Thursday, 1 December 2022

[Open session]

[Appeal Hearing]

[The Appellant Haradinaj entered court]

[The Appellant Gucati entered court via videolink]

--- Upon commencing at 1.30 p.m.

PRESIDING JUDGE PICARD: Good afternoon and welcome to everyone.

Madam Court Officer, could you please call the case.

THE COURT OFFICER: Good afternoon, Your Honours. This is case KSC-CA-2022-01, The Specialist Prosecutor versus Hysni Gucati and Nasim Haradinaj.

PRESIDING JUDGE PICARD: Thank you, Madam Court Officer.

Before we start with the hearing, the Appeal Panel will issue an oral order on the request of the Defence of Mr. Haradinaj for adjournment of today's hearing.

Mr. Cadman, the Panel notes that you requested an adjournment but the Panel cannot entertain your request. The Panel finds that you can attend these hearings and adequately represent your client's interest remotely for the following reasons.

The Panel understands that you can follow what is being said today via videolink. In case the Court has to go into private session, the Panel understands that you have access to the realtime transcript and that you can follow what is being said during these private sessions, so you are privy to the content of the private session, if any.

The Panel also notes that you have a co-counsel in this courtroom whose responsibility is to represent your client and can do so, for example, during any submissions in private session.

The Panel also assumes that you are perfectly capable of exchanging e-mails with your colleagues in the courtroom during private session and give them instructions.

In addition to that, the Panel believes that adjourning the hearings at the last minute would unduly delay the proceedings and would impact the Panel's duty to ensure the speediness and efficiency of the proceedings.

Finally, the Panel notes that there is precedent in this case where previous similar requests were dismissed by the Trial Panel and in other cases before, for example, the Mechanism, where the Appeals Chamber underlined in the Mladic case that where the client is represented by counsel and co-counsel, either one may assume the responsibility for participating in proceedings.

This is even more the case in the situation such as an appeal hearing where the Defence teams have had ample time to prepare their oral submissions on appeal, especially since the hearing of the appeal was already scheduled in an order issued on 20 October 2022.

This concludes the oral order.

So I note that Mr. Haradinaj is present in the courtroom and that Mr. Gucati will follow the hearing of today via videolink.

Mr. Gucati, can you follow the proceedings in a language you understand? Can you hear me?

Mr. Gucati, can you hear me?

THE INTERPRETER: Apparently there is no microphone.

MR. REES: Your Honour, I think he can hear you but it's on mute. Perhaps if the DMU can unmute his channel.

PRESIDING JUDGE PICARD: Is it possible to unmute his channel? Because we -- it seems that he hears me but we cannot ...

MR. REES: Your Honour, as I'm on my feet and while we're waiting for that to be done, can I mention in relation to Mr. Gucati, Your Honours will see that he's in a wheelchair. He's had surgery that Your Honours are aware of. And he intends to attend court in person tomorrow.

In relation to both today and tomorrow, I've asked him that if he is struggling to follow at any point, because he needs breaks and he is still medicated and suffering from some pain, I've asked him to raise his hand. I'd ask Your Honours to bear that in mind. If Your Honours see him raise his hand, it's because he'll be asking for a short break.

PRESIDING JUDGE PICARD: Okay. And if I don't see him, you will tell me.

MR. REES: We will also do our best to. Obviously, if I'm on my feet, he's behind me, as it were, but I am sure we will do our best.

PRESIDING JUDGE PICARD: Okay. Thank you.

Thank you. Can we hear something?

THE APPELLANT GUCATI: [via videolink] [Interpretation] Yes, I can hear you very well, Your Honour.

PRESIDING JUDGE PICARD: Okay, perfect.

Mr. Haradinaj, can you follow the proceedings in a language you understand?

THE APPELLANT HARADINAJ: [Interpretation] Yes, I do.

PRESIDING JUDGE PICARD: So I will now kindly ask the parties and the Registry to introduce themselves, starting with the counsel for Mr. Gucati.

MR. REES: Your Honour, I appear as Specialist Counsel for Mr. Gucati. Mr. Huw Bowden, Specialist Co-Counsel, is here to assist me, as is Specialist Co-Counsel Ms. Eleanor Stephenson. We also have Mr. Muharem Halilaj here to assist further.

PRESIDING JUDGE PICARD: [Microphone not activated]

THE INTERPRETER: Microphone, please.

PRESIDING JUDGE PICARD: Thank you.

Counsel for Mr. Haradinaj, please.

MS. BERNABEU: Your Honour, this is Almudena Bernabeu acting as co-counsel with counsel Toby Cadman and with me, Omar Soliman, on behalf of Mr. Haradinaj.

PRESIDING JUDGE PICARD: Thank you.

Prosecution.

MR. HALLING: Good afternoon, Your Honours. Appearing for the SPO today is acting Specialist Prosecutor Alex Whiting, Prosecutor James Pace, case and evidence manager Line Pedersen, associate legal officer Fabian Unser-Nad, and I am Matt Halling, Prosecutor.

PRESIDING JUDGE PICARD: Thank you very much.

From the record, I am Michele Picard, Presiding Judge in this case, and my colleague Judges are, on my right, Mr. Kai Ambos, and on my left, Nina Jorgensen.

This case concerns the appeal against the Trial Panel's findings regarding the responsibility of Mr. Gucati, chairman of the Kosovo Liberation Army War Veterans Association, and Mr. Haradinaj, deputy chairman of the same organisation, in a series of events that took place during the three-week period from 7 September 2020 until 25 September 2020.

Mr. Gucati and Mr. Haradinaj appeal from the trial judgement pronounced by Trial Panel II on 18 May 2022. The Trial Panel found each of the accused guilty of five counts of the indictment for offences punishable under the Law of the Specialist Chambers and under the Kosovo Criminal Code, namely of: Obstructing official persons in performing official duties by serious threat, including the aggravated form, Count 1; obstructing official persons in performing official duties by participating in the common action of a group, including two aggravated forms for Gucati and one aggravated form for Mr. Haradinaj, Count 2; intimidation during criminal proceedings, Count 3; violating secrecy of proceedings through unauthorised revelation of secret information disclosed in official proceedings, Count 5; and violating secrecy of proceedings through unauthorised revelation of the identities and personal data of protected witnesses, including the aggravated form, Count 6.

The Trial Panel did not enter a conviction for the offence of

retaliation under Count 4.

The Trial Panel then sentenced both Mr. Gucati and Mr. Haradinaj to a single sentence of four and a half years of imprisonment, with credit for the time served, and a fine of €100.

In their appeals, Mr. Gucati and Mr. Haradinaj raise, respectively, 20 and 24 grounds of appeal. They submit that the Trial Panel committed a number of errors of law and fact and errors in sentencing.

Mr. Gucati requests that the Appeals Panel overturn his conviction and acquit him on all counts or return the case to the Trial Panel; or, alternatively, reduce his sentence.

Mr. Haradinaj requests the Appeals Panel to overturn his conviction and acquit him on all counts; or, alternatively, reduce his sentence.

The SPO opposes the appeals and requests the Appeal Panel to dismiss every ground and reject the relief sought in the appeals.

In accordance with the Scheduling Orders issued on 20 October 2022 and 7 November 2022, the Appeals Panel will hear the appeals against the trial judgement by Mr. Gucati and Mr. Haradinaj. And I will now summarise the manner in which we will proceed.

I would like to remind the parties that the appeal process is not a trial *de novo* and parties must refrain from repeating their case as presented at trial. The arguments must be limited to alleged errors of law which invalidate the trial judgement or alleged errors of fact which occasion a miscarriage of justice.

Throughout the hearing, counsel may argue the grounds of appeal in any order they consider suitable for their presentations. Parties shall present their submissions in a precise, clear, and concise manner and should also provide precise references for materials supporting their oral arguments.

The Judges, of course, may interrupt the parties at any time to ask questions, or they may ask questions following each party's submissions or at the end of the hearing.

The Appeal Panel is familiar with the briefs, and I would, therefore, urge the parties not to repeat verbatim or to summarise extensively the written arguments.

I would also like to remind everyone that a few rules must be observed at all times in order to make for an effective courtroom process with an accurate record.

Please bear in mind the necessity of a good translation which requires a bit of additional time sometimes after you have finished speaking. Please do not forget to use your microphone. This hearing is transcribed in realtime and will be reflected in a transcript available to the parties and to the public.

I remind the parties to give prior notice should any submission require the disclosure of confidential information so that we can go into private or closed session. I would also like to remind the parties to be particularly careful not to reveal any information that could identify a protected witness.

In accordance with the 7 November Scheduling Order setting out

the agenda for today, this hearing will proceed as follows.

Today we shall hear the submissions from Mr. Gucati's counsel for an hour and 30 minutes. Following a break of 30 minutes, we shall hear the submissions from Mr. Haradinaj's counsel for an hour and 30 minutes.

And tomorrow, starting at 9.30, the SPO will respond to Mr. Gucati and Mr. Haradinaj for a total of two hours. And after a 30-minute break, Mr. Gucati and Mr. Haradinaj's counsel will each have 20 minutes to reply. After that, Mr. Gucati and Mr. Haradinaj will have the opportunity to make optional and brief personal remarks to the Panel.

Having stated the manner in which we will proceed, I would like to invite the counsel of Mr. Gucati to present his appeal.

MR. REES: Now, Your Honours, Mr. Gucati, we make it, has been in custody for now some, I think, this is the 797th day, so 26 months and five or six days, having been arrested on 25 September 2020.

And I begin by reference to the time that he has presently served in custody already because with the submissions on the oral hearing being limited to an hour and a half, I am required and I must focus my submissions orally, and I do so by reference to both the time that he's served and the breakdown of the sentence structure.

Your Honour is quite right, of course, that the Court imposed the single term of some four and a half years, but they did give an indication of how they'd reached that term. And in relation to the convictions on Counts 1, 2, and 5, including the aggravated forms of

Counts 1 and 2, they said they would impose a sentence of one year imprisonment; for Count 6, including the aggravated form, two years; and Count 3, four years.

Now, obviously, in relation to Counts 1, 2, 5, and 6, therefore, Mr. Gucati has already been in custody for longer than the terms that the Trial Panel indicated was appropriate for those counts.

So I focus my submissions today on Count 3 together with focusing on entrapment to the extent that it effects Count 3 and the sentencing appeal that we make.

The relevant grounds, therefore, are Grounds 1, 2, 3; Grounds 17, 18, 19; and then Ground 20. I do that for the purpose of the oral submissions. That does not in any way indicate any abandonment of any of the grounds of appeal that are contained within our appeal brief and our Notice of Appeal. They are fully set out and we ask Your Honours to properly rule on those grounds of appeal, bearing in mind the written submissions that we've made in the brief and in the brief in reply. But for today's purposes, for the hour and half of oral submissions, I concentrate on the appeal in relation to Count 3, that is the count of intimidation in which the Trial Panel said a four-year term was appropriate; entrapment, because, of course, if we are successful on the grounds in relation to the issue of entrapment, that will also affect Count 3; and then the appeal on sentence.

So turning then to Ground 1, if I may. Our Notice of Appeal alleges that the Trial Panel erred in law when finding that the words "when such information relates to obstruction of criminal proceedings

in Article 387 of the 2019 Kosovo Criminal Code" qualified only the third alternative in that provision and did not limit, they said, the application of the entire provision.

We say they erred in law when finding that serious threat for the purposes of Article 387 was not restricted to a threat to use force but included, the Trial Panel said, a threat to inflict serious harm on the health, well-being, safety, security, or privacy of a person.

They erred, we said, when finding that an act and/or statement which causes serious fears and concerns or from which a serious threat stems, to use the Trial Panel's word, amounted itself to a serious threat. And we challenge their finding that Article 387 of the 2019 Kosovo Criminal Code - the KCC I'll refer to it as from now on - did note require proof that any person was in fact induced to refrain from making a statement, to make a false statement or to otherwise fail to state true information to the police, a prosecutor, or a judge.

And, finally, when finding the *actus reus* was satisfied, when the persons to be induced were persons who had already given evidence to the SCU or the SPO or were likely to do so, and presented with a strong disincentive for such persons to provide information, they said, about any crimes under the Specialist Chambers' jurisdiction. Whereas Article 387 itself, we say, restricts the relevant information to information relating to obstruction of criminal proceedings.

Your Honours will be familiar with the terms of Article 387 of the KCC. The Trial Panel suggested that it was the purpose of that offence to criminalise the use of force or serious threat. To induce a person to refrain from making a statement or to make a false statement or to fail to state true information. But it is plain from the purposes of the offence that it relates to proceedings. It is not an offence, it cannot be, to induce a person to refrain from making a statement of any kind or to any person or to make a false statement of any kind or to any person or to otherwise fail to state true information of any kind and to any person. That clearly is conduct which doesn't fall within the scope of Article 387.

Article 387, instead, is designed to, and does, restrict the use of force or serious threats to induce a person to refrain from making a statement to the police, a prosecutor, or a judge, or to make a false statement to the police, a prosecutor, or a judge, or to otherwise fail to state true information to the police, a prosecutor, or a judge.

Now, of course, the article itself doesn't repeat the words "to the police, a prosecutor or a judge" over and over again in relation to, as the Trial Panel put it, the three alternatives. But it is clear, it must be, that those words qualify each of the three alternatives: Refraining from making a statement, making a false statement, otherwise failing to state true information. They are all qualified by the requirement that the -- it's within the context of making statements or providing information to the police, a

prosecutor, or a judge.

Now, just as those words limit the application of the entire provision, so, we say and submit, the words "when such information relates to say obstruction of criminal proceedings" will do so also. The information which is the subject of the statement that is refrained from being made or is the subject of the false statement or is the subject of the true information otherwise failed to be stated, must relate, in the words of Article 387, to the obstruction of criminal proceedings.

Now, the obstruction of proceedings is a term of art. It is an offence in itself under Article 386 of the KCC. And it's right that obstruction of proceedings under Article 386 is not confined to criminal proceedings but it will include criminal proceedings within the scope of Article 386.

The Trial Panel, in their analysis, by rejecting the submissions of the Defence and saying that those words only restricted the third alternative, that is, the provision of true information, they looked at the predecessor of Article 387 in Article 310 of the Provisional Criminal Code of Kosovo 2003. And that article, which was clearly, on the face of it, the predecessor of Article 387, that was restricted to when information related to organised crime.

Madam Clerk, can we pull up Article 310 of the Provisional Criminal Code, please.

Well, Your Honours, unfortunately we haven't got the full code there. Your Honours, of course, have got access to it and no doubt

will have looked at it ahead of today's hearing.

Article 310 provides the following:

"Whoever uses force, a threat to use force or any other means of compulsion, a promise of a gift or any other form of benefit to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a public prosecutor, or a judge, when such information relates to organised crime ... shall be punished by a fine of up to ..."

And then the sanctions are set out there.

And that article is entitled "Intimidation During Criminal Proceedings for Organised Crime," and it's clear, and we say it was apparent to the Trial Panel also, that the words there, "when such information relates to organised crime," did not simply restrict the scope of the third alternative in Article 310, that is, "otherwise failing to state true information to the police, a public prosecutor, or a judge." It qualified each of the alternatives so that an offence under Article 310 only was committed if a person used force or any other means of compulsion to induce another person to refrain from making a statement when such information relates to organised crime or to make a false statement when such information relates to organised crime or to otherwise fail to state true information when such information relates to organised crime, obviously in the context of provision of those matters to the police, a public prosecutor, or a judge.

And Article 387, the Article of the KCC under which Mr. Gucati was convicted, is in exactly the same terms, exactly the same terms, and exactly the same format and placement and formulation, in the words of the Trial Panel, as Article 310, save that the words "when such information relates to organised crime" have been replaced with the words "when such information relates to obstruction of criminal proceedings."

Article 309 of the PCCK, the Provisional Criminal Code, referred to obstruction of evidence, as does Article 386 of the current KCC. And we say that the submission that's made by the Prosecution at paragraph 61 of their response -- I'll just remind Your Honours of that paragraph. They submit that:

"It would be a consequence of the interpretation that we submit is the right interpretation. A necessary consequence would be the crimes under KCC 387 could only be charged if the intimidated person had information relating to obstruction falling under KCC 386."

Well, they could only be charged under KCC 387, but they could --

THE INTERPRETER: Could the counsel be asked to slow down, please.

MR. REES: Sorry.

PRESIDING JUDGE PICARD: Can you please slow down.

MR. REES: Thank you.

They could, of course, be charged under an offence under Article 386 if they are involved in witness intimidation in relation

to proceedings in general, whether or not restricted to obstruction proceedings. And if the effect is that only witnesses with information relating to organised crime could be intimidated under the Provisional Criminal Code of 2003, well, then that is simply, on the face of it, what the Provisional Criminal Code provided.

We say, in fact, the Provisional Criminal Code, as the 2019 code, makes, of course, provision for witness intimidation outside the scope of organised crime. It did so under Article 309 of the code. Article 309 provided, for example, there's three parts to it, but I'll read only the first. Article 309(1):

"Whoever, by use of force, by threat to use force or any other means of compulsion or by promise of a gift or any other form of benefit induces a witness or an expert to give a false statement in court proceedings," and so on, "shall be punished by imprisonment ..."

So, of course, even though intimidation under Article 310 was restricted to intimidation where the information related to organised crime, Article 309 provided for witness intimidation in general proceedings including criminal proceedings. And Article 386 of the current code does exactly that.

The interpretation of the Trial Panel, which, of course, was necessary for them to adopt that interpretation if they were to convict Mr. Gucati on Count 3 because, of course, there was no evidence of any witness involved in this case having information which related to the obstruction of criminal proceedings under

Article 386. The narrow adoption of the qualifier, or the restriction of the qualifier, when such information relates to obstruction of criminal proceedings, to only the third alternative in Article 387 has no merit at all, other than, I suppose, enabling them to enter a conviction in this case, but that's no proper basis for interpretation. It has no merit because it leads to some rather strange distinctions in Article 387. If they're right, inducing a witness by any means of compulsion to refrain from making a statement to the police, a prosecutor, or a judge in nonobstruction proceedings would be an offence. But inducing a witness by exactly the same means of compulsion - so exactly the same use of force, for example, or threat of force - to fail to state true information to the police, so to withhold true information to the police, in non-obstruction offences would not be an offence under Article 387. That makes no sense whatsoever. It has no merit.

And no merit when, of course, what constitutes a statement of a witness for the purposes of legal proceedings is determined not by its form, not whether on the top of the page it's headed "Witness Statement" or not. It's governed by, determined by its substance. What is the function of the content of the information. What is its purpose and its source. And, of course, in the context of criminal proceedings, where both a statement provided by a witness and information provided a witness are equally expected to be true, they are expected to be truthful.

The Trial Panel found that the *actus reus* of Article 387

required two elements. This is at paragraph 109 of the judgement. I'll just remind the Court of Appeals Panel of that:

"The Panel finds that the offence of intimidation within the meaning of Article 387 requires the following material elements:

"One, the use" --

THE INTERPRETER: Could the counsel please slow down when he's quoting from texts which we do not have and can only rely on the transcript to be able to follow. Thank you.

MR. REES: Madam interpreter, I will do my absolute best. But, Your Honours, of course, are aware of the time limit that has been placed on me and I do want to develop the arguments as best I can. I will do my best, I promise. I take it she heard that because she waved.

So the following elements:

"The use of force, serious threat, and any other means of compulsion, a promise of a gift or any other form of benefit, against any person making or likely to make a statement or provide information to the police, a prosecutor, or a judge."

And they repeated that at paragraph 557. The Panel will assess whether the accused used serious threats against any person making or likely to make a statement or provide information to the police, a prosecutor, or a judge.

In so finding the elements in those two paragraphs and the elements at which they would assess the accused's conduct, the Trial Panel just simply ignored two elements of the offence on the

face of the offence. They ignore, firstly, and this can't be controversial, there is no issue about it in the sense of -- I'm not referring to matters that are submitted by us when we're talking about implied requirements.

They ignored, firstly, the requirement in Article 387 that information provided to the police, prosecutor, or a judge must be true. Don't mention that at all. They've dropped that. And that's, of course, because there was no evidence called, there couldn't have been. And we know that in relation to Count 4 and the acquittal for retaliation, for example, the Trial Panel mentioned that the Prosecution had not called any evidence to demonstrate that there was any truth in any of the counts that witnesses had provided. They couldn't do that because they never disclosed what the counts were. We knew nothing at all about what any of these people said to be witnesses or potential witnesses had said and whether there was any veracity in it.

So they simply just dropped the word "true" from the words "provide true information to the police, prosecutor, or a judge." And they also dropped the words "when such information relates to the obstruction of criminal proceedings." They just completely ignored it. They dropped it out of what they regarded as a definition by which they would assess the accused's conduct. And that didn't make any sense even on their own findings, because even on their own findings, the words "when such information relates to the obstruction of criminal proceedings" qualified at least the third alternative of

Article 387; that is, that is the alternative, otherwise failing to state true information to the police, a prosecutor, or a judge.

Now, having referred to it at the earlier part of their judgement, when it came to actually assessing the conduct of the accused they dropped the words "true" when assessing information being withheld or failing to be stated to the police, and they dropped the words "when such information relates to the obstruction of criminal proceedings" to that alternative.

And that poses a problem, we say, to upholding their conviction on Count 3, because on the Trial Panel's own findings, all it could say was that the acts and statements of the accused would have created serious fears and concerns for persons who gave evidence, that's the word they used, to the SC or the SPO, or were likely to do so, thereby constituting a strong disincentive for such persons to provide further information about any crimes under Specialist Chambers jurisdiction.

Pausing there. There's some explanation that needs to be set out for why the Trial Panel were making the point of referring to a disincentive for persons to provide further information. That's because the Trial Panel recognised, properly, that there was a distinction between the offence of intimidation and retaliation. Retaliation targeted at persons who had already given, to use their words, evidence to the SC SPO. Those persons were not the target of the count of intimidation. They were not the target of Count 3, because the intimidation count refers to persons doing something in

the future, providing a statement in the future that they haven't done already because they'd been induced for the purposes not to provide the statement, or we'd say a true statement, or they'd been induced to provide a false statement. They hadn't done it already. They'd been induced to provide in the future, or they'd been induced to otherwise fail to state true information.

So in that paragraph, firstly, it is to be noted that the Trial Panel never referred to any person being induced or the use of serious threat being targeted at somebody to fail to provide a statement or to provide a false statement. And in that paragraph of the judgement where they refer to persons who had already given evidence, those persons were not the target of Count 3. They fell within the count of retaliation, and there was an acquittal on that count because the Trial Panel hadn't heard any evidence of any retaliation aimed at those persons and whether it was -- whether the information they'd given in any statements were true or not.

So the persons in the paragraph for the Trial Panel's findings relevant to Count 3, it was the target of Count 3, were those persons to provide information about any crimes under Specialist Chambers jurisdiction.

So the Trial Panel relied upon and found the defendants guilty on the third alternative under Article 387; that is, the use of force or serious threat -- in this case, in fact, the use of serious threat in order to induce persons to fail to provide information about any crimes under Specialist Chambers jurisdiction.

And in doing so, relying on that third alternative, they ignored two aspects which, even on the Trial Panel's own ruling, qualified the third alternative in Article 387; namely that such information had to be true information and had to relate to the obstruction of proceedings, the offence under Article 386. So a pre-existing offence under Article 386.

Those two matters are essential ingredients of Article 387 such that the further information they referred to that was disincentivised, to use their words, had to relate to the obstruction of criminal proceedings and had to be true for Article 387 to be made out, and it wasn't. Those features were absent both in the Trial Panel's analysis but also, as a matter of fact, in the evidence itself. No doubt that is why it was absent in the findings, because there wasn't any evidence in relation to the provision of information or the availability of information with anyone disincentivised to assist relating to proceedings for an offence under Article 386, and certainly no evidence from which you could infer that such information was true.

Now, we have, of course, as part of our submissions, raised the fact that Article 386 can deal with general offences of witness intimidation. That's clear on the face of Article 386, which provides:

"Whoever by any means of compulsion," compulsion, of course, could include the use of force, or the use of serious threat of force, and is potentially wider to involve other means of compulsion.

386, please, Madam Officer. I think we have this. No, we don't. It only goes up to page 147. There we are, again.

I'm sure that you're well familiar and acquainted with these provisions in any event.

But Article 386(1) provides for an offence where compulsion or a bribe is used with intent to, for example, cause a person to make a false statement, provide a false document, conceal a material fact - that is, fail to state information - in an official proceeding. Lots of different ways, in fact, that witness intimidation can be prosecuted under Article 386.

And I don't shy away from the fact that referring to Article 386, in my submission, suggests that there was potentially another way of prosecuting the conduct that the Trial Panel found amounted to a criminal offence. Although, I say this in relation to that submission: It would be wrong, for example, to substitute in some way a conviction for Article 386 when Mr. Gucati was never charged under that article. When this issue was raised significantly in advance of the trial, no application made by the Prosecution to amend so that a trial take place under 386 rather than 387, even though they were given plenty of notice. And moreover, I suspect the reason why the Prosecution never entertained that is because they accept, as did the Pre-Trial Judge, as did the Trial Panel, that Article 386 requires proof that a person, for example, under 1.1.1, was caused to make a false statement, or was caused to provide a false document, or was caused to conceal a material fact. Proof of consequences was

required, the Prosecution accepted for Article 386 as they refer to a distinction which they say relates -- between Article 386 and Article 387.

But in our case, the Prosecution did not call, did not adduce any evidence that anybody had actually been induced to refrain from making a statement, or had been induced to make a false statement, or provide a false document, or otherwise fail to state true information. And, therefore, proof of consequences in our case, in this case, would not be made out for the purposes of Article 386, in the same way as, we submit, not in relation to Article 387. But it may well be that that's the reason why the Prosecution chose to pursue Article 387 rather than 386.

Those errors in relation to the *actus reus* for Count 3 invalidate the Trial Panel's findings that the *actus reus* was made out. And we say that, accordingly, the conviction on Count 3 should be overturned.

JUDGE AMBOS: Mr. Rees, can I --

MR. REES: Please.

JUDGE AMBOS: -- ask you three questions. As to Article 387, if I understand you correctly, you say that the obstruction element after the word "when" applies to the three alternatives. Okay?

MR. REES: Yes.

JUDGE AMBOS: So how would you then explain that the reference to information in this part of Article 387, "when such information -- such information relates," et cetera, is only reflected in the third

alternative by the wording "true information"? How does this go with your argument that this part applies to the three alternatives and not just to the third alternative? First question.

MR. REES: Can I answer that now?

JUDGE AMBOS: Yes.

MR. REES: Because the drafters of Article 387 acknowledge that there is no material distinction to be drawn between a statement or the provision of information for the purposes of legal proceedings. What constitutes a statement of a witness is determined not by its form, not what it's called, but by its content, function, purpose, and source.

And in the written submissions, in the written brief, we've referred to a filing, F334, before the Trial Panel in which they -- in fact, I've taken their word for it there, because that was in relation to an application to admit documents, I think, under the bar table motion, and they were making the point that the SPO was seeking to admit documents that were headed "Contact Notes." And the Trial Panel accepted -- you might call it a contact note, but, effectively, it's a statement for the purposes of these proceedings because of its content, its purpose, and its source.

And the drafters acknowledged that. And they acknowledge it in Article 387. So although the word "information" only appears in both the qualifier and the third alternative, the information also appears as a matter of substance in both a statement being made or refrained from being made or a false statement. They both contain information.

And that same acknowledgement of the substance was there in Article 310 of the Provisional Criminal Code, because Article 310, Provisional Criminal Code, "Intimidation during criminal proceedings for organised crime," I do not understand anyone to suggest that that was not restricted only to cases involving organised crime, I understand, because there's been no challenge to it, and the Trial Panel appeared to take that view, that the words in Article 310, "when such information relates to organised crime" related not just to the third alternative in that provision, which is "to otherwise fail to state true information to the police, a public prosecutor, or a judge." But the words "when such information relates to organised crime" also qualified the words "to induce another person to refrain from making a statement when such information relates to organised crime," or "to make a false statement to the public prosecutor, prosecutor, or judge, when such information relates to organised crime."

JUDGE AMBOS: Mr. Rees, that's just repeating what you just said. Who are "the drafters" here?

MR. REES: Well, I think the drafters, they may well be different. They may not be the same people. But they've clearly followed what is set out as a template in Article 10.

JUDGE AMBOS: But where is your reference to the drafters? Drafters normally would be the legislative body who drafted the provision. Do you --

MR. REES: Yes.

JUDGE AMBOS: Do you have a concrete reference who says that the drafters meant that and that with the provision?

MR. REES: Well, what I say is the purpose of statutory construction is to look at the words of the article and to see if one can ascertain the intention of the drafters. That's the purpose of statutory construction. And I'm not going to refer the Court of Appeal to any parliamentary instruments or anything of that nature.

What I do say is, though, when you look at the words of Article 387, which is clearly drawn wholesale, save for this one relevant change wholesale from Article 310 of the Provisional Criminal Code. The words are exactly the same save that the restriction in Article 310, "when such information relates to organised crime," has been replaced with an equally valid and powerful restriction, "when such information relates to obstruction of criminal proceedings"; that is, obstruction under 386 in a criminal case.

JUDGE AMBOS: My second question, if you allow me. The part "from making a statement," first alternative. This statement, in your view, this statement has to be true?

MR. REES: Yes.

JUDGE AMBOS: Well, it doesn't say so.

MR. REES: It does require -- it does specifically state that the information that the perpetrator intends to induce another person to fail to state must be true. So Article 387 does specifically say that. And there could be no distinction, no distinction of any

merit, by requiring the person, the perpetrator to induce another person to refrain or to fail to state true information and not require the same intention of veracity in relation to the statement.

And, after all, although the words "to refrain from making a statement" are not preceded by the words "true," the words "or to make a false statement" do refer to the issue of the veracity of the information.

JUDGE AMBOS: Yes, absolutely.

MR. REES: Yes.

JUDGE AMBOS: And so I wonder why the drafters didn't add a second statement referring to false statement if you were right that the first statement, only speaking of a statement, only would imply that this must be a true statement. Then the second part, false statement, would be superfluous, redundant, wouldn't it?

MR. REES: And my explanation for that, Your Honour, is that the drafters do not make the distinction between information and statement. They acknowledge the substance is one and the same.

So whereas they have stated that the information must be true, it follows that so must the statement because, understandably, Article 387, as 310 of the provisional criminal code did, it made witness intimidation to induce another person to make a statement only an offence if it was false. And they made it an offence for a person to use witness intimidation or any other means of compulsion to induce another person to otherwise fail to state information only an offence if it was true. Not an offence to use force to induce

another person to fail to state false information.

And likewise, it must follow, in our submission, that it is only an offence under Article 387, as it was under Article 310 of the Provisional Criminal Code, to use compulsion to induce another person to refrain from making a true statement would be no offence to induce another person to refrain from making a false statement, just as it's not an offence to induce another person to fail to state false information.

JUDGE AMBOS: Thank you very much.

My third question. You spoke of consequence or proof of a consequence. I only refer to Article 387. What is a consequence, in your view, as to this provision?

MR. REES: So we submit that the consequence that's prohibited in Article 387 is that a person is actually induced to refrain from making a statement, or is actually induced to make a false statement, or is actually induced to fail to state true information, when -- and I'm not going to keep repeating it, you'll understand, when such information in relation to each of those alternatives relates to obstruction of criminal proceedings.

But we say that's the prohibitive consequence, and it's the consequence that the Prosecution were required to prove, and they did not.

JUDGE AMBOS: Just on this. That would mean if someone exercises a threat against a person, a witness, for example, and this person, notwithstanding this threat, makes a statement, a true

statement, a false statement, it would not fall under Article 387.

MR. REES: Yes.

JUDGE AMBOS: Because, you say -- just to understand your argument, you say that the threat must be successful; i.e., that would be a result crime. That's what you were saying. Not just a threat as such to induce someone, which is of course a specific mental element is sufficient, but the threat must be successful that the person threatened doesn't make the statement required.

MR. REES: Yes.

JUDGE AMBOS: That's your interpretation.

MR. REES: That is my submission. That is our interpretation. We draw support for that in the following ways.

Firstly, the Trial Panel itself, although it rejected the submission that the Prosecution had to prove any of those three consequences, it, nevertheless, identified that the prohibited consequence was not the making of a threat. That's not what's prohibited. The prohibited consequence is actually getting somebody to, for example, not make a witness statement that you believe is true or to make a false statement or to fail to state true information to the police.

And they said that that was the prohibited consequence when they were looking at the issue of intent and whether, in their submissions, eventual intent was enough. And if we have time, I will come on to that, although it is there in our written document.

But they acknowledge themselves that the prohibited consequence

was the actual making of a false statement or not providing a statement or getting somebody to conceal a material fact.

Now, not only did they acknowledge that that was the prohibited consequence and not the making of a threat itself -- because there were plenty of other offences within the Kosovo Criminal Code that deal with the making of a threat, not least under Article 181, the offence of making a threat. So that's already criminalised by lots of other offences.

Article 386. The Prosecution and the Trial Panel were of the view, and as was the Pre-Trial Judge, that required proof of consequence; namely that the perpetrators induced a person to decline to give a statement, make a false statement, or conceal a material fact, for example.

They were of the view, and I agree with them, so everyone agreed in relation to Article 386, that, for example, if you used a means of compulsion - so if you use force - against a person involved in criminal proceedings with the intent to cause that person to make a false statement in an official proceeding but they didn't actually make a false statement, the Trial Panel, the Prosecution, the Pre-Trial Judge all agree that that was not an offence under Article 386. No doubt, because, there are plenty of other offences in the Kosovo Criminal Code that would deal with it. So, for example, Article 181, making a threat is an offence in itself.

So we do submit that Article 387, just like Article 386, requires that a person was actually induced. So the perpetrator must

act in order to induce another person with that purpose and another person must actually be induced. And the purpose of Article 387, as the Trial Panel put it, to protect the information of witnesses and other information providers and, more generally, the integrity of proceedings by penalising the perpetrator who intends to influence a witness, that's their words, that purpose is shared equally by Article 386, obstruction of evidence or official proceedings.

There's no difference at all in the purpose of the two, save, we say, that Article 387 is restricted to the specific use of force, serious threat, or compulsion when a witness already has information relating to an earlier example of obstruction of criminal proceedings under Article 386.

The Prosecution, on this point, they refer to the ICTY and the ICC and offence of contempt under the ICTY rules and the Rome Statute. Rule 77(A)(iv) of the ICTY rules, the offence of interfering with a witness, and Article 70(1)(c) of the Rome Statute, they say, the offence of corruptly influencing a witness.

But neither of those offences, as they are drafted, and they are drafted very differently, there is no analogy in terms of drafting at all with Article 387, those offences in the ICTY rules and the Rome Statute do not refer, either expressly or by any implication, to a prohibited consequence. The prohibited consequence that the Trial Panel acknowledged is present with Article 387, that is, not the making of a threat but the inducing of another to, for example, refrain from making a statement.

And in the case of Bemba, which we do have -- I hope we can pull that up, please. Let's see if this one will work.

I've just been assisted, Your Honour. Apparently everything is in the presentation queue in full, but it's the display that's restricting the amount of pages that can be shown for some reason. I don't know why that is.

If we look at paragraph 737 of Bemba - this is a case, of course, dealing with Article 70(1)(c) of the Rome Statute - the ICC Appeals Chamber recalled that the Trial Chamber in Bemba found the offence of corruptly influencing a witness under Article 70(1)(c) did not require proof that the conduct had an actual effect on the witness. The Appeals Chamber agreed with the finding, which was supported by the wording of the provision. By stipulating that corruptly influencing a witness amounts to an offence and no more - and no more - without mentioning any result of this conduct, Article 70(1)(c) of the Statute places the emphasis on the criminal conduct.

Now, Article 387 does go further, though. It does refer to the result of the conduct. Indeed, it actually specifically sets out that purpose, doesn't it, that a person is induced to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police.

So we say whatever is the position under the ICTY rules or the Rome Statute, the Kosovan criminal code, which it is important to remember is an instrument that is not the preserve of the Kosovo Specialist Chambers. It predates it and, indeed, has a much wider

purpose than a set of procedural rules or, indeed, simply a statutory foundation instrument for an international court.

The Kosovo Criminal Code takes a difference approach. Whatever the reason for that is, it takes a different approach. It's there in the very different terms of Article 387 to the contempt offences set out in the ICTY rules and the Rome Statute.

The Trial Panel didn't find, and there was no evidence upon which it could reasonably find, that any person was induced to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, prosecutor, or a judge. In this case, the Specialist Chambers itself or the SPO. Indeed, and I'll refer to this later on when we turn to sentence, they expressly found the opposite, that there was no actual hindrance, as a matter of fact, with the SPO's investigations as a result of the defendants' conduct.

And, accordingly, we say that, again, individually, but also cumulatively, again, these arguments, we say, target the *actus reus* of Article 387 and demonstrate that it was not properly established, not made out, either on the evidence or according to the Trial Panel's analysis, and Count 3 should be overturned.

I've already referred to the fact that the Trial Panel, when they came to consider Count 3 and assess their factual findings and apply it to their analysis of the law, they ignored the qualification entirely about information relating to the obstruction of criminal proceedings. Indeed, they said it was sufficient if a person was

induced to fail to state information about any crime under the Specialist Chambers jurisdiction. That clearly is not supported by the terms of Article 387. And they used, as I've already said, the terms "evidence" and "information" interchangeably.

As part of establishing the *actus reus*, they also used the evidence of the witness Zdenka Pumper, as to her review of the contents of what became known as the three batches. I think it's also been referred to as the three sets. Your Honours will understand what I mean by that.

Your Honours will also know that the full content of those batches was not disclosed. In relation to Batch 2, a large amount was disclosed, but the SPO made it clear that the material that was disclosed from Batch 2, it was already public, did not form part of their case. So we can set that aside.

In terms of the material that was actually said to be the material that was protected, the information that was protected and should not have been revealed, only a fraction - only a fraction - of the material was actually shown to the Trial Panel and, indeed, to the Defence.

And I refer to that evidence in particular when criticising, as I do, the admission of and the reliance upon the evidence of Ms. Pumper as to the numbers of witnesses or potential witnesses that were said to have been identified in the material that was never shown to the Trial Panel or to the Defence. It's clear that those numbers formed an important part of the Trial Panel's decision that

the *actus reus* was made out.

They referred to the scope of the revelation, that's a heading they used, when they were assessing the *actus reus* of Count 3. And that was in relation to, and I'll just find the relevant paragraph, if I may. The heading "Scope of Revelation" is at page 193 of the judgement. And to summarise, at the start of that passage, the Trial Panel referred to the accused revealing the identity and personal data of hundreds of witnesses and potential witnesses. Now, the evidence for that finding came only from Ms. Pumper. The evidence of that finding came from no other source.

Certainly, of the documents that were shown to the Trial Panel, only six names were identified. Not actually in the documents. Four in the documents. Four names of persons that they could assess and agree were properly described as witnesses or potential witnesses. I won't refer to the names, but they're there in our appeal brief. They were four Serbian officials.

There were two other witnesses that were identified by name, one of whom specifically was referred to as somebody who suffered serious consequences. And I'll come on to that, if I may, shortly, because we don't accept that that was a finding that was properly justified on the evidence.

And then there was another name. Again, I won't mention it. It's there in the appeal brief. If we do need to go into closed session, and you ask me to refer to them, I can certainly do that, but I don't think we need to.

So six names in total. Only four in all the documents that we were shown. And all the documents we were shown were only a fraction of what Ms. Pumper said the batches consisted of.

So the evidence that there were hundreds of witnesses and potential witnesses came solely from Ms. Pumper. It came solely from her review of the documents. It came solely from her own analysis of what was a witness and what was a potential witness in circumstances where the documents that she did disclose, including the charts, didn't give any means by which that analysis, that there were hundreds of witnesses and potential witnesses, could be ascertained.

Just as an example. If we can look at the first page of what were described as they were charts that Ms. Pumper drew up.

If we look at P90, please, Madam Clerk. And the first page of what's Annex 1.

So this was the format of each of the charts. And this chart was produced because the -- I think it was the Pre-Trial Judge, in fact, agreed that the documents in the batches ought to have been disclosed in full, in the sense of they met the requirements of either Rule 102(3) or Rule 103, but that because of Rule 108, he authorised redactions. He authorised withholding the information that otherwise was disclosable.

And having authorised withholding it, he ordered, as a counterbalance measure, not to be used as evidence, which is what did happen, but to -- as a counterbalancing measure to ensure fairness to the Defence from non-disclosure of the documents, he ordered the

production of these charts, which set out the language of a document, the type of document - so letter, e-mail, letter - with attached list of witnesses is an example, title of the document, date, description of document, origin, author of document, indicia suggesting confidential nature, name of potential witnesses yes or no.

Now, leaving the adequacy or otherwise of that as a counterbalancing measure to non-disclosure, evidentially, although that chart did, for example, identify with a yes or no whether Ms. Pumper was of the opinion that a name of a witness or potential witness, according to her own test and her own application of that test, was mentioned, it was only mentioned as a yes or no. They gave no indication of the numbers, and it gave no indication of whether, for example, there was -- if, for example, in row 1, that was ticked "yes," it gave no indication whether it was a witness or a potential witness or, indeed, whether if in row 2 that was also ticked "yes," it was the same name. We had no indication and we had no way of verifying it or challenging the assertion that there was simply, on her analysis, hundreds of witnesses and potential witnesses.

Now, we applied to exclude the evidence of Ms. Pumper, W04841, in its entirety. As far as this appeal is concerned, my complaint I can limit to their refusal to exclude the evidence insofar as it related to contents of the batches that were neither disclosed nor exhibited.

We have referred, in the written appeal, to the parts of the transcript where we raised the admissibility of her evidence

summarising documents that had not been disclosed nor shown to the Trial Panel, both before the trial, at the outset of her evidence, before she gave evidence, after the Trial Panel deferred the issue. After she'd then given evidence, after the Trial Panel again deferred the issue of admissibility, we applied to exclude both her documents, the declarations and the charts, but also her oral evidence because she was describing, we say, clearly, given her analysis of documents, that she had no relationship to other than having reviewed them in the context of her employment as an investigator with the SPO.

And we referred in the written appeal brief to the case of Perisic, for example, and to Bizimungu, and the appeal of Milosevic - I won't give the full references because you have them there in the annexes to the appeal brief - where the ICTY and the ICC have criticised the use of investigators' reports, summaries of documents in which the investigator has no relationship to them save being asked to review them as part of their employment with the prosecuting agency.

In Perisic, paragraph 15, they said that an investigator, who has only become familiarised with documents by virtue of having reviewed them in the context of his or her employment with the prosecuting party may testify as a fact witness only in relation to the provenance and chain of custody of the documents he has obtained in the context of his employment, as no other relation between the investigator and the documents has been established.

It was a matter of opinion from Ms. Pumper that the documents

contained the identity of hundreds of witnesses and potential witnesses. An opinion that we could not challenge because we were not shown the documents. And more importantly than that - more importantly than that - the Trial Panel were not shown the documents, were not shown the documents to analyse them themselves, to apply their own test as to what was regarded as a witness or potential witness for the purposes of Count 3, because they didn't agree entirely with the test that Ms. Pumper used.

And in the absence of producing the evidence itself, the summary of the investigator, without any contest, ought not to have been relied upon or regarded as an independent assessment. It's not. The probative value of her assessment was no more than the probative value - that is none - in prosecuting counsel opening the case and explaining as part their summary that the documents contained hundreds of witnesses' and potential witnesses' personal data.

Disclosure of that material, if the Prosecution were to rely on the summary of Ms. Pumper, disclosure of the material that she saw would not just have made the case less complex, as the Trial Panel considered, but it would have actually made the trial fair. And in the absence of disclosure of those documents, reliance upon Ms. Pumper's evidence as to the numbers of witnesses and potential witnesses was unfair. And it clearly formed a part, an important part of the Trial Panel's assessment that the *actus reus* for Count 3 was set out. Those submissions are set out in full in my appeal brief, and I won't go over those further at this stage.

What I will do, very briefly, is simply remind the Panel that in paragraphs 75 on to 95, we make the point, and we expand upon and explain the point, that the Trial Panel's finding that the fact that fears and concerns in relation to the hundreds of witnesses and potential witnesses that are referred to by Ms. Pumper, the fact that fears and concerns may have, on their finding, been established or caused does not in itself mean that the acts and statements of the accused amounted to a threat.

And, indeed, there was a real disharmony in the Trial Panel's decision when they came to refer to the issue of the scope of the revelation and their finding that many persons were caused serious fears and concerns with the Trial Panel's finding, for the purposes of Count 5, that only one witness was found to have suffered fear and concern which could be described as substantial interference with the safety, security, well-being, privacy, or dignity of protected persons or their families. That was the phrase that the Trial Panel used to assess whether serious consequences, which is the statutory phrase, was made out for the purposes of Count 5. They said that serious consequences would be made out if there was substantial interference with the safety, security, well-being, privacy or dignity of protected persons or their families.

And yet, despite their finding in relation to Count 3 that many people were caused serious fears and concerns, on a proper analysis of the evidence, for the purpose of Count 5, only one witness, they said, would fall within that category. I won't mention his name.

His name is referred to at paragraph 538. I don't need to mention his name. You have it in the appeal brief.

But we criticise that finding also. He is somebody who there had been no evidence from him, either in person or by way of hearsay, complaining that he had suffered fear and concern. Moreover, he is somebody who, for many years, since at least 2012, had been very public himself about his cooperation with the investigation into potential offences committed by members of the KLA. In the press, he cooperated with press interviews. Made it perfectly clear that he saw nothing to fear and had no concern from his name being made public. That was apparent by his own public conduct.

So only one witness they actually found to have suffered fear and concern which could be described as substantial interference with their well-being, privacy, dignity, safety, or security. And in relation to him, they ignored the evidence that he had no such fear or concern, and, indeed, relied on a note in which he never referred to any such fear or concern himself.

Your Honours have the submissions in relation to Ground 1(1)(b) and the submission that the word "serious threat" for the purposes of Article 387 are to be restricted to the use of force. The words are immediately preceded by the words "use of force" which supply context to the words "serious threat," that is, the use of force or serious threat, we say, of force.

I am not going to go over the submissions that are set out in the appeal brief, but I just want to expand on one point. Your

Honours will recall that the Trial Panel referred to other examples in the Kosovo Criminal Code where threat was used as part of other alternative offences. And we've set out that, in fact, when you look at those, there is very much a common theme that runs through all of those examples, save for sexual offences, and I'll come back to that specifically. But all the other examples of threat refer to threat to harm of the person or property. Specifically person or property.

And without going through those examples as a whole, we've listed them, we do refer specifically to Article 181 because that is the offence of threat. Article 181 makes clear that the words "serious threat" or set out what serious threat is relate to words, acts, or gestures to harm another person. So that is what serious threat is where unless it is specifically the threat is identified, for example, for sexual assault. The threat to reveal a fact that would seriously harm the honour or reputation of a person.

Elsewhere, threat is always in relation to either threat to person or property. And specifically, Article 181, the offence of threat, to seriously threaten refers to words, acts, or gestures to harm another person. And if that is not clear enough that that refers to -- harm to another person means physical harm to another person, Article 181 is an offence under Chapter XVI of the code, which is entitled "Criminal Offences Against Life and Body."

Serious threat, for the purposes of Article 181, and, we say, Article 387, means threat to life and body.

In this case, the Trial Panel didn't find that any such serious

threat was made out. Their much wider interpretation of the scope of threat means that one cannot infer that the threat that they found related to threat of use of force or harm, serious harm to the person. In those circumstances, we say, again, the *actus reus* of Article 387 is not made out.

Before I leave Count 3. I've already dealt with the issue about the qualification, we say, in Article 387, which applies to each of the three alternatives. That, of course, also relates to the intent that's required. We say that the -- for the purposes of Article 387, a person acts with direct intent when he's aware that he uses serious threat to induce another person to refrain from making a statement, to make a false statement or to otherwise fail to state true information to the police, prosecutor, or a judge, when such information relates to obstruction of criminal proceedings and he desires the commission of that offence.

It is not enough, as the Trial Panel held, that an accused intends to dissuade a witness from giving evidence to the Specialist Chambers. That is not enough as an intent. That intent, by itself, may be perfectly legitimate. It may be perfectly legitimate to use legitimate means - for example, to persuade somebody in conversation - not to give evidence. That is not sufficient.

Nowhere in the judgement did the Trial Panel find that the accused was aware that his actions and statements amounted to a serious threat, and we say they didn't, in any event, because they did not come with any representation to inflict harm on another, nor

that the accused desired that his actions and statements amounted to a threat to inflict harm on another. They simply didn't find that.

Nor did they find that he acted with awareness of and desired to induce a person specifically to refrain from making a statement, and it was not suggested that he acted to induce somebody else to make a false statement. And they ignored, when considering what his intention was, his *mens rea*. Again, the word "true" in the qualifier to the third alternative, whether he was acting with awareness of and desire for inducing a potential witness to refrain from giving further true information or evidence, they didn't consider that. Equally valid, an equally valid inference that he was desiring to induce people not to give false information to the SPO. And they ignored the qualifier that the information must relate to the obstruction of criminal proceedings when considering his *mens rea*.

Again, we say that, like the *actus reus*, the *mens rea* was not established. Direct intent was not properly established.

And then finally, we have said in relation to Count 3, that although the Trial Panel, of course, found that direct intent was made out, we challenge that. And if the Court of Appeals Panel, if you agree with our challenge to it, we say that the Trial Panel's finding that eventual intent as an alternative was sufficient, we say that that cannot sustain a conviction under Article 387.

We agree with the separate opinion of Judge Barthe, which was to the effect that the words "to induce" in Article 387 indicates a specific purpose or goal-orientated activity; namely that the purpose

or goal of the use of force or serious threat or other means of compulsion was to induce another person to refrain from making a statement and so on.

To put it a different way. We note, we observe that whereas in relation to each of the other counts, 1, 2, 5, and 6, upon which they convicted, the Trial Panel actually, in section 3 of the judgement, set out precisely what they said was required both in terms of awareness and the standard of prohibitive consequences and so on for the purposes of eventual intent. For the purposes of Count 3, and as part of section 3 in the judgement dealing with Count 3, they didn't. They never actually spelled out what they said was required for eventual intent.

They did say at paragraph 121 that:

"... the phrase 'to induce' indicates either the desire of the perpetrator under Article 21(2) ... or the accepted prohibited consequence of his or her actions ..."

And then they later said the prohibitive consequence was not the making of a threat. It was somebody being induced to refrain from making a statement and so on. Which all was slightly jarring because, at the same time, they were suggesting that Article 387 never required proof of any consequence at all.

PRESIDING JUDGE PICARD: Mr. Rees, may I interrupt you?

MR. REES: I am aware of clock ticking.

PRESIDING JUDGE PICARD: You are.

MR. REES: I am.

PRESIDING JUDGE PICARD: I am glad you are aware. It's about 15 more minutes, no more.

MR. REES: I appreciate it.

JUDGE AMBOS: Can I just ask another question. In Article 387, your interpretation of serious threat, meaning serious threat of force.

MR. REES: Yes.

JUDGE AMBOS: How does it then go with the following part, "any other means of compulsion"? Why do the drafters allow for a lower kind of threat or even compulsion if they, before, require threat or force? How do you interpret this? Could you explain this?

MR. REES: They could have, I agree, simply said "the use of any means of compulsion." They didn't do that. They specifically referred to the use of force or serious threat or any other means of compulsion.

And I acknowledge, and have done in the appeal brief, that, for example, the finding of the Trial Panel that threat to privacy or dignity, as they put it, of protected persons, or threat of harm to those qualities, those rights, they might fall within the scope of any other means of compulsion for the purposes of Article 387. I concede that. And I have done in the appeal brief. But the Trial Panel never found or, indeed, considered other means of compulsion. They specifically said they weren't considering it. They referred to the Prosecution making clear that, for example -- I'll just get the reference if I may, Your Honour. So the

Trial Panel did not consider any other means of compulsion as an alternative element. They said, paragraph 557:

"The Panel notes the SPO does not plead that the accused used force, any other means of compulsion, a promise of a gift or any other form of benefit, and therefore these elements shall not be addressed."

And to that extent, I agree with the Trial Panel and acknowledge that there they were taking the fair approach that Mr. Gucati in his conduct ought not to be assessed by reference to a means that the SPO did not plead. They didn't put the case on that basis, and his conduct should not be assessed by some other basis.

JUDGE AMBOS: That's a procedural argument, of course. That does say nothing about the right interpretation of Article 387. That's a substantive issue. And why does a drafter allow for any form of compulsion, and you should then narrow the serious threat to threat of force.

Another thing is, what is pleaded. That's a procedural issue there.

MR. REES: But I make the point, in answer to Your Honour's question, I understand it, because, thinking about how it could have been drafted, the drafter could simply have just put "any means of compulsion." He could have just said, "any means of compulsion used in order to induce a person to refrain from giving a statement," so on, "is an offence," but he didn't. The drafter didn't. He specifically, for example, referred to the use of force, and he

specifically referred to the use of serious threat, all of which fall within other means of compulsion, potentially. But other means of compulsion are defined as being different to use of force and use of serious threat.

And we say that serious threat is properly understood, by references to the words "use of force," and, indeed, perhaps more to the point, by Article 181 and the offence of threat, which makes it clear that serious threat refers to threat to the life and body of the person.

Let me turn then, as I am aware of the clock ticking, I'm going to turn to the sentencing appeal in the circumstances.

We say that the Trial Panel made discernible errors in the sentencing of Mr. Gucati when they assessed the seriousness of this case and failed, we say, to appropriately reflect the features that we have set out in Ground 20(A) of our notice; that is that the appellant did not use force or the serious threat of force. That's on their findings. Did not desire that actual harm be caused to any witness or potential witness. Did not intend to obstruct any Specialist Chambers Judge. And we've given the references in the notices where the Trial Panel found these features. That there was no actual harm caused to the SPO investigations on the Trial Panel's findings. And, as I've already submitted, only a limited number of persons, the Trial Panel found, could be said to have suffered substantial interference with their safety, security, well-being, privacy, or dignity, and none of whom actually suffered any harm to

their person.

The fact that the Trial Panel ruled that serious threat was not confined to a serious threat of force, that means that where they have found that there was serious threat, and we challenge that, that, on their finding, one cannot imply that that finding amounts to a finding that the acts and statements of the accused amounted to a serious threat itself.

The highest that the Trial Panel put Mr. Gucati's intent, paragraph 543 and 596 of the judgement, was that he disregarded or was indifferent to the possibility that harm could occur. That's how they put it. He did not desire, on their findings, that any actual harm be caused.

They found, at paragraph 499, the following: The accused's act of revealing protected information mostly to the professional media did not affect the finding about revelation of protected information.

The point I make for the purposes of the sentence appeal is this: They found there that Mr. Gucati mostly revealed, as they put it, to the professional media only. That measure was a measure that reduced risk and ought to have been reflected again in their sentence. It was a feature that they found but did not consider for the purposes of sentence.

They did note that Mr. Gucati did not directly threaten any SPO official, although did not acknowledge, for the purpose of sentence, their earlier finding that he had no intention to obstruct any Judge. But importantly, more importantly, they found that there was no

inability or concrete difficulties to collect evidence, to preserve the security of proceedings or ensure the safety of witnesses or the significant diversion of resources to address the consequences which resulted from Mr. Gucati's conduct. That is an important matter which ought to have been given significant weight when assessing gravity.

No person was found to have been induced to refrain from making a statement or to provide a false statement or to otherwise fail to state true information to the police, a prosecutor, or a judge.

The Trial Panel did say it took into account its finding that, ultimately, the SPO did not establish that its ability to investigate or prosecute crimes was actually obstructed because they found that there was an attempt only, no actual obstruction. But they didn't identify what weight they gave that factor. And we say, when one takes a step back and looks at the sentence of four and a half years in the round, they clearly gave insufficient weight to that factor.

We say that because harm, of course, is a primary indicator of gravity, the primary indicator of gravity, and the absence of any actual harm caused to investigations in this case ought to have weighted heavily. And a sentence of four and a half years, which, we submit, is out of reasonable proportion for the range of sentences imposed for similar offences at other international courts and tribunals in the past, is simply inconsistent with the finding they made that there was an absence of any actual harm caused to investigations.

We go into some further detail in our written brief about how -- about the evidence, references to the evidence, that, for example, on 7 September 2020 when the first press conference was held, and the 16 September when the second press conference was held, the witness Mr. Jukic conceded that neither of those events created any high priority for witness security or handling. That was his evidence. And they took no specific action, the witness security handling team, after either of those press conferences.

In the event, few persons found to have actually suffered consequences which amounted to substantial interference. There's the one person who was named. I've already referred to what we say is the criticism of the finding that he suffered fear and concern that amounted to substantial interference.

The Trial Panel also referred to two persons who were said to have been relocated. And I won't refer to it, by Your Honours will know that we make criticisms about that finding as well. Those matters are there in the written brief. But even at their highest, two persons relocated.

And then there was evidence that a total of 20 to 30 persons were made subject to other security measures. So that was the overall figure. Within that figure, some of those were subject to emergency risk planning by the SPO. The Trial Panel didn't hear any evidence about what that number was. Just that some of the 20 to 30 were made subject to emergency risk planning, which amounted to substantial interference according to the Trial Panel. And others

within that number of 20, 30, were simply given new phone numbers or devices, communication devices, which did not, they said, amount to substantial interference.

So we know the overall figure is something less than 30. We don't know exactly what the figure is. And in relation to that number that's less than 30, exactly how far we don't know, the risk was assessed below the highest level. And we know that because Mr. Jukic gave us the ladder of risk that's used. That's transcript reference for Mr. Jukic's evidence is there in the written brief. And we know from his other answer, again referred to in the references to the transcript, risk assessed below the highest level on that ladder.

PRESIDING JUDGE PICARD: Can you conclude, please.

MR. REES: Indeed.

The sentencing range, we say, that is apparent for other international tribunals that have conducted sentencing exercises in relation to offences of contempt or witness intimidation sets out quite a clear range. That range goes from, in previous cases, a fine, at the lowest level, up to a sentence of some 18 months to two years. That is a sentence falling at the top of that range.

And we have referred, in our written brief, to the summary of that sentencing range that Judge Alphons Orie gave in the case of Ngirabatware, referring to, at the top end of that range, to the Seselj case, where accused was sentenced to two years' imprisonment.

And we have provided a summary, we say, of relevant sentencing

cases which back up that range. And within those cases, there are a number of aggravating features that appear in those authorities: Direct contact with a protected witness. Direct publication of a protected witness's identity by the defendant personally. A person suffering established direct harm, so, for example, evidence of a loss of business. Or a victim induced to commit an offence and then punished for it afterwards. Position of trust being abused, another aggravating feature. Interference with a particularly vulnerable or particularly important feature, another feature. Person actually induced to refrain from giving a statement or giving a false statement or withholding information. Offending over a prolonged period including previous convictions. So in the Seselj case, for example, where repeatedly convicted. And sophisticated planning, real sophistication in the case of Rasic, Gombo, Ngirabatware. All features that are absent in the present case.

Now, I don't suggest that there's any of those cases that are on all fours with Mr. Gucati's case. There, of course, are differences. There always are. The idea that there will at some point be a case where the facts are identical in another case must be incredibly rare. Of course there are differences. But we submit that the sentencing tribunal is not required to go looking for a case that is identical in fact, that is on all fours, before the Court will get some assistance from looking at other cases in the absence of identical sets of facts.

But the Court should look at the overall range, consider

similarities, consider differences, and then consider where the present set of facts sits in relation to that general sentencing practice because consistency in sentencing is important.

There is one further sentence case which, before I conclude, I do want to raise. It's the case of Margetic, the reference is IT-95-14-R77.6. I think we can upload that onto the screen.

PRESIDING JUDGE PICARD: I don't remember all the cases you mentioned in your brief, but I believe it is mentioned.

MR. REES: Margetic, in fact, is not.

PRESIDING JUDGE PICARD: Too bad.

MR. REES: Your Honour was spot on. You didn't recognise it from the brief. It's not there. But it's an additional one I wish to raise. I think it dates back to 2007. It's an ICTY case. And the reason why I refer to it, I -- it's stopped by the page, only a single page.

It's a case in which a journalist published online the full list of protected witnesses in the case. I think there is some hundred or so witnesses, in excess of a hundred. In that case, without being able to refer to the conclusion, my recollection is it was a -- the sentence was -- total term of three months with a fine of €10.000.

PRESIDING JUDGE PICARD: Mr. Rees, we'll find it.

MR. REES: You'll find it.

PRESIDING JUDGE PICARD: Yes.

MR. REES: Just very quickly --

PRESIDING JUDGE PICARD: Now that we have the reference, we can

find it easily.

MR. REES: I'm very grateful. 48 oral orders violated, as it were, including orders issued during closed session for 21 witnesses and the use of pseudonyms for 27. The entire witness list was published, and the total number, I think, just very quickly, 102 witnesses. And that came after warnings about earlier conduct and actual evidence, not contested, that it had had a material effect, at least in relation to three witnesses, both to their health and also their cooperation with investigation. So evidence that actual investigations had been hindered.

I ask you to bear that in mind as part of consideration of that sentencing range.

And we say this: That acknowledging that there, of course, are differences in Mr. Gucati's case to all of this, nevertheless, imposing a sentence of four and a half years in total, double, in effect, the top of that sentencing range, when what can be said about Mr. Gucati's case is that it's absent those features I've identified at paragraph 425 of the appeal brief, direct contact with a protected witness, direct publication by him personally of a witness's identity, no evidence of a person suffering established direct harm, position of trust being abused, and so on.

PRESIDING JUDGE PICARD: We shall read it.

MR. REES: I'm grateful. To impose a sentence double the top of that range identified was simply capricious and manifestly excessive in all the circumstances.

In the circumstances, then, we ask Your Honours to allow the appeals in relation to not only Count 3 but all the counts that are subject to the 20 grounds of appeal in our notice and brief; and in the alternative, to reduce the sentence and allow the sentence of appeal on Ground 20. Thank you.

PRESIDING JUDGE PICARD: Thank you, Mr. Rees.

So now the hearing will be adjourned for some minutes, and we'll start again at 3.45.

MS. BERNABEU: Your Honours, if I may, I should have apologised at the beginning. Mr. Cadman would like to address and deliver the speeches as he was programmed. So after the break, perhaps he can start.

Mr. Cadman will be delivering the speech remotely if that is okay with the Panel.

PRESIDING JUDGE PICARD: Yes.

MS. BERNABEU: Thank you very much. I am grateful.

PRESIDING JUDGE PICARD: Thank you.

[Trial Panel and Court Officer confers]

PRESIDING JUDGE PICARD: Sorry, Mr. Cadman, did you want to add something to what your co-counsel said?

MR. CADMAN: [via videolink] Thank you, Your Honour. I did actually raise my hand earlier, but I appreciate that you were following Mr. Rees at the time.

So just to say that my health is failing, so I will do my best to be able to present the appeal for Mr. Haradinaj. To the extent

that I'm unable to, I will indicate and then I will just ask one of my colleagues to take over if there is a need for that.

And if there is any need to go into private session, which I hope there will not be, but if there is, then, of course, Ms. Bernabeu will take over that part of the presentation.

PRESIDING JUDGE PICARD: Okay. Thank you. We are grateful that you accepted to follow the hearing on your computer. Thank you.

So we'll adjourn now until 3.45.

--- Recess taken at 3.26 p.m.

--- On resuming at 3.46 p.m.

PRESIDING JUDGE PICARD: We shall now hear the submissions of the counsel of Mr. Haradinaj, Mr. Cadman.

MR. CADMAN: [via videolink] Thank you, Your Honour.

So first of all, let me just say thank you for the opportunity to be able to present this remotely. It's not an ideal situation. It's not the situation I would have hoped for. Unfortunately, this is the second time during proceedings that I have contracted COVID. So, unfortunately, these are the circumstances that we now live in. But I appreciate the opportunity to be able to do that. But I must, reluctantly, accept your ruling not to adjourn the proceedings and to move on.

Mr. Haradinaj has given his indication that he wants to continue and has authorised me to continue in this way.

As I said before the break, if for any reason I feel as though I am failing, I will simply hand over to one of my colleagues to

continue. They have my written notes in front of them as well, but hopefully it won't come to that.

I'll say at the outset that having listened to Mr. Rees' presentation, I will do my best not to go over the same ground as he has covered. That's a common theme throughout these proceedings, that there is obviously a great deal of cross-over between the two cases for Mr. Gucati and Mr. Haradinaj. Many of the issues are the same issues. And so if I don't cover those issues, please don't take that as those matters are not being pursued. And, certainly, we maintain all of the written submissions that have been set out in the appeal and the reply to the Prosecution brief in response. So all of those matters are maintained.

What I would like to do, first of all, is just offer some introductory remarks in relation to the appeal that has been brought, and then I'm going to be dealing with, not all of the counts on all of the grounds of the appeal, but those that I consider to be the most relevant for Your Honours' consideration. And I will be concluding with Ground 24, which is the sentencing ground, towards the end.

Just dealing with the introductory matters. And certainly, it is a theme which is set out in our appeal brief that deals, very generally, with the fairness of proceedings. Obviously, the purpose of a criminal justice process or any judicial process, a trial at its most basic, is to convict those who are guilty and acquit those where the evidence does not establish guilt. But, obviously, in reality,

the situation is much more nuanced. It is not to convict a person because of an opinion. It is not, no matter who that individual is, and how many share that opinion. It is only to convict where the evidence proves guilt and following the completion of a fair trial process.

And the principle of fairness is one that there can be no derogation. And without using any what are now very cliched references, it's an essential principle that underpins any process in a democratic society.

Mr. Haradinaj submits and maintains in the appeal brief and the earlier Notice of Appeal that the proceedings were not fair. He was prejudiced and, thus, the convictions as entered should be overturned and overturned in their entirety.

It is respectfully submitted that the unfairness has been demonstrated right from the outset of these proceedings. Mr. Rees has covered some ground in that respect in terms of the disclosure, and I intend to cover some ground in that in particular.

One of the aspects that we set out as to the fairness of the proceedings concerned the composition of the Trial Panel. As you will be aware from -- certainly from Ground 1 of our appeal, there were high-level briefings that took place that involved senior members of the Specialist Chambers, senior members of the SPO that dealt with briefing embassies, members of the diplomatic community before the trial took place, where discussions took place as to these proceedings and other proceedings before the Kosovo Specialist

Chambers.

We argued that and we sought the recusal of both the President and the Vice-President of the Specialist Chambers on the basis of that and some other matters. We consider that that goes very much to the overall fairness of the proceedings.

We had requested details of briefing notes, records of these meetings, but that was refused. Such a submission will, of course, be subject to the inevitable objection in terms of relevance and so on, but this cannot be viewed -- certainly this trial cannot be viewed in a vacuum. It has to be viewed within the context of what the Defence maintains is a prosecutorial department that pays lip service to its obligations in terms of fairness, respect and transparency. Those matters have been argued extensively throughout the appeal brief and throughout the proceedings.

Much the same as the Specialist Prosecutor's Office has sought to suggest that allegations of witness intimidation in the instant case must be viewed within the context of their entirely unrelated allegations some two decades earlier, the trial must be viewed within the entire context of what has occurred during the investigation and what has occurred outside of the trial process.

In essence, at every turn, Mr. Haradinaj had been prejudiced by the actions and/or inaction of the SPO both before the Pre-Trial Judge and during the trial process.

24 grounds of appeal have been raised within the appeal brief. The length and complexity of the trial judgement justifies its

length. That length and complexity has led Your Honours to grant an oral hearing to enable further submissions to be developed. It is certainly not my intention to address each ground of appeal in isolation and, therefore, a selective approach has been adopted.

I will try to use my address today to develop and supplement arguments raised in our appeal brief and our response -- our reply to the SPO brief in response. We, of course, adopt all of the submissions made in our written submissions, and I will refer to them only to the extent to give context to the additional submissions.

The purpose of this hearing is clearly not to repeat what has already been said, and I take note of what Your Honour said at the outset of this hearing. So I will try not to reargue what has been set out in detail in the written submissions and only focus on those matters, as I've said, that I consider to be of particular relevance.

When this case was opened on behalf of Mr. Haradinaj, again at a time when I was also suffering from COVID, I made the point that courts try cases, but occasionally, cases try courts. We set out, in our submission, that such a statement is not truer than in these present proceedings. This is the first case that resulted in a judgement and the first case that goes to appeal, and so what happens in this case will set a precedent or will set the tone for how all future cases are dealt with.

That imposes a great responsibility on Your Honours, on myself, on Mr. Rees, and on prosecuting counsel. That responsibility is to ensure that the proceedings overall are fair. There has been some

criticism as to the overarching appeal ground related to the fairness of proceedings as it doesn't point to any specific finding by the Trial Panel. But, of course, Your Honours will be mindful of the fact that the proceedings have to be viewed as a whole, to have been fair, that there to have been equality of arms between the parties. And that is, of course, one of the central matters that Your Honours will have to consider when viewing the appeals in their entirety as to whether the proceedings were fair. We say they were not.

The entire Prosecution case relied on three members of the SPO's own staff, two of whom provided evidence that we have said in our written submissions that is unreliable at best and at times dishonest. And a third witness whose memory, as you will see, Mr. Moberg, whose memory of the events in September 2020 were fleeting at best. The final witness, Mr. Berisha, a journalist, undermined the Prosecution case and effectively set out and reinforced one of the main defences that was being raised by the Defence, certainly by Mr. Haradinaj, that being that his actions were justified in the public interest.

When we look at the confidentiality of the documentation, it's important to recall that it was the SPO that allowed, or as we have said, may have facilitated, the leak of documents from his offices. It is the person who brought those documents to the WVA headquarters that breached the confidentiality, if those documents are found to be confidential or non-public. I won't go into the details already raised by Mr. Rees in relation to the fact that we have not been able

to consider whether those documents, in their entirety, were confidential or non-public because we have not seen them, neither did the Pre-Trial Judge who confirmed the indictment, and neither did the Trial Panel that issued its finding.

In the appellant's words, in Mr. Haradinaj's words, he did what he considered to be in the public interest on what had been leaked. No more. No less. He was not involved in the leak itself, and the Prosecution in their opening statement confirmed this. His greatest fears of involvement of Serbian intelligence in this process have been realised. We've seen since the end of the trial the emergence of evidence that clearly shows the involvement of Serbia in shaping this process. That is what the appellant sought to expose. That was his only motivation.

The SPO stated in its own opening statement at the trial that truth is the foundation of justice. In opening the case for the Defence, I stated that the appellant acted in the public interest and to expose what he considered to be an improper prosecutorial policy. That's why I have called him and that's why we called expert evidence to establish him as a whistleblower.

But in doing the job uncovering the truth in this case, we ask that the Court should be guided by the public interest in the broader sense. Whilst the Prosecutor seeks to hide the truth about the penetration of its security, it is the job of the Defence, and ultimately the Court in its judgement, to blow the whistle. This was entrapment by the agents of Serbia, its allies, aided, wittingly or

unwittingly, by the impenetrable blanket of secrecy that's been thrown over these events.

If the credibility of this institution is to be restored, then, as always, sunlight is the best disinfectant. That is what we argued and that's what we maintain.

I stated at the outset that disclosure has been one of the central issues in this matter, and so I would like to just deal with Grounds 1, 4, 10, and 17 that deal more broadly with the issues of disclosure. But at this stage, it's important to note that all grounds of appeal cut across the application of due process. The appellant was unable to properly present a defence not knowing the full extent of the case against him.

These four grounds have been grouped together on the basis that they refer in essence to issues of disclosure, and it is the issues of disclosure, or lack thereof, that have been so pervasive throughout these entire proceedings.

With this position in mind, it is submitted that the Appeals Panel is being asked whether the Defence, when compared with the SPO, have been placed on an equal footing. If that is answered in the negative, as we submit that it must, in that there that's not been parity between the parties, then the principle enshrined in Article 6 has been violated and the appeal must succeed on that point of general fairness.

It is my submission that on any assessment this question cannot be answered in the affirmative. The SPO has consistently paid lip

service to its disclosure obligations, and has submitted on numerous occasions in written filings seemingly adopted the position that the SPO is the arbiter of what should or should not be disclosed and, further, that the SPO is not bound by these disclosure obligations. This has recently been apparent in two recent developments.

Your Honours, I'm going to tread carefully over the next couple of minutes just to ensure that we don't need to go into private session.

So on 27 January this year, the SPO received item 206 and notified to the Defence after the delivery of the trial judgement. That is F00075, referring to paragraph 44. The Panel found that the failure to provide timely notice of item 206 did not prejudice the Defence. However, it did not consider that the explanation of the delay justified the late notification, including that the SPO had violated its notification obligation under Rule 102(3) of the Rules.

MR. HALLING: Your Honour, just briefly to rise here. We object to these submissions. It goes beyond the scope of the Appeals Panel's agenda for this hearing.

MR. CADMAN: [via videolink] Your Honour, I'm happy to respond.

PRESIDING JUDGE PICARD: It seems to me that we already decided on that point, no? We already made the decision.

MR. CADMAN: [via videolink] You have. But, Your Honours, I'm using this as a further example, and Your Honours have ruled upon this point and have ruled that the SPO violated its disclosure obligations under 102(3). The point is that I'm using this as an

example when considering whether the conduct of the SPO in these proceedings, as far as disclosure is concerned. But I'm more than happy to move on.

PRESIDING JUDGE PICARD: Please do.

MR. CADMAN: [via videolink] So in looking at the disclosure that has not been carried out in these matters, I only raised those as an example to just demonstrate the point. I accept that Your Honours have ruled upon this point, and I accept that we can now move on.

What I want to say here is at the commencement of these proceedings, at the point of arrest and indictment, the SPO outlined their position that the documentation said to have been leaked would not be disclosed and would not be disclosed to the Pre-Trial Judge and would not be disclosed to the Trial Panel in its entirety. The Defence has not had an opportunity to scrutinise those documents. That is a matter that we have argued consistently throughout these proceedings that has seriously hampered the ability of the Defence to present its case on the basis that the central issue - namely, the issue relating to the three batches - has not been provided to the parties in order to be able to present its case.

We've not been put in a position to determine, as Mr. Rees has already stated, that the -- in relation to Batch 2, that the material that was not considered to be confidential and non-public was disclosed. The only part of Batch 2 that were considered were not made available to the Defence nor were the main part of the material in Batches 1 and 3.

The concern that was raised, and has been repeatedly raised throughout these proceedings, is that the indictment was confirmed and the Trial Panel issued its ruling on the basis of not being fully aware of what the actual evidence was.

Again, it's not being suggested that every point can be relitigated during an appeal hearing, and I accept that. However, the issue falls to be considered as it sets the scene for how the trial process was to be conducted, and the position adopted by the SPO in terms of its obligations, or whether in terms of fairness was to be observed or adhered to.

The conclusion to be drawn at the conclusion of the proceedings is that these principles were not adhered to.

And terms of the SPO itself, it deemed itself, as we have seen repeatedly through the filings, that it is the arbiter of what should and should not be disclosed, and therefore, adopted from the outset a position that is in direct contravention not only of Article 6 of the convention, but Rules 102 and 103 of the Rules of Procedure and Evidence.

So it is the background to the trial process and the constant theme throughout that is one of prejudice, prejudice to the appellant, and thus the convictions ought to be overturned on this point alone. That was what was being argued in these four grounds grouped together.

Now, of course, there is the presumption that the SPO, as any prosecutorial authority, will act in good faith. However, this is

not an irrebuttable presumption, and given the numerous failures of the SPO, it is submitted that this presumption no longer stands. There is doubt, that doubt is evidenced by the continuous drip feeding of further documentation during the trial, post trial, the disclosure obligations have not been adhered to, and there's doubt as to whether the trial had been fair or otherwise.

We have referred to the case of Rowe and Davis v. United Kingdom from the European Court of Human Rights, with specific reference to paragraph 63 that has been referred to in the written submissions that reinforces this point.

We submit that the same has occurred in the instant case, the SPO has taken decisions that it is not mandated to take and in doing so has caused serious and significant prejudice to the appellant.

I'd like to turn now to Grounds 12 and 13 dealing with the issue of entrapment. In the appeal brief, we've set out Grounds 12 and 13 that relate to entrapment. I will deal with them together.

It was pointed out in reply that the -- the response to the Prosecution reply, that due to an administrative filing error, submissions to the appeal brief omitted those relevant to Ground 12. That is at paragraph 38 of our reply. Also, keeping in mind the pressure of keeping within the word limit has resulted in certain discrepancies between the Notice of Appeal and the appeal brief. However, it is our submission that these deficiencies are not so serious that our arguments should be disregarded, and I will set out why.

Grounds 12 and 13 in the appeal brief address the failure of the Trial Panel to investigate the source of the leak from the SPO adequately or at all, thereby transferring the burden to the Defence to support their *prima facie* credible claims of entrapment or incitement. The SPO contends that since the notice makes no mention of the alleged error law in Ground 12 or elsewhere, the appellant's submissions on this issue in the appeal brief go beyond the scope of the Notice of Appeal and, to that extent, should be rejected *in limine*. That is at paragraph 142 of the Prosecution brief in response.

The SPO even go on to claim that because the submissions in the appeal brief do not correspond to what is stated in the grounds in the notice, they should be rejected in their entirety. That, in our submission, is quite wrong.

What is crucial is that the Notice of Appeal foreshadowed all of the submissions in the appeal brief. Specifically, contrary to the assertion of the SPO, the submissions in Grounds 12 and 13 were implicit in Ground 16 in the Notice of Appeal, which stated:

"The Trial Panel erred in law in failing to apply the correct legal test for the defence of entrapment once it had been raised by the Defence."

Ground 16 specifically cites paragraphs 835 to 839 of the trial judgement in support.

Paragraph 837 sets out the conditions for compliance with Article 6 in case of entrapment. One of them is that if a plea of

entrapment is made and there is *prima facie* evidence of entrapment, the Court must examine the facts of the case and take the necessary steps to uncover whether there was any entrapment through an adversarial, thorough, comprehensive and conclusive procedure. The submissions in the appeal brief were, therefore, consistent with the Notice of Appeal. It is regrettable that there is no neat correspondence between the two, but the dismissal by the SPO of our submissions would be thoroughly disproportionate and, we say, unjustified.

Despite this limited capacity to investigate, the Defence has assembled circumstantial evidence of incitement or entrapment by the SPO: the lack of evidence that he invited the leak of the documents; the absence of preventive actions by the SPO or the KSC; the cessation of deliveries of documents after his arrest; and the refusal of the SPO to disclose documents that might assist in conducting his own investigations. That is paragraph 140 of the appeal brief.

Even though there was no direct evidence rebutting the circumstantial support for entrapment defence, the Trial Panel, in our submission, erred in failing to investigate further what are credible claims by the Defence and -- claims of the Defence fully and impartially and, therefore, reversed the burden onto the Defence.

Now, the SPO is dismissive of Mr. Haradinaj's arguments in this regard. They submit that the appellant merely refused the Trial Panel's finding. That is a common theme. Simply asserting

that his claims of entrapment and incitement was *prima facie* credible and that was there was evidence that the source of the leak was the SPO.

The appellant's submissions are described as "once again riddled with inaccuracies, misrepresenting the evidence and the judgement." That is the Prosecution brief in response at paragraph 147.

But there are several defects in the SPO's case here. The SPO states that the appellant's allegation of a lack of evidence that he "invited the leak of the document" ignores "a plethora of evidence that he and" his co-defendant "invited persons to provide the KLA ... with more documents with the promise that they would make them public."

The SPO presents three items of evidence: That Mr. Haradinaj invited deliveries after the first two; that after the third he invited the person who delivered the third; and that after disclosing three sets, both accused reiterate their willingness to publicise other material.

All of the invitations were made after the first two deliveries were made and cannot, of course, be evidence that the appellant invited them. And the expression of willingness to publicise is in no sense an invitation for a leak of those documents. None of the evidence adduced by the SPO suggests that Mr. Haradinaj, or anyone else at the KLA WVA, took any action to elicit the sequence of deliveries of documents at their offices that took place in September 2020.

The SPO claims that no action was taken by the SPO or KSC to -- let me rephrase that. The SPO claims that the assertion that no action would be taken by the SPO or KSC to prevent or dissuade the appellant from disclosing ignores the evidence of three judicial orders. However, the evidence of the three orders quite simply does not contradict the submission in the appeal brief. They only prohibit the dissemination of the material that was to be seized.

A further submission by the SPO concerns a statement in the appeal brief that the Trial Panel "demonstrated a presumption in favour of the SPO, stating, for example, that 'there is no indication that [the third batch] was intentionally leaked by the SPO.'" The SPO calls this "yet another bald claim of bias with no credible basis."

The general presumption or the general case for presumption in favour of the SPO is set out in Ground 1 in the appeal brief and reply. The circumstantial evidence suggesting SPO responsibility for the leak has already been referred to. That is at paragraph 140 of the appeal brief. Moreover, the documents leaked purport to have been produced or received by the SPO which is now --

THE INTERPRETER: The interpreters note that this is too fast and we are unable to keep up. We are very sorry.

MR. CADMAN: [via videolink] I do apologise.

PRESIDING JUDGE PICARD: Did you hear?

MR. CADMAN: [via videolink] Yes. I will slow down. I do apologise.

PRESIDING JUDGE PICARD: You are speaking too fast, so if you could please slow down.

MR. CADMAN: [via videolink] I will. I do apologise.

So I'll just go back.

So the circumstantial -- sorry, I'm hearing the Albanian now.

The circumstantial evidence suggesting SPO responsibility for the leak has already been referred to. As I said, that is paragraph 140 of the appeal brief. Moreover, the documents that leaked purport to have been produced or received by the SPO, which is now prosecuting Mr. Haradinaj for alleged crimes related to those documents.

In short, *prima facie* case for entrapment is sound and the Trial Panel did not take appropriate steps regarding it.

I'll move on now to deal with Mr. Haradinaj's appeal on certain of the individual counts for which he was convicted.

JUDGE JORGENSEN: Mr. Cadman, if I might just ask a question there. It's under the threshold for showing or demonstrating your argument of entrapment. This not wholly improbable standard. Could you clarify where that threshold is in your submissions in terms of the sort of evidence that needs to be put forward?

MR. CADMAN: [via videolink] Well, I mean, it's certainly set out in detail in the brief where we deal with what the test is. There were two matters that certainly have been raised during the trial process as to the test of wholly improbable. I mean, certainly the information for which the Trial Panel were seized of, it was our

submission that that far exceeded the wholly improbable test.

The second issue that was raised, and I'm afraid I don't have the authority in front of me now, but I'll come back to it, was -- the other issue was when the Trial Panel has reviewed that material that is not disclosed to the Defence and then makes a finding as to wholly improbability without the Defence being able to advance submissions on that, that would entail a breach of Article 6, and that was one of the points that we made.

Now, of course, if the suggestion had been made -- and what we have to look at is the material in question into Batches 1, 2, and 3 had come from the SPO, that that material was very clearly stated by the former Specialist Prosecutor at the opening of the case that Mr. Haradinaj played no part in how that material was leaked, stolen, or otherwise obtained and had played no role in that material being presented to his offices at the WVA headquarters in Prishtine.

MR. REES: Can I? Sorry, not to interrupt, but hopefully just to assist. Your Honour asked a question about --

JUDGE JORGENSEN: And you want to answer the question instead of Mr. Cadman?

MR. REES: I am not going to answer the question, but I am going to direct the Court, if I may, to paragraphs 332 to 339 of the Gucati appeal brief, which, I think, I hope, does answer the question that the Court asked.

Apologies, Mr. Cadman.

JUDGE JORGENSEN: Thank you.

Do you want to add something, Mr. Cadman?

MR. CADMAN: [via videolink] No, I'm always grateful for Mr. Rees' assistance in these matters, and certainly it is something that both counsel have set out in their written submissions. I think I had referred to the earlier paragraphs in our brief where we do set out that test.

But the position being made was that it was only if the allegation was wholly improbable that, effectively, the second stage would no longer be required. And our position was very clearly maintained, and I'm grateful for Mr. Rees for the reference, but very clearly maintained that that threshold had been passed.

I only added the additional point in relation to when the Trial Panel has seen that material, material that would suggest the involvement of others, whether they are members of the SPO, Serbian officials or other Kosovan nationals, where there was evidence of those individuals' potential involvement in the procurement and the distribution of the material that clearly passed that threshold.

And so when the Trial Panel seized that material, but the Defence is excluded from seeing and scrutinising that material, that would entail a breach of Article 6. And, as I said, I will come back with the reference for that case in due course. I don't have it before me right now. But it's certainly set out in the appeal brief submissions.

Moving on to -- unless Your Honour as --

JUDGE JORGENSEN: Thank you, Mr. Cadman. It was just to follow

up, because it was really the element of incitement within that threshold, how that fits in. So how do you explain that you've satisfied that aspect of it, or is that part of meeting the threshold?

MR. CADMAN: [via videolink] Well, certainly there has to be a basis for making the suggestion. And, of course, there were updated notices that had been provided by the SPO during the course of the proceedings that provided at least a basis for believing that other persons were involved.

I'm conscious not to go into material upon which Your Honours have already ruled that further advance that position, but the position that we had stated throughout the proceedings, that it was not only an allegation against the SPO, it was an allegation against other individuals, potentially Serbian authorities as well, that had provided that material.

So the issue is whether there is a basis which is more than highly improbable for believing that the claim of incitement or entrapment had been established. Our position was always very clear, that there was an evidential basis for believing that, and that material, we say, should have been disclosed once the Trial Panel had seen it. The Defence should have had the opportunity to inspect that material so that the matter could be advanced further so that investigations could be carried out.

We say that the Trial Panel erred by not doing that.

JUDGE JORGENSEN: Thank you.

MR. CADMAN: [via videolink] So I was about to go on to Ground 18 that deals with Count 1. And, again, I apologise if there's cross-over with what Mr. Rees has already covered, but I'll try to deal with this as briefly as I can.

So under Count 1, Mr. Haradinaj was found guilty of obstructing official persons in performing official duties by serious threat. And if we look at Article 401(1), where it says:

"Whoever, by force or serious threat, obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished by imprisonment by three months to three years."

Now, Ground 8 concerns the scope of "serious threat." We submit that the Trial Panel erred in law by concluding that serious threat against third parties could be sufficient to meet the *actus reus* and the intent for the crime. Both the Trial Panel and the SPO, we say, adopted a literal reading because it is the literal reading. And the reference to that is the trial judgement paragraph 146 and Prosecution brief in response 110.

Their view is that because the words "serious threat" are unqualified, they should be understood to include a serious threat directed at someone other than an official person. Sometimes it is, of course, appropriate to adopt a literal reading of a legal text. However, if there is uncertainly about the scope of a definition of a crime, there is always a strong case for interpreting it restrictively so that acts which may be reasonably deemed not to be

criminal are not included. Article 2(3) of the Kosovo Criminal Code states a general principle that is applicable. And just to quote from that provision:

"In case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the persons against whom the criminal proceedings are ongoing."

But in its judgement, the Trial Panel cited a passage from the commentary by Salihu and others in support of its interpretation. And the reference for that is paragraph 146 of the trial judgement, with reference to the commentary at pages 1165 to 1166. And that is F74. But the relevant passage is as follows:

"The threat should be addressed to the official person with the intention of obstructing the official duties. However, it might also be addressed to another person or object."

It is submitted that the Trial Panel has, in our view, misunderstood the commentary. It is not intended to allow for the possibility of the serious threat being directed exclusively at someone other than an official person. Rather, it allows for a single serious threat to be directed at both official person and another person or object. For example, a perpetrator might inform a police officer and his family that serious harm will come to them unless the police officer acts in a particular way in violation of his official duties. And that we set out in appeal brief at footnote 171.

But it's because there has been a serious threat directed at the

police officer that the act may come within the ambit of 401(1). If someone obstructs another person by force or serious threat, it is natural to understand that the force or threat to be directed at the person obstructed. It is therefore submitted that if the article had been intended to have a broader scope --

THE INTERPRETER: The interpreters kindly ask the speaker to slow down when reading. It is very difficult to follow. Thank you.

MR. CADMAN: [via videolink] I'm going to apologise again.

Your Honours, I had actually provided the written note, which is why I'm reading rather than summarising, just to facilitate the translation. But I can see that hasn't really helped, so I will slow down.

So what I was saying is if someone obstructs another person by force or serious threat, it is natural to understand the force or threat to be directed at the person obstructed. It is, therefore, submitted that if the article had been intended to have a broader scope, this would have been expressed in its formulation.

I make reference at the end of that submission on the general complaint that was made during the trial process and as part of the appeal that the Defence was invited to offer submissions on the elements of the offences, and one of the difficulties that we have confronted throughout these proceedings was that after providing written submissions on the elements of the offences, which, obviously, had a direct impact on how the defence was to be conducted, was never given until the end of the trial.

Many of these issues could have been dealt with by setting out what the elements of the offence and the extent to which these provisions should be applied, because there was very clearly a divergence of opinion between the Prosecution and the Defence, and these matters were not resolved before the trial. And we say that that had a direct impact on the way in which the trial could be and was, in fact, presented.

I had intended to deal with Grounds 19 and 20 that deal with Count 3. I'm conscious of the focus of Mr. Rees' submissions in that regard that formed a great part of his oral submissions in this appeal. I don't want to go over the same material. The position is accepted. It is endorsed by the Haradinaj Defence as the correct interpretation, and so I'm more than happy to move on to the next argument so as not to repeat ground that's already been covered.

JUDGE AMBOS: Mr. Cadman, can I ask you a question regarding Article 401(1).

MR. CADMAN: [via videolink] Yes, Your Honour. Of course.

JUDGE AMBOS: So this provision allows for commission by an attempt. How would you make your argument taking into account an attempted commission of this provision?

MR. CADMAN: [via videolink] Sorry, there's a bit of interference towards the end. Could you just repeat that again, sorry?

JUDGE AMBOS: As you can see from para. (1), it is not necessary to fully make up the elements, *actus reus*, of this offence, but it's sufficient to attempt to obstruct an official person. So my question

is since I understood your argument now about the fulfilment of the elements of the offence but not for the possible attempt to commit such an offence, and so I wanted to ask you if your argument is equally valid if you think of an attempted commission? I'm not sure if you understood me?

MR. CADMAN: [via videolink] Sorry, Your Honour. Yes, I did understand the question.

So the point that was set out in the written submissions, and certainly the point that was set out at trial, was that there was -- in the way that the count was formulated, our position was that there was no evidence as to this obstruction or an attempt to obstruct official persons. So I think my position would remain the same, that there was no evidence of obstructing official persons.

I think the point that I was making was when you're looking at persons other than official persons, but I think that would apply to both an attempt or actual obstruction. I think that would be the position.

JUDGE AMBOS: Just as a thought experiment: I can threaten a private witness with the intent and attempting to obstruct an official person in the exercise of its function. Logically speaking, is this for you a possible interpretation?

MR. CADMAN: [via videolink] If there was a threat, then it is a possible interpretation. Then it then falls down to whether the evidence supports that. The position was that the evidence did not support that.

JUDGE AMBOS: Thank you.

MR. CADMAN: [via videolink] As I've noted, I will not deal with Count 3. I recognise that Count 3 is, in effect, the most significant matter, but I'm reluctant to go over what would inevitably be repeated submissions from what Mr. Rees has already stated.

But just save to say that we maintain what is set out in our Ground 18 of the written submissions of the appeal brief, which moves me on to Ground 21 which deals with Count 5.

This was the count dealing with violating secrecy of proceedings through unauthorised revelation of secret information disclosed in official proceedings.

Now, we challenge this finding under Ground 21, which states that the Trial Panel erred in law in finding that the treatment by the SITF SPO of certain documents as confidential amounted to the information contained in them being declared secret under Article 392(1) of the Kosovo Criminal Code and failing to take account of the domestic law definition of secret information.

Looking at Article 391(1):

"Whoever, without authorisation, reveals information disclosed in any official proceedings which must not be revealed according to law or has been declared to be secret by decision of the court or competent authority shall be punished by a fine or by imprisonment of up to one year."

Mr. Haradinaj was charged in the indictment in connection with

secret information and not information which must not be revealed according to law.

Our submission is that secret information is defined in Article 612 of the Law on Classification of Information and Security Clearances as, I quote, "information the unauthorised disclosure of which could seriously damage security interests of the Republic of Kosovo." And it's set out in the appeal brief that no evidence was presented that the information the appellant was found to have disclosed contains secret information according to the definition.

Your Honours, if you'll just permit me for a moment. It's suddenly got quite dark, and I just want to turn on a light so that I can see.

PRESIDING JUDGE PICARD: Please do.

MR. CADMAN: [via videolink] The last sentence that I read comes from the appeal brief at paragraph 193. The reply responds to the SPO challenge to the application of the Law on Classification of Information and Security Clearances, and that's dealt with in our reply to the Prosecution brief in response at paragraph 60 and 61.

What the SPO has stated is that a competent authority, like the SITF or SPO, marking or treating information as confidential is naturally understood as declaring this information secret by a decision within the meaning of Article 392(1) of the Kosovo Criminal Code. But I'd like to take this opportunity to expand upon the reasons why this assertion is self-evidently false.

As indicated in the reply at paragraph 61, the ordinary meaning

of "secret" is narrower than that of "confidential" in the context of information. Also, the formulation of Article 392(1) clearly distinguishes two types of information disclosed in any official proceedings, namely information which must not be revealed according to law, which is essentially confidential information and information which has been declared to be secret by a decision of the court or competent authority.

In legislation, confidential information is distinct from secret information which has a narrow ambit defined by national security. Whatever the SPO may have intended, Count 5 of the indictment charges Mr. Haradinaj with unauthorised revelation of secret information, not unauthorised revelation of information that must not be revealed according the law.

Now, the burden is on the Prosecution to formulate the indictment so as to cover the alleged criminal acts that an accused has committed. It is, of course, a basic tenet of the rule of law that if it is found that the accused has not committed the crime charged in the indictment, they must be acquitted. This applies even if the Prosecution has made a mistake in drafting the indictment. That is the position that is set out under Ground 21 dealing with Count 5.

I'd like to turn now to Ground 24 to deal with sentencing. And, again, there will be some cross-over with what Mr. Rees has said, but I think it is important that it is set out. Certainly what I can say, that the reference that Mr. Rees referred to, the last case that

he referred to, which I will also refer to, should be contained within the Haradinaj presentation queue. That simply was put in the list of documents to be included.

So what I'd say in relation to sentencing. First of all, we've made it quite clear in the written submissions and in summary today that the appellant should be acquitted on all counts. But certainly if he is not, his sentence should be reduced.

Ground 24, we submit the Trial Panel, considering all the circumstances, erred in fact and decided on a manifestly excessive sentence. That is paragraph 209 of the appeal brief. And we specified five errors that the Trial Panel made in this regard.

First of all, we reaffirm our submissions in the appeal brief and the reply. Nevertheless, I'd like to elaborate on item 4 in Ground 24, which concerns previous and established sentencing jurisprudence from other international tribunals.

In determining an appropriate sentence for Mr. Haradinaj, the Trial Panel stated that it took note of a range of sentences imposed on persons convicted of similar offences at courts or tribunals. That is paragraph 979 of the trial judgement. It gave the following five examples: The Marijacic and Rebic and the Jovic trial judgements at the ICTY; the Akhbar Beirut and Al-Khayat sentencing judgements at the STL; and the Nzabonimpa trial judgement at the Residual Mechanism. Those are in the trial judgement at footnote 2012.

The critical paragraph in the determination of the sentence is

paragraph 1004. The Trial Panel stated that it took note of the range of sentences imposed on persons convicted of similar offences at international courts or tribunals but that it was difficult to infer from a sentence that was imposed in one case the appropriate sentence in another. It then gave a summary of the offences that it found that Mr. Haradinaj had committed. And in paragraph 1006, it specified the sentences on individual counts and pronounced a single overall sentence of four and a half years.

Now, this is the first time that the Kosovo Specialist Chambers has had to make a determination of sentence. It has no previous jurisprudence to guide it. Diverging widely from international practice would, we submit, be unjust. We entirely accept, as Mr. Rees has also said, that each case is different and it is very difficult to find a case, as Mr. Rees has said, on all fours with this case. I accept that. But Mr. Haradinaj's sentence is so much at variance with those imposed for similar offences at international courts and tribunals that, in our submission, it amounts to a failure to take account of the relevant core practice.

In the cases of Marijacic and Rebic, Jovic, Akhbar Beirut, Al-Khayat, and Nzabonimpa, which the Trial Panel considered to be similar, the penalties were all significantly lower than in this case. The case of Marijacic and Rebic concern an article on the cover of a newspaper which stated it related to secret testimony. That is case IT-95-14-R77.2, the trial judgement of 10 March at paragraph 1. The Trial Chamber found both accused guilty of contempt

of the Tribunal, specifically disclosing information relating to proceedings in knowing violation of the order of the Chamber and each was sentenced to a fine of €15.000. That's at paragraph 36.

Josip Jovic was charged with having published information and material in his newspaper concerning a protected witness and having refused to comply with an order to cease publication. That is IT-94-14 and IT-95-14/2-R77. The Trial Chamber found him guilty of disclosing information in relation to proceedings in knowing violation of an order of the Chamber and sentenced him to a fine of €20.000. That's at paragraph 27.

In the STL case, Akhbar Beirut, Al Amin was found to have published the names, photographs and significant personal details of 17 purported confidential STL witnesses and, after what he acknowledged as public outcry and claims from various members of the public that his previous publication had infringed the law, he then published a second article with the photographs, names and personal information of a further 15 purported witnesses. That's at paragraph 17 of the judgement.

A certain number of witnesses expressed fear. Two witnesses lost confidence in the STL's ability to maintain the confidentiality of witness information. And at least one of the exposed purported witnesses suffered direct harm in the loss of a business. He was sentenced to €20.000, a fine of €20.000. That's at paragraph 20.

The Al-Khayat concerned five episodes on Al Jadeed TV entitled "The Witnesses of the International Tribunal." They allowed for the

identification of three witnesses at the STL. On 10 August 2012, the Pre-Trial Judge at the STL issued a confidential and *ex parte* order directing Al Jadeed TV to cease dissemination of all material alleged to be related to confidential Tribunal witnesses.

Ms. Khayat was part of the management of the news department of Al Jadeed TV and had the ability to remove the information on the purported confidential witnesses from Al Jadeed's web site but failed to do so. The Contempt Judge found that she was wilfully blind to the 10 August 2012 order, that she violated the order by failing to remove the information on purported confidential witnesses, and she was sentenced to a fine of €10.000.

The case of Nzabonimpa is, in fact, rather different from the others in that it doesn't concern the disclosure of information. The accused were charged with knowingly and wilfully interfering with the administration of justice. They participated in a highly organised effort in which payments were used to induce witnesses in a genocide trial to recant their testimony. That's at paragraph 405.

Nzabonimpa - I will, obviously, mispronounce these names, I do apologise for that - Ndagijimana and Fatuma had spent more than 11 months in pre-trial detention and were sentenced to time served.

Ngirabatware who played a leading role in funding and directing the operation was sentenced to two years' imprisonment to be served concurrently with a sentence already being served for public incitement to commit genocide.

In each of these five cases, the accused were found to have

committed an offence or offences for which the maximum penalty was a fine or seven years' imprisonment or both, and sentences were all imposed at very much the lower end of the scale.

And as Mr. Rees has already mentioned, we also highlight the case of Margetic. As I've said, it's IT-95-14-R77.6, trial judgement 7 February 2007. And as Mr. Rees has quite rightly said, this was a witness list published on a web site containing the names of 102 witnesses, many of whom were subject to protective measures put in place by the Trial Chamber in order to ensure their security and to prevent the disclosure of their identities to the public and the media.

THE INTERPRETER: Could the counsel please be asked to slow down please.

MR. CADMAN: [via videolink] The Trial Chamber held that by publishing the witness list, Margetic had reversed the effort of the protective measures "thus undermining the confidence of the witnesses in the tribunal's ability to protect them." That is at paragraph 69. It also found that the conduct was "likely to dissuade protected witnesses from testifying in the future" --

PRESIDING JUDGE PICARD: Mr. Cadman, could you slow down a little bit.

MR. CADMAN: [via videolink] Sorry, I thought I had.

PRESIDING JUDGE PICARD: Could you slow down, please.

MR. CADMAN: [via videolink] Of course.

So the Trial Chamber considered that this attempt that he

committed was to be particularly egregious and he was given a sentence of three months' imprisonment and a fine of €10.000. And that's at paragraph 86 of that judgement.

Now, of course, there are differences in every case. And all the cases mentioned differ significantly from the case of Mr. Haradinaj. Unlike Mr. Haradinaj, Mr. Margetic was found to have published the names of a large number of witnesses in aggravating circumstances, yet he received a much lower sentence.

In our submission, contrary to what is stated, the Trial Panel did not take note of the range of sentences imposed on persons convicted of similar offences at international courts and tribunals. It is our submission that the sentence given by the Trial Panel was so grossly in excess of the norm established in emerging practice in other international tribunals and courts that it amounts to an error that falls to be reversed.

Now, Your Honours, we had said at the outset, and we say again, that is an unusual case. The documents that are central to each count of the indictment were not disclosed to the Defence. The documents purport to emanate from the very body that is prosecuting the appellant. The SPO has provided no assistance whatsoever to the accused in their efforts to discover how the documents reached the KLA war veterans offices in September 2020.

More generally, there has been a lack of disclosure. Unfairness has been a constant in the proceedings at trial. This is also, as I've said, the first case to reach the appeals stage at the Kosovo

Specialist Chambers.

In my brief submissions today, in our appeal brief, and in our reply to the Prosecution brief in response, we give reasons for overturning the findings on each count on which Mr. Haradinaj was found guilty. The SPO has argued that this case should be argued by numbers. We submit that justice is not served by adopting a strict approach. Fairness requires much more.

In the end, I must return to the fundamental flaws at the trial stage that affect the entire Prosecution case: The lack of transparency on the part of the SPO, the prejudice suffered by Mr. Haradinaj as a result of what the SPO, the Pre-Trial Judge, and the Trial Panel have failed to do. In my submission, all five findings of the Trial Panel must be overturned.

If you're not with me on that point, as I've stated, the sentence is one that is manifestly excessive and should be reduced. I maintain all of the submissions that are set out in our appeal brief and in our reply.

Your Honours, those are my submissions for today.

PRESIDING JUDGE PICARD: Thank you.

Does that conclude your oral submission, Mr. Cadman?

MR. CADMAN: [via videolink] Yes.

PRESIDING JUDGE PICARD: Thank you very much. You've been much shorter than what we expected.

Mr. Rees, you want to add something?

MR. REES: Well, I'm going to ask if I can take the time. As we

finished before we were due to, as we're all here, perhaps I can just deal with a couple of points where questions were asked of Mr. Cadman, and if I can just touch upon those.

It seems to me I could reserve it until the reply, but it assists the Prosecution because they get to deal with that tomorrow then and the points that I wish to make. I'm, obviously, in Your Honours' hands.

MR. CADMAN: [via videolink] Your Honour, if I could just make one comment.

PRESIDING JUDGE PICARD: Yes.

MR. CADMAN: [via videolink] Certainly, I had intended to use the full 90 minutes afforded to me. But, obviously, having listened to Mr. Rees, there were certain matters that it would really not be in the interest of everyone's time for me to make the same arguments again. That has reduced the amount of time that I needed to make my submissions.

PRESIDING JUDGE PICARD: And we appreciate it. But Mr. Rees is going to use the time you left. And he has more submissions.

Okay, you can -- but not too long.

MR. REES: [Microphone not activated]

THE INTERPRETER: Microphone, please.

MR. REES: Yes, so I'll just focus on the questions that were asked, in fact, and just hope to assist in relation to those questions.

Firstly, Mr. Cadman was asked how the appellants say that the

burden or the hurdle of not wholly improbable has been passed.

In the first instance, we say that that hurdle is very low indeed. It's much lower than the usual hurdles that one encounters in criminal procedures. We say that, in fact, and this is drawn directly from the words of the authority Ramanauskas, the Grand Chamber of the European Court, paragraph 70, that the -- "it falls to the prosecution to prove there was no entrapment provided only that the allegation is not wholly improbable."

We specifically note that the Grand Chamber refers to an allegation. It's an allegation that has to be not wholly improbable. That doesn't imply any evidential burden at all. All that's required to raise the issue is the making of an allegation of incitement which is not wholly improbable. Neither the making of an allegation nor meeting the assessment of that allegation as other than wholly improbable requires *prima facie* evidence. It doesn't require it, we say.

And we have, at paragraph 335 of our appeal brief, referred to the concurring opinion, the separate opinion of Judge Kuris in the second Ramanauskas case, in which he provided a very concise analysis of the forming of not wholly improbable. As he noted, it is an absolutist formulation. It is to be taken exactly for what it literally says. And I acknowledge that the purpose of Judge Kuris' opinion was, to some extent, to criticise the formula for the fact that it is absolutist. But, nevertheless, he was acknowledging that that is what the Grand Chamber has said the test is.

It's a clause, not wholly improbable, to be taken exactly for what it literally says and the accused is, therefore, entitled, if he raises the allegation, to benefit from virtually any doubt unless the latter, the doubt, is absolutely unnatural, is how he put it.

Obviously, the Trial Panel proceeded on the basis that there was a requirement for *prima facie* analysis. They said that. The Prosecution are quite right that the Trial Panel did -- were certainly aware of the proper approach as spelled out in Ramanauskas. Their problem is they didn't then apply it. They applied a different standard of their own, namely, a requirement for *prima facie* evidence of entrapment.

The only burden upon Mr. Gucati, we say, upon either appellant, frankly, was to raise an allegation of incitement that was not wholly improbable. And that low threshold is properly crossed.

The Trial Panel conceded that a deliberate leak by the SPO staff member --

THE INTERPRETER: Could the counsel be asked to slow down please.

MR. REES: -- could not be excluded.

Mr. Gucati in evidence alleged that he was entrapped. He said, and these are his words from the transcript, and the reference, again, is in the appeal brief:

"If" what was described as "Lightning Strike 1, Lightning Strike 2, and Lightning Strike 3 had not delivered the documents to the KLA WVA, encouraging us to make the material available to the public, we

would not have called the press conferences. After all, we would not have had any material to discuss at the press conferences. The events of September 2020 only occurred because someone at the KSC or the SPO provided the material to us and encouraged us to present it to the media."

That was his evidence. He said that the deliveries came with the express incitement and implied incitement to make the contents available to the media. The very first delivery came with the words "make it available to the man who speaks to the media." It's clear incitement.

As a matter of fact, acts of incitement occurred. The conduct complained of could not have occurred without them. Whoever was behind those deliveries exerted such an influence on Mr. Gucati, and I'm using there the words of Ramanauskas, exerting an influence, as to incite the commission of alleged offences that otherwise would not have been committed because they provided the means to commit the offence and encouragement to do so. Without providing the means, the offences could not have been committed.

The only issue of fact was whether the person making that incitement, or persons, involved an officer of the SPO or an external agent acting on their instructions.

Mr. Gucati alleged that an officer was involved, although he could not prove it and did not have to, we say. Did not have to in accordance with the European Grand Chambers' guidance in Ramanauskas.

What happened in the Trial Panel's judgement is that they, in

effect, applied an inappropriate reverse burden and standard of proof standard on the accused to prove, at least to a *prima facie* standard, that he was entrapped, and that is not in accordance with the European Court's case law and jurisprudence on entrapment.

The other question that was asked then was in relation to Article 401 by His Honour Ambos. And as I understood the question, in effect, Your Honour was asking whether there was an inconsistency between the argument that the target of a threat for the purposes of Article 401 must be the official. And the provision that it's sufficient for an attempt to obstruct an official person being enough to make out the offence, whether there's an inconsistency there between that submission the target's got to be an official and the fact that you can commit the offence by only attempting to obstruct and not obstruct it.

We maintain that the target must be the official, the target of the threat. And we don't see that there is any inconsistency with the offence being capable of being satisfied by an attempt to obstruct only.

In the judgement of the Trial Panel at paragraph 145, the Trial Panel defined the term "obstruct." The Trial Panel said that:

"... the term 'obstruct' means to prevent, impede, hinder, or delay the motion, passage, or progress of something."

So in the Trial Panel's view, and we don't disagree with this, there is a difference between obstructing meaning actually preventing, actually impeding, actually hindering, or actually

delaying the motion, passage or progress of something, and attempting to prevent, impede, hinder, or delaying. And they applied that distinction, which, again, we don't disagree with, paragraph 647 of their judgement. Sorry, not 647. 653. My apology.

The Panel noted that the SPO in this case had not pointed to any act that a Specialist Chambers or Specialist Prosecutor's Office official "was prevented, impeded, hindered or delayed in performing as part of his or her ... work, as a result of the Accused's actions."

So in this case, there was no prevention, impeding, hindering, delaying performance of work. There was also no indication that as a result of the diversion of time and resources, the SPO was prevented from or delayed in carrying out its regular investigative functions. The Trial Panel said that "the use of resources by investigative or prosecutorial authorities to respond to criminal activity undermining their work is ... normal, and expected ..." It's a normal part, a course of their work. "The use of such resources is not necessarily evidence of obstruction. In the present case, the Panel considers that the use of resources by the SPO is an indicator of the seriousness with which the SPO addressed the matter," but concluded that they could not conclude "that the diversion of SPO resources was so significant that it led to obstruction."

So the Trial Panel --

JUDGE AMBOS: But, Mr. Rees, exactly here the idea and the whole structure of attempt comes in. It's beyond dispute that there was a

completed 401(1) commission. We are talking about the attempt, attempted commission. Why is this so? I want to follow up on this, because I have another question for you, appreciating your intervention at this point.

The attempt, of course, is an incomplete offence on the part of the *actus reus*. We have a mental element in the mind of the person who attempts or the mind of the person who attempts may be to obstruct official proceedings or to target official persons by threatening private persons. That's the structure of attempt.

And you make the argument in your appeals brief -- let's go to my second argument. And if you don't agree, fair enough.

MR. REES: Well, I don't --

JUDGE AMBOS: But my second argument is that in your appeals brief you make this argument that the attempt in 401 must be goal-oriented activity.

MR. REES: Yes.

JUDGE AMBOS: And I wanted you to elaborate on this interpretation. Because what you are basically saying is that there is a specific intent requirement --

MR. REES: Yes.

JUDGE AMBOS: -- by way of the attempt structure.

MR. REES: Yes.

JUDGE AMBOS: And maybe you can elaborate on this argument.

MR. REES: So firstly, if I could just get to the conclusion of my answer. I know that it was lengthy, but the point I was coming to

is this: I see, in our submission, no inconsistency between a requirement that, for example, the threat must be aimed at an SPO official and the fact that on some occasions that threat may well hinder that official's work, on other occasions that threat directed at the official may not. It may have been intended to hinder but for all sorts of reasons, such as the fact that that officer has got plenty of security in place, doesn't feel that -- in any way intimidated by it. In fact, he carries on with his work unhindered.

So we don't see any inconsistency between the fact that the offence can be complete when an attempt is made to obstruct and our submission that the target -- and I'm not going to go over that. You have those submissions on paper in my appeal brief, and Mr. Cadman has made some oral submissions on it.

In relation to the second matter that Your Honour raises now. Firstly, we say that although, obviously, there are examples where attempt is provided for in the Kosovo Criminal Code where the full offence is not complete, this is not one of them.

So Article 401(1), where the Court finds that obstruction was -- there's not been actual obstruction, only attempted obstruction, that is still a sufficient element for the *actus reus* of the offence in Article 401. One's not relying on the separate provision in the code for offences where attempt is made out. We're dealing here with an element of the offence. If you attempt to obstruct, that is sufficient *actus reus* for 401 and the offence is complete.

JUDGE AMBOS: Just to get this clear. It's not totally correct

what you are saying. It's not complete in a doctrinal sense. It's complete in the sense of the description of the elements in this offence.

And let me just make another point. To understand you correctly, but I really want to understand your point, because, of course, you could say it says "attempts to obstruct an official." What you are saying basically is: You can attempt to obstruct an official -- you always have to attempt to obstruct an official, you always have to target an official, Mr. Rees. That's your point.

And here's a diverted interpretation where we have to make up our mind. You can say, as the Panel has said, I can target a private person and indirectly I attempt to target an official, but you say, since it says "attempts to obstruct an official person," even under the attempt mode, you must always target an official. Is this correct --

MR. REES: Yes.

JUDGE AMBOS: -- my reading of your view?

MR. REES: Yes, that is our submission. And, obviously, the Trial Panel took a different interpretation. And we submit, as part of our grounds of our appeal, that the Trial Panel's interpretation was the wrong one. And that [indiscernible] and, obviously, as Appeals Panel you will rule on that. But that is our submission.

And we say that the Trial Panel -- part of the foundation for the error for the Trial Panel is that they approached Article 401 and the aim of it as ensuring that official duties are not obstructed.

That's how they got to a purposive interpretation, saying, well, if the purpose is to ensure that official duties are not obstructed, then the purpose is more well satisfied by allowing the threat to be aimed at anyone who might have -- it might have knock-on consequential effect on obstructed.

And we say, actually, that that was wrong. That's where they went wrong. That the aim of Article 401 is actually to protect official persons from violent or threatening actions. That is the purpose of it. And that's why -- and we draw support from both the Kosovan case of *M.I. et al*, with the full reference for that in the annex to our submissions, and part 6.3 of that judgement where they say that the aim of the predecessor of Article 401 was exactly that, to protect official persons against violent or threatening actions.

And, indeed, that's the view taken by the commentators Salihu *et al*, and we provided the reference there. And if that is right, and we say it is, if that is right, and *M.I. et al* is right, and Salihu et al are right, then the aim is only achieved by requiring the target of the threat to be the official person who is to be protected against violent or threatening actions.

I hope that answers the further question from Your Honour.

JUDGE AMBOS: It answers the first question, thanks. But it doesn't answer the question on the goal-oriented activity. That's a further argument you make.

MR. REES: Yes.

JUDGE AMBOS: And maybe you explain to us again this argument.

MR. REES: So we say that the Kosovan Criminal Code recognises purpose as a specific feature of intent. The separate opinion of Judge Barthe quite neatly sets out the summary there, and I adopt the summary that he's put out as how he reached that position. It's one that we share.

And we say that that purpose or goal-orientated approach to intent must feature when an offence can be complete when it's attempted. So in order to attempt to do something, you have to have the outcome as your goal. You don't inadvertently attempt something. You don't mistakenly stumble across something. You attempt to do something by saying: This is what I want to achieve. I am going to do something to achieve it.

Now, you do your act to achieve the goal and then either your act is successful and does achieve that goal or, in some cases, for all sorts of reasons, not least there might be intervention by other parties, your goal is then not achieved and you've attempted to achieve it. But it's our submission that attempt and to attempt to obstruct necessarily implies that there is a goal-orientated or purpose approach that has to feature in the terms of intent.

And that leads, we say, on analysis, as Judge Barthe was led when he was considering his analysis of the requirement of intent, and he said direct intent only for Count 3. We say that same analysis drives to a position where direct intent for the offence under Article 401, at least when it's in its attempted form, likewise must have as part of that *mens rea* a goal-orientated or purpose --

purposive assessment.

JUDGE AMBOS: I do not want to extend this any longer, but just as a counterargument, maybe you can think about it overnight, sleeping or dreaming, Article 28 of the Kosovo Criminal Code defines attempt, and because you like so much these general part definitions of the Kosovo Criminal Code, and it speaks of intentionally. So there's, of course, a big debate if intention under attempt doctrine does not cover any form of *dolus*, any form of intent, and that would speak against your argument. Just as a food for thought.

MR. REES: Well, Your Honour, I follow that. And, of course, that was the -- that controversy, put it that way, is what lay between two of the Trial Panel, saying that when the Kosovo Criminal Code refers to intent it means direct intent or an eventual intent in -- in the alternative, in all cases, and Judge Barthe disagreeing because he recognised that the Kosovo code also acknowledges purpose as part of the code and understood that if a particular article requires a purpose - and he agreed that Count 3 and Article 387 required purpose - that then excluded eventual intent.

And we say the same analysis can be applied to Article 401 at least when it's in its attempted form, because attempt requires a goal. You have to aim to achieve your desired outcome in order to carry out an attempt.

But perhaps if I go to bed sleeping about that and anything further comes to me in my dreams, I can return to it tomorrow.

PRESIDING JUDGE PICARD: That concludes today's hearing and we

reconvene the hearing tomorrow at 9.30, starting with the SPO submission. And then as I said at the beginning of the hearing, we'll hear again the response of Mr. Gucati and Mr. Haradinaj's counsel. Thank you.

--- Whereupon the hearing adjourned at 5.17 p.m.