

1 Monday, 1 February 2021

2 [Status Conference]

3 [Open session]

4 [The accused not present]

5 --- Upon commencing at 11.00 a.m.

6 JUDGE GUILLOU: Good morning everyone in and outside the
7 courtroom.

8 Madam Court Officer, can you please call the case.

9 THE COURT OFFICER: Good morning, Your Honour. This is case
10 file KSC-BC-2020-05, The Specialist Prosecutor versus Salih Mustafa.

11 JUDGE GUILLOU: Thank you, Madam Court Officer.

12 Now I will kindly ask the parties to introduce themselves,
13 starting with the Specialist Prosecutor's Office.

14 Mr. Prosecutor.

15 MR. MICHALCZUK: Thank you very much, Your Honour, and good
16 morning everyone. The Prosecution team is represented today by
17 Alex Whiting, Deputy Specialist Prosecutor; myself, Cezary
18 Michalczuk, SPO Prosecutor; Silvia D'Ascoli, Associate Prosecutor;
19 Filippo de Minicis, Associate Prosecutor; and also Aniko Boldog, Case
20 and Evidence Management Assistant. Thank you.

21 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

22 Now I turn to the Defence, please.

23 MR. VON BONE: Good morning, Your Honour. My name is Julius
24 von Bone. I'm the Defence counsel of Salih Mustafa. Mr. Salih
25 Mustafa will not be present today. He has confirmed that in a

1 written statement, so I'm the only one today. Thank you very much.

2 JUDGE GUILLOU: Thank you, Mr. von Bone.

3 And for the record, I am Nicolas Guillou, Pre-Trial Judge for
4 this case.

5 On 26 January, I scheduled the fourth Status Conference for this
6 case. My objective today is to review the status of the case and
7 start preparing the transmission of the case to the Trial Panel.

8 I see that no written submissions were filed by either of the
9 parties. I will ask the parties for their submissions in turn,
10 according to the Scheduling Order, first on disclosure, then on
11 investigations, then on points of agreements on matters of law and
12 facts, and finally on the next procedural steps.

13 As usual, I remind the parties to give prior notice should any
14 submission require the disclosure of confidential information so we
15 can go into private or closed session.

16 However, before we start with this first item on the agenda, I
17 would like to issue an order for submissions to both parties. I
18 remind the parties that during the third Status Conference on
19 14 December 2020, a part of the hearing was in closed session at the
20 request of the Defence.

21 In order to be as transparent as possible to the public, I would
22 like to ask the parties for joint written submissions by Monday, 15
23 February 2021, on a lesser redacted version of the transcript of the
24 third Status Conference, and I thank the parties in advance for their
25 joint written submissions.

1 Let me now move to the first topic on the agenda, namely,
2 whether the SPO has completed disclosure of evidentiary material,
3 including exculpatory evidence; and if not, when and which material
4 remains to be disclosed, under what rule, and when the SPO will
5 disclose such material. I also invite the Prosecutor to indicate
6 whether the SPO intends to add evidence under Rule 102(2) of the
7 Rules.

8 Mr. Prosecutor, you have the floor.

9 MR. MICHALCZUK: Thank you, Your Honour.

10 With your kind permission, I would like -- before we move on to
11 the disclosure points, I would like to make just a few very brief
12 preliminary remarks on behalf of the Prosecution.

13 I would like to reiterate the general position of the
14 Prosecution regarding the course and pace of this pre-trial process.
15 As the disclosure has now been largely completed, and it's now
16 getting towards its end, it is the SPO's position, intention to
17 finalise the pre-trial phase of the proceedings already in February
18 and to move to the trial phase of the case as soon as possible after
19 the filing of the pre-trial brief and Rule 95(4) material.

20 As per our position indicated already during the third Status
21 Conference, these submissions will be finalised -- will be filed on
22 15 February. Having said that, we believe that we should all strive
23 for commencing the trial as early as March 2021.

24 On disclosure, I would give the floor to my colleague,
25 Prosecutor Silvia D'Ascoli.

1 MS. D'ASCOLI: Thank you. Good morning, Your Honours, and
2 everyone in the courtroom.

3 Yes, I will be addressing the first point, the first item on
4 today's agenda on disclosure, and detail what has been done and what
5 remains to be done.

6 Well, at the outset the SPO can say that the disclosure by the
7 Prosecution is now largely completed and will be finalised in
8 approximately two weeks, that is, by 15 February.

9 I will now give the specific details regarding the disclosure
10 process rule by rule. I will first address disclosures pursuant to
11 Rule 102(1)(B), I will then move to any additions pursuant to
12 Rule 102(2), and finally, I will conclude with the status of
13 exculpatory evidence.

14 Your Honour, as already reported in the previous Status
15 Conference, the SPO has largely completed the disclosure of its
16 evidentiary material pursuant to Rule 102(1)(a) and (b) in the past
17 months, between October and December 2020, in compliance with the
18 timeline set out in the Framework Decision.

19 In addition to that, last week on 29 January 2021, the SPO
20 disclosed one additional item pursuant to Rule 102(1)(b). This
21 disclosure, disclosure 30 in Legal Workflow, was the result of the
22 final assessment conducted on the items seized from Mr. Mustafa.

23 Further, the SPO may add one witness to its witness list. This
24 witness was recently interviewed by the SPO, and we are now in the
25 process of assessing his evidence. If the witness will be added to

1 the list of evidentiary material that the SPO seeks to rely on, this
2 evidence will be disclosed to the Defence by 15 February as well
3 together or even a little bit earlier compared to the filing of the
4 pre-trial brief.

5 There will likely be an additional disclosure pursuant to
6 Rule 102(1)(b). It will be a discrete disclosure involving just a
7 few items, and this would be actually the result of the review
8 process of the evidentiary material that we are conducting in light
9 of the drafting of the pre-trial brief. At the end of the process,
10 there might be, in fact, a handful of items to be disclosed pursuant
11 to Rule 102(1)(b). We have identified two so far, but there could be
12 a little bit more, like a handful, I believe.

13 And just to give the idea of the nature of these items, it will
14 likely be some maps, which are always useful to have, and what we
15 call near duplicates. These would be copies of items already
16 disclosed by the Defence, for example, photo lineups or prior
17 statements, which, however, we found also in different layouts in the
18 collection of evidence. And so just for the sake of completeness, we
19 will likely disclose those items as well.

20 In any case, this whole review will be completed by 15 February
21 and this discrete additional disclosure, if any, will be also
22 provided to the Defence counsel by 15 February, slightly before or
23 together with the filing of the pre-trial brief.

24 Second, I'll move to the process concerning the Rule 102(2), so
25 relevant material and evidence. This process is also concluded. The

1 relevant list was disclosed to the Defence on 1 December 2020.
2 Your Honour is asking whether there will be any additions to that.
3 Yes, there will be. Again, just a handful. We have come to the
4 total of 12 items which will be added to the list of material
5 relevant pursuant to Rule 102(2). These items range from recent --
6 SPO interviews which were recently processed into our system or
7 criminal background checks which, as well, were recently processed
8 into our system.

9 This will be done by way of a filing supplementing the list
10 filed on 1 December 2020, and again it will be done by 15 February in
11 conjunction with the filing of the pre-trial brief and the other
12 Rule 95(4) materials.

13 Now, some of these items under Rule 102(2) of the Rules will
14 also be disclosed as exculpatory evidence to the Defence pursuant to
15 Rule 103. And this brings me to my last point, addressing the status
16 of the exculpatory evidence and the disclosures thereof.

17 Your Honour, disclosure of the exculpatory evidence, of course,
18 is an ongoing process, and the Prosecution has been complying with
19 its obligation in this regard from the very outset. We have
20 disclosed already the bulk of the exculpatory material in this case
21 in the past month, and we will disclose a further exculpatory
22 evidence together with the pre-trial brief. We will also continue
23 doing our due diligence reviews for the exculpatory process so to
24 ensure that by the beginning of the trial proceedings the exculpatory
25 disclosure searches will all be up to date.

1 In terms of the latest exculpatory disclosures that the SPO
2 made, the last one was done on 18 December 2020. This was disclosure
3 29 in Legal Workflow and consisted of a further 103 items.

4 Now about what's coming up. As indicated in December during the
5 last Status Conference, the SPO needs to seize the Pre-Trial Judge in
6 relation to some potentially exculpatory materials that need
7 protecting measures in the form of provisional redactions or
8 withholding until the identity of certain witnesses is disclosed to
9 the Defence.

10 We are preparing this application and we expect to file it
11 together with the pre-trial brief, if not slightly earlier than again
12 15 February. We expect that in February 2021, very likely in the
13 same week of filing of the pre-trial brief, there will be an
14 additional residual batch of Rule 103 material which do not require
15 redactions, so this will be in conjunction to the filings, to the
16 application that we will be submitting to Your Honour.

17 In sum, Your Honour, the Chamber can rest assured that by the
18 end of February 2021 the SPO will have disclosed the main bulk of the
19 exculpatory evidence in this case, and we remain available if
20 Your Honour has any questions.

21 JUDGE GUILLOU: Thank you, Madam Prosecutor.

22 So I take it from your submissions that you will be done with
23 disclosure by 15 February at the latest, that you will have seized me
24 of any application by that date as well, and that you confirm that
25 you still envisage to file your pre-trial brief also on 15 February;

1 correct?

2 MS. D'ASCOLI: Yes, Your Honour, that's correct.

3 JUDGE GUILLOU: Thank you, Madam Prosecutor.

4 Now I turn to the Defence.

5 Mr. von Bone, did you experience any difficulties with the
6 disclosure process? You have the floor.

7 MR. VON BONE: Your Honour, the only difficulty that we have is
8 that some of the disclosures are only in English, especially of
9 certain statements, they are not -- have not been translated into
10 Albanian, and that makes it complicated. So that is the only
11 difficulty that my client especially has with the disclosures.

12 JUDGE GUILLOU: Thank you, Mr. von Bone.

13 Madam Prosecutor, is there anything you want to add on this? Is
14 there any translation that is pending, or does it refer to material
15 that is not compulsory translated according to my previous decision?

16 Madam Prosecutor.

17 MS. D'ASCOLI: Your Honour, all the material that has been
18 disclosed pursuant to Rule 102(1)(a) and (b) has be disclosed in both
19 languages, English and Albanian. Now, whether the Defence counsel is
20 referring to exculpatory material or other material, I'm not sure,
21 but we invite the Defence counsel to reach to us with the specific
22 ERN of the concerned material to the e-mail address devoted to the
23 correspondence between the parties so that we can assist with any
24 specific answers or queries.

25 But I can confirm that all of the material pursuant to the Rules

1 102(1) (a) and (b) has been disclosed as it should have been in both
2 languages.

3 JUDGE GUILLOU: Thank you, Madam Prosecutor.

4 Mr. von Bone, can you give some details about which statements
5 you are talking about, which category of disclosure that it refers
6 to? Thank you.

7 MR. VON BONE: There is one that comes to mind directly, but I'm
8 not sure whether I should say that here in open session or closed
9 session.

10 JUDGE GUILLOU: Madam Court Officer, can we move to private
11 session for a couple of minutes.

12 [Private session]

13 [Private session text removed]

14

15

16

17

18

19

20

21

22

23

24

25

1 [Private session text removed]

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 [Private session text removed]

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 [Private session text removed]

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 [Private session text removed]

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 [Private session text removed]

2

3

4

5 [Open session]

6 THE COURT OFFICER: Your Honour, we are back in open session.

7 JUDGE GUILLOU: Thank you, Madam Court Officer.

8 I will now turn back to the Prosecution for the second item in
9 our agenda, which is the status of its ongoing investigation.

10 I think you answered some of the questions in your presentation
11 on the disclosure of evidence, but nevertheless, can you still
12 confirm that your pre-trial brief will be filed on 15 February? And
13 you also stated that you were going to seize me around mid-January
14 2021 in the last Status Conference. Can you just confirm that this
15 is what your colleague just referred to and I'm going to be seized of
16 an application before 15 February on this matter?

17 MR. MICHALCZUK: Yes, Your Honour, correct on all points.

18 Let me now move on to the status of investigations.

19 We already covered that point during the last Status Conference
20 when I said that our office is conducting also investigations in
21 other cases, apart from this one, which simply means that there might
22 be a situation where we find some evidence or information also of
23 relevance to this particular case. And if so, there might be need to
24 add a couple of items to this investigation. And, of course, we will
25 be then in need to comply with our disclosure obligation.

1 But as I said before, and I'm going to also reiterate it now,
2 whatever happens, we will swiftly comply with the disclosure
3 obligations. And these additional things will not have any adverse
4 impact on our trial-readiness as we indicated already.

5 In relation to this particular case, with the witness interview
6 that we conducted last week, I need to confirm that we don't have any
7 outstanding investigative obligations. There remains some residual
8 investigative activities, but they have marginal importance for this
9 case, and again they will not have any adverse impact on our trial
10 readiness.

11 Thank you.

12 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

13 Mr. von Bone, I would now like to ask you to provide an update
14 about your investigations. In particular, have you concluded your
15 investigations, and if not when will you conclude them? And I also
16 invite the Defence to inform the Court if it has the intention to
17 give notice of an alibi or grounds excluding responsibility, pursuant
18 to Rule 95(5); to make requests concerning unique investigative
19 opportunities, pursuant to Rule 91(1). And I would finally ask the
20 Defence whether it intends to disclose evidence to the SPO, and if it
21 so chooses, the estimated overall amount and type; and whether it
22 intends to request protective measures prior to the disclosure of
23 evidence, and if so, what kind of protective measures, and for how
24 many witnesses.

25 Mr. von Bone.

1 MR. VON BONE: Thank you very much, Your Honour.

2 I can say the following regarding the investigations: I think
3 it will -- first of all, the issue of an alibi, I think there will be
4 an alibi provided by the Defence and there will be also witnesses for
5 that. I expect to conclude the interviews with those witnesses
6 within two months, approximately. Now, that is only regarding the
7 alibi, because that has priority, and then I will give notice at the
8 appropriate moment when that is done.

9 I am not sure whether there will be a need for protective
10 measures or not. That goes -- I simply cannot see or foresee how
11 that goes with the particular witnesses. But when that occurs,
12 obviously I will seize the Court in order to have those in place,
13 whether they should be in place for those witnesses.

14 One issue that we have probably not addressed yet, Your Honour,
15 is the matter of points of law and points of fact that --

16 JUDGE GUILLOU: Sorry, we move --

17 MR. VON BONE: [Overlapping speakers].

18 JUDGE GUILLOU: -- to this topic after.

19 MR. VON BONE: Okay.

20 JUDGE GUILLOU: So please --

21 MR. VON BONE: Okay.

22 JUDGE GUILLOU: -- let's stick to the issue of investigations
23 for the moment.

24 MR. VON BONE: Okay. So the issue of investigations, as far as
25 that is concerned, so there will be an alibi, that is for sure. And

1 there will be other witnesses for sure on points of fact that are in
2 the indictment, is the expectation.

3 I cannot foresee how long that will take, but I -- only for the
4 alibi witnesses, I need already about two months. We think that we
5 can complete that within that time.

6 Then there is a number of other types of witnesses that we are
7 envisaging to interview, and I think that will take -- well, earlier
8 on I said it will be six to nine months, and I think before August it
9 probably will have been completed. That is about the time that I
10 think that we will have.

11 It's not only witnesses, Your Honour, that we interview. We
12 will also try to make some documentary evidence in the sense of
13 reports and observations that we do on particular locations that we
14 would like to present as evidence. That takes longer and has not the
15 priority at this time, simply because I think we need to move on with
16 the things that we can move on with the quickest.

17 So that is the status of the investigations as far as I think
18 should do.

19 Whether I make a request concerning unique investigative
20 opportunities, so far I will not. Until today, I have not. And I'm
21 uncertain whether I can foresee that. It depends a little bit
22 whether there is any. But I doubt it, honestly. So that is the part
23 about the investigation.

24 JUDGE GUILLOU: Thank you, Mr. von Bone.

25 Mr. Prosecutor, do you want to say anything about the Defence

1 submissions? You have the floor.

2 MR. MICHALCZUK: Your Honour, I would like to respond to that.

3 First of all, we believe that this particular case is relatively
4 straightforward and does not require very intensive investigations of
5 a wider scope on the part of the Defence. We believe that the
6 indictment and the supporting material that we sent very clearly
7 delineates the parameters of the case, together with all the
8 disclosed material to the Defence that we have disclosed so far,
9 presents, for the Defence, this case in a very clear manner, and the
10 scope and ambit of the case is very easily understood. It should not
11 really trigger any extensive investigations and steps that could take
12 months, as the Defence has just stated.

13 We believe that with what the Defence already has, he could
14 easily prepare his defence and prepare his case. The timelines that
15 the Defence has just provided - months; he indicated, for example,
16 August as the time of completion of his investigations - is
17 unacceptable for the Prosecution. We also believe at the same time
18 that such a lengthy period of time adversely impacts on the rights of
19 the defendant to have an expeditious trial.

20 Having said that, we understand the importance of limited
21 investigations, and, of course, we understand the importance of the
22 Defence to present its witnesses, for example, to prove the alibi or
23 to confirm some defences that are going to be put forward by the
24 Defence. However, as we said at the outset of this hearing, the
25 Prosecution will be trial-ready just in a few weeks, and we don't

1 believe that such an extensive time as the Defence claims as
2 necessary is justifiable.

3 At the same time, I would like to underline that the Defence has
4 had already sufficient time to conduct those investigations. We had
5 the first discussion about the commencement of investigations by the
6 Defence already a few months ago.

7 Having said that, again, I would like to underline the position
8 of the Prosecution, that we all should work on the commencement of
9 the trial as early as March this year. Thank you.

10 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

11 Mr. von Bone, regarding your investigations, do you need all the
12 investigations you're referring to to be completed before the
13 beginning of the trial?

14 MR. VON BONE: I'd say two-thirds of it should be completed
15 before the trial, I think. The thing is that, Your Honour, if I can
16 address a couple of issues.

17 First of all, I think it's not up to the Prosecution to make any
18 argument about how the Defence is about to go on or not. They have
19 had ample time and they have had years of investigations, and we are
20 not simply able to put up that so quick under the circumstances of
21 these times as well. So let the Defence do the defence work, and let
22 the Prosecution do the prosecution work. I think if we stick to
23 that, I think that's better.

24 I do expect, actually, a longer list of witnesses than the
25 Prosecution has. And having said that, I think that that is what

1 takes the time. The priority of it is at the alibi, and that is,
2 until now, I think that we will have probably have completed that
3 within two months, and then it will take -- I will not say an
4 undetermined amount of time, but, I mean, we're working on it in
5 order to interview the witnesses, and so on.

6 Now, to get to your question, would that require that that has
7 to be completed before starting the trial? I would prefer so,
8 honestly, because in the balance, what we will see is that some of
9 the witnesses probably contradict what the witnesses of the
10 Prosecution are saying. And the issue of points of law and points of
11 facts, I can -- I think, if I brainstorm about it, then I can see
12 that we will have a quite large difficulties and disputes about it,
13 because we'll get to that item in a minute.

14 But in order to make the defence case, we will certainly
15 disagree on certain facts as presented by the Prosecution. In order
16 to argue those facts, we want to rely on witnesses, and that takes
17 time. It's as simple as that. And, therefore, I do not want to get
18 a trial in two separate speeds. Obviously, it is useful that at some
19 point when we have completed our investigation and we say, "Well,
20 we're ready to go to trial," that that will be the best moment to do
21 that.

22 Now, my assumption is that it will be August when we will have
23 completed it, and we're depending also on some third party factors in
24 that perspective. But, yes, that's what I can say about it.

25 JUDGE GUILLOU: Thank you, Mr. von Bone.

1 Mr. Prosecutor, do you want to add anything?

2 MR. MICHALCZUK: Just maybe one line in response to that.

3 First of all, my intention was not to sound offensive, and if I
4 did actually sound offensive, I apologise. It was not my intention.
5 My intention was simply to underline that the timelines indicated by
6 the Defence, bearing in mind our trial readiness, is simply not
7 acceptable for the Prosecution, and we have been conducting all
8 outstanding issues and have been conducting investigative steps, have
9 been complying with our outstanding disclosure obligations, so that
10 we were trial-ready as quickly as possible for the interests of
11 justice. And this is what I wanted to simply say.

12 Thank you, Your Honour.

13 MR. VON BONE: If I may add something, Your Honour. If the
14 Prosecution is concerned about the length of the trial regarding the
15 detainment of my client, then they are free, of course, to make
16 submissions in order to have my client released. It's as simple as
17 that. But their position is constantly the same and now it's always
18 going to be used to say, "Well, you know, your client is detained.
19 Let's move forward. Let's move forward." I don't think so at all.

20 We take the time that we need in order to have a balanced and
21 correct and sound defence. That is the idea. And if there is any
22 concern regarding the detainment of my client, then I look forward to
23 the different types of submissions of the Prosecution until what they
24 have done until now. Their position is very clear, and that's fine,
25 but it should not be an argument in order to say, "Well, that's why

1 we need to move forward now." Let that be up to the Defence.

2 JUDGE GUILLOU: Thank you, Mr. von Bone.

3 Then let me now move to the next item in our agenda, which is
4 the points of agreement on matters of law and facts.

5 I would now like to ask the parties whether, since the last
6 Status Conference, they have made any progress and mutual agreement
7 regarding the submission of points of agreement on law and/or facts,
8 pursuant to Rules 95(3) and 156 of the Rules; and whether and when
9 the parties expect to be able to identify a list of issues subject to
10 dispute and one with issues not subject to the dispute.

11 Mr. Prosecutor, you have the floor.

12 MR. MICHALCZUK: Thank you, Your Honour.

13 I will address both points jointly. As we indicated during the
14 last Status Conference, the Prosecution prepared a comprehensive
15 document detailing all the points that we believe could be subject to
16 agreement or disagreement, but we prepared the document in a way that
17 would allow both parties and, of course, Your Honour, to understand
18 where we stand when it comes to all the points that we believe are
19 relevant.

20 So in this regard, to be very precise, on 21 January we
21 submitted to the Defence a table of our proposals - I have this table
22 with me - where we, in a detailed fashion, presented to the Defence
23 certain facts, first of all relating to the accused, certain facts
24 relating to the Kosovo Liberation Army, certain facts relating to the
25 context of this case, facts relating to the alleged crimes, and also

1 facts relating to other miscellaneous matters.

2 So, as I said, we sent this table to the Defence. Later on, I
3 had a conversation with my learned colleague on 25 January. I also
4 sent an e-mail on 29 January, asking whether the Defence could come
5 up with a written counterproposal, a written position on our paper.
6 I received an e-mail on that same day, on 29 January, in which the
7 Defence proposed meetings on facts and law that we could agree on.

8 He suggested a few days. The first day, I believe, is 3
9 February, if I'm not mistaken, and the Prosecution will be very happy
10 to meet on that particular date, the first day available to the
11 Defence, this Wednesday, to discuss points of facts and law.
12 However, in this regard, I would like to propose that we focus on the
13 document that we produced for one simple reason: We simply believe
14 that the clear and detailed fashion, it simply reflects all the
15 points that we should discuss.

16 Of course, without prejudice to the outcome of these
17 discussions, I believe that we should simply sit and go point by
18 point, giving, of course, the Defence later on some time to consult
19 with the defendant about his position as to those facts.

20 So this is the position of the Prosecution. The earlier we
21 clear this matter, the better for us, having in mind other deadlines
22 that we indicated at the outset of this session dealing with the
23 filing of the pre-trial brief and also the commencement of the trial.

24 Thank you very much.

25 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

1 Mr. von Bone.

2 MR. VON BONE: Yes, Your Honour. And I thank my learned counsel
3 for making that document. The document is called "Proposal for
4 Agreement on Facts Pursuant to Rule 95," and in that, most of it
5 are -- it's a list of facts, right, as they are proposed or not, and
6 there is some very easy items. There is no trouble with that.

7 But the point is the following, Your Honour, and that's why I
8 think that it is important that the Prosecution, my learned counsel,
9 and me will discuss this in depth, because I would not want to have a
10 situation in which we are going to have a debate about a said or a
11 proposed type of fact which, in fact, we might dispute at all,
12 because if you make a point of fact and you say, "Well, okay, this is
13 a fact, and please put your position on it" or "whether you agree
14 with that fact or not," is fine with me, too.

15 But I do not think, Your Honour, that it is so easy that we can
16 agree on facts. On law, there is not even -- that's not even part of
17 it yet, as far as I'm concerned, whether there is an internal
18 conflict or whether people can be conceived as a member or
19 non-members of the KLA and so on. So this kind of thing I think we
20 will need, and that's what I asked my learned friend, too, probably
21 we will need to have some clarification about what we mean with that
22 fact in order, Your Honour, that serves the efficiency of the trial.

23 Why? Because at some point when we say, "Okay, we agree on that
24 point," then still the Panel can say, "Well, we have our own
25 position," and we can say, "Well, we want to hear about this or that

1 point." But, nevertheless, I think it is important that we don't get
2 into a debate and say, "Well, you know, it's what the parties have
3 agreed upon so therefore we can say that it is a fact." That is not
4 the case, and that's why I think the document needs a little more
5 time for us to discuss about it. And then say, "Okay, this is what
6 we mean with it." And that is the position of the SPO. Fine. But
7 we can either say, "I simply dispute it," but the Defence will not
8 say, "Well, this is our position on that issue." That is, as part of
9 the Defence, in itself, a part, what we will use in the Defence.

10 So just to -- I'm not sure whether I'm clear or not, but let's
11 have that conversation. I proposed a number of dates. I think it is
12 important that in that conversation we first clarify what we mean
13 with something and then say, "Okay, we believe it is that way," and
14 whether or not the Defence agrees on will be said in that document,
15 disagree or agree on it. But I would not want to have a situation in
16 which the Defence or the Prosecution can rely on something and say,
17 "Oh, but, you know, let's not discuss that because we have agreed on
18 it, so, you know, the Court has nothing further to do on that issue."
19 No.

20 I think that for the benefit of this trial, it is important to
21 see whether facts are indeed facts as they are proposed, so that is
22 why I think we need to sit down and have clarification about that.

23 There is a number of issues that need no clarification. The
24 birth date of my client is something that needs no clarification.
25 It's probably not even in discussion. But other points, whether the

1 KLA is such and such organisation, whether the KLA gets its orders
2 from that or that group of people, whether those people -- whether
3 Mr. X or Y is, indeed, part of the General Staff or not, some issues
4 like that can be disputed. Whether a particular brigade is operating
5 or, in fact, actually operating in a particular area is a factual
6 matter that I think we need to have clarification in order to avoid
7 that we say, "Okay, we agree on that," and then the point cannot
8 further be discussed.

9 That is the intention that I had in my e-mail to learned
10 counsel, that we need to sit down on that. And I think if we work
11 hard on it together, I think then that could be within a month's time
12 or so completed. My personal estimate was that I would strive to get
13 this document done within the end of the month, provided - provided,
14 I say that again - that I would have been able to discuss with my
15 client.

16 The document is in English. It takes time to go through it. If
17 I have an Albanian version of it, it makes it easier for me to
18 discuss it with him and it's more efficient. So my idea was to have
19 it done within a month of time, but, I say it again, if I have been
20 able to discuss it completely with my client. That is obviously an
21 important matter.

22 That is my submissions, Your Honour.

23 JUDGE GUILLOU: Thank you, Mr. von Bone. My idea was also to
24 have it done in a month's time, but starting from the last Status
25 Conference, so I would have hoped that this would have been done by

1 now. But I'm glad, at least, that you have started the discussions
2 on this.

3 Mr. Prosecutor, do you want to reply? And also on the proposed
4 timeframe for the discussions, which would be a month from now, so
5 let's say the end of February. Does it seem like a reasonable
6 timeline?

7 MR. WHITING: Your Honour, if I may address these points.

8 So I think that this process is sounding much more complicated
9 than it is, in fact. We are proposing facts. If the facts are
10 agreed, in principle they'll be taken off the table for trial. If
11 Defence counsel doesn't want to agree to the facts, that's fine, we
12 don't need to have agreement, and we'll litigate them at trial.

13 And so the description of prolonged conversations about these
14 facts or debates, I think, is misplaced, and this should not be a
15 place where we're going to see reasons for further delay of these
16 proceedings.

17 We have proposed facts, we're happy to discuss them,
18 Mr. von Bone can arrange for them to be translated, if necessary, or
19 have an interpreter with his client, but we would expect that this
20 could be concluded within a matter of weeks. If it takes a month,
21 that's fine, because there are other things that are going on. But
22 it really should not take longer than that, and it is a very simple,
23 straightforward procedure.

24 If I may, while I'm standing, Your Honour, I would like to
25 return to the matter of the investigations and the trial date to make

1 clear the position of our office.

2 The request for continued investigations until August is, in our
3 view, extraordinary. This case has been charged for four months now.
4 When it was charged, the Defence had clear notice of what the case
5 was about and has had four months to conduct investigations, and it's
6 my understanding that those investigations have been underway.

7 To request an additional six months when it's been represented
8 to us that an alibi Defence can be resolved in two months seems out
9 of proportion to what this case is. Let's remember that this case is
10 very narrow, very specific. It takes place over an approximately
11 two- three-week period. The events are very circumscribed and
12 specific.

13 We would expect, and I know Mr. von Bone has said that it's up
14 to the Defence to decide how long the investigations takes, well, it
15 is not up to the Defence to decide that. It's up to Your Honour.
16 And Your Honour should be making those decisions, and will be making
17 those decisions, based on, obviously, the interests of accused who
18 has been held, detained by a decision of Your Honour, but also the
19 interests of victims and the public to have this case expeditiously
20 resolved.

21 So we would urge the Court -- we understand that the Defence
22 needs time to investigate. They should have time to investigate. We
23 want this case to be properly litigated, properly defended. That is
24 in our interests as well. However, dragging this out until August
25 seems, on the facts and what is required by this case, to be truly

1 unwarranted.

2 And so we would urge a much more circumscribed period of time
3 and urge that that be set as soon as possible by Your Honour so that
4 we have clear direction and guidance with this case, because our
5 concern is that this case -- if that's not done, this case will
6 drift, and that will not be in anybody's interest.

7 So we would ask that this be addressed and that a reasonable
8 time - a reasonable time for Defence investigations - be provided.
9 Thank you.

10 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

11 Mr. von Bone.

12 MR. VON BONE: No, Your Honour. The issue on the point of facts
13 is more complicated, because it also has implications for the
14 witnesses that we are going to interview. If we are simply going to
15 say we dispute about something, then that does not help, actually,
16 the case of the Defence.

17 In fact, when the position of the SPO is regarding the fact that
18 there is a kind of safe house or a detention centre or a detention
19 camp in a particular area which is run by a particular unit, then I
20 think that is a question not only for debate, it's also a question
21 for the Defence whether we are able to identify witnesses who can
22 actually argue that is not the case at all. Yes?

23 We can maybe say there is an existence of a school in Zllash or
24 there is an existence of a house in Zllash, but the actual
25 representation of what that house is or what the status is or the

1 qualification of that house has implications for the Defence
2 regarding their position on it.

3 And I do not want to argue here in Court anything without being
4 able to rely on it through witnesses, and that's why I say we are
5 busy to find the witnesses regarding many factual issues, which can,
6 in fact, say something for the defendant, and say something also
7 about the facts, whether those facts are facts or whether those facts
8 are not facts as they are presented, especially in the Confirmed
9 Indictment, you know, whether that is the case or not.

10 So that is obviously up to the Trial Chamber at some point to
11 make that determination, but I think it is important for the Defence
12 that we are able to get time in order to get there. It will also
13 speed up the trial and make it simple -- make it more simple in order
14 to make determinations.

15 So that's why I think it's more complicated than it would
16 initially look like.

17 JUDGE GUILLOU: Thank you, Mr. von Bone.

18 Regarding this point, you are under no obligation to agree with
19 anything. The Defence is not obliged to agree with the facts.
20 That's really the first point.

21 The second point is that this is not the moment to debate about
22 all the facts. It will be the trial that is aimed at that. So if
23 you're not sure about certain facts, if you haven't been able to have
24 sufficient clarification, you just don't agree with the fact. It's
25 as simple as that.

1 The agreement on law and facts is just aimed as speeding up the
2 proceedings and not being obliged to litigate matters that do not
3 need to be litigated in trial. But I understand your point. And if
4 you haven't had clarification on point, then the response is very
5 simple: Then there is just simply no agreement. And when you say
6 there is no agreement at this stage, it doesn't mean that your client
7 would be absolutely litigating this matter with you in the trial. It
8 just means that at this stage of the proceedings, you're not in a
9 state where you can agree on the fact.

10 So I think we shouldn't see this agreement as basically an
11 obligation on you at this stage and an obligation to know all the
12 details of the facts, because if not, we would do a trial within the
13 pre-trial phase, and we would have to go into the details of each
14 piece of evidence.

15 MR. VON BONE: May I ask, Your Honour, words are important. And
16 the question is: Whether you agree on the fact. That implies that
17 that is a fact, and that is exactly what I am trying to say, whether
18 that is a fact or not needs to be determined. And we will have --
19 that is a fact that might need to be proved by the Prosecution in
20 order to do that, in order to state that, and make it a fact.

21 Otherwise, we say, "Well, the Defence disagrees with the fact.
22 Please have them have their position on that fact." Well, no, first,
23 I think it is up to the Prosecution in order when they make a
24 determination about a particular fact that they are able to give
25 grounds for that. And saying, "Do you agree on that fact" implies,

1 rather, that it is a fact rather than that remains to be seen whether
2 it is a fact. That is what I'm trying to say, Your Honour, and
3 that's why I think it is useful for me and my learned counsel to have
4 that clarification, because then when we are able to agree on issues,
5 then that makes it much easier. And then we can also say, "Well,
6 okay, this is how we both view that particular fact and that
7 particular issue, okay. That remains undisputed. We don't need to
8 litigate that."

9 JUDGE GUILLOU: Thank you, Mr. von Bone.

10 Can the parties agree to engage in discussions very soon,
11 especially since we have a proposal for this week, and can the
12 parties agree to finish this discussions on agreements on law and
13 facts by the end of February?

14 Mr. Prosecutor.

15 MR. MICHALCZUK: If possible, we would like to make it earlier.
16 As I said at the beginning, the first day stipulated by the Defence
17 was this Wednesday, actually, so we would be very happy to sit
18 together and clarify any unclear point that there might be in this
19 document. And if the Defence counsel -- if the Defence doesn't agree
20 with something, let's go to trial and litigate the points. And let's
21 agree on whatever we can agree just to clear the path for trial.

22 So I would suggest this Wednesday, as the first date proposed by
23 the Defence. Thank you.

24 MR. VON BONE: Yes, Your Honour, I proposed in total four
25 sessions, and I said at least we will probably need two sessions to

1 meet for the minimum. But just to clarify, these are points of fact,
2 not so much even points of law. Just to give that. And if there is
3 another issue that we say, "Well, we are going to have a similar list
4 on points of law," then, you know, well, you know, we need to discuss
5 that.

6 But regarding this document, I think we should be able to have
7 it done within a month. I truly hope that the Prosecution could
8 provide me an Albanian version. It makes it much easier. My client
9 can work for him on it -- for himself, and the discussion that I have
10 with him, it makes it much easier. It's hard work. I'll do my best
11 to discuss all the topics with him. And that's why I also say if we
12 have clarification on it, I can, of course, get that into the
13 discussion that I have with my client. And then we can say, "Okay,
14 that point is done and it's off the table," so to speak.

15 So that's what my proposition is.

16 JUDGE GUILLOU: Thank you, Mr. von Bone.

17 So I take it from our discussions that in a month from now, so
18 Monday, 1 March, the discussions will be finished on this topic. And
19 whether there is agreement or not an agreement, this will be the
20 deadline to reach any agreement on this topic.

21 MR. VON BONE: It's fine, sir.

22 JUDGE GUILLOU: Nothing prevents you from reaching an agreement
23 earlier. I would be most happy with that. But no later than the end
24 of the month.

25 MR. VON BONE: Yes, Your Honour. And while it is the idea that

1 we have had this discussion and we have reached a -- we have
2 completed this, that we submit it to you or the SPO does? That is
3 the idea? Of 1 March.

4 JUDGE GUILLOU: Thank you.

5 For the next point on the agenda, I would like to turn to the
6 Defence first.

7 Mr. von Bone, do you envisage filing a pre-trial brief and
8 related material under Rule 95(5) of the Rules? And if so, when do
9 you expect to be in a position to submit such a filing? I would also
10 like to hear from the parties about a proposed date for the
11 transmission of the case file to the Trial Chamber, pursuant to
12 Rule 98(1) of the Rules.

13 This is, in fact, a follow-up to the discussions we've already
14 started, but I would really like the Defence to already mention to
15 the Court when it would be ready to move to the trial phase.

16 Mr. von Bone.

17 MR. VON BONE: The first point, Your Honour, whether we are
18 going to file a pre-trial brief or not, I think that that will be
19 after completion of the Defence investigation. That will probably be
20 the moment when the case of the Defence starts. Before that time,
21 there will be a pre-trial brief.

22 So when -- let me see. Let me check for a moment. Sorry,
23 Your Honour. When it comes to the moment in time on which we would
24 need to start the trial, yes, I don't think, Your Honour, I have a
25 clear date in mind. As I say, it is obvious that the Defence needs

1 more time to complete its investigation. I think it would be useful
2 to start the trial if we have completed the investigation. And in my
3 opinion, and considering the amount of witnesses that we envisage,
4 I'd say somewhere in July, that timeframe would be probable. We will
5 not have completely completed the investigations at that time, but
6 that is the estimate that I would say.

7 JUDGE GUILLOU: Thank you, Mr. von Bone.

8 Mr. Prosecutor.

9 MR. WHITING: Your Honour, since I started on this point, I'll
10 continue.

11 I'm not going to repeat myself, but we've made our position
12 clear. We think there's been a lot of time for investigation and
13 that the case should be transmitted to the Trial Panel already as
14 early as March. If Your Honour is minded to provide more time to the
15 Defence for further investigation and delay the transmission to the
16 Trial Panel, we would just ask that that be circumscribed. Thank
17 you.

18 MR. VON BONE: And once again, I reiterate, Your Honour, that
19 the Prosecution has had years to prepare their case, and we are under
20 a lot of pressure in order now to file something quickly or to have
21 this go on forward, and then things are not -- simply not in balance.

22 So I, therefore, want to stress how important it is that the
23 Defence gets the time that it needs in order to get the
24 investigations done. Thank you very much.

25 MR. WHITING: If I may briefly, Your Honour.

1 I'm afraid that's a false argument. We've not had years. We've
2 been working for years, but we've been working on lots of cases, not
3 just this one. And our obligation is very different to the
4 obligation of the Defence. We have to make a case and build a case
5 and prove it beyond reasonable doubt and bring the charges with that
6 in mind.

7 The Defence, by contrast, is presented with a circumscribed
8 case, which is clearly laid out in an indictment and confirmation
9 decision, provided with the disclosure that it needs to answer. And,
10 of course, it needs -- again, the Defence needs to have adequate time
11 to prepare and investigate. That is essential to this process. But
12 it is in no way comparable to what the Prosecution has had to do and
13 can't be measured in any way in comparison.

14 And, again, given the circumscribed nature of this case, the
15 narrow nature, and the information that's been provided, it's our
16 view that we should be moving to trial relatively soon. Thank you.

17 JUDGE GUILLOU: Mr. von Bone. And just before you take the
18 floor, you've already had four months, and I've asked in every
19 Scheduling Order of every Status Conference if you had a defence of
20 alibi, and I don't think it takes nine months to basically be in a
21 state to finish investigations on this.

22 So I perfectly understand that you need time for your
23 investigations, but they also need to be reasonable compared to the
24 size and the scope of the case. You have the floor.

25 MR. VON BONE: Well, I think the scope of the case is much

1 larger than people might want to present here, because I think,
2 actually, that whatever is in the Confirmed Indictment there is a lot
3 to litigate about. And, therefore, the clear-cut case and the
4 narrowed-down case, I disagree with that because there is lot of
5 points of fact and a lot of points of law that we want to dispute.
6 And disputing something with words makes no sense. In order to have
7 something well-funded and well-founded, you need to be able to rely
8 on witnesses that can say something about that fact.

9 In order to find those, it's quite a task, Your Honour. And the
10 Prosecution has always much more means than the Defence has. And
11 that -- the best means that we have is to give us time in order to
12 prepare our case. That is the only way how you can get things into
13 balance. Otherwise, we are at some point in time being confronted
14 with the fact that, oh, yeah, you know, we found this or that or that
15 witness, we would like to hear them in that case regarding that and
16 that point. It makes no sense. It only will delay the case in that
17 sense, and I don't think it would be useful.

18 JUDGE GUILLOU: Thank you, Mr. von Bone.

19 Mr. Prosecutor, do you want to add anything?

20 MR. WHITING: Nothing further, Your Honour.

21 JUDGE GUILLOU: Next, would either of the parties like to raise
22 any point that has not yet been dealt with? And I remind the parties
23 to give prior notice should any submission require the disclosure of
24 confidential information.

25 Mr. Prosecutor, is there anything else you would like to raise?

1 MR. MICHALCZUK: No, Your Honour. We don't have any points.
2 Thank you.

3 JUDGE GUILLOU: Mr. von Bone.

4 MR. VON BONE: There is an issue of a third party involved that
5 makes it very complicated for the Defence to operate, and that has
6 been taking a long time, too much of a long time. And I truly hope
7 that during this month there will be, with that third party, a solid
8 discussion on which the Defence can move forward, and that has been
9 one of the issues that has been difficult in this case for the
10 Defence.

11 I do not want to -- I remain a little bit vague, Your Honour,
12 but I do not want to get very specific on the issue. But I can
13 reassure you that it has been making things rather complicated.

14 JUDGE GUILLOU: Thank you, Mr. --

15 MR. VON BONE: And also the reason, Your Honour, that in the
16 beginning of this case the Defence was simply unable to move forward.

17 JUDGE GUILLOU: Thank you, Mr. von Bone.

18 Mr. Prosecutor.

19 MR. WHITING: Your Honour, the Defence counsel has been quite
20 cryptic about what he's just said, but it raises some concerns if
21 there are individuals or organisations that are impinging the work of
22 the Defence. That is something that, in our view, should be brought
23 to the attention of the Court in a more clear, direct way and as
24 quickly as possible, because we certainly do not want to get in a
25 situation where there is -- the Defence's ability to operate is

1 compromised.

2 I, of course, leave it to the judgement of the Defence counsel.
3 But I would just urge that that be a matter that is raised sooner
4 rather than later, if it is, in fact, somehow impinging, by whatever
5 means, the proper functioning of the Defence.

6 JUDGE GUILLOU: Mr. von Bone.

7 MR. VON BONE: Well, as I say, Your Honour, I'll probably have
8 more clarity on that in this month, actually, because there is a
9 clear indication for me that that issue will be resolved.

10 JUDGE GUILLOU: Do you need to brief me on this issue ex parte?

11 MR. VON BONE: And in closed session, I take it?

12 JUDGE GUILLOU: And in closed session.

13 MR. VON BONE: I think it's useful. Yes, Your Honour.

14 JUDGE GUILLOU: Or do you want to do it in writing?

15 MR. VON BONE: No, I can bring it to -- I can bring up the
16 issue.

17 JUDGE GUILLOU: We will then probably have to break for 10, 15
18 minutes, to have this ex parte session now. But is it possible for
19 the Prosecution if we reconvene briefly for the end of the Status
20 Conference after this ex parte session? Is it possible on the
21 Prosecution's side?

22 MR. WHITING: Yes, absolutely.

23 JUDGE GUILLOU: Then, Mr. von Bone, we're going to reconvene in
24 12 minutes at 12.30 for an ex parte session, the time you will need
25 for this, and then we'll reconvene later with the Prosecution to

1 finish this Status Conference. The hearing is adjourned.

2 --- Recess taken at 12.18 p.m.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 --- On resuming at 1.09 p.m.

2 JUDGE GUILLOU: We are back in public session for the end of
3 this Status Conference.

4 Let me first ask the parties if they have anything else to add
5 to the previous items on the agenda.

6 Mr. Prosecutor.

7 MR. MICHALCZUK: No, Your Honour. We have nothing else to add.

8 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

9 Mr. von Bone.

10 MR. VON BONE: No, Your Honour. Not from the side of the
11 Defence. Thank you very much.

12 JUDGE GUILLOU: Thank you, Mr. von Bone.

13 Before we move to the date of the next Status Conference, I
14 would like to move to private session very briefly to discuss with
15 the parties about a recent filing.

16 Madam Court Officer, can you let me know when we are in private
17 session.

18 [Private session]

19 [Private session text removed]

20

21

22

23

24

25

1 [Private session text removed]

2

3

4

5

6

7

8

9

10 [Open session]

11 THE COURT OFFICER: We are back in open session, Your Honour.

12 JUDGE GUILLOU: Thank you, Madam Court Officer.

13 Mr. Prosecutor, do you have any submissions on the date of the
14 next Status Conference in this case?

15 MR. MICHALCZUK: Your Honour, we don't have any preference. The
16 only remark I can make is that, as we indicated before during this
17 session several times, we would be very happy to finalise the
18 pre-trial process as quickly as possible.

19 On our part, we don't need any Status Conference for now.
20 Everything for us is clear. If Your Honour, however, or the Defence
21 requires any Status Conference, so let's do it perhaps at the end of
22 February. Not earlier than that. Thank you.

23 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

24 Mr. von Bone, on the date of the next Status Conference?

25 MR. VON BONE: I would say in two months, Your Honour, simply

1 because I think at that point I can also give a clear picture on how
2 far the investigation is and maybe even an earlier date for the start
3 of the trial phase. Thank you very much.

4 JUDGE GUILLOU: Thank you, Mr. von Bone.

5 This concludes today's hearing. I thank the parties and the
6 Registry for their attendance. I also thank the interpreters,
7 stenographers, audio-visual technicians, and security personnel for
8 their attendance.

9 The hearing is adjourned.

10 --- Whereupon the Status Conference adjourned at 1.13 p.m.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25