Friday, 2 December 2022

[Open session]

[Appeal Hearing]

[The appellants entered the courtroom]

--- Upon commencing at 9.30 a.m.

PRESIDING JUDGE PICARD: Welcome back to the appeal hearing.

May I ask again the parties to present themselves.

So I note that Mr. Haradinaj and Mr. Gucati are both in the courtroom.

And as yesterday, may I ask Mr. Haradinaj whether he understands the proceedings in a language -- he can follow the proceedings in a language he understands?

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

PRESIDING JUDGE PICARD: Mr. Gucati?

THE APPELLANT GUCATI: [Interpretation] Yes, I do understand.

PRESIDING JUDGE PICARD: Thank you.

So may we start with the counsel of Mr. Gucati.

May I ask the Registrar to call the case.

THE COURT OFFICER: Yes, Your Honours. Thank you. And good morning. This is case KSC-CA-2022-01, The Specialist Prosecutor versus Hysni Gucati and Nasim Haradinaj.

PRESIDING JUDGE PICARD: Thank you.

So counsel for Mr. Gucati, can you present yourself?

MR. REES: Your Honour, our representation remains as of yesterday. Can I mention one thing about Mr. Gucati's attendance.

He's in his wheelchair in the moment. There may be times when he wishes to stand up just to stretch his legs. If he does that, please just --

PRESIDING JUDGE PICARD: Yes, I noticed yesterday on the screen that he was standing from time to time.

MR. REES: Yes, thank you.

PRESIDING JUDGE PICARD: Good.

Counsel for Mr. Haradinaj.

MS. BERNABEU: Good morning. Yes, we have Mr. Cadman, who is also joining remotely today. We have Mr. Omar Soliman and Mr. Admir Berisha with us, Your Honours. Thank you.

PRESIDING JUDGE PICARD: Thank you.

I hope you are getting better, Mr. Cadman.

MR. CADMAN: [via videolink] Slowly. Hopefully improving, Your Honour. Thank you for asking.

PRESIDING JUDGE PICARD: For the Prosecution.

MR. HALLING: Good morning, Your Honour. Our seating is rearranged but the same appearances as yesterday.

PRESIDING JUDGE PICARD: And the Court as well, Michele Picard, Judge Kai Ambos, and Judge Nina Jorgensen.

So today we will start with the submissions of the Prosecution.

MR. WHITING: Good morning, Your Honours. And may it please the Court. My name is Alex Whiting. I'm the Acting Specialist Prosecutor.

In a moment, Mr. Halling and Mr. Pace will address the specific

points that were raised by Defence counsel yesterday. But before they do, I want to take a few moments to frame this case and the appeal, also responsive to points that were raised yesterday, and recall for the Court the full picture of everything that happened that led us all to being here today. That is, the conduct of the accused that led to the charges and the proceedings before the Trial Panel that resulted in their convictions.

The accused contend that they were treated unfairly in the proceedings below. Nothing could be further from the truth. There is no question that the accused committed the crimes with which they were charged, and they were given a full opportunity to challenge and contest the Prosecution's case. They were convicted after a fully fair trial and they were given a just sentence.

On three separate occasions - on September 7, 16, and 22 of 2020 - the accused held press conferences at the War Veterans Association office in Prishtine and knowingly and purposely disseminated confidential documents related to SPO investigations to the media, encouraging the press to publish the material.

After each press conference, the accused further amplified their conduct by speaking to the media and posting on social media. By this conduct, the accused committed --

MR. REES: Your Honour, I hesitate to interrupt Mr. Whiting, but I'm slightly puzzled as to why we are listening to a closing speech as if this is a trial. As Your Honour reminded everybody yesterday, this is not a trial. This is an appeal. And so I'm slightly puzzled

as to what Mr. Whiting is doing right now.

MR. WHITING: Mr. Rees, I'll explain to you what I'm doing. You have contested all of the allegations and you have contested the fairness of the trial. The facts of the case are relevant. I'm going to summarise, briefly, the facts of the case and get to the legal issues which you have contested.

Everything I'm saying here is pertinent and responsive to the arguments that were made both by yourself and Mr. Cadman yesterday.

PRESIDING JUDGE PICARD: May I ask the parties to finish this discussion. I think the Prosecution has the right to lead this case the way he wants. If he wants to remind the Court of what happened in that case, it's his problem. He has two hours to present the case.

MR. REES: Your Honour.

MR. WHITING: Thank you, Your Honours.

By this conduct, the accused committed the crimes for which they were convicted by the Trial Panel. They did so openly and brazenly on television and in the media. In this case, Your Honours can literally watch the accused committing the crimes charged on video.

After the press conferences, the SPO moved swiftly to seize the documents and the accused were ordered by the Single Judge of this Court to stop disseminating the documents. Did they do so? No, they did not. They continued.

After being warned about their conduct, after seeing the response of the SPO and this Court, they continued on their path,

encouraging further leaks and continuing to disseminate confidential information.

After the third time - the third time - the SPO obtained arrest warrants and the accused were arrested in Prishtine and brought to The Hague where they were charged with the crimes that were the subject of these proceedings, the very crimes that the accused committed on television.

The accused pled not guilty, as is their right, and insisted that the Prosecution prove their criminal liability beyond a reasonable doubt, as is also their right, and that is exactly what the Prosecution did. On the basis of overwhelming - and I mean overwhelming - evidence of guilt, the Trial Panel found that the Prosecution had proven beyond all reasonable doubt every element of five of the six counts in the indictment.

And at every stage of the proceedings, the rights of the accused and their ability to raise legal and factual challenges were fully protected by the Single Judge, by the Trial Panel, and by this Appeals Panel. The accused were permitted to challenge their detention, including to this Court, nine separate times. They obtained full disclosure related to the charges in the indictment and to their defences. In particular, the Trial Panel took pains to ensure that the accused received all disclosure related to the claims of entrapment, even though at no time - and I mean at no time, before trial or during trial or even today, yesterday - did the Defence offer any factual basis whatsoever for that defence.

The Defence were also permitted to challenge every aspect of the proceedings and the case against them. During the trial, which took place over 36 hearing days, the Defence were given a full opportunity to challenge the Prosecution's evidence, cross-examine the witnesses called by the Prosecution, and call 13 witnesses of their own.

MR. REES: Your Honour, I hesitate again to interrupt, but I'm afraid I feel I have to.

Firstly, because I would like to just remind Mr. Whiting what Your Honour said yesterday. That Your Honour, in fact, ordered, effectively, the parties were to refrain from repeating their cases --

THE INTERPRETER: The interpreters kindly ask the speaker to speak into the microphone. We cannot follow.

PRESIDING JUDGE PICARD: You don't speak in the microphone. The interpreters cannot interpret.

MR. REES: Sorry. Your Honour ordered the parties yesterday to refrain from stating their cases presented at trial, not leave it to the discretion of the parties.

Second matter that I raise, Your Honour, is this. Mr. Whiting has just misled the Court and those listening to these proceedings when he asserted that the accused received all disclosure related to their claims of entrapment during the course of the trial.

Your Honours know, because Your Honour has made orders post the trial, that that is not accurate. That all disclosure related to entrapment was not --

PRESIDING JUDGE PICARD: I'm going to --

MR. REES: -- provided during the --

PRESIDING JUDGE PICARD: I'm going to --

MR. REES: -- course of the trial.

PRESIDING JUDGE PICARD: I'm going to interrupt you. We listened yesterday to your arguments about disclosure, and we are very aware of what you said yesterday and what is written in your brief as well.

MR. REES: Well, it's one thing to argue matters, but if Mr. Whiting is going to state matters of fact, as he said, then he has to be accurate. And he has just misled the Court and those listening to these proceedings when he asserted -- and he knows that he is not accurate when he asserted that full disclosure relating to the claims of entrapment was received during the course of the trial.

PRESIDING JUDGE PICARD: Okay.

MR. REES: He knows that that is inaccurate.

PRESIDING JUDGE PICARD: We take note of your submission about that point. And, as I said, we are aware of what you said yesterday and what you wrote in your briefs. That's it.

MR. REES: Your Honour.

PRESIDING JUDGE PICARD: And for the rest, may I ask you to proceed, please.

MR. WHITING: Thank you, Your Honours. And, obviously, just to be clear on the record, every single thing I'm saying here is absolutely accurate. And Defence counsel, I think, knows that.

MR. REES: Well, I absolutely do not.

MR. WHITING: Mr. Rees, we did not interrupt your argument yesterday, however long it went. I ask that I please be allowed to proceed.

The accused complain that the Prosecution should have handed back to them the entirety of the batches which had been seized from them after they disseminated them to the media. This argument is both wrong and it is absurd. The Defence's position is that the only way that this case could be tried would be to return to the accused the very confidential and highly sensitive documents, including internal work product, that the accused disseminated to the public, a crime that they have repeatedly said they would commit again.

The Single Judge and the Trial Panel properly found that there exists compelling reasons, obviously compelling reasons, not to hand back the batches that had been seized from the very accused that had disseminated them, and they imposed counterbalancing measures to ensure that the Defence would have fully sufficient information regarding the content of the documents in order to be able to test them. And they did.

The issue regarding the content of the batches is, number one, did they pertain to SPO investigations; number two, were they confidential; and, number three, did they contain the names of protected witnesses. These three facts can be established based on the pages of the batches that were, in fact, disclosed to the accused.

Pause here for a moment. The three facts at issue regarding the content of the batches are established beyond any doubt by the pages that were disclosed to the accused. On top of that, you have the accused's own descriptions of the batches, because, of course, they saw and studied them, the testimony of the accused at trial, the reporting in the media regarding the batches, the testimony of Witness 4866, and the detailed table and evidence provided by Prosecution Witness 4841.

Let's be clear here. Let's be clear. The Defence were fully able to challenge and test the content and the authenticity of the batches, and there was clear and inconvertible evidence in the record supporting the Trial Panel's findings.

Given there was no doubt whatsoever about what the accused did in this case, the Defence resorted to a defence of excuse, that is, entrapment, and one of justification, that is, public interest. Both of these defences fizzled to nothing. There is simply no basis for either defence. And now that all the facts are in and have been assessed, we can say definitively what was clear all along, that these defences were and are legally and factually baseless without any foundation.

Throughout the proceedings, and still today, the Defence allege entrapment even though no facts have ever supported this defence. And, in fact, everything that the accused did and said, including their testimony at trial, belie this defence. As the Trial Panel found at paragraph 836 of its judgement, entrapment occurs when law

enforcement "exerts such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed."

Well, we know for certain - we know for certain - that this did not happen. And this addresses what I think was at the heart of Your Honour Judge Jorgenson's question yesterday about what evidence existed demonstrating incitement or compulsion. The answer to that question is none. There is no evidence whatsoever.

Let's put aside for a moment how the batches got to the accused. I'll get to that. We know for certain that the accused were not compelled in any way to commit the crimes that they did at the press conferences. At every stage - while committing the crimes, afterwards, and even during trial - the accused celebrated and embraced what they did.

They were not forced to do it. Mr. Gucati said that nobody but God could force him to call the three press conferences. They continued to do it, and they have said they would do it again. That is sufficient to dismiss the entrapment defence.

But, of course, it is also true that the batches were not given to the accused by law enforcement. Of course that did not happen. And in paragraphs 859 to 890 of the trial judgement, paragraphs which were skipped over by Defence counsel in their submissions, the Trial Panel methodically addresses and dismisses each of the specious arguments advanced by the Defence on this point, finding that there is simply no evidence of law enforcement involvement.

JUDGE JORGENSEN: Mr. Whiting, if I could just follow-up with you on that threshold of not wholly improbable, because Mr. Rees explained the Defence position yesterday that there was actually no evidential burden because of the nature of this argument. So I was wondering if you could address that point and explain a bit more clearly the nature of that burden, if there is one and what needs to be demonstrated, because also you have referred to the defence of entrapment but the Trial Chamber found it wasn't, in fact, a defence. So if you could clarify further, please.

MR. WHITING: Yes, thank you, Your Honour. So we do refer to it as times as a defence of entrapment as a shorthand, though, of course, the Trial Chamber found that it is a procedural mechanism related to the fairness.

In response to the argument that the wholly improbable test is not an evidential test, that is plainly wrong. That cannot be. If that's the case, it's a meaningless test because all that would be required then is for the defendant to simply say the words "entrapment" and then that would put a burden on the -- no matter what the circumstances, as long as the sentence, as long as -- as Defence counsel said, an allegation is sufficient. As long as an allegation, on its face, was coherent, then the burden would be on the Prosecution to prove a negative, to disprove the Defence.

It plainly requires more than that. It's plainly an evidential burden. It's not necessarily a high evidential burden, but it can only be tested by evidence. And the Defence implicitly conceded this

at trial, because they sought desperately to advance evidence through specious inferences that would support the Defence and shift the burden.

And, in fact, yesterday, Defence counsel also tried to offer evidence, even though he argued that it wasn't an evidential test, he actually advanced some evidential arguments, arguing that Mr. Gucati had -- had put in play the Defence had offered evidence by, number one, arguing that because the batches were provided to him, he was able to commit the crime. That's, obviously, not sufficient to meet the test, because that would be true in every case. It's not mere opportunity. It's not a but for test that satisfies. The test has to be more than that.

And, secondly, he argued that on the occasion of the first batch being delivered, the person delivering the batch said something like, I don't remember the exact words, but "provide this -- give this to the media" or something. That's, obviously, insufficient to show any kind of incitement or compulsion. Again, opportunity is not what is required. There has to be some minimal - minimal - threshold of evidence showing incitement or compulsion.

And here, it's not just that there's a lacking of that evidence, all the evidence, including the evidence from the accused, goes the other way. It goes the other way. It shows that they were not compelled. That they did this -- the accused, by their own statements, say they did this willingly, they encouraged it, they continued to do it even though they were told that law enforcement

didn't approve it. And they have continued to embrace it at trial. They've said nobody but God could compel them.

So the evidence shows that they -- affirmatively, that they were not compelled. I hope that answers Your Honour's question.

JUDGE JORGENSEN: Thank you, yes.

JUDGE AMBOS: Could I just follow up with a follow-up question on my colleague. The human rights case law in this case is Article 6 case law, the European Court of Human Rights assumes that there is police involvement in these incitement cases. That's the obvious situation of all our case law in Strasbourg. And here, of course, this is not the same.

So my question to you is what is the consequence of this factual difference, that in the Article 6 case law we know that definitely police was involved to incite someone to commit a crime, while here there is, of course -- we are unaware of any involvement of anybody. So does this make a difference in terms of the test we take from Article 6?

MR. WHITING: Well, Your Honour, so we have argued all along, and continue to argue, that there are two parts of the test. One is, as you say, law enforcement involvement; and the second is that there's some degree of compulsion or incitement. I just addressed the incitement and compulsion.

As far as the law enforcement involvement, we say, yes, there's been no evidence at any point of law enforcement involvement. Therefore, in our view, it's inapplicable. It is wholly improbable.

It's been wholly improbable from the beginning to the end that this is a defence, that the accused were entrapped, both because there was no law enforcement involvement and, secondly, because there was no incitement or compulsion.

And if the Appeals Panel affirms the Trial Panel on its factual findings, which should receive deference, that there was no compulsion, then this ends the matter and there's no need to inquire any further.

In sum, the evidence is clear that there is no compulsion, no entrapment, and no reason to disturb the findings on appeal.

The public interest defence fares no better. Defence counsel claimed that the accused were seeking to show that the Prosecution had cooperated with Serbia. That is obviously false. The conduct and statements of the accused show without any doubt that their goal was to try to undermine this institution, to bring it down and cause its collapse as well as to intimidate witnesses and potential witnesses.

This defence of public interest fails and it also fails completely.

At the end of the day, this case is simple and it is straightforward, even if it is very grave. The accused committed the crimes with which they were charged. They did so openly. They continued to embrace their cause. They remain unrepentant. They have shown no remorse. They have said they would commit the crimes again given the opportunity.

Given the consequences of their acts and their stated motivations, the sentence of four and a half years is both justified and it is just. Part of the reason this Court was established and put in The Hague was to combat efforts to intimidate witnesses and undermine the Court, the conduct of the accused in this case. We submit that this case has shown definitively that this Court can counter such efforts through processes that are legal, fair, fully protective of the rights of the accused, swift, and just.

On that basis, Your Honours, we ask you to affirm the convictions and the sentences, and I will now yield the floor to my colleagues, to Mr. Halling first, who will address more specifically the points that were raised by Defence counsel yesterday. Thank you.

PRESIDING JUDGE PICARD: Thank you.

Mr. Halling.

MR. HALLING: Good morning, Your Honours. So my colleague, Mr. Pace and I, are now going to respond in further detail to the Defence arguments made in this hearing and any further questions that the Panel may have.

We've divided the topics amongst ourselves as follows: I'll be focusing on the grounds of appeal related to the convictions found in the trial judgement, so this would be the applicable law, the factual findings, and the defences raised, including entrapment, we have a couple further points. Mr. Pace is going to be addressing the overall fairness of the proceedings leading up to those convictions - most notably the grounds concerning disclosure, as well as the

sentences imposed.

Your Honours, throughout this trial the Defence has run arguments that aren't there. They have presented strained legal interpretations of statutory provisions that have not withstood scrutiny from any Judge that has looked at them, and they have presented fanciful inferences that are completely unsupported by the evidence. And right at the outset, I wanted to contrast that with the trial judgement that is before Your Honours in this appeal, which is consistently grounded, reasoned, and restrained on all of these same points.

And the Defence is persisting in these tactics, they were doing it yesterday. And we can start with the crimes, and we can start with where they started, with intimidation. Specifically with this three alternatives theory that was discussed yesterday, where the language in Article 387 of the Kosovo Criminal Code is understood as modifying all three of those alternatives in the provision when it really only modifies the third, because the Defence interpretation does not make sense on the statutory construction of the provision.

Some of these reasons were discussed in Judge Ambos' questions yesterday, the qualification of information and such information within this part of the disputed language, the use of the word "true" appearing in some places and not others suggesting that proving truth or falsity is not necessarily required for every alternative.

The Gucati Defence showed Your Honours the Provisional Criminal Code of Kosovo on the screen yesterday, and Article 310, which is

argued as being an antecedent to Article 387 of the code. And it was described as being the same but for the difference being that the qualification language on organised crime was changed to the obstruction language that's in the provision now. It's not the only change.

Article 310 of the Provisional Criminal Code of Kosovo also had, in the title, "Intimidation During Criminal Proceedings for Organised Crime." It was not "for obstruction." It was not transposed in the same way in the new version. It just says, in the current provision, "Intimation During Criminal Proceedings."

And although we can't claim to know what the drafter said when Mr. Gucati said at page 23 of the realtime transcript that the drafters were acknowledging things about the provision. I don't know what he means. But the amendment of a legislative instrument can be an indicator of a legislative intent. And the way in which this particular provision was amended does evince a legislative intent that this is supposed to be construed broader in the current form than it was in the Provisional Criminal Code.

JUDGE AMBOS: Mr. Halling, what is the importance of the title for provision?

MR. HALLING: It gives an indication of the purpose of the provision. It's an indication of its scope.

JUDGE AMBOS: It's a title. Do we know that these titles are part of the provision? Because in the German law, it's not the case. In our criminal code, the title is not part of the provision. So I

am not sure. It is really a question. Is this part of the provision, or who added these titles to these provisions in Kosovo law?

MR. HALLING: Yes, we don't know ourselves exactly how these titles are constructed. We just find meaning in the fact that it is changed and, indeed, we draw meaning from that. We also would draw meaning, Your Honours, from the absence of authority from the Gucati Defence jurisprudentially that anything supporting this interpretation exists.

And turning back to the modern formulation of the provision, this is particularly notable because we have authority that this third-alternatives-covering-all thesis is not being followed by Kosovo courts. We provided Your Honours with two authorities. They're in Annex 2 of our brief, translated into English.

If intimidation could only lead to a conviction, under Article 387, if there were some predicate act of obstruction, these judgements that we've presented, which don't have anything like that, shouldn't exist. The Gucati Defence, and both Defence teams, in fact, have argued repeatedly throughout these proceedings and in their appeals that this Court is not sufficiently respecting Kosovo law and Kosovo jurisprudence.

But where are we here? All of the Kosovo jurisprudence is not on their side, and they are persisting in making the argument anyway. Incidentally, Mr. Rees is mistaken when he said yesterday that the Trial Panel made an under-reasoned finding on the third alternative.

That argument is dependent on their false interpretation.

If you look at paragraph 605 of the trial judgement, it is clear that the finding of guilt is made on the first alternative. So these factual findings don't appear in the judgement for the perfectly understandable reason that it was not necessary to reach them in order to convict the accused.

On consequences. There's no statutory language saying that the threat has to be successful. In this respect, the provision is more similar to analogous provisions of the ICTY and ICC than the Defence care to admit. And reading such a requirement of consequence into Article 387 of the code cuts against the protected interest.

Why wouldn't intimidating a witness who's still told the truth in the face of serious threats not still be a victim of the crime of intimidation during criminal proceedings? It feels more natural and logical to say that that should still be a crime, and the Defence interpretation cuts against that.

The serious threat of force is again reading language into the provision that isn't there. And the Gucati Defence's argumentation on this got extremely confused across pages 45 to 47 of the realtime transcript. When confronted with Judge Ambos' questions, the way that I understood Mr. Rees is that although the provision itself could cover compulsion, of which a serious threat without force would be, but that is not pertinent in these proceedings because the Prosecution charged it in a way that the serious threat of force needed to be proven.

To deconstruct this argument. The SPO has alleged conduct falling under the scope of the provision, but the accused should, nevertheless, be acquitted because additional words could have been written into the indictment that weren't. Such an argument doesn't have substance. The SPO charged the case under the provision with conduct that fell within its scope. The Trial Panel entered a conviction on same.

On the volume of witnesses and in relation to the secrecy of proceedings, which I'm about to turn. Needless to say neither the indictment nor Article 387 of the code have any particular quantitative threshold of how many witnesses need be intimidated. It's incumbent on Defence when raising appeals to be able to explain why the remaining evidence would not still support a conviction in the judgement, and on this particular point the Defence fails to do so.

Just to share one such exhibit that was discussed and quoted in paragraph 567 of the judgement. This was another one of the exhibits finding the serious threat. And it's Mr. Haradinaj speaking at the first press conference.

And if I can turn Your Honours' attention to the screen.

[Video-clip played]

MR. HALLING: "No one is unknown." This is what they say when they get the first batch. There is ample evidence supporting the Trial Panel's findings and no error is established.

As I said, this is related to the secrecy of proceedings because

the Defence misrepresent, again, the Trial Panel's findings. On page 39 of the realtime transcript, Mr. Rees said:

"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."

That simply isn't true. The finding in the judgement is not identified. What I suspect is being referenced here is in relation to paragraph 547 of the judgement, which is about Count 6, not Count 5, and it's about the witnesses for whom a finding of serious consequences was made. And you can see that it is not just one witness. It's the two witnesses who were relocated. It was the witnesses who were subject to emergency risk planning, and it's for the person who was publicly named as a witness. Those are the witnesses at risk.

Incidentally, the redacted person, who is underlying Gucati Ground 11, the SPO never confirmed whether this or any other person was involved in SPO investigations. I would also note, and this is in the public part of the judgement, that this witness is an Albanian, not a Serbian, person. So the notion of public interest which arises in the appeals, that this was to expose the SPO's collaboration with Serbia, simply does not square with this evidence relied upon by the Trial Panel. If anything, the Trial Panel could have added more to the serious consequences and decided not to do so.

It's not part of the trial judgement. And we can direct Your Honours to paragraph 205 of our SPO final brief at trial, where

there was additional evidence on admitted contact notes that could have been used. The Trial Panel decided not to do it in fairness to the Defence. They limited the finding only to evidence that they felt could be sufficiently challenged. And that finding should be given deference on appeal and no error is established.

There was discussion yesterday about legal sources in Kosovo that are simply not incorporated into the KSC's law. This is an express requirement in Article 3(4) of our law. This includes the classification law, which is neither incorporated by reference by the KSC's law, nor is it incorporated in any other way in the Kosovo Criminal Code provision underlying Counts 5 and Count 6.

So the word "secrecy" being defined in the same way as that other law would be an incorrect statutory interpretation. The correct interpretation is to use the word "secrecy" in a generic sense, which is exactly what the Trial Panel does in paragraph 78 of its judgement.

And, incidentally, this came up again yesterday. The indictment is quite clear that both of the alternatives underlying Count 5 must not be revealed according to law, or has been declared secret by a decision of the court, both of those are charged in this case. You can see it in paragraph 33 of the indictment, and it's why the Trial Panel is allowed - and did - make findings on both alternatives.

There are other arguments that were referenced in the written briefs that didn't come up yesterday in relation to the secrecy of

proceedings counts for the reasons that were discussed in our brief. The perpetrator need not have been party to the proceedings in which the protected information was disclosed. The SPO is, indeed, a competent authority to classify information. There is no evidence of abuse of that authority.

And, in fact, both Prosecution and Defence witnesses agreed that it is standard practice to mark investigative activities as confidential. And the evidence before the Trial Panel that's cited in the judgement shows that the accused know this.

I can show another video. This is from an interview that Mr. Haradinaj gave. This is from P8, page 26, it's cited in paragraph 593 of the judgement.

[Video-clip played]

THE INTERPRETER: [Voiceover] "The first batch was only intended to tell us, you poor morons, you fools, you spies, do not think that someone will protect you. They will only exploit you. No one has ever protected a spy after exploiting him. On the contrary, he has been either killed or discredited. How can you have such expectations, to betray your people, your army, lie, concoct what evidence provided by the enemy."

MR. HALLING: Could no reasonable Trial Panel concluded that these accused had awareness that they were protected people in the materials before them? This is also related to a repeated refrain of the accused that is discussed in paragraph 590 of the judgement, that there is repeated statements that the accused tell others not to make

names public.

There is an example of this from Gucati's testimony, which is cited in the trial judgement at paragraph 374.

[Video-clip played]

THE INTERPRETER: [Voiceover] "First and foremost, I'm sorry that you say 'distributed.' We have not distributed anything. We placed the documents on the table. Whoever wanted to take it was free to do so. That's one.

"Secondly, I've told the media and everyone else that the names should not be made public, which is what I've been abiding by throughout my life. That you need to protect the privacy of anyone, be it a Serb, an Albanian, a Roma, an Ashkali, and that has been the standard that I've been abiding by throughout."

MR. HALLING: For the reasons in the judgement, the Trial Panel sees through the accused that when they give information to the media indiscriminately without redactions while saying that they're not making names public, that that is unsustainable on the evidence. That finding needs to be given deference, and there is nothing in the Defence appeals, nor anything they said yesterday, which would justify a reversal.

As to the obstruction convictions. And this was discussed yesterday. It's perfectly natural to interpret Article 401 of the Kosovo Criminal Code in a way to include an attempt to obstruct an official person through conduct directed at other persons or objects. The intent to obstruct the official person would still be clear in

such circumstances.

At the end of the hearing yesterday, Mr. Rees said that what should be the correct law is borrowing from what Judge Barthe was saying in his separate opinion on Count 3 into Count 1, to try and create a mental element that doesn't exist. Incidentally, someone who would disagree with doing that would be Judge Barthe. His separate opinion is limited on making a direct intent only finding on Count 3. He does not transfer that logic to Count 1, meaning that the decision in the judgement that he signed, that the standard rules of intent apply when interpreting this provision, continues to apply.

Your Honours were read the Salihu treatise yesterday by Mr. Cadman on this. The excerpt was not read in full. And I would encourage Your Honours to go back to the beginning of that paragraph on page 1165 of the treatise, because the Salihu authors give some context to what they mean when they're talking about directing the obstruction in a way that is in consistent with the reading of the Haradinaj Defence. This is what's said. So it's talking about the perpetration in page 1165 of violence directed against objects, and it gives an example. And the example is:

"... for instance, damaging the measurement instrument of a surveyor to prevent him from surveying the land."

This is in the authority that the Haradinaj Defence was reading to you yesterday. That is a clear example of actions directed at an object. And this shows that the specific intent kind of readings that were being offered are inconsistent with the very thing quoted,

and a treatise which is relied upon favourably by the Defence in other contexts.

It's clear that the Defence almost seems to have awareness that they have overpitched the mental element when talking about the exchange in the transcript yesterday at realtime transcript page 77, when Judge Ambos was giving the example of obstructing a private witness while attempting to obstruct an official person. And what he said was interesting. He said that, yes, that might be possible, but the evidence doesn't support it.

I hate to inform Mr. Cadman, but Ground 18 of the Haradinaj appeal brief, of which this error is alleged, is alleged as an error of law. As soon as the Haradinaj Defence acknowledges that that is possible under the provision, an X should just be drawn through that ground. It's not an error of law anymore. And, of course, it's not an error of law. The Trial Panel's interpretation of the provision makes sense.

Incidentally, this is another provision where there has been meaningful legislative amendments to it, and it's discussed at paragraph 144 of the trial judgement. The provisional code in Kosovo in the equivalent article had the phrase "by force or threat of immediate use of force," which is now "force or serious threat." So there was a threat of force in the provision that has been removed, and this needs to be understood when interpreting the authorities discussing provisions in the antecedent's history of this.

There was reliance on the *M.I. et al* case in the appeals brief.

It was mentioned again yesterday. *M.I. et al* is discussing the provisional code provision, which means it has different statutory language and different elements, and that this needs to be borne in mind when using that judgement in any context.

This judgement also comes up in the context of Count 2, which wasn't discussed much yesterday but which I wanted to briefly address. Faton Klinaku himself had intent to obstruct SPO officials for the reasons stated in the judgement. Either direct or eventual intent suffices to participate in a group who attempts to obstruct by common action. And you can see from the reasoning culminating in paragraph 700 of the judgement that Mr. Klinaku is found to have at least eventual intent.

This also comes up in the context of cumulative convictions, which are related to Ground 14 of the Gucati appeal, and which I also wanted to briefly address.

The cumulative convictions test adopted by the Trial Panel is appropriate, it is completely within the bounds of Kosovo law, and it's a good test. For someone who agrees, I can give a quote. That when asked about this test, this reciprocal speciality or materially distinct elements test, that "their general sense and principles, that I think they should -- that the Court should, indeed -- must apply, not because necessarily Your Honours are bound by those cases from other jurisdiction but only because they set out very neatly what are general principles of assessment of culpability and sentencing."

That quote, Your Honours, is from Jonathan Rees at the closing statements. This is pages 3823 and 3824 of the transcript. And there is wisdom in using the materially distinct elements test. Amongst other reasons, it is time tested. There is a wealth of valuable ICTY jurisprudence in particular that interprets the contours of this test that allows for more reliable application of it if it's used at the KSC.

JUDGE AMBOS: Mr. Halling, can I just interrupt here. I have a few questions for you.

Before coming to the test we should apply or not as to the relationship between para (1) and (2) of 401, I still have to come back to Article 387. I don't know if you come back to this article. Maybe you come back to it, but I wanted to ask you this question anyway. How do you interpret the element to induce in this article?

MR. HALLING: The same way as the trial judgement does, Your Honour. It is not a statement of specific intent. We argued at trial that it is meaningfully different from the way Article 388 is interpreted. And, actually, the Trial Panel didn't even find specific intent there. So there is no reason why the general rules in Article 21 of the code wouldn't apply to that language.

JUDGE AMBOS: Since you referred to the separate opinion of Judge Barthe, you are certainly aware that we have a principle called principle of legality, *nullum crimen sine lege*, which is applicable under Kosovo law, Article 2(3) of the Kosovo Criminal Code. According to this principle, one should certainly interpret

provisions in a strict sense, in a very precise sense, and terms which may indicate a narrow definition may be interpreted that way. That actually was the core of Judge Barthe's argument in this part of his separate opinion.

So if I understand your position correctly, you give no weight at all to the verb "induce," so we could also remove this word from the provision. It wouldn't make a difference.

MR. HALLING: I don't know if I would go so far as to say that, Your Honour. But just that the way in which the provision is constructed, there is no indicator that anything other than the default mental elements of intent would not apply to the provision. As we argued in our brief, even if Judge Barthe's opinion is accepted, it is a separate opinion and the reason why is that he agrees that direct intent is present in Count 3. And as long as that finding is upheld and there's --

JUDGE AMBOS: Yes, that's another issue. Of course, one could still say when you -- that if we accept direct intent, we say direct intent -- you say direct intent has been proven. So then that's just an academic debate, but that's another debate. Okay, but I take your point.

And if you say default element in intent, what do you mean by "default element"?

MR. HALLING: Perhaps my time at the ICC is betraying me, but I'm making reference to Article 21 of the code which gives the definitions of direct and eventual intent which is used consistently

by the Trial Panel in interpreting all of the crimes that are charged.

JUDGE AMBOS: So you mean *dolus eventualis* as a default element?

MR. HALLING: You could call it that. It's direct or eventual intent being sufficient and if -- eventual intent seems to be analogous to *dolus eventualis*.

JUDGE AMBOS: Absolutely. So then let us have a look at Article 401. Just to come back to this discussion we had yesterday. Actually, at the end of this -- I'm not sure what happened to our dreams finally. But if you go to the wording again, to 401(1). I think we all agree here that we have to interpret these provisions on their wording. Take them seriously. Okay?

Also in terms of legality, which is part of Kosovo law. If it says "attempts to obstruct an official person," attempts to obstruct an official person, I just wonder does this not imply that even in the case of attempt, the person who attempts must target an official person?

MR. HALLING: The key word in Your Honour's question is "target." We disagree with the Defence when they say that there is a kind of specific direction requirement in this provision, because the statutory language doesn't have it. But we would accept that whenever you are obstructing or attempting to obstruct the official person, you do have to have the attempt to obstruct that official person even if your actions are directed at third persons or objects, and we think that's reconcilable with the principle of legality.

JUDGE AMBOS: Now I'm even more confused. But you would agree that the full commission in the sense of a complete fulfilment of the *actus reus*, a consummation of the offence, requires that you obstruct an official person as said in the provision. You would not say that it would be sufficient to obstruct a private witness under this provision.

MR. HALLING: Yes, and this is the Trial Panel's finding as well, and it's why the full commission wasn't found to be established.

JUDGE AMBOS: So that's the reason why the Trial Panel goes for attempt, actually. So what is the construction of attempt then in your construction? How do you explain to us that this was an attempted obstruction even if it was not directed against official persons?

MR. HALLING: This was the stated admission of the accused, Your Honour, to abrogate, to destroy this institution, and they are revealing this protected information in order to destroy our operations. This is when you see in the evidence of the Trial Panel's judgements about wanting to undermine the Court, wanting to destroy it in five minutes. You've seen these paragraphs. This is their intention.

And so even if the acts might be directed or targeted on some level at private persons, the official person is still there and the Trial Panel's findings support that.

JUDGE AMBOS: So then let's talk about the relationship between

para 1 and 2, this whole issue of *concours d'infractions*, or what you call cumulative convictions. You, of course, take the Blockburger test which is US Supreme Court case law and you apply it to Kosovo then, taking it from the ICTY case law. But I think we -- we agree that we have to apply Kosovo law here, now. We have to, of course, apply our law, and the Kosovo law, the Kosovo Criminal Code. And it seems clear to me, to be very straightforward here, that the Kosovo law applies *concours d'infractions*, that's *Idealkonkurrenz in German terminology, concours d'infractions* in French, so that's a classical *concours idéal*, *concours réel*, possibly of subsidiarity as quoted in the Supreme Court decision of the Kosovo Supreme Court.

So first if you would agree that we have to apply not per se international law but Kosovo law as to criminal law, would you agree to that or not?

MR. HALLING: I would agree to that but on this particular occasion they're compatible, and I actually think I can prove it with an authority if I can present a hard copy to Your Honours.

JUDGE AMBOS: Which authority?

MR. HALLING: This is an Appeals Panel Court in Kosovo. It is the *K.P. et al* judgement. The full citation is PAKR-1122/2012, 25 April 2013.

JUDGE AMBOS: I would be very much interested to read this. So you argue that the Kosovo -- this authority, Kosovo authority, Kosovo authority, basically quotes the Blockburger test and says the Blockburger test is the same as *concours idéal*.

MR. HALLING: If I could take the indulgence of the court officer to hand these to the Judges, there's enough copies for the staff and one for each Defence team as well. And the key paragraph will be paragraph 28.

JUDGE AMBOS: So the argument would be that Kosovo law accepts, at least, the Blockburger test? We can check this, of course, with this authority, this one authority. Thank you. But would you think that's possible also to apply the *concours* test which, of course, is -- actually that's a test we apply in German and French law and it comes from the continental European law. It was said by the Trial Panel they don't understand, in the Trial Panel judgement, what this means. They didn't understand this reference of the Kosovo Supreme Court where this *concours idéal* was applied. That should certainly be not the reason for Judges not to apply something. If we don't understand, we should try to understand it, no?

So my question is, wouldn't you agree that it is at least an open question what test we apply, I mean, and not so quickly -- even if we have this one authority, which I will check later, if we have clearly a tradition where -- the continental European tradition with the *concours* test, *concours d'infractions* test is applied, and, again, our constituency is Kosovo and we should apply, if possible, Kosovo law.

MR. HALLING: I appreciate that, Your Honour, which is why we've tried to find a Kosovo court authority on this. I guess where we would agree is that principles of international criminal law on

cumulative convictions are an available interpretation under Kosovo law. It, perhaps, is not necessarily the only one. Judge Barthe is an example of this.

Judge Barthe applies principles much more oriented in the civil law tradition and reaches exact same results in this case. We think that it is important to apply this test, and we think that there are other cases of this Court where this same question is going to arise.

But for purposes of interpreting the Kosovo Criminal Code, there seems to be multiple ways to interpret it. I would agree with that. But the *M.I. et al* one is not a correct interpretation. And even Judge Barthe would say on Your Honour's question that if you follow that path, the conviction stands.

JUDGE AMBOS: And that brings me to my other follow-up question, you already anticipated it, and that is, of course, the practically relevant question. And that is how do we interpret the relationship between 1 and 2? Because the key issue here is can a person be convicted on both counts. Now counts in the sense of the provisions, okay? The one is an individual threat, para 1. And another is another a kind of collective group offence.

What is the difference between these two provisions which justifies, as done by the Trial Panel, and as taken as your position, that a person is convicted for both -- for the same conduct for both provisions?

MR. HALLING: On the materially distinct elements test, the answer is straightforward: There is one element in Count 1 that is

not in Count 2, and vice versa, and, therefore, you can enter the convictions for both. If you take the logic of Judge Barthe, there is a *concurrence idéal* because the protected interests are different, focusing in particular on the group element in Count 2 and that that is a different protected interest than what is in Count 1.

One authority that might be relevant in this regard, Your Honour, is the *Bemba et al* appeals judgement. If you look at paragraph 751 of that judgement, you actually see the ICC Appeals Chamber confronted with a very similar question to what we are talking about now. This was a trial judgement in a contempt case that made findings with what you call the Blockburger test, and it seemed to be an Appeals Chamber Bench that had different views, because there is words like "subsidiarity" in this paragraph that are borrowing more from the civil law tradition.

But the Appeals Panel said that it is arguable that "a bar to multiple convictions could also arise in situations where the same conduct fulfils the elements of two offences even if those offences have different legal elements. For instance, if one offence is fully consumed by the other offence, or is viewed as subsidiary" --

THE INTERPRETER: The interpreters kindly ask the speaker to read slowly when reading. Thank you.

MR. HALLING: Ah, apologies.

"... or is viewed as subsidiary to it."

In other words, the Appeals Panel said you could do it a different way but did not overturn the trial judgement and actually

did not even overturn the legal interpretation of the trial judgement because the principles of consumption and subsidiarity would have led to the same result. So it's not an error having any impact on the decision, and you could actually resolve the question simply by just saying the *M.I. et al* authority is wrong and stopping.

JUDGE AMBOS: I saw that Mr. Cadman wants to say something, but can I just finish, with your permission, one last idea, and then Mr. Cadman can intervene.

That was very clear. Thank you very much for your explanations. I just wanted to clarify that the *concours idéal*, yes, corresponds to the Blockburger test but not subsidiarity/consumption. These are forms of what in French you would call *concours apparent*. They are fake *concours, Gesetzeskonkurrenz* in German. And this is really the issue here.

I understand your point, but the question is if one distinct element in two paragraphs of the same provision justifies a double-counting or double conviction if, for the remaining part, the second provision may be subsidiary. That's a thing we have to decide and that's really the key issue here apart from the rather academic discussion what kind of test we apply.

But now if Mr. Cadman could ...

PRESIDING JUDGE PICARD: Mr. Cadman, you wanted to intervene.

MR. CADMAN: [via videolink] Sorry, Your Honours. It was just a very small point. As I am appearing remotely, and, obviously, I can't stand up in court to get Your Honours' attention. Obviously, I

can't receive a hard copy of the *K.P. et al* judgement. I'd just ask that it be sent to me electronically so at least I can consider it during the break.

PRESIDING JUDGE PICARD: I believe it's possible to do that.

MR. HALLING: We'll send it, Your Honour.

Unless there's any further questions in relation to the cumulative convictions part of the Gucati Ground 14, I did want to turn to the entrapment discussion that was happening earlier today with Mr. Whiting and with Your Honour Judge Jorgensen.

On the evidence as found by the Trial Panel, any question of substantive entrapment simply doesn't exist. There is no evidence. It is found by the Trial Panel in what I would call withering detail that nothing supports this defence.

And just to point out the degree to which the Trial Panel considered everything, the last section of those entrapment findings goes into circumstantial indicators of the Gucati Defence. Not all of them appear in the Gucati Defence's final brief, and the reason why is because they changed their mind or abandoned some of them from the pre-trial brief to the final brief. These Judges took the step of going back to the beginning of the case just to make sure that they had addressed arguments that the Defence had raised at any time even if they did not land on them in their final articulation of their position.

In terms of the question of threshold. There is a threshold. It's a minimal threshold, as Mr. Whiting was describing. But the way

the Defence articulates this it's as if there is no standard at all. And I wanted to focus for a moment on Judge Kuris' opinion in Ramanauskas 2 because this was the authority that they presented yesterday. This is the description of an absolutist formula. This is the not wholly improbable test having an absolutist formula.

This is obviously this judge's opinion. It's not a judgement of the European Court of Human Rights as a whole. And in fairness to Mr. Rees, he did mention that Judge Kuris describes it as an absolutist formula a little lamentably, that he wished that it had been a little different, but it is absolutist.

But it's actually even more nuanced than that. This is another occasion where I would encourage Your Honours to read the part next to the cited opinion in the Gucati brief. If you look at paragraph 12 of the opinion, he talks about how the European Court of Human Rights has, at times, used the term literally in the absolutist way but says that this is infrequent, meaning that there is not uniformity on the absolutist view.

Perhaps more interestingly still, Judge Kuris says that it's possible to use principles of statutory interpretation to give the term "not wholly improbable" a more literal meaning. So it's not just that Judge Kuris is lamenting the absolutist formula, he is lamenting the absolutist formula, acknowledging that it is implied infrequently, in saying that there are statutory interpretation principles that give you a path to interpreting it better.

This is the champion authority of the Gucati Defence for the

legal points they were making. They borrowed time to get that case in front of Your Honours, but that's what it says.

There are other defences that are discussed in the briefs that did not come up very much yesterday. Whistleblowing was mentioned very briefly. The Trial Panel's findings on the law are quite clear. There is no employment relationship in this case. There is no evidence that accused were in such a relationship or associated with anyone that was. The interference with the freedom of expression rights is clearly described in the trial judgement as being in accordance with the law necessary and proportionate.

The public interest was fully considered including all Serbia-related arguments. The statutory framework of the KSC gives the SPO the legal entitlement to cooperate with Serbia. And for the evidence cited in the trial judgement, and I can direct Your Honours to paragraph 813, this was known at the time the batches were delivered. So the accused was not exposing that when they were exposing the batches. The only new information actually revealed by the accused's conduct was confidential investigative records and protected witnesses.

There is no evidence of improprieties in this trial with the Serbian authorities, and the Trial Panel considered what evidence there was in paragraph 814 of the trial judgement.

I don't know if there's much to say on the acts of minor significance ground that is also raised in this regard. I would just like to add to what we already say in our brief, but this is another

interesting example of the Defence teams briefly mentioning something in their pre-trial brief, abandoning it for the rest of the trial, and the Judges of this Trial Panel going back to the beginning to make sure that every possible thing was heard, considered, and reasoned when making all of their findings.

Your Honours, the convictions found by the Trial Panel were reached meticulously. Challenges against such rulings are going to end predictively. And the Defence, throughout this appeal, have been, in contrast to the Trial Panel, disorganised, selective, and misleading. Mr. Whiting said it this morning: The accused committed brazen crimes on videotape for all to see, but the Trial Panel found those crimes by measured determinations made in a transparent and reasoned manner. And the path by which they reached those determinations, as well as the sentences imposed, were fair and reasonable at every step.

And Mr. Pace will address you further on these points.

PRESIDING JUDGE PICARD: Thank you.

MR. PACE: Good morning, Your Honours. And thank you for bearing with me there for a minute until I set up.

I will start by addressing Gucati's Ground 2(A) and Haradinaj's Ground 4 concerning the non-disclosure of batches or parts thereof.

During yesterday's submissions, in particular by counsel for Mr. Haradinaj, we heard many references to concepts such as fairness, equality, and prejudice. But, mirroring the written submissions in appeal, there was no precision, no substance, and ultimately no truth

to those broad generic allegations.

Yesterday's submissions in particular ignored the active role played by the Pre-Trial Judge and the Trial Panel whenever disclosure issues arose. A role that was taken seriously, that allowed extensive submissions by the parties, and that disposed of issues in a transparent, reasoned manner, in decisions which were open to the parties to seek leave to appeal.

These decisions ensured that the rights of the accused were fully protected. The approach adopted in this trial was one which a reasonable trier of fact could follow and this approach should be given deference.

Defence submissions on disclosure attempt to muddy the waters, but the case record and the trial judgement are clear. The SPO did not seek to admit any non-disclosed pages of the batches into evidence. It would have been procedurally barred from doing so. And since they were not admitted into evidence, the Trial Panel could not - and did not - rely on them in the trial judgement.

This is not a narrow or misguided definition of evidence as the Haradinaj Defence alleges in its reply. This is reality. And the reality is that the Defence was not deprived of access to any evidence in this case.

Significantly, the Trial Panel had a wealth of evidence to rely on in making determinations related to the contents and confidentiality of the information made public by the appellants. The Trial Panel relied on more than any one piece or one category of

evidence in doing so. Among the evidence the Panel considered are the several pages of the batches themselves which were disclosed and subsequently admitted into evidence.

The Defence submissions gloss over this important factor, so I'd just remind you of some relevant information. The entirety of Batch 2, which is Exhibit P104, was disclosed with minimal redactions to the six pages thereof the SPO alleges contain confidential information. Both counsel yesterday, at pages 33 and 64 of the realtime transcript, made inaccurate submissions in relation to this batch.

There was also disclosure of six pages from Batch 4 and 11 pages from Batch 1. And I'd like to take a quick look at the disclosed pages from Batch 1, which are Exhibits P93 to 97, and 139 to 144.

And, Madam Court Officer, this is for broadcast only inside the courtroom.

In viewing these pages, Your Honours, you'll see, for example, logos of the SITF and Serbian authorities, names and signatures of persons employed by such organisations, references to the KLA, and references to confidentiality. Requests for information by the SITF to the Serbian authorities, including in relation to named individuals such as two of the persons who are now accused in *Thaci et al*. You will also see references to the dates and locations of SITF interviews.

The SPO also disclosed, and the Trial Panel admitted, 17 pages from the first set of Batch 3 and the corresponding pages from the

second set. And this includes the entire executive summary. Let's take a look at the first page of this executive summary.

And again, Madam Court Officer, this is for broadcast only inside the courtroom.

And this is the first page from P107. As Your Honours can see, either on your screens or later, this one page alone describes the scope of the entire document. It refers to the highly recognisable names of five individuals. And it also refers to several relevant locations in the first footnote.

Subsequent pages of this executive summary include headers and footers clearly featuring the SPO logo and denoting confidentiality, as you can see in this slide which is page 3 from the same exhibit. Other disclosed pages clearly identify by name alleged victims of various crimes, along with references to the location and timeframe of the crime. Footnotes refer to testimony, statements, and documentary evidence.

As mentioned by the Acting Specialist Prosecutor earlier today, these pages are by no means all the Trial Panel considered. They also considered the relevant contemporaneous statements made by the appellants to the media, testimony of the appellants during trial, media articles, and 4866's testimony. This Panel also relied on W04841 who gave facts and evidence and was competent to testify on all matters she testified on.

This evidence included charts which were a juridically ordered counterbalancing measure to ensure the Defence could know the

particulars of every single document contained in Batches 1 and 4 and the six pages from Batch 2.

Madam Court Officer, the next slide and all my following ones can be broadcast to the public.

We saw this exhibit yesterday during Defence submissions, and this is page 95537 from Exhibit P90. This is a chart prepared by 4841 on which she was also cross-examined. And as you can see on your screens, or you should be seeing on your screens, it includes descriptions, dates, and information on origin or authorship, along with information suggesting the confidential nature of the document and whether any names of potential witnesses or witnesses were mentioned. You're seeing this on your screens now, I believe.

Again, for the record, this is from P90.

When Your Honours consider these various mutually corroborative items of evidence, it is clear that the Panel had a solid basis upon which it could reach the findings that it did. It's important to recall that the Defence chose not to seek leave to appeal the Pre-Trial Judge's decisions ordering non-disclosure of the batches. In his reply, Gucati asserts leave was not sought because unfairness did not arise out of non-disclosure, and this concession is important, Your Honours.

Gucati acknowledges that the fact the SPO was authorised not to disclose the batches was not unfair. His argument that it was the Trial Panel permitting the SPO to adduce evidence about non-disclosed excerpts that resulted in unfairness ignores, for example, the

disclosed charts and the extensive cross-examination W04841 was subjected to. Both of which ensured that the accused's rights were fully respected.

There was no unfairness.

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

MR. PACE: Yes, with my apologies to the interpreters, I will do my best.

It's also important to recall that, as the Trial Panel noted, the Defence did not challenge evidence of Haradinaj Expert Witness DW1253. That, as a matter of practice, the record of ongoing criminal investigations was confidential and is validly lifted by a competent authority, and that this would include, for instance, internal work product and all information pertaining to witnesses.

Finally, the Appeals Panel should also bear in mind some of the reasons why the SPO was authorised not to disclose the entirety of the batches. It was telling that on appeal, including yesterday, the appellants did not even attempt to attack such reasons. Let's have a look at a few excerpts from video evidence which may explain this approach.

As I mentioned, the next and all other exhibits I will be displaying are all public.

[Video-clip played]

THE INTERPRETER: [Voiceover] "If I was working -- even if you sentence me to 300 years, I will do it again. I'm speaking on my

behalf, on behalf of the whole people. We are ready to face 300 years in prison. We are ready to die."

MR. PACE: That's Mr. Haradinaj on 22 September 2020 stating he would still disclose the documents at issue even if he were to be sentenced to 300 years. And, Your Honours, that's from P35.

[Video-clip played]

THE INTERPRETER: [Voiceover] "Journalist: So even if there would be a penal consequence as a result of this, you have no regrets that you are publicising this?

"Hysni Gucati: Not even a millimetre, even if they were to give me five years in prison, I would be more than ready to answer the call of the Special Court about the publicising of the files ..."

MR. PACE: That was Mr. Gucati, also on 22 September 2020, stating he had not even a millimetre of regret for publicising the documents at issue, "even if they were to give me five years in prison." And that's from Exhibit P28.

The accused even indicated they would commit further crimes of the same nature to the Trial Panel during their testimony as we can see from the following two excerpts.

[Video-clip played]

"Q. Mr. Haradinaj, that doesn't answer my question. I'll ask it again. So you would" --

"A. No, don't ask the question. If you bring them, I will act the same, because I am convinced that I acted rightly and I did it in the interest of informing the public and for the sake of

transparency. I think that, I have that conviction, that it was appropriate.

"Q. Would you do it all over again?

"A. I said it earlier as well yesterday and the day before. I'm not a guardian of anyone, so of this institution or of the offices here in The Hague. I look after the work for which I'm paid. So please do not provoke me with questions regarding this documentation."

MR. PACE: That's Mr. Gucati being asked whether he would repeat his conduct all over again and making himself very clear. That was on 8 December 2021, while the Haradinaj excerpt we saw just before was from 13 January 2022.

Your Honours, the reasons why the SPO was authorised not to disclose the entirety of the batches are unassailable.

I turn briefly to Haradinaj's 16th and 17th grounds of appeal which also concern disclosure and fairness.

I first note that there is no item admitted into evidence that the Defence was barred from commenting on or challenging, and Haradinaj's reply seems to accept this. Haradinaj's challenge in these grounds seems to be to the procedure foreseen in Rule 108. It would defeat the purpose of this rule if the items at issue were to have been provided to the Defence before the relevant determinations.

Haradinaj's insistence in his reply that he should have been a participant in *ex parte* hearing where this was the subject matter is illogical.

I next turn to the issue of sentencing, which is addressed in Gucati's Ground 20 and Haradinaj's Ground 24 and at some length yesterday.

The sentence imposed fits the circumstances and the gravity of the appellants' crimes. The focus here, Your Honours, should be on the appellants' crimes, on the crimes the Trial Panel found the appellants committed. Not those they did not commit. Not those committed by persons who are not the appellants, in courts which are not the KSC, for crimes within contexts which are not those we are dealing with in this case.

In their appellate submissions, including yesterday, the Defence is not saying the Trial Panel should have compared like with like because, at least to our knowledge, and based on the cases cited by the Defence, there is no case quite like this one. Indeed, yesterday you heard Mr. Haradinaj's counsel explicitly acknowledge that "all the cases mentioned differ significantly from the case of Mr. Haradinaj." Indeed, the cases the Defence refers to are not just not on all fours with this one, to borrow an expression from yesterday. The SPO's brief in response touches upon certain differences in the cases cited by the Defence.

But just to mention one difference to a case referred to only yesterday, and that is the Margetic case, for example. At paragraph 88 of the judgement, the ICTY Chamber noted that, at trial, that accused did not persist with an attitude which showed reckless disregard for the safety of witnesses. In this case, the one we are

dealing with today, the Trial Panel heard the accused themselves on the stand indicate they would commit their crimes all over again. We heard that minutes ago.

In his reply, Gucati argues that none of the authorities cited in footnote 417 of the SPO's response brief go as far as the Trial Panel did in its approach to sentences by other courts and tribunals. Let's consider some of the authorities the SPO cited in that footnote.

On your screens, Your Honours, is one of the authorities cited in the footnote, and this is from paragraph 22 of the STL contempt reasons for sentencing judgement in the Al Khayat case. As you can see here, the Judge in this case stated:

"Finally, I note that the case law of other international tribunals cited by the parties concerns cases that, quite clearly, are factually very different from this case. As a result, in determining the sentence to be imposed on Ms. Khayat in this case, I cannot be guided by the penalties imposed in those cases."

In another authority cited in this contested footnote, this on your screens now is paragraph 32 from the ICTY Babic judgement on sentencing appeal. The ICTY Appeals Chamber stated, as you can see:

"... the precedential effect of previous sentences rendered by the International Tribunal and the ICTR is not only 'very limited' but 'also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence.'"

One final excerpt to consider from our footnote 417, the contested footnote, is from the ICTY Appeals Chamber in the case against Slobodan Milosevic, where in the decision on interlocutory appeal on Kosta Bulatovic contempt proceedings, that Chamber held at paragraph 62:

"The Appeals Chamber is also not satisfied that the circumstances of this Appellant should be compared to the circumstances of other accused convicted of contempt by this Tribunal. Trial Chambers have the discretion to tailor sentences in contempt proceedings as they find appropriate, and so long as the sentences are merited by the individual circumstances of a case, a Trial Chamber is not obligated to consider whether the same sentence has been given for a more or less serious contempt charge in another case."

JUDGE AMBOS: Can I just ask you a question here. Would you say that consistency in sentencing is a goal we should pursue in this court and in international criminal courts? And are there limits -- second question, we all agree that each case is different. That's a kind of truism. But are there limits to discretion in sentencing?

MR. PACE: Thank you, Your Honour. I'll start by the second question. And the limits to discretion and sentencing in this case are very clearly set out in the sentencing ranges provided for the individual crimes which the Trial Panel, of course, as obliged, entered separate convictions of and then one sentence reflecting the totality of the criminal conduct.

So, yes, there is a discretion in the abstract. Our argument, of course, is that in this case there was no abuse of discretion whatsoever.

As to consistency in sentencing and is that a goal we should pursue, yes, there should be some consistency, Your Honour.

And one aspect that the Defence entirely ignores in this argument about how the Trial Panel approached the other courts and tribunals is the fact that, although having given, in our submission, very adequate and just reasons as to why they did not follow the sentence in those other cases, you will find the sentencing section of the trial judgement is littered with references to the jurisprudence of other courts and tribunals in terms of the principles to apply.

So when it comes to the gravity, when it comes to aggravating mitigating factors, the Trial Panel was very well aware, and in some way, at least, to Your Honour's question, seeking to assure a consistency of that nature. And to finalise the submission, by not following blindly the sentences in other courts, it is our submission, that, in fact, this Trial Panel was being consistent with the jurisprudence, including that which I just referred to.

Thank you, Your Honour.

Yesterday, the Defence attempted to paint you a watered-down picture of the impact of the accused's actions, including what seems to be a fundamental misunderstanding of what relocation could mean to an individual.

Since the Defence submissions focus so much on other cases and aspects allegedly absent from this case, I will remind you some of the factors the Trial Panel considered in sentencing in this case.

In paragraphs 979 and 1004, for example, the Trial Panel considered that the unlawful dissemination was on a wide scale, that the appellants used an organisational platform, that they repeated their conduct, that they vowed to undertake the same offences again, and they made disparaging remarks towards witnesses in a climate of witness intimidation, and that there was the potential effect of protected information being accessible for a long time to a large number of persons.

On this issue of impact, I also remind you that one of the Defence's own experts explained that it's not only any particularly mentioned witness that is impacted by actions such as those of the accused but the witness community more broadly.

The arguments repeated yesterday that Gucati mostly revealed protected information to the professional media and that this reduced the risk and ought to have been reflected in the sentence ignores, for example, the trial judgement finding that the "massive amount of information revealed was revealed in an indiscriminate manner, without any effective precaution, such as redaction of names or selective revelation of information, and a general indifference to the possible consequences of such acts."

And that was from paragraph 964 of the trial judgement.

I also here refer to the Defence's own expert witness,

Ms. Myers, who described a person's decision to go public with information, as the appellants did, as the "nuclear option or the option that is the most difficult to manage." And that's from the transcript in this case on 21 January this year.

The Defence also either forgot or ignored the finding that the actions, such as those by the appellants, "could have had the effect of preventing the SC/SPO from fulfilling their mandate and could have resulted in victims of crimes under SC jurisdiction being denied their right to truth and have access to justice."

And that, Your Honours, is from paragraph 968 of the trial judgement.

Other Defence arguments on sentencing also fail to establish any error. By way of an example, the Trial Panel appropriately considered the climate of witness intimidation in Kosovo. To ignore this climate would have been to ignore reality. Haradinaj misrepresents the basis for the Trial Panel's findings in this regard as set out in paragraphs 165 to 167 of our response brief.

Arguments that the Trial Panel did not properly reflect the roles of the appellants are based on a skewed reading of the trial judgement, which provides every support for the imposition of identical sentences on both accused.

Your Honours, there was no error in sentencing.

Turning briefly to Haradinaj's 5th ground of appeal. The Trial Panel's decision to clarify or define the elements of the crimes and modes of liability in the judgement and not before was not

erroneous.

THE INTERPRETER: Counsel is kindly ask to slow down.

MR. PACE: Yes, I will.

The parties had equal access to the indictment, the law, and the Kosovo Criminal Code, and the Confirmation Decision. The SPO also made it clear that the elements as set out in the Confirmation Decision were relied upon as a normative basis relevant to the presentation of its evidence.

In his reply, Haradinaj asserts that the Trial Panel created a "legitimate expectation" that it would pronounce itself on the elements of the crimes and modes before the presentation of evidence. Haradinaj fails to support this assertion. Indeed, in rendering the oral order related to the filing of written submissions on the subject, the Presiding Judge ordered the parties to file such submissions "if they so wish." This language, "if they so wish," could not reasonably lead to any specific legitimate expectation in terms of outcome or the timing thereof.

Haradinaj's allegations of unfairness, lack of impartiality and bias in Grounds 1 and 2 are unfounded and unsubstantiated, as were similar arguments in other grounds. Stringing together a list of decisions the appellant is dissatisfied with does not suffice to show bias or establish any error.

Haradinaj's arguments ignore relevant context, misrepresent the trial record, and ignore the fact that the Trial Panel was composed of professional Judges.

In his reply to Ground 1, Haradinaj accuses the SPO of "arguing its case by numbers," explaining that this is because the SPO characterises as without merit any Defence submissions where the Defence cannot specify which trial judgement excerpt is said to be unfair and precisely why it is unfair.

We heard something on these lines from counsel for Haradinaj yesterday as well. But Your Honours do not need me to tell you that the failures in this telling Defence submission are the Defence's own, not the SPO's. An appeal becomes unworkable where a party cannot even identify relevant findings they challenge or articulate why they choose to challenge them.

Your Honour, this concludes our submissions and we welcome any questions from the Panel.

PRESIDING JUDGE PICARD: Thank you.

[Appeals Panel confers]

MR. WHITING: Your Honours, if I may, I just have one additional point that I would like to add to Mr. Pace's argument.

PRESIDING JUDGE PICARD: You have time to.

MR. WHITING: Yes, it will just take a few minutes. And it's in further response to Your Honour Judge Ambos's question about consistency in sentencing.

I, of course, completely endorse what Mr. Pace said, that in our view, the sentence that was imposed on the accused is fully consistent in reasoning and logic and approach and with the jurisprudence in other cases for the reasons that we have set out.

However, I think it is also important to note that the principle of consistency in sentencing has to also allow for developments and growth in thinking about sentencing. The field that we're in is very young. There's only been about 25 years of sentencings in these kinds of cases in a handful of obstruction cases. And it's our submission, separate from the argument that this is consistent, that there are reasons to think perhaps differently, in different ways about the dangers that obstruction and intimidation cases pose to these courts, to this enterprise.

The way those cases were thought of in the earlier years of these tribunals and the way we think about them today, we submit, is very different and it's part of the reason this court is here in The Hague, it's part of the reason this Court was set up, to combat these kinds of intimidation. There's a history of intimidation. And, therefore, I think that while remaining respectful to the principle of consistency, there has to be also the possibility that we think differently and think perhaps that these cases require sentences that are a little more severe than were imposed in some of the earlier cases.

So I would offer that as an additional argument to Your Honour Judge Ambos' question. Thank you.

JUDGE AMBOS: So can I follow-up on this clarification. So if, just for the sake of argument, one would have case law which goes in a different direction in terms of a less serious sentence for this kind of conduct, you would still say that we can justify a more

serious sentence, because you are saying the last 25 years are *tempi passati*, and now we look with a different eye on this kind of conduct and therefore we have to be more serious. I mean, apart from -- as you certainly know, consistency is, for us, in national systems, in all national systems, a big goal. It's not just in international tribunals. And we cannot separate international criminal justice from criminal justice in general.

So I think you certainly would agree that we could not defend a position where we say, well, consistency is a value but in concrete terms we can deviate from previous precedents because we just say today in -- in this day, that we should have a stricter look on this kind of conduct. So maybe you could just clarify this.

MR. WHITING: Yes, Your Honour. I certainly agree that consistency is an important principle both to the international system and to national systems where I have also worked. That's absolutely right. However, it cannot be that there is no possibility of growth and development and rethinking in systems with respect to sentencing.

It cannot be that the first cases in an international system that we hope will continue for decades, centuries, impose a ceiling on these kinds of cases forever in the future. So it cannot be that the first impositions of sentences in the first 25 years of this project, which is, honestly, a blink of an eye in the development of an international system, can then be the ceiling forever.

There has to be the possibility that we think, well, perhaps we

thought about those sentences in the wrong way. Maybe those sentences were too lenient. Maybe those didn't accomplish the purposes of sentencing for those very cases. Maybe we need to adjust the way we think about sentences.

And I think we cannot do that simply based on nothing. That has to be a reasoned decision. But here, I submit, we submit, that there's ample grounds to think that obstruction, intimidation of these courts, of witnesses in these courts, of this project, is a deeply serious problem that goes to the core of the work here, and perhaps we think that it is a more -- maybe we can come and think that it was a more serious problem than was initially appreciated than when the first sentences were imposed.

So I think there are two separate grounds. And for the reasons Mr. Pace set out, and we've put in our filings, I think you can make arguments that the sentence that was imposed was fully consistent with the reasoning of other cases. However, I think it's also permissible to Your Honours, and to the Trial Chamber, to think, well, maybe we should do this a little differently. And maybe these kinds of cases require a more serious sentence because it keeps happening, it keeps happening, these obstructions, and part of the reason we impose sentences is to make it stop.

And so for that reason also it's justified.

JUDGE AMBOS: Thanks. But taking into account then also Kosovo practice, no? Because this is not the ICC. I think there is a difference, Mr. Whiting, between -- you cannot put all international

criminal tribunals in the same basket. I mean, of course, we are actually in a court which should apply Kosovo law. And so if we take this seriously, then we should look at the sentencing practice in Kosovo, if there is any, I don't know, in these kind of cases.

MR. WHITING: I understand, Your Honour. And for that reason, I think this principle and this reasoning is applicable both to national jurisdictions and to international. And in respect of the national systems where I have practiced, this same principle applies. There has to be the possibility of growth and development in sentencing law. Thank you.

PRESIDING JUDGE PICARD: Thank you. So that concludes the Prosecution's submission for this morning.

We'll take a break. We'll reconvene at quarter to 12.00. And after that, we'll hear the replies of the Defence for Mr. Gucati and Mr. Haradinaj, who will have each 20 minutes to reply. Thank you.

--- Recess taken at 11.18 a.m.

--- On resuming at 11.48 a.m.

PRESIDING JUDGE PICARD: So I will ask the counsel of Mr. Gucati to reply. 20 minutes for that.

MR. REES: Well, can I begin very briefly by thanking Mr. Cadman, who has told me that if I haven't finished within 20 minutes, he's happy if I eat into a little bit of his time.

PRESIDING JUDGE PICARD: You mean like yesterday?

MR. REES: Indeed.

So I'm going to try and bring some of the points together. But,

obviously, Your Honour will understand that the Prosecution's approach dealt with different aspects at different times. So if it does feel a little bit like I'm retorting paragraph by paragraph, as it were, that's really what I am doing.

Mr. Whiting began by asserting, not arguing, but simply asserting the Defence was fully able to challenge and test the content and authenticity of the batches. I ask a rhetorical question, as we asked it in the course of the appeal, and as we did at trial: How were we able, the Prosecution say, to challenge the assertions of Ms. Zdenka Pumper as to the identification of witnesses or potential witnesses and their numbers within the batches?

Now, we've posed that rhetorical question. We haven't been provided by an answer by the SPO in either their written brief or, indeed, in their oral replies today.

The examples of some of the very limited documentation that was disclosed in redacted form that Mr. Pace showed contained no means of, for example, identifying a person who, in the words of the SPO, and the way in which they restricted the basis of Count 6, to any persons likely to have information about a crime, the perpetrator, or important circumstances relevant to Specialist Chambers proceedings. No information in any of those examples by which we could identify or challenge whether those documents identified a person likely to have information about a crime, perpetrator, or important circumstances relevant to the Specialist Chambers proceedings. We simply had to take Ms. Pumper's word for it. Nor in those examples anything by

which, if there was such a person named, any information as to the numbers of any such persons.

And, yes, there is no, as Mr. Whiting put it, I think, quantitative threshold for witnesses for the purposes of the offence of intimidation under Count 3. I agree with that. And we don't suggest that there is a quantitative threshold. What we do refer to is that the Trial Panel itself used quantity of names of witnesses and potential witnesses allegedly identified by Ms. Pumper within the documentation as a feature which went, they said, to the assessment as to whether the *actus reus* of a serious threat was, in fact, established.

Now in our written appeal brief, we, of course, make submissions criticising the proposition that the existence -- if you do something that causes others to have fear and concerns, it does not necessarily follow that what you did was a threat, because a threat has to come with a representation that you make that you will inflict harm in the future. We can all think of examples where, for example, somebody in their backyard might light a fire because they're getting rid of their garden refuge. The neighbours next door worry it's too close to their shed, so they're caused fears and concerns for their shed. That doesn't mean that lighting a fire in your backyard was a threat. It's not a serious threat for the purposes of intimidation.

So that the relevant point is not that there's a quantitative threshold. It's that the Trial Panel used the numbers, the evidence from Zdenka Pumper as to numbers as part of their assessment as to

whether the *actus reus* was, in fact, made out, and that was wrong. It was wrong because disclosure in relation to the information that would have allowed us to challenge that was not made.

The tests for disclosure of the batches in their entirety was held to be met by the Pre-Trial Judge. He identified that material should be disclosed either under Rule 102(3) or 103. He then ruled under Rule 108 that there were grounds, however, to restrict that disclosure.

Now although, of course, we -- in a general sense, we criticised and criticise that decision because we had sought disclosure of the material, we're, of course, here for appeal proceedings. So I'm only concerned with raising such matters as I say go to the safety of the conviction. Using "safety" not in a technical term, because that's not part of the test, but in the sense of invalidation of the judgement or occasionally a miscarriage of justice.

And we say that, actually, the knock-on effect of withholding that disclosure was that a fair approach would have then restricted the Prosecution and its case to that which had been disclosed. And that didn't happen. And the Trial Panel, unfairly, allowed the Prosecution to call Zdenka Pumper to give oral evidence describing documents, in particular identifying on her own test and on her own analysis whether a particular page identified a witness or potential witness, without, for example, any evidence as to whether any person that she identified was a person likely to have information about a crime, the perpetrator, or important circumstances relevant to the

Specialist Chambers proceedings. We never heard any evidence to that effect whatsoever.

She was allowed, nevertheless, to say, "That page does have a person to meet that test. Trust me. And not only does that page have one person, it has X numbers of persons." And then the Trial Panel say: In using the figures that she has told us that are in those documents, without us having seen them or the Defence having seen them to challenge them, we say that goes to demonstrating that there was a serious threat established.

Mr. Whiting also referred to entrapment and used the words "entrapment" and "incitement" interchangeably. I don't really have an issue with that. Although, to use the phrase or the wording of Ramanauskas, which is the leading authority, that's the key case, not Ramanauskas No. 2, and that's always been our position and it remains our position, that's unequivocal, because that's a decision of the Grand Chamber which sets outs the approach to entrapment. They refer to it police incitement but entrapment is also used.

What is not used and what does not feature anywhere in the jurisprudence of a police incitement or entrapment, it certainly doesn't appear in Ramanauskas, the leading case, is the other word that the Prosecution use interchangeably which is compulsion or whether a defendant is compelled or forced. Those are concepts which play no part whatsoever in the legal test for police incitement or entrapment. They are imposed by the Prosecution into this case when they have no legal authority behind that proposition. And, in fact,

they tried to do that in the trial itself. And, of course, that is something which the Trial Panel rejected, quite rightly. Noting at paragraph 858 of the judgement that, yes, there was evidence of predisposition, as it were, but that does not exclude the possibility of entrapment.

What is required is not compulsion or being compelled or being forced. What is required, as is said in Ramanauskas, is influence and the effect of the influence.

If Your Honours would just pause for a moment.

The exertion of such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.

That is the test. It does not require compulsion or anybody to be forced. If an influence is exerted which incites the commission of an offence that would otherwise not have been committed, that is sufficient. Whatever the nature of that influence is and whether or not the person influenced accordingly is predisposed to commit any such offence.

If, for example, a police officer provides the means with which to commit an offence to a person and incites them to do it, that is a classic case of police entrapment. Without any concept of duress or the subject being forced to do it, he has been entrapped.

It was suggested -- turning now to some of the issues of statutory interpretation. Statutory interpretation, of course, not

being applicable to entrapment, because that is a test that's set out by Ramanauskas, the Grand Chamber. They're not statutory provisions and they're not to be interpreted as if they were statutory provisions. But I will turn to some interpretation of statutory provisions because that, of course, is important.

As an aside, the proposition that we have put forward legal interpretations of statutory provisions that have not withstood scrutiny from any Judge in this case is factually incorrect because, of course, Mr. Halling ignores the fact that the defendants were acquitted on Count 4 based on our interpretation of the statutory offence of retaliation.

The Prosecution says that there is authority in relation to the offence of intimidation from the Kosovo courts which demonstrate that our interpretation has not been followed by the Kosovo courts. They refer to two cases. They are two first instance cases of the Basic Chamber. The point was not argued in either of them. They are neither binding because you are a Court of Appeals Panel of the Court of Kosovo. You are not bound by two first instance decisions where the point was not argued before those Trial Panels.

There is no authority on the point save that there is the authority of Article 310, as it were, of the Provisional Criminal Code, which is in identical terms, save for the replacement of the qualifier "organised crime," which everyone agrees applied to the whole of Article 310, with the words "obstruction of criminal proceedings" in 387.

In relation to the issue of whether names were protected within the documentation that was raised by Mr. Halling, our brief on appeal at paragraphs 234 onwards deal with this issue. It's Ground 8 and in particular 8(b) of our Notice of Appeal.

Our complaint includes, not limited to but includes, the fact that the Trial Panel regarded Article 35(2)(f) of the Law of the Specialist Chambers and Rule 30(2)(a) of the KSC rules as having been the basis for the Prosecution's position that all names mentioned in their documents are protected. They said that, in effect, the Prosecution had exercised its powers under those provisions.

Article 35(2)(f) provides that the authorities and responsibilities of the Specialist Prosecutor include "taking necessary measures, or requesting that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence." It follows, therefore, in the first instance, that measures for the protection of a person are specifically required to be taken to be exercised. They do not apply per se. There has to be an exercise of that power.

There is no *ipso facto* confidentiality that applies to all persons named within a Prosecution document, contrary to the assertion of the Prosecution and, indeed, we say, incorrectly, the finding of the Trial Panel. Only such measures that are necessary fall within the authorities and responsibilities of the Specialist Prosecutor according to Article 35(2)(f).

Measures that are unnecessary, for example, just treating any

name that is mentioned in any Prosecution document for whatever reason or purpose as confidential, that is an unnecessary measure and it is unauthorised.

Rule 30(2)(a) likewise provides that during an investigation the Specialist Prosecutor shall ensure "the safety and protection of victims, witnesses and other persons at risk on account of information provided to or in cooperation with the Specialist Prosecutor."

Again, it makes clear the protection is not extended automatically to any person who is provided information to or cooperation with the Specialist Prosecutor. It's only provided to those specifically at risk on account of having done so.

The effect of Article 35(2)(f) and Rule 30(2)(a) is to require an assessment of the risk to any individual from having provided information to or cooperation with the Specialist Prosecutor and the necessity of any protective measure in relation to that individual.

In the present case, of course, the Trial Panel heard no evidence as to any individual assessment of risk, no evidence of any individual assessment of necessity for protective measures in relation to any alleged witness or potential witness because we didn't know who they were and we had no evidence about them. We had no information as to what information they held or what risk there was or whether any assessment had been done in relation to them. Again, another example of the unfairness of allowing the oral evidence of Ms. Pumper in the absence of proper disclosure.

I'm afraid -- just jumping back but following the order of the Prosecution's oral submissions, jumping back for a moment to entrapment. As I understand it, the Prosecution now accept that the not wholly improbable threshold is less than the *prima facie* evidence threshold that the Trial Panel obviously applied. They were asked this question on a number of occasions and both Mr. Whiting and Mr. Halling described it as a minimal threshold. I'm afraid that doesn't really give very much assistance at all as to what the Prosecution say the test is. But it is minimal.

As I say, we don't say that Ramanauskas No. 2, to use Mr. Halling's eloquent illustration of it being a champion case for the Defence, we don't suggest Ramanauskas No. 2 is a champion case for anything. What we said is that there is some assistance in a summary of the words "not wholly improbable" provided by the separate opinion of Justice Kuris. But, of course, that is only *obiter*. It is not binding in any way.

What is binding and what is the champion case is Ramanauskas No. 1, the leading case, the Grand Chamber authority which sets out precisely what the requirements of entrapment are.

If I turn to sentencing. Mr. Pace refers to Margetic, paragraph 88. And as an example of a difference between the facts in Margetic and the present case, Mr. Pace points out that although Mr. Margetic had published a list of 102 individuals, a full witness list, and had done so following earlier warnings about publishing protected information, that by the time of the trial, he had not

demonstrated the same attitude, did not persist with his earlier attitude.

And, yes, that could be said on the Trial Panel's findings to be a difference between the case of Margetic and the present case, but that difference - and this is the point, I'm sure it will have occurred to Your Honours - that difference could not possibly justify the difference in sentence between the three months' imprisonment that was imposed on Mr. Margetic and the four and a half years' imprisonment that was imposed in relation to Mr. Gucati and his co-appellant.

There was reference made to Al Khayat. As a matter of course, one can see that the sentence that was imposed in Al Khayat fell perfectly well within the sentencing range that was established by that point. All the judge was saying in Al Khayat was that there was no case on all fours. So couldn't simply look for an identical case and say that was the sentence in that case, this is the sentence, we'll have the same sentence in this case.

In terms of the approach to a sentencing range, the sentence in Al Khayat was perfectly well within the sentencing mix.

And although there was reference to Milosevic and part of the sentencing judgement in Milosevic, I don't need to address it, I don't think, because the SPO's position now is clear, both expressed by Mr. Pace and confirmed by Mr. Whiting, that they accept that consistency is important. The Trial Panel ought to have looked at the sentencing range that had been previously established and

demonstrated consistency in sentencing.

And, of course, they're right to concede at this late stage that point. It is inarguable. It always was. Although, there is a halfhearted attempt to challenge it, which I will address at the very end. But, of course, it's already established. The case of Strugar makes clear that in these types of cases, of course, there has to be consideration given to consistency, and "a disparity between an impugned sentence and another sentence in a like case will constitute an error if the former is out of reasonable proportion with the latter. This disparity ... gives rise to an inference that the Trial Chamber must have failed to exercise its discretion properly in applying the law on sentencing."

Now pausing there. That part of the judgement in Strugar neatly summarises, encapsulates both the requirement for consistency, acknowledging that you're never actually going to get two cases where the facts are identical. That's absurd to think -- for it, to look for it, or to indeed rule out any assistance because you can't find it. It also allows potentially for Mr. Whiting's argument of growth in sentencing and development in sentencing, because it's concentrating on a disparity identified by errors where sentences are out of reasonable proportion with the sentencing range that is established.

And that's exactly what we say has happened in this case.

Just dealing with one factual matter. Our understanding of Ms. Myers' evidence on whistleblowing and her reference to the

nuclear option being going public, she said that in the context of a whistleblower going directly, publishing the material directly his or herself. For example, putting it on an open web site on the internet, for example. A bit like what Mr. Margetic did, the nuclear option of Mr. Margetic himself putting up on his own web site the protected information.

Actually, she referred to whistleblowers going to members of the professional media. She identified that as a lesser, more responsible option because professional journalists are aware of their own ethical and legal responsibilities. So she saw that as a sensible alternative. That was not the nuclear option. That was the sensible alternative.

Anyway, as an aside, the point I make about the material being revealed largely to the professional media is that that's a finding of the Trial Panel. It's not an argument on my part. That is the finding of the Trial Panel, and we've identified the paragraph number in the judgement that's relevant to that, and they ought to have reflected that in their sentence.

I deal then just finally, and I hope briefly, with the argument -- the attempt to try to ride two horses that we saw from Mr. Whiting's intervention, if you like, to both adopt the submissions made by Mr. Pace and perhaps also to try and deviate from them at the same time in the same breath.

He says that this is only 25 years of sentencing practice. Well, the first thing to say that it's 25 years of sentencing

practice. It's quite a long sentencing practice. We're not dealing with a brand new area of the law. It's 25 years. And he says that people perhaps think differently about these sort of offences than they did in those very earliest years. Well, maybe they do. Maybe they don't.

I would ask Your Honours not to get carried away again with the rhetoric and look, in fact, at the cases that established that sentencing range. They're not old cases. We're not talking about cases dating back to the 1990s or the early 2000s even. In the sentencing summary that we've provided, I think the earliest date, in fact, is 2005. But they include October 2015, the case of Al Khayat, case that the Prosecution have referred to. That was a case involving the imposition of a fine. Although, the conviction was subsequently overturned and the sentence being set aside.

Then we get Al Amine, 2016. This is the imposition of a fine of €20.000 in relation to an accused who published the names, photographs, and significant details of 17 witnesses. And --

PRESIDING JUDGE PICARD: Mr. Rees, you've been now overlapping five minutes over Mr. Cadman's time. I don't know if you agreed how long you could use his --

MR. REES: I will only be a few more minutes. So I take it that because Mr. Cadman hasn't interrupted me, he's happy for me to continue for the moment.

PRESIDING JUDGE PICARD: Very well.

MR. CADMAN: [via videolink] I am.

MR. REES: Thank you.

So 17 witnesses' names, photographs, personal details published by the accused. There was then an outcry he published a second article with a further 15 witnesses' photographs, names, and personal information of them. In that case, the evidence was called specifically in relation to the number of witnesses and their fear as a difference to this case, with there being direct harm established in that case in 2016, not a long time -- not 25 years ago, a fine of €20.000 imposed.

Moving ever closer to this position in time. Case of -- well, in 2012, sentences of two years' imprisonment imposed in relation to Seselj number three. He had been convicted for two earlier offences. Continued to refuse to comply with repeated orders and decisions to remove from his web site material revealing confidential information about a number of protected witnesses. He'd been ordered to serve earlier sentences of imprisonment of a significant length, frankly, 15 months and 18 months in relation to earlier offences, including publishing some 10.000 hard copies of a book containing protected witnesses' details.

This was a particularly flagrant disregard and two years' imprisonment was imposed by the ICTY. And their Appeals Chamber in 2013 confirmed that length of sentence.

The same year, 12 months' imprisonment imposed in relation to the case of Rasic, where the defendant in that case actually bribed a witness to sign a pre-prepared witness statement, offered -- incited

that person to offer bribes to another group of potential witnesses handing over prepared statements and getting them to find men who'd been in the army of Bosnia and Herzegovina willing to sign the statements for money. She received - I think it was a she - 12 months' imprisonment, the last 8 months of which were suspended for two years.

And then much more recently. In the International Criminal Court, 17 September 2018, case of Bemba Gombo. The accused convicted after trial of offences which included inducing false testimonies from 14 defence witnesses. So witnesses who actually gave false evidence. The prosecution requested a sentence of five years' imprisonment, presumably trying the argument that Mr. Whiting tries now. They were illicitly coached, they falsely testified, the witnesses. The offences extended over a lengthy period of time, at least 13 months. They were said to be highly organised defences executed over a long period with a calculated plan to bring about false evidence in Mr. Bemba's favour, and that plan was executed so that false evidence was given. There was a large number of perpetrators involved in the offences at stake. There was an obvious organisation and coercive group dynamic, they said. Offences extensive in scope, planning, preparation, and execution. They included the aggravating features of abuse of lawyer-client privileges and attendant rights, undertaking advantage of Mr. Bemba's position as a long-time and current president.

In that case, the prosecution's request for a sentence of five

years' imprisonment was rejected and instead dealt with by a term of 12 months' imprisonment with a fine of €300.000, with the court noting that:

"The five-year sentence sought by the Prosecution would mean the imposition of a sentence equal to or greater than that imposed on a participant in the execution of more than 1000 prisoners; one of the persons responsible for the notorious Omarska Camp; a guard at the Keraterm Camp; a General who facilitated the Srebrenica genocide; a General who commanded troops involved in war crimes; and a municipal official who oversaw expulsions and killings," referring to a series of ICTY judgements.

And then getting it -- we couldn't be more up to date. In the Residual Mechanism, the case of Ngirabatware. On 25 June 2021, the Single Judge imposed, in relation to a conviction after trial, a sentence of two years' imprisonment. Ngirabatware offered and paid bribes through a number of associates to recanting witnesses and intermediaries to influence their prospective evidence. Many thousands of euros were paid in bribes.

This was a highly organised effort, they said, aimed at obtaining the recantations of, in particular, four witnesses in anticipation of review proceedings relating to Ngirabatware's conviction for genocide. In particular, the two main prosecution witnesses underpinning the conviction for genocide were actually interfered with. They were paid for their cooperation with Ngirabatware Defence in amounts exceeding millions of Rwandan francs.

Question and answer documents were created for the witnesses, the circumstances -- including details as to the circumstances allegedly surrounding their decision to recant, the refusals to meet with Defence counsel, questions about their false testimony, and why they lied during Ngirabatware's trial. These documents were, in effect, a script for them to deal with their false evidence, which, in fact, they did.

Documents were used to train witnesses in an attempt to overturn his conviction, and they were submitted to the Appeal Chamber. He repeatedly shared confidential information related to witnesses, contents of confidential filings, knowing that he was violating specific protective measures.

The prosecution requested in that case, again, perhaps an attempt, as Mr. Whiting attempts, to challenge the sentencing range that is now well-established. They requested a sentence of seven years of imprisonment in relation to Mr. Ngirabatware, stressing that the accused in that case engaged in an unprecedented and elaborate interference scheme, and underlying that Ngirabatware had already been convicted for genocide, yet he was still able to initiate and direct this complex, sophisticated criminal scheme to overturn his conviction wrongly.

Two years of imprisonment, the Single Judge said. Rejecting the prosecution's position calling for seven years.

And after -- that case was referred, of course, to the Trial Panel during the course of submissions at the closing of our

case. After their judgement, again, couldn't be more recent, on 29 June 2022, the prosecution appealed the sentence imposed on Ngirabatware. So they challenged that two-year term, presumably, again, trying the argument, perhaps what Mr. Whiting tries in this court. The prosecution appealed it and the appeals chamber in June of this year rejected that appeal and approved the appropriate term of two years. The dissenting judge in that case thought that 18 months was the appropriate term, but the majority agreed that two months was appropriate, noting, in addition, and this is relevant, and we did submit this to the Trial Panel, although they did not take account of it, the IRMCT appeals chamber accepted that there was particular hardship in the fact that Ngirabatware had been in detention in the context of the global pandemic and the restrictions that placed on his contact with family and friends. That was properly to be taken into account as a mitigating factor.

So that sentencing range that's established, that sentencing jurisprudence is not old. It is absolutely up to date. And it is the current sentencing policy of the ICC, of the IRMCT, and there are no grounds for an attempt to depart from it, if that is, in fact, what the Prosecution suggested. I don't know whether they are, because they concede that consistency in sentencing is, in fact, of course important.

We say in those circumstances the appeal should be allowed in relation to all the counts. In the event of upholding of any or all the convictions, the sentence should be reduced, the term of four and

a half year, nearly double the highest sentence at the top of that sentencing range, that is both modern, current, and sensible is out of all reasonable proportion. Thank you.

PRESIDING JUDGE PICARD: Thank you.

Mr. Cadman, you have five minutes left. I hope it's enough.

MR. CADMAN: [via videolink] Well, I hope that I won't be penalised for speaking too fast by the interpreters then. I will deal with the matters as quickly as I can. But, obviously, there are a few matters that I need to deal with, but I will deal with them very quickly.

The first point that I wanted to raise in response to Judge Jorgensen's question yesterday when I made reference to the case in the ECHR that related to where evidence was before a judge of the Trial Panel and not the Defence, then that would inevitably result in the breach of Article 6. That was the case of Edwards and Lewis which has now been put in the presentation queue and is available to the Panel.

The second point that I wanted to raise was the question asked by Judge Ambos yesterday. Having had an opportunity to read the transcript over the evening, and as Judge Ambos, I think, had recognised, I had some difficulty with the connection yesterday, and maybe even some difficulty with concentration. But I just wanted to make the following point, which was set out in my submissions before the question.

But in case there was any confusion as to what my answer was, I

just wanted to clarify that point. The point that is being made is that there needs to be a serious threat to obstruct an official person. And the term needs to be narrowly interpreted. And Article 401(1), we need to take the provision on the wording, in that if there was an attempt, this could be evidence of a different offence if it is not directed at an official person.

But my point yesterday was I accepted that there can be an attempt but that would not fall within Article 401(1), which perhaps I didn't make that explicitly clear yesterday. So just to clarify that point.

My position, and the position that we've maintained always, is that any Article 401(1) attempt would still require the targeting of an official person to be considered evidence under this provision. And my point yesterday, there was no evidence of that. So I hope that point is clear.

In terms of the concerns that have been raised, the criticisms made. I think the comment was made in reference to my use of the term arguing their case by numbers. The approach has to be that any appeals court has to look at the proceedings as a whole, taking all matters into consideration, not just referring to specific incidents within the trial process but looking at the proceedings as a whole to determine whether the proceedings were fair and the convictions are safe.

Our position was that there were numerous instances where the proceedings, taken as a whole, could not be considered fair. Of

course, that's a matter for Your Honours to consider when reviewing all the material before you, the arguments being presented both in writing and orally yesterday and today.

Dealing with some of the points that have been raised by the SPO, that we were given a full opportunity to present our case. That is simply not accurate. We've referred to the full disclosure of the batches, the refusal to be able to call witnesses, and the unnecessary restrictions that were placed upon certainly the expert witnesses of which Your Honours will be aware.

That we received sufficient disclosure. Again, this is simply not true. And Mr. Rees has set out the issues that relate to disclosure, the inability to challenge evidence in the contact notes and the inability to properly challenge the evidence of Ms. Pumper, the SPO investigator.

The SPO has also stated that there is no evidence whatsoever of any involvement in the leaks. Well, again, that is simply not accurate. Mr. Halling stated that there was no evidence whatsoever that there was incitement or compulsion. I won't deal with compulsion. Mr. Rees has already dealt with that. But, again, this is simply not accurate. The unexplained delivery of documents emanating from the SPO, the body which is now prosecuting the two appellants, is enough to establish that incitement is not wholly improbable. And this is set out in paragraph 140 of our appeal brief.

The statement was made that the SPO moved swiftly. Again, that

is simply not accurate and not borne out by the evidence. It is very clear, when you look at the evidence presented by the SPO and by the Defence, that there was not a prompt move to deal with this matter. We had requested details as to the investigative actions that had been taken to identify the source of the leak, how the documents arrived at the WVA premises, and none of this was presented. There was questions raised as to whether there was any video footage, as to whether anyone had been interviewed in the surrounding areas. Even the appellants themselves had requested that the area be placed under surveillance because the person, the mystery person who delivered the batches, said that he would return. None of this was taken seriously.

The SPO has always taken the position that it's not relevant to these proceedings. It is the most relevant matter to these proceedings, how those three batches that emanated from the SPO came to be where they were at the KLA War Veterans Association headquarters.

They've said that as far as Batch 2, there were minimal redactions. Again, there were six black pages that were presented, which was remarked upon by Judge Gaynor during the proceedings. We've seen today the chart presented by Ms. Pumper where we see a number of columns and with everything blacked out.

In relation to the issue of the classification law, the point has been made that as it is not explicitly included in the KSC law that we should exclude them, we should look at secrecy in the generic

sense, as the SPO said today. But where the KSC law is silent on one matter, one must look to other statutes for such an interpretation. And that is the point that is made.

One of the points that has been raised, and just to go back to, if I may, just for one moment, because it's relating to Count 5, in relation to, specifically, what Mr. Halling has stated, in relation to the classification law.

The position must be, and certainly it is the position that we have set out, is that the interpretation of the case law should be based on the totality of applicable law in Kosovo. And since the law on classification deals with the definition of secret, we can't take a generic approach to that definition. We've clearly set that out in paragraph 192 of our appeal brief.

And I know I have limited time, so I'm just trying to cover just the most relevant points that I would like to deal with.

One of the comments that has been made relates to the whistleblower defence, and I know that Mr. Rees has dealt with that in some form in terms of what has been stated as the nuclear option. The important point to note here is, as Mr. Rees had said, that that was direct publication of matters that may or may not be subject to confidentiality.

As Your Honours will see from the expert evidence of Ms. Myers, both in terms of her statement and in terms of the evidence that she has presented, that as long as other steps have been considered and have not been successful, then that option is an acceptable way and

would still be covered by whistleblower protection.

But, again, as Mr. Rees said, the appellants did not publish this material. As you can see, and as we've heard today, they were made available to members of the media, but they did not publish this material. But they had also, as you will see from Mr. Haradinaj's own evidence, Mr. Haradinaj, over a course of a period of time, had attempted to raise what he considered to be legitimate concerns as to the process. Legitimate concerns that he considered to be a mono-ethnic process, an improper prosecutorial process that had been cooperating with Serbian officials.

And let me just respond to what the Prosecution said this morning, as this was a matter that came out at trial. It is not a matter of cooperating with prosecutorial authorities. Many of the individuals who were believed to have been involved in cooperating with the SPO were individuals who were involved -- in Mr. Haradinaj's view, and the view of many people in Kosovo, had been involved directly or indirectly with the commission of atrocities in Kosovo during the conflict.

He had raised these concerns on numerous occasions. It was not his opposition to the Prosecution. He wanted to see all individuals who had committed crimes during the war prosecuted. But where there was evidence that the cooperation of the SPO with officials who were subject to INTERPOL Red Notices, as was presented at trial, this raised legitimate concerns that he sought to raise, both publicly and privately, with members of the national government and the

international community. He had assisted, he had tried to raise this before the national assembly, and none of these attempts were successful.

And so when the documents were presented to him, he did what he considered to be in the public interest. And this was a matter that was supported by one of the Prosecution witnesses, as we mentioned earlier, Mr. Berisha.

PRESIDING JUDGE PICARD: Mr. Cadman, I think you have to conclude now.

MR. CADMAN: [via videolink] Absolutely.

In terms of the sentencing, we've certainly heard, from what both Mr. Rees and I presented yesterday, and again what Mr. Rees has presented this morning, and, of course, there is the development of international criminal law and its jurisprudence over time that shapes our interpretation of basic principles, but any [indiscernible] must be reasonable and proportionate and not a sharp departure from what is the norm and what is acceptable.

And for that point, imposing harsher sentences on the basis of what Mr. Whiting has said is neither justified nor proportionate. I maintain the submissions that were made yesterday and maintain all of the arguments that were set out in the appeal brief and the response to the Prosecution.

Your Honours, I once again invite you to uphold the appeal, to direct an acquittal on all counts; and, in the alternative, to reduce the sentence to one that is proportionate, just, and reasonable.

Those are my submissions.

PRESIDING JUDGE PICARD: Thank you.

Before I give the floor to Mr. Gucati and Mr. Haradinaj, if they wish so, Judge Ambos has a question to put to the Prosecution.

JUDGE AMBOS: To Mr. Halling, please. I have now had the chance to look at this Court of Appeals -- EULEX, I should say, judgement, delivered by two foreign judges and one Kosovo judge. I am not sure if this is relevant for you, but just for the record.

Where exactly from this judgement do you take the conclusion that cumulative convictions or Blockburger was applied?

MR. HALLING: It would be from paragraphs 28 and 29, Your Honour. If you look at paragraph 28 of the judgement provided, the appeals panel is talking about cumulative convictions. It begins:

"The issue at stake concerns the concept of *concursus delictorum* ..."

It then says that the CCK does not directly express this principle or provide for specific rules or doctrinal theory.

And then they say that international criminal tribunals have a test. And they take the materially distinct elements test, they cite to multiple cases from the ICTY, the ECCC, the Special Court for Sierra Leone, the paragraph importantly ends: "The Appeals Panel follows this legal approach." And then it's applied in paragraph 29.

JUDGE AMBOS: Okay. That's very helpful. Thank you very much.

As to Article 71, which is the same wording as Article 76 of the

Criminal Code of 2019, which is the relevant code for us, how do you interpret the wording "by one or more acts" and so on, several criminal offences, as compared to, for example, the French Penal Code and the German Penal Code?

MR. HALLING: Well, Your Honour, I am going to take it for granted that you know more about the German code than I do.

I would say that when talking about multiple acts in this provision, it is not specific in terms of what particular legal tradition is suggested by the language. I think this is what we are seeing with the Kosovo authorities. They are not taking uniform approaches, it appears, even in courts of appeal, in relation to this question. And this is what creates space for interpretation.

And the Trial Panel interpreted it using a test that is very well accepted in lots of other places, and we think that it fits within the meaning of this language.

JUDGE AMBOS: And then my last question. Sorry to bother you with this, to insist, but I'm really interested in your views. I'm learning. Is it important that we have a EULEX court having said this, or would it be -- I could also frame the question another way: Would it be more convincing if it were a full autonomous Kosovo court? Does it make any difference for you that there is a court with three judges, two being foreign judges?

MR. HALLING: I would personally say no because the law being applied is the same throughout. This is the same law that's applied by the Kosovo Specialist Chambers, and I would personally say I don't

think the Judges of this Court are rendering judgements that are any less valid or authoritative just because of the nationalities of the Judges of the bench than any court in Kosovo.

JUDGE AMBOS: Okay. Thank you very much.

MR. REES: Can I add in relation to that, because, of course, Mr. Halling didn't get the opportunity to make his submissions in relation to this during his response. That's the first time I've heard the Prosecution's position in relation to this authority.

So my reply would be this. That this authority, K.P., is not an authority which demonstrates that a conviction in relation to both Article 401(1) and 401(2) can be sustained on the same indictment.

In this case, K.P. was convicted by the trial panel of the criminal offence of abuse of official position or authority under Article 339(1). The decision of the Court of Appeals is that he shouldn't have been convicted on that offence and they modified the conviction by replacing the conviction for the offence of abuse of official position or authority with the offence of issuance of unlawful judicial decisions under Article 346.

So in this case, the prosecution sought convictions on both charges and both the trial panel and the Court of Appeal disagreed and said you can only be convicted on one of the offences. They disagreed on which offence. And the appeals panel, in effect, overturned the conviction for abuse of official position and replaced it with a conviction for issuance of unlawful judicial decisions because the trial panel had entered a conviction in relation to the

more serious of the two offences.

But it had done so in circumstances where, I think, it's -- and, again, it's not controversial. No one would suggest that two convictions could be entered because the defendant, K.P., faced those two charges in relation to exactly the same conduct. And they said that, for the purposes of this case, there was no material distinction in the elements of the offence of abuse of an official position or issuing unlawful judicial decisions, so there could be no possibility of that defendant being convicted of both charges.

The fact that one cannot be convicted for two offences that have no material distinction in their elements for exactly the same conduct is one proposition which is non-controversial. That in itself is not authority for the proposition that you can be convicted for both an offence under Article 401(1) and 401(2) at the same time.

As we put in our brief in reply, the establishment of material distinctions in the elements of two offences is only a minimum requirement for you then to be able to look to see whether it is justifiable and sustainable for convictions on both offences for the same conduct. It is not sufficient. So we say that this authority doesn't actually assist with the decision that the Court of Appeals Panel faces and the Trial Panel faced.

JUDGE AMBOS: I have another question, sorry. Because you make this point, in para 26 of this decision, there is a reference in footnote 9 to the District Court of Peja, which is a first instance court. Was this a court of exclusively Kosovo judges? Someone knows

this? Because the first instance refers to subsumption, and that is actually *concours apparent*, so the first instance court applied actually what the appeals court then overturned, in terms of the *concours*, you know. So I just want to know if someone knows who was sitting on this bench?

MR. REES: Can I turn my back? I think I may be able to get the answer.

MR. HALLING: I don't know the answer to hand, Your Honour. We're happy to pull the authority and send it to the Panel if you like.

JUDGE AMBOS: It would be great to have this first instance decision also.

MR. REES: Our understanding, we can't confirm this, but -- and I'm very grateful to Mr. Halilaj for the benefit of his experience at the Kosovan court. He says that as this is a EULEX case before the Court of Appeals in Kosovo, the District Court of Peja is likely to have been a panel of judges, again a EULEX panel, so a mix of internationals and domestic judges.

PRESIDING JUDGE PICARD: But perhaps we can have the answer later.

MR. HALLING: Yes, when we have the authority we'll send it to everyone.

PRESIDING JUDGE PICARD: Thank you very much.

So now I will give the floor to, if he wishes so, to Mr. Gucati, if he wants to make some personal statement. You have ten minutes.

THE APPELLANT GUCATI: [Interpretation] Thank you very much.

Distinguished Judges, participants in this Chamber, distinguished representatives of the embassy of my country. On this occasion I want to say a few words.

I am a citizen of the Republic of Kosovo. I am very proud that we are a state today, and we have very great hopes for the future. It is a future for all citizens of Kosovo that motivates me, me as a freedom fighter, as a national liberation war invalid, that I was lucky to be alive. And people say that fortune rules in the world. I really believe in this saying, because it's a wonder that I am alive.

I avail myself of this opportunity to say that, with my imprisonment, the Specialist Prosecutor's Office has violated all my human freedoms and rights. Over decades, my people were forced to engage in a war for freedom and liberation. Neither my people nor myself have ever wanted or chosen the path of war because we have always been convinced that war is a mad path. But to respond to it when you are forced to, as the case was with us, is an act of wisdom.

The Kosovo state has never been an aggressor, but we have to have the right to protect ourselves, to defend ourselves against those who oppose this right. The right to live in peace. All states should have the right to stand up for themselves against aggressors. I am proud of all my co-fighters.

I and my co-nationals are now in Scheveningen detained in the high security prison. We have been and are convinced that no

European law or international law can deny or condemn a war for freedom and life. We have been forced to fight against a state that had embarked with a programme and project to wipe out my people. We fought against a state that, many times in the past and with the last war, committed crimes and genocide which have been looked upon by the world that undertook NATO operations for 78 days to stop the Serb genocide.

All of us who fought against such policies have never endangered the life of any civilians of any ethnicities for as much as we have jeopardised our lives and the lives of our families. And the best testimony of that is that Serbia undertook this attack against the Jashari family in Prekaz. People that deserve to be grateful to and not be accused against them.

As leaders of the KLA, we have not had committed any crimes. We have not violated the law. It's the others who brought these documents, the documents from the Prosecution to our offices. We have informed the competent bodies of what happened, but nobody conducted any investigation against those people to this day.

Therefore, we are not guilty of anything. We are not guilty of these leaks. Therefore, I ask this Panel to free us from all charges because we have not deserved to be detained even for a single day. We look forward to being released out of respect for the liberation war of the Kosovo Liberation Army and my people.

PRESIDING JUDGE PICARD: Thank you, Mr. Gucati.

THE APPELLANT GUCATI: [Interpretation] I'd like Mr. Haradinaj to

use the minutes that I left unused.

PRESIDING JUDGE PICARD: It seems that everybody wants to use the -- we already are overlapping the schedule.

Mr. Haradinaj, please.

THE APPELLANT HARADINAJ: [Interpretation] Honourable Judge, I think he's trying to compensate for my Defence counsel. So I'll go ahead and speak. But if you want me to speak in a minute or two, I'll do that as well.

PRESIDING JUDGE PICARD: No, no, you have time. You can speak.

THE APPELLANT HARADINAJ: [Interpretation] Thank you.

Honourable Appeals Panel, counsel, people present here, and representatives of my country. There's been two years now that the chief Prosecutor of this Prosecution office and his collaborators, who obey the orders of Milosevic, together with the Serb secret service, such as UDB, with Bojan Dimic and other Albanian traitors who now speak as journalists or analysts of conspiracy theories and coordinators of CIA and so on, and people who exploit the tragedies of others for their purposes just only to present themselves as people who know about these conspiracy theories.

Justice is not about arresting people who fought for freedom. I, as a legal professional, have seen attempts by the Prosecution to dodge their responsibilities. There is no professionalism where there are lies and excuses. By creating victims or fake victims, by wanting to achieve these effects. First by trying to dodge the responsibility for the leaks and blaming people who tried to inform

people and express the rights of the people to defend public interest.

We were here when the Prosecutor declared us guilty, and they did not take into account the presumption of innocence.

THE INTERPRETER: Mr. Haradinaj is kindly asked to slow down, please.

PRESIDING JUDGE PICARD: Mr. Haradinaj, you're speaking too quickly.

THE APPELLANT HARADINAJ: [Interpretation] I was trying to catch up time-wise. So I will restart.

In this room, during the whole process, the Prosecution and the Prosecutors, they were acting, play acting, and they presented the case here just like Don Quixote fighting against the windmills. By taking into account their arguments, the decision was like that.

We were denied the right of equality of arms, fairness. Only unfairness. You only have to look at the way the process was conducted to see that. The Trial Panel did not want to put the Prosecutor in a bad position. They were preparing, they were concocting this case and their position was *a priori* to convict us.

And from the beginning, from the moment we were arrested, a day after we were arrested, they told a conference of ambassadors that we were guilty. So that was a fait accompli. There was no need for a process to take this decision. This decision was taken based on bias and lack of impartiality.

I am giving here my opinion and my experiences. I suffered the

same thing in the former Yugoslavia. I was always sincere and I never tried to dodge my responsibilities. This is my right and perhaps a prejudice, but I am telling you sincerely that everything I have said to this Prosecution, starting from the things I've said in the 1980s and later on in these proceedings and the acts I've done all the time, I'm trying to make my point.

If this case is concluded with a rejection of the indictment, there is still no justice that has been done. I am convinced that the Trial Chamber -- neither the Trial Chamber nor us nor the Defence do not know, are not clear how things came up to here. It is clear that the Prosecution has no interest in establishing justice, and I myself and the WVA, we are not trying to avoid justice, but we want to take this to the end and this event should not remain a mystery. Justice must be done for all.

Where did these documents come from? Where did the leak happen? Second, who disclosed that documentation? And there's a question mark and an exclamation mark here. Who took those documents and who received those documents? Who brought those documents to our offices?

Under 6, if that person who brought them had agreed with somebody from our side, who was that? Was it Hysni or myself? The SPO and the Court never intended to catch those people. They had the information they needed. They had the information from our security bodies. And after --

PRESIDING JUDGE PICARD: More slowly, please. Slowly. More

slowly, please.

THE APPELLANT HARADINAJ: [Interpretation] Why did the SPO inspector never try to catch those people? We had information about those people on the three occasions, and they had video camera footage. We insisted all the time, and that's why they accepted to take that footage. Why then did they ignore what they told us -- what we told us?

If that material is so confidential, why are there still such documents not being taken by the Prosecution even to this day? So there are so many question marks.

Under 9. We were told to say that people, those people are public personalities. We are of the same opinion again. The names we mentioned are of public people. What's more important? What time did they arrive in Kosovo? If Mr. Halling thinks that there are no question marks, there are very many question marks and exclamation marks.

When these things are clarified, it will be clear that we have nothing to do with the people who did these things, and that's why we ask for all the charges to be rejected and we be acquitted. This is very important. It is very important for the public opinion internationally and the public opinion in Kosovo to know that you have undertaken an action that has no precedent in countries of liberal democracy.

This process will be the quintessence of a political prosecution office, a politicised prosecution office, and of the way that -- how

justice should not be done.

We could have not informed anyone of the material that arrived to us. What would be the benefit of that? Would that change the flow of events? This would be in the interest of the people who did that and the people who don't want to see the truth. So we were in the -- we were before a fait accompli. This.

Prosecution thinks that in the name of justice they want to get rid of a certain ethnicity specifically chosen under the instructions of Serbia and applying the genocidal regime's instructions.

So I think that we fulfilled our duties as citizens of Kosovo with what we did, not only towards the public in Kosovo but also the international public. We informed not only the media but we also informed the SPO offices, and the SPO gave itself a deadline of 24 hours to get the material. So they were not in a hurry to get it before.

Their investigators needed only 12 minutes to get to our office, but they gave themselves a deadline, one, two, three hours. We did nothing else but inform the officials, the official bodies - the police and the other authorities. We told them about the people who sold -- who brought those materials.

I have never threatened anyone, either orally or by telephone messages or in any other way. We never copied, made copies of these documents. What we did was what I mentioned earlier. We moved those documents to a distance of 20 metres from our premises, and I thought that we could professionally deal with this by informing the media.

And it was up to the Prosecution to decide what to do with it, and that's why we decide --

PRESIDING JUDGE PICARD: Mr. Haradinaj, you have to conclude now.

THE APPELLANT HARADINAJ: [Interpretation] I am concluding. Yes, I am concluding.

And we ask of you clarification of all the situation what happened. We want the truth to come out, because if the truth comes out, it will show that an injustice has been done. That's why we want from you justice without prejudice. Justice and fairness. Thank you.

PRESIDING JUDGE PICARD: Thank you, Mr. Haradinaj.

So that -- so it seems we are not concluding yet.

Mr. Cadman, you want to raise one more issue.

MR. CADMAN: [via videolink] Your Honour, yes. I'm not seeking to advance more argument. It's just to raise an issue with Your Honours and to inform Your Honours that we will have to be making a confidential filing later today. I'm not in private session so I'm -- or closed session, so I'm going to be very careful what I say.

Information has come to our attention in the last 24 hours that will require us to make a confidential filing. It relates to matters that you have already ruled upon. I'll only say that. But it is just to notify you that we are making it at this late stage because this information has only just come to our attention.

PRESIDING JUDGE PICARD: Thank you. We're not aware of this new

filing, but we'll take note and we'll have a look at it during the afternoon.

So that concludes the appeal hearing in that case. Before we adjourn, I would like to take this moment to thank the parties and the Registry for their work on this case and their attendance today. I would also like to express my gratitude to the legal teams, interpreters, stenographers, audio-visual technicians, and security personnel for their excellent assistance.

We shall render the judgement in due course. And now the hearing the adjourned. Thank you.

--- Whereupon the hearing adjourned at 1.10 p.m.