

1 Monday, 14 December 2020
2 [Status Conference]
3 [Open session]
4 [The accused entered court via videolink]
5 --- Upon commencing at 3.00 p.m.

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

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

9 THE REGISTRAR: Good afternoon, Your Honour. This is
10 KSC-BC-2020-05, The Specialist Prosecutor versus Salih Mustafa.

11 JUDGE GUILLOU: Thank you, Madam Court Officer.

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

14 Mr. Prosecutor.

15 MR. MICHALCZUK: Good afternoon, Your Honour. Good afternoon,
16 everyone. The Prosecution team is represented today by Jack Smith,
17 Specialist Prosecutor; myself, Cezary Michalczuk, SPO Prosecutor;
18 Silvia D'Ascoli, Associate Prosecutor; and Artemis Chatzistavrou,
19 Associate Disclosure Officer.

20 JUDGE GUILLOU: Thank you very much, Mr. Prosecutor.

21 Now I turn to the Defence, please.

22 MR. VON BONE: Thank you very much, Your Honour. Good afternoon
23 everybody in the court. The Defence is represented by myself, Julius
24 von Bone. I'm the Defence counsel for Mr. Mustafa. And,
25 Mr. Mustafa, he is today following the court session from the remote

1 location at the detention centre.

2 JUDGE GUILLOU: Thank you very much, counsel.

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

5 On 2 December I scheduled this third Status Conference for this
6 case. My objective today is to review the status of the case and to
7 organise exchanges between the parties and to ensure an expeditious
8 preparation for trial.

9 I see that no written submissions have been filed by either of
10 the parties. And I also note that no preliminary motion was filed by
11 the Defence by the time limit set forth in Rule 97.

12 I will ask the parties for their submissions in turn, according
13 to the schedule order, first on disclosure, then on investigations,
14 then on points of agreement on matters in law and facts, and finally
15 on the next procedural steps.

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

19 So I would first like to hear from the Prosecutor on the first
20 point of the agenda, namely, whether there have been any difficulties
21 in the disclosure process and whether the parties foresee any
22 difficulties related to the remainder of the disclosure process.

23 I also invite the Prosecutor to indicate whether the SPO still
24 has exculpatory evidence in its custody, control, or actual knowledge
25 that must be disclosed to the Defence pursuant to Rule 103.

1 Mr. Prosecutor, you have the floor.

2 MR. MICHALCZUK: Thank you, Your Honour. Before I move on to
3 addressing all the points of Your Honour, I would like to make a few
4 preliminary remarks, if I may.

5 At the outset, I would like to express the general position of
6 the Prosecution regarding the cause and the base of this pre-trial
7 process.

8 As the disclosure is now at an advanced stage and we are gearing
9 towards its end, at least on the part of the Prosecution, it is the
10 SPO's intention to finalise the pre-trial phase of the proceedings
11 early next year and to move to the trial phase of the case as soon as
12 possible, and shortly after the filing of the pre-trial brief and
13 related Rule 95(4) material. Having said that, we believe we should
14 all strive for commencing the trial as early as March 2021.

15 Later during this conference, I will address all the points that
16 Your Honour put today in the agenda and I will provide more precise
17 information.

18 When it comes to the problems with disclosure, at present, we
19 are facing none. I would like to brief Your Honour very shortly
20 about what we have disclosed so far since the last Status Conference.

21 On 16 November, we disclosed to the Defence all material under
22 Rule 102(1)(b) that did not require redactions, and this batch
23 contained in total 369 documents contained on 1.226 pages.

24 Later on, on 1 December, the SPO also disclosed all
25 witness-related material under Rule 102(1)(b) that required

1 redactions, and it all was contained in 139 documents on 1.991 pages.

2 Also we disclosed to the Defence, as required by Your Honour's
3 Framework Decision on Disclosure, a detailed notice of evidence under
4 Rule 102(3), and we are talking about a total of 390 documents. This
5 is the list that contains 390 documents in English, Albanian, and
6 Serbian language.

7 The Prosecution shortly after each disclosure sent to the
8 Defence e-mails explaining the content of each disclosed batch.

9 So when it comes to -- as I said before, when it comes to
10 difficulties that we are facing so far, we are not facing any. We
11 are meeting all our disclosure obligations.

12 Shall I continue, Your Honour, with the exculpatory evidence
13 that we still have in our possession and control?

14 Your Honour, addressing this point, the Prosecution still has
15 exculpatory evidence in our control and possession. We are, however,
16 proceeding swiftly, and exculpatory evidence that we find in this
17 process is provided to the Defence on a rolling basis. The next
18 evidentiary batch under Rule 103 will be provided to the Defence most
19 likely already later on this week.

20 We keep digging. We keep checking our batches of evidence. We
21 expect that the next review will lead to the further disclosure of
22 evidence under Rule 103, and we will disclose this evidence to the
23 Defence early in January.

24 There might be -- and there will be - we know that already -
25 there will be a need to seize Your Honour for the ruling on the

1 matter of some redactions that will be needed for one of those
2 exculpatory batches before it is disclosed to the Defence, and we
3 expect to file an application to Your Honour in the first half of
4 January. We cannot still determine the date, but we will try to
5 proceed extraordinarily quickly, especially bearing in mind my
6 preliminary remarks that we aim at finalising this process very, very
7 quickly.

8 We also still conduct several -- we transcribe the interviews
9 that we have so far conducted, and there might be also a need to take
10 a look at their content and decide whether to disclose them without
11 redactions or to, again, seize Your Honour for some redactions before
12 the material is, indeed, disclosed to the Defence.

13 One way or the other, we will be providing to the Defence
14 everything that we have under Rule 103 on a rolling basis, as soon as
15 we discover such material.

16 When it comes to investigations --

17 JUDGE GUILLOU: Yes --

18 MR. MICHALCZUK: -- this is one of the points --

19 JUDGE GUILLOU: Yes, Mr. Michalczuk, we will first hear from
20 Mr. van Bone about the disclosure, and then we will go back to
21 investigations, if you don't mind.

22 MR. MICHALCZUK: Of course, Your Honour, we don't. Thank you.

23 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

24 Mr. von Bone.

25 MR. VON BONE: Yes, Your Honour. We've received the disclosure

1 material that has been provided by the Prosecution, including a very
2 long list. I would probably later on wish to discuss that particular
3 list in a closed session.

4 JUDGE GUILLOU: Did you face any difficulties or did you have
5 any issues with the batches that you got, or is everything fine on
6 your side?

7 MR. VON BONE: No particular issues -- no particular
8 difficulties but one particular issue that is going to be addressed.

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

10 Now I turn back to the Prosecutor for the second item on our
11 agenda, which is the status of its ongoing investigation. In
12 particular, have you completed the investigative steps mentioned
13 during the last Status Conference, or can an estimated date of
14 completion be given? And are you in a position to confirm that the
15 pre-trial brief and related material under Rule 95(4) will be filed
16 towards the end of February 2021?

17 Mr. Prosecutor.

18 MR. MICHALCZUK: If I may, I will address both points
19 separately, so let me begin with the investigations.

20 At the last Status Conference, indeed, we announced that there
21 are still some remaining steps that need to be taken and most of
22 those steps have already been taken, indeed. The investigation is
23 not still fully completed. There is a very small number of such
24 steps that we have still -- that we have to take that are simply
25 required as an investigative follow-up. But we are almost at the end

1 of this investigative process.

2 Nonetheless, as we indicated at the last Status Conference, even
3 if we have still something to do, those investigations will not
4 impact on disclosure process and any of the deadlines, especially
5 contained in Your Honour's order, and also they will not impact on
6 our readiness for trial. I will address the readiness of trial in
7 due course.

8 As I already mentioned, we believe that this case should go
9 early next year to trial, and we are preparing accordingly. I must
10 also at the end of this point, addressing this point, I need to
11 emphasise that our office is not conducting only investigations in
12 this case, but we also conduct investigations in other cases. The
13 evidence found there could have an impact, sometimes big impact, also
14 on this case, and accordingly we have to bear in mind that our
15 obligation towards the Defence is to also analyse that evidence found
16 in other cases and to disclose that evidence to the Defence.

17 This is why I cannot say that we have completed everything,
18 because it's not only one case, it's not only one type of proceedings
19 that we are looking at. Nevertheless, what I want to say, we will
20 continue to properly comply with all obligations, disclosure
21 obligations in respect of any newly found material.

22 When it comes to the pre-trial brief, now the disclosure process
23 is much more advanced than I could report during the previous Status
24 Conference. So with a higher degree of precision, I can provide
25 Your Honour with a date for the moment when we can file the pre-trial

1 brief. We will file it on 15 February next year. I am talking about
2 not only the pre-trial brief but also related Rule 95(4) material.
3 Thank you.

4 JUDGE GUILLOU: Thank you, Mr. Prosecutor. Duly noted for
5 February 15.

6 Mr. von Bone, I would like to ask you now to provide an update
7 about your investigations. In the last Status Conference you
8 mentioned that you were planning to go to Kosovo early December. And
9 can you also provide an update on how much time you will need to
10 finalise investigation activities? And I also invite the Defence to
11 inform me if it has the intention to give notice of an alibi or
12 grounds excluding responsibility, pursuant to Rule 95(5), and/or to
13 make requests concerning unique investigation opportunities, pursuant
14 to Rule 99(1).

15 Mr. von Bone.

16 MR. VON BONE: Thank you very much, Your Honour. I would like
17 to address an issue regarding the materials that have been provided
18 by the Prosecution. And to be on the safe side, I would like to do
19 that in closed session because I think that I'm going to name a
20 number of -- to name names which I do not wish to disclose.

21 JUDGE GUILLOU: Then, Mr. von Bone, we will move to closed
22 session until further notice. So I will ask the Court Officer to
23 move into closed session. And please let me know when we are in
24 closed session so we can continue with Mr. von Bone.

25 [~~Closed session~~]

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1 THE COURT OFFICER: Your Honours, we are in closed session.

2 JUDGE GUILLOU: Mr. von Bone, please continue.

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

4 The issue is the following: We have received a very long list
5 of documents that are disclosed. Not all of those are, in fact,
6 disclosed, I believe, to the Defence, of that complete list, but
7 there is one general observation that I would like to make regarding
8 this matter.

9 If I see it well regarding witnesses, I see a number of
10 witnesses which are people who are identified in that list, people
11 who are mentioned as a pseudonym, and people who are, so to speak,
12 unnamed. As far as the pseudonyms is concerned, I have identified
13 13, 1-3, of those. And the question regarding that would be whether
14 previous statements of all of these people -- I can name all of the
15 witnesses by pseudonym if you wish, but I can also say that these are
16 13 of these and they start with W04393 and the list goes on and on
17 like that.

18 And I think it is very important for the Defence, and not only
19 for the Defence but also for the Trial Chamber in particular, to see
20 whether these people have been either testifying in different cases;
21 that is question one. Whether those testimonies can be or will be
22 obtained if they have, indeed, testified in those cases. And it
23 could also be that the pseudonyms could be presented or might have
24 been presented as an injured party in some kind of case.

25 And we think it is important for the Trial Chamber to determine

1 the reliability of people. If I read a number of the statements, I
2 have seen that the Prosecution questions a particular witness
3 regarding a previous testimony, but I have not been able to see that
4 testimony in the documentation that has been disclosed. And I think
5 it is very important, because it is not going to be the first and
6 probably not the last case in which we will see that particular
7 people are testifying in several cases, and I think it is important
8 for the reliability of those witnesses so that we can see what they
9 have been in -- overall been stating.

10 Now, that might concern also the people who have been

11 [REDACTED] Pursuant to Oral Order of 05/03/2021

12 [REDACTED] Pursuant to Oral Order of 05/03/2021

13 coming forward in this case but maybe they have testified also in
14 other cases. We do know that in some cases people have testified.
15 We just want to know what they have testified.

16 Sometimes there is some kind of judgement ruled in such a case
17 and then we can see how the ruling was regarding the testimony of
18 that witness, either on an issue or overall. And I think the
19 Defence -- well, the Defence believes certainly that this is very,
20 very important for the Court in order to determine -- to make a
21 determination about the witnesses.

22 Then I have seen two, what I would say, United Nations Mission
23 in Kosovo witnesses, which were unnamed - Witness A and Witness B. I
24 have not yet read those statements of those people, but once again,
25 these people, they should -- we should know whether these people have

1 made previous statements or whether they have made previous --
2 whether they have testified.

3 And for these three groups - identified, pseudonyms, and unnamed
4 witnesses - it is important not only to seek what they have testified
5 in a trial, if they have, or what they have testified in some kind of
6 investigation.

7 Of the total number of the documentation, I have identified at
8 least 232 documents that I would like to inspect further, or at least
9 take a good look at. And I think it is important that we will know,
10 for example, if we see that a investigation was stopped, against whom
11 was, in fact, that investigation, and which witnesses the
12 investigation relied on vis-a-vis a particular suspect in such a
13 case. And now I have seen only, for example, a decision about
14 somebody who might have been a suspect - he's unnamed - but I did not
15 get clear on what basis that was done.

16 So once again, it has been in previous trials seen as well,
17 whether the Rwanda Tribunal or the Yugoslavia Tribunal, we've seen
18 those kind of cases happening that some of the witnesses appear in
19 different type of cases, and they might give a different statement or
20 they might give the same statement regarding a different suspect.

21 In the many years that I've been working on these type of cases,
22 I've come across that many times and I think that is an important
23 thing to determine. So I would like to know, from the Prosecution,
24 actually, whether the witnesses identified, pseudonym, or unnamed,
25 the three groups, have been either testifying or making police

1 statements previous in whatever case. And if that is the case, then
2 it is the belief of the Defence that that material should be brought
3 to the Trial Chamber and become part of the -- of the entire case
4 file, so to speak.

5 If you wish, I can name the pseudonyms. If you don't wish, and
6 it is clear, then -- I did not want to file it as a document, because
7 then I had no idea how to classify it, public or whatever, and I do
8 not want to harm in any case any investigation or any pseudonym. I'm
9 not sure whether witnesses are watching or viewing this trial, and I
10 want to make sure that we can determine at some point their
11 reliability. And I think that would be an important part of it.

12 Sometimes we also see people who present themselves as an
13 injured party in a particular case. I have not seen questions
14 regarding that in the witness statements that I've read until now.
15 But I think, nevertheless, it is important because then we can
16 determine for what injury a particular person has been presented in a
17 particular case, and that can, of course, determine the timeline and
18 the location of that particular witness in a particular case. And
19 that might either conflict or not conflict his overall reliability,
20 and I think it is important to do that. I've discussed it with my
21 client regarding the statements, and we would really like to have
22 that to surface in this case.

23 That is the issue that I wanted to discuss in a closed session.
24 I thought it would be wise to do it like this. And if you determine
25 it different, then I'm open to that. I wait for your response, maybe

1 now, and then afterwards we can go into opensession, I can address
2 the topics you have requested from me.

3 JUDGE GUILLOU: Absolutely. Thank you, Mr. von Bone.

4 Before I give the floor to the Prosecution, I just want
5 everybody to bear in mind the decisions I've issued on protective
6 measures, because I think I've already addressed part of this in my
7 decisions.

8 But, Mr. Prosecutor, you have the floor on this generally,
9 because we are not discussing about one witness in particular as for
10 now but more on the question in principle. You have the floor.

11 MR. MICHALCZUK: Yes, Your Honour. The purpose of the list that
12 we provided under Rule 102(2) is to give to the Defence the outline
13 of what we have in general in our possession and evidence and any
14 material that we, the Prosecution, have. And this is the complete
15 list of what we have for now in relation to this particular case
16 against this particular defendant, so we gave the Defence that list.

17 [REDACTED] Pursuant to Oral Order of 05/03/2021

18 [REDACTED] Pursuant to Oral Order of 05/03/2021

19 [REDACTED] Pursuant to Oral Order of 05/03/2021

20 [REDACTED] Pursuant to Oral Order of 05/03/2021

21 [REDACTED] Pursuant to Oral Order of 05/03/2021

22 [REDACTED] Pursuant to Oral Order of 05/03/2021

23 [REDACTED] Pursuant to Oral Order of 05/03/2021

24 So everything, in a nutshell, is there on the list provided.

25 And the Defence will have ample opportunities during the trial to

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1 test the credibility of all those witnesses also on the basis of the
2 statements that they gave previously, sometimes many, many years ago
3 before different bodies. So I would say everything is there.

4 The purpose of this list, actually, is for the Defence to come
5 back to us. And in Your Honour's decision, there is, of course, a
6 deadline for that. It's the beginning of January; I believe it's 15
7 January. Up to that moment the Defence could come to us with a list
8 of proposed documents behind the list that he wishes to inspect
9 exactly in view of what he's talking about right now, so what is
10 behind the list, what evidence the Prosecution has for him to make a
11 determination how to best prepare and present his case.

12 So I would encourage the Defence to take a look at the list and
13 come to us, within the deadline, with the proposed list of the
14 documents he wishes to inspect.

15 When it comes to the other questions, he mentioned-- my learned
16 friend mentioned a few points. Also, one of them is the question of
17 reliability of witnesses in general. I think the moment to test the
18 reliability is trial rather than this phase of proceedings.

19 [REDACTED] Pursuant to Oral Order of 05/03/2021

20 [REDACTED] Pursuant to Oral Order of 05/03/2021

21 [REDACTED] Pursuant to Oral Order of 05/03/2021

22 [REDACTED] Pursuant to Oral Order of 05/03/2021

23 [REDACTED] Pursuant to Oral Order of 05/03/2021

24 [REDACTED] Pursuant to Oral Order of 05/03/2021

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1 [REDACTED] Pursuant to Oral Order of 05/03/2021
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4 [REDACTED] Pursuant to Oral Order of 05/03/2021
5 [REDACTED] Pursuant to Oral Order of 05/03/2021
6 [REDACTED] Pursuant to Oral Order of 05/03/2021
7 [REDACTED] Pursuant to Oral Order of 05/03/2021
8 [REDACTED] Pursuant to Oral Order of 05/03/2021
9 [REDACTED] Pursuant to Oral Order of 05/03/2021
10 [REDACTED] Pursuant to Oral Order of 05/03/2021
11 [REDACTED] Pursuant to Oral Order of 05/03/2021.

12 Any other aspects that my learned friend would like me to
13 address?

14 JUDGE GUILLOU: Mr. von Bone.

15 MR. MICHALCZUK: Maybe I have missed something.

16 MR. VON BONE: No.

17 MR. MICHALCZUK: I apologise if I did.

18 [REDACTED] Pursuant to Oral Order of 05/03/2021
19 [REDACTED] Pursuant to Oral Order of 05/03/2021
20 [REDACTED] Pursuant to Oral Order of 05/03/2021
21 [REDACTED] Pursuant to Oral Order of 05/03/2021
22 [REDACTED] Pursuant to Oral Order of 05/03/2021
23 [REDACTED] Pursuant to Oral Order of 05/03/2021
24 [REDACTED] Pursuant to Oral Order of 05/03/2021
25 [REDACTED] Pursuant to Oral Order of 05/03/2021

1 it's just that if we want to have a trial which -- in which at some
2 point we would -- this would come up during the trial, that would
3 prolong the trial unnecessarily. And, therefore, I think it is
4 useful to make that determination beforehand rather than that we face
5 issues during the trial phase.

6 I think that is the most logical. But so the essence of the
7 injured party is not so much whether they are injured party here but
8 whether they have been an injured party in any other case, wherever
9 they came from, and what their injury was, and if that injury was
10 maybe caused by an entirely different incident.

11 [REDACTED] Pursuant to Oral Order of 05/03/2021

12 [REDACTED] Pursuant to Oral Order of 05/03/2021

13 [REDACTED] Pursuant to Oral Order of 05/03/2021

14 [REDACTED] Pursuant to Oral Order of 05/03/2021

15 [REDACTED] Pursuant to Oral Order of 05/03/2021

16 [REDACTED] Pursuant to Oral Order of 05/03/2021

17 [REDACTED] Pursuant to Oral Order of 05/03/2021

18 [REDACTED] Pursuant to Oral Order of 05/03/2021

19 [REDACTED] Pursuant to Oral Order of 05/03/2021

20 All to say that that might become relevant at some point during
21 the trial, and then at least we've covered and tackled it beforehand
22 rather than during the trial, which might prolong it. So that is the
23 entire idea of this thing.

24 The pseudonym that I have identified, I'm unable yet to
25 determine whether the previous statements are complete. But if the

1 Prosecution would say today that that is complete, then we probably
2 will not have any - what is it? - any surprises during the trial.
3 But I wonder whether the Prosecution can make a final assessment on
4 that or whether that should take some additional work.

5 Of the documentation that I've received, I have identified at
6 least 232 pieces of material that I would like to inspect in the
7 coming month, and that is sometimes quickly and sometimes it takes a
8 little bit longer. So we will need to take some time for that as
9 well.

10 Thank you, Your Honour.

11 JUDGE GUILLOU: Mr. Prosecutor, do you wish to reply?

12 MR. MICHALCZUK: Not too much really in response, really. As I
13 said before, after my learned friend inspects the documents behind
14 the list, he will know exactly whether any of those witnesses gave
15 the statement in the past or not. Some of them did, indeed; some of
16 them, they didn't. This is just the list. Just as the -- this is
17 just an indication of what we have.

18 To have an informed position on that, my learned friend would
19 have to really read the documents behind it. And this is my reply.
20 It's hard to go beyond that for the purpose of this hearing,
21 Your Honour, not to prolong it too much.

22 Your Honour, thank you.

23 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

24 Mr. von Bone, I think the next step now is probably, according
25 to my Framework Decision on Disclosure, to request the documents by

1 Friday, 8 January. And once you have had access to the document and
2 you have been able to inspect them, that you see if you still have
3 questions, because it seems some of your questions might be answered
4 by the documents you will have access to. So I suggest that we go
5 for this next step and we'll assess after that if there is still a
6 need for your request.

7 I just want to add that the reliability of a witness is usually
8 assessed during the trial, so it's also one of the functions of the
9 trial. So it doesn't have to be done at pre-trial, even though it's
10 always good to be prepared and to avoid lengthy debates. But still,
11 this is one of the functions of the trial.

12 MR. VON BONE: Well, the reason why I address it, Your Honour,
13 is that at some point it is also possible that the Prosecution drops
14 a particular witness and so of course it is the final determination
15 of a -- of the Trial Chamber. However, it is up to the Prosecution
16 whether they want to move on or continue with a particular witness,
17 or whether they say, "Well, we will not," or "not anymore rely on the
18 witness" for whatever reason. So that is why I am putting that at
19 the table right now, because if there is a change of position of the
20 Prosecution regarding the number of witnesses, then, of course, that
21 changes a little bit the debate too.

22 I am -- I did not get clear, and I would like to have that from
23 the Prosecution, whether -- because in my view the list of documents,
24 as long as it is, it is not completely disclosed, to the best of my
25 knowledge. If I'm wrong, then please tell me.

1 But what I would like to know from the Prosecution is: The
2 witness statements that were previously done by those witnesses, is
3 that, to the best of the knowledge of the Prosecution, complete so
4 that we don't have to search for new things or whatever?

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

6 Mr. Prosecutor.

7 MR. MICHALCZUK: The list of the witnesses that we will rely --
8 the Prosecution relies for our case, of course, also includes - to
9 the best of our knowledge, of course - all the previous statements of
10 these people.

11 There are several witnesses, however, we don't rely, but we
12 don't, as my learned friend put it poetically, drop it. We didn't
13 drop any of those people. We simply decided at some stage that the
14 value of their evidence is of such a sort that we, as the
15 Prosecution, don't need it. However, as required by the Rules and
16 the law, all this evidence is in the files.

17 So even if there is a witness -- to give you an example, on the
18 evidence list, we have several named people. Some of these people
19 interviewed by our Prosecution office are named by the name and the
20 surname. For example, these ones are those who we interviewed in the
21 past but we, as the Prosecution, are not going to rely on.
22 Nevertheless, they are there and they are waiting for the -- for my
23 learned friend to come and inspect their statements. So this is my
24 short answer to that. So we don't drop anything.

25 And to the best of our knowledge, the list that we provided on

1 1 December, the relevance list, contains exactly what is relevant for
2 the case. Not only for the Prosecution case but what is in general
3 relevant for both of us, both parties to these proceedings and also
4 to the Court later on to make a determination on the facts and the
5 law. Thank you.

6 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

7 Mr. von Bone, does it answer your question?

8 MR. VON BONE: Yes.

9 If I can address one short part again, which is within the list,
10 there is a number of named people of whom the detention was
11 terminated by someone. It depends a little bit. The list is not
12 really clear on that.

13 The question is: Of that list of whether there is going to
14 become some insight of where these people were actually detained and
15 for what reason they were detained. That is one part.

16 Another issue, Your Honour, that I would like to know is that
17 the witnesses that have pseudonyms, the Defence would like to know
18 whether the Prosecution has done any investigation regarding the
19 criminal record of these people by an -- by some kind of
20 authoritative institution. We would like to know that, whether among
21 the list are people who have a criminal record; and if so, if that
22 criminal record exists, whether it can become part of the case file
23 or not.

24 JUDGE GUILLOU: Mr. Prosecutor, on this question.

25 And after, I'd like us to move back to public session as soon as

1 we have finished with this issue, please.

2 MR. MICHALCZUK: Of course. Thank you, Your Honour.

3 My quick answer to that would be that, according to the law and
4 the Rules, the Prosecution is, of course, obliged to collect all the
5 evidence in favour and against its case. And we also were gathering
6 all exculpatory evidence alongside inculpatory evidence. So
7 everything that we've managed to find is there in the bundle, so it's
8 now -- I believe the job of the Defence is to simply take a look and
9 see what we have found. If there is anything missing that the
10 Defence would like to collect, this is a good moment for the Defence
11 to conduct its own investigations if he deems it necessary at this
12 stage. Thank you.

13 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

14 Mr. von Bone.

15 MR. VON BONE: Well, obviously, it's difficult to investigate
16 whether a witness has a criminal record if that particular person has
17 a pseudonym rather than a name. So that gives a complication to the
18 investigation of the -- for the Defence. So it's easy to put the
19 ball on the side of the Defence regarding this matter, but we are
20 unable, of course, to know who the witnesses are. But if they were
21 or if they have criminal records and what kind of criminal records,
22 that -- that would be -- that, of course, is relevant. But it is
23 impossible for the Defence to investigate such thing as long as we
24 have pseudonyms regarding those issues.

25 So I would like to know whether the Prosecution will maybe go an

1 extra mile in that perspective for that kind of research, because we
2 are unable to do that.

3 JUDGE GUILLOU: Mr. Prosecutor.

4 MR. MICHALCZUK: Well, of course, we appreciate that the
5 knowledge about the criminal record is relevant for the Defence, and
6 also for the Prosecution, it could impact on the credibility of a
7 certain witness or witnesses. We agree. We might conduct additional
8 checks. But again, I also encourage the Defence, if he only can, to
9 conduct also his own investigation. But we can -- we can
10 double-check this particular element.

11 To the best of our knowledge, there is nothing that could be
12 relevant for this issue, if I can say so. But we can definitely
13 double-check this particular one, bearing in mind that these
14 witnesses are indeed -- many of them are protected witnesses. And,
15 indeed, the Defence doesn't have even the name to give to the
16 criminal record in Kosovo for the information that he would be -- he
17 would be willing to get.

18 We'll discuss this issue internally. This is -- I think this is
19 a valid point. Thank you.

20 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

21 Mr. von Bone, anything to add on this?

22 So the next step will be for you to provide the Prosecutor with
23 a list by 8 January and enter in discussion about this last point.

24 And I also want to remind you that the protected witnesses are
25 protected under my decision, so this can only be varied by a decision

1 that I would make. So this is something that is Prosecution cannot
2 also do by itself.

3 Unless any of the parties has anything to add, we will move to
4 public session.

5 Madam Court Officer, please proceed.

6 [Open session]

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

8 JUDGE GUILLOU: Thank you, Madam Court Officer. We are now back
9 in open session.

10 And, Mr. von Bone, I will get back to you to follow up on the
11 questions that I mentioned earlier; namely, the status of your
12 investigations, if you already know if you intend to give notice of
13 an alibi or grounds excluding responsibility, and if you wish to make
14 a request concerning unique investigative opportunities.

15 You have the floor, Mr. von Bone.

16 MR. VON BONE: The short answer is, on both issues, that I do
17 not have an answer on that yet. So that is both on point F(1) and
18 point F(2), the answer is that I do not have yet that intention.

19 And what I heard just before the court session started, and that
20 will affect the investigation of the Defence, is that the Defence
21 noticed that shortly before the start of this court session it was in
22 the news that we will probably go in the Netherlands in a complete
23 lockdown effective tonight, in 24 hours, until 19 January. So I'm
24 not sure how locked down a lockdown is. But it is the severest
25 measure until now, the prime minister will give a statement at 7.00

1 this evening, and what I've heard is that there will be a complete
2 lockdown. So that will certainly affect the opportunities that the
3 Defence have to either travel to Kosovo, which it has until now not
4 been able to do.

5 That is basically what I have to do on the status of the
6 investigations. How long it will take? I would say an estimate
7 would be about nine months for sure.

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

9 Mr. von Bone, I understand that you might be limited by the
10 corona measures. I also understand that you might not have all the
11 information you need to finish your investigation, but I would
12 really, really advise and if possible that you can proceed with
13 investigation as soon as possible, because we do not want to delay
14 too much the end of this pre-trial phase. So as soon as you have the
15 possibility to travel to Kosovo to proceed with investigations, I
16 invite you to proceed as expeditiously as you can.

17 MR. VON BONE: I will, Your Honour. Thank you very much.

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

19 Mr. Prosecutor, nothing to say on investigations?

20 MR. MICHALCZUK: Maybe just one line to address what my learned
21 friend has just said.

22 As we said, our intention is to very quickly finalise the
23 disclosure process, very, very quickly file the pre-trial brief and
24 related documentation, and as quickly as it is only possible to move
25 to the next phase, trial.

1 The indication of my learned friend of nine months of
2 investigation, starting probably from next year at some point, is
3 rather concerning with regard to the timeframe that we are envisaging
4 for this case. Of course, it's not all dependent on us, and I
5 understand that the Defence should have time to conduct
6 investigations. But perhaps we should think of ways to address this
7 issue.

8 For example, we've got to maybe assess the extent of the
9 lockdown measures proposed by the Dutch government. Maybe they will
10 not prohibit any foreign travels. Maybe there is a way to conduct
11 investigations in a different way rather than by the Defence counsel
12 himself going to Kosovo. Maybe there are other ways that he could
13 employ to conduct those investigations and advance his case.

14 I'm saying that also because we have a defendant in detention
15 right now, and we should also bear it in mind to move as swiftly as
16 we can. And this is the obligation not only of the Prosecution but
17 also of the Defence.

18 Thank you, Your Honour.

19 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

20 Mr. von Bone, I fully appreciate the need for investigations
21 from the Defence, but I really urge you to be as expeditious as
22 possible, because, as the Prosecutor said, we cannot depend only on
23 the opening of the borders with the corona measures. And we have the
24 possibility to benefit from exemptions from travelling, as an
25 international tribunal. There is certainly a possibility to conduct

1 investigations remotely when it's a question of having access to some
2 documents. So I really invite you to be as expeditious as possible.

3 We will discuss later in this Status Conference when could be
4 the target date for the beginning of the trial, but it is clear that
5 the length of your investigation will be a key factor on this.

6 Now I would like to have the views of the parties on points of
7 agreements on matters of law and fact, and I would especially like to
8 know if they haven't entered into discussions regarding the
9 possibility to submit points of agreement on law and facts pursuant
10 to Rules 95(3) and 156. And if it were not the case yet, when would
11 the parties expect to be able to identify a list of issues subject to
12 dispute.

13 Mr. Prosecutor, you have the floor.

14 MR. MICHALCZUK: Thank you, Your Honour. Let me address both
15 issues jointly, if I may.

16 Pursuant to your instruction, we, indeed, engaged in discussion
17 with the Defence on the points of law and facts, subject to an
18 agreement that we could reach. We discussed that issue over the
19 phone last Thursday. We are going to continue this discussion later
20 on this week. We are already thinking about a short video-conference
21 on this matter.

22 Independently of that, at the beginning of next year, the
23 Prosecution is going to prepare a document of the issues or points of
24 facts and law that the Prosecution would like the Defence to consider
25 and potentially agree. So we are going to engage in discussions, but

1 at the same time the Prosecution proactively will prepare a
2 comprehensive list of points that we could potentially agree on.

3 Our deadline for that that we are envisaging for the provision
4 of such a list to the Defence is tentatively 15 January of next year,
5 but perhaps we will manage to even provide this list earlier. Thank
6 you.

7 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

8 Mr. von Bone.

9 MR. VON BONE: Your Honour, it's a complicated issue from the
10 side of the Defence as the defendant, Mr. Mustafa, has been fighting
11 for the liberation and the independence of Kosovo. So, in general, I
12 would say that it's hard to agree on points of facts or points of law
13 regarding it. But obviously, the issue is whether we can at some
14 point see whether the particular parts of facts or particular parts
15 of law can be agreed on in order to speed up the trial. That is,
16 obviously, the essence.

17 I just want to reassure, from the side of the accused, that
18 Mr. Mustafa is obviously in the situation that he thinks, "Why on
19 earth am I accused at all for this, fighting for the independence and
20 the liberation of Kosovo?"

21 So on that part, Your Honour, we have indeed -- I've received a
22 phone call from the Prosecution last Thursday, and we concluded that
23 at some point we will engage in a discussion in order to see whether
24 we can agree on points of law or facts or not. And whether that is
25 possible for 15 January, I'm not sure how the timeline will develop,

1 but we'll work on it - that is basically what I can say - and then we
2 will see what we can come up with to you. We've been previously
3 working on a chart, so I think that in that perspective we can do
4 that. Lockdown or no lockdown, that does not hamper our discussions
5 via Zoom or whatever. But, well, we will see how that goes. There
6 is the intention to finalise that as quick as possible. Thank you
7 very much.

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

9 As you mentioned, Mr. von Bone, it's a very important step to
10 prepare for the trial because it will allow both parties and the
11 Trial Panel to focus on the elements that really are at stake. So
12 even if Mr. Mustafa does not agree with most or all of the facts, I
13 am sure there is still the possibility to agree on the law at least.
14 And so I invite you to continue your dialogue with the Prosecution
15 and to get back to me with a list that you can agree upon in the
16 following weeks.

17 Mr. Prosecutor, is there anything you want to add on this?

18 MR. MICHALCZUK: Not on this particular point, but I would like
19 to underline that we will proceed swiftly to compile this list of
20 facts, and then the rest will depend on to what extent the Defence
21 will be agreeing to that or not. That's basically it. Thank you.

22 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

23 Mr. von Bone, anything to add?

24 MR. VON BONE: Nothing to add, Your Honour.

25 JUDGE GUILLOU: Thank you.

1 Let me now move to the next point on our agenda, which is the
2 next procedural steps, and I will turn to the Defence first.

3 Mr. von Bone, do you envisage filing a pre-trial brief and
4 related material under Rule 95(5) of the Rules; and if so, when do
5 you expect to be in a position to submit such a filing?

6 You have the floor.

7 MR. VON BONE: Your Honour, we have not determined yet whether
8 we will do that, so, therefore, I cannot provide you at this moment a
9 date regarding that.

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

11 For the next Status Conference, Mr. von Bone, I would really
12 appreciate if you could be in a position to answer the question so
13 that we can prepare the next step, and especially be ready for trial.

14 I would now like to ask the parties when they expect to be ready
15 for trial, because pursuant to Rule 95(2) I shall indeed set a target
16 date for the readiness of the case for trial. We will, of course,
17 not decide on a date today, but I would like an indication from both
18 parties about when the case file will be ready to be transmitted to
19 the Trial Panel, according to the estimates of today.

20 Mr. Prosecutor.

21 MR. MICHALCZUK: Thank you, Your Honour. The SPO, and I
22 mentioned that before at the outset of this Status Conference, that
23 we estimate to be ready for trial as soon as the pre-trial brief, our
24 pre-trial brief, is ready and we file the Rule 95(4) material.

25 I indicated that our trial-readiness date is 15 February 2021,

1 and we would be happy to schedule the trial, to organise the trial
2 shortly after, as soon as possible. Possibly in March, as I said.

3 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

4 Mr. von Bone.

5 MR. VON BONE: Thank you, Your Honour. Of course, it's a little
6 bit depending on the amount and the type of witnesses that we would
7 like to present in the trial. That is obviously an issue that we are
8 facing. We will see whether it is possible to do that before the
9 month of March. I am not sure at this point. But we're working on
10 it in order to do that.

11 In my estimate, I would say that it couldn't be March, probably
12 a month or so or six weeks later, around that. So that is an
13 estimate that I give as of, let's say, January 1, because the month
14 of December is nearly over and I do not expect that this month we
15 will be in a position to work on that. Basically, everybody in the
16 world is having Christmas and whatever holidays, so the last one and
17 a half week of December is gone, and we have another week.

18 So we'll work on the witnesses and see what we can come up with
19 and then -- in order to present it at some point. Thank you very
20 much.

21 And by the way, Your Honour, if I would have any earlier date,
22 obviously, then I will make submissions regarding that so that it is
23 easier for all the parties to make a timeline for that. But I must
24 say that we are also a little bit depending on third parties
25 regarding this issue.

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

2 Next, would either of the parties wish to raise any point which
3 has not yet been dealt with?

4 Mr. Prosecutor?

5 MR. MICHALCZUK: No points, Your Honour. Thank you.

6 JUDGE GUILLOU: Mr. von Bone.

7 MR. VON BONE: No, Your Honour. I don't think I have any other
8 point to raise.

9 JUDGE GUILLOU: Thank you.

10 Finally, Mr. Prosecutor, do you have any submissions on the date
11 of the fourth Status Conference?

12 MR. MICHALCZUK: The Prosecution doesn't have any preference as
13 to the date. It could be January. It could be February. Everything
14 depends on the needs and Your Honour's and the Defence preference.
15 It could be either of those two months. Thank you.

16 JUDGE GUILLOU: Thank you, Mr. Prosecutor.

17 Mr. von Bone.

18 MR. VON BONE: Well, there is a slight preference for the month
19 of February to set a new court date.

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

21 Mr. von Bone, is there any specific milestone or event that you
22 wouldn't like us to do the Status Conference before? I'm especially
23 thinking about my framework disclosure -- the decision on disclosure.
24 Is there a specific step in the proceedings that you would like to
25 have behind you for the next Status Conference?

1 MR. VON BONE: Well, as I have identified really a number of --
2 a long number of things that I would like to take a look at from the
3 list of the Prosecution, I think that will take a little bit more
4 time than normal. I have identified 232 issues off that list. So
5 it's not only me; I also want to discuss that with my client,
6 obviously, who is the person that we are primarily concerned about.
7 And then we can get together, work on that, and how we feel about it.
8 And when obviously it is not necessary, then it is not necessary.
9 But if we do feel it is necessary.

10 The one thing I would like to ask is how would the Judge want
11 the Defence to communicate with the Prosecution regarding the things
12 that we would like to inspect? Is that through a submission or can
13 we go directly into contact with the Prosecution? We have, together,
14 one e-mail on which we can rely. I can simply put the list on it and
15 then we can set a date, or I -- I think it will be a number of dates,
16 to be clear, that we would like to inspect those topics.

17 JUDGE GUILLOU: You can proceed directly with the Prosecution on
18 this, according to my framework decision, so feel free to reach out
19 to the Prosecution directly.

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

21 JUDGE GUILLOU: Finally, I would like to remark that the
22 judicial recess begins on 21 December and ends on 1 January 2021.
23 During this time period, I will only be responding to urgent matters,
24 so non-urgent matters should be addressed to the Basic Court either
25 before or after the recess.

1 This concludes today's hearing --

2 MR. VON BONE: Just, Your Honour --

3 JUDGE GUILLOU: Oh, Mr. von Bone.

4 MR. VON BONE: -- if I may.

5 JUDGE GUILLOU: Sure.

6 MR. VON BONE: The very last thing is I obviously have meetings
7 with my clients. Those are usually Zoom meetings. They are usually
8 not longer than one hour. Obviously, that does not the -- do the --
9 it's not the normal way of working, because usually with a case file
10 like this, you are together with a client, like, a full day or so.
11 So I really would hope that it would be possible that we are able
12 somehow to have a little bit longer conversations than only an hour.
13 It's really -- it makes it a lot easier to work on the casefile
14 together and it will eventually speed up the trial as a whole.

15 So I hope that at some point, either the Registry or whoever,
16 can communicate with the detention centre that we are not really
17 completely locked into this tight schedule. And we have usually two
18 meetings in -- in a week. It depends a little on the week. But the
19 organisational thing, as far as the DMU is concerned, they usually
20 decide how and when and what day and so on, so it would be helpful
21 that we can work a little bit longer hours and preferably more days
22 at some point.

23 Thank you very much.

24 JUDGE GUILLOU: Thank you, Mr. von Bone. Have you raised this
25 issue with the DMU or with the Registrar?

1 MR. VON BONE: I've only with the DMU, but I will take a look
2 how it can be done. But it would be really preferable in cases like
3 this that we have, like, an afternoon or an entire morning.
4 Obviously, there is different detainees too. But due to these COVID
5 measures, I understand everybody's position and everybody's
6 possibilities and impossibilities. But, of course, it works very
7 different when you are normally here, go to a detention centre, stay
8 there an entire afternoon, and then you can go through a case file
9 like that. And now that is limited, and you have only so much time
10 and you've many topics to cover. So it just, in general, makes it a
11 little bit more complicated.

12 So the only thing that I would ask is whether, you know, that
13 would be made available a little bit longer by whoever could
14 interfere in that.

15 Thank you very much.

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

17 I invite you to mention this next time you schedule such a
18 meeting with the DMU. And it's also noted on the record that you
19 wish to have longer periods of time in order to be able to have more
20 productive meetings with your client. And if there is any issue on
21 this, we'll discuss about that during the next Status Conference, but
22 I hope that this will be able to be fixed directly with the detention
23 unit.

24 Anything else from any of the parties?

25 Then this concludes today's hearing. I thank the parties and

1 the Registry for their attendance. I also wish to thank the
2 interpreters, stenographer, audio-visual technicians, and security
3 personnel for their assistance.

4 The hearing is adjourned.

5 --- Whereupon the Status Conference adjourned at 4.07 p.m.

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