 in relation, in large part, to their ability to do their work with  
2 all requisite safety.

3 As we mention in our request, they interact with other people.  
4 They are interacting with witnesses in our other cases. And because  
5 of that, anything that links their activities to their names is going  
6 to have a knock-off effect on other witnesses.

7 What we are asking for is actually no more than what the  
8 Practice Direction calls for when referring to SPO staff in the  
9 course of proceedings. They are supposed to be referred to by their  
10 title rather than their name, unless it's strictly necessary. And  
11 it's actually strictly necessary to keep their names out of the  
12 public record for the reasons that I was describing, and we don't  
13 feel like that there's any compromise of the rights of the accused  
14 given that none of the protective measures will apply to their  
15 ability to examine the witnesses.

16 Thank you.

17 JUDGE BARTHE: Thank you, Mr. Prosecutor.

18 To follow up on this. Today, just a moment ago, and also in  
19 para 4 of your request, Mr. Prosecutor, you claim, and I quote:

20 "Ensuring that the two witnesses are only referred to by  
21 pseudonym is necessary for them to carry out their work while  
22 safeguarding their safety, the safety of witnesses, and other persons  
23 they interact with, and the integrity of ongoing and future  
24 investigations."

25 In this regard, I would like to know whether you argue, as you

1 already did, that the work of the SPO, in general, and/or the work of  
2 the two witnesses in particular, and/or the integrity of ongoing or  
3 future investigations are protected, specifically protected by  
4 Article 23(1), and also Rule of the Law and also Rule 80(1); and, if  
5 so, why.

6 MR. HALLING: The reason why it does is because the integrity of  
7 the investigations in this particular context is connected with the  
8 safety of the persons concerned. If our staff members are not safe  
9 when conducting their activities in the field, it is going to affect  
10 our investigations and the integrity thereof.

11 So it's not a situation, and the Defence makes this argument  
12 that, obstructing investigations is not in Rule 80 and therefore it  
13 can't be considered. In our view, that's not the way Rule 80 is  
14 structured. The reason why the integrity is affected is because of  
15 criteria that are in the rule. And as long as there are criteria  
16 within the rule that are applicable, the Chamber can make a ruling on  
17 the basis of what is contained in the rule alone.

18 And so it's all connected. There's not, like, a discrete factor  
19 that if it's not in the rule, you can't apply it. They are linked in  
20 this particular instance.

21 JUDGE BARTHE: Thank you, Mr. Prosecutor.

22 I would like to -- Mr. Cadman.

23 MR. CADMAN: Your Honour, just to respond very briefly to the  
24 points made by my learned friend for the Prosecution.

25 JUDGE BARTHE: Mr. Cadman, excuse me. You will have the

1 opportunity to respond to everything after the questioning, if you  
2 don't mind. If you could wait just a few more questions or a few  
3 more minutes.

4 MR. CADMAN: Of course, Your Honour.

5 JUDGE BARTHE: That would be nice. Thank you so much.

6 Mr. Prosecutor, to continue, I would like to come back to para 4  
7 of your request for protective measures in which you say and argue  
8 that the necessity of protecting the identity of SPO staff members is  
9 explicitly acknowledged in the KSC's statutory scheme. In this  
10 context you mentioned, *inter alia*, Article 33 of the Registry  
11 Practice Direction on Files and Filings Before the Kosovo Specialist  
12 Chambers that should require that SPO staff members shall only be  
13 referenced by their functional titles, unless strictly necessary.

14 If this is correct, Mr. Prosecutor, does that mean that, at  
15 least in theory, all SPO staff members can only be referenced by  
16 their functional titles and/or are entitled to pseudonyms during  
17 ongoing proceedings regardless of their procedural role or internal  
18 function, or where would you draw the line in this respect?

19 MR. HALLING: The line should be drawn where the  
20 Practice Direction draws the line, Your Honours.

21 It is a general rule in the Practice Direction to only refer to  
22 them by functional titles. There is an exception built in, when it  
23 is strictly necessary. If there's a situation where the name of an  
24 SPO staff member assumes fundamental importance for the fairness of  
25 the proceedings, for example, then it would be within the

1 Trial Panel's discretion to declare that it's strictly necessary and  
2 that the names need to be revealed for procedural fairness reasons.

3 There is nothing approaching that in this instance. We aren't  
4 asking for relief under the Practice Direction. We're merely  
5 pointing to the Practice Direction, as well as the regime governing  
6 standard redactions, that there are standard understandable reasons  
7 why SPO staff shouldn't be named in proceedings, and those reasons  
8 are linked to Rule 80 of the rules, which is the framework governing  
9 protective measures.

10 So we would never say it's an absolute rule that always has to  
11 apply in all circumstances, but there is logic behind these rules.  
12 The logic applies here as well. And there is no strict necessity  
13 identified by the Defence, especially on anonymity, which, as we  
14 addressed, isn't an issue, that would justify having to name them in  
15 this instance.

16 JUDGE BARTHE: Thank you, Mr. Prosecutor.

17 And now my last question at the moment for the Prosecution. In  
18 footnote 7 of your request, you cited case law of the International  
19 Criminal Court, namely, decisions in the trials against  
20 Dominic Ongwen, Jean-Pierre Bemba Gombo et al, and also  
21 Germain Katanga et al.

22 Could you please specify why and to what extent the legal  
23 considerations of these decisions should be transferable to the  
24 present case?

25 MR. HALLING: Thank you, Your Honour.

1           The ICC has a protective measures framework under, in  
2     particular, Rule 81 of the ICC Rules of Procedure and Evidence. That  
3     framework bears a lot of similarities to Rule 80 of the KSC rules.  
4     So we are not saying that the Trial Panel is bound to follow the  
5     jurisprudence of the ICC, but we do note that these are cases where  
6     ICC judges have looked at similar situations and have granted  
7     in-court protective measures to Prosecution investigators.

8           In all of these instances, their identities were known to the  
9     Defence when they were testifying, and there was no concerns about  
10    cross-examination. They got to take the transcript without  
11    redactions no differently than if the protective measures had not  
12    existed. It was a low level of protective measures that they were  
13    granted, and we are trying to follow suit with this application.

14          If you compare our motion to our Rule 95 summaries for these  
15    witnesses, we're actually asking for less protection than we had  
16    previously indicated. We had indicated face and voice distortion,  
17    and now we are just asking for a pseudonym. So we really are trying  
18    to balance the publicity of the proceedings, and we appreciated that  
19    the Trial Panel wants to prioritise this, but we don't think that  
20    this is compromising the publicity of the proceedings or the rights  
21    of the accused for the reasons that we've stated, and these ICC cases  
22    reached the same conclusion.

23          JUDGE BARTHE: Thank you, Mr. Prosecutor. This concludes my  
24    questions at the moment for the Prosecution.

25          I will now turn to the Defence with questions.

1 And, of course, Mr. Cadman, you have the opportunity, will get  
2 the opportunity to comment. And also you, Mr. Rees, or co-counsel,  
3 on what has been said by the Prosecution.

4 So my first question or my question for the Defence would be or  
5 is, Mr. Cadman, I will start with you, because you filed written  
6 submissions. In your submissions in preparation for the Trial  
7 Preparation Conference, you claimed that the measures requested by  
8 the SPO cannot be justified under the rules of this Court; and  
9 further, that they are not, in any event, consistent with the rights  
10 of the accused and his right to a public hearing, including the right  
11 to face those that accuse him. I refer to para 11 of your  
12 submissions.

13 Moreover, you repeatedly refer to both witnesses, SPO witnesses,  
14 as anonymous witnesses, a fact that, in your view, effectively  
15 prevents the Defence from cross-examining them on the basis of their  
16 identity; paragraph 18 of your submissions.

17 Now, given that the names and also the professional background  
18 of the two witnesses have already been disclosed to you and your  
19 client as well as to the co-accused and his counsel - I refer, in  
20 this respect, to Annex 2 to the submission of the SPO pre-trial  
21 brief; for the record, this is filing number F00181/A02 - and that  
22 the witnesses are to be seen and heard by both accused, their  
23 counsel, and also the public.

24 Could you tell, Mr. Cadman, the Panel please, if you still think  
25 that the measures could, nevertheless, be inconsistent with the

1 rights of the accused and that the Defence would be effectively  
2 prevented from cross-examining them.

3 Please note that we also read the Kostovski decision you cited  
4 in para 15 of footnote 10 of your submissions, versus the  
5 Netherlands. In this decision, the European Court of Human Rights  
6 found the violation of Article 6(1) and 3(d) of the European  
7 Convention on Human Rights, because the conviction is, in my opinion,  
8 correctly stated by the Prosecution, the SPO, of the accused of armed  
9 robbery was to a decisive extent on the statements, based on the  
10 statements of two anonymous witnesses who were neither at trial nor  
11 during the investigation stage interviewed in the presence of the  
12 accused or his lawyer.

13 But this would, as far as I understood it, obviously be not the  
14 case here if the SPO's request were to be granted.

15 Mr. Cadman, you have the floor.

16 MR. CADMAN: First of all, it's accepted, as it has been  
17 earlier, that the situation is not strictly on point with Kostovski.  
18 The names and the positions of the two witnesses are known to the  
19 Defence. Of course, anonymity can be a broader concept in not just  
20 knowing the names of those individuals.

21 What the SPO has referred to is relying on the general  
22 principles in the Practice Direction, in particular. Our position on  
23 this would be that the Practice Direction is guidance. It does not  
24 have a greater force of law than the legal framework of this  
25 institution.

1           It is not accepted, and it has never been accepted by the  
2   Defence, that there should be a blanket ban on using the name of any  
3   professional witness by the SPO. This has been raised by the Defence  
4   in the past. The Practice Direction, in our view, is not consistent  
5   with the general applicable principles.

6           The issue is whether it is strictly necessary for the names of  
7   these two individuals to be anonymised for the purpose of these  
8   proceedings.

9           As my learned friend for the Prosecution has quite rightly  
10   stated, the initial application was for a greater form of protective  
11   measures. Not just the redacting of the names. But there were two  
12   other forms that they were seeking that, obviously, the Defence had  
13   opposed. They are now only seeking for the names of those  
14   individuals to be anonymised. The question has to be: Why is that  
15   necessary?

16          What the Prosecutor has stated is that these are individuals who  
17   have conducted witness interviews and continue to do so. These are,  
18   obviously, individuals that are known. That has to be taken into  
19   account as to whether the fact that their identities are known as  
20   employees of the Specialist Prosecutor's Office and continue to be  
21   known in having contact with witnesses, why there is such a strict  
22   necessity for their names to be redacted.

23          Again, not wishing to repeat what is set out in the written  
24   submissions. Our position is, first of all, that it is not strictly  
25   necessary. That the Special Prosecutor has not identified why it is



1 strictly necessary. What risk to professional witnesses would be  
2 incurred if their names were to be made public during these  
3 proceedings, and the fact that they continue to conduct and have  
4 contact with witnesses in a public form means that their identities  
5 are already known.

6 So what I would submit is it is more of a question of why is it  
7 strictly necessary for their names to be redacted? Again, I must go  
8 back to the point that it is not just the withholding of individual's  
9 names from the parties that goes to anonymity. There are limitations  
10 on our ability to effectively cross-examine witnesses if their  
11 identities are not known, and we are prevented by putting certain  
12 questions to them on the basis of their identity.

13 That is what we are asking the Trial Panel to consider when it  
14 makes a decision of whether this application by the SPO is strictly  
15 necessary. We say it's not.

16 JUDGE BARTHE: Thank you, Mr. Cadman.

17 Mr. Rees, do you want to say anything on this?

18 MR. REES: If I may, I'll add this very short submission.

19 It's a matter of principle. The starting point is that this  
20 trial will be a public trial, and the public are entitled to follow  
21 it. There is public interest in it, and they are entitled to hear  
22 from the witnesses, to know who the witnesses are, and to follow the  
23 evidence, unless there is very good reason to change that starting  
24 point position.

25 Your Honour asks the SPO to spell out the nature of any threat

1 and the evidence of it. It is, of course, a matter for Your Honours,  
2 but I struggle to follow a direct answer to that very straightforward  
3 and clear question asked by Your Honours. It's a matter of public  
4 principle, and we say that the SPO have not met the criteria --  
5 strict criteria to interfere with the starting point, the general  
6 principle that these are public proceedings and the public should be  
7 able to follow them.

8 That's my submission.

9 JUDGE BARTHE: Thank you, Mr. Rees.

10 Mr. Prosecutor, do you want to comment on this?

11 MR. HALLING: Your Honour, I believe that what we've said today  
12 and our application addresses all of the submissions just made. So  
13 unless the Chamber has any other questions, we have nothing further.

14 JUDGE BARTHE: Thank you, Mr. Prosecutor. Those were my  
15 questions.

16 Thank you, Judge Smith.

17 JUDGE SMITH: Do any of my other colleagues have questions?

18 Judge Mettraux.

19 JUDGE METTRAUX: Thank you, Judge Smith. And good morning to  
20 all.

21 I will start, if I may, by exploring the submissions of the  
22 Prosecutor, that the disclosure of the name and identity of the  
23 proposed two witnesses could create a risk to their safety and/or  
24 that of individuals with whom they interact. I'd like to ask you a  
25 few questions about that.

1 First, may I take it that when you discussed the possibility of  
2 these individuals being called as witnesses you informed them in the  
3 exercise of diligence that they might have to testify without  
4 protective measures? Can we assume this to be the case?

5 MR. HALLING: You can, Your Honour. All witnesses that the SPO  
6 interacts with, it's always clear that protective measures are  
7 something that the SPO can request, but it is within the  
8 Trial Panel's prerogative as to whether or not it's being granted.  
9 So this was treated no differently.

10 JUDGE METTRAUX: And do not sit down, Mr. Halling, I have a few  
11 questions for you on this. But if that is indeed the case, and I'm  
12 grateful for your confirmation to that effect, that would suggest as  
13 well that when you asked them to prepare a statement, statements,  
14 nine of them for the purpose of these proceedings, you did so on the  
15 understanding that they might not be granted the measures that you  
16 are seeking. Am I right in that assumption?

17 MR. HALLING: Again, Your Honour, this is how it works with all  
18 of our witnesses. We need to take statements, we need to disclose  
19 them. It is not up to us whether they get protection. We can only  
20 say that we will request protection when justified. And, again, it  
21 was the same here.

22 JUDGE METTRAUX: So, again, maybe to state the obvious, but that  
23 assumes that you took the decision to call them, if necessary,  
24 without protective measures, despite the risk that you say there  
25 could be to them or to the individuals they interact with; correct?

1 MR. HALLING: That's correct, Your Honour. It's the risk that  
2 we run with all of our witnesses. Even witnesses that have faced  
3 very grave security concerns and have had family members killed while  
4 testifying in proceedings, they still have to have their protective  
5 measures accepted by the Chamber. It's always a risk that we run,  
6 but all we can do is make our showing as to why there's an  
7 objectively justifiable risk to them and proceed accordingly with the  
8 request for protective measures.

9 JUDGE METTRAUX: Thank you for that.

10 I want to ask you more specifically about something you say. I  
11 think it's at paragraph 3 of your submissions. That -- you refer to  
12 the risk to others, that the fact that their names or their  
13 identification features could effectively create a link with this  
14 organisation that could put people at risk when and if they interact  
15 with them.

16 What I want to know is: At the same time you are not seeking,  
17 as you said, properly, the non-disclosure of their physical  
18 appearance, and what I want to know is whether the disclosure of that  
19 physical appearance could potentially have the same associating  
20 effect between who they are, or what they look like, at least, and  
21 their function, and how, in effect, you square the circle between  
22 asking us not to disclose their name while, at the same time,  
23 allowing for their face to appear on the screen.

24 MR. HALLING: Yes, Your Honour's question implicates the part of  
25 our motion that is confidential, but I will try and answer it in open

1 session.

2           There is an extra link that is created by the name of the staff  
3 member and their activities in the field, in a way that their face or  
4 voice alone may not. There is an extra ability to identify. There's  
5 an extra level of risk entailed by having their name, which can be  
6 determined on paper from all sorts of manner, and a name that has to  
7 be presented in the ordinary course just of travel, in order to go to  
8 the -- on missions for the SPO. That that risk is the risk that we  
9 are trying to address with our relief sought.

10           If the Trial Panel concludes that the only way to address the  
11 risks is to add protective measures to our request, it's within the  
12 Trial Panel's prerogative. But in our assessment, we have tried to  
13 ask for the minimum, the minimum that's required for the reason to --  
14 to address the reasons that we state in our application.

15           JUDGE METTRAUX: Just to be clear, I am not suggesting to -- for  
16 you to ask more. I am trying to figure out how one makes the other  
17 one logical.

18           And just to take you on your answer. Isn't the fact -- you say  
19 there's an extra level of risk if the name, rather than the face, is  
20 disclosed. Isn't it the case that more people will have or would  
21 have access to what they look like rather than have access to what  
22 their name is?

23           I'm mindful, of course, of your submissions in writing that  
24 their passport might go into a number of hands for the purpose of  
25 their mission, but isn't that the case that there is a likelihood of

1 more people being able to know who they are simply because their face  
2 would appear on the screen than having access to their passport?

3 MR. HALLING: There is some risk to that extent. But as I was  
4 saying, it is a lower risk. If someone took my picture -- someone  
5 did take my picture in court this morning, and they took that picture  
6 and wanted to find out my name from the picture alone, how would they  
7 go about doing that? You can't put a picture into a Google search.  
8 There is a level -- there is an obstacle there to be able to identify  
9 someone from a picture alone.

10 However, if you have my name - and not that I'm particularly  
11 everywhere on the internet - but it is much easier to identify who I  
12 am, where I live, what I'm doing, including pictures of me. The name  
13 is the thing that is creating a level of risk that justifies  
14 protective measures.

15 And so, although, perhaps someone is able to make links of the  
16 kind that you describe on the basis of the picture alone, in our  
17 assessment, that risk is manageable. But the risk of the name is  
18 not, and so that's why we make the distinction.

19 JUDGE METTRAUX: Thank you. And it's the legal part of your  
20 brain that I want to go to, Mr. Halling, if you allow me. And it's  
21 really about the application of the test that you are inviting us to  
22 exercise.

23 If we understand it properly, the basis of your submission is  
24 that the disclosure of the identity of the proposed witnesses will  
25 create a real likelihood of danger or risk to the witness or to the

1 individual concerned.

2 Now, what I wanted to know from you is whether you were aware of  
3 any precedent, legal precedent from Kosovo specifically, that would  
4 have granted the sort of protective measures that you are now seeking  
5 from us; in particular, having a police officer or a serving  
6 prosecutor who acts on behalf of one of the parties to testify under  
7 protective measures. And if you are aware of such a precedent, we  
8 would be very grateful for an indication to that effect.

9 MR. HALLING: Your Honour, we don't have any Kosovo cases  
10 exactly conforming to the fact pattern that you describe. There are  
11 European Court of Human Rights cases, some of which are mentioned on  
12 our list of authorities and in our bar table request, whereby no  
13 violation of the Article 6 of the ECHR was found by police officers  
14 not being identified in the course of trial.

15 So to the extent that Kosovo has to be consistent with the  
16 European Court of Human Rights, those cases can stand for the  
17 proportion that there is at least no human rights constitutional  
18 restriction in Kosovo to applying protective measures of the kind we  
19 are discussing.

20 JUDGE METTRAUX: Thank you. Maybe I was slightly unfair. It's  
21 probably a legal and factual issue. But what is important here is,  
22 of course, and you are right to point it out, the context that we are  
23 dealing with. And we carried out the small exercise of looking at  
24 cases from Kosovo at the ICTY - the Limaj and Haradinaj case - to try  
25 to identify precedent that might be relevant to those cases and

1       couldn't.

2               It appears that those precedents suggest that, in both of these  
3       cases at least, each and all of the witnesses who served either in  
4       the past or at the time of their testimony did so in public with  
5       their name disclosed. Is that a correct assumption and understanding  
6       of these cases?

7               MR. HALLING: Your Honour, that is our understanding. However,  
8       the investigators in those ICTY cases were not repeat actors in  
9       Kosovo the way that SPO investigators are. Because of the way our  
10      mandate is designed, our investigators are going to go to Kosovo  
11      specifically far more often than an ICTY investigator who may only be  
12      there for a very isolated part of their broader responsibilities.  
13      And the way in which the risk is assessed, it has to be  
14      individualised, and it has to be indexed to the risks as of this  
15      moment. We have a footnote to our filing in the Thaci et al case  
16      identifying the climate of witness intimidation in Kosovo recently  
17      and what is the level of risk that is there in Kosovo now. And we  
18      would just ask that our application be evaluated on its  
19      individualised merits; what these particular staff members are doing  
20      now and the place that they are going to now.

21              JUDGE METTRAUX: I have just -- you forced me to ask additional  
22      questions in response to my colleague Judge Barthe's questions, that  
23      I want to ask you.

24              You've referred to the Practice Direction both in your written  
25      submissions and again today in court. What I want to know from you,



1 or maybe the first question, is: Of course, the Practice Direction  
2 does not regulate the question of witnesses; right?

3 MR. HALLING: Correct. We do not ask the Trial Panel to make a  
4 ruling on protective measures pursuant to the Practice Direction. We  
5 want the ruling to be pursuant to Rule 80, and how to interpret  
6 Rule 80 we are making reference to other parts of the broader  
7 statutory scheme.

8 JUDGE METTRAUX: Because, in fact, the Practice Direction refers  
9 to the general mandate and competence of the Registry to regulate the  
10 business of the Registry, not the business of court; right?

11 MR. HALLING: Correct, Your Honour.

12 JUDGE METTRAUX: And to the extent that this Practice Direction  
13 would be relevant at all to these proceedings, of course, they will  
14 have to be interpreted in light of our Law, our rules, and to the  
15 extent relevant, the Constitution, and as, I think, was mentioned by  
16 the Defence, the commitment of these instruments to the principle  
17 that proceedings should be held in public. Is that a correct  
18 assumption?

19 MR. HALLING: All correct, Your Honour. We are using the  
20 Practice Direction because it is another indication in the statutory  
21 scheme in the nature of the protected interest that we are  
22 identifying under Rule 80. It was decided that at the KSC at the  
23 level of filing practice that it is best not to identify people from  
24 the SPO by their names, and that principle is the same principle that  
25 we are applying here.

1           So we are seeing it in other parts of the statutory scheme, but  
2           the Trial Panel is -- we would never say that the Trial Panel is  
3           bound by the Practice Direction. That's not our submission.

4           JUDGE METTRAUX: Thank you for this clarification.

5           And briefly with the Defence, maybe starting with Mr. Cadman, if  
6           Mr. Rees doesn't mind. But you've made a submission in your written  
7           submission, and again today, about what you claim is potentially the  
8           prejudice that would result from the protective measures being  
9           granted.

10          What I want to know is really specifically what you say would  
11          the prejudice consist of? Because as you properly conceded, and so  
12          did Mr. Rees, the names of the individuals, their statements, the  
13          nine of them, are available to you. So could you assist the Panel in  
14          telling us what exactly you would not be able to do or do it in a  
15          manner that you consider prejudicial to you in relation to these two  
16          witnesses that would be affected, should the measures be granted?

17          MR. CADMAN: Your Honour, I think what we've set out, and what  
18          we've already said, is, effectively, two parts of the argument. One  
19          is that proceedings, in principle, should be in public, and we've  
20          made that point very clear. The other point that we've made is it is  
21          not merely knowing the identity -- counsel knowing the identity of a  
22          witness. There are certain aspects of -- all aspects of that  
23          witness's identity being subject to cross-examination.

24          We have to be able to put questions to that witness based on who  
25          they are and what their function is. Now --

1 JUDGE METTRAUX: Well, may I stop you there, Mr. Cadman.

2 You would be able to do that to the extent it doesn't reveal  
3 their identity. I mean, this is the measures as I understand them,  
4 sought by the Prosecution, would not deprive you of this possibility.  
5 Quite the contrary.

6 I mean, are you suggesting that the specific identify of one or  
7 two of these persons is at stake in your prospective  
8 cross-examination, or are you saying something else?

9 MR. CADMAN: Well, Your Honour, these are the only two witnesses  
10 that have been called by the Prosecution. There are no other  
11 witnesses that we are going to have the opportunity to cross-examine.  
12 The Prosecution is not calling any of the witnesses that -- at least  
13 one of their witnesses subject to protective measures is alleged to  
14 have contact with.

15 There are, of course, matters, and perhaps the Court should view  
16 this in the context of this case as a whole, and we have set out a  
17 number of restrictions that have been placed on the Defence. But the  
18 only two witnesses that are being called by the Prosecution are two  
19 of their own witnesses which, yes, we know their identity, but you  
20 are depriving the defendants from the right to confrontation, you are  
21 depriving the public from the public nature of these proceedings.

22 In terms of whether there are specific limitations on what we  
23 can cross-examine those witnesses on not knowing their identity --  
24 I'm not in a position to set out, at this stage, whether there are  
25 specific limitations by not knowing or not having that person's

1 identity known. But it is quite clear that the evidence that they  
2 are putting forward, the way in which their evidence is going to be  
3 assessed is going to be assessed by virtue of who they are and what  
4 evidence they are presenting.

5 It is very difficult for us, at this stage, to be able to  
6 foresee every single circumstance in which we are going to be  
7 prevented from cross-examining them on. The point of the matter must  
8 be more a question of whether there is a necessity and whether the  
9 Specialist Prosecutor's Office has established that necessity for  
10 withholding certain aspects of their identity.

11 JUDGE METTRAUX: And maybe a follow-up, and it's going to be the  
12 last to this line of questions. But assuming that there might arise  
13 circumstances in which you are, indeed, minded to ask a question of  
14 either of these witnesses that could reveal their identity, should,  
15 of course, the measures be granted, wouldn't the solution be for you  
16 to ask for a closed session in which this can be done? And put aside  
17 the general issue of the publicity of the proceedings. I'm asking  
18 specifically about what prejudice this would cause, if any, to your  
19 client.

20 If you are, as could, in theory, occur in need of asking a  
21 question that could have the effect of revealing the identity of  
22 either of these witnesses, wouldn't the solution be to ask the  
23 Chamber to go into closed session for the purpose of these questions?

24 MR. CADMAN: Your Honour, yes. And that is, of course,  
25 something that the Trial Panel may have to consider at some stage.

1     What it could mean is that the entirety of their evidence goes into  
2     closed session. That is a risk. That we foresee. Of course, there  
3     can be certain aspects of that evidence being in closed session, but  
4     our concern is that in order for us to put questions that we need to  
5     put to these two witnesses there is a risk of the entirety of that  
6     cross-examination going into closed session.

7             JUDGE METTRAUX: I'm grateful, Mr. Cadman.

8             Mr. Rees, any submissions?

9             MR. REES: Two points, if I may.

10            On the specific point that Your Honour was asking Mr. Cadman  
11     about; namely, the effect on Defence -- the Defence and Defence  
12     preparation, of granting a protective measure so that the witness can  
13     only be referred to by pseudonym. It has an effect which goes beyond  
14     the process of examination-in-chief and cross-examination and  
15     re-examination.

16            We are, of course, still undergoing investigations. We are  
17     continuing to prepare for trial, including continuing to speak to  
18     potential Defence witnesses. The conduct of SPO officers in this  
19     case, as I hope is clear from the detailed Defence pre-trial brief  
20     that has been submitted, is in issue, and the granting of a  
21     protective measure to the two officers, one of whom was involved in  
22     actually searching the KLA WVA premises in September last year, will  
23     hamper our ability to properly investigate this case. It will hamper  
24     our ability, for example, to investigate whether there are any  
25     specific concerns about the credibility of that witness that might

1 arise from speaking to potential Defence witnesses, because that  
2 witness can only be referred to by pseudonym, which will mean nothing  
3 to a potential Defence witness. So I add that.

4 There is a second point that I wish to raise that arises from  
5 the submissions made by Mr. Halling. He referred to a filing in the  
6 case of Thaci and others, which set out, he said, the environment as  
7 it exists at the moment in Kosovo in relation to witnesses.

8 If that is relied upon by the SPO, in these proceedings, for  
9 this application, they should serve it upon Mr. Gucati and  
10 Mr. Haradinaj, because I haven't seen that filing. I've got no idea  
11 what it says. And that approach from the SPO, frankly, is  
12 symptomatic, referring to material, relied-on material, which has not  
13 been disclosed to the parties.

14 Perhaps the SPO can assist whether, in fact, they do rely on  
15 that filing; and, if so, they can disclose it to us in these  
16 proceedings so that we can consider it and respond to it.

17 JUDGE METTRAUX: Thank you, Mr. Rees.

18 Any submissions in response? Briefly, Mr. Halling. We've all  
19 been generous with ourselves with the five minutes we inflicted on  
20 us, so briefly, please.

21 MR. HALLING: Certainly.

22 As to what Mr. Rees just commented upon, the filings relied on  
23 are in footnote 4 of our request. They are public. There is no need  
24 to serve them. Everything that we are relying upon is in the public  
25 filing accessible on the KSC web site.

1           And the last thing I was going to mention, just in terms of the  
2   scope of what we are requesting. There is no prohibition if this  
3   application is granted on using the names of our witnesses when  
4   strictly necessary in Defence investigations. That is not what we  
5   are requesting. Nor are we requesting that everything be in private  
6   session. Our intention is to have a limited discussion in private  
7   session on the identity of the investigator and the other witness at  
8   the beginning of their examination, and then to proceed with,  
9   basically, the entire direct without needing to go into private  
10   session again.

11           So this is a very discrete thing that is being requested, and we  
12   would just ask that it be understood in these terms.

13           JUDGE METTRAUX: Thank you. Those were my questions.

14           I think Mr. Cadman is on his feet.

15           JUDGE SMITH: Oh, Mr. Cadman, I'm sorry. Go ahead.

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

17           Just to comment on the last point that's been made. It  
18   certainly was not my understanding that, based on the application the  
19   Prosecution has made, that we would nonetheless be entitled to  
20   provide the details of those witnesses to our own Defence witnesses.

21           As Mr. Rees has quite rightly said, there are aspects of what we  
22   would need to put to these witnesses, and it's more of a question not  
23   what they can say but what they can't say that we would need to put  
24   to our own Defence witnesses.

25           So I would ask the Court to take that into account. Surely the

1 fact that they are now saying that we can disclose the identity of  
2 those two witnesses subject to protective measures, if granted, to  
3 our own Defence witnesses for them to comment upon it, surely that  
4 undermines the whole basis upon which the application is being made.  
5 It renders it completely unnecessary.

6 JUDGE SMITH: Thank you, Mr. Cadman. Perhaps I could suggest  
7 that you have an *inter partes* discussion about this. There is  
8 nothing stopping you from doing that. It seems there was a  
9 misunderstanding about that, so I would suggest you take this  
10 opportunity, and others, to talk to each other.

11 We can move to the next topic, which concerns the SPO's proposed  
12 definition of a witness. And Judge Gaynor has indicated a desire to  
13 ask some questions on this topic, so, Judge Gaynor, you have the  
14 floor.

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

16 Before I move to that topic, I just have one further question  
17 for the Prosecution in respect of the European Convention of Human  
18 Rights, and you've said that there are some decisions from the  
19 European Court of Human Rights where it has been found that there has  
20 been no violation of Article 6 of the Convention where police  
21 officers have not been identified in the course of trial.

22 And do you accept that there's often a distinction at the  
23 domestic level between the testimony of police officers who have  
24 testified about undercover activities and police officers who testify  
25 about non-undercover activities; and, if so, do you accept that most



1 of the Strasbourg jurisprudence you referred to relates to undercover  
2 police activity?

3 MR. HALLING: Yes, Your Honour, we do accept that there is a  
4 distinction to this effect. It is going to come up later in this  
5 hearing, I'm sure, when we discuss entrapment and other issues.

6 But, yes, the European Court of Human Rights case law, just for  
7 the benefit of the Panel, that I was referencing, the case in  
8 particular is Laukkanen and Manninen versus Finland. And you can see  
9 the consideration that was motivating my submission. It's in  
10 footnote 15 of our bar table request, and that is not in the  
11 undercover police context, if I recall.

12 So there is a distinction in the ECHR jurisprudence, and we are  
13 on the non-undercover side of that distinction.

14 JUDGE GAYNOR: Very well.

15 We'll now move to the definition of "witness." And as directed  
16 by the Panel's 21 July order, the SPO filed on 23 August submissions  
17 in relation to the definition of "witness," and the SPO set out five  
18 categories of individuals who fall under the definition of a witness.

19 I have one question which concerns the status element, as it's  
20 being referred to. Now, in paragraph 4 of the SPO's submissions, the  
21 SPO states that none of the six crimes charged in this indictment in  
22 this case has a status element that the conduct of the accused must  
23 relate to someone who is a witness. However, retaliation, which is  
24 Count 4 of the indictment, under Article 388(1) of the Kosovo  
25 Criminal Code, may only be committed against a person with the intent

1 to retaliate for providing truthful information relating to  
2 commission or possible commission of any criminal offence to police,  
3 an authorised investigator, a prosecutor, or a judge.

4 Now, the SPO notes in its submissions that in his Confirmation  
5 Decision, the Pre-Trial Judge in this case, at paragraph 54, made it  
6 clear that retaliation under Article 388 of the Criminal Code,  
7 relates only to a person providing information to the Special  
8 Investigative Task Force and/or the SPO about any crimes or offences  
9 falling under SC jurisdiction.

10 Now, similarly, intimidation, under Article 387 of the  
11 Criminal Code, relates not to any person, as the SPO appears to  
12 suggest at paragraph 5 of its submissions, but to, as the  
13 Pre-Trial Judge said at paragraph 58 of his Confirmation Decision, to  
14 any person making or likely to make a statement or provide  
15 information to the police, a prosecutor, or a judge.

16 Now, these persons appear to fall squarely within the definition  
17 of witness set out by the SPO at paragraph 3 of its 23 August  
18 submission. So my question is, to the SPO - and, of course, the  
19 Defence will have an opportunity to response - do you maintain your  
20 position that Counts 3 and 4 of the indictment in this case do not  
21 have a status element, that the conduct of the accused must relate to  
22 someone who is a witness?

23 Mr. Halling.

24 MR. HALLING: Yes, Your Honour, we do.

25 And the point that I wanted to focus the Trial Panel's attention

1 on is actually footnote 8 in that submission on a witness.

2 The Kosovo Criminal Code is making a distinction as it goes  
3 through these kinds of offences against the administration of justice  
4 crimes, and they are using the term "witness" in some of these crimes  
5 and not in others. In intimidation and retaliation, Your Honour  
6 cited to the code provisions. It talks about persons doing  
7 particular things or being intimidated or retaliated against for  
8 doing those things, but it doesn't use the word "witness."

9 And because "witness" is used in other crimes around the same  
10 point in the code, we are ascribing meaning to that. So all that is  
11 required is that someone is a person. And, truth be told, someone  
12 might, under any definition of a witness, could still be providing  
13 information to Prosecution authorities. Think of an anonymous  
14 informant, for instance. Without actually qualifying as a witness or  
15 being questioned as a witness. This isn't part of the legal elements  
16 of the crime.

17 We acknowledge that witnesses are a common fact pattern. The  
18 kind of people that would be intimidated and retaliated against,  
19 falling under the code, would often be witnesses as classically  
20 understood, but it's not an element of the offences. And that was  
21 the point that we are stressing in our submission, and you can see  
22 that most clearly from other code provisions which we're not  
23 charging.

24 JUDGE GAYNOR: Thank you, Mr. Halling.

25 The Defence will have an opportunity to respond, but this might

1 be an appropriate moment to take a break. I'll leave it to the  
2 Presiding Judge.

3 JUDGE SMITH: How long, gentlemen, do you think you will be in  
4 response?

5 MR. REES: I will be very brief. I certainly will  
6 acknowledge --

7 JUDGE SMITH: I'm sorry. Go ahead if it's short, and you can  
8 turn your microphone on. I didn't turn mine on either.

9 MR. REES: I apologise.

10 No, I'll be very brief. I simply acknowledge the clarification  
11 that's been provided by the SPO as to their interpretation, their  
12 approach to the word "witness" and also "potential witness." It will  
13 assist us in the preparation of the case to understand how the SPO  
14 have approached those terms, but I don't have any further submissions  
15 to make at this stage. Obviously, in due course, we will be looking  
16 at greater detail as to the elements of each offence, but I don't  
17 specifically respond to the SPO's submission. It's simply there to  
18 give us some assistance as to their thinking and their approach.

19 JUDGE SMITH: Mr. Cadman, anything?

20 MR. CADMAN: I'm conscious that the interpreters will need a  
21 break. I will also defer to when we deal with the elements.

22 JUDGE SMITH: Thank you very much.

23 Anything else by anybody?

24 JUDGE GAYNOR: No, thank you very much.

25 JUDGE SMITH: All right. We will take a 30-minute break. We

1 will be back here at 11.35.

2 --- Recess taken at 11.07 a.m.

3 --- On resuming at 11.36 a.m.

4 JUDGE SMITH: I realise this is the first day and you don't know  
5 what to expect from us, but we do like to start on time. So please  
6 do your best to be in the courtroom at the time we designate.

7 We can now move to the next topic, which is bar table motions.  
8 In relation to this topic, I am going to give the floor to  
9 Judge Mettraux, who has expressed an interest in asking some  
10 questions.

11 Judge Mettraux.

12 JUDGE METTRAUX: Thank you, Judge Smith.

13 In an order of 21 July of this year, we invited the SPO to  
14 consider the possibility of filing a bar table motion before  
15 8 September, and pointed in particular to three categories of  
16 proposed exhibits that are on their annexes: That's SPO, so-called  
17 official notes, newspaper articles in respect of which the author  
18 will not be called, and Facebook postings attributed to the accused.

19 Maybe as a matter of clarification that might assist the parties  
20 in answering our question, this step was taken with a view to ensure  
21 that both parties, the Prosecution and the Defence, had clear and  
22 timely notice of what evidence the Panel will admit or will not admit  
23 on the record of these proceedings so as to avoid any prejudice to  
24 either or both parties that could result from a decision taken at a  
25 later stage in these proceedings. So I hope it clarifies things.

1           Now, yesterday we were in receipt of an application from the bar  
2     table, as the expression goes, from the Prosecution in relation to a  
3     proposed 4-or-so-hundred exhibits. And I will start with a number of  
4     follow-up questions for the SPO, and I will turn in a second to the  
5     Defence.

6           So, Mr. Halling, if it's you again. The first one has to do  
7     with protective measures. We want you to clarify whether there is  
8     any intention on your part to seek the admission of any of these  
9     proposed exhibits other than as public exhibits.

10          MR. HALLING: Yes, Your Honour, we do.

11          So most of the exhibits, their classification can be kind of  
12     derived from the way in which the exhibit is presented. A media  
13     article or a video taken from open source is not going to have a  
14     confidential classification. Official notes documenting SPO  
15     investigative activities are understood to have, at least as a  
16     starting classification, confidential.

17          So we haven't described it as a protective measure as such,  
18     because this is just the initial classification that we have issued,  
19     but we are obviously aware that the Trial Panel has the authority to  
20     reclassify anything in the record that they see appropriate,  
21     including exhibits.

22          JUDGE METTRAUX: Well, thank you. I think I can safely say that  
23     you should prepare yourself for making these submissions in writing,  
24     of course, not at this point, so that we are in a position to make  
25     the determination of substance in relation to admissibility and, if

1 necessary, to grant, or not to grant, measures that you would seek in  
2 relation to individual proposed exhibits. That's the first question.

3 The second has to do with something you say in your filing, if  
4 you want to turn to it. That's the bar table motion. At  
5 paragraph 26, you make the submission that in relation to what the  
6 Defence says is the non-exclusive use of their Facebook account, and  
7 your submission is that this claim or the argument that the Defence  
8 is putting forward is, for the purpose of the bar table motion, an  
9 issue of weight rather than admissibility. Do we understand these  
10 submissions correctly?

11 MR. HALLING: You do, Your Honour. Our submission is that  
12 the -- differential standards of proof come into play here.

13 As to admissibility, we have established *prima facie* relevant,  
14 probative, that these Facebook posts were made by the accused, or at  
15 least someone on their authorisation. But that their statements.

16 At the end of trial, there might be a reasonable doubt, there  
17 might be something as regards to the weight of the evidence that it  
18 might be considered differently. But if the question of  
19 admissibility, the possibility that someone else could have accessed  
20 the post, in our submission, shouldn't be considered. It's  
21 *prima facie* admissible. It should be admitted in the record, and the  
22 Judges can decide at the end of the trial whether we've discharged  
23 our burden of proof in being able to fully rely on those statements.

24 JUDGE METTRAUX: Well, let me test that assertion with you a  
25 little bit more.

1           Let's assume that we were to accept the position of the Defence,  
2           that the Facebook accounts were not under the exclusive use, or  
3           without the knowledge, let's assume, of either or both of the  
4           defendants; in other words, that you have failed to establish that  
5           this is either their account or that they were aware of what activity  
6           was going on on their Facebook account, what would you say then is  
7           the relevance of that material? Because, as you say, of course, the  
8           criteria for admissibility are not exactly identical as those that  
9           will be required of us to assess at the time of writing the  
10          Judgement? However, relevance is also something that goes to the  
11          admission and not just to the evaluation of weight.

12          So assume, for the sake of argument, that we were to accept the  
13          Defence submission on that point, what would you say then is the  
14          relevance of that material to your case?

15          MR. HALLING: The way I understand Your Honour's question is  
16          that if the Defence's fact is accepted, that they did not have  
17          exclusive access to the Facebook account, what relevance can be drawn  
18          from the post. And to that we would say quite a bit.

19          There are indicators from the way in which these posts are  
20          written that they are written by the accused or someone on their  
21          behalf. There is no evidence in the record, in contrast, that they  
22          have disavowed any of these posts or deleted them or that they have  
23          done anything to prevent them being associated with these words. And  
24          there is --

25          JUDGE METTRAUX: Maybe --



1 MR. HALLING: Yes.

2 JUDGE METTRAUX: I will stop you, Mr. Halling. Maybe I wasn't  
3 clear enough.

4 Let's assume for the sake of argument that they are right. The  
5 Defence, that is. So let's assume that you are not in a position to  
6 establish the facts that you have just outlined. Let's assume you  
7 are not in a position to establish that they were aware or that they  
8 are responsible for this activity on their account. What would be  
9 then the relevance of that material to your case, if you fail at that  
10 point?

11 MR. HALLING: If it is determined that there is a reasonable  
12 doubt that these Facebook posts can be attributed to the accused,  
13 then I would guess that the Judges' reliance on them would be quite  
14 limited, but that involves accepting a second inference presented by  
15 the Defence which is not established by the evidence.

16 This is a circumstantial evidence problem: There is a Facebook  
17 post, who does it belong to, who is responsible for it? And there is  
18 abundant evidence supporting the inference that it was written by  
19 Gucati and Haradinaj or on their authorisation. There is no evidence  
20 to the contrary. And so -- I mean, I guess our submission would be  
21 they would need to present something to justify there being a  
22 reasonable second explanation as to what happened here, because all  
23 of the evidence is pointing to the fact that these are their posts.

24 JUDGE METTRAUX: Thank you, Mr. Halling. I won't belabour, but  
25 I do suspect that the answer from the Defence will be we don't have

1 to put anything forward. It's for you to exclude that possibility.  
2 But I'll come to the Defence in a second. And if you do not mind, I  
3 will go on with a few more questions for the Prosecution and then  
4 turn to you.

5 The second question that I have in relation to this motion has  
6 to do with what you have renamed so-called contact notes. I do note  
7 that they used to be called SPO official notes and that's the name  
8 that's given to them on the physical pieces of paper that we were  
9 given, so I note this change of terminology. But I'm more interested  
10 in the substance of these documents.

11 You make the submission, and we accept that submission, at  
12 paragraph 27 of your bar table motion, that these documents pertain  
13 to witnesses. That's what you say at paragraph 27. And then you  
14 acknowledge that these notes contain the records of what these  
15 witnesses have said to either investigators of your office or in some  
16 cases Prosecutors -- and/or Prosecutors and an investigator. And  
17 then there is an assertion on your part to the effect that these  
18 notes, official notes, were not taken for the purpose of legal  
19 proceedings, and I want to test that claim with you.

20 At paragraph 27 of your motion, you say that these notes  
21 resulted from effectively an initiative intended to check on the  
22 well-being and security of these individuals. Now, assuming that one  
23 of these persons would express a security concern or safety concern  
24 to you, one, I would think, of the steps that could be taken by your  
25 office would be to seek protective measures, I assume, in relation to

1 one or several of these individuals with a view to deal with the risk  
2 that is resulting from the situation. Would that be a correct  
3 assumption? That's one of the steps that could be taken by your  
4 office.

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

6 For the cases that these people apply to, it would be a Rule 80  
7 application in that case. As we explain in our motion, these are not  
8 witnesses in the Gucati Haradinaj case, and as a result it's our  
9 submission that we don't have to affirmatively justify the protective  
10 measures.

11 I take Your Honour's note that you would like a submission from  
12 the SPO as to why certain materials in the submitted evidence are  
13 classified as confidential, and we can make a submission to that  
14 effect. But even then, we wouldn't be asking for protective  
15 measures. We would be justifying our initial classification of the  
16 evidence, no differently than if we'd made a confidential filing and  
17 then were asked to justify its status.

18 JUDGE METTRAUX: My point was slightly different. My point is  
19 this: If one of your investigators or Prosecutors calls on  
20 individuals who informs you that he or she feels threatened or has  
21 concrete evidence to that effect, one of the steps that you may take  
22 is to seek protective measures from the Court to deal with this  
23 matter, either as a general precaution or in relation to the case in  
24 which he or she would be testifying. And my question is: That is  
25 legal proceedings; correct?

1 MR. HALLING: The statement of the witness was not taken in the  
2 context of legal proceedings. If that definition that was suggested  
3 in the question were the definition of legal proceedings, then it  
4 would not be possible to check in on the well-being or the security  
5 of a witness without taking a statement. And not only would this  
6 impact protective measures, but it would also impact disclosure. We  
7 have an obligation to disclose all the statements of our witnesses.

8 People that have security concerns raised, our understanding is  
9 that that's not, strictly speaking, part of the legal proceedings.  
10 It could then become part. But for the definition of Rules 153 to  
11 155, and you can see the cases that we cite distinguishing these  
12 kinds of considerations from more classical statements, that is the  
13 limitation that these rules are putting on what falls within their  
14 scope.

15 JUDGE METTRAUX: I think the sensitive aspect of your submission  
16 is *stricto sensu*. If the purpose is to make a risk assessment, of  
17 course, one of the possible, if not likely, consequence of that  
18 exercise is potentially legal proceedings.

19 Now, I will leave it to you to consider further, and I'll ask  
20 you a similar question, or at least going to the same direction.  
21 It's a submission you make at paragraph 32 of your motion. It says  
22 this, and I'll read it for you, talking about these notes, you say:

23 "These materials are also evidentiary indicators that the  
24 conduct of the accused was intimidating and/or retaliatory within the  
25 meaning of those crimes," "those crimes" being the crimes with which

1     you charge both defendants.

2             Now, as I understand those submissions, in your own words and  
3     submissions, as you are collecting information from these  
4     individuals, you are becoming aware of the potential commission of  
5     what you say are crimes within this jurisdiction. Is that assumption  
6     correct?

7             MR. HALLING: Whatever information we acquired was incidental to  
8     the purpose of the statement. We were not -- these contact notes  
9     were not created -- by the way, they were called contact notes just  
10    because there are official notes in other categories. We weren't  
11    trying to change the meaning of the definition. We were trying to be  
12    precise as to what kinds of official notes are at issue. But they  
13    were not taken for use as evidence in the proceedings.

14            If you look at the Pre-Trial Judge's decision which granted  
15    non-disclosure of these materials, the counterbalancing measure that  
16    was ordered was that we provide these official notes to the Defence.  
17    So there was not a -- we were not planning on using these in the  
18    proceedings all along. Many of them were disclosed as a result of  
19    this decision. And once they were disclosed, it was then decided to  
20    use them as evidence. But the character of the contact note wasn't  
21    for purposes of legal proceedings. It was for the purposes that are  
22    identified in the request.

23            JUDGE METTRAUX: So let me push it one step further. Let's  
24    assume you are doing something for one purpose. As you are  
25    collecting this information, you, in your own submissions, are

1 becoming aware of the potential commission of a crime that comes  
2 within your competence and the jurisdiction of this Court. Those  
3 are, in effect, your submissions.

4 Now, at that stage are we looking at something that could  
5 qualify as legal proceedings, or are you still asserting that we have  
6 to look backwards at what was your initial purpose for getting in  
7 contact with these witnesses in the first place?

8 MR. HALLING: Our submission is that it would be a wholistic  
9 assessment in order to make this determination. What are legal  
10 proceedings is a term of art in this context. Rules 153 to 155 are  
11 based on rules in international tribunals. Rule 68 of the ICC rules;  
12 Rule 92 bis, 92 ter, 92 quater, and 92 quinquies of the ICTY rules.  
13 Because of the similarity in the provisions, we -- it's in our  
14 submission that the jurisprudence from these tribunals on the meaning  
15 of the provisions is relevant here, and they are describing legal  
16 proceedings as being a limit as what falls within the scope of the  
17 rule.

18 And the kind of latent appearance of relevance to the legal  
19 proceedings, the kinds of information that you're describing in your  
20 question, you know, we can look at the Ongwen citation, you can look  
21 at the Lubanga citation that we have where security notes of contacts  
22 were admitted through the bar table, it's not being understood in the  
23 way that is addressed in the question. It's being understood in a  
24 more discrete sense, and we are arguing that that more discrete sense  
25 is the proper ambit of Rules 153 to 155.

1 JUDGE METTRAUX: I am grateful, Mr. Halling, for those  
2 submissions.

3 I have questions for the Defence as well. If you don't mind,  
4 I'll ask those questions. And, of course, feel completely free to  
5 respond to the submissions of the Prosecution on any of my questions  
6 either as part of your responses or at a later stage.

7 But one clarification that I want to look from you, Mr. Cadman,  
8 is in relation to something that is not entirely clear, at least, in  
9 my mind from your submissions. And the question is this: You  
10 address in your submission what was then a prospective bar table  
11 application by the Prosecution that has now become an actual  
12 application to that effect, and you seem to take quite a principled  
13 objection to the issue, and, of course, that's absolutely your right  
14 and entitlement.

15 But what I want to understand from you is whether your position  
16 on the law is that this Panel is not permitted to issue a decision  
17 from the bar table which, using a non-technical term, is an  
18 application by motion; or, are you saying something slightly  
19 different, which is that in the exercise of our discretion we should  
20 not be admitting the evidence in this matter.

21 So could you please clarify this for me?

22 MR. CADMAN: Thank you, Your Honour.

23 It's certainly the second position that you put forward. We are  
24 not saying that the Trial Panel is precluded. But, obviously, there  
25 has to be some exercise of discretion as to what is included.

1           What we have set out -- and bearing in mind we only received the  
2           motion yesterday, and we will be exercising our right to respond  
3           within ten days in written submissions to that. What we have stated  
4           is that the use of bar table should not be used as a way to  
5           circumvent the usual procedures under proper disclosure.

6           JUDGE METTRAUX: Thank you, Mr. Cadman. Stay on your feet, if  
7           you may. I have a couple more questions for you.

8           But, of course, you will be entitled to respond in writing to  
9           the substance of the application, and I'm not trying to put you on  
10          the spot in relation to any of these issues. So if you feel that you  
11          would prefer to reserve your position for your written submission,  
12          feel free to make that clear to us.

13          But there's one issue that I would like to address with you.  
14          It's again the claim that you made at that time, and I understand you  
15          might be taking a different position now that you have the  
16          Prosecution submissions in front of you, but there was a suggestion  
17          that entertaining such an application would necessarily and  
18          unavoidably cause you prejudice.

19          And, again, my question is whether this should be qualified in  
20          the sense that it was the reflection of a concern that you had,  
21          shadowboxing, effectively, against what might come your way. Is it  
22          still a concern that you have today? And if that's the case, could  
23          you specify what prejudice in particular you are concerned about.  
24          And as specific as you can be, of course, without disclosing anything  
25          that is confidential.



1 MR. CADMAN: Certainly, Your Honour. And to adopt Your Honour's  
2 term of shadowboxing, which was exactly the position we were put in,  
3 not knowing precisely what were going to be the parameters of the  
4 application, which we now have.

5 All I can say at this stage, and we will reserve our position  
6 for it to be in written submissions, as, obviously, preparing for  
7 today's hearing, we only received the application yesterday, and I  
8 wouldn't want to put forward something that changes as a result of  
9 later having considered the full application.

10 The position that we put in terms of anticipating what was going  
11 to be the application was that there are very real concerns as to the  
12 amount of material that would be included that we would not have an  
13 effective opportunity to challenge the authenticity, the absence of  
14 chain of custody of certain material. So there are concerns that,  
15 without having the authenticator of that material that we would be  
16 able to cross-examine, then that would put us at a significant  
17 disadvantage.

18 But, of course, I would much prefer to be able to put that more  
19 eloquently within the ten days afforded to the Defence.

20 JUDGE METTRAUX: So we will expect eloquence from you,  
21 Mr. Cadman.

22 But simply also before you sit down, maybe to put your mind at  
23 rest about something else you said at the time when maybe concern was  
24 greater than it needed to be. But it's the fact that, of course, if  
25 we were to entertain the Prosecution's application in its entirety,

1 or in relation to at least some of the material that they are  
2 proposing to tender in that way, we would be, as is the practice,  
3 deal with each item of evidence that is being put forward.

4 So if they are those concerns that you have voiced, which are  
5 legitimate, in relation to any particular items of evidence that's  
6 being proposed, we would hope that as part your eloquent written  
7 submissions we would have indications of those specific exhibits that  
8 give you those concerns.

9 And, as I promised Mr. Rees, to give him a chance to be heard,  
10 that's now your chance, Mr. Rees.

11 MR. REES: Well, I can't guarantee eloquence, but I will do my  
12 best, having reserved our position to consider the very full and  
13 lengthy application with its annexes, with due consideration we will  
14 respond at that stage.

15 I do add this. We support the rendering of a decision in  
16 respect of admissibility of the substantial application prior to the  
17 Prosecution opening. That would be our position. And to the extent  
18 we also support oral argument being heard on this matter but once  
19 we've had time to properly reflect upon the detail of the application  
20 and respond in writing first to give the Trial Panel the assistance  
21 of our submissions in writing before we expand upon them orally.

22 JUDGE METTRAUX: Thank you. Those were my questions. Concise  
23 is almost as important as Mr. Cadman's commitment to his own  
24 submissions. So thank you, Mr. Rees.

25 JUDGE SMITH: Anything else from my colleagues?

1           So we move on. Sorry. So we move on to the written submissions  
2 requested from the Defence, and the first issue to address relates to  
3 the Defence submissions on entrapment or incitement.

4           And before we go into the details, I have an oral order to make.

5           The Panel has taken notice of the decision of the Court of  
6 Appeals Panel issued on 29 July 2021, in which it found that the  
7 Defence was deprived of the first step of Rule 102(3), namely, the  
8 opportunity to be informed of the materials in the possession of the  
9 SPO relating to the process through which alleged confidential  
10 material arrived at the premises of the KLA War Veterans Association.

11           That the Pre-Trial Judge erred in finding that this issue was  
12 not relevant to the case.

13           And, crucially, that the SPO should have included material in  
14 its possession falling under the so-called Gucati requests (b) (c) in  
15 its Rule 102(3) notice.

16           In light of this position, the Panel orders the SPO to submit an  
17 updated Rule 102(3) list by 6 September 2021;

18           Orders the Defence to indicate to the SPO by 9 September 2021,  
19 or at any time earlier, which items among those listed in the updated  
20 detailed notice they seek to have access to by way of disclosure or  
21 inspection;

22           Orders the SPO to seize the Panel by 15 December 2021 with any  
23 grounds disputing the materiality of evidence or requests for  
24 protective measures or non-disclosure;

25           Orders the Defence to respond, if they so wish, by 20 September

1 to the aforementioned SPO requests;

2 And orders the SPO to disclose to the Defence the sought  
3 material that is not subject to the aforementioned requests by  
4 17 September 2021.

5 15 September is the date for the order for the SPO to seize the  
6 Panel.

7 This concludes the oral order.

8 And now I give the floor to my colleague, Judge Gaynor, who has  
9 some questions on the topic of entrapment and incitement.

10 MR. HALLING: Apologies, Your Honour. Is it possible to take  
11 the floor briefly before those questions?

12 JUDGE GAYNOR: Yes.

13 JUDGE SMITH: It's okay, just go on.

14 MR. HALLING: Just for a moment in relation to the oral order  
15 just given.

16 If it's the SPO's position that updating the Rule 102(3) notice  
17 in the manner Your Honour has just described would involve revealing  
18 information that would be subject to protective measures, even just  
19 on the list, is it within the scope of your Chamber's briefing  
20 schedule to file a request to the Chamber, confidential *ex parte* to  
21 that effect, with sufficient time to rule on it by the 6th so that we  
22 could at least be heard on this point before having to update the  
23 Rule 102(3) notice?

24 JUDGE SMITH: We'll amend our oral order later on, either today  
25 or tomorrow, to include a response to your request.

1 MR. HALLING: Thank you, Your Honours.

2 JUDGE SMITH: All right. Judge Gaynor.

3 JUDGE GAYNOR: Thank you, Mr. President.

4 Now, on the 21 July order, the Trial Panel instructed the  
5 Defence to file additional submissions on entrapment, and the SPO was  
6 ordered to provide its response orally during today's hearing.  
7 Therefore, I would like to invite the Prosecution to address the  
8 Panel on this issue.

9 MR. HALLING: Thank you, Your Honours.

10 The SPO's position is that there is no legal or factual basis  
11 for a defence of entrapment or incitement, and the Defence fails to  
12 make out a *prima facie* case.

13 The cases relied upon by the Defence require two elements to  
14 establish entrapment. There must be, one, an official person taking  
15 action; and, two, this action must exert such pressure upon the actor  
16 such as to incite them to commit an offence that would not otherwise  
17 have been committed. And this is from Ramanauskas, the case from the  
18 Grand Chamber of the European Court of Human Rights, relied upon by  
19 both Defence teams.

20 The Defence provides no evidence to establish either element.  
21 What is alleged is, indeed, wholly improbable within the meaning of  
22 the European Court of Human Rights case cited at paragraph 17 of the  
23 Gucati submissions. There was no undercover operation here. No  
24 official person acting on the accused, and therefore the Defence of  
25 entrapment does not apply. Cases like Ramanauskas involve the

1 conduct of police in undercover operations. There is no evidence of  
2 such official action here, and the cases relied upon by the Defence  
3 are thus misguided.

4 There is no evidence that an SPO official was involved with the  
5 deliveries of any of these batches. The accused have admitted that  
6 their encounters with those delivering the batches were extremely  
7 brief and that they do not know who delivered them.

8 There was no opportunity for an official person to even interact  
9 with the accused, let alone incite or cause them to commit crimes.  
10 In fact, all of the evidence is contrary to the claims of the  
11 accused.

12 The SPO reacted with all possible speed following the three  
13 disclosures. The SPO secured a judicial order following the  
14 7 September 2020 disclosure and seized the materials on 8 September.  
15 The second disclosure was also seized the next day. The third  
16 disclosure was seized on the same day.

17 This is what the evidence shows. The accused have never  
18 themselves said they were incited or entrapped at any point.  
19 Instead, they rely solely on allegations about the SPO's  
20 investigation and conjure fanciful and false theories about the SPO  
21 manufacturing the crimes against the accused.

22 But the evidence, to the contrary, shows that the accused  
23 committed the crimes repeatedly and enthusiastically. They had the  
24 option to return the materials to the SPO instead of releasing them  
25 to the press. They were informed by judicial orders that they were

1 engaging in wrong-doing. They continued to engage in the conduct.  
2 They released them to the press on every occasion. They welcomed the  
3 delivery of the batches. They promised to publish more as more was  
4 received. They wanted to destabilise the KSC and took every  
5 available opportunity to do so. They were not influenced, much less  
6 overborne, by anybody.

7 The Defence cannot establish the *prima facie* threshold to even  
8 justify disclosure on these matters as held by the Pre-Trial Judge  
9 and confirmed by the Court of Appeal. The Defence cannot change the  
10 scope of the trial on the merits to present such arguments.

11 And just to finish, Your Honours. The SPO announces that it  
12 intends to file a motion to strike Defence witnesses and parts of  
13 testimony of Defence witnesses that are irrelevant to the trial and  
14 only go to collateral matters. This includes testimony going to  
15 alleged deficiencies in the SPO's investigation and alleged political  
16 pressure applied against EULEX or the KSC.

17 Thank you, Your Honours.

18 JUDGE GAYNOR: Thank you very much, Mr. Halling. I would now  
19 have a couple of questions for the Defence.

20 Now, the Defence have outlined in their pre-trial briefs various  
21 factors in support of the argument that it would be reasonable for  
22 the Panel to infer the existence of a plan or deliberate effort to  
23 entrap the accused. We would like to inquire further into your  
24 arguments in this respect.

25 First of all, Mr. Rees, do you accept that the Defence bears the

1       onus of establishing a *prima facie* case of entrapment or incitement?

2           MR. REES: No, I don't accept that.

3           JUDGE GAYNOR: Mr. Cadman?

4           MR. CADMAN: It's a position that's been put forward jointly by  
5       the Defence. No, we do not accept that.

6           JUDGE GAYNOR: Now, Mr. Rees, in your 27 August submissions,  
7       you've set out jurisprudence of the European Court of Human Rights  
8       relating to entrapment.

9           MR. REES: Yes.

10          JUDGE GAYNOR: And this suggests that incitement may be by a  
11       state agent or by private party acting under the instructions or  
12       control of the state agent.

13          MR. REES: Absolutely.

14          JUDGE GAYNOR: And my question is to you, first of all, do you  
15       consider that incitement by a person not acting under the  
16       instructions or control of a state agent constitutes entrapment?

17          MR. REES: We have set out that we accept an essential part of  
18       a plea of police incitement, as it were, is to establish the  
19       involvement of the investigating agency. Whether direct or indirect  
20       does not have to be through an individual officer. It does not have  
21       to be with the approval of senior members of that investigating  
22       agency. But there has to be some involvement with the prosecutorial  
23       agency.

24          JUDGE GAYNOR: Thank you. And analogously, do you consider that  
25       incitement or entrapment by a person not acting under the



1 instructions or control of the SPO constitutes entrapment or  
2 incitement?

3 MR. REES: I would qualify that by making the point again that  
4 it does not seem to us any part of the case law reviewed in the  
5 European Court of Human Rights that, for example, the authority of  
6 the organisation as a whole, represented either by a senior member of  
7 the organisation, needs to be proved or needs to play a part in the  
8 incitement.

9 It would be enough if, for example, an agent of the SPO went  
10 rogue and acted without the knowledge of any other person within the  
11 SPO.

12 JUDGE GAYNOR: And can I ask you, do you have any jurisprudence,  
13 in particular of the European Court of Human Rights, but of any  
14 domestic authority or any international court to support that  
15 specific submission in.

16 MR. REES: Yes, is the answer. And it is -- I have referred to  
17 Ramanauskas. I can assist further by identifying the specific  
18 authority for that proposition, but we say it is firmly made out in  
19 the case law of the European Court.

20 JUDGE GAYNOR: That a rogue agent --

21 MR. REES: That an agent going rogue is sufficient.

22 JUDGE GAYNOR: I think the Panel would appreciate your  
23 identification of the specific jurisprudence of it.

24 MR. REES: And I will assist the Court with that.

25 JUDGE GAYNOR: Now, I would like to ask both Defence teams:

1 Does either Defence team currently have any evidence - I mean  
2 evidence, not a matter of inference - but evidence that suggests that  
3 any current or former member of the SPO or any private party acting  
4 under the instructions or control of the SPO delivered or provided  
5 the material in question to the Veterans Association?

6 As you're on your feet, we'll start with you, Mr. Rees.

7 MR. REES: Yes, we say there is evidence. The evidence is set  
8 out in a summary form in our paragraph 20(c) of our submissions of  
9 27 August 2021.

10 Circumstantial evidence is evidence. There is no distinction to  
11 be drawn between direct evidence and circumstantial evidence. It is  
12 evidence. And we intend to call the evidence that we set out there  
13 in paragraph 20(c) onwards to, we say, the effect that the inference  
14 can be drawn without anything further that there must have been  
15 involvement from an SPO officer in the process by which the batches  
16 came to be delivered to the KLA WVA.

17 JUDGE GAYNOR: Thank you.

18 Mr. Cadman, would you like to say anything?

19 MR. CADMAN: Your Honour, just to endorse the position that has  
20 been set out by Mr. Rees. And, obviously, not wishing to present our  
21 entire case at this stage, there is, of course, evidence that will be  
22 called, as Mr. Rees has set out but both in terms of circumstantial  
23 and evidence and inferences that can be drawn as a result of the  
24 failures of the Special Prosecutor's Office that can lead to only one  
25 conclusion: That there had to have been involvement from the Special

1 Prosecutor's Office either acting directly or indirectly, and  
2 evidence will be called to that effect.

3 JUDGE GAYNOR: Thank you, Mr. Cadman.

4 Now, I have two questions for the Prosecutor's Office.

5 Is the SPO's position, because we've read your assertions in  
6 this regard very carefully. Is it the SPO's position that there is  
7 no information in its possession which could be material to the  
8 argument that any current or former member of the SPO or any private  
9 party acting under the instructions or control of the SPO delivered  
10 the material in question to the Veterans Association?

11 MR. HALLING: Your Honour, that is correct. And we've made this  
12 submission before. If there was any evidence to that effect, it  
13 would not need to be noticed and selected by the Defence pursuant to  
14 Rule 102(3). That would fall under Rule 103. In our opinion, it  
15 would be potentially exculpatory. We would disclose it directly.  
16 And the Court of Appeals made the same finding.

17 So not only is there no evidence but this is the reason why no  
18 evidence has been disclosed.

19 JUDGE GAYNOR: Thank you. Those were my questions on this  
20 matter.

21 Thank you, Judge Smith. I'll pass to the Presiding Judge.

22 JUDGE SMITH: Judge Mettraux has some questions.

23 JUDGE METTRAUX: Thank you, Mr. President.

24 Mr. Rees, I will call upon you again on this issue. I just  
25 want -- I think you have answered it, but I will ask you,

1       nevertheless.

2               But do you accept, like the Haradinaj Defence, that the identity  
3       of the official from SITF or SPO who, according to both Defence  
4       teams, partook in the claimed entrapment or incitement is unknown; is  
5       that correct? You are not suggesting that that person is known by  
6       anyone in this Court. Is that a correct understanding?

7               MR. REES: On the information that we presently have, I note,  
8       and I'm grateful for Trial Panel's oral order earlier on, because it  
9       saved me from making specific submissions on it, that the SPO has not  
10      complied with its disclosure obligations. Stage 1 of the three-stage  
11      process, to be applied under Rule 102(3), has not been complied with  
12      yet.

13              JUDGE METTRAUX: Put, Mr. Rees, put the disclosure issues aside  
14      for a question. Back to my question, and I'll ask you maybe two  
15      questions that you can tackle at once.

16              You are not proposing to identify any given individual as part  
17      of your case. Your case, as I understand it, and as the Panel  
18      understands it, is you will seek an inference from the Panel that a  
19      number of indications - 13 of them in the paragraph 20(c) that you  
20      have identified a moment ago - would allow for the inference that  
21      entrapment occurred, or at the very least that the Prosecution has  
22      failed to demonstrate it to be unreasonable, that conclusion. Is  
23      that right?

24              MR. REES: Yes.

25              JUDGE METTRAUX: You are not going any further than that

1       evidentially. You are not proposing --

2           MR. REES: No. As we've said in our Defence pre-trial brief,  
3       the identity of the person who made the delivery -- the identity of  
4       the persons who made the deliveries is unknown.

5           JUDGE METTRAUX: And so is the person, in the scenario that you  
6       gave to my colleague Judge Gaynor, so is if your case were to be an  
7       indirect, so-called, entrapment, the official that would have been  
8       otherwise involved in the matter, you are not proposing to identify  
9       this person; correct?

10          MR. REES: Not proposing to. We can't. We don't know. That's  
11       why we've sought disclosure of material that was relevant and should  
12       have been listed on the Rule 102(3) notice. Once we received that  
13       Rule 102(3) notice, as amended, we will make such disclosure  
14       applications from that list as are appropriate and in accordance with  
15       the oral order, and we will see where that then takes us, as it were.

16          JUDGE METTRAUX: Thank you.

17          MR. REES: But, again, I don't think it's any part of the case  
18       law of the European Court that requires the identification of a  
19       particular officer involved.

20          JUDGE METTRAUX: And that was not the suggestion either.

21          MR. REES: No.

22          JUDGE METTRAUX: It was an inquiry about the nature of the case  
23       that you proposed to put forward.

24          MR. REES: Absolutely.

25          JUDGE METTRAUX: Thank you.

1           Mr. Cadman, that be your turn. I have a number of  
2       clarifications that I would seek from you. I've read, of course,  
3       your submissions on that issue and so you can -- do not feel that you  
4       have to repeat anything that's in it. But there's a number of issues  
5       that arise from it, and maybe the question was not sufficiently clear  
6       to you.

7           But at paragraph 30, 3-0, of your submissions, you suggest that  
8       the Panel is asking you to justify your claim of entrapment. That  
9       was not the intention and that certainly isn't what we were asking  
10      you. What I was asking you -- what I want to ask you now is  
11      something slightly different. It's about the legal basis that you  
12      are relying upon to advance this claim of entrapment, and I will  
13      spend a few seconds, perhaps, that will make it clearer to you what  
14      assistance I'm seeking here.

15          Our understanding is that in some jurisdictions, the notion of a  
16      defence of entrapment does not exist. In some other jurisdictions,  
17      it does exist. And then you have other jurisdictions, national  
18      jurisdictions where it could be, for instance, grounds for exclusion  
19      of evidence - France, for instance - or it could be a mitigating  
20      factor as is the case in Switzerland, if it were to be established  
21      that entrapment has indeed occurred.

22          Now, what I want to know from you is, very specifically, what is  
23      the legal basis? Where does this Panel have to turn to find the  
24      legal basis on which you ask us to rely to allow what you say is a  
25      defence of entrapment? And before you answer that question, may I

1 direct you specifically to Article 12 of our Law, which sets out the  
2 applicable law, which, in summary fashion, says that the law that we  
3 apply to these proceedings is substantive law, that is, effectively  
4 either Kosovo domestic criminal law to the extent it's been  
5 acknowledged as applicable in this jurisdiction and/or customary  
6 international law.

7 So my question to you is a specifically legal one, a legal  
8 basis, is where is the Panel to go to find that this notion of a  
9 defence of entrapment is made to be relevant and applicable to these  
10 proceedings?

11 MR. CADMAN: Thank you, Your Honour. Clearly I did  
12 misunderstand the question that was being asked initially, as is  
13 clear from the answer in Article -- or paragraph 30. That was  
14 certainly our reading of the order.

15 As Your Honour has indicated, there are a number of different  
16 jurisdictions where the Defence is looked upon in a very different  
17 way. It may constitute an abuse of process and a bar to proceedings.  
18 As you've already stated, it may also be considered as mitigation or  
19 exclusion of evidence.

20 The difficulty we have is that it is not clearly set out in the  
21 legal framework of this institution. And to my mind, it's not  
22 clearly set out in the criminal procedure laws of the Republic of  
23 Kosovo either.

24 What we have set out is that it is a Defence that can be raised,  
25 and should be raised, in the specific circumstances of this case.

1 And it is, of course, a matter for the Court to determine to what  
2 extent that Defence can be applied and what is the remedy. We  
3 haven't set out at this stage what that remedy is. What we have  
4 stated, that it is -- it is a defence. It is certainly recognised  
5 under the European Convention on Human Rights, as we've already heard  
6 from Mr. Rees on the jurisprudence of the European Court.

7 But what we have not set out at this stage, and, of course, it  
8 is a matter to be raised at trial, as to whether we can satisfy our  
9 burden on whether the Prosecution in response can satisfy their  
10 burden, and then the result of what that defence actually is. We  
11 have not set out at this stage what the remedy is.

12 JUDGE METTRAUX: Mr. Cadman, I don't want to put you on the  
13 spot. I don't think you've pointed to any legal basis, and I won't  
14 ask the question again, but I do suggest that you give consideration  
15 to that matter, because, of course, there has to be a legal basis  
16 somewhere, and maybe you can consider perhaps the arguments of your  
17 colleague Mr. Rees, on that point and see whether they are consistent  
18 with yours. Because as we understand the positions so far, they are  
19 slightly different. But as I said, I won't belabour the issue at  
20 this stage.

21 But there's something also that I will put for your  
22 consideration either today or at the time that you will choose for  
23 your submissions on that point. But we asked you also what the  
24 elements of that purported defence of entrapment were, and that was  
25 with a view to ensure that this Panel, if it was to entertain such an



1 argument, would have a legal basis on which to rely and then know  
2 what the elements of that defence are.

3 And, again, as you would probably be aware, the elements of such  
4 a defence may be vastly different from one jurisdiction to the other.  
5 And your response to that inquiry, at paragraph 44 of your  
6 submissions, was to the effect that the conditions and requirements  
7 applicable to such a defence in the Special Court's legal framework  
8 are those that would be ordinarily applicable in a domestic context,  
9 the defence of entrapment being recognised as a legitimate defence  
10 domestically, and therefore the same must hold true for the purpose  
11 of the Specialist Chambers.

12 Now, with respect, Mr. Cadman, I still am somewhat confused  
13 because of the fact that you haven't pointed to a legal basis that  
14 would allow us to identify those elements which you say are  
15 regulating the law of entrapment that you are putting forward for  
16 consideration. And I don't mean to put you on the spot, Mr. Cadman,  
17 on that, but if you wish to address the matter now, please do so. If  
18 you prefer to keep this matter for your further consideration and  
19 make those submissions later, we'd understand that.

20 MR. CADMAN: I'm sorry, Your Honour, as you've graciously given  
21 me time to respond to that in full, I will take that time and respond  
22 at a later time. If Your Honour would like me to deal with that  
23 later today or tomorrow morning, I'm more than happy to deal with it  
24 at that stage.

25 JUDGE METTRAUX: Well, we'll leave that time to you, Mr. Cadman.

1 Of course, it can be done at a later stage, and it's not for us to  
2 decide your strategic position. It is simply that it would assist  
3 the Panel to understand what the legal framework around your argument  
4 is said to be by you so that we can give consideration to that part  
5 of your case.

6 Mr. Rees, I will now offer you a chance to comment on anything  
7 that's been said. And at the same time, there's a question in my  
8 mind that I want to direct to both Defence teams, and that is the  
9 suggestion - as I understand it, at least - is the fact that a  
10 so-called defence of entrapment, or incitement, depending what term  
11 is used, would only ever become relevant, to this Panel at least, if  
12 and where we were satisfied that one or more of the crimes that are  
13 charged against your and Mr. Cadman's client have been established.

14 Is that legal assumption a correct one, in your view?

15 MR. REES: Yes, that's how we've approached it in the Defence  
16 pre-trial brief.

17 Mr. Gucati raises substantive defences in relation to each of  
18 the charges. He does rely on the plea of incitement if the  
19 Trial Panel is against him on any of those charges.

20 If it assists, our submission is that the plea of incitement is  
21 a matter that should be tried during the course of the trial. The  
22 evidence is, effectively, one and the same with the matters that the  
23 Prosecution bring in by way of charge. So, for example, the -- it  
24 does not seem to us to be a useful process to, for example, hold  
25 something like a trial before the trial on the issue of incitement.

1 We would submit that it's a matter that can be dealt with properly  
2 during the course of the trial and dealt with at the conclusion of  
3 it, as it were.

4 JUDGE METTRAUX: Thank you, Mr. Rees.

5 May I take it that the position is shared by Mr. Cadman on  
6 behalf of Mr. Haradinaj?

7 MR. CADMAN: Yes, Your Honour.

8 JUDGE METTRAUX: I have one last question, and it's for you,  
9 Mr. Halling. You've indicated that you were intent on filing a  
10 particular application, I think you used the expression, to strike or  
11 strike out certain proposed witnesses who are, to your understanding,  
12 to testify to some of the issues of concern.

13 Do you have an indication to give to us of the timing when you  
14 would wish to make such an application? And, again, not putting you  
15 on the spot. If you need more time to consider the matter, let us  
16 know.

17 MR. HALLING: Your Honour, envisaging what we intend to file, I  
18 think we would be able to file it by mid-September.

19 JUDGE METTRAUX: Thank you.

20 JUDGE SMITH: Anything else? So moving on. We have about 25  
21 minutes. We'll start the next subject. I am not sure we will finish  
22 it in that time-period. We'll take a break at 1.00, as I had  
23 indicated earlier.

24 The next topic concerns the prospective witnesses of the  
25 Defence, and I give the floor to my colleague Judge Gaynor, who has

1 some questions on this topic.

2 Judge Gaynor.

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

4 In the 21 July order, the Panel instructed each Defence team to  
5 submit by 27 August a summary of the facts or circumstances in  
6 relation to which each witness would testify; in particular, in  
7 respect of the issue identified by both Defence teams as public  
8 interest.

9 The SPO was ordered to provide its response orally, if any,  
10 during this hearing.

11 I would now like to invite the SPO to provide its response.

12 MR. HALLING: Thank you, Your Honours.

13 As we just mentioned on the previous issue, the Defence is  
14 seeking to elicit a great deal of evidence concerning matters not  
15 relevant to this trial, and that the SPO does indeed intend to file a  
16 motion to strike this kind of irrelevant evidence. It connects to  
17 the discussion on the previous issue, because a lot of the issues  
18 that are manifestly irrelevant seem to be going to this entrapment,  
19 incitement issue.

20 The reason why the Defence teams are struggling to identify  
21 whether or not this is a substantive defence, or what the elements  
22 are, is because it isn't. It is something that would be more akin to  
23 a procedural motion on the fairness of the trial or to have evidence  
24 of the SPO to be excluded. It is the difference between whether or  
25 not evidence should be elicited during trial on the merits of these

1 questions or whether it's a collateral issue.

2 And our position is that a lot of these points that are going  
3 towards things like incitement or entrapment are not going to the  
4 merits of the trial and --

5 JUDGE GAYNOR: Can I interrupt you for a moment?

6 MR. HALLING: Yes.

7 JUDGE GAYNOR: We're dealing with the issue of public interest.  
8 A number -- we're now finished with entrapment and incitement. A  
9 number of the witnesses which have been listed by each Defence team  
10 are being called, it appears, in respect of an issue of public  
11 interest.

12 Now, do you have any specific response to give right now on that  
13 specific point?

14 MR. HALLING: On the specific point Your Honour raises, it  
15 depends on what the public interest is. Our understanding is that  
16 the public interest is going to this same point in trying to expose  
17 matters on the political dealings of institutions or whistle blowing  
18 that are sort of relevant to the defence they are mentioning, which  
19 is why I linked the issues.

20 But, in short, public interest alone is not a justification for  
21 eliciting relevant evidence at trial, and we intend to address this  
22 in our filing.

23 JUDGE GAYNOR: Thank you very much, indeed.

24 Now, I would like to turn to the Defence teams. Is it the  
25 Defence position that acting in pursuit of the public interest, which

1 is referred to in your filings, is a substantive defence to any of  
2 the charges in this specific indictment in this case, taking into  
3 account the restrictions on freedom of expression set out in  
4 Article 10(2) of the European Convention on Human Rights? And, if  
5 so, to which specific charges is public interest a defence?

6 I can start with Mr. Cadman.

7 MR. CADMAN: Put simply, Your Honour, yes, it is. The Defence  
8 intends to call evidence to demonstrate that and by virtue of calling  
9 witnesses of fact and expert evidence as to the public interest  
10 defence on the disclosure.

11 JUDGE GAYNOR: Thank you.

12 Mr. Rees.

13 MR. REES: [Microphone not activated]. We agree with the  
14 position of Mr. Haradinaj. Whether it's characterised as a  
15 substantive defence or whether it's characterised as part of the  
16 process of analysing whether the Prosecution have proved beyond  
17 reasonable doubt the elements of each offence, we do say that it's  
18 important that the Court considers the accused's rights to freedom of  
19 expression and the public interest that is inherently protected  
20 thereby.

21 JUDGE GAYNOR: And are you able, Mr. Rees, to assist us with any  
22 citations in Kosovo law or to any jurisprudence of the European Court  
23 of Human Rights or the ICTY or any relevant court which support the  
24 argument that public interest is a valid defence to charges similar  
25 to or identical to the indictment in this case?

1           MR. REES: What I do point to in the Defence pre-trial brief, at  
2     some detail, is the accused's rights that are protected under  
3     Article 22 of the Constitution of the Republic of Kosovo, Article 19  
4     of the Universal Declaration on Human Rights; Article 19 of the  
5     International Covenant on Civil and Political Rights; Article 10 of  
6     the European Convention; Article 41 of the Constitution; and  
7     Article 42.

8           These offences are specific to the Kosovan Criminal Procedure  
9     Code. There is no body of case law that provides any real assistance  
10    to the Trial Panel on the interpretation of them, as is clear from  
11    the decision on the confirmation of the indictment from the  
12    Pre-Trial Judge in which he embarked on the interpretation of the  
13    offences with very little citation of authority to assist him in  
14    doing so.

15          We will invite the Trial Panel to look in detail in the offences  
16    themselves, and the Trial Panel will have to reach its own  
17    interpretation on the scope of those offences.

18          And we will submit, as part of that exercise, the Trial Panel  
19    will have to look at the constitutional rights that are guaranteed to  
20    Mr. Gucati in relation to freedom of expression.

21          JUDGE GAYNOR: Thank you very much, Mr. Rees.

22          Mr. Cadman, I'd invite you to identify, if you can, any specific  
23    jurisprudence or provisions in domestic law which go to the issue of  
24    public interest as a defence to charges -- specifically the charges  
25    in the indictment here.

1 MR. CADMAN: Your Honour, as Mr. Rees has stated, there is no  
2 example of any of the international or *ad hoc* tribunals having --  
3 where this has been argued before. This will, in effect, be the  
4 first time that it's been argued in proceedings such as this.

5 There are, of course, examples where a whistle-blowing defence  
6 or public interest defence are argued -- or have been successfully  
7 argued in the domestic legal arena, and certainly the purpose of  
8 calling the expert from -- which we have listed from the  
9 whistle-blowing international network is to set out the European  
10 legal framework, including the EU directive on whistle blowing. And  
11 so that is the purpose of why that will be argued at trial.

12 JUDGE GAYNOR: And in respect of the expert witness that you've  
13 just referred to, who I believe appears on both Defence witness  
14 lists. When do you anticipate that you will be ready to disclose the  
15 final report of that expert, including the expert's qualifications,  
16 to the SPO, in accordance with Rule 149?

17 MR. CADMAN: If I could just take a moment, Your Honour.

18 We anticipate that we will be in the position to serve that  
19 within the next four weeks.

20 JUDGE GAYNOR: Thank you, Mr. Cadman.

21 I now move on to the witnesses that have been listed by both  
22 Defence teams. These are fact witnesses, as far as the Panel  
23 understands, who it is said "will testify on whether the accused were  
24 acting in the public interest/can be classified as whistle blowers,"  
25 that's a direct quote.



1           Are you able to let the Panel know at this stage what are the  
2           specific facts that those witnesses can testify about that are  
3           specifically relevant to the charges set out in the indictment in  
4           this case?

5           Mr. Cadman.

6           MR. CADMAN: Your Honour, we've set out in our written  
7           submissions who the witnesses are that we intend to call at this  
8           stage. There may well be applications for further witnesses in due  
9           course as Defence investigations continue.

10          We've set out the details, as we see we are required to  
11          disclose, at this stage. We do not consider it necessary for the  
12          Defence to disclose the entirety of its Defence case at this time.  
13          What we have set out are a number of witnesses of fact and those  
14          witnesses who can talk about the public interest in the disclosure  
15          matters.

16          They are made up of those that were employed by the War Veterans  
17          Association at the time, there are journalists, and there are those  
18          that have had experience with the EULEX system that will go to the  
19          public interest defence.

20          JUDGE GAYNOR: Thank you.

21          Mr. Rees, would you like to add anything as to the facts that  
22          these witnesses will testify about which are relevant to the charges  
23          in this indictment?

24          MR. REES: We have, of course, [Microphone not activated]. We  
25          have, of course, submitted a detailed lengthy pre-trial brief on

1     behalf of Mr. Gucati, which sets out therein the issues of fact that  
2     will be relied on in relation to what is being characterised as  
3     shorthand as public interest issue.

4             As we have put in the Defence pre-trial brief, we have referred  
5     to the accused's rights of freedom of expression. We have referred  
6     to the Constitution of the Republic of Kosovo as modern, open, and  
7     liberal. It is a rejection of the secretive authoritarian repressive  
8     years that Kosovo endured under the communist Yugoslavia and then  
9     nationalist Serbia. That under Article 2(3) of the Kosovo Criminal  
10    Code the definition of a criminal offence is to be strictly  
11    construed, interpretation by analogy shall not be permitted. In the  
12    case of ambiguity, the definition of a criminal offence shall be  
13    interpreted in favour of the person against whom the criminal  
14    proceedings are ongoing. Similarly, any limit to the exercise by the  
15    accused of his constitutional rights must be strictly construed and  
16    applied only where clearly demonstrated to be strictly necessary and  
17    in accordance with the law. And Articles 22, 40, 41, and 42 of the  
18    Constitution which confirm the accused's right to freedom of  
19    expression.

20            JUDGE GAYNOR: Yes. But, Mr. Rees, if I can just interrupt for  
21    a second. We are specifically interested in knowing the facts that  
22    these witnesses might be able to testify which can assist this Panel,  
23    taking into account the charges in this particular indictment.

24            MR. REES: Yes. And I follow the nature of the request, and it  
25    is spelled out in the Defence pre-trial brief, which is why I was

1 coming onto it.

2 But it is important that the Trial Panel understands our  
3 position. It's been referred to as a defence of public interest.  
4 And we raised the public interest, because it is an important part of  
5 the task of the Trial Panel.

6 I don't characterise it as a substantive defence, however. It  
7 will form part of the considerations of the Trial Panel when they  
8 come to consider the scope of the offences, construing them narrowly.  
9 And we're not dealing with offences that have been dealt with in  
10 other international criminal courts, because these are -- these are  
11 offences created by the Kosovan Criminal Code, which is subject to  
12 specific rights protected in the Constitution of Kosovo and the other  
13 instruments that are specifically adopted in that Constitution.

14 So the interpretation of those offences can only be done by  
15 reference to the other rights that are guaranteed within the  
16 Constitution.

17 In relation to the facts, we have referred in the Defence  
18 pre-trial brief to the fact that the content of the press conferences  
19 referred to and the purpose of them was to make public the  
20 collaboration between the SPO and the Serbian authorities. That is  
21 essentially the matter of public interest, the fact that goes to  
22 public interest that we rely upon. And we have made that clear, I  
23 hope, in the very detailed and lengthy 107-page Defence pre-trial  
24 brief, responding paragraph by paragraph to the Prosecution pre-trial  
25 brief.

1 JUDGE GAYNOR: Thank you, Mr. Rees. We'll return to that issue  
2 a little later.

3 But for the moment -- the issue of the collaboration, as you  
4 describe it, between the SPO and the Serbian authorities. So you  
5 will have the opportunity to return to that.

6 At this stage, would the SPO like to respond to anything, taking  
7 into account what you've already said and your upcoming motion that  
8 you've indicated to all that you intend to file?

9 MR. HALLING: I think our position on the matter is clear,  
10 Your Honour. Unless you have further questions, we have no further  
11 submissions.

12 JUDGE GAYNOR: I've no further questions.

13 Thank you, Judge Smith.

14 JUDGE SMITH: All right. Any other colleagues?

15 Judge Mettraux, I give you the floor.

16 JUDGE METTRAUX: Thank you, Mr. President.

17 So I will briefly summarise what, at least, is my understanding  
18 is the position of the Defence as far as the legal basis, again,  
19 question is concerned here.

20 Mr. Cadman, you have not pointed to any particular legal basis  
21 where the Panel would have to look to find what you claim is a  
22 substantive defence of entrapment or incitement.

23 While counsel for Mr. Gucati, Mr. Rees, is suggesting a slightly  
24 different route through provisions of the Kosovo Constitution,  
25 Article 3 and 22, I understand, and a number of provisions from

1 relevant human rights instruments, including Articles 6 and 10 of the  
2 European Convention on Human Rights.

3 Now assuming for the sake of argument that these provisions that  
4 Mr. Rees has put forward as the underlying legal basis for the claim  
5 of defence of public interest, I would be interested in knowing what  
6 you say is the definition of that notion, to the extent that we will  
7 have to apply that definition to assessing the evidence that you will  
8 seek to offer to the Panel to determine whether one fits into the  
9 other.

10 And having conducted diligently, I hope, a little research on  
11 that point, we could identify one definition of public interest under  
12 the applicable Kosovo legal regime. It's at paragraph 4 of  
13 Article 200 of the Criminal Code that refers not to something that  
14 is, I should make clear, directly relevant to these proceedings.  
15 It's the unauthorised disclosure of confidential information. It is  
16 not a provision put forward by the Prosecution, but it does helpfully  
17 define "public interest" in those terms, and I would like to read it  
18 to you. It says that:

19 "'Public interest' means the welfare of the general public  
20 outweighs the individual interest. The disclosure of confidential  
21 information is in the public interest if it involves plans,  
22 preparation, or the commission of crimes against the constitutional  
23 order or territorial integrity of the Republic of Kosovo or other  
24 criminal offences that will cause great bodily injury or death to  
25 another person."

1           And my question to both counsel, for the Defence, and the  
2           Prosecution can, of course, address the issue as well if they so  
3           wish, but is that a definition that you accept to be reflecting your  
4           understanding of what "public interest" stands for, for the purpose  
5           of these proceedings? Or are you suggesting that another definition  
6           should apply? And if the latter, could you tell us where we should  
7           be looking for it?

8           And, Mr. Cadman, perhaps, to start with.

9           MR. CADMAN: Your Honour that is one of the definitions under  
10          Kosovo law where it deals with public interest, and that is one of  
11          the definitions that we say that the Trial Panel will have to  
12          consider.

13          I do not have a copy of it with me, but I am sure that we can  
14          provide a copy towards the end of the day. But there is also  
15          domestic legislation that deals explicitly with the defence of public  
16          interest under whistle blower, but I am more than happy to ensure  
17          that that is provided to the Trial Panel.

18          JUDGE METTRAUX: We'd be grateful, Mr. Cadman.

19          Mr. Rees.

20          MR. REES: Well, I'm very grateful for Your Honour's reference.

21          JUDGE METTRAUX: I think, Mr. Rees, you have a microphone issue.

22          MR. REES: I'm very grateful for Your Honour's reference to that  
23          particular article in the Criminal Code. Would Your Honour permit us  
24          time to consider that and reflect upon it? Obviously we understand  
25          that the Trial Panel will wish detailed submissions in due course as

1 to what we say is the definition of public interest to be applied.

2 JUDGE METTRAUX: We'd be grateful for that, Mr. Rees.

3 MR. REES: Thank you.

4 JUDGE METTRAUX: Thank you. And take on board as well my  
5 subsequent questions, if you may. I think you have clarified it, and  
6 I'm grateful for that, but I want to give Mr. Cadman also an  
7 opportunity to comment on something you said.

8 Are we to understand that the public interest which you submit  
9 is relevant to these proceedings - in other words, the public  
10 interest that your clients were pursuing in conducting themselves in  
11 the way that the Prosecution allege they did - was to expose what you  
12 said is the cooperation between the SITF and/or the SPO on the one  
13 hand and the Serbian authorities on the other? That is the one and  
14 only, I should say, public interest that forms part of your case. Is  
15 that assumption a correct one?

16 MR. REES: Yes, in order [Microphone not activated].

17 I'm very sorry, it's because the microphone is here.

18 JUDGE METTRAUX: It hasn't been made practical for you,  
19 Mr. Rees. I do realise that.

20 MR. REES: I did try to move this earlier on, Your Honour.

21 In short, Your Honour, I was agreeing that in order to be  
22 concise and encapsulate the principle, the point, it can be  
23 summarised -- the public interest can be summarised and has been in  
24 the Defence pre-trial brief as the exposure of collaboration between  
25 the SPO and its predecessor and the Serbian authorities.

1 JUDGE METTRAUX: So let me press you a bit on that point. And,  
2 again, if you feel that you need more time to address that issue in a  
3 different setting, please say so.

4 But assuming that this would constitute a legitimate public  
5 interest for the purposes that you have identified, the Prosecution,  
6 as I understand, is claiming that the collaboration between SITF on  
7 the one hand and SPO, both of them, one or the other, and the Serbian  
8 authorities was, in fact, an issue that was and had been in the  
9 public domain for quite some time. And the material that they will  
10 seek to put on the record of these proceedings suggests that this was  
11 even an issue addressed by one or both of the defendants.

12 So what I'm asking here - and, again, offering you the  
13 possibility to stay your hand on your submission if you so wish - but  
14 would your position be that there was the public interest that you  
15 claim there was despite the fact that this information, the  
16 cooperation between SITF/SPO and the Serbian authorities, was said to  
17 be in the public domain already at the relevant time?

18 MR. REES: We would certainly submit that information that is in  
19 the public interest does not lose its relevance because it's already  
20 been reported on previously. Information that is in the public  
21 interest can continue to be reported in the public interest and it  
22 does not lose its status.

23 For example, information that is in the public interest does not  
24 have that public interest only so long as it is a scoop. It cannot  
25 do.



1 JUDGE METTRAUX: I'm pressing onwards, Mr. Rees, and tell me  
2 when you wish to not be pressed further. But have you been able to  
3 determine what percentage or what amount of the material that the  
4 Prosecution is relying upon to establish the charges would contain  
5 information that goes to that issue?

6 In other words, what lies behind my question is how much of that  
7 material would go to that issue of public interest if we were to  
8 accept your submissions that, demonstrating the cooperation that you  
9 mentioned, would be in the public interest? Are you able to tell us  
10 what amount, percentage, quantity of the material that your clients  
11 are alleged to have unlawfully disclosed would reveal this sort of  
12 information or would go to establish that public interest?

13 MR. REES: No, I cannot assist with that because the Prosecution  
14 has neither served the material as evidence nor have they disclosed  
15 it, so I cannot.

16 JUDGE METTRAUX: Well, they have to the extent that you have the  
17 supporting material. Of course, you have 400-plus exhibits. But  
18 I'm -- as you said, maybe my question was an unfair one. But keep it  
19 in mind.

20 MR. REES: Your Honour, I wish I could assist you on that. We  
21 have sought disclosure from the very first hearing of that material  
22 so that we could precisely assist the Trial Panel with such issues as  
23 to the authenticity of the material, whether it is properly  
24 confidential, to precisely assist with issues as to which documents  
25 in particular go to public interest and so on, but we have had -- we

1 have been refused disclosure accordingly, so I cannot.

2 JUDGE METTRAUX: Well, going back to the nature of this defence  
3 in the broader sense. I understand your position on the exact nature  
4 of what is being advanced is slightly different from your point of  
5 view than Mr. Cadman, and I totally accept this.

6 But what I want to understand is whether you are disputing the  
7 fact that the SITF and/or the SPO was authorised - and, in fact,  
8 mandated - to seek relevant information from all possible relevant  
9 sources of such information. Are you disputing this?

10 MR. REES: If I may answer the question in this way. The  
11 Trial Panel will have to look in due course at the evidence to see  
12 exactly what was, for example, discussed and said in the press  
13 conferences and look at the nature of that material. The nature of  
14 that material, the only names that were mentioned were publicly known  
15 names, people performing public roles in Serbia, each of whom had a  
16 particular history that made the disclosure of their collaboration  
17 with the SPO relevant and in the public interest.

18 And we have set out at length in our Defence pre-trial brief  
19 what we will say about those names. We will call evidence about  
20 them.

21 JUDGE METTRAUX: So, if I paraphrase, and correct the  
22 paraphrasing if you feel you have, the case of Mr. Gucati on the  
23 issue of public interest is, therefore, not one about generic  
24 cooperation between SITF on the one hand and -- SITF and SPO on the  
25 one hand and the Serbian authorities on the other. Your case on that

1 point is the revealing of cooperation between, on the one hand, these  
2 two organisations, and, on the other, a number of Serbian officials  
3 which you have identified in your brief. Is that a fair  
4 understanding and summarising of your case on that point?

5 MR. REES: Yes, as I accepted, Your Honour.

6 To be concise, as a shorthand, reference to collaboration  
7 between the SPO and Serbian authorities is an accurate summary. But,  
8 of course, at trial the evidence that will be called will be more  
9 nuanced than that, and we have set out at length in our Defence  
10 pre-trial brief, some 107 pages, a clear indication of the facts that  
11 we intend to call.

12 And the Trial Panel can take it that anything that we have put  
13 in the Trial Panel -- sorry, in the pre-trial brief, any factual  
14 assertion therein, we propose to call evidence to support that  
15 factual assertion. That can be assumed by the Trial Panel.

16 JUDGE METTRAUX: Thank you, Mr. Rees. I will take it that the  
17 summary of your response was a "yes" to my question. But, of course,  
18 we will consider every factual matter that you put forward, you say,  
19 in support of that to the extent, of course, that they are relevant  
20 to the issues at stake, which is what we are endeavouring to --

21 MR. REES: Thank you.

22 JUDGE METTRAUX: -- establish today.

23 Mr. Cadman, do you want to add anything to what has been said by  
24 your colleague?

25 MR. CADMAN: Your Honour, due to the lateness of the hour, I

1 don't think that there is anything that I should reasonably add at  
2 this stage. Only just to support what Mr. Rees has said, is that  
3 evidence will be called to that effect.

4 And, of course, it's whether both Mr. Gucati and Mr. Haradinaj  
5 had a reasonably held belief.

6 I'd also take the point, just very, very quickly, about matters  
7 being in the public arena prior to the disclosures being made. We  
8 will, of course, being setting that out, and we certainly expect that  
9 to be part of the expert evidence. It is important to establish, in  
10 order for such a defence to succeed, is that it has been put into the  
11 public domain and there have been attempts to address the issue that  
12 had not been successful that have required steps to be taken. That  
13 is all part of the whistle-blower defence, and certainly that's  
14 what's contained in -- as we can set out in written submissions in  
15 terms of what Kosovan law says as to whistle blowing and what the EU  
16 directive says as to whistle blowing. But, of course, we can put  
17 that into written submissions. But our position is, the fact that  
18 it's in the public domain does not undermine the defence. If  
19 anything, it enhances it.

20 JUDGE SMITH: Judge Barthe had one question. I'm going to beg  
21 your indulgence for just a minute so that we can break as soon as  
22 possible.

23 Go ahead.

24 JUDGE BARTHE: Thank you, Mr. President. Very briefly. My  
25 question is actually for the Defence.

1           It seemed to me, I have to say, maybe I was wrong in this  
2   regard, that you are or were arguing that it was at least  
3   inappropriate, if not illegal, for the SPO to seek legal assistance  
4   and/or cooperation of what you, Mr. Rees, call today, collaboration  
5   from or with the Serbian authorities.

6           So my question is, very briefly: Are there any other legal  
7   avenues available to the Defence -- or, excuse me, to the SPO, to the  
8   Prosecution, than relying upon national authorities when inquiring  
9   about evidence located on their territory? And if so, which legal  
10   avenues are they, in your opinion? Thanks.

11          Sorry, I didn't mention that. Mr. Rees, if you want to take the  
12   floor, the floor is yours.

13          MR. REES: Well, it is a question that I would wish to consider  
14   and reflect upon the answer to, in short.

15          JUDGE BARTHE: Mr. Cadman.

16          MR. CADMAN: I would adopt the same position.

17          JUDGE BARTHE: Thank you.

18          Any comment from the Prosecution on this point?

19          MR. HALLING: Just very briefly.

20          It is apparent from the materials disclosed and what is  
21   submitted in the bar table alone that not everything disclosed falls  
22   within the public interest identified.

23          Of course, the SPO needs to be able to investigate using the  
24   cooperation framework provided by the law wherever evidence relevant  
25   to the investigation is, and all of this calls into question the

1 public interest identified by the Defence.

2 We appreciate that they want to reflect and that the Defence  
3 want to make further submissions. We will address them when they  
4 will come.

5 JUDGE BARTHE: Thank you.

6 JUDGE SMITH: All right. We'll take a 90-minute break. We'll  
7 try to -- well, a little short of 90 minutes. We'll try to get back  
8 on schedule. So if you could be here at 2.30, we will have our last  
9 one-and-a-half-hour session.

10 And so we'll see you then.

11 --- Luncheon recess taken at 1.07 p.m.

12 --- On resuming at 2.29 p.m.

13 JUDGE SMITH: Now, let's move on to the written observations on  
14 the draft order on the conduct of the proceedings.

15 The Panel thanks the SPO, the Haradinaj Defence, and the  
16 Registry for their submissions.

17 Mr. Rees, you've indicated that you wish to make oral  
18 submissions instead. That was not envisaged by the order. Any  
19 specific reason you did not want to present a written response?

20 MR. REES: It's my understanding -- my understanding of the  
21 order was that there was a limitation that if you want to make  
22 written submissions --

23 JUDGE SMITH: [Overlapping speakers] ...

24 MR. REES: -- to do it by the 27th.

25 JUDGE SMITH: But it's not a problem. Would you like to have

1 maybe till Friday to make a written submission?

2 MR. REES: Yes, if those are of more assistance to the  
3 Trial Panel, then we'll do it that way. I'm grateful.

4 JUDGE SMITH: I think it would be simpler. We don't mean to  
5 punish you. We just -- we didn't understand or maybe our order  
6 wasn't clear enough, but can you have something on file by Friday?

7 MR. REES: Yes, I'm sure.

8 JUDGE SMITH: Okay. All right. Thank you very much.

9 MR. REES: Thank you.

10 Your Honour, before we move on, this morning the question was  
11 asked as to whether there was authority for the proposition that the  
12 a rogue agent would suffice when considering the plea of incitement,  
13 and I referred to the case of Ramanauskas.

14 Ramanauskas is, indeed, the authority for that proposition.  
15 There are other cases, but it's there in Ramanauskas. In that case,  
16 the government of Lithuania explained that the officer, who had  
17 approached the third person and offered a bribe, had negotiated with  
18 him, as they put it, on his own private initiative and had not  
19 informed the authorities of that action. And the European Court,  
20 effectively, said that the national authority couldn't be exempted  
21 from their responsibility for the action of their police officer by  
22 simply claiming that he was acting in a private capacity and hadn't  
23 discussed it with others first.

24 JUDGE SMITH: All right. Thank you.

25 In addition to the oral submissions that we received, the Panel

1 also has taken note of the Registry's submissions on services offered  
2 by WPSO. In this regard, the Panel has a question for the Registry.

3 What is the reason for the confidential classification of the  
4 Registry Practice Directions attached to its submissions? And why  
5 aren't there any public redacted versions of these documents?

6 Mr. Roche.

7 MR. ROCHE: Thank you, Your Honour.

8 The documents attached are in our administrative classification  
9 system marked as limited, or Limite, and this equates to confidential  
10 to the classification system used in Legal Workflow. This  
11 classification level is used for information and material in judicial  
12 support and administrative records, the unauthorised disclosure of  
13 which could be disadvantageous for a number of reasons, including the  
14 safety, security, or privacy of any person, or the interests of  
15 justice, the parties, or the participants to the proceedings.

16 And a number of them refer to methodology, which is used by WPSO  
17 in its engagement with witnesses and other persons it comes into  
18 contact with. And that's what -- the operational methodology used  
19 could be, for example, deduced and applied in future cases if persons  
20 wished to cause harm to a witness, for example, or other person  
21 engaged with the Specialist Chambers.

22 If the Panel so directs, we could review the documents. We  
23 have, I will admit, never considered whether there should be public  
24 redacted versions of these documents, but it is something that the  
25 Registry would be very willing to consider if the Panel so wished or



1 directed.

2 JUDGE SMITH: I suppose our question is because there are some  
3 Practice Directions that maybe privacy or safety are not involved,  
4 and perhaps those could be dealt with in a different way. Just as in  
5 the interests of transparency.

6 So, yes, maybe a review would be helpful and you could perhaps  
7 report back to us at some point.

8 MR. ROCHE: Thank you, Your Honour. We will do so.

9 JUDGE SMITH: Thank you.

10 I will now render an oral order in relation to the Registry's  
11 submissions on the conduct of proceedings.

12 The Panel hereby orders the parties to indicate to the Registry  
13 directly by 6 September 2021 their agreement, objections, or  
14 suggestions regarding the logistical arrangements accompanying  
15 initial contact, arrival, and familiarisation of witnesses, which is  
16 in paragraphs 5 to 24 of the Registry's submissions.

17 The Registry is ordered to report back to the Panel by  
18 10 September 2021 on the outcome of these discussions, raising any  
19 unsolved matter.

20 And that is the end of the oral order.

21 So we'll move on now to translation and interpretation.

22 In its 21 July order, the Trial Panel also instructed the  
23 parties to raise, by 3 September, any remaining translation or  
24 interpretation-related concerns with the Registry directly and to  
25 identify specifically the relevant passages of documents with which

1 an issue is taken.

2 The Trial Panel further ordered the SPO to seek verification of  
3 part of a transcript flagged by the Gucati Defence as erroneously  
4 transcribed by 23 August 2021.

5 It also ordered the Gucati Defence to submit, by 27 August 2021,  
6 a filing containing the translation of the document relied upon in  
7 footnote 47 of its pre-trial brief.

8 I first give the floor to the Registry to indicate any  
9 translation or interpretation-related concerns raised by the parties  
10 pursuant to our order and also to provide us an update on the state  
11 of the translations in the present case and whether there are any  
12 pending requests for translation.

13 So, Mr. Roche, once again you have the floor.

14 MR. ROCHE: Thank you, Your Honour.

15 To take your questions in order. Since the order of the Panel,  
16 no specific concerns have been raised by the parties regarding  
17 ongoing or outstanding translations. If you wish, I can give you an  
18 overview of the total number of translations since the pre-trial  
19 phase has commenced.

20 I should point out that all filings and annexes are  
21 automatically transmitted by CMU to Language Services Unit for  
22 transmission, so that will include the documents which are required  
23 to be provided to the accused in translation but also all other  
24 filings and annexes.

25 So Language Services Unit has received 859 requests for

1 translation since the commencement of the pre-trial phase. And of  
2 those, 426 are into Albanian, and the remainder are requests for  
3 translation into the Serbian language. We have completed  
4 translations of 90 of those documents, 68 of which are into Albanian  
5 with the remainder into Serbian.

6 And since the order of the Panel on 21 July, 122 requests have  
7 been received, 61 of which were into Albanian. And, again, the high  
8 number reflects the fact that the submission of documents for  
9 translation is an automatic process.

10 Thank you.

11 JUDGE SMITH: Thank you, Mr. Roche.

12 As regards the verification of the transcript flagged by the  
13 Gucati Defence, we note that the SPO disclosed on 20 August the  
14 results of this inquiry.

15 Mr. Rees, I believe it was your objection or notation. Are you  
16 now satisfied as regards the transcription and translation?

17 MR. REES: We haven't yet taken instructions -- [Microphone not  
18 activated].

19 JUDGE SMITH: Once again, your microphone.

20 MR. REES: We haven't yet taken instructions from Mr. Gucati on  
21 that matter. We will do so and we will confirm to the SPO the  
22 position.

23 Thank you.

24 JUDGE SMITH: Thank you.

25 As regards the translation of the document relied upon in the

1     Gucati pre-trial brief, we note that a filing has been made in this  
2     regard.

3             Mr. Prosecutor, any point to raise about the translation?

4             MR. HALLING: No submissions, Your Honour.

5             JUDGE SMITH: Thank you.

6             Any other outstanding or unsolved, unresolved translation or  
7     transcription issues? Any points to raise about the translations by  
8     anybody?

9             Mr. Cadman.

10            MR. CADMAN: Your Honour, nothing specifically. We have raised  
11     throughout these proceedings that -- and we do understand the  
12     pressures that are on the Registry and the translation service. But,  
13     obviously it does cause difficulties to taking instructions from our  
14     clients who do not speak English and require to see everything in a  
15     language which they understand.

16            From what Mr. Roche has said, the 400 or so translation of  
17     documents that need to be made, 90 of them have been done. And that  
18     is, obviously, a very small selection of what has been sent for  
19     translation. We are finding ourselves in a position where we  
20     actually have to get rough translations done ourselves in order to be  
21     able to take instructions.

22            The only point that we make, which we've made previously, is  
23     just to remind ourselves that this is an institution of the Republic  
24     of Kosovo, there are citizens of the Republic of Kosovo on trial.  
25     All documentation should be translated, as far as possible, in a

1 language which they understand, and it does need to be accelerated.

2 I understand, having worked in tribunals for some time, that  
3 translation is always one of the most pressing issues and one of the  
4 greatest use of resources. But we have to be mindful of the fact  
5 that Mr. Gucati and Mr. Haradinaj are entitled to be able to consider  
6 all of the material in a language which they understand.

7 JUDGE SMITH: Thank you, Mr. Cadman.

8 Mr. Rees, anything you want to add?

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

10 JUDGE SMITH: All right. Anything from the Panel, questions?  
11 The Panel will issue an oral order in this regard at the end of the  
12 conference, which it looks like that will be tomorrow.

13 We'll move on to the SPO list of witnesses. Judge Barthe has  
14 indicated he has some questions concerning this, so we will give the  
15 floor to Judge Barthe.

16 JUDGE BARTHE: Thank you, Mr. President.

17 First, the SPO list of witnesses, Mr. or Madam Prosecutor, do  
18 you, in fact, intend to continue with two witnesses who were employed  
19 in your office as the sole witnesses in this trial?

20 MR. HALLING: No. The SPO is intending to call one additional  
21 witness. The statement of this witness is going to be disclosed this  
22 week. As will be seen upon disclosure, the statement is a more  
23 formal account of information provided to the Defence. The Defence  
24 have already been given advance notice, albeit just during the break  
25 from the last hearing, as to who the individual in question is.

1           We will seek to file an application, because we are aware that  
2           we need to seek the Trial Panel's leave to add this person to our  
3           list of witnesses. We will seek to file that application next week.

4           And if you would like more information about the individual in  
5           question, it would require private session, but I'm available to do  
6           that as well.

7           JUDGE SMITH: There will be -- I think you have seen we are  
8           proposing, perhaps, the next -- the Prosecution's Preparation  
9           Conference for next Wednesday. Can it be on file prior to that date?

10          MR. HALLING: Yes, Your Honour.

11          JUDGE SMITH: All right. Thank you.

12          JUDGE BARTHE: I just want to add that, let me at this juncture  
13          caution the SPO that the later requests for additional witnesses are  
14          made the higher the threshold of good cause that the Panel will adopt  
15          in determining such requests.

16          I think this concludes my questions for the moment.

17          JUDGE SMITH: The next topic concerns SPO witnesses and the  
18          Panel's -- the next topic concerns SPO witnesses and the Panel's  
19          fact-finding responsibilities. I give the floor to Judge Mettraux  
20          who has some questions on this topic.

21          Judge Mettraux, you have the floor.

22          JUDGE METTRAUX: Thank you, Mr. President. And it's really more  
23          of a request than a question, I think.

24          But at paragraph 19 of our order, we asked the SPO to explain to  
25          us how they intend to call the evidence of the two proposed witnesses

1 without invading the province of the fact-finders, and we pointed to  
2 a specific decision from the Milosevic case of 30 September 2002, and  
3 we directed you to the decision with a view to ensure that you do not  
4 seek to lead evidence from these witnesses that effectively would ask  
5 of them to draw conclusions or inferences that are within the remit  
6 or province of the Trial Panel.

7 And the first thing that I would wish to hear from the SPO is  
8 whether that is clearly understood, that this is the expectation of  
9 the Panel in relation to these two witnesses.

10 MR. HALLING: It is, Your Honour. The SPO's witnesses are  
11 providing facts and evidence. Not analysis and conclusions.  
12 Accordingly, there is no risk of them invading the fact-finder's  
13 province.

14 The batches at issue in this case contain confidential  
15 information on SITF/SPO investigations and protected persons. They  
16 cannot be disclosed for reasons set out at length in the  
17 Pre-Trial Judge's decision authorising their non-disclosure.

18 Disclosing them is incompatible with the very premise upon which  
19 this case is brought that such information should never have been  
20 disseminated in the first place. And the batches need not be  
21 disclosed, because SPO staff can describe whether information seized  
22 belonged to the SPO and was confidentially classified. This is  
23 precisely what W04841 intends to testify about. It is not possible,  
24 for example, whether information published in the media is contained  
25 within the batches without a witness from the SPO to link the media

1 to the batches. W04841 is necessary to provide such links as they  
2 are not apparent from the media articles alone.

3 W04842 is being called to testify, amongst other matters, on the  
4 scale of the resources that the SPO had to devote to addressing  
5 security concerns following the dissemination of the three batches.  
6 This is of direct relevance to Count 6, which is charged with a  
7 sentencing enhancement, requiring proof that the protected persons  
8 whose information was revealed caused "serious consequences for the  
9 person under protection or the criminal proceedings are made  
10 impossible or severely hindered."

11 W04842 is able to speak to the hindrances to the SPO's  
12 investigation in a way which the documentary evidence alone cannot  
13 provide.

14 These examples of their anticipated testimony illustrate how,  
15 unlike the Milosevic decision identified by the Trial Panel, W04841  
16 and W04842 are not presented as mere analysts of the information in  
17 evidence before the Trial Panel, nor are they setting out opinions  
18 akin to expert witnesses. They will provide facts not available from  
19 the remainder of the case record, which are necessary to prove what  
20 is charged.

21 As such, they do not encroach upon the fact-finding role of the  
22 Trial Panel.

23 Thank you.

24 JUDGE METTRAUX: We take note of these submissions, Mr. Halling.

25 The additional invitation that we'd make to you in light of the



1 submissions you've just made is to ensure, as part of the  
2 examination-in-chief, that if they are asked about certain facts that  
3 their basis or circumstances in which they came to have knowledge  
4 about one particular fact or circumstance that's relevant to the case  
5 is raised with them so that it is clear at all stages the basis on  
6 which they are able to give information about this or that fact that  
7 you say is relevant to your case.

8 MR. HALLING: Understood.

9 JUDGE SMITH: Judge Gaynor, did you have a comment -- or a  
10 question, I mean?

11 JUDGE GAYNOR: Yes, I have some questions to follow  
12 Judge Mettraux.

13 JUDGE SMITH: Go ahead. You have the floor.

14 JUDGE GAYNOR: First of all, I'd like to ask the SPO about the  
15 submissions you've just made about the diversion that you argue has  
16 taken place of SPO resources, and you say that this diversion has  
17 severely hindered SPO investigations.

18 The Panel would like to better understand your argument in this  
19 regard. Is it not the case that any investigation that the SPO  
20 carries out, pursuant to its mandate, will require diversion of  
21 resources towards that particular investigation? And if so, how does  
22 the SPO distinguish between investigations that amount to or involve  
23 unlawful obstruction of its work and those which do not?

24 MR. HALLING: Your Honour, the distinction that we would make is  
25 between the investigations that we are conducting within our core

1 mandate, and the extra investigation that's prompted going into  
2 issues like contempt, prompted by the criminal conduct of others.

3 In this latter context, you can see it from the contact notes of  
4 witnesses. There is a lot of fear. There are a lot of struggles  
5 that they're having, and these people had to be systematically  
6 contacted on an office-wide level in a way that was never  
7 contemplated under the criminal investigation within the Court's core  
8 mandate. It was extra, prompted by the conduct of the accused.

9 And you can see from the official notes, and we can give  
10 examples if the Trial Panel would like, that the fear even extended  
11 so far as to even when witnesses were told that their names were not  
12 in the materials, that they still felt fear because of it. So all of  
13 this required management by the SPO, and in our submission the  
14 totality of what needed to be done led to a substantial hindrance  
15 caused by the revelation of protected persons, which will not be true  
16 in normal investigative activity but is true for this kind of  
17 investigative activity.

18 JUDGE GAYNOR: But is it not the case that investigating  
19 potential contempt of court is the job of any domestic prosecution  
20 service? It's not particularly distant from its core mandate.

21 MR. HALLING: It's a question of degree. I take the point from  
22 the Trial Panel, that there will be some disruption to the normal  
23 order of operations whenever contempt occurs. But the relevant code  
24 provision for Count 6 is talking about it with a qualifier. It's,  
25 you know, severely hindered the investigation caused by this

1 revelation.

2 And not every investigation of contempt is going to cause that,  
3 but we believe that that element is met here on the evidence that  
4 we're presenting. It is a question of degree, and we think that that  
5 degree justifies the sentencing enhancement here.

6 JUDGE GAYNOR: Now, setting aside your arguments regarding the  
7 diversion of SPO resources. I want to ask you about Count 2, which  
8 is obstruction by a group.

9 Is the SPO case based on the argument that official persons,  
10 including SPO staff as well as Judges, were, in fact, obstructed in  
11 performing their official duties; or, is the Prosecution case based  
12 on the argument that the accused were aware that as a result of  
13 participation in the group, this obstruction might ensue and they  
14 acceded to the occurrence of this obstruction?

15 Which of those two alternatives is the Prosecution case based  
16 on?

17 MR. HALLING: There's lots of ways to describe criminal  
18 intentions. I will just use the ICTY terminology. Where you have  
19 general intent crimes, you can have indirect intent. Sort of the  
20 accedence of the likelihood of result flowing from the criminal code  
21 conduct being sufficient to establish liability.

22 The element on Count 2 that Your Honour is identifying has no  
23 specific intent in it, and so we would say that something more akin  
24 to indirect intent would meet the element. The only count that has a  
25 clear specific intention in it is Count 4, if I'm not mistaken.

1 And -- on retaliation.

2 So the answer to your question would be the latter formulation  
3 of intent, that accepting a sufficiently strong possibility of a  
4 result is enough to incur responsibility under this count.

5 JUDGE GAYNOR: Okay. So in this particular case, you are not  
6 asserting -- setting aside the diversion of resources argument.  
7 You're not asserting that any official was, in fact, obstructed in  
8 the performance of their duties; is that correct?

9 MR. HALLING: I think that is correct, Your Honour, the way that  
10 you've described it.

11 The second objective element as identified in the Confirmation  
12 Decision -- the first one is: Do participation in a group of persons  
13 which, by common action -- that's element one. Element two is:  
14 Obstructs or attempts to obstruct an official person in performing  
15 official duties.

16 The fact that "attempt" is embedded within the element is an  
17 indicator that the obstruction does not need to have occurred in  
18 order for criminal liability to ensue. So it is not a requirement to  
19 meet the elements of Count 2 to prove the obstruction as such.

20 JUDGE GAYNOR: Thank you.

21 Now in respect of intimidation, is the Panel correct in its  
22 understanding that the Prosecution is not asserting that the accused  
23 induced or attempted to induce specific individual witnesses to  
24 refrain from making a statement or otherwise fail to state true  
25 information to the SPO:

1 MR. HALLING: The way I would understand the question, this is  
2 again a question of general intent. The conduct of the accused is  
3 intimidating. The accused do not need to know the specific  
4 individuals that they are intimidating or specifically intend that  
5 they are intimidating, like, one person as opposed to another.

6 If they engage in conduct that is intimidating within the  
7 meaning of the elements, then they would be convicted on the  
8 applicable law as set out in the Confirmation Decision. And just to  
9 foreshadow the submission from the Chamber on this, we believe the  
10 Pre-Trial Judge is correct on the applicable law. So, as understood,  
11 that would -- it would not be necessary to prove intimidation of  
12 specific persons.

13 I hope that answers your question.

14 JUDGE GAYNOR: Right. That leads on very well to my next  
15 question.

16 Could you confirm whether the SPO intends to prove that any  
17 specific witness felt intimidated or that any specific witness felt  
18 that there had been acts of retaliation? Do you intend to prove that  
19 as part of your case?

20 MR. HALLING: Yes, as an evidentiary indicator of the  
21 intimidation and retaliatory intent.

22 It is not an element of the offence, but the fact that people  
23 were intimidated or were retaliated against is an indicator. Amongst  
24 all of the other evidence and all of the other factors, that the  
25 conduct itself was intimidating within the meaning for Count 3 and

1 that it was harmful action within the meaning of Count 4.

2 We understand these to be conduct crimes. We even have a  
3 footnote in discussing this, that if you think of the construction of  
4 corruptly influencing a witness in the ICC Statute under  
5 Article 71(C), the jurisprudence of the ICC, and this goes to the  
6 Bemba et al Appeals Judgement that's in the list of authorities,  
7 doesn't require any particular consequence.

8 The person may not have been corrupted. It's a conduct crime.  
9 However, the fact that someone was corrupted is an indicator that the  
10 corrupt influencing conduct occurred, and we're intending to do  
11 something similar here.

12 JUDGE GAYNOR: Can I ask you or invite you to explain, briefly,  
13 how you intend to prove that any specific witness felt a feeling of  
14 intimidation or that a specific witness felt that there had been or  
15 were likely to be acts of retaliation? How do you propose to prove  
16 that?

17 MR. HALLING: This primarily relates to the contact notes that  
18 we have tendered through the bar table, so they are relevant to that  
19 factual indicator. They are also related to the other alternative in  
20 the sentencing enhancement, that the protected person suffered  
21 serious consequences.

22 So we have collected all of this evidence. As we explain in the  
23 bar table request, it's not intended to be the sole or decisive  
24 evidence for any of the counts that we have charged, but it is  
25 relevant to the charges in this aspect.

1 JUDGE GAYNOR: Okay. We'll return to the question of contact  
2 notes, and I'll have some further questions on that in due course.  
3 But for the moment, that's all.

4 Thank you.

5 JUDGE SMITH: Thank you, Judge Gaynor.

6 The next topic concerns the SPO exhibit list. In the 21 July  
7 order, the Panel indicated that it will seek submissions from the SPO  
8 on whether it intends to propose additions to its amended list of  
9 exhibits and, if so, the reasons for the delayed request.

10 MR. HALLING: Thank you, Your Honour.

11 As indicated in the annex to the bar table request, and as  
12 recently discussed in the hearing, following the transcript review,  
13 we do have slightly altered revised transcripts, and we do intend to  
14 have those on our list of exhibits, and we will make an application  
15 to that effect.

16 Also, the additional witness that we mentioned, the disclosed  
17 statement, we would also seek to add to our list of exhibits. And  
18 the reason why is that we only acquired it recently, so that's going  
19 to be the reason for the request. But as I indicated, on that  
20 respect we're going to file a separate application next week before  
21 the Specialist Prosecutor Preparation Conference.

22 So other than those things, there is no anticipated list of  
23 evidence additionally we're contemplating.

24 JUDGE SMITH: And can your application be on file by 6 September  
25 so that we can actually see it before we hold the hearing?

1 MR. HALLING: Yes, Your Honour. On any timeline you like.

2 JUDGE SMITH: The Panel will issue an order in that regard at  
3 the end of this conference.

4 Do any of my colleagues have any questions?

5 Judge Mettraux.

6 JUDGE METTRAUX: Thank you, Judge Smith. Very briefly, and it's  
7 directed to the SPO once again.

8 Simply to inquire whether you have taken the view that some of  
9 the items that are currently on your proposed exhibit lists, whether  
10 you have taken the view that you will not be relying upon any of  
11 these items. And if that is the case, whether you have given notice  
12 to the Defence of your position.

13 MR. HALLING: Thank you, Your Honour. And just briefly before  
14 addressing it, I was reminded.

15 In our bar table annex, we also mention that we have a video on  
16 our list of exhibits but the translation was not on the list of  
17 exhibits. And just for completeness, we've been doing this with  
18 other videos, that would be part of the same application.

19 But turning to Your Honour's question. We are waiting for the  
20 Trial Panel's resolution of the bar table request that we've made in  
21 order to make any sort of definitive determination about what further  
22 exhibits are necessary on the list of exhibits. So as soon as that  
23 is resolved and there is clarity from our side as to what was  
24 admitted and what is not, we should be able to promptly give quite a  
25 precise notification as to what further exhibits will actually be



1       tendered at trial.

2               JUDGE METTRAUX: We're grateful for the indication. And, of  
3       course, the question is intended to signify the Panel's position that  
4       we do not condone the overloading of exhibit lists. We are not, of  
5       course, accusing you of having done that. We do think that it is  
6       helpful to the parties and to the process itself that if you have  
7       taken the view that any of your proposed exhibits are not to be used,  
8       that notification be given to the other side ASAP. And, of course,  
9       the same logic would apply when we reach the Defence case.

10              So I'm grateful, Mr. Halling, for the indication.

11              I have a couple more questions about some of the items that you  
12       have on your list presently. One of them -- I can give you the  
13       numbers, if that's useful to you. That's from 370 to 372, and 476 to  
14       480. And those are, in effect, judgements of courts based in Kosovo.  
15       They are EULEX/UNMIK judgements. And the question is very much about  
16       the intended use of these documents for the purpose of your case.

17              MR. HALLING: Yes, Your Honour. In order to establish the  
18       protected persons elements for Count 6, in particular, what  
19       protective measures have been given to the people in the batches is a  
20       subject that W04841 intends to testify about. And in order to  
21       preserve those protective measures, the cases in which these  
22       witnesses were protected needed to be notified to the Defence at some  
23       level of obstruction. So citing to the judgements is our indicator  
24       as to what cases are going to be relevant in W04841's testimony.

25              Now, that evidence may be elicited in a way that doesn't require

1 the judgement itself to be in evidence, and at some level we're in  
2 the Trial Panel's hands during the testimony of that witness whether  
3 that's necessary. But that's why they're on the list of exhibits and  
4 what purpose they're serving.

5 JUDGE METTRAUX: So just so that I'm clear in my mind about the  
6 process that you will propose is: The witness in question would come  
7 to court and assert that a person whose name was part of the  
8 disclosed information is the same person as was granted protective  
9 measures in one of these cases, and that means the Panel will have to  
10 take that witness's word for it? Is that the process?

11 MR. HALLING: W04841 is going to indicate that a person in the  
12 batches also has protective measures in one of these other cases.

13 In terms of taking the witness's word for it, it's up to the  
14 Trial Panel how to evaluate the testimony, whether additional  
15 evidence is required to establish the protected persons element.

16 I would note in this regard that part of the protected persons  
17 element, as identified by the Pre-Trial Judge, is just being in these  
18 classified materials to begin with. So it may not be, strictly  
19 speaking, necessary to determine the protective measure status of  
20 individual witnesses in order to make a finding on Count 6.

21 So we would never say that the Judges need to take our word for  
22 anything in the evidence record. But whether this -- you ask what  
23 this evidence is intended for, this is what it's intended for.

24 JUDGE METTRAUX: Thank you.

25 There's a second group of documents that form part of your

1 exhibit list, and these are documents that refer not to the conduct  
2 or statements that you attribute to Mr. Haradinaj or Mr. Gucati but  
3 to two other individuals in particular - a member of the Veterans  
4 Association and a legal adviser whom you have mentioned in various  
5 filings.

6 Now, what we want to understand from you is what purpose you  
7 will invite or what relevance you will invite the Panel to attribute  
8 to these documents other, of course, I imagine your first submission  
9 will be that under one of your counts you will seek to establish that  
10 the offence was committed jointly. So put that particular aspect  
11 aside. Is there any other purposes that you seek to pursue by  
12 leading evidence pertaining to the acts of third parties who are not  
13 charged in these proceedings?

14 MR. HALLING: You correctly identified my initial submission,  
15 Your Honour.

16 Going past that. The evidence of these other persons are often  
17 given in a way where it's clear that they are also speaking for the  
18 accused. There are examples, for instance, where the legal adviser  
19 is speaking in an interview with one or both of the accused. You  
20 also have an example where the other gentleman you mentioned gave an  
21 interview, making many of the same talking points as the accused, and  
22 was congratulated by Mr. Haradinaj on Facebook.

23 So there are certain statements of these other persons that are  
24 revealing of the intentions of the accused. And to that extent, it  
25 is also relevant to prove the mens rea for, actually, all the counts.

1 JUDGE METTRAUX: I'm grateful. You will, of course, be mindful,  
2 I'm sure, of the fact that there are certain human rights  
3 implications and limitations to the findings that can be sought of  
4 the Panel in respect of individuals who are not subject to these  
5 proceedings and who are to be presumed innocent, of course, and will  
6 be treated as such and do not have the benefit of a Defence. So I'm  
7 just giving you that indication for you to take into consideration in  
8 the way you will attempt to present that evidence.

9 Lastly, Exhibit 33, I think it is, on your list, which is a  
10 document in relation to which we had a discussion a moment ago where  
11 a new transcription and translation has been given. Is that your  
12 plan, to apply to us to have that new version - subject, of course,  
13 to what Mr. Rees might be able to give you as an indication - to have  
14 that new translation and transcription to replace the old one?

15 MR. HALLING: That's correct, Your Honour. And as indicated,  
16 there is a footnote in our bar table request annex that confirms that  
17 the exhibit tendered for admission is, indeed, the revised transcript  
18 for this particular item.

19 JUDGE METTRAUX: And finally, a number of these proposed  
20 exhibits contained redactions, sometimes very heavy redactions. Are  
21 you intent on tendering those versions of the document? That is,  
22 those that were communicated as part of the disclosure process to the  
23 Defence. Or, are you intent on tendering less redacted or  
24 differently redacted versions of these same documents?

25 MR. HALLING: We are tendering the redacted version that has

1     been disclosed to the Defence. We are not going to rely on anything  
2     that is covered by those redactions, because the Defence cannot  
3     fairly respond to it.

4             In terms of whether the level of redactions could be revisited  
5     or there could be lesser redacted versions. The jurisprudence  
6     requires the SPO to keep this under review throughout the trial.  
7     When we see an opportunity to file a lesser redacted version of  
8     something tendered for admission, then we will do so. If the  
9     Trial Panel is interested in prompting us to do so in relation to a  
10    particular item, it's, of course, within the Judges' prerogative.

11            But at this time what we are tendering are the redacted versions  
12    that have been disclosed, and we are only relying on the contents  
13    that can be seen.

14            JUDGE METTRAUX: Any question or comment from the Defence?

15            Of course, Mr. Cadman, we have taken note of your earlier  
16    comments about difficulties associated, you say, with some of these  
17    redactions. But putting that issue aside, anything else that you  
18    would wish to respond to?

19            MR. CADMAN: Not at this stage, Your Honour.

20            There have been a number of things set out by the SPO that will  
21    require us to consider our position, but we will certainly come back  
22    to. We will reserve our position for now.

23            JUDGE METTRAUX: Thank you.

24            Mr. Rees.

25            MR. REES: We will, of course, consider the bar table motion

1     that's been made by the SPO and respond to that in due course. I  
2     think many of these issues will be dealt with in our response to that  
3     application.

4             JUDGE METTRAUX: Thank you.

5             JUDGE SMITH: Anything else from my colleagues? My colleagues  
6     have no other questions, so we will move on to the next topic on the  
7     agenda, which concerns the right to confrontation. And Judge Barthe  
8     will lead that discussion at this stage point.

9             Go ahead.

10            JUDGE BARTHE: Thank you, Mr. President.

11            In the 21 July order, the Panel indicated that it will seek oral  
12     submissions on how the SPO intends to guarantee the effectiveness of  
13     the right of confrontation as provided under Article 6(3)(d) of the  
14     European Convention on Human Rights and reflected in Article 31(4) of  
15     the Constitution of Kosovo, Article 24(4)(f) of the Law of the Kosovo  
16     Specialist Chambers, and Rules 153 to 155 in respect of proposed  
17     exhibits where: (a), the author of the proposed exhibit is known to  
18     the Defence but is not called to give evidence; (b) the author of the  
19     proposed exhibit is unknown to the Defence because identifying  
20     information has been redacted; and/or (c), the proposed exhibit is a  
21     record of what a third party has stated, and that third party is not  
22     called to give evidence.

23            Furthermore, submissions were sought on: (a) whether the SPO  
24     can confirm that the author of the proposed exhibit or the third  
25     party whose statement is recorded is unable to testify, and, if so,

1 whether the reason is within the meaning of Rule 155 of the KSC  
2 Rules; and (b), whether the SPO intends to tender into evidence any  
3 of the SPO official notes concerning contact with a witness, and, if  
4 so, under what provision of the rules.

5 Meanwhile, the SPO has already submitted a request for admission  
6 through the bar table, so the last question has been answered. For  
7 the others, Mr. Prosecutor, you have the floor.

8 MR. HALLING: Thank you, Your Honour.

9 To discuss this question and the subparts within it, it is  
10 important to underscore from the outset that the core of the evidence  
11 in this case is publicly available video and publicly available  
12 statements of the accused. All the elements of the offences charged  
13 can be made out on those videos and statements alone.

14 Confrontation of SPO official notes must be understood in this  
15 light. Focusing on SPO official investigative notes in particular,  
16 it is standard in criminal trials for an investigator to summarise  
17 the Prosecution's investigation and evidence. This is what W04841  
18 will be doing in this case. Calling every single investigator who  
19 participated in a large investigation is simply unnecessary when they  
20 are describing the investigative activities they undertake pursuant  
21 to their official duties.

22 What people say to them in the course of those duties may  
23 implicate questions of admissibility. But, one, no witness  
24 statements were taken during these operations; two, the purpose of  
25 them was not to take testimonial evidence; three, for reasons

1 explained in the bar table request, statements of the accused do not  
2 implicate the right to confrontation the same way witnesses do; and,  
3 four, what statements are recorded in these investigative reports are  
4 fully consistent with what the accused say in the course of their  
5 public statements.

6 The categories identified by the Trial Panel are all variations  
7 of the same question, all of which concern admitting materials  
8 without a corresponding witness. There is a distinction, as we  
9 discuss in our bar table request, between what human rights law  
10 requires and what the statutory admissibility framework, such as  
11 Rules 153 to 155, require. A further distinction must be made  
12 between the admissibility of evidence and the weight ascribed to that  
13 evidence at the end of the proceedings.

14 As discussed in the bar table request, human rights law permits  
15 reliance upon absent or anonymous witnesses, extending the term  
16 "witness" also to persons not being called. The European Court of  
17 Human Rights sets out factors summarised by the SPO, and also the  
18 Haradinaj Defence in recent filings. The key consideration regarding  
19 this test is that it is really a test of weight rather than  
20 admissibility.

21 The Trial Panel must be mindful of the rights of the accused  
22 when weighing the evidence at the end of trial, but there is no  
23 admissibility restriction imposed by the European Court of Human  
24 Rights on such materials.

25 As for admissibility in the KSC statutory scheme, the



1 Trial Panel is given substantial discretion in this regard.  
2 Rules 153 to 155, as we've discussed earlier today, require the  
3 evidence to be testimonial and to be taken in the context of legal  
4 proceedings. For the reasons explained in our bar table request,  
5 none of the evidence tendered for admission implicates these  
6 concerns.

7 There is no reason to consider that the Defence will not have an  
8 adequate right to confrontation in this trial. The heart of the  
9 Prosecution's evidence in this case is not witnesses but rather open  
10 source audio-visual evidence. The elements of the offence are  
11 established by what the accused did on video for all to see - no  
12 redactions or questions of provenance implicated.

13 The Defence objections about confronting an anonymous case are  
14 all predicated on misrepresenting the SPO's case, focusing on a  
15 subset of the evidence which is never intended to be the sole or  
16 decisive evidence for any element of the offences charged.

17 Now, there was another part of your question on the agenda  
18 related to contact notes and Rule 155. Would you like me to address  
19 that now as well?

20 None of the evidence tendered without a witness falls under  
21 these rules, including 155. And in this regard, you can see our bar  
22 table request and the Ongwen case cite and the ICTY authorities that  
23 circumscribe the interpretation of these rules to testimonial  
24 evidence in the context of legal proceedings.

25 So Rule 155 does not apply, in our submission, to these contact

1 notes in particular. If it was assumed, for sake of argument, that  
2 Rule 155 did apply to these contact notes, I would just note that the  
3 criteria would be met.

4 It is noted that Rule 155 is broader than comparable rules at  
5 other tribunals, such as Rule 68(2)(c) of the ICC Rules of Procedure  
6 and Evidence. Rule 155 extends unavailability to a person who has  
7 died, who can no longer be traced with reasonable diligence, or who  
8 is by reason of physical or mental impairment or other compelling  
9 reason unable to testify orally.

10 Compelling reasons are present here. A finding has been made by  
11 the Pre-Trial Judge that non-disclosure of the persons concerned by  
12 these contact notes is strictly necessary. This is fully supported  
13 by the information disclosed, particularly by those who said they  
14 suffered serious psychological harm as a result of the disclosures.  
15 When combining the Pre-Trial Judge's determination with the secondary  
16 role these notes play in the cases charged, it would be perfectly  
17 appropriate to admit this evidence under Rule 155 were it to apply.

18 Thank you.

19 JUDGE BARTHE: Thank you, Mr. Prosecutor.

20 Does the Defence want to comment on the submissions?

21 Mr. Rees.

22 MR. REES: We will raise our objections in the written  
23 submissions in reply to the bar table motion.

24 JUDGE BARTHE: Very well.

25 Mr. Cadman.

1 MR. CADMAN: Likewise, Your Honour.

2 JUDGE BARTHE: Thank you.

3 JUDGE SMITH: Judge Mettraux, I believe you had some questions.

4 JUDGE METTRAUX: Thank you, Mr. President. I do.

5 And I want to press you a little bit, Mr. Halling. You are  
6 getting used to being pressed on that issue, and I will come in a  
7 second to Rule 155 that you've just cited. But let me start with  
8 this.

9 Let's assume that you bring your witnesses in court and you ask  
10 them, as you seem to be intending, to comment upon some of these  
11 notes. Is that the case that they and we will effectively be put in  
12 a position of them having to assume, of course, that the information  
13 contained in these notes is complete, accurate, and that the  
14 translation, of course, that might have taken place in that context  
15 was reliable?

16 In other words, the witness will be asked or would be asked to  
17 assume that whatever is contained in this note is, indeed, correct  
18 and a correct, accurate reflection of the exchange that might have  
19 taken place between a witness and one of your staff.

20 MR. HALLING: Yes, Your Honour. This is within the scope of  
21 W04842's testimony, and the answers to that question will be before  
22 the Trial Panel viva voce.

23 JUDGE METTRAUX: Then the follow-up question is how do you say  
24 the Defence would be in a position to effectively, and I use the  
25 technical term of "effective confrontation" under the ECHR regime, to

1 effectively challenge the accuracy of that record if the note in  
2 question, in particular, was not drawn up by your witness?

3 MR. HALLING: The witness in question, because they were  
4 involved in writing these notes, is able to speak generally to the  
5 process by which such notes are made at the SPO. The Defence is  
6 given all of the content of the contact notes that is being relied  
7 upon. They can contest their contents, including -- and they've  
8 already been doing this in submissions, the dates on which they  
9 appear or the way in which the information is presented. They are  
10 entitled to do that. In their bar table responses, we expect them to  
11 do it again.

12 So they are given an opportunity to challenge the statements.  
13 And at least according to the European Court of Human Rights, there  
14 is nothing necessarily prohibiting reliance on such statements,  
15 particularly as a question of admissibility if they aren't able to  
16 examine each and every person in those contact notes.

17 JUDGE METTRAUX: Well, what you are saying, and again I don't  
18 want to put words in your mouth, but you are suggesting that they  
19 would be able to ask questions of the witness about the general  
20 procedure by which -- or the manner or the process by which these  
21 notes are taken, but I'm more curious to know about the process in  
22 relation to a specific note that might have been prepared and that  
23 they would want to challenge the reliability, the credibility, the  
24 accuracy of the record as the Defence appears to be doing in their  
25 submissions.

1           How do you suggest that they would be able to effectively do so  
2   in relation not to the general procedure that's being followed by  
3   your office. We understand that. But in relation to a specific note  
4   that you seek to rely on. And I remind you that in your own  
5   submission, and you've repeated it now, you are also relying on that  
6   material to establish what you say is the intimidating nature of the  
7   conduct you attribute to the defendants.

8           MR. HALLING: Yes, Your Honour. W04842 did draft some of these  
9   notes himself, and he's able to speak to those notes and is able to  
10   answer every question that's contemplated in Your Honour's question.  
11   All other notes are going to look the same. They are going to have  
12   similar processes. And the reliability of them is going to be  
13   mutually reinforced by what W04842 is in a position to say in  
14   relation to his notes.

15          We are not going to call just like -- it's a mirror image of the  
16   investigation question. We are not going to call every single person  
17   that contacted one of these witnesses. In our submission, it's not  
18   necessary for us to discharge our burden of proof to do so. But this  
19   is ultimately a question of weight going to the Trial Panel. If the  
20   Trial Panel is concerned about the reliability of exhibits beyond  
21   those that the witness can speak to directly, this will be reflected  
22   in the Judgement. I am quite sure. But it's not a question of their  
23   admissibility and it's not a question of confrontation. They are  
24   going to get a right to confront the evidence. The question then  
25   becomes: What are fair uses of that evidence at the end of the

1 trial?

2 JUDGE METTRAUX: If there is any concern to be had, Mr. Halling,  
3 it should be yours. We are not concerned by anything on this side of  
4 the courtroom.

5 Going to Rule 155 on which you are or that you have made mention  
6 of, suggesting that if the rules that you rely on do not provide a  
7 basis, Rule 155 would provide you that basis. Now, the rule as I  
8 read them, say that:

9 "... or other compelling reason the individual concerned is  
10 unable to testify orally ..."

11 Now, there is an inability that has to be established for this  
12 rule to kick in. My question is whether you have inquired with any  
13 of the persons concerned, whether they are the author of either  
14 notes, or the individual or the witnesses to whom they spoke, whether  
15 they would be prepared to testify, and whether you have received an  
16 indication by some or all of them that they are, as the rules say,  
17 unable to testify orally. In other words, that they have refused or  
18 expressed their unwillingness to be called as witnesses. Or is it  
19 simply the case that it is your judgement that this should not be the  
20 case?

21 MR. HALLING: I understand Your Honour's question to be in  
22 relation to the persons contacted. If I've misunderstood the  
23 question, please correct me.

24 JUDGE METTRAUX: Well, take it to both. The complaint, as I  
25 understand it, from the Defence, is that there's effectively a

1 multiplication of the hurdles that they are facing. The fact that  
2 there is a hurdle in their mind about the protective measures that  
3 are being sought from the witness, to which is added a hurdle in  
4 terms of both publicity and ability to confront in the fact that the  
5 person who drew up the note is not identified. And you've mentioned,  
6 with the exception of three or four notes that were prepared by one  
7 of your proposed witnesses, to which there is an added layer of  
8 difficulty, they say, which is the fact that the identity of the  
9 individual at the other side of the telephone line is again not  
10 identified.

11 So question is -- to you is whether any steps have been taken by  
12 your office to query with any of these persons, be they the author of  
13 these notes or, and perhaps more relevantly, you are right, the  
14 persons who were at the other side of the phone call, the witnesses,  
15 whether any of them have been asked to give evidence and have  
16 declined to do so.

17 MR. HALLING: As concerns the SPO staff taking the notes, that  
18 isn't the Rule 155 submission that we are making. We have no  
19 indication that the SPO staff in question are unavailable within the  
20 meaning of the rule.

21 The statements in the notes that are of interest are not them.  
22 They are just sort of the vehicle by which the statements of these  
23 other persons come, and that is what the Rule 155 submission is  
24 focusing on. It's a singular collection of evidence in the sense  
25 that part of the answer to Your Honour's question is embedded in the

1 evidence itself. The difficulties that the witnesses face in coming  
2 to testify and the compelling reasons are in the notes themselves.

3 And as to the question of sort of taking the SPO's word for it  
4 as to whether or not they could come, this isn't our word for it. We  
5 made an application to the Pre-Trial Judge that their non-disclosure  
6 was strictly necessary, and the Pre-Trial Judge granted that  
7 application, which is why these redactions have been applied in the  
8 first place. So --

9 JUDGE METTRAUX: But I'll stop you there, Mr. Halling. This is,  
10 with all due respect, two different questions. At best, the notes  
11 that you are seeking to tender do, indeed, reflect the expression of  
12 a concern by any of these or some of these individuals. This is not  
13 the issue I was going to.

14 My question, and I will repeat it, is whether any of these  
15 persons was asked to testify by your office and that they declined to  
16 do so. I would assume that if this had been done and there were  
17 those security concerns, the proper course of action is to seek  
18 protective measures from the Chamber.

19 So back to my question: Was any of these persons contacted for  
20 the purpose of giving evidence?

21 MR. HALLING: I think I'm stating it correctly, that once we got  
22 the ruling of the Pre-Trial Judge, that we did not need to disclose  
23 their names, we did not have any further discussions about which ones  
24 should be on our witness list because it was never our position that  
25 they would be.



1           And this goes back to the original submission. All of this  
2     discussion, in our view, is on the hypothetical understanding that  
3     Rule 155 applies. Our position is that it doesn't apply, and our  
4     decisions, in terms of consulting witnesses, with a view of them  
5     giving testimony, need to be understood in that light. We don't  
6     think of these people as our witnesses making witness statements.

7           JUDGE METTRAUX: Thank you.

8           JUDGE SMITH: Judge Gaynor, do you have a question?

9           JUDGE GAYNOR: Thank you, Mr. President, I do have a few  
10    questions for the SPO.

11          Mr. Halling, do you accept that, for the purposes of Rules 153  
12    to 155, a written statement includes any record prepared for the  
13    purpose of legal proceedings of questions to and answers from a  
14    witness?

15          MR. HALLING: Not every one. There are certain situations  
16    where -- and you see it in the notes. If a witness is asked about  
17    their security concerns, for instance, there will necessarily be a  
18    question and answer in order to determine whether those security  
19    concerns exist. But looking at the authorities we provide in our bar  
20    table request, that is not necessarily making it within the purpose  
21    and context of legal proceedings.

22          An interview by a journalist is another example. That would  
23    also be a situation where you would have a question and answer, but  
24    it wouldn't be a statement within the meaning of these rules.

25          The legal proceedings. These are not people who are on our

1 witness list, they are not people we are intending to call, they are  
2 not questioned about their knowledge of any particular case. They  
3 are asked about how they felt. They are asked about their state of  
4 mind as a result of these disclosures, and so we weren't interviewing  
5 them. And so not every -- although there is a question and answer  
6 inevitable in any phone call talking to a witness about these topics,  
7 it doesn't necessarily bring it within the scope of the rules.

8 JUDGE GAYNOR: Very well. In your bar table motion, you suggest  
9 that some of these notes are to be admitted, if your motion is  
10 granted, to establish "the serious consequences witnesses suffered as  
11 a result of the acts in conduct of the accused."

12 And earlier you said that you will be tendering this evidence in  
13 order to establish feelings of intimidation felt by witnesses or  
14 feelings of retaliation might be in the air or might have taken  
15 place.

16 Do you establish that any note which establishes that kind of  
17 information is a witness statement for the purpose of Rules 153, 154,  
18 and 155?

19 MR. HALLING: We do not. Legal proceedings, as was discussed  
20 earlier, we understand it as a term of art. The whole context of  
21 this conversation depends on a latent understanding that something  
22 that might be a statement is going to be used in evidence in legal  
23 proceedings.

24 So if the definition of "legal proceedings" was extended to  
25 anything that is relied upon in evidence in a criminal case, then the

1 limits of the rules would have no meaning. Everything would become  
2 relevant for legal proceedings, because it's being tendered in the  
3 first place for legal proceedings.

4 It's something about the content of the statement, its  
5 characteristics, and the way it was initially collected that, in our  
6 submission, is what these cases are focusing on, which is why you see  
7 instances like the one in Ongwen that we cite to in our bar table  
8 request, whereby a witness's statement containing information was  
9 found to fall within the Rule 153 analogue of the ICC rules. But an  
10 investigator report by that same witness, even referencing some of  
11 that same information, was found not to fall within the scope of the  
12 rules.

13 The difference is one was testimonial in a way that the other  
14 wasn't. And you can see similar distinctions with the legal  
15 proceedings, not legal proceedings. And this example may be most  
16 applicable in our bar table request is the Lubanga example, where it  
17 was actually the Defence who were tendering security contacts of  
18 Prosecution witnesses. The Prosecution objected on internal work  
19 product grounds and that it was testimonial -- covered by, you  
20 know -- they weren't able to admit it through the bar table, and the  
21 Lubanga Trial Chamber accepted it.

22 Not everything with a question and answer component is  
23 necessarily legal proceedings, and as we've discussed because of the  
24 similarity of these rules to ones at other tribunals, we think that  
25 reliance should be placed on the way that they have interpreted the

1 scope of the provisions.

2 JUDGE GAYNOR: Okay. Now, the Lubanga decision that you cited,  
3 I think you accept in your motion that that decision came down well  
4 before the Rules of Procedure and Evidence of the ICC were  
5 incorporated to include the lessons of Rule 92 bis, ter, quater at  
6 the ICTY. Is that not the case?

7 MR. HALLING: That's correct. In our submission, that actually  
8 makes it even more applicable. Because there was a Rule 68 at the  
9 time of the Lubanga decision. It was a simpler version of the rule  
10 that only had what -- if I recall, they had Rule 68(2)(a) and  
11 Rule 68(3) of the modern rule. Which meant that the kinds of things  
12 that needed to be introduced for a witness were narrower. The  
13 principle of orality, in other words, was stronger at the time of  
14 Lubanga than it is now.

15 So for the Lubanga Trial Chamber to say in the face of that  
16 stronger principle of orality that had fewer exceptions back then,  
17 that it still could be tendered without a witness, we find to be  
18 meaningful.

19 JUDGE GAYNOR: I have a few questions about the distinction  
20 between the act of phoning a witness and the creation of a contact  
21 note of the conversation, which is reflected in that note.

22 Now, the accused in those cases were arrested on 25 September  
23 2020, I believe. Some of the SPO contact notes appear to have been  
24 prepared by SPO staff in January and February of 2021 regarding  
25 conversations with witnesses that had taken place in September or

1       October of 2020.

2               Now, the SPO sought their admission in evidence yesterday, just  
3       over six months after the notes were prepared.

4               Now, you appear to have stated in your submissions that these  
5       notes - that is to say, the conversations with the witnesses - were  
6       not taken for the purpose of legal proceedings. However, my question  
7       is were the notes prepared by your staff in January and February of  
8       2021, were they not prepared for the purpose of legal proceedings?

9               MR. HALLING: Apologies, Your Honour. Just give me a moment. I  
10       want to pull up the decision that's relevant to the answer to  
11       Your Honour's question.

12              Thank you. Sorry.

13              These notes, the delay in them, you can see from the notes  
14       themselves that they were taken at a much earlier point, many of the  
15       notes that have these January dates on them, and that they were  
16       actually reflecting September -- often September 2020 conversations  
17       at a later point.

18              As of January 2022 [sic], the overwhelming majority of these  
19       notes, anything unrelated to W04842, in fact, it was not our  
20       intention to disclose and rely upon those notes in these legal  
21       proceedings. You can see it from their absence in our in-depth  
22       analysis chart, our Rule 86(3) outline, we weren't relying on these  
23       notes. And you can see it from the moment when they were disclosed.  
24       They were largely disclosed as a result of a counterbalancing measure  
25       ordered by the Pre-Trial Judge in Decision 136 that was rendered on I

1 believe 22 February 2021. So that was the first indication to us  
2 that we needed to disclose these additional materials. As has  
3 happened with other counterbalancing measures ordered by the  
4 Pre-Trial Judge, once the bridge was crossed to have to disclose the  
5 material, because it is relevant to our charges, we decided then to  
6 rely on it.

7 So the procedural history of the notes is consistent with what  
8 I'm saying. They were not prepared for legal proceedings, they were  
9 brought into them, and now we're seeking to rely upon them.

10 JUDGE GAYNOR: You are, indeed, seeking to rely upon them. And  
11 as we've mentioned, you're seeking to rely on them, in part, to  
12 establish the serious consequences witnesses suffered as a result of  
13 the acts and conduct of the accused to use the formulation set out in  
14 your appendix to the bar table motion.

15 But is it not the case that in doing so, in asking the Panel to  
16 accept these notes as proof of serious consequences, of proof of  
17 feelings of intimidation, of proof of a sense that perhaps  
18 intimidation was in the air, are you not asking the Panel to accept  
19 the truth of the information provided by those witnesses to the SPO?

20 MR. HALLING: We are. But the elements that you are describing  
21 and where it's placed in our case, I wanted to emphasise.

22 The serious consequence is not an element of any of the  
23 offences. It's an element of this sentencing enhancement on Count 6  
24 alone, and the sentencing in the KSC statutory scheme has a different  
25 procedural framework and different confrontation rights than the

1 evidence at trial.

2 It's actually presumptively, a written procedure, if you look at  
3 Rule 162 of the KSC Rules. So there may be a situation, to forecast,  
4 where the Trial Panel uses these notes only when corroborated by  
5 other factors in the Trial Judgement for the elements of the offences  
6 and may use them for more at sentencing in a way that's perfectly in  
7 conformity with the statutory framework.

8 The Defence doesn't have the same right to examine sentencing  
9 witnesses as they do when examining the witnesses during trial. And  
10 the way that the KSC statutory scheme is phrased, it is generally not  
11 a bifurcated sentencing procedure. So we need to present all  
12 evidence establishing these serious consequences now.

13 And this goes back to the distinction I was making at the  
14 beginning of my submissions. There's a difference between  
15 admissibility and weight. And if the Trial Panel has reservations  
16 about using these in the conviction stage versus the sentencing  
17 stage, it's within the prerogative of the Trial Panel. But as a  
18 question of admissibility, they are allowed to enter the discussion,  
19 they are allowed to enter the deliberations of the Trial Panel, and  
20 then the weight ascribed to them would be at the end of the trial.

21 JUDGE GAYNOR: Thank you. I believe that's all questions that I  
22 have on this subject.

23 Thank you, Judge Smith.

24 JUDGE SMITH: Judge Barthe.

25 JUDGE BARTHE: Thank you, Mr. President.

1           Indeed, I have a question. Another one, very briefly, for the  
2           Prosecution, again, unfortunately.

3           Mr. Prosecutor, you argued a couple of minutes ago, and also in  
4           your bar table motion, that Rules 153 to 155 are not applicable in  
5           the present case. And, of course, you gave reasons for this view. I  
6           don't have to summarise these reasons anymore.

7           In case, Mr. Prosecutor, that the Panel does not share your  
8           reasoning, which of the aforementioned - is my question - three rules  
9           would be applicable in your case given that the contact notes contain  
10          information on the potential -- *inter alia*, I have to say, on the  
11          potential consequences of the alleged conduct of the accused? Would  
12          this refer, in your opinion, to the acts and conduct of an accused  
13          within the meaning of Rule 150, 154, or would 153 be applicable?

14          Thank you.

15          MR. HALLING: Yes, I understand Your Honour's question is a  
16          different version of what we were calling the hypothetical situation  
17          with Rule 155.

18          Rule 154, acts and conduct, is actually not a prohibition for  
19          introduction through that rule. Obviously we aren't intending to  
20          call any of these people at this time. I think we've been quite  
21          clear. So we aren't intending to use -- we're not thinking in a  
22          Rule 154 lens with these persons.

23          As regards Rule 153 -- and we can provide authorities if the  
24          Court is interested in this. Acts and conduct of the accused is  
25          generally understood within the kind of natural meaning of those



1 terms. It is the acts of the accused and their conduct. These  
2 witnesses actually have no knowledge of the acts and conduct of the  
3 accused themselves. They are describing the impact of those actions  
4 upon them. And if you look at Rule 153, were it to apply, one of the  
5 factors in favour of admissibility under that rule is the impact of  
6 the crimes upon the victims.

7 So if Rule 153 applied, we would argue that it actually -- that  
8 that part of the rule wouldn't be the issue. It goes back to the  
9 original question about whether these fall within the scope of the  
10 rules at all, and we've stated our position, but that's how I would  
11 respond to your additional question.

12 JUDGE BARTHE: Thank you, Mr. Prosecutor.

13 Any comments from the Defence on this?

14 JUDGE SMITH: Oh, I had a question first.

15 JUDGE BARTHE: Oh, sorry.

16 JUDGE SMITH: Mr. Halling, am I correct, do I remember that at  
17 the very beginning you said that the public statements makes your  
18 case out completely?

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

20 JUDGE SMITH: And so this evidence that we've talking about now  
21 for 45 minutes is somewhat irrelevant to your case; correct? That's  
22 what I think I've heard you say.

23 MR. HALLING: I hope I didn't say that.

24 JUDGE SMITH: Well, it sounded that way.

25 MR. HALLING: Our submission is not that the evidence is

1 irrelevant. Our submission is that the evidence is relevant and is  
2 probative, but it is not anticipative of being the sole or decisive  
3 factor in proving any of the elements of the offence.

4 JUDGE SMITH: I think you said it might be possible you only use  
5 it at the sentencing stage, if there were a sentencing. A bifurcated  
6 sentencing stage.

7 MR. HALLING: Yes. We are presenting it to prove the elements  
8 of the offences. We talked about it being an indicator of the  
9 intimidating and retaliatory conduct, but we are presenting it also  
10 for sentencing.

11 JUDGE SMITH: And you didn't plan on using it at the beginning  
12 when you charged these people?

13 MR. HALLING: We did not, Your Honour. You can see it from the  
14 initial proceedings. We were initially planning on relying on  
15 W04842, and it was the Pre-Trial Judge's decision that prompted us to  
16 add this material.

17 JUDGE SMITH: Okay. We're not bound by that, you know. And if  
18 I follow these people's suggestion to my left and throw this evidence  
19 out, it doesn't really affect your case any; correct? Except for the  
20 sentencing stage possibly.

21 MR. HALLING: I would hope that would be the result. But it's  
22 actually up to the Trial Panel to decide what the importance of this  
23 evidence is at the end of the proceedings.

24 JUDGE SMITH: No, I'm just trying to find out why it is so  
25 important since you think your case is proven entirely by the public

1 statements. I mean, isn't that sort of one of the definitions of  
2 irrelevant?

3 MR. HALLING: Yeah, I would say no. The way in which we've  
4 proven the case, although the Trial Panel could rely on that alone,  
5 we don't know what the Trial Panel is actually going to rely upon.

6 JUDGE SMITH: Oh, we'll tell you pretty soon.

7 MR. HALLING: I have no doubt.

8 JUDGE SMITH: Okay.

9 MR. HALLING: But what is relevant is whether or not it goes to  
10 a fact in issue. And as we've been discussing, it goes towards the  
11 elements of the offences, and it particularly goes to the elements of  
12 the sentencing enhancement, but it even goes to the elements of the  
13 offences as charged. Whether it ends up being that the public  
14 statements alone are sufficient is a question for the Trial  
15 Judgement. From our side, we aren't able to know that, and so we are  
16 tendering evidence that is *prima facie*, relevant, and probative for  
17 your further consideration.

18 JUDGE SMITH: I appreciate a nicely stated argument. So I can't  
19 say I necessarily agree with all of that, but thank you very much.

20 [Microphone not activated].

21 MR. REES: [Microphone not activated]. We will deal in detail  
22 with these matters in our written reply to the bar table motion.

23 I will just mention one thing, though.

24 The Trial Panel should be aware that at the very first Status  
25 Conference in January, the SPO did inform the Court that they were

1 subject to steps being taken intending to interview and call evidence  
2 from up to ten additional witnesses. Certainly at the time, I think  
3 it was all parties and the Court's understanding that that referred  
4 to people who the SPO would allege had suffered consequences from the  
5 conduct relating to the charges. And that was on 8 January.

6 The Trial Panel can see that from the transcript and also the  
7 Prosecution's submissions for the first Status Conference in writing.

8 JUDGE SMITH: Anything else from any of my colleagues?

9 So we've got about 13 minutes left. We'll start with the next  
10 subject; hopefully finish it. Judge Gaynor has asked to ask a  
11 question on the topic concerning the authenticity of the SPO  
12 exhibits.

13 Judge Gaynor.

14 JUDGE GAYNOR: Thank you, Mr. President.

15 In the order of 21 July of this year, the Panel took note of the  
16 challenge of the Gucati Defence as indicated in its pre-trial brief  
17 as to the authenticity of the documents delivered to the Veterans  
18 Association on the 7th and 16th September 2020. And in that order,  
19 the Panel invited the Gucati Defence to specify whether it submits  
20 that the material allegedly disclosed by the accused did not form  
21 part of the SITF/SPO records, or that it was fabricated, or that no  
22 adequate chain of custody has been provided by the SPO, or that the  
23 authenticity of the material is being disputed under another basis.

24 First of all, I would invite Mr. Rees to take the floor.

25 MR. REES: Firstly, the challenge to the authenticity of

1 documents is not limited to those documents delivered on the 7th and  
2 the 16th of September but also extends to the documents delivered on  
3 22 September as it is spelled out in the Defence pre-trial brief at  
4 paragraph 278 and paragraph 300.

5 The position taken in the Defence pre-trial brief is that the  
6 accused did not know whether the documents and any markings  
7 purporting to indicate confidentiality and/or internal work product  
8 were authentic or false. The accused did not know that.

9 Accordingly, the accused's position is to be understood as  
10 requiring the Prosecution to prove the authenticity of the material  
11 delivered on the 7th, the 16th, and the 22nd of September. We  
12 adopt -- I adopt, on behalf of Mr. Gucati, all three of the positions  
13 that are articulated in paragraph 23 of the order.

14 Firstly, it is not accepted that the material allegedly  
15 disclosed by the accused, in whole or in part, formed part of the  
16 SITF/SPO records; (b), we do not accept that it was not, in whole or  
17 in part, fabricated; and, (c), we do not accept that any adequate  
18 chain of custody has been provided by the SPO. Indeed, we adopt all  
19 three of those positions or any combination thereof, because, as the  
20 Defence pre-trial brief sets out, Mr. Gucati, the accused, did not  
21 know whether the documents and any markings purporting to indicate  
22 confidentiality and/or internal work product were authentic or were  
23 false.

24 JUDGE GAYNOR: Thank you.

25 Mr. Cadman, I'd invite you to address us on this issue.

1 MR. CADMAN: Thank you, Your Honour.

2 The position is the same. We have set out from the very  
3 beginning of these proceedings that we are not in a position to be  
4 able to authenticate that material, both in terms of it being  
5 authentic documents from the SPO/SITF, nor are we able to say whether  
6 the material that the SPO now rely upon is that material that was  
7 seized from the premises of our respective clients. We have not been  
8 able to scrutinise that material, the Pre-Trial Judge was not able to  
9 scrutinise that material, and as I understand it today, neither will  
10 Your Honours be able to scrutinise that material to make that  
11 determination.

12 No witness is being called who was present, as far as we  
13 understand, on those three occasions when the documents were seized.  
14 No chain of custody is being presented that would be able to  
15 establish those documents as a being authentic and the same documents  
16 that were allegedly seized on those three occasions.

17 So we maintain that position, and the Prosecution has to be put  
18 to strict proof to establish that.

19 JUDGE GAYNOR: Thank you. I'd now like to invite the  
20 Prosecution to respond.

21 MR. HALLING: Thank you, Your Honour.

22 The SPO has the burden to prove that the documents distributed  
23 concern SPO investigations and are confidential. We intend to prove  
24 this by, one, calling the investigator who compared the materials in  
25 detail; two, presenting evidence on the various indicia on the

1 documents that the investigator identifies which proves whose  
2 documents these are and what their classification is; three, the  
3 media articles which reveal pages of these batches, which can be seen  
4 and scrutinised by the Trial Panel; and, four, last but not least,  
5 the behaviour of the accused, whose every word and action is  
6 consistent with them knowing that these documents were secret and  
7 concerned SPO investigations.

8 As to the 16 September 2020 documents in particular, known as  
9 Batch 2, the SPO has also disclosed this batch with redactions and  
10 will tender it through W04841. This disclosure was possible,  
11 incidentally, because most of the information in this batch was  
12 publicly available. The Defence can challenge the authenticity of  
13 these materials as they wish.

14 The Gucati Defence, turning to the media point that I was  
15 making, they put great emphasis on the fact that the pages published  
16 by the media could have come from some source other than the KLA War  
17 Veterans Association. And again, I've said it earlier, I'm  
18 committing to it again: The elements of the offences charged are  
19 proven by the video-recorded conduct of the accused alone. That the  
20 media further disseminated the materials after the accused merely  
21 bolsters what the accused did in the first place. Where the media  
22 got what they published is a question of inference to be ultimately  
23 considered at the end of the trial. But it suffices for now to say  
24 that at least one media outlet does confirm that it received the  
25 materials in question from the KLA War Veterans Association, that the

1 media articles on this information are all clustered immediately  
2 after press conferences where the accused purported to release those  
3 same materials to the media, that this same pattern happened on  
4 multiple occasions and, last but not least, there is no evidence of  
5 any source other than the KLA War Veterans Association delivering  
6 these same materials to the media.

7 So, in short, Your Honours, we are aware that we need to prove  
8 the authenticity of these documents, and we fully intend to do so.

9 JUDGE GAYNOR: And just to clarify. In respect of the third  
10 batch, which I understand will not be provided to the Panel, does it  
11 form any part whatsoever of your case?

12 MR. HALLING: It does, Your Honour. It's one of the three  
13 disclosures. And the list of indicators that I gave above will be  
14 true for Batch 3 as well. W04841 will talk about what is in the  
15 batch, you will have the declaration before you analysing it, that  
16 also has excerpts of the confidentiality seals, and then the media  
17 articles that have pictures of that batch will also be discussed in  
18 the manner that I described.

19 JUDGE GAYNOR: But the Panel will not be able to inspect for  
20 itself the contents of Batch 3; is that correct?

21 MR. HALLING: That's correct. And this goes to the earlier  
22 submission that we made: We can't disclose these batches. We  
23 consider them to be our internal work product, which the rules say we  
24 are allowed to keep and not disclose even to the Chamber. But the  
25 other -- in our submission, we don't need the batch in order to prove



1 the case.

2 We've built the case without it, and we fully expect to provide  
3 sufficient evidence for the Trial Panel to be able to fairly reach  
4 the conviction that we are seeking.

5 JUDGE GAYNOR: I've no further questions on this subject.

6 Judge Smith, thank you.

7 JUDGE SMITH: Anybody else? All right. Well, I believe we will  
8 adjourn for the day. I believe we will adjourn for the day rather  
9 than trying to start up another subject.

10 [Trial Panel and Court Officer confer]

11 JUDGE SMITH: We have a short pause for the interpreters.

12 Before we break -- by the way, first of all, we will meet again  
13 tomorrow at 9.30, as I said earlier. I would like to inform you that  
14 the Panel will set aside some time during tomorrow's hearing to hear  
15 the SPO's arguments regarding the redactions for the Rule 102(3)  
16 detailed notice.

17 We expect this to be an *inter partes* hearing. If now or during  
18 the hearing the SPO believes that some information cannot be shared  
19 with the Defence, the SPO can request the Panel to have an additional  
20 *ex parte* hearing. Prior to the hearing, the SPO is expected to give  
21 fair notice to the Defence about the nature and extent of their  
22 objections to disclosure.

23 That ends our procedure for today. We thank the parties and the  
24 Registry for their attendance. I also wish to thank the  
25 interpreters, stenographers, audio-visual technicians and security

1 personnel for their assistance. So we will see you tomorrow at 9.30.

2 The meeting is adjourned.

3 --- Whereupon the hearing adjourned at 3.59 p.m.

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