14 September 2026

[Open session]

[Closing Statements]

[The accused appeared via videolink]

--- Upon commencing at 9.30 a.m.

JUDGE GOSNELL: Court Officer, please call the case.

THE COURT OFFICER: Good morning, Your Honour. This is file KSC-BC-2023-12, The Specialist Prosecutor versus Hashim Thaci, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuci.

JUDGE GOSNELL: Could we have the appearances again, starting with the Prosecution, please.

MR. HAFETZ: Good morning, Your Honour. Josh Hafetz for the Specialist Prosecutor's Office, and our configuration is slightly different today so I'll restate the whole thing. We're joined by the Specialist Prosecutor Kimberly West, behind me and to my right, Illona Linkola, Ella Palsenberg, Julie Mann and Matt Halling. Thank you.

JUDGE GOSNELL: Thank you.

Defence?

MS. MENEGON: Good morning, Your Honour. The Thaci Defence team has the composition as on Thursday and Friday. Thank you.

MR. REES: I appear again on behalf of Mr. Smakaj, assisted by co-counsel Mr. Bowden and Ms. Matilda Falchetta Hainsworth.

MR. EDWARDS: Good morning, Your Honour. Iain Edwards for Isni Kilaj, together with Eva Kalb, Joe Holmes, Alex Baer and

Alex Cumming.

MR. YOUNG: Your Honour, good morning. David Young here. I appear for Mr. Fazliu as before. Thank you.

MR. ADMIRAAL: Good morning, Your Honour. Alexander Admiraal on behalf of Mr. Kuci.

JUDGE GOSNELL: Good morning. And I see that Mr. Thaci, Mr. Smakaj, Mr. Kilaj, Mr. Fazliu and Mr. Kuci are all joining us by video-conference.

So this is the last day of closing statements, and we'll proceed with the responses by the SPO.

Mr. Halling.

MR. HALLING: Good morning, Your Honour.

I will speak first, answering both Your Honour's questions and the Defence submissions last week concerning the applicable law. Mr. Hafetz will then touch on a few discrete evidentiary points and present our final statements.

But we'll start with Your Honour's questions from last week.

Question 1 was directed at the Defence, but just briefly, the absence of a specific transcript challenge is a matter that the Court can and should weigh. All that we would additionally note, and as Your Honour already seems to recall, is that arguments related to transcript challenges imposing a burden of proof or infringing self-incrimination have already been raised and rejected in the course of Your Honour's verification and reconsideration decisions. And that's F708, paragraphs 15 to 16; and F745, paragraphs 15 to 19.

On Question 2, and the different parts of it, for the *actus reus* threshold of Article 401(2). It is the participation in a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties. And common action "may include any activity jointly undertaken by the group members" and "covers in principle any type of collective criminal activity that pursues the relative obstructive purpose." And that's from paragraph 162 of the Case 07 trial judgment and paragraph 52 of the Confirmation Decision in this case.

That threshold is not the same as for co-perpetration. Article 31 of the KCC requires that the persons jointly commit a criminal offence by participating in the commission or by "substantially contributing to its commission in any other way." So the contribution threshold for co-perpetration is codified. When the legislature wanted to impose such a requirement, they said so. And for Article 401(2), they did not.

We'd also add that the Case 07 Pre-Trial Judge also held Article 31 inapplicable to Article 401(2) because the offence's material elements "already entailed joint commission" and "[e]ach participant in such a group acts as an individual perpetrator." The Kosovo Court of Appeals has described a statutory predecessor of Article 401(2) as an autonomous criminal offence beyond the concept of restrict or classic form of co-perpetration. And that's the *RR and MV* judgment of 7 December 2017. It's PAKR 158/17, paragraphs 138 to 139.

The participation threshold is identical in the attempted form. What changes is the consequence in the second element: the group's common action need not have obstructed anyone. So the question for each accused becomes accordingly whether, with direct or eventual intent, each partook in, contributed to or enabled a common action that had the capacity to obstruct, not whether each individual's contribution met a substantial threshold.

As for Vllaznim Kryeziu, Kryeziu's participation lies in the 6 October 2023 visit itself, which is part of the common action. He's addressed by name at the outset, and he remained a participant in the conversation throughout the critical period in which Witness 4's two prior statements were dissected, and the instructions for the witness settled. When Thaci placed Witness 4's prior statements before Kilaj with the whispered words "read this one here," he directed Kryeziu in a normal voice to stay where he was while Kilaj read it. Thaci then ran two conversations in parallel: an audible normal exchange with Kryeziu on an innocuous subject, which provided cover for the whispered instructions to Kilaj about the passage Witness 4 was to be told to change. And this was all discussed last week in the SPO presentation T1065 to 1066.

Sustaining that cover is conduct which enables the common action. It is the technique Thaci used the next day when he told Artan Behrami to "speak louder" so that he could whisper to Smakaj. Kryeziu's continued participation in the visit where other violations of the secrecy of proceedings occur further cements his role.

Nothing more is required of him. Kryeziu watching a protected witness's confidential statement change hands and supplying the audible conversation for minutes and minutes while Thaci gives whispered instructions to Isni Kilaj. That's a man who is at least aware that obstruction may occur and accedes to it.

We recall that the acts of a participant need not contribute directly to the obstructive purpose, and Kilaj was the member designated to carry the instructions and the pages. But Vllaznim Kryeziu's role was neither passive, nor incidental. His normal-voice exchange with Thaci enabled the delivery of instructions and was integral to the way Thaci delivered them. That role is readily apparent from the recording itself, and we would especially direct Your Honour's attention to the audio corresponding to pages 44 to 54 of P109-ET, in conjunction with the corresponding LSU memorandum. If the audio timestamps would assist, we are happy to provide them.

Question 3 on Article 11 of the KCC. We do not consider Article 11 on acts of minor significance applicable in the same way as Article 113 of the KCC. Article 16(3) of the Law incorporates, for crimes under Article 15(2), the individual criminal responsibility provisions contained in the Kosovo Criminal Code of 2012, but it then gives a list of specific articles, 8 to 10, 17, 21 to 27, 27 to 40. Article 11 seems to have been deliberately skipped and is therefore not applicable in line with the foundational principle codified in Article 3(4) of the Law. The Kuci Defence is

simply wrong in this regard when arguing at RT 118 on Friday that Article 11 applies because the general part of the KCC is incorporated through Article 16(3) of the Law.

The SPO's reliance on Article 113 is different. The offences incorporated by Article 15(2) carry with them the statutory definitions of the terms they use - "official person," "group," so on - without which they cannot be applied. And the Case 07 Trial Panel applied Article 113 for that reason. Article 11 is not merely definitional in the same way.

In any event, the Case 07 Trial Judgment rejected an Article 11 argument because the offences carried significant custodial sentences and because of the interests they protect. Article 11's own criteria - the nature or gravity of the act, the absence or insignificance of intended consequences, the circumstances in which the act was committed - all of this points in the same way as what happened in Case 07.

Question 4 --

JUDGE GOSNELL: Can I just interject a question there, Mr. Halling?

MR. HALLING: Please.

JUDGE GOSNELL: Is it the SPO's position that Article 11 is -- and here I draw the words from Article 16. Is Article 11 of the KCC an individual criminal responsibility provision or is it a different kind of provision?

MR. HALLING: We would say that it is related to individual

criminal responsibility because it actually would be a defence to any crime charged. It actually voids the offence charged and would be dispositive in situations where it applied between guilt or innocence. That the surrounding provisions near it are incorporated but not it, suggests that they were looking at this part of the Code when deciding whether to incorporate it or not.

We will move on to Question 4, and this is about the search report and INV 55.

It is not necessary to rely on INV 55 in order to make the evidentiary connections required to sufficiently identify the provenance of the Smakaj document, but we need to provide some context to address the Smakaj argument that the filing is not in evidence.

P125 and P126 were tendered without any corresponding search report, with the Defence objecting at the time that the provenance of the document was disputed and that the items could be admitted only through a witness who could speak to their alleged provenance. And Your Honour correctly overruled that objection in the bar table decision, which is F737.

When further bar table items were tendered, the Defence maintained the same objection to the new items, characterising Your Honour's prior ruling as a rejection of its position that witnesses were needed. Your Honour corrected that characterisation in Decision F810, explaining at paragraph 11 that the Smakaj document and photographs were admitted not because testimony concerning the

seizure or creation of information is never required, but rather "because there were independent indications of authenticity and probative value in respect of those items to meet the threshold for admissibility."

We heard what was argued last week. At the time, the Defence did not seek certification to appeal or reconsideration of the specific rulings admitting those exhibits. The Smakaj Defence also never challenged the legality of the search of Smakaj's residence within the timeframe to do so under Rule 42(3).

Those independent indications of authenticity identified at the admissibility stage are still there, which is what makes INV 55 unnecessary. In fact, the Detention Centre recordings are such that the Smakaj document itself is not even needed to convict on Counts 12 and 13.

But it should be given weight because its provenance is still independently established, including by:

One, the agreed fact that the SPO conducted a search and seizure operation at Smakaj's residence on 30 October 2023.

Two, P126, which shows pages corresponding to the Smakaj document, in a vehicle whose registration plate the Smakaj document concedes is that of a car registered to Smakaj.

Three, P240, an associated exhibit of Witness 8's evidence to which no relevance objection was made, and to which we will return to shortly for Your Honour's fifth question.

Four, the sixth agreed fact, which ties the item and evidence

bag codes analysed by Witness 8 to the Single Judge's search and seizure order for Smakaj's residence. And this is explained in footnote 168 of our reply.

Five, Witness 8's report which records the same codes for the document he examined.

Six, the recording of the 7 October 2023 visit in which Smakaj asked, "can I bring [the or these] papers"? Thaci answered, "Yes, you do that," and "you keep these." And Smakaj whispered, "Put them in the pocket."

And seven, the Detention Centre computer and printing records and Witness 8's analysis which traced the document to the only detainee printer in the Detention Centre.

Comparisons to an adversarial trial based on criminal evidence cannot supplant application of the Law and Rules of the KSC, and there are more than enough indicia to establish the authenticity of an admitted exhibit under this Court's framework.

Question 5, in relation to P240 and the redacted signature. In light of Your Honour's question, if it would assist the Single Trial Judge or the Defence, the SPO can identify the signatory behind this redaction in private session. But as to the question as to whether the weight of P240 is undermined by the redaction, the answer is no.

The redaction covers the identity of the SPO staff who signed the bag, as can be seen already from the A.2.5 redaction applied. The redaction leaves intact everything that gives the notations their evidential value: the evidence reference number, the item code,

vehicle registration, and the description of the item. Each of those particulars is corroborated independently, as I just mentioned.

The Smakaj Defence objection made at T1151 and 1152 last week that there's no evidence of who wrote the notation is one the Defence could have made efforts to remedy had they required this information. We recall in this regard that the regime for standard redactions, including Category A.2, and the procedure by which a receiving party may challenge any specific standard redaction was established by the Pre-Trial Judge in Decision F100. No party sought certification to appeal that decision, and the Smakaj Defence never invoked the challenge procedure in relation to this redaction.

Unless there is anything further from Your Honour, I'm now going to address some of the mechanics of how the law works in this case in response to the Defence closing statements.

Those submissions were largely familiar last week. Your Honour heard mostly the same submissions on the applicable law that the Defence made a few weeks ago in their final trial briefs. Every submission of consequence was answered through the SPO's consolidated written reply brief. What Your Honour did not see last week was anything that could overcome what's in that reply, and on many occasions the Defence did not even engage with the SPO's answers.

So rather than repeating the full submissions from our written reply, I wanted to touch on five key aspects of the Defence approach to the law which, when understood for what they are, warrant rejecting all contested points.

Number 1, focusing on fact patterns instead of scope. At T1086 to 1089, the Thaci Defence asked Your Honour not to depart from what they termed "the well-established practice of Kosovo courts" on the meaning of Article 401, drawn from a review of various cases. But the meaning of the provision is not well-established by those cases. It is the Thaci Defence's own gloss on cases decided on their facts. None of the Thaci Defence cases hold that Article 401(2) is categorically limited to crowds or to named officials. The scope of a statutory provision is not narrowed by what cases happen to be brought under it.

Number 2, undue reliance on uncharged provisions. At T1084, and then 1087 to 1090, the Thaci Defence argues that the allegations concern witness interference of the kind addressed by Articles 386 to 388 of the KCC, and that had charges been brought under these provisions, they would have failed for lack of evidence of bribery, threats, or compulsion. That's a clear a straw-man argument as you will ever see. The SPO should not need to explain why it did not proceed on charges the Defence believes are unviable.

The Supreme Court Panel in Case 07 rejected the argument that the existence of Articles 386 and 387 somehow narrowed Article 401, which is the offence charged in this case. Paragraph 41 of the Case 07 legality decision holds that "it would be flawed to request a different interpretation of a criminal norm simply because a conduct may result in two different crimes." The Thaci Defence is fully aware of this paragraph. They quote it in paragraph 70 of their

final trial brief. And the charges in this case fall under the protected interests covered by Article 401(2).

Reliance on uncharged provisions is part of a larger set of arguments challenging the SPO case on bases it did not advance. As the Pre-Trial Judge held in paragraph 64 of the Preliminary Motions Decision, and that's F347, attempted obstruction is a form of commission under Article 401(2). We are not stacking inchoate offences in the manner alleged by the Kilaj Defence across RT 43 to 48 on Friday. We charge an agreement to commit an offence which can be completed through attempt.

The Kilaj Defence declared at RT 46 that they found no authority at all for an agreement to attempt. To the extent that means they could not find any authority for the way this case is charged, they actually did. At RT 47 on Friday, the Kilaj Defence read from paragraph 21 of the case of *R. v. Dery*, describing that case as "absolutely on point." Paragraph 21 discusses how its ruling relates to the older case of *R v. May* and states, and this was quoted last week:

"The conviction in *May* was for conspiracy to obstruct justice. Obstruction of justice, a distinct offence under the [Canadian] Criminal Code, is framed in the language of attempt: [...] It was argued on that basis that the charge of conspiracy to obstruct justice impermissibly combined two forms of inchoate liability [...]."

The Kilaj Defence quoted this last week, but not the next

paragraph of *Dery* which explains what happened to that argument in *May*. It was rejected because obstruction of justice was treated as a substantive offence notwithstanding the inchoate elements of its statutory definition.

From paragraph 22 of *Dery*, where Martin J.A., speaking for a unanimous Court of Appeal in the *May* case "considered it sufficient to say that obstruction of justice was a substantive offence and that the accused's submission failed for that reason alone." Paragraphs 21 to 23 of *Dery* undermine the Kilaj Defence, their asserted novelty of the way the modes of liability are pled in this case, and it is even further undermined by the Case 07 precedent.

Which brings us to aspect number 3, pretending the *Gucati and Haradinaj* case didn't happen the way it did.

At T1088, the Thaci Defence said the meaning of official duties had not been litigated in Case 07 and invited Your Honour to reassess those findings. In short, ignore the jurisprudence because they were mere observations unrelated to the litigation in the case.

The impugned finding on this point is paragraph 147 of the Case 07 trial judgment, where the judges held that "the language of these provisions does not suggest a requirement of singular specificity, i.e. identifying the form and nature of the particular duty obstructed."

That ruling is directly on point. The official persons and official duties were pleaded similarly to Case 07 as in this case, and the Case 07 judges' position followed full argument. This

includes the Gucati Defence, arguing at paragraph 31 of its Case 07 final trial brief, which is filing F567/RED in the Case 07 record, that the Prosecution are "required to prove that the actions of the accused were directed against an official person performing a specific official duty." The Gucati Defence then cited the same Salihu commentary passage the Thaci Defence used in paragraph 42 of its final trial brief. This was all litigated.

Number 4, pretending the appeals proceedings didn't happen the way they did. At T1093, the Thaci Defence invited Your Honour to adopt its approach on Article 32(3) incitement and listed its authorities in favour of its position. But they omitted to mention orally the critical counter-authority, which is the majority ruling on appeal in this case against their interpretation.

The Case 07 appeals judgment's determination on legal certainty bears quoting here. From paragraph 37, the Court talks of interlocutory appeal decisions which are "binding during the appeal proceedings of the same case as to all issues decided by those decisions, with the purpose of preventing parties from 'endlessly relitigating' the same issues." So when the Thaci Defence invites Your Honour to adopt an interpretation that the Appeals Panel majority has already rejected in this case, the Appeals Panel's own words are the answer.

I could also extend this point to pretending that KSC appeals proceedings don't convey finality. The Kuci Defence made a distinction, at RT108 on Friday, that they were not saying orders

could never be final, but rather they were drawing a distinction between a procedural framework and a decision that ends a dispute. There is no source given for that proposition at all. To the extent the Kuci Defence is implying that a final judgment can never be reopened at the KSC, that's actually not true as can be seen by the procedure in Article 48 of the Law. Finality does not necessarily mean immutability. Whether the order can still be challenged by ordinary appeal remains the appropriate test for finality under Article 393 of the KCC, in line with the definition of what a final order/judgment is in Article 485(1) of the Kosovo Code of Criminal Procedure.

The Case 06 protocol was confirmed following interlocutory appeal and is therefore final. The Kuci Defence's distinction made last week again collapses into a view where if the Case 06 protocol is not final, then nothing ever can be.

Number 5, reliance on words the Kosovo legislature never said. At T1092, the Thaci Defence argued that conduct which is specifically identified in Article 27 of the KSC as mere preparation cannot amount to an attempt under Article 28. The Kilaj Defence ran a variation of this argument at RT 30 to 31 on Friday. Now, it's true that attempting an offence must exceed preparatory acts, but that's different from saying that the conduct listed in Article 27 can only be preparatory.

This is not what the KCC says anywhere, and you can see this isn't the case from the KCC itself. For example, Article 27(2) has

that list of preparatory acts, including removing the impediments to the commission of a criminal offence, but theft committed by breaking into locked premises through the use of force or the removal of obstacles constitutes aggravated theft under KCC Article 315(1.1). You can see similar overlap between the conduct in Article 27 and the completed offence in Article 136 of the KCC. These offences do not criminalise preparation as sufficient. They require completed offences. When the KCC criminalises preparation, this is clearly stated. You can look at Article 138 of the KCC as an example.

Whether conduct moves into the execution stage depends on the material elements of the offence charged and the conduct in context, not simply whether it can be described using terms in Article 27, a provision that's not even charged in this case.

In this regard, the Kilaj Defence argued that we've never specified clearly when the attempt occurred at RT 26 and 27, that they are playing tennis without a partner. Paragraph 531 of our final trial brief reads as follows:

"The conversation during the 6 October visit demonstrates that the Kilaj Group began to execute the material elements of the offence, as further supported by protected information recovered at Kilaj's residence."

That's as clear as it can be said.

The Smakaj Defence arguments about lacking the capacity to obstruct, at RT 6 to 7 on Friday, also simply don't align with the evidence. The official duties targeted for obstruction in this case

are obtaining, preparing, and testing witness evidence in Case 06, which is the work of SPO Prosecutors, investigators, and of the judges and staff of the Court. Against those official duties, providing detailed instructions to be delivered to witnesses has the capacity to obstruct. Printing documents affirming those instructions and giving them to co-accused in violation of Detention Centre procedures has the capacity to obstruct those official duties. Returning to the Detention Centre a month later to receive further instructions has the capacity to obstruct those official duties. It must also be kept in mind that Mr. Thaci's conversations with his charged groups include him committing the offences of violating the secrecy of proceedings and contempt of court. Those offences are classified in the KCC as offences against the administration of justice and public administration. It is inevitable that committing offences against the administration of justice had the capacity to obstruct official persons presenting witnesses in a criminal case.

Your Honour, what the Defence are doing as concerns the law is pretty clear. They dismiss the Case 07 jurisprudence as unreasoned or allegedly distinguishable, even when that jurisprudence directly applies to points of law in this case. They read into the Kosovo Criminal Code requirements and limitations that the legislature didn't write. They take the particular circumstances of past Kosovo cases and present them as if they were the limits of the provisions applied in them.

What the Defence fail to acknowledge is the reason why they

can't find a Kosovo case on facts like these. There's never been one. A former head of state, on trial for war crimes and crimes against humanity, setting out to obstruct the officials trying him by shaping the evidence against him from inside the Detention Centre. That conduct is extraordinary. It does not look like a typical Kosovo obstruction case, and that is precisely why these offences are so exceptionally grave.

The Thaci Defence in particular is trying to turn all of this on its head; that because the case is unprecedented, the conduct must fall outside the law. That's not how the law works. The law needs no precedent on identical facts before it can be applied. The facts are new; the law is not.

Your Honour, we ask for nothing more than that the words that the Kosovo legislature chose be given their ordinary meaning, in line with ordinary principles of interpretation, in line with the Court of Appeals' decisions in this case, and the settled jurisprudence of the Court. The Defence is running from what the law is, just as they are running from what the evidence is. And it's to that evidence that Mr. Hafetz will now turn.

MR. HAFETZ: Good morning, Your Honour, and thank you. I will be brief.

I want to ensure the record is clear after the Defence closing submissions from last week.

Overall, regarding the core evidence in the case, Thaci's hours of recorded visits with his co-accused and others, what you've heard

from the Defence is largely a retread of the now long-running strategy to avoid engaging with what was actually said and done during those recordings and outside of them.

The fallback strategy then remains spinning parallel narratives where up is down, black is white, and pages and pages and pages and pages of patterned instructions for how witnesses should testify across time were really just sharing "memories and common histories." That's from the Defence last week.

And the fallback from that is a now endless line of unfounded counterfactual claims that have no basis in this record, sweeping claims about vast intelligence service conspiracies or rogue Detention Centre officers, all masquerading in here as reasonable doubt or common sense when they're neither reasonable nor sensical, let alone based anywhere this the record before Your Honour.

This has been, and continues to be, the strategy - distract and deflect. And it ignores the record before Your Honour.

But a few points bear specific correction.

First, last week, the Defence repeated in several forms that when it comes to the contacts between Thaci's co-accused and the targeted witnesses, including Remi Mustafa and Bislim Zyrapi, the Prosecution is ignoring the past relationships that the co-accused had with the target witnesses.

But the Defence has it exactly backwards. The Prosecution isn't ignoring that Fadil Fazliu and Fahri Fazliu had a prior relationship with and access to Remi Mustafa. It is the Prosecution case that the

Fazlius did have a prior relationship and access to Mustafa.

Indeed, it is in significant part because of that relationship and access to Mustafa that Thaci repeatedly dictated his instructions to Fazliu on the 2nd of July and told him to use his son Fahri to deliver those instructions to Mustafa the next day.

That's the point. And the evidence, including the visit recording, the transcript of that recording, and the external corroborating records, including their phone contacts, all bear this out.

The same is also true for Mr. Smakaj. It is the Prosecution case that Smakaj had access to and a relationship with Zyrapi. That relationship and access are part of why Smakaj was one of the people whom Thaci tasked to provide his instructions to Zyrapi. Smakaj could get it done.

And not just any friend with access to the targeted witness. In Smakaj, Thaci chose a friend who already had information about Zyrapi that would further assist in executing Thaci's instructions.

Specifically, Smakaj had on his seized laptop a document with a creation date of 2021 that is related to Zyrapi and which -- with information corresponding to Mr. Zyrapi's 2020 SPO interview. Your Honour can find this recovered document at Exhibit P211, and it's discussed at paragraph 253 of the SPO's brief. The relevance of that document, P211, seized from Smakaj's laptop, is that it shows Smakaj already had information on Zyrapi's anticipated SPO testimony.

This was all part of Thaci's *modus operandi*. He selected people

because, and precisely because, they could be relied on to get his messages to the witnesses whose testimony he wanted to dictate.

Second, much was claimed last week about Mr. Smakaj's presence for the participation -- and participation in Thaci's detailed instructions for how Mr. Zyrapi should be told to testify.

Thaci's instructions that he provided for Zyrapi, first in their 9 September visit and then again on 7 October 2023 with the Smakaj document, are not ambiguous. The claim now that Thaci's instructions to be delivered to Zyrapi were really just helpful truth-seeking instructions not to "mix things up" is contradicted repeatedly by the visit transcripts.

Mr. Thaci was not a judge in Case 06 intending to offer helpful courtroom tips to witnesses he was barred from contacting.

His repeated instructions in the Smakaj visits, just as they were in the Kuci visit, were aimed at controlling what Mr. Zyrapi would say and not say, and in particular what he would say about the General Staff. And all of his instructions were intended to help his - "his "being Mr. Thaci's - case.

Many of these specific instructions are detailed in our brief, citing directly to the transcripts.

We ask Your Honour to look at the record.

As to whether Mr. Smakaj received Thaci's instructions, whether, in other words, Mr. Smakaj was in the room where it happened, whether he was in the room when it mattered, the answer is yes. He was there.

The idea that Your Honour is somehow incapable of examining the total body of evidence before you, including the five and a half total hours of scheduled, confirmed, recorded visits with Thaci on 9 September and 7 October, where Mr. Smakaj was addressed by name and identified by other verifiable information, is incorrect.

The evidence for the attribution is in the record, it is detailed, and Your Honour does have the capacity to verify it for himself.

The 7 October visit alone, where Smakaj passed greetings to Thaci from Zyrapi from their documented interaction days earlier, and then later in the visit passed on more information from Zyrapi to Thaci, includes more than 20 references to Smakaj's name "Bashkim." He is addressed directly by his name more than ten times. He responded directly to nearly all of those. Several times Mr. Smakaj referenced his own name while telling a story about himself.

Aside from the repeated direct references to his name in a three-person visit with Mr. Thaci, whose voice itself is easily recognisable and distinguishable from his 28 hours of recorded visits and his multiple one-on-one recorded phone calls, aside from all of this, there are numerous other details in the recording and the transcript that identify Smakaj as present and which allow you to assess when he is speaking.

Your Honour, this is all laid down in our final brief and at Annex 10, with timestamps.

Mr. Smakaj was in the room and he did play a role when it

mattered, specifically when Thaci was issuing his detailed instructions for Mr. Zyrapi. The transcript of P110 reflects Mr. Smakaj speaking on 220 of the 231 total pages of the visit transcript. Again, Your Honour can listen for himself to the full recording and assess this.

This includes the P110 transcript pages where Thaci issued his instructions for Zyrapi, including at transcript pages 45 through 51, 108 through 113, and 224 to 225, all of which Mr. Smakaj participated in, and all of which the SPO relied on in its brief.

The content of six of the 15 pages I just cited were verified by the Language Services Unit, and for the rest of them, the Thaci and Smakaj Defences withdrew their challenges to those pages.

This page range includes verified pages containing Thaci's specific instructions that correspond to the Smakaj document, printed at the Detention Centre on 7 October, three hours before the visit, and which, yes, the SPO seized from Smakaj's car three weeks later.

This includes, for instance, the portion of the 7 October visit recording where Smakaj was referred to by name and specifically responded to and contributed to Thaci dictating what was to be said about the six specific General Staff members. This is at pages 111 through 113 of P110, and the corresponding reference is found at pages 1 and 2 of the Smakaj document, again, all detailed in the final brief.

But immediately after Thaci concluded this part of his instructions for Zyrapi at page 114 and 115 of the transcript of

P110, Thaci again addressed Mr. Smakaj directly by his name, Bashkim. Specifically, he asked, as verified by the LSU, "By the way, who is still there, Bashkim, who do you still have there in the village?" Smakaj's immediate response was, "Just my youngest brother." And Smakaj then went on to describe a specific medical detail of his family member for several transcript pages.

Your Honour can listen to the voices in this extended discussion, first, the instructions regarding the Smakaj document, then the segment with personally identifiable information from the P110 audio - that's transcript pages 115 to 117 - and compare the voices to the beginning of the transcript where Mr. Smakaj speaks at length about his son at Bonn university, an external fact confirmed by evidence from Smakaj's phone. That Bonn discussion is P110 at transcript pages 8 through 10. And if it's useful to the Court, I can provide the timestamps for each of those.

But this is not complicated. His voice is readily identifiable.

What the totality of the evidence shows is this: Mr. Smakaj was there when it mattered, and that he actively participated in the Zyrapi instructions.

Finally, as to the Smakaj document, Mr. Halling has already provided additional details again on the subject, which is also detailed in our brief, but let me expand on and clarify one specific point raised by the Defence last week.

The Defence referenced the work of the independent counsel in this case who was tasked by the Pre-Trial Judge to review Mr. Thaci's

cell computer and Detention Centre printer logs for evidence of an electronic version or versions of the content of the Smakaj document that was seized from Mr. Smakaj's car.

The Defence complained last week that the SPO did not call the independent counsel here to testify. There was no need to do so. The independent counsel's findings as they relate to the printing of the Smakaj document at the Detention Centre on 7 October, hours before Mr. Smakaj visited, are admitted and detailed in the final trial brief.

But the Defence certainly could have called the independent counsel to ask her questions about her reports if it had wanted to, but the Defence chose not to.

Instead, they now try to introduce uncertainty where there is none. Specifically, the Defence suggested last week that it's not possible to determine when the seized Smakaj document was printed at the Detention Centre given the fact that the independent counsel identified multiple versions being printed there on different dates. But this is not so.

The independent counsel identified 11 files responsive to her search queries for the Smakaj document. Seven of those 11 responsive files were from the Detention Centre printer logs, and four were from Mr. Thaci's cell computer.

In her report to the Pre-Trial Judge on her findings comparing each of the 11 files to the contents of the seized Smakaj document, the independent counsel identified all 11 responsible -- excuse me,

all 11 responsive files as containing exact - "exact" - copies of the Smakaj document, along with other material in the files.

In her more detailed annexes to the same filing - and this is all in P137, Annex 3 and Annex 4 - the independent counsel identified a smaller number of the 11 as exact copies to the content recovered and found in the Smakaj document, when she compared not just the words but also the colour and other formatting in the printed files.

Again, these findings are all detailed in P137 and at Annexes 1, 3, and 4, produced by the independent counsel.

But here's the thing: As stated in our final trial brief, the Prosecution conducted a complete comparison of all 11 versions of the Smakaj document and compared them to the seized paper --

MR. REES: I'm sorry to rise to my feet, but there's a matter I would like to raise with Your Honour.

JUDGE GOSNELL: Well, Mr. Rees, normally there aren't objections during closing statements, but is information being referred to that is not evidence?

MR. REES: Yes.

JUDGE GOSNELL: Well, I'm going to allow Mr. Hafetz to continue and then you can apprise me of that during your response.

MR. REES: Well, perhaps Mr. Hafetz could give us a reference to the evidence by way of exhibit number or, indeed, by reference to a testimonial witness for the evidence that he believes he is about to tell us about.

JUDGE GOSNELL: Mr. Hafetz, proceed as you wish. And, Mr. Rees,

I'll be very interested to hear anything you have to say about Mr. Hafetz's references if they fall outside of what is evidence in this case.

MR. HAFETZ: Your Honour, you can find the reference to the SPO's comparison of the document at page 42, footnote 181, which states that we compared all 11 electronic versions to the Smakaj document --

MR. REES: That is in your final trial brief.

MR. HAFETZ: Shall I go on, Your Honour? I'll answer that question.

JUDGE GOSNELL: Mr. Rees, it's perfectly appropriate for a party to make reference to their own final trial brief in their submissions --

MR. REES: It is, but I just wanted to clarify that the reference he was giving us was to his final trial brief, not to either an exhibit reference or to the reference of a transcript for any oral evidence that was called. It's simply a footnote in the trial brief. Is that right?

JUDGE GOSNELL: Mr. Rees, you'll have every opportunity to comment during your reply.

Mr. Hafetz.

MR. HAFETZ: Thank you, Your Honour. And what I was going to go on to say, if I had been permitted to finish my sentence, was the final trial brief notes that the SPO conducted the comparison of items that are in evidence. All 11 versions, electronic versions,

are in evidence. They are in evidence at Exhibits P139 through P149, inclusive. We don't need a witness to tell you. You can compare the documents yourself and find what we did, which I'm about to explain.

The comparison of all 11 files to the seized Smakaj document can be conducted page by page, line by line, and character by character. And what this detailed comparison shows beyond any doubt is this: Some of the 11 electronic versions are very close matches to the Smakaj document but are easily distinguishable from the printed Smakaj document because the electronic versions are missing certain content present in the seized Smakaj document.

You see this, for example, in the electronic versions contained in Exhibits P141, 142, 143, 144, and 148.

Much of this is indeed documented by the IC herself in P137.

The independent counsel was also correct that several of the digital files she recovered contained near exact matches to the typed content of the seized Smakaj document. You can see these, for example, in Exhibits P145, P146, and P149.

Specifically, by comparing the documents, you can see that the electronic versions of all of the typed words are identical to the typed words in the paper Smakaj document seized from Mr. Smakaj's car. But in each of these cases I just mentioned, there are differences between the digital versions and the content of the seized Smakaj document.

The differences are not to the typed words, which are identical, but in very slight differences in formatting. Your Honour can find

this again at P145, 146, and 149.

Specifically, each one of these files with the same typed words is missing a series of typed dashes used as a section break on a single page. These typed dashes are present on page 6 of the printed Smakaj document, but they are not present in any of the three otherwise identical versions found at P145, 146, and 149. You can see the missing line of dashes when you compare page 6 of these three exhibits - again, 145, 146 and 149 - with page 6 of P125, which is the seized Smakaj document.

And to assist the Court in finding and confirming the difference, I will be more specific.

At the top of page 6 of the seized Smakaj document, Exhibit P125, there is a paragraph in Albanian that begins "26 *Nentor* 1998." The next paragraph on that page 6 begins with the Albanian words "*Eshte Gabim*." I'll spell it, E-s-h-t-e, *Gabim*, G-a-b-i-m. Between these two paragraphs on the top third of page 6 of P125 are a series of dashes forming a line across two-thirds of the page.

Exhibits P145, 146 and 149 all have the same two paragraphs I just described. The words in those paragraphs are identical to the words in the Smakaj document, but none of the three exhibits - 145, 146, 149 - has the line of dashes printed between the two paragraphs as found in P125. It's a small difference, but it's all the difference.

None of these electronic versions is, in fact, an identical match to the printed Smakaj document found at P125. Don't take my

word for it. It can be done by Your Honour.

Ultimately, the complete comparison of all 11 electronic files identified by the independent counsel shows that only one of those 11 files identified by the independent counsel contained a digital version of the Smakaj document that is truly and completely identical to the printed content of the paper version found in Mr. Smakaj's car. Identical in every element of its typed content - words, formatting, spacing, dashes. Identical.

That lone identical version is Exhibit P139. This lone identical version of the printed Smakaj document is the version that was printed at 10.02 a.m. on 7 October by the detainee printer inside the Detention Centre three hours before Mr. Smakaj and Mr. Behrami visited Mr. Thaci. The same visit where part of the content of the document was discussed when targeting Bislim Zyrapi for interference, with handwritten B's for "Bislim" added to the document. The same visit where Thaci and Smakaj explicitly discussed, with the sound of paper audible, exchanging a document while targeting Zyrapi for interference.

Again, all 11 digital versions are in evidence. I've provided the exhibit numbers. The Court can verify the SPO's comparison results for itself. But the result is unambiguous.

The typed content of the document seized from Mr. Smakaj's vehicle on 30 October 2023 is a direct, identical, word-for-word, character-for-character, dash-for-dash match to the digital version printed at the Detention Centre on the morning of 7 October. And not

one of the other responsive files found on Thaci's computer and the DC printer logs is a complete, identical match to the Smakaj document.

The evidence is clear, it is consistent, and it is internally coherent.

Mr. Smakaj gave -- excuse me, Mr. Thaci gave the Smakaj document to Mr. Smakaj on 7 October immediately after they discussed the content of the document as part of the Zyrapi instructions. Just like Mr. Thaci gave Witness 4 statements to Mr. Kilaj during the targeting of Witness 4 just one day earlier.

This was the *modus operandi*. Print material to target witnesses. Use the printed material during the Detention Centre visit to target witnesses. Then take the printed material out of the Detention Centre to complete the task.

Again, Your Honour, we ask you to look at the record. The Prosecution submits that when you do, and when you apply the law to that record, you will find that the Prosecution has met its burden on each and every charge.

Thank you.

JUDGE GOSNELL: Thank you very much, Mr. Hafetz and Mr. Halling.

I believe it will be most productive to take the break now, give the Defence an opportunity to prepare their replies, surreplies.

Ms. Menegon --

MS. MENEGON: Indeed, Your Honour. Yeah, indeed, Your Honour. That would be much appreciated.

JUDGE GOSNELL: So we will take a break now, and we will reconvene at 11.20, please. Thank you.

--- Recess taken at 10.48 a.m.

--- On resuming at 11.20 a.m.

JUDGE GOSNELL: Ms. Menegon, please proceed.

MS. MENEGON: Thank you, Your Honour.

Your Honour, I will first start by replying to your questions from last week, and then I will address a few points raised today by the SPO.

So in response to your first question, I confirm that it is indeed our position that the absence of a Defence challenge to a particular transcription or translation proffered by the SPO cannot be taken into consideration in assessing the reliability of the portion of transcription and translation.

Our reason for not challenging specific lines or words of the transcripts or attributions in the transcripts, through the submission of our own transcription, but instead challenging the transcripts in their entirety, do rely on the SPO burden of proof and the privilege against self-incrimination or right to remain silent.

We made our position clear in our filing F376 of 17 July 2025, well before the start of the trial, and we reiterated it, in particular, in filing F683 of 20 July 2026, especially paragraphs 6 to 11.

But it is also a matter of practicality. We do not know exactly what words were actually said by whom in those visits. And Mr. Thaci

cannot be expected to recall the words spoken. And the only way we could discover them would be to create our own transcripts of the entire visit, up to 30 hours of visit, following proper forensic procedures recommended by Professor Fraser. We did not have the resources, nor the time to do so, being noted that the SPO apparently relied itself on a pool of up to seven transcribers over a period of up to two years and a half to produce the latest versions of the transcripts tendered in this case. This is outside of our reach.

Regarding the Bemba case, we believe that the ICC Appeal Chamber was wrong in its -- in the paragraph 1339 of its judgment, in that you are not bound by it in any events, given that not only it emanates from a different court, but also the facts of the two cases are different. We say this ruling is wrong because it creates a reversal of the burden of proof and violates the right to silence of the accused.

The Defence does not have the burden to prove any specific inaccuracy or even of identifying exactly where errors lie in the SPO evidence. It is for the SPO to prove that any given part of its evidence is reliable.

Besides, we submit that the ICC Appeal Chamber is in a different position from Panels of the KSC because it is not bound by the jurisprudence of the European Court of Human Rights, and you are. Pursuant to Article 6(2) of the European Convention on Human Rights, the Prosecution bears the sole and unshifting burden to establish the accuracy and reliability of all evidence it seeks to rely on. This

principle is cited, in particular, by the European Court of Human Rights in the case of *Telfner v. Austria*, especially its paragraph 15.

A transcript is a secondary, interpretive summary of raw audio. Under the principles cited in *Telfner* and other cases, the Defence decision to challenge the entirety of the transcripts and not to raise specific transcription errors cannot be construed as a waiver of accuracy or shift the burden of verification to the accused. To require the Defence to audit and disprove SPO-generated transcripts would invert the presumption of innocence and violate Article 6 of the European Convention of Human Rights. The ICC case law cannot relieve this Court of its obligation under the European Convention.

In addition, Your Honour is in a very different position from that which arose from Bemba. We have not merely put the Prosecution to proof on the transcripts. In denying their reliability, we have put forward concrete scientific reasons why they are unreliable in their entirety. We have produced expert evidence from Professor Fraser which explains why they are unreliable in their entirety.

Professor Fraser has also explained why the LSU verification process cannot remedy the failure of the SPO to adopt a proper scientific method to create its transcript, since the LSU was primed by reading the SPO transcripts.

In response now to your question related to the rule in *Browne and Dunn*, I will make the general observation that it is not clear to

us that this rule applies directly in Kosovo -- in Kosovo law generally or before the KSC specifically, but nevertheless we submit that our position is consistent with this rule.

First, as it is often expressed in the most simple form, this rule requires that the party put its case when cross-examining a witness. But here, the SPO has not called any witness, despite our requests, who could testify about the transcript creation or the reliability, such as a transcriber, a supervisor, or any other staff. So there was simply no witness for us to put our position to. We tried to raise it with Witness 7, but he indicated he had no information.

Secondly, the broader principle reflected in the rule in *Browne and Dunn* is that when a party challenges the credibility of any evidence from the other side. It should state its case in this regard at an appropriate moment so that an answer can be given, if there is indeed an answer. This is a matter of fairness to a witness, but it also allows the court to ensure that the argument of the parties answer each other.

And we submit that in the instant case that is what we have done. We have complied with this principle. We have made very clear to the Prosecution and to the Court what the reasons are to our challenge of the reliability of the transcripts, well before the start of the trial. We have given the Prosecution a fair possibility to answer that challenge. We did so when we requested disclosure of the information related to the creation of the transcripts in 2025.

We made the argument again in our bar table response F688 in January 2026. And we repeated it in each of our verification requests submitted to the LSU, the table attached to our e-mail request stating that:

"The recorded audio is indistinct; the Defence challenges the [reliability and authenticity] of the Albanian Transcript (and subsequent translation); the SPO has not shown that it's methods are appropriate for transcribing" --

JUDGE GOSNELL: Ms. Menegon.

MS. MENEGON: Sorry.

JUDGE GOSNELL: Could you --

MS. MENEGON: Sorry.

JUDGE GOSNELL: -- return to what you were just saying about two sentences and slow down.

MS. MENEGON: I apologise to the interpreters.

So in our request submitted -- in our verification requests, we attached a table summarising the challenges raised for each transcript, and I quote:

"The recorded audio is indistinct; the Defence challenges the [reliability and the authenticity] of the Albanian Transcript (and subsequent translation) ... the SPO has not shown that its methods are appropriate for transcribing indistinct forensic audio."

Therefore, it cannot be said that we have not put our case to the SPO. We have done so repeatedly, and we did so at an early moment so that the Prosecution had time to respond.

The Prosecution was on notice and could have called evidence within its own case to answer the Defence objection. They did not. Even after hearing Professor Fraser's evidence, they could have sought to call rebuttal evidence. They did not. The only reason why they have not is because there is no answer to that expert evidence.

I take this opportunity to respond something that the SPO has repeatedly stated which is wrong. The SPO say there are no legal precedents which rely on the concept of priming, as explained by Professor Fraser, to exclude the transcripts. That is not correct. We have included in our final trial brief, in Section VI.A.b, beginning on page 141, submission of these issues. We set out a number of cases where transcripts were excluded specifically because they were unreliable due to priming.

You will see that most of the cases we quoted are from common law jurisdictions, such as Australia or the UK, where the rule in *Browne and Dunn* is strictly applied. And in none of those cases did the judge require the defence to identify specific lines of transcripts which were challenged or to provide an alternative interpretation of the words.

Your Honour, the audio played last week by my colleague Mr. Rees are a good illustration of the issues raised by the audio in the SPO transcription when the audio are indistinct, with overlapping speakers, for instance. If you listen the audio yourself, it would be very difficult, if not impossible, to identify who is speaking and who is saying what by yourself, without external information, that

is, the SPO transcripts.

The problem here is that this external information are SPO transcripts created in-house by the SPO without any transparency as to their methodology or process. Specific members of the SPO created these transcripts, and yet the SPO decided not to call any of them, not to call anyone able to explain how they were created. Who did the voice identification? Are they persons who transcribed the audio or other staff, or both? We don't know.

As noted by my colleague Mr. Rees, the SPO asked you to review online videos of prior speeches of the accused, which have not been tendered, of only a few minutes, to identify the voice of the accused. That is not permissible and, in any event, unworkable. This is not how voice identification works, as explained by Professor Fraser in her report, 1D136 at page 12-13.

As we submitted previously, the SPO transcripts equate to witness statements since they contain the words the transcriber thinks they heard. Similarly, the SPO's voice attribution is effectively the opinion, testimony of SPO audio transcribers, or other persons, who listened to the audio. And yet the SPO has not called any transcriber as witness, but asks you to rely on the opinion of unknown member of the SPO. We received some CVs, but they were redacted so we do not know their identity.

Such evidence should not be accepted as though it has been scientifically established, and with no evidence given, or tested through cross-examination, as to the process this was done.

And, indeed, Rule 140(4) provides that:

"A conviction may not be based solely or to a decisive extent on: (a) the statement of a witness whom the Defence had no opportunity to examine; (b) the evidence of witnesses whose identity was not disclosed to the Defence."

Accordingly, we submit that any conviction in the present case cannot be based solely or to a decisive extent on the SPO transcripts, their authors being unknown, and the Defence having been deprived of the opportunity to examine them.

In response to your second question, we have set out our position regarding the meaning of common action by a group in our final trial brief at paragraph 51-62. And in our response brief, we address the errors in the SPO submission at paragraphs 6 to 8.

We submit that the common action of a group should be interpreted consistently with the Kosovo case law, and it should also be interpreted in a way that gives the word its meaning. This means that it cannot be interpreted as merely another way of saying co-perpetration. I think the SPO agree with that. If the drafters had intended that, they would have referred to co-perpetration without them using a totally different expression.

"Common action," we submit, is therefore different from "coordinated actions." It means action taken physically together. That is seen through the consistent and exclusive use of the provision in mob scenarios in Kosovo.

Regarding --

THE INTERPRETER: Interpreter's note: The speaker is kindly asked to slow down when reading. Thank you.

MS. MENEGON: I apologise to the interpreter. Thank you.

Regarding the question of when common action of a group could be said to have been commenced for the purpose of an attempt, the only element of Article 401(2) which could be said to be one of conduct is "[participation] in a group of persons which by common action ..." Therefore, the group is defined by its engagement in common action together. Without common action, there is no "group which by common action ..." For that reason, we consider that an attempt under Article 401 could only be commenced when the common action is commenced. The mere formation of a group is insufficient.

Your Honour has asked specifically about Mr. Kryeziu and how he participated in the common action regarding Witness 4. He clearly did not. The SPO has not identified any act on the part of Mr. Kryeziu which would have formed part of the common action. His mere presence during the visits or the fact that he allegedly held separate conversations are insufficient. It was essentially passive and not part of any common action.

This issue is not limited to the counts concerning Witness 4. The same problem applies to all the counts concerning Article 401. In none of them is there any evidence of common action taken by the alleged group. For the alleged Fazliu Group, the group members were never physically together. And for other groups, they are alleged to have been together at most for the duration of the visit. Any action

taken thereafter was taken only by some of them, and not Mr. Thaci, since he was in detention.

So even if some action occurred, which we dispute, the Prosecution only contend that the group members undertook coordinated action and not common. We say this does not meet the requirements of Article 401.

JUDGE GOSNELL: Ms. Menegon, can I just interject a question here. It's in respect of your submission that an attempt -- the attempt can only happen when the common action begins.

Doesn't that collapse the notion of commission with the notion of attempt? How is there any distinction between the two if that is how you interpret 401(2)?

MS. MENEGON: With regard to attempt, the requirement is at least substantial acts towards commission. This is what I'm referring to. And we are saying we need common action through a substantial act to have commission, which cannot be, for instance, only a mere agreement, a mere discussion, between the visitors at the Detention Unit.

So we do differentiate a discussion and some concrete acts toward commission. Thank you.

JUDGE GOSNELL: Thank you.

MS. MENEGON: With regard to Question 4, the SPO has confirmed, indeed, that they did not consider that the SPO filing constitutes evidence, and we submit even less so when it concerns the act and conduct of an accused during a search and what was allegedly found

during this search. As we have submitted earlier, the SPO should have called witnesses to prove their case regarding what was or was not discovered during the search of Mr. Smakaj's house.

We submit that the circumstantial element developed today by the SPO regarding the so-called Smakaj document are insufficient to establish beyond reasonable doubt the origin of the document P125. And we reiterate our submission in our final brief at paragraph 715 that the SPO has failed to prove that P125 was seized from Mr. Smakaj's car.

With regard to P240, we submit that the weight to be given to this document, if any, is undermined not only by the fact that the name is redacted, but also by the fact that this person was not called to testify and subject to cross-examination, especially in light of the principles set out in Article 140(4)(a) and (b).

Now, I would like to respond to some points raised by the Prosecution this morning.

The SPO, with regard to the interpretation of the law and the provisions of the KCC, asks you to disregard and depart from Kosovo case law while you are a Kosovo court. The SPO places undue reliance on Case 07 and Case 10. They want to rely on some judicial statements in these cases which were made without the benefit of Defence submissions raised in the current case.

The SPO claims that Case 07 rulings on the meaning of "official duties," for instance, have the benefit of Defence litigation. But Your Honour will not find a single reference in this Case 07 record

to any Defence argument about the Kosovo case law that we have put before you.

The SPO say that the Defence relies only on fact patterns and not explicit rulings from the Kosovo courts. But this is untrue, especially with regard to the definition of "official duties." The Defence has referenced the clear definition given to that phrase in Kosovo cases; for example, official duties means "activities exercised by the official person(s) within the scope of its [or] their function or delegated power." This is at paragraph 44 of our final brief.

The SPO simply ignores this case law. It ignores that this case law was not before the Trial Panel in Case 07 when it permitted the SPO to bring a case without identifying any official duties.

The SPO tries to conjure up an answer from the Court as to why there has never been any case in the history of the Kosovo Criminal Code where witness interferences were prosecuted under Article 401. The SPO has claimed that the facts of our case are so singular that there has never been before any such opportunity, while the SPO has repeatedly claimed that there was a pervasive climate of witness intimidation in Kosovo.

In fact, in our final trial brief, at paragraph 69, we set out examples where senior officials in Kosovo were accused of attempting to interfere with witnesses, government ministers. For example, in 2013, EULEX case, the judges heard the case involving the former Permanent Secretary of the Ministry of Health and the former deputy

prime minister. These men, and other senior officials in similar cases, were not charged under Article 401. The charges brought were those of obstructing evidence or official proceedings under Article 386 of the KCC.

The SPO would like to make you believe that the allegations are unique and unprecedented. But that's not correct. The only thing which is unprecedented is the SPO mischaracterisation of the Kosovo law.

Your Honour has taken judicial notice of witness interference being widespread in Kosovo, and yet it has never been charged until Article 401 in Kosovo. This is because the SPO interpretation of the KCC provision is wrong.

The SPO has no answer to this, other than claiming that it does not matter. They have no problem with this Court being the first forum in which an entirely new interpretation is given to Kosovo criminal law. They appear to have forgotten the principle of *nullem crimen*, of strict interpretation of criminal law, and the principles that the prosecution under criminal law must -- that the prosecution under criminal law must be foreseeable. They appear to have forgotten the principle of equality before the law.

The SPO has insisted that Your Honour must follow the prior rulings of the KSC, but they seem to ask you to depart from the KSC rulings regarding the fairness of the trial. The KCC Appeal Panel has ruled that a person prosecuted before the KSC may only be treated differently from persons tried in other Kosovo court where this is

"objectively and reasonably justified." We refer to this case law in final brief, paragraph 155.

In the current case, there is simply no objective or reasonable justification for why Mr. Thaci should be convicted before this Court for conduct which have never been brought before a court in Kosovo under Article 401, let alone been the subject of a conviction there.

In any event, we submit that even if the SPO interpretation of the law was correct, the SPO has failed to prove beyond a reasonable doubt that Mr. Thaci and his co-accused attempted or agreed to obstruct the KSC proceedings. Whether charged as an attempt or agreement, you need more than a preparatory act as defined by Article 27 of the KCC. You need at least a substantial act or a substantial preparatory step to a commission.

We have developed our arguments regarding the lack of evidence of substantial acts or substantial preparatory steps under each visit in our final brief. The SPO has not replied to those arguments.

As indicated earlier, a mere discussion or exchange of paper at the DU is insufficient. This would materialise at most an agreement, not a substantial act toward commission. And in any event, as indicated earlier, we submit that the SPO transcripts are not reliable.

The SPO refers to contacts between Mr. Smakaj and Mr. Zyrapi, Mr. Fazliu and Mr. Rrustem Mustafa, but it has not proven the contact of the exchanges. And both Mr. Mustafa and Mr. Zyrapi have explicitly denied having discussed their Case 06 evidence with them.

This is an agreed fact, and the SPO has decided not to call them. It cannot reasonably ask you to infer that they lied to the SPO while the SPO has not called them and not properly put its case to them, for instance, by showing to Mr. Zyrapi the so-called Smakaj document.

With regard to the Kilaj visit, the SPO does not even allege any contact with any witness after the visit.

For the reasons developed in our final brief and our closing argument, I therefore request the acquittal of Mr. Thaci on all counts. Thank you.

JUDGE GOSNELL: Thank you very much, Ms. Menegon.

Mr. Rees.

MR. REES: Firstly, I adopt that which has been said by Ms. Menegon in relation to the issue of transcription and attribution of the transcripts of P00108 and 110 in surreply. I will, as I said last week, try not to overlap with Mr. Menegon and rely upon her submissions where they cover my case also.

I'm also conscious that in the surreply, it is not the intention for me to repeat my submissions in full from last week. I maintain them all, and I won't repeat them because I know that Your Honour will take them fully into account. So I'll try to deal with some discrete points made by the Prosecution in their response.

It is said by the Prosecution today that it is true that attempting an offence must exceed preparatory acts. We agree with that. Whether substantial or minimal, attempting an offence must exceed preparatory acts.

The Prosecution says that is different from saying that the conduct listed in Article 27 can only be preparatory. Well, we don't disagree with that submission either.

But what we do say is this, and it seems that we're on common ground here: That where the conduct alleged does go beyond merely agreeing, planning, or organising with another person the commission of an offence, liability under Article 401 can be charged as attempt or agreement. Where, however, we submit, the conduct alleged does not go beyond merely agreeing, planning, or organising with another person the commission of the offence, Article 27 effectively prohibits liability under Article 401 being charged as an attempt or agreement, because Article 27 makes clear that agreeing, planning, or organising with another person the commission of an offence can only be -- only leads to criminal liability where the relevant offence in the Kosovo Criminal Code specifically says so. And Article 401 does not specifically provide for preparation as a basis for liability for it.

Mr. Hafetz says that the submissions that we make as to lacking the capacity do not align with the evidence. Well, we repeat -- I'm not quite sure what that submission, in fact, amounts to, but we repeat the rhetorical question: How does providing detailed instructions to be delivered to a witness have the capacity to obstruct without any attempt to deliver them to a witness?

Providing detailed instructions to be delivered to a witness does not have the capacity to obstruct the obtaining, preparing, and

testing of witness evidence in Case 06 without anything further. It is not conduct which exceeds preparatory acts. It is merely conduct that does not go beyond agreeing, planning, or organising with another person the commission of the offence, which, as a result of Article 7, is prohibited as a basis for liability under Article 401. It does not have the capacity to obstruct without anything further.

The same applies to printing documents affirming those instructions and giving them to the co-accused in violation of Detention Centre procedures. Without anything further, it may be a violation of Detention Centre procedures, but it does not have the capacity to obstruct the official duties said to be targeted for instruction in this case, namely, obtaining, preparing, testing witness evidence in Case 06. It requires something further to be done with such a printed document before it can be said to have the capacity to obstruct. It is merely conduct alleged that does not go beyond agreeing, planning, or organising.

And whether or not an offence, for example, of contempt of court as an offence against the administration of justice, has the capacity to obstruct official persons obtaining, preparing, and testing witness evidence in Case 06 depends on looking at what was done with the information that was disclosed in violation of a court order.

Where nothing is done with it, then it cannot have the capacity to obstruct an official, the official duties being obtaining, preparing, and testing witness evidence in Case 06. Each of the alleged types of conduct in this case do not go beyond preparatory

acts. They do not exceed preparatory acts. And the Prosecution concedes that if that is right, there can be no liability for attempt, and we say, further, there can be no liability for agreement also on that basis because of the effect of Article 27.

Let me deal briefly with the submissions made in relation to the document recovered from Mr. Smakaj's laptop.

The document that is said to be recovered from his laptop is -- dates back some years before the conduct that is alleged in this case. There is no relevance to that document over and above what is suggested by the SPO actually in their final trial brief that there is some interest that Mr. Smakaj has, plainly, in events taking place in this court. He shares that interest, no doubt, with almost the entire population of Kosovo.

Let me turn, then, in relation to the issue of printing from the Detention Unit and the submissions that are made by the Prosecution in relation to the work of the IC, the independent counsel.

I rose to my feet to object to submissions being made on the basis that they were to refer to material that is not in evidence. And indeed, in our submission, I was right to do so because the Prosecution do refer to matters which are not in evidence.

Mr. Hafetz says that the Prosecution undertook "a complete comparison of all 11 electronic files" identified by the independent counsel as responsive to her searches. Well, if they have done, we haven't been able to, and Your Honour does not have all 11 electronic files in evidence before Your Honour in unredacted form.

Mr. Hafetz continues and says later in the same part of his submissions in reply that all 11 digital versions recovered from responses to the independent counsel searches, all 11 digital versions are in evidence. They are not in evidence. Parts of them are. There are, Your Honour knows, heavily redacted contents of those 11 files with a very small amount of material visible in evidence. So, for example, each of the files contain something in excess of 50 or so pages of which a small number of pages are visible. The remainder of the 40 or so pages are covered in heavy black squares.

It is in those circumstances that -- circumstances where independent counsel has said that each of the 11 digital files -- sorry, each of the 11 digital files printed on seven different occasions in October and November 2023 contain, and I quote from her report, "an exact identical copy of the relevant document."

We have not seen, and Your Honour has not seen, at least as far as I know, not in evidence at least, the full, unredacted digital versions of those seven electronic files, let alone all 11. There is, I concede, an inconsistency in her report, but it's one that has not been able to be clarified.

In any event, that aspect of the case - and we have set out our submissions in full in relation to that at paragraph 96 to 98 of our final trial brief, and our reply to the Prosecution final trial brief at paragraphs 12 to 14 - goes to a specific, discrete aspect of the case only, which is where the printing of the *per Avokatet*.doc file

at the Detention Unit and when that can be established.

Even if the Prosecution are allowed to go behind the clear and unambiguous statement from independent counsel that within the full, unredacted digital versions of the 11 responsive files, there is, I quote, "an exact identical copy of the relevant document," even if they're entitled or permitted to go behind that, it does not follow that the document that was AAOR4213NL had been printed on the morning of the 7th of October, 2023.

Why? Because on any view, a third party with access to the Detention Centre was able to reproduce an exact, identical copy of the relevant document. We know that because the Prosecution says independent counsel was able to produce an exact, identical copy of the relevant document. We do not know, because, as we put in our submissions last week, once the *per Avokatet*.doc file was taken to the detention offices for printing, it was digitally outside the control of any detainee. And the Prosecution cannot say on any view that the printing of the *per Avokatet*.doc to produce an exact, identical copy of the relevant document can have taken place without the digital file being placed under the control of the detention officer and therefore outside the control at that point of the detainee.

It was still able to be done when the independent counsel asked for it to be done.

It is, in any event, a minor issue because, as the Prosecution know and quoted in their final trial brief, at paragraph 12 of the

Smakaj pre-trial brief, Mr. Smakaj made it clear that he had never seen AAOR4213NL, the so-called Smakaj document as labelled by the SPO, before it was produced before him by an anonymous SPO officer. He also has stated that he does not accept that it was located in his car, or that the photographs were taken on the 3rd of October, 2023, the search of his residence, nor do they show where the SPO located and seized the document which the SPO say is AAOR4213NL. The real issue is not when it was printed, but by who, and how does it end up before the Court.

On that point, the SPO were asked the clear and direct question by Your Honour in these terms. Question 4, as Your Honour labelled it, the Prosecution cites at paragraph 3 of its final trial brief to INV F55, which is a filing before the Single Judge at the investigative stage of this case, describing the search of Mr. Smakaj's residence. It's a filing in the name of the Specialist Prosecutor herself. It is not a contemporaneous record, but it is referred to in the final trial brief at paragraph 53. And Your Honour asked the direct question:

"Does the Prosecution seek to rely on this filing to establish that P125 was seized from Mr. Smakaj's car and that the photographs in P126 were taken on the day of the search? How do you respond to the Smakaj argument, which was made yesterday, that this filing is not evidence and cannot be so relied upon?"

It's clear from the indirect way in which that question was answered that, in fact, the Prosecution do not seek to rely on that

filing to establish that P125 was seized from Mr. Smakaj's car and that the photographs in P126 were taken on the day of the search, and that they accept that the filing is not evidence and cannot be so relied upon. At least they haven't answered differently.

And unless Your Honour requires me to, I could go through the long history of these proceedings, together with the evidentiary rules, to demonstrate why, of course, we're right. But given that the Prosecution do not appear to contend otherwise, I will not.

Does Your Honour wish me to?

JUDGE GOSNELL: No, Mr. Rees.

MR. REES: Can I take it that Your Honour doesn't need me to in those circumstances?

JUDGE GOSNELL: You can take it that I'm aware of all of the submissions that have been made by the parties on this matter.

MR. REES: Right.

So they don't rely on it and they obviously cannot in the circumstances because it is not admitted in evidence.

What do they actually say about it in the pre-trial brief? It's perfectly clear in that that they were referring to it only for the existence of a search, but they did not in the pre-trial -- sorry, in the final trial brief assert either that they were relying on it to establish P125 being seized from Mr. Smakaj's car, the photographs, P126, being taken on the day of the search.

We labelled the fact that they referred to that report, which is not a filing of the Court, it's a filing of the Specialist

Prosecutor, we describe that as a last-ditch attempt to address that they have not established the circumstances in which the document AAOR4213NL had been recovered, and we maintain that. And it appears that the Prosecution, having tentatively referred to it in the filing, do not now rely on it at all.

The other question that Your Honour posed to the Prosecution was this:

"The Prosecution relies, at paragraph 73 of its reply brief, on P240, which was the photographs, as providing evidence that P125 was found during the search of Mr. Smakaj's residence, and in particular there is -- I'm sorry, P240 is the photograph of the evidence bag, and on the outside of the evidence bag is a notation, and this notation is what's cited at paragraph 73 of the reply brief.

"The question is: Is the weight that can be placed on this document undermined at all by the redaction of the name of the person who appears to have signed the notation?"

There was an attempt to address that question directly at least. The attempt began by an offer to adduce further evidence at this late stage, even though evidentiary proceedings have been squarely and firmly closed by Your Honour. And it was an offer not taken up, of course, by Your Honour, quite properly. Again, another last-ditch attempt to try to remedy the failures of this prosecution.

When that offer was not taken up, properly, the Prosecution's position then was to simply say that it doesn't lead to an undermining of the weight to be placed on the document, and then

effectively to try to explain why Your Honour can, frankly, ignore these submissions.

The answer is, of course it undermines the weight to be placed on the document. It is inherent in the legislative scheme - and I quoted from the rules last week - that anonymous testimonial documentary evidence is of reduced weight. That follows from the requirement that there must be no sole or decisive verdict of guilt placed on such evidence.

It is not just the fact that the -- that a signature appears to be redacted, or we're not actually sure, it's sort of guesswork as to whether a signature has been redacted. Something's been redacted on P240, there's a blank square, but there's no evidence as to what's underneath it.

If there is a name underneath there, we have no idea who it is. We also don't have any idea when the name was appended to this document together with the description that is above it. The description, the name, and the details are not printed on the outside of the bag. They are written in handwriting on the outside of the bag.

And even if a name has been redacted, it is clear that there is no date or timing of the making of those entries. There is a purported date and time for the items seized produced, but not for making the description on the front of the evidence bag.

If the so-called Smakaj document was ever inside this evidence bag, we have no evidence as to when it was placed inside it. The

fact that there is an anonymous description on the front of the evidence bag places that in exactly the same category as any other statement or mere assertion made by the SPO in the prosecution of this case on, for example, bar table motions or submissions or exhibit lists or surrogate sheets. They do not amount to evidence of any probative value whatsoever. It is just as probative as the Prosecution, in their transcripts, attributing voices to names or making descriptions as to what is heard on the tape in terms of non-verbal sounds. As Your Honour has already ruled, those matters have no probative value and no evidential weight will be attributed to them. And for the same reason, this anonymous entry, undated, untimed, falls into the same category.

Both the tentative reference, seemingly now withdrawn, to INV 55, merely a report filed by the Specialist Prosecutor herself, and indeed ignoring the obvious deficiencies in the front of that evidence bag, they are both last-ditch attempts by the Prosecution to remedy the failures of their case, demonstrating implicitly that they accept that they have not proved the origin provenance of that document, AAOR4213NL. An exhibit number, as it happens, that you will not find, Your Honour, on the front of that evidence bag or anywhere on the evidence bag.

Your Honour will see a reference to a number ending 6344 on the front, a B number. The only evidence in relation to that came during the course of Mr. Herlaar's evidence because this was a document not -- P240 exhibit, not produced via the bar table, but only

referred to during the course of Mr. Herlaar's evidence when he was asked to see the alphanumeric number beginning with the letter B, and to confirm that that number beginning with B matches the evidence reference number in Table 2 of his report, and he said yes, it does.

It is a leap again for the Prosecution to then refer to the sixth agreed fact and say that that conclusively demonstrates that they are one and the same. It does not at all.

For each of the reasons I referred to last week, the voice attribution failures, the failures by the Prosecution to prove the provenance, origin, and custody chain of the document AAOR4213NL, and the fact that the allegation itself does not go beyond being merely preparatory, Your Honour should acquit Mr. Smakaj of the two charges that he faces.

JUDGE GOSNELL: Thank you, Mr. Rees.

Mr. Edwards.

MR. EDWARDS: Your Honour, Mr. Holmes will deal first with Your Honour's second question regarding co-perpetration and adjacent matters. I'll then address you in respect of Article 11.

MR. HOLMES: Thank you, Your Honour.

Just by way of brief amendment to that roadmap, I'm also going to deal firstly with some submissions made this morning on agreement to attempt. So that will be the first issue I cover. Then the second issue will be on common action of a group, part of Your Honour's second question on Friday.

In relation, then, to agreements to attempt, this morning the

SPO placed reliance on the case of the Crown against *May*, which it suggests wholly undermines our submission on Friday that there is no authority for the charge of agreement to attempt. But the first observation to make in relation to this, Your Honour, and it's perhaps an obvious one, is the SPO have identified no precedent from Kosovo, applying the provisions of the KCC and the Kosovo Constitution, nothing from this Court, nothing from the jurisdiction of the ICC or any international criminal tribunals. It's only this authority that they bring to Your Honour's attention.

It's perhaps a situation covered by my learned friend's submission that these are extraordinary facts. Don't expect any precedent, was the gist of that submission. Well, Your Honour is entitled to a legal basis and, indeed, will no doubt insist upon one.

As things stand, the sole authority to which the SPO has referred Your Honour is the case of *May*. We sent this case around this morning, Your Honour. My learned friend didn't refer to it, so let's take a look at that case.

It's a case from 1984. It's the Ontario Court of Appeal. If I could refer Your Honour, please, to page 260. There were two paragraphs, paragraphs 2 and 3 of that page, where it deals with -- rather briefly and decisively, with the submissions made on behalf of the appellant in that case on what was a charge of attempt to conspire. And it says this:

"Counsel for the appellant also contended that the indictment did not charge an offence known to law. This argument was based upon

two propositions. The first is that a conspiracy to attempt to commit an offence is conceptually impossible. Persons do not conspire to attempt to commit offences; they conspire to commit them. The second proposition is that to impose liability for conspiring to attempt to commit an offence is contrary to the policy of law and would push liability back to a point that is too remote from the commission of the substantive offence to constitute a proper basis for [criminality]."

Those two submissions, Your Honour, we say, apply directly to the charges in this case. But there's an important point of distinction to which the court comes in the following paragraph, and I'll read on:

"In support of this argument counsel for the appellant invoked the policy considerations underlying *R. v. Dungey*" of 1979, and citation is there. Your Honour may remember that authority. It was referred to extensively throughout the case of *Dery* which was read to Your Honour on Friday. Speaking through Mr. Justice Dubin -- "in which this court - I beg your pardon - speaking through Mr. Justice Dubin, held that the offence of attempting to conspire to commit a substantive offence is not an offence under Canadian law. Although the offence created by [Section 127(2)] of the Code is framed in the language of attempt we think that [Section 127] in fact creates a substantive offence" - and this is the important part, Your Honour - "the gist of which is the doing of an act which has a tendency to pervert or obstruct the course of justice and which is done for that

purpose."

Your Honour, inherent within Mr. Halling's submissions is that Article 401(2) creates a materially identical legal situation. But Article 401(2) contains two variants. It contains the actual and the attempted forms of perpetration. The authority for that -- well, Your Honour will require no authority for that. But in the case -- in the trial judgment of Case 07 on 18 May 2022, at paragraph 158, the Trial Panel had this to say:

"The Panel further finds that the wording of Article 401(2) of the KCC ('obstructs or attempts to obstruct') indicates that the offence can be committed either when the obstruction has occurred or when it has only been attempted."

There's nothing controversial in that statement. It's a statement that Your Honour may well have read many times when seeking to explore the legal parameters of this offence.

The actual variant, however, as this passage makes clear, requires proof that the obstruction has actually has occurred. It requires proof of that consequence. It is not, as the offence under consideration in *May* was, an offence whose gist is the doing an act which has a tendency to pervert or obstruct.

This is critical, Your Honour, because the attempted form adds a variation to the substantive actual offence.

As an attempt liability, it is inchoate in that it is the asserted liability for the attempted version of the substantive underlying offence. So the actual form of obstruction under 401(2).

Like all other forms of inchoate liability, it is not itself inherently harmful, but provides the legal basis for the prevention of harm through the prosecution of acts that precede the substantive underlying offence.

The SPO cannot escape the fact that 401(2) attempted form is inchoate simply by pointing to the fact that it is provided for explicitly within the text of 401(2). And that, Your Honour, we say is the high point of the SPO's submissions on this point. They identify no point of principle, no point of substance for their submission that Article 401(2), attempted form, should in some way be treated differently from an inchoate form of attempt liability.

Indeed, it is identical in every meaningful form to Article 28 attempt under the KCC. And indeed, the SPO this morning appeared to accept our submission on the interplay between Articles 27 and 28 as a framework for assessing where the *actus reus* of attempt lies and indeed made submissions in that context on pages 15 and 16 of this morning's transcript.

It does not matter, in our submission, that the provision is explicitly provided for in 401(2). That does not distinguish it in substance. It does not alter the character of the attempted liability envisaged. And if it did, even if it did, Your Honour, the SPO have placed no submissions before Your Honour on how and why it differs. Such a submission is, with the greatest of respect, overly formulaic and pays disproportionate regard to semantics and technicality rather than underlying principle.

Your Honour, inherent within my learned friend's submissions this morning, it appears to be that unless 401(2) can be construed in line with Section 126(2) of the Canadian Code, the provision to which *May* referred to back in 1984, i.e. an offence the gist of which -- the gist of which is the prohibition of acts that tend to obstruct the course of justice, not actually obstruct the course of justice, but those which tend to do so, then it has no answer.

There is no precedent before Your Honour for the rolling of two inchoate theories into one charge, no principle with which to rebut the remoteness concerns articulated by the Canadian Supreme Court in the *Dery* case. There's no legal basis whatsoever for the novelty of the charge.

Your Honour, can I move, please, to the second issue which relates to the common action of the group requirement under 401(2), and it is, of course, Your Honour's second question from Friday.

Just by way of framing, I'll deal first, Your Honour, if I may, with the overlap with co-perpetration. And then secondly, I'll bring into the analysis the significance of the fact that this is charged as an attempt, which was a further limb of Your Honour's question.

The elements of co-perpetration, of course, is provided by way of legal basis by Article 31 of the KCC. Case 10, just referring Your Honour to case -- to the Confirmation Decision in Case 10 of the 2nd of October, 2023, it sets out what are the essential elements of co-perpetration in there. Again, they're not controversial, but just so that Your Honour has the citation.

It requires that two or more -- yes, I beg your pardon. Paragraph 58 of the Confirmation Decision. It requires that two or more persons jointly participate in a -- in or substantially contribute in any other way to the commission of an offence.

It makes the point at paragraph 61 that co-perpetration cannot be applied in relation to 401(2), as the material elements of that offence - obstructing an official person in performing official duties by common action of a group of persons - already entail joint commission.

In Case 07, Your Honour, in the appeal judgment, the Appeal Panel was asked to resolve the question of whether it was possible to enter convictions under both subparagraphs 1 and 2 of Article 401 in respect of the same conduct. This is not the question Your Honour has posed, but nevertheless, the analysis is instructive.

Your Honour, I'll pick up the analysis, if I may, at paragraph 307, where the Appeal Panel says this:

"The Panel recalls that, in the current KCC," the Kosovo Criminal Code, "the two criminal offences of obstructing official persons in performing official duties by force or serious threat and obstructing official persons in performing official duties by common action of a group are both included in the same article" - that's Article 401 of the KCC - "which indicates that they protect the exact same legal interest, namely the unimpeded performance of official duties. As to their definitional elements (*actus reus*), the difference between the two provisions lies in the fact that under

paragraph 1 of Article 401 of the KCC, the perpetrator himself/herself performs an act of obstruction (by force or serious threat), while under paragraph 2, he or she only acts as part of a group of persons."

The Court then goes on to consider the significance of a difference in minimum punishments which are provided for in respect of each of those subparagraphs. And it says in concluding on this, on the paragraph, it says:

"... under Article 401(2) of the KCC, the perpetrators act as part of a group, where it would generally not be possible to establish the specific individual actions of obstruction committed by an accused and which, in turn, may entail varying degrees of risk."

Now, Your Honour, it's plain when one looks at the footnote there, footnote 701, that what is meant by "varying degrees of risk" is the enhanced dangerousness - and this is the term that is used by the Kosovo Court of Appeal in the judgments which are cited in footnote 701 - the enhanced degree of dangerousness that is invoked by the fact that the obstruction is carried out or attempted to be carried out as part of a group.

There is -- there is reference in paragraph 701 to the case which my learned friend for the SPO referred to this morning, I believe, Kosovo appeal judgment of the 7th of December, 2017, paragraphs 138 to 139, which is summarised as follows by the appeals chamber:

"Wherein the Kosovo Court of Appeals held that the offence as

embodied in Article 401(2) of the KCC is 'an autonomous criminal offence beyond the concept of restrict or classic [form] of co-perpetration,'" thereby suggesting -- sorry, I'll just read on and finish the sentence, "given that a group has a different dynamic which increases the dangerousness, and that the action required to establish this criminal offence is to take part in a group of persons, which is an individual act."

The Salihu commentary also refers to that additional act, the common action of the group in terms of dangerousness.

"The dangerousness posed by this criminal offence [under 401(2) of the KCC] to society does not come from the actions of an individual, but rather, from the joint actions of multiple persons who are aware of such joint action, i.e. aware of jointly causing a proscribed consequence."

Your Honour, so it's clear when taking those authorities, authorities from the Kosovan courts adopted, endorsed by the Appeals Panel of this Court, that 401 -- both 401(1) and 401(2) require an element of aggravation, an additional, a supplementary *actus reus* element to carry the offence of obstructing official persons over the criminal threshold. This is the point that we've made in our pre-trial brief. Since the outset of trial we've maintained that that is a critical element of 401(2), and that in -- whereas 401(1) requires the proof of serious threat, the enhanced dangerousness is implied by 401(2) by the fact that the acts must be proven to be part of a common action of the group.

Your Honour, it may well be that the Kosovo courts refer to dangerousness because of the way in which that provision has commonly been charged, which is as part of a crowd, part of a -- these are protest cases very often, almost exclusively protest cases, in which there is, indeed, demonstrable dangerousness. The extent -- to the extent to which those legal provisions can be applied in this case, it may well be that an appropriate description is about the enhanced coercive capacity of actions taken as part of a group.

And this is where I'll move to the second limb of Your Honour's question concerning whether and to what extent the common action requirement is impacted by the fact that the charge is an attempt.

It's clear that the analysis -- it's clear that on analysis that it is the obstruction itself that must be carried out in a group in order to require -- in order to satisfy the requirement of enhanced dangerousness which the Kosovo authorities appear to agree is inherent within the *actus reus* of 401(2).

What then happens when the charge is an attempt? Well, Your Honour, this question highlights, illuminates the absurdity of the Prosecution case. In cases where the acts of the attempt are part and parcel of the execution phase of the underlying offence, as we have urged Your Honour to find that they should be, this question simply would not arise since the group element would be required throughout the execution phase, from the very beginning of the execution phase until the failed or frustrated attempt. But in this case there was no failed or frustrated attempt. There was simply a

month of inactivity following what we now know the Prosecution term the beginning of their execution phase.

And so the requirement that the dangerousness of the conduct was in some way enhanced by the fact that Mr. Kilaj was part of a group fundamentally cannot be satisfied since none of the witnesses were ever contacted or attempted to be contacted.

At a minimum, Your Honour should require proof of additional dangerousness, and if not additional dangerousness, proof of the fact that the coercive capacity of the acts which the Prosecution allege were somehow enhanced by virtue of the fact that it was carried out as part of a group. To suggest that a group meeting in a Detention Centre somehow enhanced the dangerousness which Mr. Kilaj posed, even if all of the SPO's factual allegations are to be taken on their face, in this controlled and secured environment of the Detention Centre, in circumstances where no follow-up action was taken, is, indeed, of course, absurd.

The answer to this problem, Your Honour, is proximity, proximity of -- a requirement that the *actus reus* of attempt is construed as proximate in time, in space, in intention, and in purpose to the failed or frustrated act which was the object of the attempt. This is what is missing critically in this case. If Your Honour accepts our submissions on proximity, indeed, we suggest this problem simply does not arise.

Your Honour, unless I can assist you any further on the law, I'll hand over to Mr. Edwards.

MR. EDWARDS: Your Honour, I'll now briefly address you in respect of Article 11 of the Kosovo code of conduct -- Criminal Code.

The SPO's argument is founded on the fact that Article 11 is not expressly provided for, expressly incorporated by Article 16(3) into the legal framework of the Law of the KSC. The practice of this Court, however, is clear that this is simply not determinative of the matter.

The Trial Panel in Case 07, of course, did find that it had authority to apply Article 11, that it could be taken into account. And you see this at paragraph 799 of the trial judgment in Case 07. And I read from about halfway down paragraph 799:

"The Panel further notes that Article 11 of the KCC governs another defence raised by the Accused, i.e. acts of minor significance. In this regard, the Panel is mindful that denying the availability of defences defined under the KCC in adjudicating offences under Article 15(2) of the Law could prejudice the rights of the Accused and result in inequality of treatment in their respect. The Panel will therefore consider these provisions when addressing the relevant defences."

So that, despite the fact that Article 16(3) does not expressly incorporate the provisions of the KCC governing all defences.

In the particular circumstances of Case 07, the Trial Panel found that the acts of Messrs Gucati and Haradinaj were not acts of minor significance, and so the matter rested there. But that does not mean that the Trial Panel did not feel that it could lawfully

consider the question of Article 11. Article 11 was applicable.

And then on appeal in Case 07, the Appeals Panel was called upon to deal with Article 11 by way of a point taken by Mr. Haradinaj. I won't read it now, but I would direct Your Honour's attention to paragraphs 384 to 394 of the Appeals Judgment. It's not necessary for me to read those out, but suffice it to say that the Prosecution's position, as summarised at paragraph 387, was a position that involved taking no point on appeal that the Trial Panel was in any way wrong to conclude that Article 11 could be considered. The Appeals Panel simply rejected Haradinaj's appeal on the substance, and that's at paragraph 394.

The Case 07 Appeal Panel was also called upon to consider the applicability of another article of the Kosovo Criminal Code that had not been explicitly incorporated into the SC Law, and that relates to the applicability of Article 76 of the Kosovan Criminal Code. And it's at paragraph 301 of the Appeals Panel's judgment where they deal with this issue. And I'll read it out because it's short. At paragraph 301, we read this:

"The Panel also acknowledges that, as the Trial Panel held, Article 76 of the KCC, which concerns the punishment of concurrent criminal offences, is not explicitly incorporated into the Specialist Chambers' legal framework. Nevertheless, the Panel agrees with the Defence that, to the extent that the crimes charged are crimes under the KCC, the concurrence between them should be judged on the basis of the legal theory of concurrence as applied in the

national context."

So we submit that the common thread here, the common thread as between the applicability of Article 11 and Article 76 is essentially this: The provisions of the Kosovo Criminal Code should apply, even where they're not explicitly incorporated, in circumstances where refusing to do so would result in prejudice, in inequality, and unfairness. That's why in Case 07, both in first instance and on appeal, Article 11 was considered.

And I conclude on this point by noting that the Prosecution implicitly acknowledges that Article 11 was applied in Case 07, as they must, when Mr. Halling fell back on his subsidiary argument that, in any event, in this case, the nature and gravity of the offences would point in the same way as what happened in Case 07. That is, the Prosecution seem to accept, as they must, that the Trial Panel can, should turn its mind to Article 11.

Your Honour asked my learned friend this morning specifically if Article 11 of the KCC is an individual criminal responsibility provision or if it's a different kind of provision, and Mr. Halling answered.

Our position is this: It's fundamentally different. Article 11 provides for a complete defence. It's same as in other jurisdictions where acts that can be properly described as *de minimus* do not attract criminal sanction. Not just sanction, criminal responsibility. And that's where we are here.

We address Article 11 in our final trial brief at paragraphs 188

to 191, and I rely on those paragraphs here.

What we say are the most relevant of the circumstances provided for by Article 11 are essentially the first, second, and fourth situations, if I can put it that way. In other words, that:

"An act shall not constitute a criminal offence even though it has the characteristics of a criminal offence as defined by law if it is an act of minor significance." And minor significance -- "[an] act shall be deemed to be of minor significance when the danger involved is insignificant due to ..." There's then a list of five factors. They are disjunctive, one, two, three, four, or five. And we rely on the first that relates to the nature or gravity of the act, because even if the Prosecution's facts are found to be made out, we're talking about a situation where Mr. Kilaj is discussing acts but never actually carries them out. And we submit that that significantly reduces the gravity of the act to one of minor significance.

The second factor is defined as being the absence or insignificance of intended consequences. Here, we say you don't even need to look at insignificance of intended consequences. There is an absolute absence of intended consequences, because, as we say in our final trial brief, even taking the Prosecution's case at its highest, as soon as Mr. Kilaj walks out of the Detention Centre on the 6th of October, the entire thing evaporates away.

And we also rely on the fourth of the factors, the low degree of criminal liability, for the reasons which Your Honour is very, very

familiar with.

Even taking a document or documents to which Mr. Kilaj is not entitled, it does not in itself increase the intended -- increase the nature or gravity of the act and does nothing to bring about any intended consequences. Nothing is done with the document.

That, Your Honour, unless Your Honour has any specific questions on Article 11, that's all I propose to address you on in that regard.

Mr. Hafetz made no submissions in his rebuttal regarding Mr. Kilaj, so I certainly won't say anything in this reply other than to conclude by saying that the Prosecution has failed entirely to deal with what is at the heart of the case against Mr. Kilaj. The Prosecution has completely failed to turn its mind to the fact that the complete absence of any action by him after the 6th of October is the most powerful evidence of lack of intent on his part.

The only thing that the Prosecution can say in response to this is that this is the Defence shadow boxing. They can't deal with the substance of the point because they can't. They have no answer to that fundamental aspect of Mr. Kilaj's defence. And that is why, Your Honour, the only appropriate verdict in this case is one of not guilty.

JUDGE GOSNELL: Thank you, Mr. Edwards.

Mr. Young, how much do you have?

MR. YOUNG: Your Honour, I can be quite brief. I anticipate 15, 20 minutes.

JUDGE GOSNELL: And Mr. Admiraal, what's your estimate?

MR. ADMIRAAL: I anticipate the same, 15 minutes, something like that.

JUDGE GOSNELL: Okay. I propose, then, that we take the lunch break now. So we'll return at 1.55. Thank you.

--- Luncheon recess taken at 12.53 p.m.

--- On resuming at 1.55 p.m.

JUDGE GOSNELL: Mr. Young, the floor is yours.

MR. YOUNG: Your Honour, thank you.

As I mentioned, I hope to deal with this in less than 20 minutes. So I'm going to make a few short observations, firstly, if I may, in relation to the Question 1 which Your Honour posed and then deal with three short points in close.

Your Honour, in relation to the submissions generally, we adopt the submissions that the Defence before me have made and so I don't repeat them.

In terms of Question 1, Your Honour posed the important question: Is the Defence's position that the absence of a Defence challenge to a particular transcription or translation proffered by the SPO cannot be taken into consideration in assessing the reliability of that portion of that transcription and translation?

The short answer is yes for the reasons that have been given. If I may, I'd like to just add a few words to what Ms. Menegon and others have said.

Your Honour asks the next question: Is the position based in any way on the burden of proof, which rests on the Prosecution, or on

the privilege against self-incrimination?

We would submit, Your Honour, respectfully, that the right to silence primarily, and we rely upon parts of our pretrial -- sorry, our closing brief, final brief, in paragraphs 19 and 21 which deal with this issue. Of course, it engages, we say, the issue of the burden of proof in the sense that it is the Prosecution's obligation, we say, to elicit evidence to a satisfactory standard at court. And we submit that the absence of challenge by the Defence does not automatically allow a juror of fact to accept the alleged facts as proven. It certainly does not, as the Prosecution suggested, lend reliability to unreliable evidence.

Your Honour, I would like to briefly cite a judgment in another case that might assist the Court because it's hopefully on point. It's a case called - I'm probably pronouncing it very badly - Brdjanin. The references I have is IT-99-36-T. The judgment, Your Honour, was on 1 September 2004, and I'm quoting from paragraph 24, which Your Honour may consider to be relevant to the point -- the question that Your Honour has posed.

The fact -- in this judgment, it was held that: "The fact that the Defence has not challenged certain factual allegations ... does not imply that the Trial Chamber has accepted these alleged facts to be proved. For each individual fact alleged by the Prosecution the burden of proof remains with it."

And then Your Honour has the advantage over me, of course, Your Honour then posed the question in relation to the *Bemba* appeal

at the ICC, of course, because I understand, respectfully, Your Honour was, I think, involved in that case and no doubt has the advantage over myself of knowing the case far better. But we would submit in short that the ICC's appeals judgment is not binding on the Specialist Chambers per se. Of course, we accept that you may consider that judgment insofar as you deem it to be the reason to be convincing. But we would submit this, that it's a very easily distinguishable case on the facts because we submit that the science of Mr. Babala, I believe it was, is very distinguishable from that of the accused in this case. For the Babala defence did not, in the appeals chambers' words, indicated how mistakes materially affect the content of the document in question. As Your Honour knows, in our final brief, we did so at some length.

The mistakes in this case, with respect, are of a different nature from what was alleged by the Babala defence in the *Bemba et al*. The Babala defence's challenge, as I understand it, was one of reliability based on alleged irregularities in the French translation which could be identified one by one.

Our challenge, as Your Honour appreciates, is based on a cluster of problematic methodological errors that lead to the unreliability as a whole. And with respect, unlike Babala, we have hopefully identified the areas we rely upon.

Your Honour, I'm now going to turn, if I may, to three short points in closing this case on behalf of Mr. Fazliu.

The first point is, happily, it appears that the law in relation

to -- there seems to be a measure of agreement between the parties. Mr. Hafetz, as he said this morning, and some of the others, it would appear that counsel seem to agree that the Prosecution accept that they have to -- what they have to prove must exceed preparatory acts. In England, the way I think it's normally put is that the -- for attempt, the prosecution has to prove what's more than merely preparatory. Perhaps it's the same principle in essence. But they must prove -- the acts they must prove must exceed preparatory acts.

And so if the law is agreed, applying the law to the facts, the Prosecution effectively rely upon two meetings with Mr. Remi Mustafa on the 29th of June and the 3rd of July. And I would respectfully submit that simply by arranging or attending two meetings with him is clearly not sufficient for the law to be triggered or to bite in this case. Arranging meetings or attending meetings is not enough.

The reality is, Your Honour, that the key evidence could have been, but is not, what happened at the meetings, the contents of the two meetings at Route 66 on the 29th of June and the 3rd of July. And in relation to these two meetings, there is no Prosecution evidence whatsoever. The reality is the Prosecution have not called Mr. Remi Mustafa who was said to be at the meetings. They have not called any staff from Route 66. They have not called any customers from Route 66. So we have no indication from any salient witness as to what the contents were of the two meetings at Route 66.

With respect, the only evidence that we had before the Court as to what may have been discussed comes from Mr. Fazliu himself, when

he explained to Mr. Thaci that he had meetings -- or he had a meeting and was going to attend another meeting at Route 66, and he explained a non-case-related reason for having a meeting.

So with respect, applying the law to the facts and the law to the case in Mr. Fazliu's case, we would submit that the reality is the acts that can be proved are wholly insufficient to prove the case on the two counts alleged against Mr. Fazliu. And for these reasons, Your Honour, we do submit that the correct verdicts are verdicts of not guilty against Mr. Fazliu on both counts.

I should have added, Your Honour, that one of Mr. Hafetz's first points in relation to Mr. Fazliu - I think his only point today, with respect - was this, if I can go to his words. I believe Mr. Hafetz indicated that the Prosecution do not ignore the fact that Fadil Fazliu had a prior relationship with Mr. Remi Mustafa. I'm grateful for that indication. I hope I never suggested that you were ignoring that. I don't believe I did. But Your Honour may take the view, in fact that's rather helpful, that when there's evidence or suggestion that the Fazlius knew Remi Mustafa and had a prior relationship may be helpful to Your Honour when considering how sinister or not it may have been viewed to simply have a meeting in a coffee bar on two occasions.

These are my submissions. Thank you.

JUDGE GOSNELL: Thank you, Mr. Young.

Mr. Admiraal.

MR. ADMIRAAL: Thank you, Your Honour.

I want to begin with what the SPO said this morning. Two counsel spoke. They spoke about the law and about the facts. They spoke for more than an hour. Not one word was about Mr. Kuci.

The SPO spoke about Fadil Fazliu and his son. They spoke about Smakaj and his laptop. They spoke about Zyrapi and telephone contacts. They spoke about the Smakaj document, about dashes on page 6, about 11 electronic versions, about printer logs. But on the subject of Mr. Kuci, nothing.

And that silence follows the silence in the written reply of nearly 10,000 words. The SPO devoted four paragraphs to Mr. Kuci. Not one of them addressed a single fact. Not one identified a witness he contacted. Not one identified a message he sent. And not one identified a note recovered from him.

They only answered some of my legal arguments, and I'll start with those arguments.

This morning, the SPO told Your Honour that the absence of a Kosovo case on facts like these is not a problem for the SPO. They said: The facts are new; the law is not. They said the law needs no precedent on identical facts before it can be applied. They criticised the Thaci Defence for treating the particular circumstances of past Kosovo cases as the limits of the provisions applied in them.

Your Honour, the SPO can't have it both ways.

In their reply, the SPO dismisses my submission that the Case 06 protocol is not a final decision. It calls my reading unreasonable.

And it offers a textual argument about appealability. It offers no Kosovo authority whatsoever for the proposition that a continuing procedural framework, amendable by the Trial Panel at any time under Rule 116(4), is a final decision for the purposes of a criminal offence.

So when the SPO has no precedent, the law simply applies. When the Defence has no precedent, the argument collapses.

Your Honour, I ask for the same treatment the SPO asks for itself. There is no Kosovo case on the finality of a witness contact protocol because no one has ever been prosecuted for it. That is not a weakness in my argument; it is a consequence of how extraordinary this prosecution is. It's a consequence of abusing Article 393. Apply the words of Article 393 and Article 485 of the Criminal Procedure Code to these facts, as the SPO invites Your Honour to do for its own case, and the question is whether a framework that the Trial Panel could - and did - amend is the kind of definitive determination that Article 393 was written to protect. And I say it is not.

On Article 11, Your Honour put the question directly to the SPO this morning, and the answer was revealing.

The SPO said Article 11 relates to individual criminal responsibility, that it would be a defence to any crime charged, that it voids the offence, and that it would be dispositive between guilt and innocence. And that is precisely my point.

Article 16(3) of the Law incorporates, for the purposes of

individual criminal responsibility, provisions of the Criminal Code. The SPO accepts that Article 11 is a provision going to individual criminal responsibility. It accepts that Article 11 is dispositive between guilt and innocence. Having accepted that, it then asks Your Honour to disregard it because of where it sits in the list.

Your Honour, the SPO applies Article 113 of the Criminal Code because it says the offences cannot be applied without the definitions they use. That is a functional argument, not a textual one.

And the same functional logic applies to Article 11. An offence cannot be applied without the limits the same Code places upon what constitutes an offence at all.

The SPO refers to the decision in Case 07. And I would point out to Your Honour that in Case 07, this Court, and also the Court of Appeal, did not rule that Article 11 is not applicable. It was merely ruled that the criteria of Article 11 were not met in that case. In other words, Article 11 was deemed applicable by this Court and, to use the SPO's own words from this morning, that matter has already been litigated.

Your Honour will have noted the intensity with which the Prosecution resists this provision. It has argued the point in writing. It argued it again this morning. And it argued in the alternative, saying that even if Article 11 applied, the conduct falls far outside of it.

And now ask why. Article 11 directs the Court to the nature of

the act, the absence of consequences, the circumstances, the degree of blame, and the personal circumstances of the accused.

Apply those criteria to Mr. Kuci. 18 words to a friend of 30 years, containing no reference to the case. A conversation after which nothing whatsoever occurred. No witness contacted. No witness influenced. No evidence altered. No proceeding delayed. No harm of any kind established. A man of 55, with no criminal record, who spent his professional life building the legal order.

If Article 11 has any application anywhere in the Criminal Code, it has application here. The SPO resists it because it knows the outcome of the assessment.

The SPO this morning did not answer my factual arguments. Not one of them. And let me be specific about what the SPO did not answer.

I said, Friday, that the SPO had abandoned its opening theory that Mr. Kuci passed on the congratulations of an unnamed person. No response.

I said that the correct translation removes the suggested link to Mr. Thaci and to any wider scheme. No response.

I said the SPO's own written position at paragraph 51 of its reply is that Mr. Kuci -- Mr. Kuci's charges do not depend on proof of any intention to frustrate proceedings. No response.

I said that Mr. Mustafa had already given his television interview before the message was sent, so the message cannot have shaped what he said. No response.

And I said that Section II(c) of the Case 06 protocol expressly contemplates contact made without realising the protocol applied, and requires only that the case not be discussed and no interview sought, and that Mr. Kuci did neither. No response.

And I said that no note was ever recovered from Mr. Kuci despite a search of his home and his phones. No response.

And I said that Your Honour had ruled that the transcript's description of paper and writing are not evidence in themselves. And also no response.

I said that the phone records around 6 September showed four numbers, none linked to any Case 06 witness, and that the SPO's opening claim that those records showed Mr. Kuci did as he was told had quietly vanished. No response.

When the Prosecution has evidence, it shows you evidence. We saw that this morning. Dashes, characters, page numbers, printer times. That is what a prosecution looks like when it has something. For Mr. Kuci, there was nothing to show, so nothing was shown.

For Mr. Fazliu, the Prosecution told you about messages with Mustafa on 26, 29 June, and the 3rd of July. Times, dates, phone records.

For Mr. Kuci, the Prosecution has phone records, too. It examined them. It examined the March phone. It examined the December phone. It examined four numbers contacted after his landing in Pristina on 6 September. And it found nothing. Not one witness, not one call, not one message.

And Your Honour will recall what the SPO told this Court at the opening of the trial. It said Mr. Kuci's phone records showed that he did as he was told upon landing in Kosovo, and that claim was made in February. It has not been repeated since. It was not repeated in their final trial brief. It was not repeated in the reply thereof. It was not repeated last Thursday, and it was not repeated this morning. It was abandoned because it was false.

Your Honour, when the Prosecution advances a specific factual claim at the opening of a trial, fails to prove it, and then quietly stops making it, that is not a neutral event. It tells you something about the evidentiary foundation of this count.

I come to my conclusion.

Mr. Kuci was brought before this Court on a translation that was wrong. The word "he" became "I." A theory of transmitted instructions vanished with a singular pronoun.

That error was not discovered by the SPO. It was discovered because this Defence used the verification mechanism. The SPO told Your Honour last week that the mechanism works when it is earnestly use. It does. The one time this team used it, it revealed that a central plank of their case against my client rested on a mistranslation.

Mr. Kuci was then told, at the opening of this trial, before the public and before this Court, that his phone records showed he had carried out instructions upon landing in Kosovo. And that was untrue.

The records show four numbers, none connected to any witness. That assertion was never withdrawn. It was never corrected. It was simply allowed to fall silent.

And Mr. Kuci was never asked a single question about his intent, not once in two years.

And Your Honour, it's the Defence opinion that the SPO should abandon a change when the evidence disappear.

The translation was corrected. The phone theory failed. No note was found. No witness was contacted. No message was sent. No meeting occurred.

At each of those moments, there was a decision to make. And at each of those moments, the answer was to continue.

The SPO asks this Court to punish a man for words followed by nothing, while itself standing behind assertions that were followed by nothing.

Continuing to repeat an allegation does not make it evidence, persistence is not proof, and Mr. Kuci should therefore be acquitted.

I thank you.

JUDGE GOSNELL: Thank you, Mr. Admiraal.

Under Rule 135(4), the accused have the right to speak last. I have canvassed previously with the Defence whether any of the accused wish to make -- avail themselves of that opportunity.

So I'll first ask Ms. Menegon, do you confirm that Mr. Thaci does not wish to make a final -- make any final remarks?

MS. MENEGON: Indeed, Your Honour.

JUDGE GOSNELL: Mr. Rees?

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

JUDGE GOSNELL: Mr. Edwards?

MR. EDWARDS: I confirm.

JUDGE GOSNELL: Mr. Young?

MR. YOUNG: No, thank you.

JUDGE GOSNELL: Mr. Admiraal?

MR. ADMIRAAL: I confirm.

JUDGE GOSNELL: Thank you.

Before I move to close this case, I remind the parties that Rule 136 prohibits any further submissions to the Panel, to the Court, unless in exceptional circumstances or with good cause. It is understood that this prohibition does not apply to applications concerning detention or conditions of release.

I wish to express my genuine gratitude to all counsel for their excellent submissions, both written and oral, which have been enormously helpful to the Court, and more generally for the efficient and courteous manner in which this trial has been conducted since the beginning.

I'd also like to thank everyone involved in supporting the conduct of these proceedings, including security officers, stenographers, interpreters, and everyone else, including the Registrar and the Deputy Registrar, both of whom are here today, without whom these proceedings would not be possible.

The parties and participants will be advised in due course

regarding the date for the rendering of the judgment in this case.

And with that, pursuant to Rule 136, this case is closed, and we are adjourned.

--- Whereupon the proceedings adjourned at 2.19 p.m.