Wednesday, 15 February 2023

[Specialist Prosecutor's Preparation Conference]

[Open session]

[The accused entered the courtroom]

--- Upon commencing at 9.31 a.m.

PRESIDING JUDGE SMITH: Good morning, everyone.

Madam Court Officer, would you please call the case.

THE COURT OFFICER: Your Honours, this is case KSC-BC-2020-06, The Specialist Prosecutor versus Hashim Thaci, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi.

PRESIDING JUDGE SMITH: Thank you, Madam Court Officer.

Now, I remind the parties and participants that introductions will not occur regularly, as we stated the last time. Just let the Panel know by standing if you have a new member you would like to be recognised. By that, I mean co-counsel. Your support staff is for you to manage.

Nobody's standing?

I also note that the four accused are present in the courtroom today.

As for today's session, we will take a break around 11.00 a.m. We will resume at 11.30 a.m., and continue to 1.00 p.m. when we will break for lunch. We will then resume at 2.30 p.m. and continue until 4.00. We hope that it will not be necessary to go beyond the 4.00 p.m. deadline, and, therefore, we ask all parties and participants to ensure that their submissions are short and focused

as possible.

As you all know, on 19 January 2023, this Panel scheduled the SPO preparation conference for today, February 15th. A written agenda was circulated on January 26th. And as indicated in the agenda, the Panel will, among others, seek answers from the SPO to the matters articulated in paragraphs 1 through 5 of Rule 18, and we will turn to those matters now.

Before we get to any questions, I would like to make a few comments regarding the size and structure of the SPO's case.

I recall that since our first conference in December, we have been asking the SPO to take a hard look at reducing the size of its case. We appreciate the efforts in that regard, as evidenced by yesterday's filing. And based upon the information currently before us, the Prosecution has reduced the hours requested by them for presentation to 545 hours.

The Panel does stress, once again, the importance of limiting unnecessary or duplicative witnesses and exhibits. Corroborating witnesses should be called only when the facts and circumstances justifying corroboration are important to the SPO case. And documentary evidence should have a direct connection to the allegations and not be tendered to enhance the context or to explain the general environment. Evidence of little probative value should be avoided.

It appears that the SPO intends to submit evidence on nearly every act against any alleged victim and every crime site during the

temporal jurisdiction period in order to provide as much crime-based evidence as possible. And without minimising the serious nature of such allegations, we note that a strategy that seeks to lead evidence on each of such acts or sites is one that will take a vast amount of time and might unnecessarily not bear on the success or otherwise of your case.

We also note that the Defence pre-trial briefs do not appear to take issue with many of the alleged incidents.

A representative group, which adequately illustrates a particular class of acts, crimes charged, their classification, scale, nature, places where they occurred, and the victims of the crimes, the perpetrators, and their alleged connection to the accused, might be equally or more effective and certainly a great deal shorter. Any attempt on the part of the SPO to be exhaustive is, in our views, bound to exceed the timeframe reasonable for the prosecution of such a case.

We do, however, once again, acknowledge the efforts of the Prosecution in eliminating one of the alleged crime sites, and we would urge you to continue to review those sites for further reduction.

And I would like to reiterate a comment made at the trial prep conference concerning the structure of the SPO's case. We have repeatedly stated that it is not only desirable, but in our opinion necessary, that evidence of, for example, the chain of command of the KLA, if that is to be presented, be present in a structured,

coherent, and logical manner. We sought clarifications from the SPO, and we were not fully satisfied with the result of those inquiries. We continue to advocate for such an approach.

While we reiterate that the manner of presentation is primarily the responsibility of the calling party, the Panel does remain concerned and will remain concerned throughout this trial. Therefore, we ask the following to be considered by the SPO and note that perhaps the Panel will issue an order on this. I think we'll start out with a request.

When a witness is called by the SPO to give evidence in whole or in part about the functioning of the KLA chain of command, the SPO will be expected to prepare, for the purpose of streaming the evidence in question, visual aids or charts that provide a clear and detailed understanding of its case in relation to the part or parts of the chain of command in relation to which the witness is expected to testify.

These charts or visual aids are intended to assist the Panel, the Defence, and the participants in understanding the evidence that is to be given and to place it in the proper context. Such charts or visual aids should, to the extent possible, contain information regarding the relevant military units, structures, and associated entities, the operational zones, the special units, the military police, et cetera, as far as relevant to the evidence of a proposed witness.

The SPO shall also consider using maps and other visual aids to

help identify physical locations relevant to its case and to contextualise these as far as necessary.

The SPO shall provide a copy of any such chart or visual aid to the Panel, the Defence, and Victims' Counsel no later than 24 hours prior to the commencement of the evidence of a witness.

The Prosecution may decide which witness warrants the production of such a document.

We now ask for submissions from the parties and the Victims' Counsel on that issue. Perhaps the SPO has already developed such visual aids or is in the process, so if that is the case we are grateful.

Mr. Prosecutor, is that assistance something you can provide and are you, in fact, preparing it?

MR. HALLING: Your Honour, it is assistance that we can provide. If our opening statement visual aids overlap with what Your Honours were contemplating, so we think we can modify it to accommodate exactly what you just said.

PRESIDING JUDGE SMITH: Any comment, Mr. Kehoe?

MR. KEHOE: No, Your Honour. Thank you.

PRESIDING JUDGE SMITH: Thank you.

Mr. Emmerson, nothing?

Mr. Roberts?

MR. ROBERTS: Very briefly, Your Honour. Would it be possible to have them a bit more than 24 hours in advance, because if there's any issues -- from prior experience, there can be issues with how

things are represented, and it may be more efficient to deal with questions before we get into court and take up court time.

PRESIDING JUDGE SMITH: I'm going to leave that to you to discuss with the Prosecution. And if you cannot come to a reasonable conclusion, let me know.

MR. ROBERTS: Thank you, Your Honour.

PRESIDING JUDGE SMITH: Okay. And go ahead.

MR. ELLIS: Nothing further, thank you.

PRESIDING JUDGE SMITH: Thank you.

I thank the parties and the participants for their submissions.

Oh, Mr. Laws. I'm sorry.

MR. LAWS: Nothing to add.

PRESIDING JUDGE SMITH: All right.

Now as to the options available to the Panel under paragraph 1 of Rule 118.

It's quite clear that the Panel has the authority to, *inter alia*, limit the number of witnesses, limit the time available to the Prosecutor to present its evidence, shorten the length of the direct examination, and/or invite the SPO to restrict the number of crime sites or crimes alleged.

However, it is the Panel's intention, at this stage of the proceedings, to trust the Prosecution and to allow it to run its own case as it sees fit and, therefore, to be responsible for decisions on the structure of the case at this time. The Panel reserves the right to intervene where necessary to ensure the fairness,

expeditiousness or good order of the proceedings. But once again, we acknowledge recent events as outlined in your recent filings, and we urge you to continue to consider streamlining your case.

A similar approach will be applied to the Defence case or cases, if any is presented. The Panel will regularly monitor the progress of the SPO, and later on the Defence case, if necessary, in light of the estimates it has already provided to determine if some more limiting action is required by the Panel, and it will take such action as it deems necessary.

The Panel will also review, on an ongoing basis, the need to call each and every listed witness and/or exhibit.

The Panel also expects that as soon as the SPO has formed the view that it will not call a witness and/or use certain exhibits, the SPO will give notice to the Panel and the parties and participants of this.

Is that clear, Mr. Prosecutor?

MR. HALLING: Understood.

PRESIDING JUDGE SMITH: Thank you.

Now, as to the total time allocated to the SPO to present its evidence, I should note that the schedule we have provided to the parties and participants totals a bit less than 600 hours in the first year of trial. We will get to the sitting schedule later in more detail, but for now I would like to ask the SPO some questions regarding the size of its case, and they will be short questions. You can just remain standing, whoever is going to answer it.

Let me start with a few questions on the witnesses.

At the present time, based upon yesterday's filing, you were at 312 witnesses.

MS. MAYER: That's correct, Your Honour.

PRESIDING JUDGE SMITH: Is that correct? And that is different than what you previously filed, a reduction of some 11 witnesses, I believe. Is that correct?

MS. MAYER: That's correct, Your Honour.

PRESIDING JUDGE SMITH: Are you considering dropping any other witnesses at this time?

MS. MAYER: As we previously said, this is an ongoing process and we absolutely intend to continue this review. We think the review will change nature as the trial gets underway and evidence is introduced, so we're committed to doing that.

PRESIDING JUDGE SMITH: I also would like to ask you in this context about your filing of 7 February 2023, that is F01261, which pertains to a request for variation of protective measures in respect to two witnesses.

The Panel would like to be clear about one thing: Are you saying that unless the requests for variation of the protective measures is granted, the two witnesses are not prepared to testify?

MS. MAYER: I know you asked me to remain standing, Your Honour, and I am prepared to talk about the beginning of the agenda. I am going to defer to my colleague on this.

PRESIDING JUDGE SMITH: That's fine.

MR. HALLING: Your Honour, our submission is that if the protective measures are varied, we would seek to introduce those witnesses' testimony in writing. We understand that whether that application is granted would be subject to a separate decision of the Trial Panel.

PRESIDING JUDGE SMITH: And if the Trial Panel orders that they be heard in person, will you be proposing to withdraw those witnesses?

MR. HALLING: We would re-evaluate at that point. So it's not been decided, but our first attempt is going to be to tender the statements in writing.

PRESIDING JUDGE SMITH: All right.

Any one of you can answer these next few.

How many crime-based witnesses will be called?

MS. MAYER: Your Honour, as the Court knows, the witnesses often have overlapping information. That said, to give you hard numbers, for crime-base witnesses -- forgive me, I just want to make sure I have the accurate count. I'm looking through my notes.

PRESIDING JUDGE SMITH: Take your time.

MS. MAYER: For crime-base witnesses, 188.

PRESIDING JUDGE SMITH: And structure of the KLA, how many?

MS. MAYER: 110. And I can continue on with the other two categories that's in the agenda, Your Honour.

PRESIDING JUDGE SMITH: All right.

MS. MAYER: The acts and conduct of the accused, 63, and --

PRESIDING JUDGE SMITH: I'm sorry, 63?

MS. MAYER: 63, Your Honour. And the contextual elements, 37.

And as I said, if the Court does some quick math, that adds up to more than 312. That's because, as this Panel knows, these witnesses have overlapping information. We categorise them in the main or primary category, but many of our witnesses have overlapping information.

PRESIDING JUDGE SMITH: We expressed some concern earlier about the number of hours that would be assigned to a witness following the submission of a witness statement under 153 or 154 or -- not under 155. Have you done anything to limit those hours?

MS. MAYER: Yes, Your Honour. Both in our filing of February 1st -- I apologise to the Court, I don't have the number of the filing. It was in response to this Court's third oral order of 16 December regarding the first 12 witnesses. That was our first filing which indicates a reduction of hours for the 154 witnesses.

That has continued in our filing yesterday. In the annexes that are attached, the -- our work in reducing the hours includes a significant attempt to focus on the 154 witnesses where prior statements, if accepted by the Court, will be introduced and will cover a significant foundation of their evidence.

PRESIDING JUDGE SMITH: As to the list of the first 12 witnesses that you've had in annex to filing F01243, we understand that the order in which they appear in the filing is the order in which they will be called. Is that a correct assumption?

MS. MAYER: That is correct, Your Honour.

PRESIDING JUDGE SMITH: All right. You can be seated now.

MS. MAYER: Thank you.

PRESIDING JUDGE SMITH: I will come in a moment to a number of applications that have been made by the Defence in respect of the commencement of the evidential part of these proceedings.

For the time being, please note that if there needs to be any change to the order of calling these witnesses, we expect the SPO to notify the Panel, the Defence, and the Victims' Counsel as soon as the need for a reshuffling arises.

Yes, sir?

MR. FERDINANDUSSE: Your Honour, if I may make one supplementary remark. As I think we have put in a filing, we are very much aware that the Court wants courtroom time to be used efficiently. So once we have full cross-examination estimates, we will have to review how the order of the witnesses will relate to courtroom time without having to come witnesses for two times within three weeks or so.

PRESIDING JUDGE SMITH: Understood.

MR. FERDINANDUSSE: Thank you.

PRESIDING JUDGE SMITH: We appreciate the comment.

Let me continue with a few questions on the number of charges and crime sites and one question on exhibits.

Does the SPO intend to reduce or narrow the number of charges in the indictment at this time?

MS. MAYER: No, Your Honour.

PRESIDING JUDGE SMITH: Okay. And you understand that you are invited to do so as 118 shows?

MS. MAYER: We do. And we very much appreciate the Court's context and framework at the beginning of this morning's session. We intend to continue to look at our evidence, but take our burden very seriously and -- but we're very, very mindful of the court time.

PRESIDING JUDGE SMITH: Thank you.

Do you intend to present evidence with regard to every crime site listed in the indictment save for the one you've already told us you're eliminating?

MS. MAYER: Yes, Your Honour. That's exactly right.

PRESIDING JUDGE SMITH: And how many crime sites will be referenced in the SPO's case?

MS. MAYER: That requires a little bit more math, Your Honour, so let me get my notes.

There are, as the Court knows from the schedules attached to the indictment, Schedule A, which relates to detentions in Counts 2 through 7, a total of 42, including the filing that we made yesterday with the one location. It's a total of 42 locations within 17 municipalities.

PRESIDING JUDGE SMITH: On detention alone?

MS. MAYER: On detention. That's correct, Your Honour.

Regarding Counts 8 and 9, Schedule B lists 22 locations within 15 municipalities and also incorporates, in paragraph 138 of the indictment, Schedule A, and as listed in that paragraph, killings in

connection with withdrawals from sites in the face of offensive by FRY forces. So that's the total scope of sites related to Counts 8 and 9.

PRESIDING JUDGE SMITH: And I take you at your word that you're continuing to review those crime sites.

MS. MAYER: We are, Your Honour. The other thing I'd note, as relates to all of the counts and all of the sites, is that while we understand a raw number of sites might give an impression about how long that might take or how complex the evidence is, there are examples throughout the indictment and the pre-trial brief we hope that make clear that not every site is the same. And even if it lists a number of locations, the presentation on that evidence may be very brief. It may be a matter of days to cover one location, less than a week.

Again, I don't want to commit us until we see how the evidence is adduced and the cross-examination times, but there are locations where -- not all locations are equal, I should say, in terms of the length of presentation of evidence that we expect.

PRESIDING JUDGE SMITH: Thank you.

MS. MAYER: Shall I continue for the other two counts or is the Court satisfied?

PRESIDING JUDGE SMITH: The last question I have in this line is what part or percentage of the proposed exhibits from your Rule 95(4)(c) list does the SPO plan to seek to tender from the bar table?

MS. MAYER: Approximately 50 to 60 per cent, as we said in our filing yesterday.

PRESIDING JUDGE SMITH: Thank you.

I'm now going to hand over to Judge Gaynor who has some further questions for the SPO.

Judge Gaynor.

JUDGE GAYNOR: Thank you, Judge Smith.

I've three questions for the SPO concerning the duration of the SPO case. I'll read them all at once, and then I'll give the parties an opportunity to comment.

First of all, what are the factors the Panel should take into account if it chooses to exercise its discretion under Rule 118(1)(d) to determine the time available to the Specialist Prosecutor for presenting evidence?

Second, the SPO submits that 545.5 hours of direct examination are warranted for the presentation of its case. This is high compared to previous complex trials before international tribunals. For example, in the Karadzic trial at the ICTY, the prosecution was limited to 300 hours for the direct examination and re-examination of all its witnesses. In the Mladic trial, the chamber granted the prosecution a little over 200 hours for the direct examination of all its witnesses. Both cases involved extensive use by the prosecution of the ICTY's equivalent of Rule 154. Both involved bar table motions and judicial notice of adjudicated facts. Both cases involved indictments which contained allegations which are

considerably broader in temporal, territorial, and substantive scope in the main indictment in the present case.

The question is this: What is it about the present case that warrants 545 hours for the direct examination of all SPO witnesses?

The second question concerns the Panel's obligation under Rule 118(5) to set a target date for the closing of the Specialist Prosecutor's case. The SPO has estimated that its case may conclude at the end of 2024, though it may continue into 2025. Has the SPO fully taken into account the obligation on the Panel to ensure that the Defence is given a fair opportunity to cross-examine, which includes the right of the cross-examining party under Rule 143(3) to elicit evidence relevant to the case of the cross-examining party?

So we'll start with the SPO, please.

MR. TIEGER: Good morning, Your Honours.

First of all, I appreciate the opportunity to address the first two questions raised by Your Honour in part because I think there was a time when I myself might have framed such a question in a similar manner myself relatively rhetorically, and so I was obliged to go back to the ICTY jurisprudence and other institutions to respond to that question as objectively as possible.

And so I want to address both the utility of the Karadzic and Mladic and ICTY cases as comparative measures for the size of this case and also the standards that should be applied when the Court exercises or chooses to determine whether to exercise its discretion

to limit the case.

And the answer to the first is, essentially, that the Karadzic and Mladic cases, for reasons arising from the very nature of those cases and the nature of the institution and the stage of development of the institution at the time those cases were tried, will not be a reliable measure of the time that should be allocated for a case of this type, and I'll illustrate that in a few ways, but I wanted to foreshadow the essential argument.

So first of all, with respect to the particular circumstances of the case. Your Honours will be aware that in those cases there was, for example, a vast amount of contemporaneous meticulously recorded documentary evidence, and such -- and I'm talking about assembly sessions, government sessions, presidency sessions, daily combat reports, directives, orders, on and on, that reduced the need for reliance on individual witnesses.

In addition, you had the fact that, in a relatively paradoxical way, witnesses were scattered around the globe by the very crimes which gave rise to these cases and/or had been interviewed in circumstances where they were otherwise free of fear of and intimidation, and there was a vast array of witnesses from whom to choose. And they were testifying about and talking about crimes of such a scale that it wasn't pieced together witness by witness, but most individual crime-base witnesses, in fact, not to mention other witnesses, were in a position to give evidence about a wide range of crimes.

In addition, you had a large number over a long period of time of internationals, both the diplomats and media figures, who were particularly positioned to give evidence about both crimes of long duration and command and control in very insightful ways in a manner that is not necessarily replicated here.

Now, I'm not suggesting that none of those matters exist here. For example, as the Court will find, portions of the common purpose in this case were, in effect, publicly disseminated by the accused in real time to magnify their effect. And you'll also find that there are materials which were seized from the residences of the accused of considerable value to this case too, but nevertheless, the scale is considerably and meaningfully different.

And second, I spoke about the development and the refinement and evolution of the institution. And you'll find that in such things as adjudicated facts. You mentioned the Karadzic case. And you may recall, Your Honour, that in the Karadzic case, there were approximately 2400 adjudicated facts built on previous cases and built on years and years and years of churning and refining evidence in court about the same matters.

Now, even if one posits that you could adduce adjudicated facts at the rate of, let's say, one every 12 minutes from a witness, which I think is clearly excessive, that would translate into roughly about 600 hours. Or every 15 minutes, let's say. And I mention that because it shows the difference in these sorts of cases.

I would also mention, and I think it's worth noting, that the

efficiency measures employed in those cases were extreme, and I think ultimately came in for some criticism. Victim witnesses testified for very, very short periods of time in the context of 154 evidence. That can be replicated, but I am certainly aware, and I think the Court may well also be aware, of the criticism that victims were given short shrift in that context. And my impression is that institutions that followed, including the ICC and including this institution, have tried to rebalance that to some extent. So that is also a factor that impacts the number of hours.

I'm not suggesting that any single individual factor is decisive, but I think clearly, when you aggregate them, it's not difficult to see that the prior cases are not necessarily a reliable or constructive measure of how many hours should be allocated to a case of this type. And, indeed, if part of my submission is accurate, that is, that institutions that have focused on the same type of cases over and over again achieve a certain level of efficiency that institutions that deal with fresh cases cannot achieve, then one might suggest that at the ICC, which is the latter type of institution, I would submit, you would see numbers that more closely resemble the ones we have submitted. And I've looked at those cases, and, indeed, that seems to be the case.

And just a handful of examples would be Ntaganda, you have 281 hours for 87 witnesses; Ongwen, 400 hours for 120 witnesses; Ngaïssona, 400 hours for 152 witnesses; Kushayb, 280 hours for 132 witnesses. Now, again, I'm definitely not trying to make an exact

equivalency here, but I think the trend is clear. When you're dealing with these cases in a different context, a different number of hours are required.

And just to underscore the risk of drawing extrapolations from prior cases without deeper analysis, I would note that two cases that form just a fraction of the crime base in this case that were addressed in the ICTY, Limaj and Haradinaj, took a total of 200 court days, which I think translates into roughly 8 to 900 hours. I say that not to use them as an example of how much time the SPO should get here, but just a caution against extrapolations without diving deeper into the factors that gave rise to those cases.

And in terms of the factors the Court should use in this case, I'm going to just cite a couple that I think are the paramount considerations, but I think they bring us to the point raised by the Presiding Judge this morning; that is, that these factors are best exercised in the context of concrete and real-time review of the use of time in a particular case.

So I would say those factors essentially are -- begin with the fact that the scope of the case is not defined by the Prosecution generally. It's actually defined by the crimes themselves and by the accused. And that's the point you begin with. After that, courts have taken a look at whether or not the indictment may better be pared down to reflect a reasonable representation of those crimes rather than an exhaustive accounting of every crime. That's true for large-scale cases, and the Court will recall that the Karadzic case

was reduced to some extent on that basis.

But the Prosecution has not attempted here to enumerate crime-base sites for the purpose of an exhaustive accounting of everything that happened during the indictment period but rather because the nature of this case and issues such as widespread and systematic, the size of the group, armed conflict, policy that arises -- policy inferences that arise from the replication of crimes at sites under the control of the accused can be read in that way. Those are the factors that give rise to the charges in the indictment here and to our focus on those crime sites rather than any attempt to be exhaustive in the historical accounting of what happened during the indictment period.

And once you're past that point, I think the standards to be applied are essentially the ones that have been articulated in court here, whether the -- the obligation to ensure a fair and expeditious trial. And a fair trial means the opportunity for both sides to present their case. It definitely means the opportunity for the Prosecution to present its case, and case after case has repeated that. And expeditious means is the trial proceeding in a way that focuses on the evidence needed to establish the charges and nothing more. So it refers to selection, not selecting an extraordinary number of redundant witnesses, and not selecting witnesses who speak to issues that don't arise from the indictment or are not relevant to the case, and the time used in this case. And that, as I think the Court addressed before, is a matter most effectively and

constructively addressed in a real-time basis as the case unfolds.

JUDGE GAYNOR: And just on the third question, the estimate of the end of 2024, early 2025. My question was, does that fully take into account the Panel's obligation to ensure that the Defence has a fair opportunity to cross-examine, including the rights of the cross-examining party to elicit evidence relevant to its own case.

MS. MAYER: We believe that it does, Your Honour. Obviously, we don't have exact estimates. We do have the first 12 witnesses. Some of the estimates from the Defence, some of them are more than 200 per cent of the estimated court time, even, for example, in the first 12, for a fully live witness. We leave that to the Court's discretion as to whether or not that vindicates the 143(3) entitlement of the Defence. But I think as we go forward, we believe that it will, if the Court and the Defence have a cross-examination that's within reason, but that obviously takes into account the Rule 143 rights.

JUDGE GAYNOR: Thank you very much.

I'd now like to give the Defence an opportunity to respond.

MR. KEHOE: Yes, Your Honour. May I comment on that last point first, if I will.

Counsel raises an interesting point on cross-examination on these 154 witnesses. As Your Honour knows, our prior collective experience has been that you had a witness statement, maybe 20, 25 pages, with possibly 30 to 40 paragraphs, and we would all collectively go through those statements and say: Well, we object to

such and such a line on paragraph 37 as not pertinent, and such and such a line, or paragraph 24. And, collectively, the Court would say: Okay, we'll look at this 30-page, 20-page statement, and it will be the basis of then 92 ter, here Rule 154 statement.

That's not going on here, Judge. We have thousands of pages of testimony, even with the first witness, heaven knows how much testimony, on a myriad of issues. And they want to include all of that information in there about information that the person may have learned from second and third parties. So without any guidance from the Prosecution as to what in the statement they are actually interested in, they have left it up to us to sift through these thousand pages, however many pages it happens to be, to address the pertinent issues.

Now, going back to the time concerns that Mr. Tieger talked about. The procedure on the statements or the one that was routinely employed, certainly in the Karadzic case, and certainly in the Mladic case. To some degree they went to statements later on. But if there is some concern about the amount of cross time on these 154 statements, that is why, because we do not know what the Prosecution thinks is important.

I believe this issue was addressed by my learned friend Mr. Emmerson previously, but I think it revisits itself now when we're looking at day-to-day time concerns on cross-examination. We're not interested in prolonging this matter any longer than any of us. As Judge Smith said, he wants to finish this in his lifetime. I

think we all share the same concern. But I am sure, Judge Gaynor, you appreciate the difficulty of getting a thousand pages' worth of testimony and then having it on us to sift through that thousand pages and to divine what it is that the Prosecution is actually advancing as their point. Because the way it is now, what they are doing is, or what they want to do, is take all of these sworn testimonies in a myriad of different places, place them in the record, and then when we come to the final pre-trial brief we'll pluck this fact from here and this fact from here and this fact from here, and you, Defence, don't have anything to complain about, you had all this information.

So how does that translate into the day-to-day concerns and the issue on cross-examination time just put forth by my learned friend across the bar? That's the problem. We do not have that curtailing of time here that happened and that we were routinely dealing with at the ICTY. We did it for many, many decades. You know, I chuckle as to the maturation of particular institutions. I would note Your Honours have a significant, vast amount of experience in the maturation process in many of those institutional -- in the institutions that we were all before previously that we come to in basically the same crime base and certainly the same geographic base.

So going back, Judge, it's a serious concern given the way the formulation of these cases have been put together by the SPO with regard to how we protect our client's rights with this vast amount of information that hasn't been highlighted that we have to then address

on cross.

JUDGE GAYNOR: Thank you.

Mr. Emmerson.

MR. KEHOE: Can I just address the first point, Judge?

JUDGE GAYNOR: I'm sorry. Go ahead, please.

MR. KEHOE: I apologise, Judge. The first point, Judge, I mean, look, we are talking about a case that is two and a half times the size of the Mladic case. Two and a half times the size of a case involving Ratko Mladic and almost two times the size of the Karadzic case. And what we have here is virtually every particular event that the SPO could come before that is put into this indictment, and they're saying to the Court that the scope of this indictment was not selected by the SPO, it was selected by the accused? I beg to differ. The choices concerning what is in and what is out of that indictment rests squarely with the SPO.

And possibly there -- this hasn't been addressed as specifically as it will be, but there are particular cases. Counsel may recall the Haradinaj decision that I know Your Honours are familiar with. There was a decision in Haradinaj on command responsibility where the individual perpetrator was found guilty, but the commander above him, Mr. Haradinaj, was found not guilty. So now we're going to go through, in the first 12 witnesses I might add, I believe it's witness 10, we're going to go through that same scenario on a command responsibility or aiding and abetting or a JCE theory to try to convict or try to lay the blame for that onto these four accused

after there has been a decision, both on an appellate level and a trial chamber level, that the individual commander right above the perpetrator was found not guilty.

The Prosecutor is doing it all over again. So we have someone at the bottom that has -- the perpetrator has been found guilty. His immediate commander is found not guilty. And there's no JCE in the Dukagjini operative zone. But now after this person is found not guilty, we're going above him to try to absorb these four gentlemen into that case. There is a lot of that going on here. That is going to protract this matter significantly, and, unfortunately, we're going to have to be the ones to bring that to the Court's attention on a routine basis.

So is there more than enough room for Your Honours to exercise your discretion to say to the SPO that their timeframe of ending this at the end of 2024 and into 2025 is simply too much time and to curtail it accordingly? I do believe Your Honours have that discretion and right to do that.

And I raise the particular point with regard to one of the more recent cases that we're going to relitigate all over again, that's been litigated once before, because it's going to come up in the first 12 witnesses. Thank you.

JUDGE GAYNOR: Sorry, just one point. Did you intend to say that you believe this case is two and a half times the size of the Mladic case?

MR. KEHOE: Well, is -- excuse me. It is. It is. The Mladic

case was 200 hours, and the Prosecution --

JUDGE GAYNOR: Yes, now I understand your point. Yes, I understand.

MR. KEHOE: And this is 545. I don't know exactly what the math is --

JUDGE GAYNOR: Yes, I understand --

MR. KEHOE: -- but it's more.

JUDGE GAYNOR: -- your point.

Mr. Emmerson. Thank you.

MR. EMMERSON: If I can just make three short points, if I may.

First of all, in the end, these are questions of judgment and feel for a very experienced Trial Panel looking at the nature of the case that the Prosecution is seeking to allege in this -- what is already known about the case is being structured and presented.

We know, and Your Honours will have seen it in the two latest joint submissions of the Defence - the first one, a request for relief; the second one, addressing the presentation of evidence from the bar table - of the sorts of difficulties that seem to be being encountered on all aspects of the Prosecution case and marbled throughout it which really come to three words: Lack of focus. There is a very obvious lack of focus in the way the case has been put together and is to be presented.

I entirely accept that the Trial Chamber's decision to leave the Prosecution to order its case as it, in its professional judgment, considers is the correct order to call its evidence, but Your Honours

have also made the point that calling the evidence in the haphazard manner that the Prosecution is currently proposing to call it is not going to assist them to present a focused and clear case.

Now, I'm not delving into that issue again except that we will encounter those difficulties as the trial begins. And I think you will have seen in our pleadings, moving from a witness about the central Kosovo area of Drenoc from the middle of the summer 1998, when there are many more witnesses about that issue who have not yet been even disclosed to us because the material remains redacted, and then jumping to the next witness who deals with an event in a completely different part of Kosovo at the end of 1999 in the first few witnesses places had a huge burden on the cross-examiner. But also it's not just a burden in the sense that we have to be on top of a vast area for each witness and then another one, but also for the Trial Chamber.

But where the really -- or, I say, the compound challenge is we have an important witness coming in the first two or three who will be giving evidence about events in relation to Drenoc in the summer of 1998 when there's a whole clutch of witnesses to come later in the trial, and in this list, but more importantly outside this list, for whom the redactions in their evidence have not been lifted, so the Defence does not yet know what the other witnesses are going to be saying about the same series of events and, therefore, is hampered in cross-examining the witness who gives evidence earlier.

So there are obviously -- I entirely accept that the starting

premise is for the Prosecution to make its own bed and to choose how it runs its case, but if the consequence is that we are going to have to lay down the marker with a witness in the first two witnesses that we may well want the witness recalled once the disclosure has been given of the other witnesses - and this is not going to happen with one crime scene, it's going to happen over and over and over again because there isn't structure and focus - that is a manifest problem.

The other problem, it goes to the question of scope and scale and the exercise the Court's discretion to impose some structure over this case. In the interest not just of -- we're not in the business, either on this side of the court or, with the greatest of respect, on the Bench, of trying to help the Prosecution present a coherent case. It's up to them to do that. But what we are -- and in this respect, both the Bench and this side of the courtroom have a common interest. We are under a duty to make sure that if they choose to do it in this chaotic way, it doesn't prejudice the rights of the accused and threaten the fairness or efficiency of the trial process.

Anything that threatens a really overlong trial is, obviously, in itself, per se, to the detriment of the accused who have been custody for two years before the trial began. It's not -- I wouldn't imagine we're going to be asking for provisional release while the trial is ongoing unless there is a significant development that makes that an appropriate course to take. And so one of the things that the Bench is going to be having in mind, no doubt, in considering the exercise of its discretion and the factors involved is that

protracted to that is in itself an enemy of justice, and it's an enemy of clarity, and it's an enemy of the rights of the accused not to be detained, especially in custody, or subject of a prosecution which is unreasonably prolonged.

Now, if one looks at the way the Prosecution is proposing to tender the documents, and there's some commentary on this in the latest joint Defence filing, there is no indication of, in a vast swath of documents, what is said to be relevant. So you have a -- or even sometimes what passage in a series of ERN numbers is said to be probative of the Prosecution's case.

Put on top of that the fact that whereas in 92 ter cases in the ICTY there would be a witness statement which presents that witness's evidence, they would then testify to say that they accepted it and maybe give a short summary of certain details and would then be cross-examined by the Defence, here, you are getting seven, eight, nine, ten hours of interview transcripts, all of which go in, all of which will inevitably contain duplication, qualification, lack of clarity, possibly contradiction. And all of this material, relevant or irrelevant, useful, clear or unclear, instead of it being filtered and finessed and put before us and before the Trial Chamber in a coherent and logical fashion, it is going to be shovelled into the Trial Chamber in the hope that the Registry, in preparing summaries for the Bench of the evidence as what it shows and what it doesn't, will do what should really be the Prosecution's job for them.

And so we'll all end up at relevant points in the trial,

certainly at the end, with a vast morass of material that nobody quite knows the relevance of, but from the Prosecution's case, the advantage is they can put off defining their case till the very end if they put as much as possible in through the process.

Yes, of course, it's true that in one sense, I don't mean to be pejorative at all, but there is an old saying: Sometimes the right thing to do is to give the prosecution enough rope and see whether they hang themselves. But that's not necessarily -- well, first of all, it's not coherent and it's not good justice, but it's also potentially really prejudicial to the fair trial rights of the accused.

So that's my first general point. The other two points I wanted to make very briefly are, again, as I say, it may be ultimately a matter of feel. And, of course, it's true that you can't take sheer numbers comparisons, as Mr. Tieger says, as -- without -- shorn of their context. Let's put it that way. Shorn of their context. And there is no mathematical comparison. I wouldn't disagree with that.

But it may well be an indication of how focused the Prosecution case is, which, after all, lies at the heart of your discretion - in other words, is it a focused and properly expeditiously prosecuted case, or how can it be made such - to -- you know, simple comparisons of the scope and the hours taken is in itself some indication not so much of numbers, maths, and time allocated for particular witnesses but, rather, overall, if professionally experienced prosecutors can prosecute a much more significant geographical and numerical crime

and much more extensive crimes in a much shorter time, there has to be some explanation. Otherwise, the obvious inference is this prosecution is not being conducted with an appropriate degree of discrimination and focus. That's the point, really.

And when one sees that the prosecutors of former President Slobodan Milosevic, whose indictment began with events in Kosovo but then proceeded to cover Croatia and Bosnia before returning to 1998, 1999 in Kosovo, because, of course, he began the campaign in the Balkans with the statements in Kosovo. So we're talking about -- I mean, I imagine the indictment period overall must have been ten years or thereabouts, right across the entirety of the Balkans. And in that case, it's not a question of what they were ordered to do but what they actually did in concluding the entirety of their case. And many people were critical of the attempt to try all of those three conflicts together, but they did. That was the prosecution's position.

It took them, in terms of presenting their case, on all of those, before they closed the case, and, of course, President Milosevic died after the closure of the prosecution case, it took them a total of 360 court hours. Whereas to try these cases, it's said is double that. One fraction of what was charged against Milosevic in these proceedings.

So, I mean, it's of course right to say that you can't just take numbers and compare one case to another, but it's sophistry on the part of Mr. Tieger to suggest that there isn't some lesson to be

learned here. It's not about how many hours per count on the indictment or how many hours per number of dead people, because if that were the case, Milosevic's trial would have taken 20 years. But it is the case that that comparison -- and bear in mind that doesn't fall into Mr. Tieger's explanation that it came late in the evolution of the institution when lots of facts had been adjudicated, one of the -- well, the earliest big case that the ICTY put on trial.

And if you make just that very approximate comparison, all it does is reinforce the conclusion that there is a total lack of focus in the way the Prosecution case is being presented. There could hardly be a case that -- I'm sorry, I'm being interrupted.

JUDGE GAYNOR: Yes, go ahead.

MR. FERDINANDUSSE: Your Honour, I fail to see how these very lengthy submissions still stick to the questions that have been asked.

PRESIDING JUDGE SMITH: Well, they haven't gotten as lengthy as Mr. Tieger's statement yet, so let's finish.

MR. EMMERSON: And similarly, I will finish as briefly as I can, but I don't think, really, at this time it lies in the mouth of the Prosecution to object to the length of the submissions.

But be that as it may, it's difficult to envisage a case where we're two weeks away from the current beginning of the trial which more cries out for the use and exercise of the discretion that the Court has. And it's not to tell the Prosecution how they should be prosecuting. I'm sure we'd all have advice for them. But it's

rather to say this will not do. This is not the way the Court can accept the prosecution to being handled.

And when all of the explanations that are given to you by Mr. Tieger make no sense, aren't borne out by the facts - as I say, in the Milosevic case it was right at the very beginning of the court's evolution in that regard - one then asks: What is the heart of what Mr. Tieger said to you? The heart of what he said to you is it's very different prosecuting the Serbian defendants because they were a real army. They had documents, they had command structures, they had daily reporting. The people at the top were clearly in control of the people at the bottom. What we have --

JUDGE GAYNOR: Sorry, Mr. Emmerson, we have received your recent applications on a number of issues. Right now we really are focused on the question of the duration --

MR. EMMERSON: Yes, and I'm --

JUDGE GAYNOR: -- of the Prosecution case.

MR. EMMERSON: -- addressing Mr. Tieger's explanation to you of -- I'll sit down in just a second. Of why this case was different. That was your first question. And so if it's not to do with the fact that the ICTY was an experienced tribunal for doing shorter cases, the other explanation given to you is: We have to prove things that could easily be proved in the ICTY against the Serbian defendants because they were a proper army. We kept records and minutes and so on. Whereas for the KLA, we're going to have to take snippets and pieces from different witnesses. Therefore, there must be more and

more of them. But really, that is just to emphasise the approach that the Prosecution is taking, which is to put everything into the central bundle and then hope to piece a mosaic together at the end that might stand as something of a JCE when the material evidence, unlike the Serbian cases, says Mr. Tieger, isn't available.

So whichever way you look at it, the amount of time that they are proposing to take is a reflection not so much of any legitimate difference between this case and another case as an inevitable consequence of a lack of focus that is being characterised every aspect of the way the Prosecution has put the case together.

JUDGE GAYNOR: Mr. Roberts, can you just focus on the issue right now which is under discussion, which is the expected duration of the SPO case. Thank you.

MR. ROBERTS: Thank you, Your Honour. I'll be as brief as possible, and obviously fully support what's already been said by my colleagues.

It was quite heartening to hear Mr. Tieger suggest that the rights of the accused and the fairness of proceedings should be at the very heart, and that, in my submission, is exactly where Your Honours' discretion should be based on.

Accused have rights. They're very clearly set out in Article 21. There are four rights that, in my view, should be taken into account primarily when making this assessment on the time. 21(4)(a), the right to be informed promptly and in detail of -- and in a language which he or she understands of the nature and cause of the

case, and in relation to recently unredacted indictment allegations, that's an issue and should be one taken into account by Your Honours in assessing that the appropriate duration of the Prosecution case. The right to have adequate time and facilities, also very relevant. The right to be tried within a reasonable time. And, finally, the right to examine or have examined the witnesses against him or her.

So in my submission, Your Honour, very, very briefly, that is the apex of your decision. That should be where you focus your discretion.

In relation to Mr. Tieger's final point, the Prosecution doesn't have, I would suggest, rights in the same way that an accused have rights. An accused has rights set out in the Statute, in the Law. The Prosecution has the opportunity, the fair opportunity to present its case, but trying to draw some parallel or some equality between the two is not justified by the law and is not justified, I would submit, by the way that these proceedings should be determined. So that's all I have to say on this point. Thank you.

JUDGE GAYNOR: Thank you.

And, Ms. Alagendra, do you have anything to say about the expected duration of the Prosecution's case?

MS. ALAGENDRA: [via videolink] Mr. Ellis will be addressing the Court, Your Honours.

JUDGE GAYNOR: Thank you.

Mr. Ellis.

MR. ELLIS: Thank you, Your Honours.

We agree with the points made by our colleagues on these issues. We would say when considering the overall length of the Prosecution case, a paramount factor must be that the accused, that my client is in detention, has been in detention since November 2020. So to hear that the Prosecution case will go on until early -- or could go into early 2025, of course after that would come no case to answer submissions and Defence cases, and then, of course, time for Your Honours to consider judgment, is a very real concern for us. And we ask the Court to take into account the duration that the accused will spend in detention before a judgment is rendered in assessing what is a reasonable length of time for this Prosecution case.

We agree, of course, with the submissions that were made previously, that previous cases can't be definitive. They can, nevertheless, be a useful comparator for Your Honours exercising your years of experience of hearing similar cases. We note that none of the cases cited by Mr. Tieger seem to rise to more than 500 hours for a prosecution case. We are not the ICTY. We don't have years of previous judgments in that sense in this institution, but Your Honours do have the benefit of the experience gained from those cases and from that tradition.

We're about to have applications for adjudicated facts. We've got an exhibit list proposed by the Prosecution of, what, 18.000 documents. We certainly also in this case have international witnesses being called by the Prosecution. In our submission,

nothing in what is said by the Prosecution justifies taking so very much longer than all of those previous cases.

It's not just relatively paradoxical, as Mr. Tieger said, to say that larger-scale cases needed less time. It's simply wrong, in our submission.

And, Your Honours, the other point I would make is that we would encourage Your Honours to address this point now, or at an early stage, because the difficulty in this being approached on a rolling basis, and then the Prosecution later on dropping witnesses and cutting incidents or detention locations, is that we'll be wasting time now in Defence preparations on issues that may not ultimately be heard in court.

So we would invite the Court to take that into account.

JUDGE GAYNOR: Thank you, Mr. Ellis.

Mr. Laws, do you have anything --

MR. KEHOE: Excuse me, Your Honour, just on the Defence side, if I give you one further number. Counsel mentioned that the Milosevic case and the Karadzic case were quicker, if you will, because there had been adjudicated facts.

I do recall specifically and personally that the Gotovina case was a case of first impression, and the Prosecution was given 200 hours.

JUDGE GAYNOR: Thank you.

Mr. Laws.

MR. LAWS: Your Honour, no, we have no submissions to make on

this topic. Thank you.

JUDGE GAYNOR: Thank you very much to all counsel.

I will defer to the Presiding Judge. Thank you.

PRESIDING JUDGE SMITH: I will continue with one question. And I would like not only to hear from the SPO but also from Defence on this subject, if you wish.

On November 18, 2022, the SPO filed a list of points of agreement reached by the parties. That's filing F01114, with one confidential annex and one public annex.

The Defence teams filed a joint Defence notice related to F01114 in F01116.

Have there been any additional developments in connection with this subject?

MS. MAYER: Yes, Your Honour. We continue to engage in *inter partes* discussions. As recently as last week, on 9 February, we initiated contact with the Defence counsel specifically seeking to know if they -- what the Defence teams -- if there are points of law from the Confirmation of Charges Decision, if they agree with any points of law, and whether or not they agree to any relevant facts, and we are looking forward to their answer and to a discussion on that.

PRESIDING JUDGE SMITH: When is the answer expected?

MS. MAYER: I leave that to my colleagues across the aisle.

PRESIDING JUDGE SMITH: You didn't set a time?

MS. MAYER: We did not set a time, Your Honour.

PRESIDING JUDGE SMITH: Well, then I'll ask the Defence to respond and tell me what you think about this subject.

MR. KEHOE: Well, we had given some adjudicated facts to the Prosecution which they rejected outright. I am not sure at this juncture, Your Honour, if we are going to agree on any points of law and fact at this juncture. That doesn't say that *inter partes* discussions won't reach a further result, but I don't know how productive it's been to date.

PRESIDING JUDGE SMITH: And what's the problem?

MR. KEHOE: We just don't agree. I mean, we don't agree on the facts advanced, these broad facts advanced by the Prosecution on a myriad of issues. So that's really the sum and substance of it.

PRESIDING JUDGE SMITH: All right.

Mr. Emmerson, anything to add?

MR. EMMERSON: Yes, I don't want to dwell on the facts, the agreement on facts. But agreement on law is a little difficult, because the Prosecution, other than the indictment itself, hasn't made any submissions of law relevant to the issues that the Trial Chamber has raised in its pre-trial brief. So neither has it advanced any submissions in correspondence as to legal interpretations or what could be the basis for agreements on points of law.

So we, at the moment, have nothing to respond to. I presume that's one of the reasons why the questions have been asked that they have this afternoon, to clarify certain issues of law, what the

Prosecution's is. So I'm afraid the ball is in the Prosecution's court to clarify its position. And if there are issues on which we can agree, then obviously we will do so. But of the questions that have been identified for this afternoon, I think you may find that there is relatively little agreement between the parties on the -- I mean, the questions have been framed for focusing on the touchstone issues. Some have been litigated so far in these proceedings; some have not. But either way, the parties, I think, will take fairly divergent positions on some of those issues. That will be clear, I think, by the end of today.

Facts, facts is a -- I mean, we will have adjudicated facts for certain, and we have the judgments of the Kosovo cases at the ICTY to consider as well. But when it comes to the facts of the crime-base on the ground, it's a complicated question because it's obviously impossible for us to admit facts which we have no knowledge of. And so if an event is alleged to have occurred, its scope, scale, the number of them, the timeframe, and so forth, are things that the Prosecution is going to have to address. And so we can't make an admission about something that we weren't present for or don't have any knowledge of. So that, I think, is one of the problems.

PRESIDING JUDGE SMITH: Do you intend to answer the Prosecution's request?

MR. KEHOE: I mean, Your Honours, there have been *inter partes* discussions on this. We can go back. I do believe that there have been discussions back and forth. I'll consult with my colleagues on

the most recent one. But we can do that.

PRESIDING JUDGE SMITH: There was just the suggestion that they had made an offer and hadn't heard back from you yet.

MR. KEHOE: I am not certain that offer diverges much from the factual scenarios that they have advanced previously, which were these broad factual concerns about which we know nothing, as my colleague Mr. Emmerson just [indiscernible].

MR. EMMERSON: Just to be clear, the letter that my friend was referring to, the extent of the inquiry is, without any particularisation or proposals from the Prosecution, one sentence. It says: What aspects of the Pre-Trial Judge's Confirmation Decision, so right at the very beginning of the process, what aspects of the law in that Confirmation Decision do you, the Defence, put forward as agreed positions on law? Which is -- I certainly don't intend to answer that. The Prosecution has to deal with that.

PRESIDING JUDGE SMITH: Okay. Thank you, Mr. Emmerson.

Mr. Roberts, anything to add?

MR. ROBERTS: I believe that it would assist us if the Prosecution would actually put forward, as Mr. Emmerson has said, exactly what its position is, and until we receive that there's not much we can do. Is the Prosecution's position that the law as set out in the Confirmation Decision is correct and they will never seek to go beyond that, then I would like that to be clarified. If they clarify that and it's straightforward for the Defence as to what we

might be agreeing to, then that's something we can entertain. But until we know exactly what they are putting forward, we are in a similar position as Mr. Kehoe and Mr. Emmerson.

PRESIDING JUDGE SMITH: Thank you.

Maybe as we get into the other questions, the substantive questions, you'll be illuminated a little bit and we can start looking at things that you actually can agree upon.

Mr. Ellis.

MR. ELLIS: I look forward to being illuminated, Your Honour, as we discuss it with --

PRESIDING JUDGE SMITH: Me too.

MR. ELLIS: But our position is the same. We would like the SPO to state clearly what its position is on these legal issues, and then we'll respond.

PRESIDING JUDGE SMITH: I take note of those comments.

Mr. Laws, anything you want to add to this?

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

PRESIDING JUDGE SMITH: So I thank you for your submissions on this matter, and we move on to disclosure.

Rule 118(1) provides the Panel may verify at the SPO Preparation Conference that the disclosure obligations of the parties have been met. And it's very clear that it's "have been met." As you're aware, Rule 103 requires SPO to immediately disclose exculpatory evidence as soon as it's in their custody, control or actual knowledge, and that is an ongoing obligation.

Apart from that, we emphasise that we do not authorise, nor will we condone, so-called rolling disclosure of material that is already in your possession. We have explained in a recent decision our position on that point and hope that good note has been taken of it.

Today, we want to verify that the SPO and, as required, the Defence, pursuant to Rule 104, have complied with all necessary disclosure obligations. That means we wanted to verify that all material that is in your possession and is required to be disclosed has, in fact, been disclosed.

We also want to hear from the SPO that they are done with reviewing and reassessing the evidential relevance of their holdings.

If some additional disclosure is offered after this date, there will need to be a very convincing explanation for the lateness.

So as to material currently in the SPO's custody, control or actual knowledge, it is our expectation that all Rule 103 disclosure has been completed. Is that correct?

MR. HALLING: Yes, Your Honour.

PRESIDING JUDGE SMITH: And as to all other disclosure required, has that been completed?

MR. HALLING: The one note we would have in this regard is in relation to Rule 102(3), because there are items in our holdings that we've collected in recent months that we need to notice such that they can go through the Rule 102(3) procedure and to be disclosed to the Defence.

We are prepared to file a new updated Rule 102(3) notice in the

next week, and then the Defence can select items, and we believe that we're going to be able to discharge our disclosure obligations prior to the commencement of trial.

PRESIDING JUDGE SMITH: Let's hear from the Defence on this subject.

MR. KEHOE: That's a subject that I wanted to address. What is the volume of this new 103 material that we're talking about?

PRESIDING JUDGE SMITH: Fair question.

MR. KEHOE: And we're getting more materials coming in --

PRESIDING JUDGE SMITH: Fair question.

MR. KEHOE: Thank you.

MR. HALLING: Right now we're estimating about 700 items. There's another small set of items that we've identified that should have been on a previous Rule 102(3) notice, and we're just going to disclose those directly in the next week. But the next 102(3) notice, it's approximately 700.

MR. KEHOE: I'm a big page counter, Judge, with all due respect, because this goes -- 700 items doesn't really tell us much.

PRESIDING JUDGE SMITH: No.

MR. KEHOE: Could I ask Your Honour to inquire as to the pagination number?

MR. HALLING: I don't have the number of pages to hand. What I can say is I think this notice is going to be ready for filing as early as Friday this week, and so it will be clear what the items are and we can give a page count when filing.

PRESIDING JUDGE SMITH: Let's just say that it will be Friday. We're getting close to trial. We need to get on with this.

And you can go ahead on with any other comments that you have.

MR. KEHOE: I think I -- Judge, I mean, obviously we're on the cusp of trial and yet we're still disclosing 102(3) items after the any number of deadlines put on by the Pre-Trial Judge and your admonitions throughout the discussions with Your Honour in mid-December. I know Your Honours, having been on this side of the well, appreciate what that means with 700 additional documents coming our way with the myriad of items that have been disclosed in less than the last 30 days.

I don't know what to say, Judge, other than to say this is a problem.

PRESIDING JUDGE SMITH: Yes, it is. And we've acknowledged that already.

MR. HALLING: Your Honour, could we briefly respond to that point before continuing?

PRESIDING JUDGE SMITH: Yes.

MR. HALLING: This is an issue that is inherent in Rule 102(3). It is going to be a continuous procedure. We're going to keep getting new items throughout the trial. We are going to have to keep noticing them. So this is not, in our submission, a problem. This is the way Rule 102(3) works, and we're going to have to keep doing this across trial.

PRESIDING JUDGE SMITH: So you're saying all 700 items are

something you just came into your possession?

MR. HALLING: They're not all just came into our possession. Some are things like Rule 107 clearances and things like that. But this is a set of items that most of which, I would say, couldn't have been noticed at an earlier point in time. But we're going to have to keep doing this as the trial progresses.

PRESIDING JUDGE SMITH: Mr. Emmerson, do you wish to be heard?

MR. EMMERSON: Not at this point. There may be submissions to be made at a later stage, but not at this point.

PRESIDING JUDGE SMITH: All right.

Mr. Roberts.

MR. ROBERTS: Two issues, Your Honour. Firstly, in relation to the Defence notice of alibi under Rule 104. I, obviously, know we're due to file that, I believe, today. We have filed a submission in relation to that, in relation to the new allegations, that's filing 1281. So obviously if no decision is issued on that, we will file a notice reserving our position while we get further information. We're obviously waiting for more clarity in relation to the specifics of the allegation from the Prosecution pre-trial brief, which you ordered to be disclosed -- provided today in an unredacted or lesser redacted format, so we're hopeful that we can get more information and provide more information to you. So that's the issue in relation to notice of alibi.

The other question, and this was from the joint Defence request in relation to the first Prosecution bar table motion, that there

were various disclosure issues in relation to the material that the Prosecution is seeking to tender through the bar table pursuant to different issues that are set out in detail in that motion. So there is or there will be some ongoing disclosure issues in relation to those documents.

And, obviously, given the volume of bar table motions that the Prosecution has suggested it will be filing over the course of the trial, I think they suggested 50 to 60 per cent of the documents, this is something that I would imagine would continue for a long time and will be an issue in relation to each one.

So just to flag up those issues.

PRESIDING JUDGE SMITH: Thank you.

Mr. Ellis.

MR. ELLIS: Your Honours, this very much continues to be a problem that concerns us. You will have seen from our joint filing that in addition to the large 56.000 pages disclosed on 30 January, we've been continuing to receive disclosure batches trickling in. I think a further 11 batches since those major batches were delivered.

In relation to the specific items mentioned, 102(3) disclosure, it's clearly a concern to us that there's a further 700 items potentially of material to the preparation of the Defence that we don't yet have notice of. And it's quite clear from the way in which the Prosecution opened its submissions that some of those are items that should have been on the previous 102(3) but weren't. So once again we're behind the game trying to catch up with disclosures that

we should have had previously.

In relation to 103 disclosure, we don't believe that we've had everything. We e-mailed the Prosecution on 7 February with various requests. We haven't even had a response to that. So we will continue raising these matters. We don't think we've had everything yet.

PRESIDING JUDGE SMITH: Thank you. I think it's quite true that you haven't got everything yet.

The Panel regards disclosure as a fundamental aspect of the requirement of fair trial in this case, and it is not a secondary duty of the SPO. Anything that's in your possession should have already been disclosed. There just isn't any excuse for that. Matters that arise out of nowhere and now are in your possession as of yesterday, I understand the need to give notice on that.

It's time to get the game together. You know, we're going to trial soon.

So I thank you for your submissions. We will deal with this as best we can as soon as we can.

We are going to go into substantive questions now.

In paragraph 9 and 10 of the agenda, we indicated certain substantive matters on which we would like the parties' views. It goes without saying the Panel is aware of all of the previous findings on these matters by the Pre-Trial Judge, the Court of Appeals Panel, and/or the Constitutional Court Panel. The purpose of the questions we're going to ask now is simply to allow the parties

to state their views on certain issues which might be of particular relevance in this case.

This said, we ask the parties to be brief in their submissions. We've got to go a little bit faster than we were. We don't need a half hour on one subject, and that's what we had, at least a half-hour. So let's try to confine yourselves to two to five minutes in response to the question. And if we have a follow-up question, we'll ask it.

Judge Barthe will start. We're going to take a break in about ten minutes, so he may begin with one question, and then we'll break, and then we'll come back and continue on, because he has several.

Go ahead, Judge Barthe.

JUDGE BARTHE: Thank you very much, Judge Smith.

My first set of questions is for the SPO and relates to the modes of liability. I note that in paragraph 176 of the indictment, this is for the record, filing 00999/A03, the public redacted version of the indictment, the SPO alleges the following, and I quote:

"Through the acts and omissions described above, Hashim Thaci, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi committed through their participation in a joint criminal enterprise and /or aided and abetted the crimes charged in this indictment. In addition or in the alternative, Hashim Thaci, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi are responsible as superiors for crimes committed by their subordinates."

I would like to ask the SPO the following: According to your

case theory, are the accused principal offenders or core perpetrators in the joint criminal enterprise or only aiders and abettors in the JCE?

Mr. Prosecutor.

MR. HALLING: Thank you, Your Honour. So our submission would be that they are principals in the JCE. Joint criminal enterprise is a vehicle of principal liability. And our modes of liability are charged in the alternative in this case. I mean, in practical terms, it means that each of the modes of liability you mentioned would be addressed in turn for the same set of facts.

It is not possible, in our submission, to have -- although, I mean, it's factually possible, but it is not legally possible under customary international law to be convicted of aiding and abetting a JCE. The modes of liability can't be stacked on top of each other in those terms, and in that regard I direct Your Honours to the Kvocka appeals judgment at paragraph 91, where a trial judgment attempt to do that very thing was reversed on appeal.

JUDGE BARTHE: Thank you, Mr. Prosecutor.

I turn to my next question. This question is also for the SPO, which is linked to the same paragraph of the indictment that I've just read.

In the SPO's view, what is the relationship between participating in a JCE, aiding and abetting, and superior responsibility? And more specifically, is it correct to assume in this case, in the present case, that the latter two forms - aiding

and abetting, and superior responsibility - are only pleaded in the alternative, that is, in the event that the Panel does not find the accused guilty of participating in a JCE? And if this is the case, why is that?

Mr. Prosecutor.

MR. HALLING: Yes, Your Honour, I can answer that question in terms of the relationship between our modes of liability. It may go slightly past 11.00, just a few minutes.

As I said, the modes of liability are charged in the alternative. So what that means is that when the elements for more than one mode of liability are met for the same facts, a conviction should be entered for only one of them. This is what I said before.

The factual findings for the other modes of liability could still be considered in sentencing. So just to give an example: A conviction for JCE I, the superior-subordinate relationship could be considered at sentencing.

When the elements of all modes of liability are met for the same facts, in our submission a conviction should be entered on the form of principal liability which best reflects the culpability of the accused. And we have ordered them in that way in the paragraph of the indictment that you mentioned. So it would be JCE I, JCE III, aiding and abetting, superior responsibility.

As was done by Your Honours in the Gucati and Haradinaj trial judgment, we would ask again that findings be made on all alternative modes of liability charged.

The last thing I would say on this, in terms of the relationship between these modes, is that we've been talking about the same facts. If there's a situation where Your Honours are of the view that a conviction can be entered for one mode of liability on certain facts and a different mode of liability for others, then in that situation the conviction should be entered on both modes of liability for their respective facts. The overarching consideration should be that the individual criminal responsibility of the accused be fully reflected.

[Trial Panel confers]

PRESIDING JUDGE SMITH: All right. We'll take a mid-morning break.

MR. KEHOE: If I could just bring one matter to the Court's attention.

PRESIDING JUDGE SMITH: Yes.

MR. KEHOE: On the proposed trial schedule, we did have conversations with the SPO during the break last night about a suggested schedule. Not that we're -- the Court is bound by anything that the parties agreed to, of course. But I don't know if you want to address that now to consult about that or at some point.

PRESIDING JUDGE SMITH: I've got a section for that. We'll come back to it.

MR. KEHOE: Yes, Your Honour. Thank you.

PRESIDING JUDGE SMITH: All right. So be back here at 11.30 and we will begin at that time.

--- Recess taken at 11.01 a.m.

--- On resuming at 11.29 a.m.

PRESIDING JUDGE SMITH: You may proceed, Judge Barthe.

JUDGE BARTHE: Thank you, Judge Smith.

My next question is also for the SPO, and it again pertains to the modes of liability as set out in the indictment.

Mr. Prosecutor, have you considered other alternative modes of liability in the present case, for example, JCE II liability, or civil law concepts such as co-perception or indirect perpetration?

MR. HALLING: Thank you, Your Honour. Our answer differs depending on which of those modes of liability that's under discussion.

For JCE II, this could have been charged. In our assessment, it did not add much beyond the JCE I, JCE III modes of liability that we'd already charged.

For co-perpetration and indirect perpetration, it's our assessment that these are not modes of liability under customary international law and that, therefore, they're unavailable for us to charge by virtue of Article 12 of the Law. We understand that these modes of liability are applied at the ICC, which is not applying customary international law. But in this context, and I would direct Your Honours to the Stakic appeals judgment, and specifically paragraph 62, a trial chamber that attempted to enter a conviction at the ICTY under co-perpetration, this was reversed on appeal, and so joint criminal enterprise is the customary international law mode of liability we've charged.

JUDGE BARTHE: Thank you, Mr. Prosecutor.

I now turn to the Defence.

Mr. Kehoe first. Do you have any comments on these issues so far?

MR. KEHOE: Yes. Several things, Judge. With regard to the first comment that Your Honour made on JCE and aiding and abetting, and I believe the last issue is command responsibility.

There seems to be some divergence between the position of the Prosecution and certainly the Pre-Trial Judge, because what we just heard and what the SPO has advanced is that they are proceeding on a case of JCE and/or aiding and abetting and/or command responsibility. The Pre-Trial Judge, and this goes to the thinking that command responsibility, and scholars have called it a *sui generis* crime, and so he termed this to be JCE and/or aiding and abetting and -- excuse me, or command responsibility. Much different. So there's no "and/or" there.

At this stage, Your Honour, it would be helpful to the Defence to know exactly what we are addressing in this regard if you are -- is it "and/or," especially with command responsibility, or an "or."

The other issue on command responsibility that is not clear and has been discussed but I do think that the Chamber would want some clarifications on this, command responsibility is -- really breaks down into two components: A military commander and a civilian commander. Command responsibility on a military line is a very different regime. A commander, on the Yamashita theory, that a

commander -- you have a duty to know. So a commander can't just say, "I didn't know what was going on in the field." He has to set up lines of communication. He has to ensure that his commanders in the field are relaying information back and forth. So it is a different regime.

The superior responsibility at a civilian level is, you know, knew or, you know, wilful blindness. It's a different equation. And it is still not clear to us on the eve of trial, Judge Barthe, which one we're addressing. Especially with regard to the command responsibility issue.

But we do have that divergence of opinion between the SPO's position that they have advanced throughout and what the Pre-Trial Judge had to say.

With regard to your second question, Judge, and I understand your question with regard to JCE II, you know, perpetration and co-perpetration, it hasn't been charged that way. They would have to be -- if they consider those modes of liability, they would have to be a reformulation of the indictment with us addressing that indictment in whatever form we have on a motion practice. Certainly, if they went to a JCE II, we would have to address that in that fashion, and certainly, I believe, as co-perpetration and perpetration as well.

So our simple answer to that is it's not part of the indictment, it hasn't been noticed, and if it were to be reformulated in that regard, we would have significant litigation on those issues. Thank

you.

JUDGE BARTHE: Mr. Emmerson, any comment from you?

MR. EMMERSON: We are grateful for the clarification of the Prosecution's position and wish to add nothing at this stage.

JUDGE BARTHE: Thank you, Mr. Emmerson.

Mr. Roberts.

MR. ROBERTS: I am also grateful to the Prosecution's clarification. It does appear we can agree some questions of law. We also don't consider that those modes of liability are part of customary international law. We also don't consider that JCE III is part of customary international law as well, but I know that goes into another question.

My only issue is the authority, or just to be very clear, the lack of authority, if I can put it, of the Chamber to requalify modes of liability in the indictment or requalify any allegations. Our understanding is in the absence of an equivalent provision to Regulation 55 of the Regulations of the Court of the ICC, there is no authority. If the Prosecution wishes to change or amend or increase the modes of liability, it is dependent on them to follow the procedures set out in Article 39(8) of the Law and Rule 90, I think.

So just to be very clear, our position is that there is no authority of the Chamber to do so. And if that is something that the Chamber is -- in any way believes it can do, then, obviously, very advance notice to the parties would be welcome so that any motions that would be necessary could be filed at that stage. Thank you.

JUDGE BARTHE: Thank you, Mr. Roberts.

Ms. Alagendra or Mr. Ellis.

MR. ELLIS: Your Honour, I think it's me as I'm the one in front of Your Honour.

Just to say that we're preparing at the moment on the indictment as we understand it, and with the clarifications today, that is, three modes of responsibility: JCE, aiding and abetting, and command responsibility. That's what I'm on notice of.

JUDGE BARTHE: Thank you, Mr. Ellis.

Any reply?

MR. HALLING: Yes, we can reply briefly to at least what the Thaci Defence was referencing.

The question that Your Honour asked is a different inquiry than what the Pre-Trial Judge was doing, and so there's actually no divergence between what I've said and what the Pre-Trial Judge did. The Pre-Trial Judge was confirming the scope of the indictment, and in order to confirm that scope, needed to make findings on all alternative modes of liability to make sure that they could be in the cases charged.

What's being discussed now is how those modes of liability are interrelated for purposes of entering convictions at the end of the case. So we don't see any difference from what the Pre-Trial Judge did, and the Pre-Trial Judge was correct to make findings on all of our charged modes of liability.

On the question of military versus civilian commanders, this

distinction exists at the ICC and affects the elements of command responsibility. There is no such distinction in customary international law in terms of changing the elements of the offences. This is -- the key is effective control, and we have charged it sufficiently in accordance with customary international law.

What the Thaci Defence is saying factually are allegations that these are all military commanders but that that is not a point on which the elements of the offence depend.

MR. KEHOE: With regard to the first point noted by counsel on the divergence of opinion on the Pre-Trial Judge, if I may cite to Your Honour to the Pre-Trial Judge's decision F000026, it's been a long time we've had four 0s in front of two numbers, but 000026. In that particular provision I think it's quite clear that there is a divergence of opinion between the SPO and what the Pre-Trial Judge saw this mode of liability.

To say that there is not a distinction in customary international law between command responsibility on a military level and on a civilian level, with all due respect, my learned friend is simply incorrect. I think the modes of liability and certainly the *mens rea* in that regard and the elements that have been encapsulated, true, in the Rome Statute are -- have been accepted under customary international law as distinct elements of those modes of liability.

JUDGE BARTHE: Thank you very much. Let me now turn to further questions on JCE, joint criminal enterprise liability. Again, these decisions are first and foremost for the SPO.

In the Decision on the Confirmation of the Indictment, as you've said, Mr. Kehoe, filing F00026, the redacted version, I will call it "the Confirmation Decision," the Pre-Trial Judge held in paragraph 110 that:

"The perpetrator's contribution to the JCE need not be, as a matter of law, necessary or substantial, but it should at least be a significant contribution to the crimes for which he or she is found responsible."

My question is the following, Mr. Prosecutor: First of all, do you agree with this finding; and if so, what is the difference between a substantial and a significant contribution? And I'm aware, of course, that this question is not easy to answer, but maybe you can give a brief example for each.

MR. HALLING: The answer to the first question is yes, we do agree with the Confirmation Decision on this point. This reflects the crystallisation of the language of the ICTY appeals chamber on the required level of contribution.

As for your second question, it is, indeed, highly abstract. But what we could say from the way in which these contribution thresholds have been defined at the ICTY is that it is apparent that the objective threshold for JCE liability, significant contribution, seems to be lower than that same contribution for aiding and abetting, where a substantial effect on the crime is what is required.

And in terms of sort of why this might be, because JCE is a form

of principal liability and aiding and abetting is a form of accessorial liability, this goes to the kind of theoretical grounding of how joint criminal enterprise is constructed. And, I mean, if it's helpful, I can explain further as to what I mean by that, but it's completely consistent with joint criminal enterprise that the way in which principals and accessories are differentiated is on the subjective level, whether you're in the common purpose group sharing that common purpose or not. The former are principals, the latter are accessories.

And because that's the way in which that distinction between principals and accessories is done in customary international law, we submit that the objective threshold of contribution should be relatively low because it would be double-counting otherwise.

JUDGE BARTHE: Thank you, Mr. Prosecutor.

Any comments from the Defence?

MR. KEHOE: With all due respect, I don't know what he just said with regard to that explanation. But the difference between substantial and significant, I think we accept the fact that it is significant. I guess the arcane question is what's the difference between substantial and significant. I am sure Judge Smith will harken back to debates in American courts about the difference between clear and convincing evidence and beyond a reasonable doubt. It's like counting angels on the head of a pin. I don't think anybody, Judge Smith, has come to a satisfactory conclusion with regard to that and so too with this.

I certainly don't know the difference between substantial and significant, but it seems to be the intent that it be a lot. That you have to do something that is pretty important, that you have to -- your contribution just cannot be some passing interest. Your contribution has to be a lot.

I apologise for that pedestrian explanation, but unfortunately that's the best I can do.

JUDGE BARTHE: I have to say, Mr. Kehoe, I am not sure whether you're saying with your comment that my question was good or was not good.

MR. KEHOE: No, I think the question was good because there was some confusion on significant or substantial, and it's out there Judge. We put in, I think, our pre-trial brief that it can significant. I think, you know, with -- citing Brdjanin, Popovic, and others in that regard. But I do understand that there is some discussion out there with regard to substantial. My point is I'm not certain it's clear to us what the difference is.

JUDGE BARTHE: I understand. Thank you very much.

Mr. Emmerson.

MR. EMMERSON: Subject to any further research and developments, the authorities seem to support the test of significant, and we understand that to be the position put forward by the Prosecution.

On the related question under paragraph 3, we, as you know, take the position that JCE III doesn't apply to crimes of specific intent.

JUDGE BARTHE: Thank you, Mr. Emmerson. We will come back to

that in a second.

Mr. Roberts or -- Mr. Tully.

MR. TULLY: Thank you, Your Honour. In keeping with your directions, I'll keep my answer brief.

I do have one comment to make before I address Your Honour's question, and I don't want to put meaning where there is none, but we do note that the beginning of Mr. Halling's answer was:

"The answer to the first question is yes, we do agree with the Confirmation Decision on this point."

This brings us back to our issue with the agreed facts -- excuse me, the agreed law between the parties, that it appears that the Prosecution is agreeing with the Confirmation Decision on this point, which does ask the question in the negative, which parts of it do they not agree with and what is their statement of law. So maybe that's something to bear in mind when dealing with the issue raised by Mr. Roberts.

I don't have much else to add beyond those submissions of my colleagues. I agree. And I think the literature has borne out that the difference between substantial and significant is somewhat of an amorphous distinction. However, we have addressed this in our brief, that we do consider the law to be quite settled on the matter, that it is significant contribution which must be shown in a conviction pursuant to this mode of liability. We address this in our brief from paragraphs 96 to 103.

One point I would like to add, though, Your Honour, because I do

realise that the understanding is that significant is lesser of the two. However, that does not mean that it must be diminished to something of an afterthought. We have highlighted in our pre-trial brief, at paragraph 103, a comment on significant contribution, that it must still form part of the chain of causation.

Chain of causation is something of an imperfect metaphor, because it implies that once one link is broken, then the rest of the chain does not exist.

So if you leave that to one side, and as the chambers in Blagojevic and Jokic at trial judgment at paragraph 702, citing Brdjanin trial judgment at 263, they said that "the accused's involvement in the criminal act must form a link in the chain of causation." It's not necessary that the participation be a *conditio sine qua non*.

We follow that, but my comment on the significance of the act must be that the act has to occur as some kind of result of that contribution, because by definition, an act which has absolutely no bearing on the criminal act that is ultimately carried out cannot logically be regarded as significant. It is by definition insignificant if it has not had a final effect on the crime carried out.

And that's my response, Your Honour, unless there's anything else. Thank you.

JUDGE BARTHE: Mr. Ellis.

MR. ELLIS: Thank you, Your Honour. I agree with that last

submission. The authorities do appear to establish it is a significant contribution rather than a substantial contribution. But we would say worthy of emphasis is the second part of the passage that Your Honour opened with from the Pre-Trial Judge's decision. It needs to be a significant contribution to the crimes, and that may be important in a case like this where the common purpose alleged is a vague and political one to gain control over Kosovo.

What would be required, in our submission, is a significant contribution to the crimes.

JUDGE BARTHE: Thank you, Mr. Ellis. This was exactly my next question; namely, whether a member of a JCE - and I address you, Mr. Prosecutor, again - need to contribute, be it significantly or otherwise, to the JCE or to the crime for which he or she is allegedly responsible.

MR. HALLING: Thank you. Your Honour, this question is actually of similar abstraction to the previous one, although it sounds deceptively simpler.

You can look through the jurisprudence of the ICTY and you can find individual sentences where it seems like the contribution is directed at the plan, the joint criminal enterprise common plan, and the contribution is directed towards the crime. The sentence in the Confirmation Decision, which it seems that all parties agree with, actually has this in both halves of the sentence, depending on which part of the sentence you read. It seems like the contribution to the JCE need not be necessary, substantial, but can be significant, but

it needs to be a significant contribution to the crimes.

What we would submit is going on here is that when you are contributing to a criminal plan, which is what is happening in a joint criminal enterprise, that is necessarily contributing to the crime as well. So what we would argue is that the correct analytical frame for evaluating the accused's contribution is to look at their contribution to the criminal JCE charged, and the result of that assessment would be a finding of whether the contribution to the crimes was significant or not.

So as you can see, I have sort of combined these in the answer and it's because analytically you can't distinguish them. The contribution to the plan is going to have an impact on the crimes. And the assessment of whether the contribution to the plan arises to such a level that it be a significant contribution to the crime requires a case-by-case assessment.

JUDGE BARTHE: Can I just ask, Mr. Prosecutor, could it be otherwise, I mean, vice versa, that the contribution to the crime also contributes to the joint criminal enterprise?

MR. HALLING: It can, but it goes back to what I was saying about the theoretical differentiation between principals and accessories. People could be contributing to a plan without being part of that plan. And the way customary international law distinguishes principals from accessories, such a person would be only aiding and abetting.

So it's factually possible for someone to be contributing to a

crime in such a way that it furthers a common plan, but they would need to share that common purpose in their mind in order to be JCE liable.

JUDGE BARTHE: Thank you, Mr. Prosecutor.

Mr. Kehoe.

MR. KEHOE: Well, it is a two-part test. I mean, if, in fact, the accused, whoever it happens to be, enters into this agreement that he knows is a criminal agreement, there has to be some - some - linkage with what comes into JCE III. Oh, we're just looking at disparate entities throughout, and this Prosecution has got to prove what linkage has to be. There has to be some connection. It just cannot be some amorphous, unnamed, undescribed connection as we've laid out in our brief that is going to engulf the accused in everything that happened in Kosovo in 1998 and 1999. That's the problem with the formulation that's been advanced by the Prosecution.

JUDGE BARTHE: Thank you.

Mr. Emmerson.

MR. EMMERSON: There are many different ways of posing the dilemma as to what it is precisely that the Prosecution needs to prove that the substantial contribution was made to. I think in common with the Prosecution position, we would agree that it's very much fact specific.

But pausing here for a moment, it's not simply a question of whether you contributed to the commission of a specific crime on the indictment, and this is Your Honour's question about perhaps it

resulting back, that being a contribution to the JCE. And I think what this discussion throws up is that whenever two or more people agree to commit a crime within the jurisdiction of the tribunal, there is a JCE. It might be between two people beating up the same man in a one-off incident, or it might be a group of people in the KLA in one particular facility, or it might be the policy of the local commander, or it might be the policy of the zone commander.

What you're being asked to find here by the very fact that all these disparate crimes are being said to be part of the same JCE is not that they are a myriad of smaller JCEs, but that there was an overarching JCE which involved a deliberate intention on the part of the participants of the JCE to commit those crimes, to commit crimes that were then committed on the ground as part of that policy.

It's not enough to say, "Was there a JCE?" Of course there are JCEs. Whenever two or more perpetrators commit the same crime it's a JCE. The question here is, was there an overarching JCE involving what is said to be either the whole General Staff or these accused and some others, but that's what needs to be proved by the Prosecution, not that a JCE existed but that a JCE existed at that level, the organisation was vertically structured, and that the members of the JCE were in one way or another, either through words, deeds or policy, promoting the commission of those crimes and that the crimes that were actually committed on the ground were not simply a grievance between anything beneath that level. They have to show right the way up to the top that this is one single JCE.

So, I mean, I appreciate that's not the particular framework within which Your Honour has asked the question, but it's actually the issue for this trial.

JUDGE BARTHE: I understand. Thank you.

Anything further?

MR. TULLY: Nothing further, Your Honour. I believe my colleagues have encapsulated our position on the matter as well. Thank you.

JUDGE BARTHE: Thank you.

Mr. Ellis.

MR. ELLIS: Your Honour, the distinction that I believe the Prosecution is trying to blur is between a common plan which is inherently criminal and a common plan which is not. But plainly if you have a common plan that is inherently criminal in and of itself, then any significant contribution to the crime will also be a significant contribution to the plan, and vice versa.

But where you have a common plan pleaded which is not inherently criminal, the distinction becomes important. And that is why we do insist that what is required is a significant contribution to crimes, because significantly contributing to Kosovan independence is not a crime.

JUDGE BARTHE: Thank you.

PRESIDING JUDGE SMITH: Thank you, Judge Barthe.

I think Judge Mettraux had a quick follow-up question.

JUDGE METTRAUX: Thank you, Judge Smith.

And I have a follow-up question for you, Mr. Ellis, but I think it applies to the submissions of some of your colleagues. You're advancing a suggestion that proof has to be made of a significant link between the conduct attributed to the accused and the crimes themselves.

What I'm interested in is do you have any case law that you could cite where factual findings were made by a chamber or a panel verifying that a person convicted of a JCE I or a JCE III, for that matter, did actually make a significant contribution to any of the crimes? And I'm asking that because, at this point, I cannot think of one. So if you can think of one either on your feet or at a later stage where you think that this verification of a significant linkage between the conduct and the crimes exist, I'd be most grateful for that indication now or at a later stage if you need to.

MR. ELLIS: Your Honour, I'm afraid I lack the mental agility to pull those off the top of my head. But what I would say is that it's inherent in the findings referred to that a significant contribution to the crimes is one of the steps in the modes -- in the elements of crime. So we would say that there is a clear answer there in and of itself.

I can come back in written submissions, but perhaps now is not the time.

JUDGE METTRAUX: I can reassure you, Mr. Ellis, you don't lack mental agility. You've made a demonstration of it repeatedly already.

But I have other questions for the Defence, if I may, and probably starting with you, Mr. Kehoe, on something we've already discussed in the past, and that's the reference made by yourself and some of your colleagues to the so-called Serbian crimes.

And I will just summarise what we understand to be the position at this stage. There was an indication given to us in December by the SPO that they are not taking issue with the fact that Serbian forces committed crimes and atrocities against members of the Kosovo civilian population, so the issue is not in dispute.

We also understand your position to be that the evidence which you would wish to lead on these crimes could be relevant to other issues, you say, in the case. And one that you and some of your colleagues have pointed to is to the effect that these crimes might have had an effect on the effectiveness and the functioning of the KLA's chain of command.

Now, following your submissions, we've carefully reviewed your brief, and, of course, the briefs of your colleagues, in search of such indications as to where you claim that any such crimes have or could reasonably be said to have had an effect on the functioning of the KLA. And we could find one, perhaps, which is the attack on the Jashari compound, which falls, you say, outside of the relevant framework of the armed conflict, but we could not find any other in any of the Defence briefs.

And what I'm asking is a very simple question. I don't want to have a lengthy discussion on the issue, but simply, did we miss any

part of your brief or your colleagues' brief, and I will turn to the other Defence, where you point to these incidents, where you say: We need to be permitted to lead evidence of Serbian crimes because it has a demonstrable impact on the functioning of the chain of command? Is there any such part of the brief that we missed?

MR. KEHOE: [Microphone not activated] And I will talk about a portion of it, and my colleagues will talk about another portion of it, but let us just talk about what happened in the spring of 1999.

Of course, during the bombing campaign by NATO, there was a significant concerted effort to cleanse the Kosovo areas of the Kosovo Albanian population. In excess of 800.000 people were sent into third countries, another 200-plus displaced. Those are estimates, Your Honour, I'm sure you know.

During that particular timeframe, the chain of command of the KLA was turned upside-down. Much of the command left the area because of what was going on. But in essence, what transpired for the people that were there was a reaction in many instances to what the Serbs were doing. It's important to go through these crimes because it contextualises much of the conduct that goes on throughout here.

Now, we're just talking about the spring of 1999, but the same is also true of the summer of 1998 where there was a massive Serb offensive that essentially destroyed the KLA in many different areas, rendering them virtually impossible to defend themselves.

JUDGE METTRAUX: Can I stop you there, Mr. Kehoe --

MR. KEHOE: Yes.

JUDGE METTRAUX: -- because this is part of the reason why we're asking these questions.

To me, at least, there is a significant difference between what we may call Serbian crimes, for lack of a better description, and Serbian offensive. I do take your point about military activity having a rippling effect on the opposing forces. What I'm asking is whether the crimes that you have attributed, and some of your colleagues have attributed, to Serbian forces have had such an effect.

And, again, I'm not asking to engage in lengthy discussion. It's whether there is somewhere in your brief examples of where these crimes - and I'm not talking about military operations - but crimes have had a detrimental effect on the functioning of the KLA. And if there is none in your brief - I wasn't able to find one - whether at some stage you can give us an indication of what these incidents would be. Because at this stage, it's very difficult, at least from my point of view, to identify.

MR. KEHOE: And, Your Honour, we will gladly give you a list of those incidents going back to 1998, what exactly the impact was on the civilian population, what exactly the impact was on the KLA. The impact on the civilian population and the KLA is ofttimes mixed. You know, we will have expert testimony as to what the reaction was of the KLA, people that were in refugee camps or otherwise displaced in Macedonia, Albania, and to some degree in Montenegro, and what their

motive was coming back. Some of that -- that activity that took place, that retribution, we can clearly establish and we will establish through witnesses that these people came back with revenge in mind.

These are activities for which the Prosecution is now holding our clients responsible in many different categories, generally speaking and specifically.

And then there is the element, of course, in much of this which is the aspect of self-defence. And if I can just have my colleague Mr. Misetic address that issue briefly. I know you don't want to engage in a long discussion about this, but if Mr. Misetic can talk about this two minutes.

MR. MISETIC: Yes, you've got it.

So, Judge Mettraux, first, the deadline for the Defence to file additional defences is Monday, and so you will be getting an additional filing. I know you're focused on our pre-trial brief, but there is another submission coming consistent with your orders.

We are going to raise self-defence, which is a defence under the Rome Statute and is part of customary international law as established by the Kordic trial chamber judgment.

One of the elements of the defence of self-defence is that you must prove that there was a threat of an imminent and unlawful use of force. And so it's the unlawful nature, not just the military attack by Serbian forces, but that there was an unlawful component to it that would be relevant to your assessment of a defence that's raised

to address several issues raised by the Prosecution in their pre-trial brief.

I'll give you some examples. There is an allegation in paragraph 12 of the pre-trial brief that the four accused deployed troops with minimal training, in some cases with no prior military experience, non-existent or minimal information on international humanitarian law. One of the issues that we're going to raise just on that section alone is: Does a population under attack have an obligation to train people in IHL before they defend themselves?

So it's one thing for the Prosecution to say they concede that Serbian crimes were committed. It's another thing, for purposes of the Defence, is the Prosecution conceding that at all times relevant to the indictment there was an imminent and unlawful use of force by the Serbian side against the Kosovo Albanian population? And we believe that's how the question should be phrased.

If that's not conceded by the Prosecution, then it will require us to lead evidence that there was a threat of an unlawful use of force by the opposing side which mitigates any liability on the part of the accused. It goes to the issues I just addressed. It may also go to the issue of detention, which is another issue on your list of questions which I'm going to get to. But what does a party that's attacked and is exercising its right to self-defence, what rights does it have as a non-state actor in a non-international armed conflict to detain for purposes of security. And we'll address that question, because my two minutes are up. Thank you.

JUDGE METTRAUX: Well, thank you. Stay on your feet, Mr. Misetic, because there is a follow-up question on the issue of these crimes. And I note that your case, your collective case, is evolving on these issues, and we will discuss that at a later stage.

But on the issue of Serbian crime, just as a matter of clarification, there doesn't seem to be any suggestion by any of the Defence teams that evidence of Serbian crime is being offered in mitigation. Is that a correct understanding of the position, at least of your team, Mr. Misetic?

MR. MISETIC: I am not sure what you mean by "mitigation." So to the extent it is relevant to the defence of self-defence, then it is offered for that purpose. I can assure you that no one on this side of the bar will ever raise *tu quoque* or a crime A on the part of someone in the KLA is justified by crime B committed by someone on the Serbian side. So that will never happen on this side.

JUDGE METTRAUX: And I will go back to Mr. Kehoe, if I may, before turning to the other Defences.

And this was about an issue which we very, very briefly brushed in December, and that's the reference in your brief at paragraph 45 and 61 to something called the Horseshoe plan or Horseshoe operation. And I would wish to know from you exactly what we need to make of this, Mr. Kehoe, and in particular two things.

The first one is whether you offer to establish the actual existence of such an operation? In other words, whether you're making an offer of proof as part of your case that you will establish

to a satisfaction that such a thing actually existed. And maybe you will understand from my question that it's slightly loaded to the extent that the existence of such an operation has been questioned.

So my first question is, are you offering to prove the existence of such a matter at trial?

MR. KEHOE: Yes, Your Honour. We will. We will prove -- I mean, the term "Operation Horseshoe" is a term that has been picked up by the international community, the British army, and other entities, military entities, that were analysing the situation at the time. And I don't think we should get hung up, Your Honour, on the -- we used the name "horseshoe" because that has been the term of art in much of the literature that is out there.

The Milutinovic decision made a finding that this particular operation did in fact take place. Mr. McCloskey has been versed on this, and when we got to that, he was going to address that issue, further clarification on that regard, if we can have Mr. McCloskey address.

But, yes, we are going to establish what Operation Horseshoe or what was happening such that the Milutinovic court found that this ethnic cleansing was taking place during 1999, and it did take the form of surrounding the civilian population, burning, killing, et cetera, and then -- not only the civilian population but the KLA, and funneling those people to Albania and Macedonia and, to a lesser degree, Montenegro. And as a consequence of that and what emanated from that, not only with what was happening at the time, as my

colleague Mr. Misetic talked about, the *mens rea* of detention issues, but also what was the *mens rea* of people coming back, their revenge capabilities, the revenge motives of people coming back, which explains much of the violence that took place when those people came back, the refugees and displaced people came back to their homes in Kosovo.

So, yes, we will be establishing that.

JUDGE METTRAUX: And I think you've answered it, but in your submissions, this element is responsive to the Prosecution's burden to establish the *mens rea* in relation to a number of the charged crime. Is that how we have to frame it?

MR. KEHOE: That is correct, Judge.

JUDGE METTRAUX: Thank you.

MR. KEHOE: If I may, I don't know if you have any other detailed questions, because Mr. McCloskey is well versed in this issue and can answer any other further questions that Your Honour might have.

JUDGE METTRAUX: I'm grateful for the offer. I've had what I wanted today from that.

But any submissions from the other Defence teams on these issues?

MR. EMMERSON: Yes, if I may. I take the way in which Your Honour has clarified the question to be pointing to a distinction between conduct that occurred and had an impact on the KLA's organisation, on the one hand, and the classification of that

conduct as a criminal offence, on the other, as I've understood it.

Because we are not, in the submissions that we make on relevance, confining ourselves to cases where there has been a conviction but to cases where what really matters, for the purposes of the submissions to the Trial Chamber in this case, is the impact of the proven conduct, in other words, the conduct of hostilities, with one exception.

Can I just very briefly summarise the way in which we say this is raised in the brief but also the way in which it's been treated by other trial chambers in the ICTY.

So I'm not sure whether Your Honours have analysed the crimes and the distribution of crimes in terms of time, but the vast majority of the crimes on this indictment occurred in the summer of 1998 and in the summer of 1999 - in other words, the clusters are at either end - at times during which it is perfectly apparent that the KLA had almost no organisational capacity. So there's a significant distinction because there's a very much smaller number of crimes in between those two periods alleged on the indictment. That's an important starting point to this.

There were -- in 1998 we had the Serbian spring offensive to the west of Kosovo which began with the Jashari compound and then went down to the Haradinaj compound in the Dukagjin region on 24 March and razed all of the villages in between. And the evidence --

JUDGE METTRAUX: Mr. Emmerson, you are doing exactly, and it's not a criticism, but what I wanted to avoid. I do not want to go

into the substance --

MR. EMMERSON: But you are -- so you --

JUDGE METTRAUX: My question is a very simple one. If we missed indications in your brief --

MR. EMMERSON: Yes.

JUDGE METTRAUX: -- of crimes that you say are relevant to the case that you lead in the way that you describe it, we'd be grateful for the indication. We don't want a recitation at this stage of the facts of the case and --

MR. EMMERSON: The short answer is yes, there are. Did you want me to say what they are?

JUDGE METTRAUX: Yes, please, that would be of assistance. Thank you.

MR. EMMERSON: That's what I was doing. That's what I was doing.

So the first one is the Serbian spring offensive coming from the Jashari compound and razing all of the villages in between and controlling all of the main roads critical for the ability of the KLA to organise. Then the second major period was the Serbian summer offensive.

Now, as you will see, most of the crimes were taking place between those two events in that cluster and during the summer offensive. And for that period of time, it's very obvious, and there was evidence admitted in Haradinaj, and you'll hear it from some of the Prosecution witnesses in answer to questions, that the KLA had no

ability to even cross country during the day-time. They couldn't use vehicles on the main road. They had no methods of communication. And they were literally confined to travelling on small roads at night so that they couldn't be observed and attacked.

So absolutely it goes to the organisation of the KLA at a time when the first concentration of crimes on this indictment are said to have occurred, and that was the pattern throughout Kosovo. So it's absolutely centrally relevant to that.

You then have this period of time between November and April where there are relatively a smaller number of offences alleged on this indictment.

And then 24 March 1999, so a full year after the Haradinaj attack, that's the start of the NATO bombing. And what happens immediately after the NATO bombing is the subject of the Djordjevic and others trial in the ICTY which is a finding of a campaign of crimes against humanity organised at the highest level.

Now, I just touched on the horseshoe reference. We've used a different formulation in our opening brief, in our pre-trial brief, because I know, and I'm sure Your Honour is aware, and perhaps that's part of the reason for the question, that there is a denial from the Serbian side, and many historians dispute, that the military operation was called Operation Horseshoe or it was a formal operation of that kind.

What we've described it as is a plan, which the trial chamber found to exist in the cases in the ICTY against the Serbs, during

that period to move from the north-eastern side of Kosovo downwards, so south, south-west, and the west, as Mr. Kehoe said, to drive the population out, proceeding at certain stages and at a certain speed so that each village would then be attacked, razed, crimes against humanity committed, and then the next -- it would encourage the wave to build, everybody flooding towards the borders. And there is plenty of evidence in the process of that that Serbs were organising trucks and trains, Serb forces organising trucks and trains to force people to leave Kosovo.

However, there came a point in the midst of that forced evacuation through the commission of crimes against humanity when they closed the borders. And although it's never been charged as a genocide, it's, we would say, very clear that the genocidal intent was present at least at that moment and for a considerable period thereafter. And at that stage, the portion of the population that was targeted for genocide was the -- those remaining in Kosovo.

So I give you that because it's in response to that and immediately after the cease-fire that then everybody comes back, as Mr. Kehoe said. There are hundreds of weapons flooding around and that's when we see the second cluster of crimes. People who have returned to Kosovo, as Mr. Kehoe has said, possibly in revenge, but in any event, not in a situation where the KLA was able to establish control over the population.

So all of these things, I'm afraid, have to be examined, whether you take them as matters of fact or as matters of law. Clearly the

convictions in the ICTY are matters of record, but it doesn't matter what the convictions were. What matters is what was being done, because that's what was interrupting the ability of the KLA to control those who may have committed these crimes, particularly during those two clusters, and their ability to establish the means and structures on which the Prosecution rely.

So the issue is, as Mr. Kehoe said, it's not that the SPO admit that crimes were committed. That's not the point. It's just that you cannot make decisions -- it would be impossible for you as a Trial Chamber to make decisions about the command structure, the operational authority, whether leaders had the ability to know and to prevent or punish, or, indeed, any of the requirements that are -- have been the subject of abstract legal discussion this afternoon without understanding what the conduct of the Serbian offensive actually involved at those times and the impact they were likely to have on the issues you have to decide.

JUDGE METTRAUX: I'm grateful, Mr. Emmerson. We just want to make it clear, and I hope that was clear from the question, that there's only one set of crimes we're interested in in this trial, and that we will not entertain any sort of exercise in moral equivalence or anything of that sort. So I'm not inviting you to make further submissions. I am simply underlining the fact that the understanding we have now is that evidence of such actions, be they crimes or operations, will be led, if at all, in relation to what you say is the impact it had on the chain of command that is relevant to this

case.

I hope this is a correct understanding.

MR. EMMERSON: Specifically as to the inferences that can be drawn from the evidence.

JUDGE METTRAUX: Very well, thank you.

Mr Roberts. Mr. Tully.

MR. TULLY: Yes, Your Honour. Thank you. I will be very brief. Just to echo the comments of our colleagues, we understand that *tu quoque* as a defence is out. I understand your question to -- well, I understand your question to be an exercise in informing us of any evidence that is to be led must be relevant, directly related to the elements of crimes, ultimate determination of guilt. And I also note that in our pre-trial brief we did address the issue of Serbian crimes.

And although we did not link it directly to those issues, we intend to do so, like the Thaci Defence, relate it directly to issues that would affect the command and control of the KLA, including, as Mr. Kehoe said, motivations for retribution and revenge. They will not be cited as rhetoric. We don't intend to lead any evidence that is drawing some sort of moral equivalency between any crimes. And we understand your position -- or your direction to us that you are here to determine the criminal liability in this case.

However, we believe that -- we say that there are places where the Serbian crimes will be relevant to the determination of that guilt. And at the appropriate time, we will make the relevant

submissions and we trust that Your Honours will be satisfied with it.

Thank you, Your Honour. That's all.

JUDGE METTRAUX: Thank you.

Mr. Ellis.

MR. ROBERTS: Sorry, Your Honour, if I may just supplement my colleague's submission. The one issue that I just wanted to address is the fact that the Prosecution acceptance of these crimes is so generic and vague that it doesn't allow us to present that necessary specificity.

Obviously, you require that specificity for us to demonstrate why it's relevant to the crimes that are charged in the indictment. A generic "we do not dispute the existence of Serbian crimes" by the Prosecution doesn't help us. That doesn't allow us to present that necessary evidence.

So, obviously, we recognise what we're supposed to do, but to do so, we can't accept what the Prosecution has said as providing us with sufficient information or evidence that would allow us to do so. Thank you.

JUDGE METTRAUX: Thank you.

Mr. Ellis.

MR. ELLIS: Your Honour, I associate ourselves with all the points that have been made by the other Defence teams. Those points seem to me to go a little beyond the only issue that this is relevant to being chain of command issues.

In particular, we associate ourselves with the comments made by

Mr. Kehoe on that issue in relation to the revenge retribution motivation amongst direct perpetrators, which we would say is also a relevant issue in these proceedings.

Of course, we have no intention of advancing a *tu quoque* type defence. We're ready to justify the relevance of questions that we ask as your Order on the Conduct of Proceedings rightly requires.

I do also adopt and agree with Mr. Roberts' submission just now. What exactly is the evidential value to us of the Prosecution saying in general terms that they don't dispute that some Serbian crimes were committed? That's not something I can put in a final brief. It's not something that has the specificity that we would need in order to rely on and in order to give weight to the position.

The problem that we've got is when we put potential agreed facts to the Prosecution dealing with these crimes, the answer they come back with is no. So while the Prosecution is willing to stand up in open court and acknowledge that there were some crimes, on the specifics they're not willing to agree what we have put forwards.

JUDGE METTRAUX: I'm grateful. And I'll ask a last question to the Defence so that I can then turn to the Prosecution. And that's something both, I think, Mr. Kehoe, you're the target today, and Mr. Roberts is going to be in turn, because he made a passing comment to the same effect.

We do understand through your submissions in some of the briefs, the pre-trial briefs that have been produced by the Defence, that some of you, and perhaps all of you, are taking issue with either the

existence of JCE as a legal theory on the customary international law and/or with the suggestion that it is applicable before this jurisdiction.

Now, I'm not inviting a discussion on the point of merit - and I want to make that clear, I don't want to hear about JCE - what I'm asking is, there is a decision by the Court of Appeals Panel of this tribunal that just says that, yes, it exists under customary international law; and, yes, it applies to this jurisdiction.

Now, your submissions, as I understand them, go against the grain and, actually, the substance, I would say, of this decision. And what I'm interested in is what are you asking to do? What are you asking us to do about these findings of the Court of Appeals Panel? To ignore them? To know better that the Court of Appeal Panel? Are we not bound? And if we are not bound in any way by these decisions, what's the basis that you advance for that submissions, and what are you asking us to do? Are you asking us to revisit the question of the existence of that doctrine and its applicability here?

MR. KEHOE: Your Honour, our position is that it's a live issue. If I could have a twofold response and have my colleague Mr. Ellis take the first part, and I will take the second part, it might expedite this discussion, if I may.

JUDGE METTRAUX: Mr. Ellis.

MR. ELLIS: Your Honour, this is perhaps a point that arises from the way that we address the matter in our pre-trial brief as

well.

As Your Honour is very familiar, the way in -- the history of this matter is that we raised in a preliminary motion before the Pre-Trial Judge that we simply do not accept that JCE, and particularly JCE III, was established in customary international law at the time in 1998 and 1999. And I appreciate the invitation not to go into Borkum Island and Essen Lynching and all the other cases this afternoon. That was rejected by the Pre-Trial Judge and, as Your Honour says, it was rejected by the Appeals Panel.

That wasn't the end of the story, though, as far as the procedural history is concerned, because we then referred the matter to the Constitutional Court Chamber. And we did so on the basis that pursuant to, I think it's Article 33(1) of the Constitution of Kosovo, Mr. Krasniqi is entitled not to be charged or convicted for an offence that wasn't part of customary international law at the time.

In response to that we received a series of questions from the Constitutional Court Panel. It's in the decision on further submissions, which was filing 5 in that reference. And we were asked question (C):

"Given that the criminal proceedings against the applicant are still ongoing, is it still open to the applicant to raise his complaint under Article 33(1) of the Constitution and Article 7 of the Convention as regards JCE basic and extended forms before the Trial Panel and subsequently as the case may be before the Court of

Appeals Panel, the Supreme Court Panel," and so on.

So at least from the point of view of the Constitutional Court Chamber in asking that question, they didn't regard it as foreclosed that we could raise this argument again before Your Honours. And, ultimately, of course, they rejected our referral as being premature. And that's why we say the issue is still live, because their finding was that the right in Article 33(1) bites not at the moment of charge but at the moment of conviction, and, of course, any conviction would come from Your Honours' judgment, so it would be Your Honours' judgment that we would then challenge on the Article 33(1) basis.

So that's why we say it's still a live issue. And we are going to keep raising this issue to every angle that we can. And in order to do that, I, of course, need to preserve our right to go to the Constitutional Court Chamber, including to make sure that we have exhausted all remedies, and that's why we do so again, Your Honour.

JUDGE METTRAUX: Mr. Ellis, just as a follow-up. I understand your -- I mean, the point about the Constitutional Court, of course. But what I'm not clear about, and this is really what is of concern to us as a Trial Panel, is what is our relationship to the Court of Appeals Panel decision in terms of its bindingness, or otherwise, you say, number one; and number two, maybe that's the question for Mr. Kehoe, is, what are you asking us to do? Are you asking us to resist the Essen Lynching case, the Tadic case, and onwards, and come to the view that JCE either does not exist here or, the other path, that it does not apply in this jurisdiction? Is that what you're

asking us to do?

MR. EMMERSON: Would it be possible for us to revert to the indictment order in make these submissions because there's a parallel application that was dealt with by the Supreme Court in relation to Mr. Veseli in which the issue was directly addressed as to what is -- what was decided and what has been left for your -- for this Chamber to decide, but I can see that there is also some support for Mr. Thaci to revert to the original.

MR. MISETIC: Yes, Your Honour. I just wanted to add to what the Krasniqi Defence said and explain our position.

It is what we would say is somewhat of a Byzantine architecture that's been established by the Constitutional Court here. But there was an appeal. It was an appeal to Article 33(1) of the Kosovo Constitution. Our interpretation was the Albanian and English interpretation of that clause, which says:

"No one shall be charged or punished for any act which did not constitute a penal offence under law at the time it was committed ..."

The Constitutional Court came back and said that may be what the Albanian and English version say, but the Serbian version says something --

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

MR. MISETIC: Yes, sorry.

But the Serbian version says something different, and the

Serbian version only says that no one shall be found guilty or punished. In effect, saying that the provision of Article 33(1) on legality is reserved to be assessed and applied at conviction stage.

You can charge someone, in effect, under Kosovo's Constitution for something that wasn't a violation at the time. You just can't convict them for it.

So we are where we are now. And it's you who get the first shot at determining that constitutional question, which is: Can you convict now, consistent with Article 33(1) of the Kosovo Constitution? And, of course, then you'll have to go into the arguments that have been raised already about whether JCE III constituted part of customary international law or not.

But that is our interpretation of the Constitutional Court's decision. Whatever you decide may or may not then be rechallenged at the Court of Appeal level until it gets back to the Constitutional Court for a new assessment about its consistency with the Constitution of Kosovo. But that's what we're left with. We, of course, disagree with how the Constitutional Court interpreted the provision and say they should have relied on the Albanian and the English version, but they didn't, and we are where we are. Thank you.

JUDGE METTRAUX: Byzantine but clear, Mr. Misetic.

Mr. Emmerson.

MR. EMMERSON: Well, yes, it is quite clear, in fact. Your Honour has asked two questions. One is, did the concept of JCE

apply at that time is -- as an issue that was considered by the Constitutional Court Chamber, and has it been properly and lawfully transposed into Kosovo law when the law itself is subject to the Constitution and the Constitution guarantees non-retrospectivity. And you'll know that the equivalent judgment of the Serbian Constitutional Court has concluded that you can't prosecute or convict for crimes against humanity committed by joint criminal enterprise or for war crimes committed through joint criminal enterprise because the constitution didn't allow it. And the Constitution of Kosovo is exactly the same in all material respects.

So two fighters fighting on the same battlefield on the same day, one's Serbian, one Albanian, the constitution prevents the Serb being put on trial, but this Court's interpretation of the constitution in terms of its establishment allows the -- his protagonist on the same day to be tried for joint criminal enterprise. So it's all to do with the primacy or interrelationship between international law and the constitution.

Now, all the Supreme Court Chamber focused -- there were two applications before it. There were Mr. Krasniqi's application, which was the first of those two; in other words, it was looking at was it crystallised as a customary international law principle at the time of these events. And there was ours which was looking at does the constitution prevent it being transposed into international law. Both of them fell foul of the dichotomy that you've just been referred to between charge and conviction.

So the Supreme Court Chamber preferred the Serbian version of the Kosovo Constitution, Serbian-language version, to the Albanian and English-language versions, relying on other international instruments, including Article 7 of the European Convention, which refers to a conviction condemnae without a charge.

So to that extent, they concluded that to take that point as a jurisdictional constitutional challenge to the indictment at the pre-trial stage was premature. So that issue was purely what the Constitutional Chamber decided. Anything beyond that is what we in England would call *obiter dicta*. It is an opinion but it is not deciding the issue. The issue still falls to be decided.

And the judgment in the ruling of 13 June 2022, which is F, lots of 0s, and then 10. So it's -- yes, it's 13 June. In the second part of that, that's to say the Veseli part, explains why they have concluded the charge doesn't apply. It only arises at conviction stage. And goes on to say:

"At the same time, the Chamber must emphasise," this is paragraph 61, "that its assessment is without prejudice to any future determination of the complaints, if any, which the applicants bring before the Chamber as regards the alleged violation of Article 3 and Article 7 of the Convention."

So there is no decision against us. This is an issue that you have to decide, and it's not a straightforward one.

Now, it's true that there are some events and comments and that you'll want to take those into consideration, but you are most

certainly not bound by them. And, indeed, they aren't directly addressing all of the questions that need to be considered. The only issue that really needs to be decided by the Trial Panel is: Do we have to wait till the end of the trial? Are you bound by the fact that the Supreme Court Chamber thought that this challenge at the pre-trial stage was premature but recognised it was a challenge you would have to deal with? Are you bound to wait until the end?

And in our submission, the answer to that is no. Because here you have a situation where if you take the view that the constitutional challenge on retrospectivity is well founded, then you cannot wait until the end, because in your case management powers, you would need to think about is this trial, as currently structured on this indictment, capable of being tried in a situation where at the end we conclude we couldn't actually convict on JCE? That would have a radical effect on the charges on this indictment.

So it's an important decision to make. You definitely have power to make it now, because the objection from the Supreme Court Chamber was that Strasbourg or under the victim test you couldn't claim to be a victim of a violation just by being charged.

But these gentlemen haven't just been charged. They've been remanded in custody for two years and they will remain in custody during the trial, so they are most definitely victims if you are of the view, having heard and considered the arguments, that the constitutional provision against retrospectivity prevents this being used in -- the JCE being used in these proceedings even if it

existed. And that matters because you've got a binding decision of the Serbian Constitutional Court finding that it does not. In other words, you could not put these men on trial under the Serbian Constitutional Court's authoritative interpretation with a JCE on the indictment. So the final decision has to be that it's okay for Kosovars but not for Serbs, and that is a pretty startling thing. And we, respectfully -- I am not making a political point here. We respectfully submit that that's a difference in treatment which has no justification. Yes, it's true they're two different --

JUDGE METTRAUX: We've got your point, Mr. Emmerson.

MR. EMMERSON: Well, that's why I say it's something you may need to address at the start of the trial.

JUDGE METTRAUX: [Microphone not activated]

Mr. Roberts.

MR. ROBERTS: Very little to add, Your Honour. We, obviously, support the positions of both of our colleagues.

The only potential parallel that I could see from other courts that may be of assistance is the way that JCE III was addressed in Cambodia, where it was challenged before the co-investigating judges, they issued a decision, it went up to the Pre-Trial Chamber, holding that JCE III was not part of customary international law in 1975 to 1979. And the positions were reversed in that situation because it was, when you got to trial, it was the prosecutor who wanted another go at the decision. So you had an appellate decision, you had a pre-trial chamber, the appellate decision of the co-investigation

judges issuing their decision, and then the co-prosecutors seeking to challenge that decision again. The trial panel -- the trial chamber, sorry, independently, as far as I'm aware, assessed and reassessed the existence of JCE III under customary international law and found the same -- came to the same conclusion, that JCE III was not part of customary international law.

So in that situation, the Prosecution is effectively doing the same as what we were doing in this situation. Ultimately, it went up to the Supreme Court Chamber, and from what -- from recollection, it was dismissed on procedural grounds. But at no point was the right or the possibility for the prosecutors to rechallenge that ever addressed as far as I am aware.

So all I am saying is that there is precedent to some extent from other courts and on, obviously, a very, very pertinent issue. Thank you.

JUDGE METTRAUX: Thank you.

Mr. Ellis, would you like to add?

MR. ELLIS: Nothing to add anymore, Your Honours, no.

JUDGE METTRAUX: The SPO maybe, briefly.

MR. QUICK: Yes, just very, very briefly, Your Honour.

The framework at this Court is very clear and it's different than in Cambodia. At this Court, Trial Panels do not have the power to review decisions of the Court of Appeals. Rather, the Court of Appeals framework, the Court of Appeals has the power to affirm, reverse and revise decisions of the Trial Panel.

The relevant provisions pertaining to interlocutory appeals include Article 45 of the Law and Rules 77 and 97. Such provisions are modelled after similar provisions at other international courts and are intended to serve interests of legal certainty and predictability.

If this Panel could revise and review and revisit decisions of the Court of Appeals, there would be no reason for the Court of Appeals to issue those decisions.

So applying -- and the Court of Appeals applying the jurisprudence of other courts with similar frameworks has found that its own -- or treats its own interlocutory appeals decision as binding and will only depart from those for cogent reasons in the interests of justice. And this is the right only of the Court of Appeals which has the power to review and revisit its own decisions. The Trial Panel does not have that power.

So our position -- and I just want to -- and to end I just want to emphasise that in addition to the jurisdiction decision in this case finding that JCE does fall within the jurisdiction of the Specialist Chambers, the Court of Appeals had another opportunity to review that finding in the Shala case and issued another decision confirming the same jurisdiction.

So this issue is now settled before purposes of this Trial Panel and Court of Appeals. The Constitutional Court jurisprudence that was referred to by the Defence counsel referred to exhaustion of remedies, referring specifically to the Supreme Court and the

available avenues potentially for the parties to go to the third instance. Thank you.

JUDGE METTRAUX: I'm grateful.

Mr. Laws.

MR. LAWS: We've nothing to add on this topic. Thank you, Your Honour.

JUDGE METTRAUX: Thank you.

Judge Smith.

PRESIDING JUDGE SMITH: I think Judge Barthe had one -- do you still have a question you want to ask?

JUDGE BARTHE: If I may.

I had actually one last question, starting with the SPO again, on JCE III and specific intent crimes, as Mr. Emmerson also mentioned before.

In paragraph 112 of the Confirmation Decision, the following was held, and I quote:

"With regard to JCE I, the perpetrator must share the intent with the other participants to carry out the crimes forming part of the common purpose, including the special intent."

In contrast, the Pre-Trial Judge found, in paragraphs 117 and 122 of that same decision, that neither the aider and abettor nor the superior must have the same *mens rea*, particularly the specific or special intent, as the principal offender or subordinate.

My question to the parties, starting, as I said, with the Prosecution, is the following: What about JCE III? Of course, does

a participant in a JCE III, to make it more specific, need to have the specific or special intent him or herself, or is it sufficient that he or she foresees the commission, for example, of genocide or crimes of persecution by other members of the JCE as a reasonable consequence of the execution of the common purpose?

Mr. Prosecutor.

MR. HALLING: Thank you, Your Honour. We were almost free of the preliminary motions litigation, but we have drawn slightly back into it for this, although this question was left open following the preliminary motions appeals decision. So in our submission, JCE III does apply to specific intent crimes, and the specific intent is not required in order to make a finding of JCE III liability.

There are multiple modes of liability. Your Honour has just mentioned two, aiding and abetting and superior responsibility, that permit the accused to have a different *mens rea* from the direct perpetrators. JCE III is just another one of those modes of liability. And this has been confirmed by extensive ICTY jurisprudence.

We are aware that the STL appeals chamber made a finding to the contrary, but in our submission, that decision is conflating the *mens rea* required for a crime with the *mens rea* required for a mode of liability.

As I mentioned, although the substance of this issue was not reached on appeal, this question was fully briefed on appeal, and I would direct Your Honours to filing IA009-F00014, and specifically

paragraphs 14 to 26, where our full position on this question is set out and all of the relevant cases are discussed.

JUDGE BARTHE: Thank you, Mr. Prosecutor.

Mr. Kehoe.

MR. KEHOE: Yes, Your Honour. On the question can JCE be applied to specific intent crimes, the answer is no.

The position advanced by the Prosecution on a JCE III is that if, in fact, members of this entity are committing genocide, that it's not necessary for the people in -- as part of the JCE to have that requisite *mens rea* in a specific intent crime. It likewise applies to torture and persecution.

Frankly, Your Honour, the Pre-Trial Judge had it correctly. He said in, and I believe this is in -- it's filing, again, 00028. It is 00030. It says:

"... for the purposes of the present case, the Pre-Trial Judge considers that it would be a legal anomaly to convict any of the Accused as participants in a JCE (... involving arbitrary detention and cruel treatment) for having ... foreseen the possibility that the crimes within the common purpose would eventually lead to the *dolus specialis* crimes of persecution and torture being committed."

Now, this went up to the appellate chamber on a jurisdictional issue, and the jurisdictional -- and the court at that point said that the Pre-Trial Judge went too far in making that decision and that it was still an open question for the trial chamber. And I cite to you the decision on appeals. That would be 00030, paragraph 235.

But the greater weight of international law is that it would clearly be a legal anomaly to have a -- somebody that's part of the JCE and not have the specific intent for genocide yet be responsible for genocide. It is our submission, it has been our submission throughout, that that is not the law, and that on that score the Pre-Trial Judge had it correct. Thank you.

JUDGE BARTHE: Thank you.

Mr. Emmerson.

MR. EMMERSON: [Microphone not activated]

MR. TULLY: Nothing to add, Your Honour. I believe the position is set out very succinctly by Mr. Kehoe.

Perhaps this is not the time, but I'm not sure where it fits in. We do notice in -- we are speaking about it quite extensively today. We don't have a de-redacted version of the Confirmation Decision from the Pre-Trial Judge. If it's something you want to consider and any orders to be made today, I am not sure if it needs to be back to the Pre-Trial Judge or if Your Honours can deal with it, but I leave it to you.

JUDGE BARTHE: Thank you.

Mr. Ellis.

MR. ELLIS: Yes, nothing to add on that point, Your Honours.

JUDGE BARTHE: Thank you very much for the clarification.

PRESIDING JUDGE SMITH: The next thing we want to discuss is the sitting schedule that we provided to you. And right before the morning break, Mr. Kehoe said he had the rarest thing that we've

heard in this court today, and that was maybe an agreement on something.

MR. KEHOE: It's a beautiful thing, Judge.

If I may, Judge, if I could talk to my colleague, Mr. Roberts, who had the discussions --

PRESIDING JUDGE SMITH: Go ahead.

MR. KEHOE: -- with the SPO. I spoke to him afterwards, but he had the discussions, so it's better if it comes from the horse's mouth.

PRESIDING JUDGE SMITH: Mr. Roberts.

MR. ROBERTS: Thank you, Your Honour.

We, obviously, received yesterday the Prosecution's response to both the joint motion in relation to the scheduling and to our separate motion which had been filed a day or two before.

We consolidated -- well, we spoke to the different Defence teams. We tried to achieve a common position and went to speak to the Prosecution. We fully understand and recognise that it's, obviously, completely within the Trial Panel's discretion as to when they schedule the beginning of trial, but we were able to come to an agreement, or at least a non-opposition from the Prosecution, and I'll leave them to confirm that, that if we started on 3 April with opening statements and followed immediately afterwards by the first witness, so there would be no break between the first witness and the opening statements, but also that we did not challenge the order of witnesses as set out in their notification of 1 February of the first

12 witnesses, which was, obviously, part of our submissions from earlier this week, then the Prosecution would not oppose that position.

In part, that, obviously, reflects the scheduling of another case, I believe, in a certain week. It does also reflect the schedule that is set out by this Trial Panel, but obviously does not include the sitting weeks for March. We also -- and I apologise to Mr. Laws because we did not include him in discussions last night, and that was my fault. We did speak to him this morning, and we are hopeful that he does not have opposition either to the proposal.

So our position is that 3 April with the order of the 12, and that was hopefully a position that is acceptable to the Chamber, with the full understanding that March will not be a week or a month off, I should say that, given the significant number of motions for admission of evidence, both 155, bar table motions, et cetera. Essentially, the trial is starting at the beginning of March but it's a paper trial for March before we get to the oral part of the trial at the beginning of April.

So we have followed your recommendation. We've sought, despite, obviously, we have differences of opinion or differences of interpretation of communications or of positions, but we've sought with the Prosecution to try and come to an agreement, and I thank them for being willing to enter into that. And we leave it with Your Honours as to what you wish to do with that information.

PRESIDING JUDGE SMITH: Prosecution.

MR. HALLING: Yes, Your Honour. That's accurate. All that we would add, and we've said before, we've never been totally opposed 100 per cent to any kind of delay of this kind. We were hoping that this trial would still start in March. But as Mr. Roberts mentioned, when you look at the schedule and when the Shala trial has to sit the week of March 27, the difference between having opening statements on something like March 20th and hearing the first witness in early April versus moving both to early April didn't make much difference in the progress. And so because of that, we don't oppose.

PRESIDING JUDGE SMITH: Mr. Laws, do you have an opinion?

MR. LAWS: Your Honour, may I make our position clear. We're sympathetic to the Selimi Defence and particularly *[REDACTED] Pursuant to In-Court Redaction Order F01299RED.*

*[REDACTED] Pursuant to In-Court Redaction Order F01299RED.*, and so we certainly don't oppose the short adjournment that they have asked for.

As for the slightly longer period agreed between the parties, not only is it, as Your Honour has said it, a rare and welcome event, but it's also involved, obviously, some horses being traded. And we don't want to get involved in upsetting the delicate balance that's been found. So we are neutral as to that slightly longer period.

PRESIDING JUDGE SMITH: Thank you, Mr. Laws.

We will take that into consideration and make a ruling on it yet today. We appreciate the efforts and the confidence in each other to have a discussion about this important issue.

I will skip what I had planned to read and talk about at this point. You may get it back again after lunch, but we'll break for

lunch and be back at 2.30 and we will begin at that time. Thank you.

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

--- On resuming at 2.30 p.m.

PRESIDING JUDGE SMITH: Just to avoid the suspense, we will tell you that we will grant the motion for an adjournment until April 3rd under the terms set out by the parties. I won't call it a joint motion. I'll call it an unopposed motion. And I thank you again for dealing with this in a proper and good manner.

One question that we need to deal with that I have not put a lot of emphasis on yet is the time in which the Prosecution would close its case out, and I think you estimated end of 2024 or possibly into 2025. Is that correct?

Does the Defence wish to comment on that in any way?

MR. KEHOE: Not in addition to what we have said previously on the length, Your Honour.

MR. EMMERSON: It is too long for a Prosecution case.

PRESIDING JUDGE SMITH: I'm sorry?

MR. EMMERSON: It is far too long for a Prosecution case in this case. We've suggested all along the Prosecution case should be closed within 12 months. This is a case that's triable within 12 months. So given that the Trial Chamber has taken the view that it's unlikely to direct the Prosecution how to run its case, then the only mechanism for imposing some concentration and discipline is time. And that's a very long time for a Prosecution case on this evidence.

PRESIDING JUDGE SMITH: Mr. Roberts, anything?

MR. ROBERTS: Just to support the application or the response from Mr. Emmerson. We believe also it's far too long for this case. Thank you.

PRESIDING JUDGE SMITH: Mr. Ellis.

MR. ELLIS: Yes, we support as well, Your Honours. Far too long for this case. And we made submissions on this in filing 810 with some authorities in support.

PRESIDING JUDGE SMITH: One other question in that regard, put you on the hot seat. Assuming it ends one day, how long will your case continue?

MR. KEHOE: It's difficult to say at this juncture.

PRESIDING JUDGE SMITH: I know, but you're going to have to say anyway.

MR. KEHOE: It would certainly go on for several months. I mean, all of the witnesses that we had proposed to you, to the Court, in depositions, we will put them on *viva voce* at minimum. We have an array of other people as well. So I don't want to --

PRESIDING JUDGE SMITH: Take a stab at it. We're not going to throw you out of the room, you know.

MR. KEHOE: Three or four -- three months, depending on how much time we get.

PRESIDING JUDGE SMITH: For your case alone?

MR. KEHOE: Yes, I would think so.

PRESIDING JUDGE SMITH: Mr. Emmerson.

MR. EMMERSON: My best estimate is a maximum of three or four

weeks.

PRESIDING JUDGE SMITH: Okay.

Mr. Roberts.

And, trust me, I'm not trying to put you in a hole here. I just would like to have some reasonable response.

MR. ROBERTS: We would expect to be successful for a motion of dismissal, and so would not need to call a case. If for some reason that's not successful, I think we are closer to Mr. Emmerson's estimate than to Mr. Kehoe's.

PRESIDING JUDGE SMITH: Okay.

MR. ROBERTS: But, obviously, that will depend a lot on which witnesses may address issues that are relevant for us as well.

PRESIDING JUDGE SMITH: Okay.

Mr. Ellis.

MR. ELLIS: So far as -- we are really not in a position to give a definite figure or even a suggestion at this point. There will clearly be a no case to answer submission after the Prosecution case.

PRESIDING JUDGE SMITH: Yes, well, if we assume that that is not there, then do you intend to put witnesses on?

MR. ELLIS: At this stage? It -- well, we've gone past the pre-trial brief point where we said at that stage we couldn't give you a provisional list of witnesses given the state of the case at that point. And that is still our position.

If I'm pushed to give a figure, I would probably be somewhere between the three to four weeks given and the three months given.

PRESIDING JUDGE SMITH: Okay. I understand. I mean, as I said, I'm not trying to put you into a bad situation. I'm just trying to get some idea of what we can plan on for the future.

Prosecution, do you have anything to reply on that?

MR. HALLING: I mean, just briefly, Your Honour, about this difficulty with making the estimates, because I know Your Honours are interested in the end of our case and the closing of the case. That is dependent in large part on the reasonable cross-examination estimates being done.

We have noted that the Defence has filed their estimates for the first 12 witnesses. A lot of them are just yes/NA, not available, for the delayed disclosure ones, which is not in compliance with Your Honours' directions. So our ability to estimate is in part dependent upon information that we do need to receive.

PRESIDING JUDGE SMITH: All right. Thank you.

The scheduling for the opening of the case, which now will be on April 3rd, is that we will commence at 9.00. Opening statement by the SPO will be five hours maximum. Opening by the Victims' Counsel, I believe you said 45 minutes, Mr. Laws.

MR. LAWS: I said up to, Your Honour.

PRESIDING JUDGE SMITH: Up to, yes. The Thaci Defence is three hours maximum. The Selimi Defence, one hour maximum. The Krasniqi Defence, 1.5 hours. And then, of course, there may be some questions by the Panel.

Yes.

MR. EMMERSON: Yes, I'm just pointing out, I think you missed Mr. Veseli's time.

PRESIDING JUDGE SMITH: Oh, I'm sorry. 45 minutes, yes. I have it down in my writings. I just didn't read it.

We would also like to note the following. Counsel are cautioned to focus exclusively on matters relevant to the charges and to avoid irrelevant matters and statements of a political nature. The Panel is hoping for clarity regarding the parties' respective cases and expect you to address those issues that are core to your respective cases and to try to avoid, as much as you can, repeating what we already know from reading your pre-trial briefs.

We ask you not to interrupt the opening of the other parties or participants.

And we also ask that prior to the Court session you provide CMU a draft of your opening statement for delivery to the interpreters in order to ensure a full and accurate interpretation of your statements.

We also ask that if a party or a participant intends to make reference to legal authorities in their opening, they should provide to the Panel, the opposing party, and Victims' Counsel a list of those authorities prior to the opening statement.

Any comments on that by the SPO?

MR. HALLING: Understood, Your Honour.

[Trial Panel confers]

PRESIDING JUDGE SMITH: From the Thaci Defence, any comment?

MR. KEHOE: No, Your Honour. We understand.

PRESIDING JUDGE SMITH: Thank you.

Mr. Emmerson.

MR. ROBERTS: Nothing from me, Your Honour. Well, sorry, I say "nothing" and then I have a question. Does that mean we'll be starting at 9.00 every day thereafter?

PRESIDING JUDGE SMITH: Yes.

MR. ROBERTS: Thank you.

PRESIDING JUDGE SMITH: Mr. Ellis.

MR. ELLIS: Your Honour, just to flag at this point that Mr. Krasniqi may wish to make a unsworn statement that would form part of our 1.5 hours that we've estimated for the opening statement.

PRESIDING JUDGE SMITH: That would be within that time period?

MR. ELLIS: Yes.

PRESIDING JUDGE SMITH: Okay.

MR. ROBERTS: Sorry, Your Honour, for completeness, Mr. Selimi would be the same. It would be within our hour, if that's the case.

PRESIDING JUDGE SMITH: I assume that any of you who want to do that, you will fit that within the time period you've been given.

I take it then that the remaining requests in filings 1258 and 1271 that were previously -- are now withdrawn; is that correct?

I'll just start here. Mr. Kehoe.

MR. KEHOE: I don't do well with numbers, Judge.

PRESIDING JUDGE SMITH: Those are the two ones for the continuance.

MR. KEHOE: I think so, Judge. Yes, Your Honour. Yes.

PRESIDING JUDGE SMITH: Okay.

Mr. Emmerson.

MR. ELLIS: [Microphone not activated]

PRESIDING JUDGE SMITH: Okay. Thank you.

MR. ROBERTS: Yes, Your Honour.

PRESIDING JUDGE SMITH: Mr. Ellis? Thank you very much.

The SPO filed a request to amend the exhibit list on January 30, 2023. That is F01238. We do not want to hear the arguments that the parties put in writing, but we wish to raise a few questions and make a few comments about it.

First, by our account, this is the sixth amendment to the list sought by the SPO, which is concerning in and of itself.

Second, much of the material that the SPO now puts forward for inclusion on its exhibit list has been in the SPO's possession for some time, months, sometimes even years, and it is not quite clear to us why it has taken the SPO so long to recognise the relevance and importance of that material.

Third, we also note that much of the material pertains to the first 40 witnesses.

We therefore ask the SPO to please explain to us, first, why was this exercise and review of your holdings not conducted earlier; two, why did your earlier assessment of relevance and importance need to be revisited once again; and in addition, can you also reassure the Panel that this is a one-off blip caused by your trial preparation

and that we will not get similar applications every time a new group of witnesses is put forward.

Mr. Prosecutor. Mr. Quick.

MR. QUICK: Yes, Your Honour. I'm just making sure I get the three points.

PRESIDING JUDGE SMITH: I can remind you if you lose track.

MR. QUICK: Okay, good.

So in relation to your first question as to why this was not done earlier. As explained in the motion for the different items, the SPO was undertaking various reviews relating to its different disclosure obligations, including under 102(3), 103, as well as preparing for trial. And there were also motions to amend the indictment and amend the exhibit list and amend the witness list. And in that context, various additional documents were identified, including statements, associated exhibits which had not been disclosed previously, as well as a few additional documents that the SPO considered were important to its case.

In relation to --

PRESIDING JUDGE SMITH: Well, let me stop you there.

MR. QUICK: Sure. Yes.

PRESIDING JUDGE SMITH: My question was why did it take so long to do it? Why didn't this happen earlier?

MR. QUICK: Right. So as also explained in the motion to some degree, at the pre-trial stage the SPO was accumulating the requests, and in the interests of judicial economy, which was a process that

was approved by the Pre-Trial Judge in a couple decisions, the SPO was making requests together for items as opposed to doing individual requests as they arose. And this request was done 30 days before trial which is the timeline that is set in 102(1), subject to judicial order.

In relation to Your Honours' question about assurance of whether this will be done again. The SPO can confirm that at this point there is no additional request to amend that is foreseen. But as is acknowledged in the Order on the Conduct of Proceedings, there may be circumstances where additional documents that the SPO wishes to use with the witness, that we may, in those circumstances, seek to add those documents to the exhibit list.

I'm happy to provide further clarification.

PRESIDING JUDGE SMITH: Well, surely after all these years, and having claimed to be ready for trial for more than two years, you must be confident and ready to go to trial with your list of witnesses and your exhibits, and yet we get a new list now. We don't want to have a new list next week. We don't want -- the next time you get 12 more witnesses, we don't want to be told there are some more exhibits you forgot. We want your assurance that you're finished, that you've found everything there is to find. It's your file. Those are your files. Nobody else owns them.

MR. QUICK: Yes, that is totally understood, Your Honour. And we understand that there is a procedure in the Rules and in the Conduct of Proceedings for amending the exhibit list, and there is a

higher threshold as we move along, and we acknowledge that.

PRESIDING JUDGE SMITH: Thank you, Mr. Quick.

MR. QUICK: Yes.

PRESIDING JUDGE SMITH: Does the Defence wish to respond? Please, we've carefully read your submissions.

MR. KEHOE: Yes, Judge.

PRESIDING JUDGE SMITH: We know that you'll think that it's late. We don't need to go into that. Is there some practical reason right now that needs to be addressed concerning those exhibits?

MR. KEHOE: Well, those exhibits, in conjunction with the other 700 exhibits that we've now been informed that we're going to get, I think it's a global problem of when does -- you know, when does this come to an end? That's all.

PRESIDING JUDGE SMITH: You're beyond what I'm saying. I want to know is there some practical problem you have in accepting the fact that these exhibits could be used in trial? Is there some reason right now?

MR. KEHOE: Not other than what we have raised in our pleading.

PRESIDING JUDGE SMITH: Okay.

Mr. Emmerson, anything to add?

MR. EMMERSON: Nothing.

PRESIDING JUDGE SMITH: All right.

Mr. Roberts.

MR. ROBERTS: Nothing beyond our written submissions, Your Honour.

PRESIDING JUDGE SMITH: All right.

Mr. Ellis.

MR. ELLIS: Nothing beyond the written submissions on that, Your Honour. But there may be some other observations on disclosure if there's time.

PRESIDING JUDGE SMITH: We've passed disclosure already. That was this morning.

MR. ELLIS: Your Honour?

PRESIDING JUDGE SMITH: We've passed disclosure already.

MR. ELLIS: But I've had lunch to think, Your Honour. And I warned you I was slow.

PRESIDING JUDGE SMITH: Too late.

All right. We want to turn to the dual status witnesses and the victim application forms. And Judge Gaynor is going to deal with that issue.

Judge Gaynor, you have the floor.

JUDGE GAYNOR: Thank you, Judge Smith.

On 30 January 2023, the Panel issued its decision on the Thaci Defence request for leave to appeal the decision on disclosure of dual status witnesses. That's filing F01237.

In our decision, we dismissed the Thaci request for the reasons outlined in that decision, and we will not revisit those reasons. We did, however, state that the parties and participants would be invited to address the question of the circumstances in which information contained in the application forms should be provided to

the Defence and, where this should occur, by what means the communication of any such information should be done.

We are concerned about one issue described by the Thaci Defence; namely, the possibility that the application forms might contain material relevant to the preparation of the Defence. This raises a concern that goes to fairness for which the Panel is responsible.

The parties and participants made reference in their submissions to Rule 113(1) of the Rules of Procedure and Evidence. The Panel hopes to achieve a common-sense solution to the issue described by the Thaci Defence. We believe that the Defence should be able to know whether the application forms related to dual status witnesses contain exculpatory or relevant information and, if that is the case, to be able to access that information so that no prejudice is caused.

We hope that this preliminary assumption is agreeable to all. We'll get to the mechanics in a moment. But if you do have any observations to make right now, especially the SPO or the Victims' Counsel, you're free to do so.

MS. MAYER: We understand the Court's concern about fundamental fairness to the accused, so we do agree with that premise. I am sure when we get to the logistics conversation, we can talk about the impact of Rule 113(1) and its explicit terms prohibiting it and fashion a solution that's narrow enough to take account of the fact that this rule does presume the materials not turned over to the parties, only to the Panel and to Victims' Counsel. So that would be our starting point, Your Honour.

PRESIDING JUDGE SMITH: Mr. Laws.

MR. LAWS: Your Honour, thank you. We've had a number of discussions with our colleagues in the SPO, and we think a proposal is going to be made that we will certainly do everything we can to assist with and to facilitate. But I should make it clear for the record that our position, keen though we are to assist the Bench, and we'll do whatever is necessary, our position remains the same, that Rule 113 applies in its own terms.

I can't pretend that we have adopted another position because we haven't.

JUDGE GAYNOR: Do any members of the Defence wish to speak?

MR. KEHOE: Yes, Your Honour, I think the Court outlined, and I don't intend to revisit Your Honours' decisions, but there are issues like credibility, reliability, and the weight of the evidence as Your Honours pointed out. And absent some Court intercession, we have no way to view that. And certainly we would be welcome if -- not that the Court wants to review it, but if the Court would get assistance of another Judge to review that, we would welcome that opportunity.

We just would ask the Court to some mechanism that this information be reviewed and make a determination to present to the Trial Chamber what should be turned over in what manner.

JUDGE GAYNOR: Mr. Emmerson.

Do any other Defence counsel wish to speak right now?

Well, we'd like you now to address the following four questions:

First, do any of the parties or participants dispute that the Panel has the authority to order the disclosure of the application forms of dual status victims in light of the wording of the last sentence of Rule 113(1)?

Second, if the Panel has that authority, who should review and redact the forms prior to disclosure - the Panel or Victims' Counsel?

Third, should the review focus on identifying those parts of the forms that are material to the presentation of the Defence case, or those parts which contain exculpatory information, or both; alternatively, should the review focus only on identifying for redaction contact details and other information the disclosure of which might affect the security of any person?

Fourth, should the SPO have an opportunity to make further submissions on each form prior to its disclosure to the Defence?

Now, we'll start with the Victims' Counsel this time.

Mr. Laws.

MR. LAWS: I take the questions in turn. I don't dispute that the Court has the power to do as it wishes to do, because this Court has a power to make orders that will facilitate the expeditious and fair conduct of the proceedings.

I've already said what I say about Rule 113. But if we're going to consign that rule to the sidelines and focus on a mechanism, then the Court has the power to do that.

As I said a few moments ago, my understanding is that the SPO were going to outline to you their possible proposal in a little

detail about how this might work, and we will lend that our support. So we're entirely in Your Honours' hands. I can answer your questions, or you can hear, perhaps, what may be a pragmatic solution and see if it appeals.

May I just address one topic which is whether Victims' Counsel should review this material. May I just make our position very, very clear about that. Not only should we not be involved in that, but we really don't have the tools to do it. This is a review taken against the background of witnesses who are going to be testifying here but have made numerous statements in the past. It's not part of our job. And I don't say that because we're trying to shirk some burden or responsibility. Far from it. We're just not in a position to be holding the ring as between the Court and the parties.

For us to embark upon a process of reviewing this material for disclosure is to put us in the position of either a judge, who has to take decisions of that kind as part of their function, or a prosecutor, who is used to taking those decisions as part of the Rule 103 material. We are not in a position to do that. So whatever else emerges from today, we're going to invite you not to pursue that as a solution.

What we do ask, and it's the only thing we ask, is that whatever material is going to be disclosed, we ultimately have sight of it before that disclosure takes place because there may arise sensitivities for other victims in the application forms of a family member or the like, and we would want to see the material before it's

disclosed.

Can I just proffer this one thought before you hear from the Prosecution. It's really section 2 of the form that would be important here. It's really difficult to see how any of the other parts, the contact details, et cetera, could ever come into a disclosure obligation. Section 2 is the part of the form in which an applicant has to explain how they come to qualify as a victim participating in the proceedings and to address the question of harm.

And if those sections are the focus, then we'd suggest that we're not going to go too far wrong. As to how the disclosure happens, whether it's a summary or -- we can finesse that. But really there's only one part of the form that matters here.

JUDGE GAYNOR: Thank you, Mr. Laws.

The SPO.

MS. MAYER: Yes, Your Honour. As I said at the outset, we think the terms of Rule 113 in its language is explicit and clear. And we do have an overarching concern about a departure from the plain language of a rule that was adopted presumably with thoughtful inclusion, balancing the equities of the accused's fair trial right and the ability to have victims participate in a meaningful way.

And as the Panel knows, Rule 113 is in Chapter 8, which is focused on the participation of the victims in the proceedings. There's only two rules in that chapter. It's separate and apart from other areas of the rules that are focused on different equity.

So with that said, we do understand that the Panel is interested

in getting to a solution, and we do, as my colleague outlined, have a proposal if the Court believes that it is empowered to override the rule, the plain language of the rule.

We do think it important that the Court focus on the difference of this type of material. As the language of the rule makes clear, it is something that is not going to the parties. So neither the SPO nor the Defence is in possession of this material. The only entity that is in possession of this material are the Victims' Counsel and the Panel.

And, therefore, our proposal would be that the Panel, if it is concerned - and, again, I take the language of the order of January 30th, the decision denying leave to appeal, F01237 - where it seems the focus and concern is the possibility, not the actuality. So the fact that there could arise a situation where there could be relevant information. And given that that is an unknown, again, to the parties, we're not in possession of this, the Panel is in possession of this, that the Panel would craft a very narrowly tailor disclosure of only the material that it is concerned would implicate the accused's fair trial right.

I think our concern with doing anything other than that and discussing this material in the same framework that we discuss, standard disclosure would be the -- would be an improper framework, because the material is different. It's not material in the possession of the SPO, as the Court repeatedly notes in that decision. And the disclosure rules in the disclosure chapter are all

focused, starting with Rule 102, of material that's in the possession of the SPO. And we think it inadvisable to put this material into that frame. And so we would say the Panel could order the disclosure of the relevant section, as my colleague has noted, section 2. Again, we take him at his word. We're not in possession of this information. And that if there's a concern about redaction of personal information, that Victims' Counsel would be in the best position to recommend that to the Registry before the Registry disclose that information to both parties simultaneously so that the equality of arms is maintained.

JUDGE GAYNOR: Thank you.

Mr. Kehoe.

MR. KEHOE: Yes, Your Honour. I think that the Court's decision in paragraph 28 was quite clear. And it did implicate Rule 103, that a situation could arise where the Defence is denied access to information that could be relevant to its case and which could impact the credibility, reliability, and weight offered by the SPO. Clearly, implications of 103. Thus, if unaddressed, could negatively affect the rights of the accused.

At this juncture, Your Honour, I understand that there are issues concerning the victims. Mr. Laws acknowledged that the Court has the power to fashion a remedy in this regard. We look to the Court to fashion that remedy through turning those items over to the Court for an *in camera* review before it's turned over to the parties, or appointing yet a third -- actually, a fourth Judge, if you will,

to examine those matters *in camera*. All we would ask, Your Honour, is, given the Court has that authority, that Victims' Counsel agrees with, that there is an examination of these items to see if they fall within a disclosure issue, such as implicating Rule 103, such that it is necessary to turn it over to the Defence.

We are just looking to craft that mechanism to have that review done on these dual witnesses.

JUDGE GAYNOR: Thank you.

Mr. Emmerson.

MR. EMMERSON: [Microphone not activated]

JUDGE GAYNOR: Thank you, Mr. Emmerson.

MR. ROBERTS: Nothing from me, Your Honour.

MR. ELLIS: Nothing to add. Thank you, Your Honour.

JUDGE GAYNOR: Thank you very much.

I thank the parties and participants for their submissions. The Panel will issue a written decision on this particular matter. Thank you.

PRESIDING JUDGE SMITH: I recall that in a decision issued by this Panel on February 10th, last Friday, in filing F01277, we indicated we would allow the Victims' Counsel to make oral submissions during today's conference on a matter raised by the Thaci Defence in filing F01267.

I'm just trying to allow enough time for Mr. Laws to have an opportunity to respond, if you wish to respond at this time. So you have the floor if you'd like to respond.

MR. LAWS: Thank you, yes.

The background, as you suggested, is that we filed in compliance with the direction that we give notification of the witnesses that we wish to cross-examine. The response by the Thaci Defence was, with respect, but as the Panel has found, nothing to do with that filing but seeking to impose a further restriction on our participation in these proceedings. And that comes against the background of litigation on the Order on the Conduct of Proceedings, as it already finished and had resulted in, on the last occasion we were here, the Defence were drawing a quite different suggestion about how our participation should be limited, but this time it came in the course of a filing round in which we had no right to reply as a result of the Panel's direction. And it was that that really triggered our request for leave because we had what we regarded as being the unenviable choices of simply saying nothing and perhaps the Panel being persuaded by what had been said by the Thaci Defence or requesting leave. And we chose to request leave, and the request for leave was based on the premise that we would, if granted leave, move to strike the Thaci filing. And the basis for that can't be put any better than the Panel's own assessment of their filing, which is this:

"The Panel notes that the Thaci Defence submissions do not respond to the request but rather raise a new issue."

And on that basis, we suggest it's non-responsive to our filing and that it should be struck from the record. If there is to be a

discussion of the substantive issue about the ambit of Victims' Counsel cross-examination, then we're more than happy to have it, but we suggest it should be done in an orderly fashion. We'd much rather make submissions in writing, because we've got quite a bit of jurisprudence to refer to, and that's where we are.

So two aspects from me. First of all, yes, thank you for the opportunity. It is our suggestion that this filing should be struck from the record. And, secondly, we'll engage in the debate if the Court wishes to reopen the Order on the Conduct of the Proceedings, but we'd ask that that is done in a way that gives us the fullest opportunity to put the position of our clients before the Court.

PRESIDING JUDGE SMITH: Thank you, Mr. Laws.

Do you want to respond?

MR. MISETIC: Yes, briefly, Mr. President.

Just to note that we respectfully disagree with Victims' Counsel in -- first in the written pleading categorising our filing as a request for reconsideration of the Order on the Conduct of Proceedings. And now, again, there was another reference that we're seeking to reopen the Order on the Conduct of Proceedings.

Our reading of the order is in good faith and, frankly, doesn't address the question of the mode by which questioning will be allowed. It's silent on that point. It gives Victims' Counsel the opportunity to request leave to cross-examine, but doesn't suggest that leading questions are -- that the Panel has pre-judged the question. We would note that Rule 143(4) gives the Trial Panel the

general power to control the mode of questioning of witnesses, and we don't believe you did anything in the Order on the Conduct of Proceedings prior to trial that pre-judged the question of how you were going to allow the parties to question witnesses, including when they will be allowed to lead and when they will not be allowed to lead.

So our filing was simply intended to preserve our position, lest we be accused later of having remained silent on the point. We think the issue hasn't actually been addressed by the Trial Panel. We're happy to litigate it further if that that's necessary. But we've cited the authorities for the proposition and haven't heard any substantive reason why Victims' Counsel would be allowed to lead SPO witnesses before the Defence cross-examination has started, and we think it would be prejudicial to the Defence.

But happy to make additional submissions if the Court wishes to hear them.

MR. LAWS: May I reply? Just very briefly.

The reason that my friends, obviously, have not heard any substantive reply is that we were faithful to the Court's direction not to make one. So that's the reason that we haven't replied to the substance of what they say. But if we are going to litigate it, they will see there is a full response to it, because the jurisprudence of the ICC is not all one way, as has been suggested by Mr. Misetic just now. So that's the first thing that I wanted to say.

We're very happy to have this debate, if that's what the Court

would want, but just really to say that the Order on the Conduct of Proceedings didn't specify anything about the way in which questioning should take place. We need to look at it, but it uses the word "cross-examination." Everybody knows what cross-examination means. It means being able to ask leading questions.

So I'm afraid we rather disagree with the idea that the Panel had left it open. It wasn't cross-examination but we'll finesse whether that means leading questions or not. On the face of it, the order grants to us the right that we should have to use cross-examination at least where it's appropriate. If the Panel thinks it right to restrain us in some settings, we're more than happy to accept it. But we can't proceed on the basis that somehow the order left this up in the air.

So that's the only other thing that we wanted to say.

PRESIDING JUDGE SMITH: Thank you. Hold on just a moment.

[Trial Panel confers]

PRESIDING JUDGE SMITH: In an attempt to be fair to all parties, Mr. Laws and Mr. Kehoe, we will accept written pleadings on this matter by -- give me some guidance.

Mr. Laws, how long would it take you to respond?

MR. LAWS: Seven days, please, Your Honour.

PRESIDING JUDGE SMITH: Seven days.

And then five to respond to that?

MR. MISETIC: Yes, that's fine.

PRESIDING JUDGE SMITH: Okay. We'll do that. We'll hold in

abeyance any other decision on these pleadings at this point, and we'll make a determination as soon as possible. Definitely before trial starts.

One more issue before we leave. We have to go and we will have some oral orders that we'll present in a few minutes. We believe it might be helpful to the effort to start the evidentiary part of this trial on April 3rd if we held a shortened Status Conference on or about March 20th, two weeks prior to the start of the evidence. This would be the last opportunity to tie up some loose ends, if there are any, and for you to bring to our attention any important issue that is unresolved.

In addition, we would be able to update on you all matters that we feel you should know prior to the start and comment on if needed.

We are aware that travel times for some of you are challenging, so we would have no objection to any of you, as necessary, appearing via Zoom. And in order to accommodate the time differential, we can start the conference at 1.00 in the afternoon and finish by 4.00 at the latest.

I just seek your comments on that. If you think that's something worthwhile or not.

Mr. Prosecutor.

MR. HALLING: We're happy to do that and we're available on the date.

PRESIDING JUDGE SMITH: Okay.

Mr. Kehoe.

MR. KEHOE: Yes, Your Honour, I think it's very worthwhile and we're happy to appear as well.

PRESIDING JUDGE SMITH: Okay.

Mr. Emmerson.

MR. EMMERSON: Likewise.

PRESIDING JUDGE SMITH: All right.

MR. ROBERTS: The same, Your Honour.

PRESIDING JUDGE SMITH: Mr. Ellis.

MR. ELLIS: Your Honour, yes, we think it's a good idea.

I was -- it may be that the time difference factor makes a later start more problematic than earlier start.

PRESIDING JUDGE SMITH: Oh, does it?

MR. ELLIS: But I'll be corrected on that, I think, if I'm wrong.

PRESIDING JUDGE SMITH: Well, what would be the best time for you?

Ms. Alagendra?

MS. ALAGENDRA: [via videolink] I'm happy to do it at any time convenient to the Court.

PRESIDING JUDGE SMITH: Do you know, Mr. Ellis? I'm not hearing her.

MR. ELLIS: Your Honour, Ms. Alagendra said she's happy to do it any time.

PRESIDING JUDGE SMITH: I should put my buds in my ears so I can hear.

Say it again, Ms. Alagendra.

MS. ALAGENDRA: [via videolink] I'm happy to do it at any time convenient to the Court, Your Honours.

PRESIDING JUDGE SMITH: Okay.

Anything to add to that, Mr. Ellis, at all?

We'll stick with the plan then as we had it, for 1.00.

We will take a short recess, perhaps -- maybe a half-hour. We'll be back at that point. Thank you for your attendance.

--- Recess taken at 3.11 p.m.

--- On resuming at 3.42 p.m.

PRESIDING JUDGE SMITH: Judge Mettraux has a short matter to take up.

JUDGE METTRAUX: Thank you, Judge Smith.

Mr. Roberts, this one is for you, and it has to do with your application F01281 of 13 February 2023, regarding the question of initial appearance and a new charge, you say.

And I only have a very simple question, I hope, for you. It's whether after today's development you are maintaining or withdrawing the application. Simply that.

MR. ROBERTS: I'm maintaining the application for a deadline for preliminary motions because our view is that we have the right to make submissions, preliminary motions on the recently unredacted parts of the indictment. So we will do so in relation to paragraphs 41, 42, 49, and other ones later on which have also been recently unredacted.

In relation to the initial appearance, we'll leave it in Your Honours' hands. We consider that it does form new charges, so we do maintain it in that regard.

And the notice of alibi. We have one ready to go, but it is dependent on the information we receive in the pre-trial brief. I realise that's slightly longer, but at the present situation we still maintain that request. Yes, Your Honour.

JUDGE METTRAUX: Thank you.

Then I have a question in relation for the SPO. In paragraph 41, and you will get the time to respond in writing to the Selimi application, but we'd be assisted by a clarification or an explanation, if you are prepared to give it today, about paragraph 41 of the indictment, which is recently unredacted. And the question is to ensure that we properly understand what is being alleged in that paragraph. And in particular, whether you are alleging that the conduct of Mr. Selimi in that particular paragraph constitutes or would constitute the basis for a conviction in and of itself within the framework of what might constitute a new charge.

And as I said, we don't expect of you today to fully argue this matter, and you will have time to do it in writing, but we would be assisted if you can give us a sense, a general sense at least, of what is being alleged in that particular paragraph.

MR. HALLING: Yes, Your Honour. None of our charges change as a result of the information in that paragraph. There is no new mode of liability. There is no new charge in the statement of crimes. It is

the same case before that paragraph was lifted and after. And so as we will say in our written submission, these aren't new charges and that all of these new provisions about new initial appearances do not apply.

JUDGE METTRAUX: I'll take you further on that point.

Assuming what you said to be correct, what I understand the Defence to be saying is: Until that point, until the unredaction, we were not in a position to plead in an informed manner simply because we did not know what was under the redactions. And the question that I'm asking you about is that one paragraph, assuming it were a new charge, assuming that this was a result not from an unredaction but from an application to amend the indictment, for example, is it to be understood as the basis on which you would submit a conviction could be entered, that one incident?

Are you saying that Mr. Selimi, if you accept what you describe in this paragraph, could be found responsible of any one crime because of the conduct in that paragraph?

MR. HALLING: I think I'm following Your Honour. I'll give an answer, and please tell me if it's not sufficiently clear.

We understand this to be one of the material facts that is needed in order to prove the detention site in the indictment to which that paragraph relates, but the conviction we would ask to be entered would be first under joint criminal enterprise in relation to the site. So it is not a conviction in relation to that incident in and of itself, but that incident is an indication of the existing

charge that we intend to prove.

JUDGE METTRAUX: Thank you.

Mr. Roberts.

MR. ROBERTS: I'm not sure I'm much the wiser of what the Prosecution case on that point is and whether they consider it a new charge or not.

From my perspective, in order to provide as focused submissions for the Chamber as possible on the form of that charge, and also any potential jurisdictional challenge in relation to the new paragraphs as well, I would prefer the Prosecution to set out that position clearly, if possible, before we file on that.

So we had in the application that you referred to earlier suggested we would file on Monday, namely, 21 days from the unredaction of the indictment on 27 January, but we would appreciate a small extension to respond or to take into account what the Prosecution would be submitting on that.

If they're not intending further submissions, then we'll rely on what Mr. Halling has said. But given the slight complexity in relation to this issue, we would appreciate perhaps until next Friday to file those preliminary motions if that's acceptable for the Panel.

[Trial Panel confers]

JUDGE METTRAUX: Mr. Halling, any idea of how quickly or not you could file your submissions in writing in relation to that particular application?

MR. HALLING: If I could just have a moment to confer.

[Specialist Prosecutors confer]

MR. HALLING: By next Monday, Your Honour.

JUDGE METTRAUX: Would that work for you, Mr. Roberts?

MR. ROBERTS: If they file on Monday, we will file our preliminary motions by next Friday, if that's acceptable for the Panel? Thank you.

PRESIDING JUDGE SMITH: Thank you, Mr. Roberts.

We will now turn to the Panel's oral orders.

First oral order, opening of the case and postponement requests.

Pursuant to Rules 9, 5(a), and 118(3) of the Rules, the Panel finds that in light of the parties submissions there is good cause for the variation of the time limit prescribed by Rule 118(3) of the Rules given the amount of material that was recently disclosed to the Defence.

The Panel hereby determines that the opening of the case shall take place on 3 April 2023 at 9.00 a.m., with opening statements to be held on 3, 4, and 5 April 2023.

The starting time on those days also will be 9.00 a.m. and throughout the trial unless we make a specific change.

The hearing of the evidence will begin on 11 April 2023. The Panel notes that the Defence has withdrawn any remaining requests contained in filings F01258 and F01271, and therefore finds that these request are moot.

The Panel reminds the parties and participants that confidential information that has been disclosed to date shall remain

confidential.

Second oral order, agreement between the parties on matter of fact and law.

Pursuant to Rule 118(4) of the Rules, I, in my capacity as Presiding Judge of this Panel, hereby take note of the current state of agreement between the parties on matters of fact and law as discussed in today's hearing.

Third oral order, SPO further amended Rule 102(3) notice.

Pursuant to Rule 102(3) of the Rules, the Panel hereby orders the SPO to file its further amended Rule 102(3) notice by Friday, 17 February 2023 at 4.00 p.m.

The fourth oral order, target date for the closing of the SPO's case.

Pursuant to Rules 118(5) and 129 of the Rules, the Panel sets the target date for the closing of the Specialist Prosecutor's case to be April 1, 2025.

Fifth oral order.

Pursuant to Article 40 of the Law, the SPO is ordered to consider, in addition to using charts and/or visual aids during opening statements, to also use such visual aids and/or charts in relation to the witnesses to be called. It lies in the SPO's discretion to check which witnesses such visual aids and/or charts are necessary. They are to use the aids and charts in relation to witnesses to be called to give evidence about KLA chain of command.

The sixth oral order.

Victims' Counsel is hereby ordered to file by 22 February 2023 at 4.00 p.m. submissions on the issue of what type of questioning is entailed by cross-examination pursuant to paragraph 76(ii)(a) of the Order on the Conduct of the Proceedings. Any responses shall by filed by 27 February 2023. No replies will be entertained.

The seventh oral order, scheduling of Status Conference.

Pursuant to Rule 116(5) of the Rules, the Panel hereby schedules a Status Conference on 20 March 2023 at 9.00 a.m.

That concludes the oral orders for today.

Anything further?

MR. HALLING: Nothing further, Your Honour.

PRESIDING JUDGE SMITH: Anything from the Defence?

MR. KEHOE: Your Honour, earlier you said that the 20th was going to be at 1.00? And it's going to be at 9.00 now?

PRESIDING JUDGE SMITH: Say that again?

MR. KEHOE: I believe before we broke you said that the session on 20th March was going to be at 1.00 and --

PRESIDING JUDGE SMITH: I know. We changed that to 9.00 a.m.

MR. KEHOE: Okay. Thank you, Judge.

PRESIDING JUDGE SMITH: Mr. Emmerson.

MR. EMMERSON: Without raising any substantive submissions, may I just put two matters on the record for the next Status Conference?

PRESIDING JUDGE SMITH: Yes, of course.

MR. EMMERSON: The first is the date for the Prosecution to notify the sequential next group of witnesses once the first 12

witnesses have been called and dealt with so that we can be stacking up the preparation in advance.

And, secondly, I've raised a number of times before the Pre-Trial Judge, but the issue never came to be resolved, the number of the witnesses who are being called by the SPO particularly in relation to KLA chain of command type issues, their interviews with the SPO were conducted as suspects. And I simply mention this at this stage because if they're called to give evidence with their suspect interviews tendered as material in the case, then since they remain suspects, because the Prosecution hasn't indicated that they are no longer suspects, Your Honours will need to consider, or we would invite you to consider, what the consequences of that are for the position of the witness. Not because we represent the witness's interests, but, obviously, the witness has a right not to say anything that may incriminate themselves and, in some cases, may want to avail themselves of the right to be legally represented.

That matters for us because a witness going into the witness box who may incriminate themselves or may be led into incriminating themselves is labouring under a potential motive that can affect their candour and frankness. And so that is something, I'm not asking to argue it now, but I've raised it before. Nothing has finally been decided in relation to it. But if there is going to be a series of witnesses coming who remain on the Prosecution's suspect list, have been told they are potentially liable to prosecution and that has never been lifted in their minds before they testify,

clearly those requirements are necessary.

PRESIDING JUDGE SMITH: We understand your point and we will take it under consideration, and we'll discuss it in the intervening time period.

Anybody else? Comment?

MR. ROBERTS: No, Your Honour. Thank you.

PRESIDING JUDGE SMITH: Thank you.

Mr. Ellis?

MR. ELLIS: No, Your Honour. Thank you.

PRESIDING JUDGE SMITH: All right. Thank you, all, for being here -- oh, I'm sorry, Mr. Laws.

MR. LAWS: I was just going to ask, if I may, Your Honour, the resolution of the disclosure of the dual status witnesses and their application forms, as to that, is there going to be a written decision --

PRESIDING JUDGE SMITH: A written order.

MR. LAWS: Thank you very much.

PRESIDING JUDGE SMITH: Yes. We'll file that so you know what it is in detail.

So thank you very much. Thank you to the translators and court personnel and security and to all of you for your candour today, and we'll see you on the 20th.

--- Whereupon the Specialist Prosecutor's Preparation Conference adjourned at 3.57 p.m.