

1 Monday, 20 March 2023  
2 [Status Conference]  
3 [Open session]  
4 [The accused appeared via videolink]  
5 --- Upon commencing at 9.00 a.m.

6 PRESIDING JUDGE SMITH: Court Officer, please call the case.

7 THE COURT OFFICER: Good morning, Your Honours. This is case  
8 file KSC-BC-2020-06, The Specialist Prosecutor versus Hashim Thaci,  
9 Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi.

10 PRESIDING JUDGE SMITH: I note for the record that the four  
11 accused are attending via video today.

12 As for today's session, we will take a break around 11.00 a.m.  
13 We will resume at 11.30 and continue until 1.00. If necessary, we  
14 will break for lunch. We will then resume at 2.30 and continue until  
15 4.00, if necessary. We hope it will not be necessary to go beyond  
16 1.00 p.m., and, therefore, we ask all parties and participants to  
17 ensure that all submissions are as short and focused as possible.

18 As you all know, on February 15 of this year, the Panel  
19 scheduled this Status Conference. A written agenda was circulated on  
20 15 March 2023. As indicated in the agenda, the Panel will seek  
21 answers from the SPO and the Defence on time estimates for the first  
22 12 witnesses and the corresponding impact upon the time required for  
23 SPO's case, and I will turn to that matter now.

24 I recall that during our first conference in December and during  
25 the SPO Preparation Conference in February, we have been asking the

1 SPO to take a hard look at reducing the size of its case, and the  
2 Panel notes that the SPO has taken some steps to reduce its case;  
3 notably, the SPO has reduced the number of witnesses and hours  
4 required. The charges remain the same.

5 The Panel is also mindful that the Defence estimates are a  
6 factor which adds to the estimated time required for this case.

7 Nevertheless, the present timetable for this case, if  
8 unchallenged by the Panel, is that the evidence of the first 12  
9 witnesses is estimated to take 234 hours, which is the equivalent of  
10 more than 45 days of courtroom time. This means that the  
11 presentation of the SPO's case may take much longer than the SPO has  
12 anticipated.

13 If we apply these time estimates to the case before us, the  
14 Panel would finish the first seven witnesses by the summer recess.  
15 The Panel would, thereafter, have to continue with the first 12  
16 witnesses which would not be finished until September or October  
17 2023. If the same time estimates are used to calculate when the next  
18 batch of 12 witnesses would finish, they will finish on or about  
19 January 2024. And then there are still three months - January,  
20 February, and March - to round out the year, and I've added some  
21 witnesses to accommodate that estimate.

22 The Panel considers that if it adopts a generous approach, we  
23 would manage to hear about 45 or 46 witnesses in a year. Based on  
24 the information currently before us, and with 312 witnesses, which is  
25 the last reported number of witnesses by the SPO, the SPO's case,

1 including cross-examination, would take at least 6.5 years to  
2 complete.

3 The Panel considers that 6.5 years for the presentation of the  
4 SPO's case is excessive. We have indicated our position before, that  
5 the SPO take steps to reduce the size of its case, and the Panel also  
6 considers that steps have to be taken by the Defence to reduce its  
7 time estimates for the cross-examination of witnesses.

8 I'm going to ask for submissions from the parties, from each of  
9 you, and from Victims' Counsel, who has been quite minimal in his  
10 estimate of time, I appreciate that, as to what steps can be taken to  
11 reduce the time estimates required for the first 12 witnesses. And I  
12 do actually expect to have some ideas here. This is not a time for  
13 vague answers or putting it off. We're getting close to the  
14 beginning of trial.

15 Mr. Prosecutor.

16 MR. HALLING: Thank you, Your Honour. Just a preliminary point  
17 for the record before starting. We're in a smaller composition today  
18 than before, and our appearances would be Ward Ferdinandusse,  
19 Sebastian van Hooydonk, and myself, Matt Halling.

20 PRESIDING JUDGE SMITH: Thank you.

21 MR. HALLING: If you'd like, I can speak to the first point in  
22 the agenda, although what Your Honour has just said covers the first  
23 two points in the agenda.

24 For the first 12 witnesses, we do intend to revisit those  
25 estimates. We're going to revisit them in response to all

1 information we receive and any developments in the proceedings, and  
2 that includes Your Honours' specific directions for witnesses in the  
3 Rule 154 decision of last week; and this is F01380.

4 As we are preparing witnesses for court, we're going to be  
5 continuously trying to focus down these hours and to reduce the time.  
6 We also have a very strong interest in being efficient and in being  
7 expeditious. No one wants a six-and-a-half-year-long SPO case, and  
8 we know that we have to be efficient and expeditious in order to  
9 present the case we know we need to make.

10 As to measures, and this is going into the second part of the  
11 agenda, Your Honour, I can address this now --

12 PRESIDING JUDGE SMITH: Go ahead.

13 MR. HALLING: -- if you would like to.

14 There are, indeed, a great many measures that the SPO can take  
15 to reduce the duration of the trial. Many have been discussed  
16 before. Many are in the rules. Rule 118(1), as mentioned in the  
17 Trial Preparation Conference and the SPO Preparation Conference, by  
18 this Panel.

19 All options are on the table for us, even those in Rule 118 -  
20 removing repetitive witnesses, narrowing charges in the indictment,  
21 reducing the number of crime sites, or calling a representative  
22 sample, shortening the length of direct examinations - all are  
23 continuing to be considered. But what we would say is that the  
24 appropriateness of these measures does depend on the stage of the  
25 trial, which is why we are assessing this on an ongoing basis.

1           At the moment what we are focusing on, and as Your Honours have  
2           seen, is reducing our direct examination estimates and making  
3           targeted cuts to our list of *viva voce* witnesses. As just  
4           acknowledged, we have cut, I think, over 150 hours of direct  
5           examination estimates last month and 11 witnesses from our list.

6           One important factor within our control that we wanted to  
7           emphasise: Early witnesses are going to provide critical information  
8           as to whether further witnesses can be introduced in writing or  
9           dropped entirely. We have voluminous evidence on KLA communiqués,  
10          just as an example. We've got the communiqués themselves. We have  
11          statements in the media about them. We have documents from the  
12          accused's house. We have statements from the accused about them. We  
13          have witnesses of inside and outside the KLA speaking about them.

14          As we understand it, a little to our surprise, the authenticity  
15          of the KLA communiqués seems to be being challenged by the Defence,  
16          so we're going to need to prove that, but we don't necessarily need  
17          to present all of our evidence in order to prove that. And as we  
18          present early evidence and witnesses testify, we're going to make  
19          adjustments once we consider the matter to be established.

20          So with all this in mind, the global hours estimate that  
21          Your Honour is using with the extrapolations of the numbers - and  
22          this is in F01291 - that still remains the best estimate that we can  
23          give. But unnecessary or duplicative witnesses are going to be  
24          addressed by us as the trial goes along.

25          There are a few other matters that can also reduce trial

1 duration that are outside of our personal control. Good faith  
2 efforts by the parties to reach agreements to reduce the scope of the  
3 issues in dispute is a prime example. Your Honour also mentioned  
4 Defence cross-examination estimates. And on this one, we would  
5 appreciate actually some further clarity in today's hearing from the  
6 Defence on these estimates.

7 As Your Honours recall, each of the individual Defence teams  
8 communicated their estimates at different times. And when combined  
9 with the size of the global estimates, it does call into question  
10 whether the Defence was actually coordinating when developing these  
11 cross-examination estimates. Even with allowances for the fact that  
12 Rule 154 witnesses are going to have a relatively longer  
13 cross-examination than direct, these global examination estimates are  
14 extraordinarily long, and we find it hard to imagine that they would  
15 be warranted.

16 Scheduling flexibility is another point, and I understand we're  
17 going to be speaking about this perhaps later today. The Court's  
18 schedule is clear, but there are going to be opportunities where  
19 sitting extended hours one day or maybe part of a Friday is going to  
20 be the difference between hearing an extra witness and not. And  
21 we'll at least say for our part, we're going to be proactive in  
22 identifying those opportunities to inform the Trial Panel's  
23 scheduling decisions.

24 At the last hearing, Your Honours set a target date for us to  
25 close our case in April 2025. That's reasonable and that's

1 attainable, but it's going to require all parties, Defence included,  
2 to be reasonable and efficient in how it conducts these proceedings.  
3 And we're going to say for our part right now, we're going to keep  
4 our case constantly under review. Thank you.

5 PRESIDING JUDGE SMITH: All right.

6 Mr. Thaci's Defence. Mr. Kehoe, you have the floor.

7 MR. KEHOE: Good morning, Your Honour.

8 PRESIDING JUDGE SMITH: Good morning.

9 MR. KEHOE: Your Honour, we have --

10 PRESIDING JUDGE SMITH: You only have to cut your estimate in  
11 half.

12 MR. KEHOE: I take -- as a matter of fact, if you look at  
13 Witness 3, someone for whom the SPO has given us hundreds and  
14 hundreds and hundreds of pages, they've decided to go live with him,  
15 and he's ten hours. So I'm not quite sure what's going to come up  
16 new in those ten hours, but certainly exploring cross-examination is  
17 going to be lengthy because I don't know what they're going to do.  
18 And that also applies to their number 7, where they now have 12 hours  
19 for a *viva voce*, not 154. And last but not least on the first 12  
20 list, we have number 10 who has nine hours.

21 By the way, both number 7 and number 10, likewise, have hundreds  
22 of pages. I haven't counted them all, Judge. I tried to peruse the  
23 thought when I looked through the binders of information for each  
24 these. And we don't have any idea what they're going to say. Are  
25 they going to say something independent of what they've given in

1 sworn statements to the SPO? Are we going to start this anew? Is  
2 there going to be new information coming from these people?

3 PRESIDING JUDGE SMITH: Have you asked that question?

4 MR. KEHOE: Of these folks? Actually, I'm trying to get through  
5 this stuff first, but I am -- we are going to ask that question. And  
6 I will ask that question now.

7 PRESIDING JUDGE SMITH: Well, no, you don't have to ask it now,  
8 but the trial's going to start pretty soon so I would suggest you get  
9 to it.

10 MR. KEHOE: Well, Judge, it's -- part of the daunting task here,  
11 and I hate to sound glib here, is just getting through the 40.000  
12 pages plus unredacted information that the SPO has -- did I do  
13 something wrong? I'm going to be wrong microphone. Apologies,  
14 Judge. I'll never be a singer in Las Vegas.

15 Going through the information that has been handed across the  
16 transit.

17 Now, I will say this, Judge, we have been consulting, and we  
18 certainly started on the beginning witnesses, we have consulted with  
19 co-counsel on areas that we don't want to repeat, who is going to  
20 cover a certain area. I was talking to my colleagues on the Selimi  
21 team this past week about issues that are uniquely involving  
22 Mr. Selimi that we of course are not going to cross-examine on, and  
23 likewise Mr. Strong with regard to Veseli.

24 So are we coordinating and talking about what we're respectively  
25 going to cover? Yes. But this is their particular array of



1 witnesses. And suffice it to say -- and suffice it to say, even if  
2 we look at Witness 6 that I have 3.5 hours, there are hundreds and  
3 hundreds of pages of exhibits, hundreds, that they want to get in  
4 through this witness, that they, I assume, are just going to put  
5 across the transom and say, "Did you have any involvement in the  
6 preparation of this treatise," and they say, "Yes," and they want to  
7 introduce it into evidence, without exploring the content of all of  
8 that document -- the documents, I should say. So that is -- the  
9 3.5 hours there is misleading given the amount of information that  
10 the SPO wants to put in.

11 Now, these are their witnesses. They put these people forth.  
12 They're telling us what exhibits they want to put in front of them.  
13 There is no way in 3.5 hours are they going to be explore all of that  
14 information.

15 PRESIDING JUDGE SMITH: My question was about ideas you might  
16 have for shortening the thing. Not shortening their case but  
17 shortening your case.

18 MR. KEHOE: And the idea, Judge, is what Defence counsel do here  
19 and should do, which is we talk among ourselves as we go through this  
20 and we don't repeat things.

21 PRESIDING JUDGE SMITH: So, for example, on the first witness  
22 there is 16, 18 hours worth of examination, 15 of which is yours --  
23 not just yours, I mean the Defence.

24 MR. KEHOE: Yes.

25 PRESIDING JUDGE SMITH: Are you saying that that's still

1 accurate today, or is this a number that came up and you hadn't  
2 consulted yet?

3 MR. KEHOE: That number we came up with. On that, we had not  
4 consulted yet.

5 PRESIDING JUDGE SMITH: Okay. Is it safe to say, at least as  
6 far as you're concerned, that this is a larger number than necessary  
7 on number 1?

8 MR. KEHOE: Yes.

9 PRESIDING JUDGE SMITH: Okay. Can you tell me on yours, do you  
10 still believe seven hours is accurate?

11 MR. KEHOE: Can I just consult with my --

12 PRESIDING JUDGE SMITH: And I'm in the going to go through each  
13 one of these with you --

14 MR. KEHOE: No, no, I understand.

15 PRESIDING JUDGE SMITH: -- but I'm just asking as an example.

16 MR. KEHOE: But Mr. Misetic is much smarter than I am and he is  
17 going to cross-examine this witness.

18 [Specialist Counsel confer]

19 MR. KEHOE: Mr. Misetic advised that we're going to be try to be  
20 conservative and go less than that, but a lot of it depends - this is  
21 a very significant witness - on how this witness responds.

22 PRESIDING JUDGE SMITH: Okay. That's all. I'm not trying to  
23 nail you down to one number, but it is important that we acknowledge  
24 that these figures were adopted before there'd been significant  
25 consultation between the Defence.

1 MR. KEHOE: Yes, number one, Judge, but also before we had had  
2 the opportunity to wend our way through the thousands of pages that  
3 were disclosed.

4 PRESIDING JUDGE SMITH: Sure. Okay.

5 MR. KEHOE: Which, you know, I'm sure you know, Judge, you look  
6 through documents and you just dispense with them. They're of no  
7 consequence and -- but that's not the case with much of this. We  
8 needed to and continue to spend a significant amount of time and a  
9 lot of the information has been --

10 PRESIDING JUDGE SMITH: How do you feel about the April 2025  
11 target date?

12 MR. KEHOE: Judge, I hope and pray that we finish before that.

13 PRESIDING JUDGE SMITH: No, I don't want your prayer. I want to  
14 know if you think this is entirely possible.

15 MR. KEHOE: Yes, I think it's possible, Judge, because I think  
16 that that as opposed to throwing everything into there -- if you look  
17 at, for instance, the bar table motion, we have hundreds and -- you  
18 know, thousands and thousands of pages on information that is tied to  
19 nothing that we're trying to wend our way through. Do we need to  
20 clutter up the record with all of that stuff? Do we need to go  
21 through all of that stuff as opposed to putting it through a witness?  
22 That is what's going to take the time.

23 PRESIDING JUDGE SMITH: Well, I think you've been a prosecutor  
24 before in your past and I think you know that it's nice for the  
25 Prosecution to have the ability to try their own case. And if they

1 think it's important, we start out with the assumption that it  
2 probably is important. Now, we can lose track of that quickly, but  
3 that's the way we start.

4 MR. KEHOE: And, Judge, as a prosecutor for many decades in my  
5 prior iteration of my career, I will tell you, Judge, that less is  
6 better.

7 PRESIDING JUDGE SMITH: Yes.

8 MR. KEHOE: I mean, I don't think there's any question --

9 PRESIDING JUDGE SMITH: And on cross-examination as well.

10 MR. KEHOE: No question. Absolutely, Judge. Repetition on  
11 cross-examination does not benefit anyone.

12 PRESIDING JUDGE SMITH: You know, I appreciate the candour, and  
13 I don't want to make this hearing longer than it ought to be, so  
14 let's let Mr. Veseli -- if you have something else to say, say it.

15 MR. KEHOE: Yes, just one thing. With regard to new evidence  
16 that they intend to bring in with all of these people that are coming  
17 in that are *viva voce* that are not tied to 154, we, of course, object  
18 to any new evidence coming in that hasn't been disclosed to us. But  
19 I think that the Court understands that.

20 PRESIDING JUDGE SMITH: Understood. Thank you.

21 All right, Mr. Veseli. I understand that your numbers are a bit  
22 more reasonable. Or let's not say "reasonable." They're a little  
23 bit shorter, anyway.

24 MR. EMMERSON: No, I'm grateful for that. We are, I think, at  
25 the moment, approximately 50 per cent smaller than the -- shorter

1 than the next estimate, roughly.

2 The total estimate of Veseli cross-examination time for the  
3 first 12 witnesses at the moment is 25.5. I'm sure the Bench will  
4 understand that when giving estimates one is focusing on what might  
5 subsequently be treated as an outer limit rather than a real  
6 estimate.

7 So going back to look at the matter again with a view to giving  
8 real estimates rather than outer limits, we can shave off another 5.5  
9 hours, and I'll give you the details.

10 Witness 2, we can reduce from two hours to one. Witness 3, we  
11 can reduce from five hours to 3.5. Witness 4, we can reduce from two  
12 hours to one. And with a very clear caveat that it's an estimate  
13 rather than an outer limit, with Witnesses 5, 9 and 11, we can reduce  
14 to 30 minutes, and with Witness 12 to 1.5 hours. Those with all be  
15 on the record, I should say.

16 PRESIDING JUDGE SMITH: Thank you.

17 Mr. Roberts.

18 MR. ROBERTS: Good morning, Your Honour. I obviously second  
19 what Mr. Kehoe has already said in relation to the estimates that  
20 we've given. We've only given five estimates so far. We're still  
21 working on providing the estimates for the other witnesses. We will  
22 do so in due course and as soon as possible and will obviously make  
23 those as reasonable as possible.

24 In terms of suggestions for streamlining the case, this will  
25 come from us, but it also will be one that requires input and control

1 from the Bench and, obviously, cooperation from the Prosecution, and  
2 that is to focus on the issues that actually matter in the  
3 indictment.

4 And my concern is that the witness summaries that are provided  
5 by the Prosecution relate and include various issues that go, in our  
6 view, outside the scope of the indictment. And I will give you one  
7 example just to illustrate this point.

8 The second witness intends, or at least according to the  
9 Prosecution summary, the Rule 95(4) summary, I think it's the last  
10 paragraph, they intend to lead evidence in relation to incidents that  
11 took place after -- well after the indictment period. We would  
12 suggest that this is not evidence that's relevant to this case.

13 And to give you a concrete impact upon our cross-examination  
14 schedule, our cross-examination estimate, at present we've estimated  
15 four hours of cross-examination for that witness. I would suggest  
16 that if the Prosecution was not allowed to lead evidence on that  
17 specific issue, we would cut that in half. That's something that  
18 relates specifically to an allegation that we say goes well beyond  
19 the scope of the indictment. And I think that probably - and, again,  
20 this is just an example - relates to multiple different summaries and  
21 multiple different witnesses over the course of the 320.

22 So unless there is that cooperation from the Prosecution, or at  
23 least understanding, that they will not lead evidence on that  
24 question, then we're in the situation where we have to prepare and we  
25 have to ensure that we're ready to cross-examine on that.

1           PRESIDING JUDGE SMITH: Have you discussed this issue?

2           MR. ROBERTS: I have not discussed this issue with the  
3 Prosecution on the specific witness --

4           PRESIDING JUDGE SMITH: There again, we're getting close to  
5 trial. If this is important to you, I would suggest you get on it  
6 and discuss it with the Prosecution.

7           MR. ROBERTS: Understood, Your Honour. And maybe the  
8 Prosecution could confirm. It's in their witness summary, so my  
9 understanding is that they intend to lead it, if it's in their  
10 Rule 95(4) summary. So I would appreciate confirmation from the  
11 Prosecution whether that's the case, but my understanding was that it  
12 is, And I would see no indication from them that they did not intend  
13 to lead that evidence.

14          PRESIDING JUDGE SMITH: I'm just suggesting --

15          MR. ROBERTS: Understood.

16          PRESIDING JUDGE SMITH: -- a friendly conversation might be  
17 helpful.

18          MR. ROBERTS: And just on that point, Your Honour, what I would  
19 suggest is, therefore, if this is the case where we are requesting,  
20 obviously, I think it's paragraph 118 of the Order on Conduct of  
21 Proceedings or the Annex on the Order on Conduct of Proceedings, as  
22 when we are objecting to part of a witness testimony, that we should  
23 do so, I think, at least a day in advance and obviously provide  
24 notice to the other side.

25          For issues like this, it may be more useful to do so a little

1 bit more in advance of that, in the sense that if we're not going to  
2 hear evidence on that question, and, therefore, we're not going to  
3 cross-examine, we can update our estimate accordingly in advance and  
4 allow the Prosecution to schedule the next witnesses earlier. The  
5 earlier we can get involved in some of these issues and actually cut  
6 back the scope of some witness testimony, I think the better for the  
7 proceedings as a whole.

8 PRESIDING JUDGE SMITH: Once again, maybe a phone call would  
9 also help.

10 MR. ROBERTS: Of course, Your Honour.

11 PRESIDING JUDGE SMITH: Mr. Ellis.

12 MR. ELLIS: Good morning, Your Honours.

13 PRESIDING JUDGE SMITH: Good morning.

14 MR. ELLIS: Your Honours, the time estimates that we've given  
15 were our best estimates at the time in the position that we were,  
16 which was that an enormous volume had been given at that time.

17 Even since the last hearing before Your Honours, we've had  
18 another 38 disclosure batches by my count. So there is more material  
19 coming to us and that we are still working through. The estimates  
20 that we've given are our best estimates at the moment. If we're able  
21 to reduce them, we will do so, but they're my best estimate at the  
22 moment.

23 PRESIDING JUDGE SMITH: Any particular concepts or ideas that  
24 you might have to shorten this matter?

25 MR. ELLIS: Yes, the Prosecution could call less witnesses,



1 Your Honour.

2 PRESIDING JUDGE SMITH: Okay.

3 MR. ELLIS: That's the core of it.

4 PRESIDING JUDGE SMITH: Thank you.

5 Mr. Laws, anything you'd like to add to this?

6 MR. LAWS: Good morning, Your Honour. We have asked for two  
7 hours and five minutes as an outer estimate.

8 PRESIDING JUDGE SMITH: Can you cut that in half?

9 MR. LAWS: I don't think we can improve upon that, Your Honour,  
10 I'm sorry to say.

11 PRESIDING JUDGE SMITH: Thank you, Mr. Laws.

12 Mr. Veseli, I cut you off a little bit. I was asking everybody  
13 if they had some idea that might be of help to us in deciding what to  
14 do here. And if you have nothing at this point, that's okay.

15 MR. EMMERSON: I think, in reality, we've been banging the drum  
16 for two years now about the focus, or lack of it, in the Prosecution  
17 case. We've reached the position where the Trial Chamber has taken  
18 the view that the Prosecution must be given the scope to present its  
19 case in the order it wishes to do so, in the manner it wishes to do  
20 so. I'm not sure that anything short of a radical approach would  
21 make a significant difference.

22 We've sought to cut our times to the bone to ensure that we're  
23 not contributing unnecessarily to the delay. But in practical terms,  
24 once we've set off on this very lengthy journey with the Prosecution  
25 being given -- despite the history, which is all on the record, of

1 Prosecution promises made and not fulfilled, once we embark on this  
2 journey in that vein, I'm afraid I feel fairly certain there's going  
3 to come a time where the Bench is going to think this is approaching  
4 a train crash. But I'm not -- I don't think I can help any more than  
5 I've done already, which is to warn for a very long time of this  
6 situation.

7 PRESIDING JUDGE SMITH: Thank you. You didn't get a complaint  
8 from us about the time that you scheduled, so we appreciate that.

9 We will take your suggestions into account and your reasoning.  
10 And if we find that excessive material is being submitted by either  
11 party, or if repetitive questions are being asked, we will take what  
12 action we feel is necessary to complete this case in what we think is  
13 a reasonable time period.

14 And I think you are all aware of the methods available to the  
15 Panel under the provisions of our rules. We have said that we would  
16 start the case and observe the methods and the questioning used, but  
17 we will not hesitate to limit the SPO or the Defence, both, on the  
18 time allocated to each. So be aware of that. We've done it before  
19 and we will do it again, if necessary.

20 MR. KEHOE: Your Honour, may I just add one last notation on  
21 that.

22 PRESIDING JUDGE SMITH: Sure.

23 MR. KEHOE: We will seriously go through and try to cut this  
24 down to the bare bone. We have a commitment to the Court on that  
25 with the understanding that, if things happen during the course of

1 that questioning, that we have some leeway in excess of that time,  
2 not an extraordinary amount, but some understanding from the Court  
3 that we've attempted to try and pare this down as much as we possibly  
4 could. But as Your Honour well knows, oftentimes things happen in a  
5 courtroom that causes us to go a little bit further.

6 PRESIDING JUDGE SMITH: I assume, and we all up here assume,  
7 that you have all -- most of you have padded this just a bit for your  
8 own protection and the protection of your clients. We understand  
9 that. We just want you to recognise it, and recognise that we know  
10 that, and that we need to take what action we feel is necessary at  
11 the time, and we will. So thank you. Thank you for your  
12 submissions.

13 Now I believe Judge Gaynor has some further questions in regard  
14 to this same issue.

15 Go ahead, Judge Gaynor.

16 JUDGE GAYNOR: Thank you, Judge Smith. I've one question for  
17 the SPO following up on your submissions earlier.

18 And we acknowledge that you've said that all options are on the  
19 table for the SPO, and there are a great many measures the SPO can  
20 take to reduce the scope of its case, and you're assessing on an  
21 ongoing basis. What your position is, we acknowledge all of that.  
22 But as you yourself have acknowledged, the Panel has its own power to  
23 step in and cut down the size of the SPO case. And you have referred  
24 to, for example, Rule 118(1)(a) to (e).

25 My question to you is this: Having heard the responses by the

1 Defence today, do you have any preference as to what steps might be  
2 most appropriate for the Panel to take if it comes to the point where  
3 the Panel is not satisfied with the steps that the SPO has taken?  
4 Which steps would the SPO prefer the Panel to take to reduce the  
5 anticipated duration of the SPO case?

6 MR. HALLING: Thank you, Your Honour. As you could imagine, our  
7 first preference would be to not have that be necessary. But at the  
8 level of the question, assuming that the Trial Panel would be taking  
9 action, what would the action be, I think our preference would be if  
10 as the trial goes along, if the Trial Panel, with the knowledge that  
11 it has of the case at that point, is able to affirmatively identify  
12 witnesses that it doesn't consider anymore to be necessary to hear,  
13 that would be a measure that would be meaningful information for us  
14 to make adjustments. And if the Trial Panel was to order that  
15 certain repetitive witnesses would be cut, knowing at that point in  
16 the trial what actually would be repetitive, we would say that would  
17 be the most efficient measure.

18 JUDGE GAYNOR: Thank you.

19 Thank you, Judge Smith.

20 PRESIDING JUDGE SMITH: Okay. Judge Mettraux has indicated he  
21 has some questions.

22 JUDGE METTRAUX: Thank you, Judge Smith.

23 And the questions are for you, Mr. Halling, as well.

24 I have a bit of sympathy, I have to say, for the submissions of  
25 the Selimi Defence team, Mr. Roberts, in relation to the summaries of

1 your witnesses which you've produced. And I'll just summarise the  
2 concern.

3 We've received three different sets of summaries of the proposed  
4 evidence of your witness, I think: At the time of your pre-trial  
5 brief, together with your list of 12 witnesses, and as part of your  
6 application under Rule 154. As Mr. Roberts has indicated, you've  
7 flagged up a number of issues in those summaries. And what is  
8 unclear, to me at least, is whether that's the evidence, A, you seek  
9 to rely upon and/or that you seek to elicit from your witness *viva*  
10 *voce*.

11 There's another concern that was flagged up in some of the  
12 Defence submissions. That's the fact that some of these witnesses  
13 offer in their statement evidence that might go, for instance, to  
14 acts and conduct of one or more of the accused and that this is not  
15 flagged up in your summaries.

16 So my understanding of the purpose of these summaries is to put  
17 both the Panel on notice of what evidence you intend to rely upon for  
18 each of the witnesses and, as pointed out by Mr. Roberts, I think,  
19 importantly as well, to put the Defence on notice of what you plan to  
20 rely upon so that they can make preparations accordingly.

21 Now, when we have a summary, for instance, that doesn't reflect  
22 evidence of acts and conduct of a witness where, as we know, that in  
23 his or her statement that witness offers that evidence, are we to  
24 infer that you are not seeking to rely upon that evidence or that  
25 your summary is incomplete, if I may put it that way?

1 MR. HALLING: Yes. Rather than calling it "incomplete," maybe  
2 it was rather that the summary, just by nature of being a summary,  
3 generalises a very long interview of a witness into a small portion.

4 The sympathy that Your Honour stated at the beginning of that is  
5 very apparent in Your Honours' decision on Friday. And in the  
6 Rule 154 decision at paragraph 29, there is clear guidance on this  
7 very point, and we understand that direction to be of general  
8 applicability. So when we are dealing with evidence of the acts and  
9 conduct of the accused, we're going to proceed in the manner  
10 specified in that paragraph.

11 JUDGE METTRAUX: I'm grateful for the indication. And, of  
12 course, a summary has to remain a summary. So we're not expecting of  
13 you to tell us what we know from the statement. But what is very  
14 important, I think, both to us, again, and certainly to the Defence  
15 and Victims' Counsel, is we need to understand what part of a  
16 witness's evidence you intend to rely upon so that everyone is on the  
17 same page. But I'm taking a reassurance from your words.

18 The second question is really about the same issue. We've  
19 received indications from you, and that's your filing of 1 February  
20 2023, it's F01243, that's your list of the first 12 witnesses. And  
21 as you know, of course, you've listed a number of exhibits which you  
22 link to each and every one of these witnesses. Some of them have  
23 been offered and now have been admitted as associated exhibit under  
24 154. What we would like to know is what you plan to do with the  
25 others. And, again, with the same attempt or intention in mind,

1 which is to enable us to understand what's coming our way with each  
2 witness, and to enable the Defence to know what exhibits you plan to  
3 use with each witness.

4 So, in other words, what of the non-associated exhibits? Are  
5 you going to lead them all with each of these witnesses?

6 MR. HALLING: No, we're not going to lead them all. This goes  
7 to the remarks that I was saying earlier, that this is also a topic  
8 where we're going to be revisiting and making reassessments as  
9 information develops. And, indeed, there may be situations where  
10 already-admitted exhibits need to be shown a witness in order to  
11 contextualise them or to present further information. And there's  
12 going to be exhibits, even if they haven't been admitted already, are  
13 going to be unnecessary in the overall scope of the proceedings.

14 Not everything in F01243 is necessarily going to be tendered.  
15 And, I mean, one easy example, it's not exhibits, but prior  
16 statements of fully live witnesses are listed in that filing. We  
17 don't intend to tender them. But as we make these adjustments, we  
18 have our final presentation queue that we are required to provide in  
19 accordance with the Conduct of Proceedings deadline. And if in the  
20 course of examining a witness there's ever any question as to whether  
21 a specific document is to be shown or tendered, we can answer.

22 JUDGE METTRAUX: Well, I'm grateful. And I think I can indicate  
23 that the earlier you do that, at least in terms of informing the  
24 Defence, the better so that they are able to accelerate their  
25 preparation.

1 MR. HALLING: Understood.

2 JUDGE METTRAUX: And I'll ask you my third issue before turning  
3 to the Defence, and that has to do with a specific document that you  
4 offered as part of your bar table application; filing F01268. And  
5 the document has an ERN SPOE00232092 to 094, and it's in Annex 2 of  
6 that filing I've just mentioned under number 17(a).

7 And we would like to ensure that we understand what you are  
8 offering this document for because the English version, as we have  
9 it, is made up of one sentence only, and it's, in fact, an incomplete  
10 sentence. It reads:

11 "There have been more than two months that fighting in the first  
12 operational zones ..."

13 Now we also have an Albanian version that also contains that  
14 sentence but also a much longer piece of information. And in the  
15 explanation you give for that document, in the annex I've mentioned,  
16 you seem to be relying upon that sentence only, the one I've just  
17 read.

18 So are you offering the entire document as in the Albanian  
19 version? Are you offering the English version, that one sentence  
20 incomplete as it is? And if the latter, what are you saying is the  
21 relevance and the probative value of that? Is it merely  
22 corroborative or is it something substantive we should find in there?

23 MR. HALLING: Eventually all the contents of this document are  
24 going to be tendered, Your Honour. But in order to fully answer the  
25 question, I should maybe take a step back and explain the context of



1 this particular document.

2 The last two pages that Your Honour is identifying in the  
3 document are found in multiple versions at Jakup Krasniqi's house.  
4 This is where the materials were taken. The pages in the filing  
5 identified by the Trial Panel are a clean digital version. There is  
6 also a same version of that document found at his house that has  
7 handwritten edits on it, and this is at ERN SPOE00225101, 00225103.  
8 And that's the document that had the English translation made. So  
9 there's an ET of these pages in that document.

10 As Your Honour mentioned, the first page, it's just one line,  
11 but it's the beginning of a draft of what becomes KLA Communiqué 53.  
12 And this, to us, finding it in his house and what that says, further  
13 supports Krasniqi's authorship over that communiqué and other  
14 communiqués like it.

15 As you can see from our bar table filing, we were trying to  
16 group all communiqué evidence together in that filing, and so that  
17 meant that that first page was of particular relevance to that  
18 filing. But the latter two pages, which are media documents, they  
19 are intended for a future bar table motion. And when we file that  
20 future bar table motion, we would tender those pages with English  
21 translation.

22 JUDGE METTRAUX: Thank you. That was clear.

23 Counsel for Mr. Thaci, anything on any of the three issues?

24 MR. KEHOE: On the issue of Communiqué 53, it was a mystery to  
25 us as well, given it wasn't pieced together with anything else as to

1 what the relevance of that document happens to be. We have some  
2 degree of illumination based on the reference to this other document,  
3 and we'll have to go back and take a look at that issue.

4 But, again, my instinct was along the lines that the Court  
5 obviously had, what's the pertinence of this. I don't want to speak  
6 -- at this point I would have argued to you relevance, but I honestly  
7 need to go back and look at the other documents before I speak.

8 But I do think, if I can go back to your initial issue on  
9 particular items, it is still a mystery to many of us exactly what in  
10 the Rule 54 information the Prosecution is expecting us to pay  
11 attention to and what they are relying on. And it highlights the  
12 difficulty of wending our way through all of this information and  
13 their procedure of not only putting a witness statement but all of  
14 these other ancillary pieces of information.

15 It is acceptable, Judge -- I shouldn't say "acceptable." It is  
16 a handle -- you can handle a 50-page statement or something along  
17 those lines, but these are multiple statements of hundreds and  
18 hundreds of pages at a time. And while I do not intend to dampen the  
19 Court's enthusiasm on cutting this back, there are some witnesses  
20 that are coming where there is literally -- there are hundreds,  
21 almost a thousand pages of Rule 154 information. And without some  
22 direction along the lines that I think Rule 154 and our prior  
23 iteration, 92 ter, envisioned for both the Court and the Defence,  
24 that we are relying on these particular issues in what this person  
25 has said, we are left to drift through hundreds of pages of

1 transcripts to divine for ourselves what we think is important when  
2 it looks like that maybe the Prosecution hasn't culled that down  
3 themselves.

4 I think we've highlighted this difficulty before,  
5 Judge Mettraux, but it still exists.

6 JUDGE METTRAUX: Thank you.

7 Mr. Veseli.

8 MR. EMMERSON: [Microphone not activated]

9 JUDGE METTRAUX: Mr. Roberts?

10 MR. ROBERTS: Sorry, just trying to decide amongst ourselves who  
11 speaks first.

12 My only submission is in relation to the summaries, and that  
13 follows on from what I mentioned earlier in your questions to the  
14 Prosecution. We are concerned if the Prosecution attempts to lead  
15 anything beyond the summaries. And we will put the Prosecution on  
16 notice, and, obviously, the Trial Panel on notice as well, that if we  
17 believe that evidence falls outside the scope of those summaries, we  
18 will contest it, and we'll do so as early as we can.

19 And following on from the President's suggestion, I've already  
20 e-mailed the Prosecution just to verify exactly whether they will be  
21 leading the evidence I referred to earlier in relation to the second  
22 witness. But as we all know from proceedings at the ICTY and other  
23 courts, there are, unless a lot of care is taken, extensive  
24 discussions about whether evidence is led, evidence led is within the  
25 summary or not. So I think the Prosecution does have to be very

1 careful and very clear as to why it is. And if anything falls  
2 outside that scope, they would need to notify the Defence and the  
3 Chamber well in advance and, I would suggest, seek authorisation to  
4 lead that evidence, because the scope of the case, as I understand  
5 it, is set out by those summaries and that's the scope of notice of  
6 the Prosecution case.

7 Now, if they achieve or if they have other -- sorry, achieve.  
8 If they seek to present other evidence that is either newly  
9 identified or which was not included in those original summaries,  
10 then I would believe authorisation from the Chamber should be sought.  
11 Thank you.

12 JUDGE METTRAUX: Thank you, Mr. Roberts. And I will say nothing  
13 that you should not take as an agreement or disagreement with  
14 anything you are saying, but we note your submissions on that. And  
15 as you will have seen, I hope, from your decision of last week, we've  
16 already taken steps to ensure that you get proper notice of what  
17 evidence the Prosecution intends to lead, at least in -- as far as  
18 154 witnesses are concerned. But, thank you.

19 Mr. Ellis.

20 MR. ELLIS: Your Honour, on the issue of these summaries, we  
21 share the perception that there is a real problem here with the way  
22 in which summaries have been prepared. If I can give one example,  
23 that would be Witness 4147. The witness summary prepared by the  
24 Prosecution doesn't mention my client at all, but in the witness  
25 statement of that witness - so not an interview transcript going over

1 hundreds of pages, but a statement - my client's name appears 11  
2 times. That would seem to us to go beyond the simple process of  
3 summarising. And, therefore, we would support the position adopted  
4 by Mr. Roberts.

5 But if I may, I would say the position is even clearer with  
6 respect to those 154 witnesses who have been addressed in recent  
7 filings. Of course, Your Honours' order, the third oral order at the  
8 hearing on 16 December, was for the Prosecution to identify the  
9 issue, facts, and circumstances under which the witnesses will be  
10 examined.

11 The Prosecution dealt with that in Filing 1262. The summaries  
12 that appeared for some of the witnesses in that filing were  
13 significantly shorter than summaries that had been provided earlier,  
14 and our clear understanding is, therefore, that in drafting the  
15 summary for that specific purpose in response to Your Honours'  
16 specific order, the Prosecution was delimiting what questions it  
17 intended to ask about. And so if matters are raised outside that, we  
18 would certainly be joining the objection.

19 Very briefly on the issue of document SPOE232092. Your Honours,  
20 our response to the bar table motion is coming tomorrow. We will be  
21 addressing that document and others in full. I will simply say for  
22 the record that producing a single line proves nothing. It doesn't  
23 prove authorship, and it certainly doesn't prove involvement in  
24 drafting, unless one knows when the document was produced.

25 JUDGE METTRAUX: Thank you, Mr. Ellis.

1 Mr. Laws, anything?

2 MR. LAWS: Nothing from us. Thank you, Your Honour.

3 JUDGE METTRAUX: Thank you.

4 Mr. Misetic.

5 MR. MISETIC: Yes, sorry. Very briefly, if I could just be  
6 heard on Judge Gaynor's question, actually.

7 And in response to the SPO, we just wanted to note the SPO's  
8 proposal under what they would prefer under Rule 18 would be  
9 problematic, in our view, because I think it would -- for the Panel  
10 to tell the Prosecution what witnesses it no longer needs to hear, I  
11 think would require some deliberations among you about what has been  
12 proven beyond a reasonable doubt or otherwise some deliberation about  
13 what facts have been established so that you don't need to hear  
14 witnesses about it anymore, which I think is a problematic course for  
15 the Trial Panel to take for reasons that I probably don't need to  
16 explain to you.

17 On the other hand, if they are referring to things that perhaps  
18 are not in dispute any longer, that's something I think that the  
19 parties could *inter partes* approach the Panel about, not having to  
20 hear witnesses because the parties no longer dispute them. But I  
21 think we do reserve our position about the Panel engaging in that  
22 type of assessment of the evidence before the conclusion of the  
23 proceedings. Thank you.

24 JUDGE METTRAUX: Thank you.

25 PRESIDING JUDGE SMITH: All right.

1 Judge Gaynor has indicated he has a question for  
2 Victims' Counsel.

3 Judge Gaynor.

4 JUDGE GAYNOR: Thank you, Judge Smith.

5 Yes, I've one question for Victims' Counsel concerning the  
6 Filing F01285, which is the Victims' Counsel's Further Notification  
7 of a Wish To Cross-Examine Witnesses, filed on 13 February 2023. And  
8 in that notification you have indicated matters you would like to  
9 question a particular witness about with the leave of the Panel. You  
10 submit that those questions are of a matter of legitimate interest to  
11 victims participating in the proceedings in seeking to establish the  
12 truth about what happened to them.

13 In addition, you add that:

14 "These matters will only be addressed if not already covered in  
15 full by the SPO's direct examination of that witness."

16 So my questions to you are this: First, whether you have  
17 discussed with the SPO if the SPO intends to question the witness  
18 about the matters you have identified? And, second, whether you  
19 intend to liaise with the SPO in respect of similar situations in the  
20 future?

21 Mr. Laws.

22 MR. LAWS: Thank you, Your Honour. Yes, the answer is, yes, we  
23 have liaised with the Prosecution; and yes, I am confident that we  
24 have an understanding about the approach that both of us will be  
25 taking, and we will ensure there is no duplication of questioning in

1 relation to these topics.

2 And in relation to the supplementary question, yes, it will be  
3 our intention to liaise with the SPO when issues of this kind arise  
4 in the future.

5 JUDGE GAYNOR: So would you like the Panel to issue its decision  
6 on your request to put those questions to that witness at the  
7 conclusion of the SPO's direct examination or when exactly?

8 MR. LAWS: Yes. Yes, that would seem to us to be the  
9 appropriate moment at which to make a final decision, because it will  
10 only be at that stage that we can be completely clear that everything  
11 we want to ask has been asked.

12 JUDGE GAYNOR: Right.

13 MR. LAWS: And, of course, the SPO have many, many more issues  
14 to deal with with this witness than we do.

15 JUDGE GAYNOR: Very well. Well, thank you. We accept your  
16 proposal for how you want to proceed, and we would encourage you and  
17 direct you to follow the same approach. And in advance of any future  
18 notifications of questions that you wish to put to witnesses which  
19 might overlap with the SPO's direct examination, could we ask you to  
20 liaise with the SPO beforehand to ascertain whether the SPO, indeed,  
21 intends to question the witness about the same matters.

22 MR. LAWS: Your Honour, we will.

23 JUDGE GAYNOR: Thank you. That's all.

24 Thank you, Presiding Judge.

25 PRESIDING JUDGE SMITH: Thank you, Judge Gaynor.



1 Judge Mettraux has a question for -- or questions for the  
2 Defence.

3 Judge Mettraux, please.

4 JUDGE METTRAUX: Thank you, Judge Smith.

5 And it's probably for all four Defence teams. We wish to make  
6 sure we understand your case or cases in relation to a pretty  
7 critical issue in the case which is that part of your case which you  
8 have put forward, and I will try to summarise it in a moment, but in  
9 relation to the role, functions and power of the General Staff of the  
10 KLA.

11 We understand the Prosecution case to be, in a nutshell, that  
12 your clients were all members of the General Staff and that the  
13 General Staff had important and critical operational powers and  
14 responsibilities in relation to a number of issues - discipline,  
15 appointment, and so on and so forth.

16 But the focus of my question is really about how we should  
17 understand the Defence case in relation to this very issue. And for  
18 that purpose, we combed through your pre-trial brief, and there seems  
19 to be -- and I don't want to put words in anyone's mouth, but there  
20 seems to be a common thread through all four briefs, and I want to  
21 know whether that understanding is correct or not and offer you an  
22 opportunity to set the record on this.

23 But the understanding from your brief is that the General Staff  
24 had no or little control over what was happening on the ground, that  
25 it had no or limited operational powers, that it had no or little

1 commanding functions over the operational zones, and that the  
2 regulations in communiqués which it issues or which we are told it  
3 issued were mostly aspirational.

4 And, in a nutshell, we understand your case to be that the  
5 operational and command decisions that are relevant to this case were  
6 made either at the local level or at the operational zone level  
7 rather than at the General Staff level. Is that how we should  
8 understand your case, or cases, if there are differences, or is that  
9 summary a fair one?

10 MR. KEHOE: That is a very fair summary, Your Honour, that is  
11 reflective of the evidence that will be developed throughout,  
12 starting with the Prosecutor's own witnesses who will describe for  
13 you the chain of command within the KLA, certainly during 1998 and  
14 1999, being chaotic, being broken down, being brigades totally washed  
15 away. Yes, that is, in sum, what our evidence will be. And not only  
16 reflected by the KLA members that the SPO intends to put on the  
17 stand, but, likewise, their independent witnesses that they are also  
18 going to put on the stand that talk about, in February 1999, the  
19 virtually independent regional military authority. And then again,  
20 in March 1999, that same SPO witness, that the efforts -- who noted  
21 that "the efforts to bring operative zone commanders," now, this is  
22 March 1999, "the efforts to bring operative zone commanders under the  
23 umbrella of the General Staff have been only partially successful as  
24 the zone commanders clearly retain operational independence."

25 And I'm sure Your Honours have seen this, which is the letter

1 from the United States State Department to the Foreign Affairs  
2 Committee in May 1999, where Ms. Larkin, Assistant Secretary of  
3 Legislative Affairs notes that:

4 "There is no political structure in Kosovo or effective command  
5 and control of the KLA."

6 So in addition to supplementing the concise analysis that  
7 Your Honour has put forth, which is our position, it is also  
8 reflective in the evidence to be advanced by the SPO's witnesses  
9 themselves.

10 JUDGE METTRAUX: Thank you, Mr. Kehoe.

11 Mr. Emmerson.

12 MR. EMMERSON: Your Honours will find the Veseli Defence case as  
13 to the role of the General Staff set out, I hope, clearly and  
14 explicitly between paragraphs 7 and 21 of the Veseli pre-trial brief.  
15 And if I can just highlight, really, one section where, at paragraphs  
16 8 and 9, we point out that in attempting to discharge the burden of  
17 proving joint criminal enterprise, the SPO has misunderstood or  
18 mischaracterised the role of the General Staff within the emerging  
19 KLA, wrongly describing the KLA as a top-down organisation that was  
20 operationally controlled by the General Staff at all relevant times.  
21 And that is to be found in the relevant passages of the pre-trial  
22 brief for the SPO.

23 We go on, however, two -- so it's not just a question of what  
24 the Defence case is here. Two trial chambers of the ICTY have held  
25 on very much the same body of evidence that the so-called

1 General Staff was comprised of a disparate group of individuals with  
2 no defined headquarters who did not even know each other, all of  
3 them, or necessarily know who the other members of the General Staff  
4 were at any time, did not communicate with each other for the same  
5 reason all of the time, seldom if ever met, and were not always  
6 present in Kosovo.

7 In short, as we point out, the findings of the ICTY in the Limaj  
8 and Haradinaj cases was that this body, such as it was, was not  
9 operating as a General Staff in any conventional sense of that term.  
10 And one will see in the Limaj judgment the reason for that. And this  
11 is important as the Trial Chamber begins to hear evidence. At  
12 paragraph 132 of the Limaj judgment, the court says:

13 "The members of the General Staff did not meet regularly because  
14 of the security situation and identified themselves not by their  
15 names but by numbers for the same reason. In these circumstances it  
16 is no surprise that the organisational structure and the hierarchy of  
17 the KLA were confusing, or not known, to outside observers, and that,  
18 to some, this suggested a state of confusion."

19 In the Haradinaj judgment on the same issues, at paragraphs 20  
20 and 21, the court -- this is the second Haradinaj trial, the court  
21 said at 20:

22 "The KLA General Staff in Kosovo did not have a single location  
23 where it was based in 1998; the members would move around for  
24 security reasons and usually independently of each other."

25 And the judgment refers to the evidence of John Crosland who was

1 at the time the British Defence Attaché to the Republic of Yugoslavia  
2 in Belgrade, so the Serbian authorities. And goes on at paragraph  
3 21:

4 "The Chamber heard from John Crosland that, while the KLA became  
5 -- was organised, to call the body at the top of 'the General'" --  
6 sorry, "to call the body at the top of it 'the General Staff' was  
7 misleading. He did not think that the General Staff had effective  
8 control over the KLA. John Crosland concluded that there was not a  
9 'great deal' of coordination between the zones and the General Staff.

10 "The General Staff would compile political statements,  
11 communiqués and give interviews," and this was interviews to the  
12 media and international media, "which would set out the strategy and  
13 political opinions of the KLA and provide an overview of the fighting  
14 ... that were occurring ..."

15 But as the evidence and the findings of the court made clear did  
16 not have effective control over events on the ground.

17 Now, the only part of the summary that Your Honour just set out  
18 that -- I'm not disagreeing with it at all, but it just needs to be  
19 nuanced in the last part of it. I think Your Honours' inference from  
20 that was that the Defence case is that such strategic operations as  
21 might have occurred on the ground would have been authorised at a  
22 local or regional zone level.

23 As we shall see, these zones didn't come into existence until  
24 the middle of the summer of 1998, one or two, and then gradually over  
25 time zones were declared. Zone commanders were not answerable to the

1 General Staff. It's absolutely clear and all the evidence that you  
2 will hear will make that clear. There was simply no line of command  
3 of the sort that you would envisage in a conventional armed forces.

4 Calling yourself the General Staff is a bit like the gentleman  
5 who was appointed in the Dukagjin zone in June 1998 to be the KLA's  
6 head of chemical and biological warfare preparation or the head of  
7 anti-tank brigade. There was no anti-tank brigade. There was no  
8 chemical and biological warfare preparation unit. People gave  
9 themselves titles in order to create the impression that there was  
10 more going on by way of organisation than there was.

11 So any of the assumptions that any trial chamber might naturally  
12 bring to bear in relation to somebody calling themselves a member of  
13 the General Staff of what is a nascent organisation made up of  
14 farmers and workers gathering arms, obviously, those assumptions will  
15 not carry any weight, or, if they do, they will soon be exposed as  
16 false during the course of the evidence. That is something we can  
17 say with complete confidence because the trial chambers who have  
18 looked at it in the ICTY in some detail over years of cumulative  
19 evidence have all come to that conclusion.

20 And so the summary is correct. But it's not just a summary of  
21 the Defence case. It's a summary of the facts and of the way in  
22 which they've been found. So the onus is on the SPO to prove that  
23 those judicial findings, which we will invite you to take judicial  
24 notice of, are wrong. And they're wrong because those courts didn't  
25 hear some key piece of evidence that will show they're wrong that the

1 Prosecution now intends to put before you. But let's be clear, if  
2 there is such a piece of evidence that the Prosecution intends to put  
3 before you, they haven't identified it in their pre-trial brief or in  
4 any of the material that they've served so far, so it would be  
5 surprising if it were to emerge at this late stage.

6 So the only remaining nuance is, does it follow that all of the  
7 crimes on the indictment were authorised at zone level? No, it  
8 certainly doesn't because some of them will have been spontaneous  
9 crimes committed by individuals on the ground. Some of them will  
10 have been scores being settled or individual so-called members of the  
11 KLA -- I mean, just to be clear what we mean by "member of the KLA,"  
12 obviously, it will be a Kosovar Albanian who maybe follows one group  
13 at one time and another group at another time. It's a farmer by day,  
14 a fighter by night. As has often been said by one of the zone  
15 commanders, "I was the commander of those who on any given day chose  
16 to follow me." This is not an army that you are discussing. This is  
17 a spontaneous and encouraged response from village defence units  
18 across Kosovo to what they perceived, probably rightly, to be a  
19 planned genocide and what they perceived definitely rightly to be an  
20 organising campaign of ethnic cleansing, crimes against humanity  
21 designed to drive them out of the country.

22 So that's why I was saying at the beginning -- we don't want to  
23 get, I know, into the Serbian side of things, but it is very  
24 important in understanding the inferences to be drawn from the  
25 evidence that you will hear.

1 JUDGE METTRAUX: It is helpful. Thank you, Mr. Emmerson.  
2 Mr. Roberts.

3 MR. ROBERTS: In simple terms, yes, Your Honour, your concise  
4 summary is our position. It's our position set out in paragraphs 89  
5 to 95. It's supplement -- of our pre-trial brief, sorry. It's  
6 supplemented, obviously, by the submissions of my colleagues with  
7 which we fully agree. But at this stage, I don't feel that there is  
8 more that I can add. But, obviously, if you have any questions,  
9 please feel free.

10 JUDGE METTRAUX: Less is more, we're told, Mr. Roberts.  
11 Mr. Ellis.

12 MR. ROBERTS: Apparently so, Your Honour. Thank you.

13 MR. ELLIS: Your Honour, I will heed that guidance. I have  
14 nothing further to add to our pre-trial brief and the submissions  
15 already made.

16 JUDGE METTRAUX: Thank you, Mr. Ellis.

17 And I am not inviting the Prosecution to litigate your entire  
18 case, but if there's something you feel you should indicate at this  
19 stage, Mr. Halling.

20 MR. HALLING: Thank you, Your Honour. I'll be brief.

21 From March 1998 to September 1999, the KLA was never as  
22 organised as a developed Western military force like the one in the  
23 United States. They become more organised over time. Nor were they  
24 ever perfectly organised, with every single order and procedure  
25 followed every single time in the exact same way. But what the



1 evidence will show, including collections of evidence like seized  
2 materials not before the ICTY, is the consolidation of an existing  
3 and functioning hierarchy.

4 The KLA General Staff had control over KLA units, but the way in  
5 which it exercised that control changed over time. Hashim Thaci,  
6 Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi were all members of  
7 the General Staff throughout the indictment period, they were all  
8 authorities whose strategies and directives were implemented,  
9 including the common criminal purpose charged.

10 Your Honours accurately summarised our position on the  
11 General Staff made explicit in the indictment and in the pre-trial  
12 brief, and we're looking forward to talking about it further on April  
13 3rd.

14 JUDGE METTRAUX: Thank you, Mr. Halling.

15 MR. EMMERSON: Without taking any further time, it is right to  
16 point out that the premise of that submission that Mr. Veseli  
17 certainly was a member of the General Staff throughout the indictment  
18 period is fundamentally misconceived as we've spelt out in our  
19 pre-trial brief. He wasn't a member of the General Staff from the  
20 spring of 1999.

21 JUDGE METTRAUX: Thank you, Mr. Emmerson.

22 Thank you, Judge Smith.

23 PRESIDING JUDGE SMITH: Thank you, Judge Mettraux.

24 Now, let us move to some questions in respect of the defence of  
25 self-defence raised by the Thaci Defence. Just for reminder's sake,

1 on 20 February, the Defence for Hashim Thaci filed a Notice of  
2 Defence on behalf of the accused. Therein, the Thaci Defence gave  
3 notice of Mr. Thaci's intention to raise the defence of self-defence.

4 To fully understand this filing, the Panel would like to ask  
5 some questions, general questions. I know you wanted to do a  
6 PowerPoint. We don't have any fundamental objection to a PowerPoint.  
7 We just didn't think it was appropriate today for this particular  
8 type of Status Conference. If you want to raise that for opening or  
9 for closing, just do it in advance in writing so that we know what  
10 you're doing.

11 Turning to the first question, which I will address to Defence  
12 counsel for Mr. Thaci. I take it, Mr. Misetić, you will be doing the  
13 response.

14 MR. MISETIĆ: Yes, Mr. President.

15 PRESIDING JUDGE SMITH: The Panel notes that your client is  
16 charged with six counts of crimes against humanity and four counts of  
17 war crimes. Therefore, can I clarify if your client is pleading the  
18 defence of self-defence against all 10 charges against him?

19 MR. MISETIĆ: Your Honour, the answer is, in light of the JCE  
20 allegation and the fact that all of the crimes are charged, even if  
21 through JCE III, then the answer is yes. Because even if they were  
22 only to prove one of the crimes alleged as part of the JCE I, then  
23 all of them would be JCE III crimes, or at least as alleged, as pled  
24 in the indictment. And therefore, yes, they're all related.

25 PRESIDING JUDGE SMITH: [Microphone not activated]

1 MR. MISETIC: I can't hear you.

2 PRESIDING JUDGE SMITH: Oh, I'm sorry.

3 Following on from this question, then. By pleading guilty --  
4 I'm sorry. By pleading the defence of self-defence, you are claiming  
5 that the self-defence excludes criminal responsibility, for example,  
6 the crime of arbitrary arrest and detention, inhumane acts, cruel  
7 treatment, torture, enforced disappearance, murder - in effect,  
8 you're saying that this is justified by the self-defence.

9 MR. MISETIC: So not quite, I think, in the way you're posing  
10 the question, but if I may have a few minutes to explain.

11 PRESIDING JUDGE SMITH: A few.

12 MR. MISETIC: Okay.

13 We're particularly concerned with Count 3. So it's the unlawful  
14 arrest and detention charge. There are 34 paragraphs in the  
15 indictment that charge -- and this is paragraph 61 to 95, that charge  
16 as a crime arrest and detention without due process of law. Full  
17 stop. So there's no need, according to the Prosecution, to allege  
18 any physical or mental additional mistreatment other than the arrest  
19 and detention without due process of law. That's 34 paragraphs.  
20 There's going to be a lot of ground to cover at trial. And that  
21 allegation is a JCE I crime as pled in the indictment.

22 So the first step is to say, I think the Prosecution case will  
23 be, if they prove unlawful detention, arrest and detention without  
24 due process of law, then they will argue, we anticipate, that even if  
25 they didn't do anything else, that a possible consequence of the

1 unlawful arrest and detention was that people would be tortured,  
2 killed, mistreated, et cetera, so they're liable for the whole thing.

3 So the answer to your question is a little bit more complicated  
4 in the sense that, yes, the defence applies to the Count 3, and I'll  
5 explain why in a second, but then it also by necessity applies to  
6 anything that would flow from that Count 3, which would be the JCE  
7 III crimes.

8 Now, why is it particularly relevant to Count 3? There are a  
9 lot of issues that you're going to be asked to address in this case  
10 that I think that are issues of first impression in international  
11 law, and one of the things we intend to raise is self-defence because  
12 there are two primary questions that are unanswered at the moment by  
13 the SPO.

14 One is we have a situation here where we have a non-state actor  
15 in a non-international armed conflict. So a non-state actor -- the  
16 first question that the Prosecution hasn't taken a position on in  
17 this case is: Is it the SPO's position that the KLA had no legal  
18 authority at all given that they were a non-state actor under Serbian  
19 or Yugoslav law at the time to detain anybody? In which case, is it  
20 the SPO's position that they didn't have the authority to detain  
21 under Yugoslav and Serbian law, and, therefore, any detention by the  
22 KLA is per se without due process of law and arbitrary? That's the  
23 first question.

24 The second question is: Or do they say, even do they  
25 acknowledge and concede, that if they didn't have it under domestic

1 law, there was a right, in a non-international armed conflict by a  
2 non-state actor, to detain under international law? They haven't  
3 taken a position on that point.

4 But let's assume, for the sake of argument, that they concede  
5 that there is a power to detain by a non-state actor in a  
6 non-international armed conflict. Then it takes us to the next  
7 question which is, and this is discussed in the Mustafa trial  
8 judgment, but is also discussed by the Appeals Panel in this very  
9 case, which I'll get to in a second, which is: What are the  
10 procedural safeguards that a non-state actor in a non-international  
11 armed conflict must provide to people who are in detention?

12 So the factual circumstances of this case are that the KLA at  
13 the time of the events here is opposed to the state. So when we talk  
14 about due process of law, the traditional guarantees of due process  
15 are Article 14 of the International Covenant on Civil and Political  
16 Rights, Article 6 of the European Convention on Human Rights, both of  
17 which talk about a person's fundamental rights to a fair trial and to  
18 be tried by a court established by law. Okay?

19 So the question for the Prosecution here is: If they concede  
20 that there was a power to detain by the KLA but they argue that they  
21 didn't provide procedural safeguards, including due process of law,  
22 how was the KLA to provide due process of law as a non-state actor?  
23 Is it their case that the KLA was supposed to set up ad hoc courts?  
24 If so, which law were those courts supposed to be applying? Or is it  
25 their case that the KLA was supposed to take detainees to Serbian

1 courts to be reviewed -- to have their conditions of detention  
2 reviewed by Serbian judges? Which law applies according to the SPO?

3 Are the conditions of detention to be reviewed by -- in  
4 accordance with Serbian law? In which case, if a Serbian, let's say,  
5 combatant is detained, is a judge to assess whether under Serbian law  
6 that Serbian combatant should be detained or is some other law  
7 applicable? All of these questions are issues that are going to be  
8 raised.

9 But I draw the Trial Panel's attention to the Appeals Panel  
10 decision in this case, if I can find it. This is the Appeals Panel's  
11 decision on appeals against the Decision on Motions Challenging the  
12 Jurisdiction of the Specialist Chambers, 23 December 2021, paragraph  
13 95, and it says:

14 "The Panel will first turn to address the Veseli submissions  
15 regarding the legal bases of detention and the Pre-Trial Judge's  
16 finding that any form of deprivation of liberty in non-international  
17 armed conflict was arbitrary under IHL. At the outset, the Panel  
18 agrees with the Defence that the fact that IHL does not explicitly  
19 provide for authorisation to detain in non-international armed  
20 conflict does not necessarily mean that such conduct is prohibited.  
21 As such, the Panel is of the view that this would not render any form  
22 of deprivation of liberty arbitrary under IHL.

23 "In addition, and as acknowledged by the Pre-Trial Judge, there  
24 might be other sources besides IHL that could provide for such legal  
25 bases."

1 Now, one of our arguments, not exclusive, but one of the  
2 arguments that we will raise, and that we were required to disclose  
3 under the rule, which is why we disclosed it now, is that the right  
4 of self-defence, first of all, under Serbian law, gave the KLA the  
5 right to detain. And I'm referring specifically to Article 9 of the  
6 1976 Yugoslav Criminal Code, which is the defence of necessity, and  
7 Article 9, paragraph 1, is:

8 "An act committed in necessary defence is not considered a  
9 criminal act."

10 So to address an argument that the SPO made earlier, I think  
11 they were putting the cart before the horse to say, for example,  
12 torture is forbidden under international law and, therefore, using  
13 torture as an action of self-defence is prohibited, is not allowed.  
14 You can't invoke self-defence to justify torture. We agree with that  
15 proposition.

16 The question, however, is, is the detention unlawful in the  
17 first place, is it a crime in the first place if you're acting in  
18 self-defence? And so our position is, first of all, under Article 9  
19 of the 1976 Yugoslav code, you can detain. And as the Appeals Panel  
20 itself said, there may be other sources that allow the KLA to detain,  
21 and we believe one of those sources is the right of self-defence,  
22 also under international law.

23 Secondly, on the issue of what types of procedural safeguards  
24 should a non-state actor in a non-international armed conflict under  
25 attack and acting in self-defence provide? Is it the case that

1 someone under attack in necessary self-defence who takes an action of  
2 detention can't do that before they've set up ad hoc courts to make  
3 assessments of detention?

4 We would argue that self-defence is something that needs to be  
5 considered in that context as well, in the context of what types of  
6 procedural safeguards need to be provided. So that's an additional  
7 ground.

8 We cite two more things, and then I'll sit down. The Kordic and  
9 Cerkez Trial Chamber said:

10 "... any argument raising self-defence must be assessed on its  
11 own facts and in the specific circumstances relating to each charge."

12 That's paragraph 452 of the Kordic and Cerkez trial judgment.  
13 And we agree with that. These are issues that will have to be fully  
14 litigated at trial and you'll have to assess and hear arguments as to  
15 the applicability of this. But these are -- many of these questions  
16 that we're raising are issues that I think are going to be issues of  
17 first impression for you to opine on and give your judgment on.

18 And one final point which is not limited to the issue of  
19 self-defence but generally on the issue of Serbian crimes and Serbian  
20 offensives and things along that nature, and this is related also to  
21 Judge Mettraux's question earlier about effective control. All of  
22 the questions of the conduct of Serbian forces is related to the  
23 question of effective control, and we would draw your attention to  
24 the Oric case, the case of Naser Oric in Srebrenica, paragraph 503  
25 and 504 of the Oric trial judgment, and I quote:



1           "Moreover, taking into account the chaotic circumstances  
2 prevailing during the early months of the Srebrenica siege ... the  
3 Trial Chamber simply cannot come to the conclusion that the  
4 Srebrenica Armed Forces Staff had effective control over the  
5 Srebrenica military police ..."

6           And then paragraph 504:

7           "Therefore, the Trial Chamber is not satisfied beyond reasonable  
8 doubt that the Accused, as commander of the Srebrenica Armed Forces  
9 Staff, exercised effective control over the Srebrenica military  
10 police ..."

11           So the chaotic circumstances in Srebrenica created by the  
12 Serbian siege of Srebrenica was directly relevant to the issue of  
13 whether the accused in that case had effective control for purposes  
14 of command responsibility. And the same situation applies here. We  
15 are going to argue that the chaotic circumstances created both by  
16 various Serb offences -- offensives, I should say, particularly in  
17 the summer of 1998 but also in March 1999, had direct impact on the  
18 effective-control question of the General Staff generally of the  
19 accused here specifically and the issue of Serbian crimes as well as  
20 related to that question.

21           So I'm sorry for the lengthy response, Your Honour, but I think  
22 it needed to be discussed.

23           PRESIDING JUDGE SMITH: Okay. We will assume for a moment, for  
24 argument's sake, that the KLA could possibly take people into custody  
25 for their own protection. What's the duty of care after you take

1     them into custody?

2             MR. MISETIC: There are, obviously, certain minimum guarantees  
3     under IHL to --

4             PRESIDING JUDGE SMITH: [Microphone not activated]

5             MR. MISETIC: Of course not. That's my point. So I conceded  
6     that point in my presentation. You can't torture people, you can't  
7     kill people, you can't do certain things that are prohibited. So  
8     that's why I was trying to --

9             PRESIDING JUDGE SMITH: The problem is almost everybody, almost  
10    every crime-based event here is somebody who was taken into custody.  
11    It begins with somebody being taken into custody --

12            MR. MISETIC: Yes.

13            PRESIDING JUDGE SMITH: -- and ends with something else  
14    happening. And I'm struggling with the fact that -- well, with those  
15    facts.

16            MR. MISETIC: Well, and I --

17            PRESIDING JUDGE SMITH: And the fact that if bad things happen,  
18    the KLA says, "Oh, no, since you charged us with JCE III or JCE I, we  
19    don't get to discuss those matters. Self-defence takes it all out."  
20    I'm having a struggle with that.

21            MR. MISETIC: I don't think I said --

22            PRESIDING JUDGE SMITH: Well, you indicated that, in effect, the  
23    self-defence operated as to all of them because of the fact that  
24    there was the JCE-type charge.

25            MR. MISETIC: No, I --

1           PRESIDING JUDGE SMITH: That's the way you led off.

2           MR. MISETIC: So I guess there's maybe a misunderstanding.

3           PRESIDING JUDGE SMITH: No, I probably didn't understand you  
4 properly.

5           MR. MISETIC: Okay.

6           PRESIDING JUDGE SMITH: That's entirely possible.

7           MR. MISETIC: If you're -- so if you're looking at just the  
8 charge of torture, for example, you bring in a case of, you know,  
9 person X was tortured and that's the charge, then I don't see a  
10 circumstance where we're going to argue that: Okay, they were  
11 tortured but they were tortured in self-defence.

12           My point was that one of the charges - one of the charges -  
13 could lead to applicability to all of the charges, and that one  
14 charge in particular is -- or self-defence is relevant to that one  
15 charge in particular, and that is the count of unlawful detention.  
16 But it doesn't necessarily mean that independent of that Count 3  
17 we're going to be applying and justifying every action of everyone as  
18 justified by self-defence.

19           PRESIDING JUDGE SMITH: Okay. It only sounds like it.

20           MR. MISETIC: No, no, it only relates to the liability to the  
21 extent that they try to use -- they try to say that if you were  
22 responsible for unlawful detention, full stop. And I would also  
23 clarify, you say that people were unlawfully detained and then bad  
24 things happen, I don't think that's the case for 34 of the paragraphs  
25 in the indictment, right? Those 34 paragraphs just say: So-and-so

1 was arrested or detained without due process of law, full stop.  
2 That's incident.

3 PRESIDING JUDGE SMITH: No. Yes, you're misunderstanding me  
4 now. I'm just saying that any person in this group that had  
5 something, let's say, just bad happen to them - torture, murder,  
6 mayhem of some sort - started out with an arrest. They were mostly  
7 taken into custody --

8 MR. MISETIC: Right.

9 PRESIDING JUDGE SMITH: -- and then something happened.

10 MR. MISETIC: Yes.

11 PRESIDING JUDGE SMITH: So I'm just struggling to understand.  
12 Your position is in the event that we would deem the arrest and  
13 detention to be, or the detention alone, to be not objectionable,  
14 then the rest of them stand on their own then, right? They're not  
15 dependent on that unlawful arrest.

16 MR. MISETIC: I think we're saying the same thing, but let me  
17 just clarify.

18 We're not applying self-defence to the perpetrator who killed  
19 someone.

20 PRESIDING JUDGE SMITH: Yes.

21 MR. MISETIC: Okay. So we're not saying that that perpetrator's  
22 crime of murder was justified by self-defence. So --

23 PRESIDING JUDGE SMITH: I understand that.

24 MR. MISETIC: So -- okay. And so all we're saying is that to  
25 the extent that our client specifically is being held responsible

1 under JCE III for the actions of that person, if you were to find  
2 that he is responsible somehow because -- and I will say that there  
3 is an allegation, and this is in particular paragraph -- let me just  
4 find it. Paragraph 12 of the SPO brief. Here's all the -- I  
5 shouldn't say "all." Here's one of the allegations:

6 "The accused participated in the common criminal purpose through  
7 their awareness of the circumstances in which the policy against the  
8 opponents was being implemented, the absence of safeguards to prevent  
9 abuses."

10 Right? So their *mens rea* is if they know that there aren't  
11 courts to review detentions, right, then they're aware that there are  
12 circumstances that this policy is being implemented and, therefore,  
13 they're in a JCE I. And now we get to they're liable for -- if  
14 somebody, without their knowledge, killed someone, tortured someone,  
15 et cetera, you're still liable for it.

16 So our point is the applicability of self-defence first as a  
17 source of authority to detain in the first place is applicable here.

18 PRESIDING JUDGE SMITH: We will certainly study that, and  
19 appreciate your candour.

20 A couple of other questions, though. And this is more of a  
21 technical one. Are we in agreement that a defendant who pleads  
22 self-defence does bear the burden of what's been called establishing  
23 that there is sufficient evidence to require the issue to be  
24 litigated, and then the Prosecution, of course, still has the burden  
25 of proving that there was not in self-defence. But you do have the

1 burden to put at least put the -- put enough evidence on to bring the  
2 matter to the attention of the Panel; is that correct?

3 MR. MISETIC: That is correct and that is --

4 PRESIDING JUDGE SMITH: No argument?

5 MR. MISETIC: Yes, we intend to do that, and I think it's  
6 related to the question of the Serbian offensives and the Serbian  
7 crimes that we discussed earlier. That's part of why we're raising  
8 it, in addition to, this is a whole other part, the issue of  
9 effective control.

10 PRESIDING JUDGE SMITH: Carefully about that.

11 MR. MISETIC: As we've said in the past --

12 PRESIDING JUDGE SMITH: We don't want the case to become one of  
13 a prosecution of Serbian crimes. We do not want that to happen here.

14 MR. MISETIC: We're defence lawyers, so we're not prosecuting  
15 anybody.

16 PRESIDING JUDGE SMITH: Okay.

17 MR. MISETIC: I will say that, you know, if you look at the Oric  
18 trial and appeal judgments, you will see the relevance of the -- in  
19 that context, the Serbian siege of Srebrenica and its effect on  
20 effective control. And we think that there are many parallels, and  
21 we will actually ask you to draw the parallels in closing argument,  
22 and why the context of the Serbian offensives and crimes is relevant  
23 to these issues.

24 PRESIDING JUDGE SMITH: Coming to what I would call the  
25 substantive elements of the defence of self-defence, do we agree that

1 the -- according to Kordic, which you cited, that it must be shown  
2 that the accused acted reasonably to defend himself or others in this  
3 case; is that correct? There's a reasonableness issue.

4 MR. MISETIC: Yes, I don't think you can act unreasonably in  
5 self-defence. So, yes.

6 PRESIDING JUDGE SMITH: The threat has to be imminent and  
7 unlawful.

8 MR. MISETIC: Yes.

9 PRESIDING JUDGE SMITH: Proportionate to the degree of danger.

10 MR. MISETIC: Yes.

11 PRESIDING JUDGE SMITH: In effect, you're -- am I wrong, in  
12 effect, you're pleading self-defence by proxy? That somebody else  
13 did the act and that was the self-defence, and it's imputed to your  
14 client; is that correct?

15 MR. MISETIC: I'm not sure if that's quite the case. But, yes,  
16 and to the extent that -- and, again, I'm going to use the example of  
17 the detentions. So were detentions reasonable? Was awareness that  
18 detentions had taken place reasonable? Right? Was it proportionate?

19 PRESIDING JUDGE SMITH: Proportionate.

20 MR. MISETIC: Was it in response to direct harm? Let's take  
21 those one by one.

22 If Mr. Thaci is aware that commanders are detaining people who  
23 are war criminals, and I say that -- and you'll hear evidence on this  
24 later, I'm just going to tease you with that for now. If they detain  
25 someone on the Serbian side who's a war criminal, a combatant on the

1 other side, is it reasonable to do so? Is it proportionate to do so?  
2 We would say yes.

3 So in that sense we're not saying any action by the person who  
4 did the detaining is covered by self-defence if -- in addition to  
5 other bases that we will argue, but that is one of them, is that it's  
6 allowed under Serbian law, Article 9, you can detain the person. And  
7 it's allowed, and we will argue, under international law additional  
8 bases to -- to detain people in those circumstances.

9 PRESIDING JUDGE SMITH: I appreciate the quote from Kordic.  
10 Unfortunately, you left the last sentence off of that particular  
11 paragraph that reads:

12 "The Trial Chamber, however, would emphasise that military  
13 operations in self-defence do not provide a justification for serious  
14 violations of international humanitarian law."

15 MR. MISETIC: I didn't leave it out. That's what I was  
16 addressing earlier. So whether it's a serious violation of  
17 international humanitarian law is the ultimate question.

18 PRESIDING JUDGE SMITH: Is the question.

19 MR. MISETIC: Right. So --

20 PRESIDING JUDGE SMITH: And you've sufficiently told me how  
21 complicated that question is.

22 MR. MISETIC: Right. So my point is, is the detention a serious  
23 violation of international humanitarian law or not?

24 PRESIDING JUDGE SMITH: Okay.

25 MR. MISETIC: Right.



1           PRESIDING JUDGE SMITH: Thank you very much, Mr. Misetic.

2           MR. MISETIC: Thank you.

3           PRESIDING JUDGE SMITH: I will certainly allow the Defence to  
4 respond.

5           Mr. Emmerson, anything?

6           MR. EMMERSON: There's no doubt that the coming into existence  
7 of the Kosovo Liberation Army over 1998 and 1999 as a collective of  
8 people fighting was in the broadest factual sense in order to defend  
9 themselves and their fellow countrymen against the Serbian onslaught.  
10 So that much is a key part of the context without any doubt at all.

11           We entirely endorse much of what Mr. Misetic has said about  
12 detention. It is our case, putting it perhaps a little more simply,  
13 that we will argue that it is not a violation of humanitarian law or  
14 a crime triable in this jurisdiction for a non-state armed group to  
15 detain somebody, for example, who was an enemy combatant, who was a  
16 civilian directly participating in hostilities, or who is - and this  
17 is one of the very difficult questions of degree you may have to  
18 consider - who is either a civilian DPH in that sense or a suspected  
19 collaborator who may be passing targeting information to your enemy.

20           Those factors, we say, are not crimes recognised under  
21 international law. And in a sense, the end result is the same  
22 because we haven't specifically joined the self-defence invocation as  
23 a matter of law because of some of the complexities that you have  
24 raised; namely, nobody would be suggesting that ill-treatment  
25 amounting to a crime triable under the jurisdiction of this Court

1 could be answered with a plea of self-defence either by the  
2 individual or, therefore, by Prosecution reasoning, on a collective  
3 basis by those who are said to be the joint criminal enterprise and  
4 authorised it.

5 So we would put the matter much, much more simply. Of course  
6 the KLA was a self-defensive organisation. That much is clear. To  
7 the extent that the Prosecution identifies the purposes of the JCE to  
8 be securing control over Kosovo territory against the Serbian  
9 attack - and there is language in the JCE description which may  
10 suggest that - then that obviously would not be a criminal intent.  
11 And I don't think, when pushed to it, the Prosecution would say it  
12 was a criminal intent. The allegation is that it was an intent to do  
13 that by unlawful -- certain unlawful means. So the focus is simply  
14 on the unlawful means.

15 And all we would say, putting it simply and, I think, coming to  
16 much the same position, is for a non-state armed group in a defensive  
17 posture against a very significant attack, it cannot, either as a  
18 matter law or as a matter of fact, be a crime for them to arrest and  
19 detain either enemy combatants or civilians directly participating in  
20 hostilities or intelligence agents, if you like, collaborators with  
21 the Serbian authorities.

22 But the reason we haven't pleaded this as a self-defence is  
23 because my client's case is very, very clear, and I think it's the  
24 case in common with the other accused, which is that our submission  
25 is that there was no such agreement that -- or, indeed, control or

1 direction from a top-down direction. If people did it, then we would  
2 say that cannot be categorised as a crime. And where they're shown  
3 to have done, we say it cannot be categorised as a crime.

4 But from as -- our best reading of the Prosecution's attempt to  
5 fix, for example, my client with criminal liability is to say, well,  
6 look, there were these things happening in different places. Yes, he  
7 wasn't involved in them and we can't connect him to them, but there  
8 are so many of them or they happened at such a time that there must  
9 have been a plan.

10 Well, we deny there was any such plan to which Mr. Veseli was a  
11 party. It wasn't his function as we will show. He had nothing  
12 whatsoever to do with that side of matters. But you will still need  
13 to go through the process of deciding whether a conglomeration of  
14 acts around Kosovo over a two-year period were criminal acts or not  
15 before you can draw any inference about them contributing as a  
16 fundamental factual basis as bricks in the wall for the Prosecution's  
17 attempt to show the existence of a joint criminal enterprise.

18 I hope that's just a rather different way of putting the same  
19 outcome.

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

21 Mr. Roberts, anything to add?

22 MR. ROBERTS: Very little, Your Honour. We, obviously,  
23 subscribe to both what Mr. Emmerson and Mr. Misetic already stated.  
24 It's always a pleasure to listen to Mr. Misetic. I always feel more  
25 intelligent by osmosis.

1 I would merely make one point. I think we subscribe more almost  
2 to the position that it is for the Prosecution to prove the  
3 illegality of the arbitrariness of the detention. And so in terms of  
4 the burden falling on us, that's where we may be slightly different.  
5 It's a complicated area of law. I think just listening to  
6 Mr. Misetic and Your Honour, we can understand that, and this is  
7 something that will require detailed argument at some point over the  
8 course of trial.

9 The one issue that may arise is the impact of Mr. Thaci's notice  
10 on the other accused. And that is a question that I don't know the  
11 answer to, so it's always slightly dangerous to raise, but my  
12 understanding is that if proven, and if that fact -- if the elements  
13 are proven in relation to Mr. Thaci and the facts are applicable to  
14 us, we would also benefit from the same. Again, I'm not entirely  
15 sure on that answer, but my understanding would be that that would be  
16 the same. But it's just something to raise in the context of that  
17 submission. Thank you.

18 PRESIDING JUDGE SMITH: Thank you, Mr. Roberts.

19 Mr. Ellis.

20 MR. ELLIS: Your Honour, again, I've got very little to add to  
21 what's gone before.

22 Simply to say, firstly, that although Mr. Emmerson and  
23 Mr. Misetic put the legal basis differently, we would see that the  
24 same factual material would likely be relevant on either analysis,  
25 and so we would oppose any restriction of introducing the facts that

1 could support either position.

2 And, secondly, I do agree with Mr. Roberts that one difference  
3 between the two positions may be in where the burden of proof lies.  
4 We would subscribe to Mr. Emmerson's description and say the burden  
5 remains on the Prosecution.

6 PRESIDING JUDGE SMITH: Thank you, Mr. Ellis.

7 Before we get to you, Mr. Halling, Judge Mettraux had a  
8 question, I think, for the Defence, and then we'll come back to you.

9 JUDGE METTRAUX: Well, unlike Mr. Roberts, I feel less  
10 intelligent after I've listened to you, Mr. Misetic, so I need to ask  
11 for a clarification on the way you articulate what you call the  
12 defence of self-defence.

13 Just to summarise my understanding of the issue, at least, on  
14 this is the Prosecution is alleging an unlawful and arbitrary sort of  
15 detention, including, as you said, for reasons of absence of due  
16 process of law. My understanding is that as an element or as a  
17 demonstration of that -- of the *actus reus* of that defence, the  
18 Prosecution will be required to show that there was, in fact, no  
19 legal basis for it. And if they were to succeed in demonstrating  
20 that, my understanding is that that's where potentially your defence  
21 of self-defence would become relevant in showing that something  
22 otherwise unlawful is rendered lawful by the existence of such a  
23 defence, assuming it applies, of course.

24 I'm a bit confused, I have to say, in listening to your  
25 submission on that point, that you seem to suggest that the defence

1     itself is the one that provides the basis for detention in the first  
2     place. Is that the way you present it to us?

3           MR. MISETIC: No. Sorry, I inarticulately, obviously, tried to  
4     explain that we agree with you and your proposition there that they  
5     have to prove the absence of legality. But procedurally here, we had  
6     a deadline that if we were going to raise self-defence, we had to  
7     make that filing in February, which we did. But by no means should  
8     you take anything I said here as exclusive of other issues that arise  
9     in this context, both in terms of what the Prosecution has to prove  
10    and us in terms of other arguments we're going to raise as to why it  
11    was legal.

12           But as strictly a matter of procedure in giving the Prosecution  
13    notice required under the rule of our intent to raise the issue, we  
14    provided the notice, and then things went off the rails a little when  
15    there was a filing challenging our notice, and now we're going into  
16    the back and forth of this issue. But these submissions are made  
17    exclusively as a result of our procedural obligations.

18           JUDGE METTRAUX: I'm not blaming you at all, Mr. Misetic, for  
19    the notice. Quite the contrary. It's most welcome, I think, in  
20    terms of putting everyone on notice of its existence. Where I'm a  
21    bit confused is in the suggestion, if I understand it properly, that  
22    self-defence as a defence would, in effect, operate, if I understand  
23    your submission correctly, as a legal basis authorising detention.  
24    Is that the way we have to understand your approach to this issue?

25           In other words, anyone claiming self-defence can raise the

1 so-called defence of self-defence as a basis for the purpose of  
2 detention? Is that the way you articulate it?

3 MR. MISETIC: Anyone claiming -- I'm a little reluctant because  
4 I fear that we're not understanding each other. But let me phrase it  
5 this way: One of the things that we are raising is, if you look at  
6 it from the perspective of the applicable domestic law at the time,  
7 when could someone in the position of the KLA under Serbian law have  
8 legally detained a Serbian police officer or army member?

9 JUDGE METTRAUX: But that part, Mr. Misetiç, I understand.  
10 That's part, as I said, of what I understand to be the burden of the  
11 Prosecution. What I don't understand is how in this context the  
12 defence of self-defence is helping you.

13 Are you saying that it would provide a legal basis in case there  
14 would be no other that is applicable? My understanding of the  
15 defence of self-defence is it only becomes relevant if and when a  
16 crime has been established; right?

17 MR. MISETIC: I would say no.

18 JUDGE METTRAUX: Now, what I understand you to say --

19 MR. MISETIC: I would say no. And this is why I was hoping to  
20 put a slide up so that you could read Article 9 of the Yugoslav  
21 criminal code for yourself. But the Yugoslav criminal code says if  
22 acting in self-defence, there is no crime. Right? So if you read  
23 Article 9 of the SFRY 1976 criminal code, it says, subsection (1):

24 "An act committed in necessary defence is not considered a  
25 criminal act."

1           So I wouldn't agree with you, then, that it only applies if the  
2 crime has been established. It's that the crime isn't established if  
3 self-defence is established.

4           JUDGE METTRAUX: Now I understand your position.

5           Very briefly, the second thing that I want to ask you is your  
6 reliance on the Oric case. And I've had briefly the time to look at  
7 it. The findings of the Trial Chamber in that case appear to be that  
8 there was a failure on the part of the Prosecution to demonstrate  
9 effective control by Mr. Oric in relation to the military police as a  
10 result of two considerations. One is what they called the chaotic  
11 circumstances at the beginning of the conflict around Srebrenica.  
12 The other one is, I think, the erratic behaviour of Mr. Halilovic,  
13 Mirzet, the head of the military police.

14           I saw no sign of Serbian crime in relation to the considerations  
15 that the trial chamber in that case took into consideration to come  
16 to that view. Is there another paragraph that you seek to rely upon?

17           MR. MISETIC: I don't think I said Serbian crimes with respect  
18 to Oric, but I did say the siege of Srebrenica. And I don't have the  
19 paragraph numbers in front me, but I believe that the Oric trial  
20 judgment has a whole section that discusses the siege of Srebrenica  
21 as a factual matter.

22           So in my submissions I said the offensives, the Serbian  
23 offensives, particularly in the summer of 1998 and in March 1999, are  
24 going to be relevant, as they were relevant in Oric. And we also  
25 believe that the crimes are relevant, both in terms of establishing



1 the elements of self-defence, right, an impending harm that's  
2 threatened, right, and in terms of effective control.

3 And because we believe the criminality, the expulsion of the  
4 Albanian population both in the summer of 1998 and more massively in  
5 March 1999 also had a direct impact on the effective control that the  
6 General Staff could issue -- could have, I mean.

7 JUDGE METTRAUX: Thank you.

8 PRESIDING JUDGE SMITH: Thank you, Mr. Misetic.

9 Now, Mr. Halling -- oh, I'm sorry. One more question.

10 JUDGE GAYNOR: I have a couple more questions for Mr. Misetic,  
11 and that concerns your submissions about the duty of the KLA as a  
12 non-state actor to provide due process of law. And specifically in  
13 respect of your submissions about the duty of a non-state actor to  
14 establish courts of law.

15 Now, is it your position that the KLA was or was not under  
16 international law obliged to establish courts of law?

17 And my second question is: Is any failure by the KLA to  
18 establish due process of law excused as a matter of law because they  
19 didn't have the power to do so, whether under Serbian or  
20 international law, or is it excused as a matter of material inability  
21 to do so due to the chaos of the conflict?

22 So I can go through the two questions again if you wish me to,  
23 but the first question is simply this: Do you accept that the KLA,  
24 as a non-state actor, was required under international law to  
25 establish courts?

1 MR. MISETIC: I don't think they were required to establish  
2 courts because I don't think they had the legal authority at the time  
3 to establish courts established by law.

4 JUDGE GAYNOR: Under Serbian FRY law or international law?

5 MR. MISETIC: Well, I don't know. I would have -- to be honest  
6 with you, I'd have to look into international law and the duty to  
7 establish courts under international law. Obviously, under domestic  
8 law, they didn't have the authority to establish courts established  
9 by law under Serbian law at the time.

10 JUDGE GAYNOR: And my second question goes to the failure to  
11 provide proper due process, and you've relied a lot on the  
12 circumstances prevailing in Srebrenica at the time when Oric was  
13 active. Are you arguing that any failure by the KLA to provide due  
14 process or to establish courts is excused due to the material  
15 inability to do so which came about as a result of facing a  
16 militarily superior opponent and the chaos prevailing at that time in  
17 Kosovo?

18 MR. EMMERSON: [Microphone not activated] ... interpolate at this  
19 point before Mr. Miseti seeks to answer that question.

20 The entire issue of the duty of a non-state actor to establish,  
21 potentially, due process and courts is a matter on which there is  
22 very, very considerable discussion, learning and doubt. And we would  
23 respectfully submit that rather than have these matters which are  
24 important and difficult debated at this stage at a Status Conference,  
25 they be the subject of more detailed consideration in a written form.

1 People watching this may see Mr. Miseti answer on the hoof on  
2 an issue they may take to be a Defence position. This is a very,  
3 very important question, and I think we will need to have it properly  
4 briefed, if I may respectfully say so, Judge Gaynor.

5 JUDGE GAYNOR: Mr. Miseti, I would invite you to respond if you  
6 wish to do so.

7 MR. MISETIC: Yes, I do agree with Mr. Emmerson that I think the  
8 question now would better properly be briefed, because the way you've  
9 asked the question is any failure, which I think we need to go step  
10 -- you know, case by case and see exactly what types of failures of  
11 due process we're talking about.

12 I was trying to suggest earlier in my submissions that the issue  
13 is for the Prosecution, not for us, to tell us their case first;  
14 right? So I think we've really put the cart before the horse at this  
15 point to say you haven't compelled them one time -- not you,  
16 specifically, but, I mean, they haven't been compelled one time to  
17 state their position on this. Right? Does the KLA have the power to  
18 detain in any circumstance, yes or no? If so, on what legal basis  
19 could they detain? What types of due process does the Prosecution  
20 say the KLA had to provide?

21 Once they're on the record with their position, then I think it  
22 would be proper for the Defence to respond to whatever their case is.  
23 Right? But all we're trying to do here is just explain why we gave a  
24 notice of intent to invoke self-defence. Right? I do agree with  
25 Mr. Emmerson that it is an extremely complicated issue. There's a

1 lot of writing about non-state actors establishing courts, et cetera.  
2 I don't think the case is actually -- Mr. Emmerson might correct me  
3 if I'm wrong. I don't think we have a legal judgment in a case  
4 that's decided the question, though. There is a lot of scholarly  
5 writing on it. But whether a non-state actor in a non-international  
6 armed conflict has a duty to establish ad hoc courts is a question  
7 that you'll have to address.

8 In terms of the due process, one -- again, one of the questions  
9 we're asking the Prosecution to take the position is: Can the KLA  
10 establish -- or was the KLA required to establish courts established  
11 by law for purposes of Article 14, ICCPR, and Article 6, ECHR, could  
12 they do it, and if so, how could they do it? And is the failure to  
13 do it then something that was a violation?

14 JUDGE GAYNOR: Thank you, Mr. Misetic.

15 Thank you, Judge Smith.

16 PRESIDING JUDGE SMITH: [Microphone not activated]

17 MR. HALLING: Thank you, Your Honour. I know we're getting to  
18 the 11.00 break soon. I'll be brief.

19 This is a manufactured complicated issue. This isn't  
20 self-defence, what's being described. If detention is not arbitrary,  
21 that would be a failure to meet the elements of the offence. It  
22 would not be a ground for excluding criminal responsibility. And  
23 whether or not the detention was arbitrary or not is completely  
24 independent from any allegations about Serbian crimes, because that's  
25 really what this issue is about.

1           No matter how chaotic the war is, you can't torture people, you  
2           can't kill people, there seems to be agreement, but you can't  
3           arbitrarily detain them either.

4           The Trial Panel has set out clear limits on leading evidence of  
5           alleged Serbian crimes in this trial. The Defence cannot raise a  
6           frivolous ground of excluding criminal responsibility as a vehicle to  
7           circumvent those limits. Thank you.

8           PRESIDING JUDGE SMITH: We will take a break for a half-hour.  
9           We'll just call it 40 minutes. We'll be back here at 11 -- oh, I'm  
10          sorry, Mr. Emmerson. Something?

11          MR. EMMERSON: Just before Your Honours do take a break, and  
12          given that the break might provide an opportunity to reflect on this  
13          matter. What has become clear in this conversation -- I'm not  
14          addressing the self-defence issue but the questions of arbitrary  
15          detention that arise from that.

16          Now, I'm, with great respect, inclined to agree with the simple  
17          formulation put by the SPO, that it is their obligation to prove  
18          arbitrary detention. But the word "arbitrariness" is one of the most  
19          difficult words, especially when it comes to detention, in  
20          international law to define.

21          So, for example, whilst human rights law continues to apply  
22          during an armed conflict, as we know, the two systems of law map over  
23          one another and seek to avoid conflict. So when deciding whether a  
24          death is an arbitrary killing, under Article 2 of the European human  
25          rights convention, the reference is to humanitarian law. Any killing

1 in a war or during a conflict which is in violation of humanitarian  
2 law is arbitrary, which, of course, in a situation where humanitarian  
3 law doesn't give you the meaning or the answer is a circular  
4 situation. And we are in that situation as regards detention by a  
5 non-state armed group.

6 So the Prosecution is not incorrect to say arbitrary detention  
7 is like torture or killing of a person detained unlawful. The  
8 question is: How do you define arbitrary? And that is a really  
9 significant issue to have clarified before we set down -- at least to  
10 know what the Prosecution says. "Arbitrary" is almost a meaningless  
11 word. It means -- there is no definition that will help you with  
12 what "arbitrary" means. You're going to have to answer the question  
13 by reference to principles of humanitarian law.

14 And my suggestion would be for the Bench to consider ordering an  
15 exchange -- at least ordering the Prosecution to define what it is  
16 they say are the limits of a non-state actor's ability to detain  
17 before it becomes arbitrary.

18 And, obviously, we can talk about due process but that's after  
19 the event. There's a separate set of questions which need to be  
20 asked and answered as well. Because it may be, let us say, that the  
21 Bench is persuaded that you can't detain somebody unless you've got a  
22 court system and an independent judge to release them if the  
23 reasonable suspicion of their involvement is not met. Well, we may  
24 not need to have a trial on that, then, because there weren't any  
25 court systems in operation.

1           So, with the greatest respect, it would help everybody,  
2 including the SPO, and certainly the Bench, and immeasurably help the  
3 Defence, if we didn't start this trial not knowing what the target is  
4 that is going to emerge at the end of it, which must mean the onus is  
5 on the Prosecution now to spell out in very clear terms what it means  
6 by "arbitrary."

7           MR. MISETIC: I'm sorry to take more time, but --

8           PRESIDING JUDGE SMITH: Go ahead.

9           MR. MISETIC: -- I just want to join Mr. Emmerson and say, you  
10 know, regrettably, and let me just say for the record, we're not  
11 manufacturing anything. Every argument we've made here is made to  
12 you in good faith because we think that there are serious legal  
13 issues here that need to be addressed.

14           We talked all morning about streamlining the proceedings,  
15 cutting back time, getting to the heart of what it is that's in  
16 dispute between the parties. It really would help us to know what  
17 are we arguing about in terms of what is arbitrary, what does the SPO  
18 think is arbitrary, so that perhaps we don't need to lead a lot of  
19 evidence on a lot of the issues we discussed today if they, for  
20 example, concede that the KLA had the power to detain. What  
21 constitutes due process in -- if you have the right to detain? What  
22 is it specifically that didn't comply with due process? You know,  
23 were courts required, et cetera?

24           I mean, maybe we can have *inter partes* discussions on this  
25 point. I'd be happy to do it. But the more that we can narrow these

1 issues, the more we can avoid taking up a lot of courtroom time  
2 exploring things that ultimately, in the end, might not be in  
3 dispute. Thank you.

4 MR. EMMERSON: I do apologise, but may I just respectfully add  
5 that the discussion that's gone on this morning, those who find the  
6 conversation makes them feel less or more intelligent, the difficulty  
7 of those discussions illustrates exactly the point that I'm making.  
8 The Veseli team comes to the same end result via a completely  
9 different route, which is the product of the fact that nobody in this  
10 courtroom knows what the target is, what has to be met, what  
11 arbitrary means, what are the rules of the game as far as that is  
12 concerned.

13 And the onus, I think, has to be a written pleading at least on  
14 what the -- supplementary to the pre-trial brief, at least on what  
15 the various sides agree and disagree, and that must begin with the  
16 Prosecution. Because if we start this trial not -- as Your Honour  
17 has said, most of the charges on the indictment have gone through the  
18 gateway of a detention. We're going to spend potentially six years  
19 deciding -- listening to all of that evidence about detention without  
20 knowing whether it's agreed that a detention is not unlawful  
21 providing there was a reasonable ground for it, and so on.

22 So I think we have to tackle that very, very quickly before the  
23 trial begins.

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

25 Anybody else?



1 MR. HALLING: Nothing further, Your Honour.

2 PRESIDING JUDGE SMITH: Okay. All right.

3 We will take a break. Please be back at 11.30.

4 --- Recess taken at 11.01 a.m.

5 --- On resuming at 11.30 a.m.

6 [The Accused Veseli not present]

7 MR. EMMERSON: Your Honours, may I just raise one question on --

8 PRESIDING JUDGE SMITH: Just a second. Go ahead.

9 MR. EMMERSON: May I just briefly raise a question on the  
10 translation of the transcript of this morning's proceedings.

11 You'll recall that I challenged the SPO's assertion that  
12 Mr. Veseli was a member of the General Staff throughout the  
13 indictment period, and I pointed out that, in fact, he left the  
14 General Staff in the spring of 1999 on the establishment of the fresh  
15 arrangements for the government of Kosovo, future government of  
16 Kosovo.

17 Apparently, although it appears correctly recorded on the  
18 English version of the transcript as me saying that he was not a  
19 member of the General Staff at any time after the spring period, it  
20 has appeared in the translation, so I'm assuming it was perhaps the  
21 translator misheard me, as he only became a member of the  
22 General Staff at that time. So it's the other way around from the  
23 translated to transcript.

24 PRESIDING JUDGE SMITH: All right. The record will reflect that  
25 statement. The record should also reflect the fact that Mr. Veseli,

1 for good reason, has left the Zoom and had filed a waiver as he's  
2 supposed to do, so there's no problem with that.

3 MR. EMMERSON: None at all.

4 PRESIDING JUDGE SMITH: I have one question, Mr. Halling, for  
5 you that is related to what we were just discussing. This is not a  
6 general discussion matter. It's just a question for you.

7 I want to know if it's the SPO's position that there is a valid  
8 legal basis under international law to detain in the circumstances of  
9 the dispute we are hearing?

10 MR. HALLING: I think that my answer to that question is yes,  
11 but just to clarify how I understood it.

12 We do not ascribe to the absolutist view that Mr. Miletic was  
13 discussing and that no KLA detention could ever be lawful under any  
14 circumstance. We do, however, believe that, in accordance with  
15 international humanitarian law, the arbitrary detentions charged are  
16 in fact unlawful.

17 We have, on this point, if it is of assistance, fully ascribed  
18 to the applicable law and the elements of arbitrary detention set out  
19 in the Confirmation Decision with no adjustments.

20 And as to the question of the Defence not having any awareness  
21 of our position, we put every single one of those legal propositions  
22 to the Defence in a proposal for agreements of law last month and  
23 they did not accept any of them. But that is our position on this  
24 point.

25 PRESIDING JUDGE SMITH: Once again, valid legal basis to detain.

1 I'm not saying arbitrary. Just to detain.

2 MR. HALLING: Yes, there can be a valid legal basis to detain.

3 PRESIDING JUDGE SMITH: Okay. Hopefully that helps frame the  
4 question a little better.

5 JUDGE BARTHE: Mr. Halling, I was just wondering which or what  
6 legal basis would you say would entitle or would grant a non-state  
7 actor the right to detain people?

8 MR. HALLING: It may be better to answer the question in the  
9 inverse, because this is how it's done in the Confirmation Decision.

10 This is from paragraph 94:

11 "The deprivation of liberty is without legal basis when it is  
12 justified neither by criminal proceedings nor by reasonable grounds  
13 to believe that security concerns make it absolutely necessary."

14 The next paragraph specifies what some of those basic security  
15 safeguards are.

16 So as you can see, there is room under international  
17 humanitarian law, as reflected in the Confirmation Decision, for  
18 there to be a valid legal basis. The citations at paragraph 94 are  
19 relevant on this point, and there's ICTY, Kordic is mentioned, also  
20 the ECCC. But this is our understanding of the legal elements of the  
21 offence and when it would be justified.

22 JUDGE BARTHE: Thank you.

23 PRESIDING JUDGE SMITH: So we will move on then to the last few  
24 items that we are dealing with.

25 Let's turn to the calendar for the case. I just want to review

1 some of that just to make absolutely sure we're all on the same page.  
2 We do -- as you all know, we intend to open the case on April 3rd at  
3 9.00 a.m. The parties and participants are expected to keep to their  
4 allocated time for opening statements.

5 In respect of the Defence, any statements by the accused should  
6 also be within that same allocated time.

7 And as a reminder, all parties and participants, the schedule  
8 for the opening statements is April 3rd, in all probability, and into  
9 April 4th, the opening statements by SPO, which is five hours.

10 On 4 April at 9.00 a.m., opening statement by either -- the  
11 remainder of the time allocated to the SPO or Victims' Counsel, who  
12 has estimated 45 minutes.

13 Then the opening statement by the Defence in the following  
14 order: The Thaci Defence is three hours maximum; the Veseli Defence,  
15 45 minutes maximum. On April 5th at 9.00 a.m., the Selimi Defence  
16 one hour maximum; followed by the Krasniqi Defence, at 1.5 hours;  
17 and, finally, we might have questions by the Panel.

18 I will ask everyone to be flexible, to be ready to go when you  
19 are the next in line in case somebody finishes early.

20 We would also like to note the following: Counsel are cautioned  
21 to focus exclusively on matters relevant to the charges and to avoid  
22 irrelevant matters or statements of a political nature.

23 The Panel is hoping for clarity regarding the parties'  
24 respective cases and expects you to address those issues that are the  
25 core of your respective cases and try to avoid as much as you can

1 repeating what we already know from reading your pre-trial briefs.  
2 We ask you not to interrupt the opening of the other parties or  
3 participants.

4 Any comments by anybody?

5 I'll start with Mr. Halling. Anything?

6 MR. HALLING: Nothing, Your Honour.

7 MR. KEHOE: [Microphone not activated]

8 PRESIDING JUDGE SMITH: Anything?

9 MR. ROBERTS: Nothing, Your Honour.

10 PRESIDING JUDGE SMITH: All right.

11 I do want to stress that it would be extremely helpful to the  
12 interpreters and guarantee an exact and appropriate translation of  
13 your statements to get a copy of your statements to them ahead of  
14 time, and you can go through CMU for that purpose.

15 We ask you for -- if there were any other items that you wanted  
16 to bring up before our trial, which is now coming up quickly. And I  
17 believe the only people that -- just the Thaci Defence and the Selimi  
18 Defence supplied some items.

19 Do you wish to be heard on these? I don't see any kind of a  
20 formal motion filed on anything.

21 MR. KEHOE: I can certainly do that, Judge. I tried to involve  
22 myself into *inter partes* discussions on that. I thought that this  
23 would be an easy way to short-circuit the situation, just to bring it  
24 to the Court's attention, that we are looking to get benefits to  
25 witnesses who have been transferred to third countries. That would

1 incorporate payments, benefits, assistance to the witness and others,  
2 and this involves two witnesses out of the first 12 and then the  
3 third witness. It goes to -- of course, the case law is pretty  
4 clear. It goes to the credibility of those witnesses. And in the  
5 system that you and I are used to, Judge, it's the Giglio material.  
6 I mean it's any incentives that a witness has that could go to his or  
7 her credibility.

8 PRESIDING JUDGE SMITH: I see that. I see what you've stated.  
9 And I'm suggesting that you file -- if you wish to have something  
10 definitive, that you file a written motion --

11 MR. KEHOE: Yes, yes, Your Honour.

12 PRESIDING JUDGE SMITH: -- and we will answer it in short order.  
13 I will say on the -- do you have anything else?

14 MR. KEHOE: Yes, Your Honour. No, no, just on that. That's  
15 fine, Judge.

16 PRESIDING JUDGE SMITH: As far as the Selimi Defence, I will say  
17 that the courtroom seating is going to remain as it is. I understand  
18 you've brought this up before. Security is a very important issue  
19 for us, and we are advised that this is a secure method of handling  
20 the situation. If you need to have a moment to go talk with your  
21 client, you certainly will be granted that. And that's been our  
22 practice. You also are granted some time, which we've tried to  
23 enhance, during the day for conversations with your client during  
24 breaks.

25 Do you have another -- anything else?

1 MR. ROBERTS: No, Your Honour. If that's the Court's decision  
2 on that, we understand and appreciate that time. We'll obviously try  
3 and focus any discussions --

4 PRESIDING JUDGE SMITH: I understand and realise that it can be  
5 a difficulty. We don't want it to interfere with your communication  
6 with your client, but we are going to keep it.

7 MR. ROBERTS: Thank you, Your Honour. Understood.

8 Just on the second issue, then, very briefly, was the deadline  
9 to respond to Filing F1374. That's the second motion in relation to  
10 Rule 154. I don't blame the Prosecution for once, which is always a  
11 nice thing to say, in the sense that there was a decision issued  
12 after they initially filed which required them, I believe, to provide  
13 some more information in relation to the relevant paragraphs of the  
14 pre-trial brief to which each of the statements of these witnesses  
15 applied or related to.

16 So we would, and I would, I'm sure -- I'm sure the Prosecution  
17 are willing to do so anyway, request that they refile the motion with  
18 that updated information to allow us to make necessary and focused  
19 submissions in response. And also given the number of competing  
20 obligations, the beginning of trial, and the fact that, as you  
21 mentioned earlier, Your Honour, we are not expecting for these  
22 witnesses to come for several months, that we be granted an extension  
23 of time to respond, so that we would request that they refile or  
24 provide supplementary information in relation to the relevance of  
25 those paragraphs, and then we would have 21 days rather than the

1 standard 10 days to respond to that request.

2 PRESIDING JUDGE SMITH: Mr. Halling, any objection to that  
3 process?

4 MR. HALLING: We would object to having to refile the motion.  
5 That wasn't an order to us in Your Honours' decision. If that is an  
6 order, we just ask that we be told by which deadline you would like  
7 that. But there's no such deadline to that point.

8 In terms of a response for -- instead of it being 10 days, being  
9 21, we would consider that to be a reasonable request and we don't  
10 object.

11 PRESIDING JUDGE SMITH: But we would like you to refile, just to  
12 be clear. And 21 days will be granted. All right?

13 MR. HALLING: Does Your Honour have a deadline by which you  
14 would like this done?

15 PRESIDING JUDGE SMITH: Can you give me what you would consider  
16 reasonable for you in this case, because we -- given the fact that,  
17 as Mr. Roberts has pointed out, it's not an immediate problem.

18 MR. HALLING: I mean, just to be conservative, Friday?

19 PRESIDING JUDGE SMITH: That's fine.

20 MR. HALLING: Thank you.

21 PRESIDING JUDGE SMITH: No problem.

22 Yes, Mr. Ellis.

23 MR. ELLIS: Your Honour, I apologise. In relation to the  
24 courtroom-seating issue, I do have two specific concerns. One of  
25 them is simply that Mr. Krasniqi is an Albanian speaker. He doesn't



1 converse in English. And so in order to communicate with him, we  
2 would request to have an Albanian-speaking team member seated near to  
3 him. It's not as simple for us as it is for the others for me simply  
4 to turn my back for a moment to go and speak to him elsewhere in the  
5 room. I can't communicate in that way without having assistance.

6 And that does really feed into the overarching point, which is  
7 that there are -- try as we might to raise things in advance with our  
8 client, there are inevitably things that come up in the course of  
9 hearings on which instructions are needed and often needed in the  
10 moment rather than waiting for the adjournment.

11 It is going to cause some disruption if counsel and an Albanian  
12 speaker to assist are turning their back and moving a couple of rows  
13 backwards every time we need to ask a simple point to our client. I  
14 hope there isn't a security concern about counsel speaking to their  
15 clients.

16 PRESIDING JUDGE SMITH: There's no restriction on that. We will  
17 grant leave whenever it's reasonable to do so. You merely need to  
18 bring it to our attention that you need to talk to your client.

19 MR. ELLIS: But, Your Honour, ordinarily, and I'm grateful for  
20 the indication, but ordinarily one would simply be able to lean  
21 across and --

22 PRESIDING JUDGE SMITH: I understand.

23 MR. ELLIS: -- do that.

24 PRESIDING JUDGE SMITH: Ordinarily that would be the way I would  
25 see it too, but it isn't going to work in this particular

1 configuration. You're going to have to go back and talk to him. And  
2 I assume you have an Albanian speaker on your team?

3 MR. ELLIS: Yes, we do. Yes.

4 PRESIDING JUDGE SMITH: And that person can move there with you  
5 when needed.

6 MR. ELLIS: And can they be situated near to Mr. Krasniqi so  
7 that if he has a message he wants to pass to us he's able to do it?

8 PRESIDING JUDGE SMITH: I will have to take that up with  
9 security.

10 MR. ELLIS: Thank you, Your Honour.

11 PRESIDING JUDGE SMITH: Go ahead, Mr. Emmerson.

12 MR. EMMERSON: I'm sorry to add an issue that you would have  
13 been expecting to have been added by Friday, but it's one question,  
14 it's brief, that arises out of the ruling on Thursday evening, which  
15 I had an opportunity to consider over the weekend. And I think I'm  
16 obliged to raise it at the earliest possible opportunity under the  
17 rules.

18 So at *[REDACTED] Pursuant to Post-Session Redaction Order F01389*. of  
the decision, the Trial Chamber was  
19 concerned with some notes and a document signed by Mr. Selimi in  
20 relation to *[REDACTED] Pursuant to Post-Session Redaction Order F01389*.  
testimony that *[REDACTED] Pursuant to Post-Session Redaction Order*  
*F01389*. produced which, on its  
21 face, appears to make allegations against co-accused. And I hadn't  
22 raised, and we don't raise, any objection to its being admitted in  
23 the proceedings. And, indeed, we have our submission deadline for 16  
24 April which will be after this witness has testified, or hopefully it  
25 will be after this witness has testified.

1 But it is very important that I put on the record, because I  
2 think the position, as articulated in [REDACTED] Pursuant to Post-  
3 Session Redaction Order F01389., is that the  
4 statement of Mr. Selimi, if that's what it's to be described as, the  
5 note that was signed, is not to be assessed under Rule 154 as such  
6 but to be assessed under the exhibits rule, 138(1).

7 Now, the issue for the co-accused's position is a simple one.  
8 It is whether or not the contents of that statement are -- the  
9 statements are tendered as evidence of the truth of their contents  
10 rather than as evidence of the fact that they were made; and if the  
11 former, whether they can properly be used by the Trial Chamber as  
12 evidence going to the acts and conduct of the accused named in  
13 Mr. Selimi's statement.

14 Now, Rule 138(1), because this is not being treated as a  
15 statement under 154 but an exhibit produced by the witness,  
16 Rule 138(1) is the governing principle:

17 "Unless challenged or *proprio motu* excluded, evidence submitted  
18 to the Panel shall be admitted if it is relevant, authentic, has  
19 probative value and its probative value is not outweighed by its  
20 prejudicial effect."

21 And paragraph 50 of the judgment notes that the Panel is  
22 satisfied that this note was relevant and authentic and it had  
23 probative effect. Plainly, the question remains open whether its  
24 prejudicial effect is outweighed by its probative value, an issue  
25 that hasn't been ruled upon or, indeed, haven't heard from the other  
defendants about.

1           Now, in your ruling, you say the admission of a record or a  
2 statement made by an accused does not, without more, infringe upon  
3 the fundamental rights of his co-defendants. And, again, that  
4 proposition, standing as it does, with the "without more"  
5 qualification, begs -- it is certainly correct, and we don't dispute  
6 it, but it also begs the question: For what purpose? And certainly  
7 as a matter of Anglo-American law, and we are doing some comparative  
8 research, it's well-established that the admission of an out-of-court  
9 statement by a co-accused who then does not go into the witness box  
10 and adopt it is inadmissible against any other accused. That's the  
11 position in Anglo-American jurisprudence.

12           Obviously, we are dealing here with a free appreciation of the  
13 evidence rule. But, nonetheless, when the Court is considering  
14 prejudicial effect against probative value, we're dealing here with  
15 the statement originally compiled by the [REDACTED] Pursuant to In-  
16 Court Redaction Order F01385RED.

16 [REDACTED] Pursuant to In-Court Redaction Order F01385RED. --

17           MR. HALLING: Your Honour, I'm sorry, just before continuing, if  
18 Mr. Emmerson could please make this point in the abstract without  
19 referencing a specific statement or any particulars.

20           MR. EMMERSON: Very well. Very well. Let me make an obvious  
21 point then. The person producing the evidence, the first witness to  
22 be called, was accusing Mr. Selimi of involvement in the  
23 disappearance and gets a response from Mr. Selimi essentially  
24 accusing other people.

25           And so we are going to submit at the appropriate time that

1 unless Mr. Selimi goes into the witness box and adopts that ...

2 [Trial Panel confers]

3 MR. EMMERSON: ... it can't be relied upon as evidence of the  
4 truth of its contents and certainly not as evidence of the acts and  
5 conduct of the accused.

6 The reason I'm raising this -- now, the logical time to raise it  
7 would be, first of all, to note it in our submission of 16 April and  
8 then ultimately can only be addressed and answered at the end of the  
9 trial when the Trial Chamber knows if there's been testimony from  
10 Mr. Selimi supporting the content of that witness statement.

11 But Rule 138(1) goes on, in the second sentence of the  
12 paragraph, to say:

13 "In exceptional circumstances, when the Panel is satisfied that  
14 an issue was not known at the time when the evidence was submitted,  
15 it shall be raised immediately after it has become known."

16 Now that seems to imply a rule that the Defence must raise the  
17 issue as early as possible, and if it is raised after the evidence  
18 has been submitted, not admitted, submitted, then the clock starts to  
19 tick for us to show that we've raised it as soon as reasonably  
20 practical.

21 This isn't an issue about admissibility. Ultimately, it's an  
22 issue about admissibility against whom and for what purpose, which  
23 are different questions. In other words, can it be relied upon for  
24 that purpose. So nobody is suggesting that the record cannot  
25 include -- or I'm not suggesting that the record cannot include that.

1 At the very least, obviously, it's evidence in the case of  
2 Mr. Selimi. But we will be submitting, and I want to put it on the  
3 record as soon as it's become known, so to speak, that that statement  
4 cannot conceivably be relied upon as evidence of the truth of its  
5 contents concerning the acts and conduct of co-accused if there's no  
6 independent testimony from either Mr. Selimi or anybody else  
7 verifying its truth.

8 At the very least, it would then be more prejudicial than it is  
9 probative, so it would require a reconsideration of 138(1) but not to  
10 the extent that it has to come out, but to the extent that it cannot  
11 be used for that purpose.

12 I'm sorry for raising that late.

13 PRESIDING JUDGE SMITH: No. And on that -- on a point as  
14 important as that, I would suggest that you file a short written  
15 submission to that effect so that we can rule on it properly.

16 MR. EMMERSON: Yes. And we were -- as I say, the timetable for  
17 that is 16 April, so I'll file that particular issue in advance of  
18 that and before the witness testifies so that you have it already.

19 PRESIDING JUDGE SMITH: Thank you very much.

20 MR. KEHOE: Just on that issue, Your Honour, it does come up  
21 with the [REDACTED] Pursuant to In-Court Redaction Order F01385RED., but  
22 it comes up with a multitude of witnesses  
23 as we move forward.

24 PRESIDING JUDGE SMITH: Okay. Thank you.

25 MR. HALLING: Just to mention, we consider that Your Honours  
effectively have ruled on this issue by ruling on the admissibility

1 of the associated exhibits in the decision last week.

2 Mr. Emmerson's legal submissions are very interesting, but they  
3 should have been raised at an earlier point in time. This is a  
4 request to reconsider the decision of last week, and we'd object to  
5 reopening the briefing schedule.

6 JUDGE METTRAUX: Well, I think the question is for you,  
7 Mr. Emmerson, but Mr. Halling stole my thunder.

8 The concern that I have is the statement, if you can call it  
9 that, attributed to Mr. Selimi was offered by the Prosecution as an  
10 associated exhibit and, therefore, had to meet the requirement of  
11 138(1) of the rules as we treated it and was treated as such by the  
12 Panel.

13 My question is why didn't you raise these issues at the time?  
14 Because if there was an objection to admission per se or, as you now  
15 say, an issue of admission and/or use in relation to the co-accused,  
16 shouldn't that have been raised there and then? You will find in a  
17 footnote to our decision a number of authorities for the proposition  
18 that the statement, in general terms, of a co-accused can in some  
19 circumstances be used against co-defendants.

20 So my question to you is why didn't we get the benefit of these  
21 submissions at that stage? Because I do have the concern that  
22 Mr. Halling has raised right now, that we are, in effect, in a  
23 situation where we will have rolling objections to documents that  
24 have now made it to the record.

25 MR. EMMERSON: Well, let me explain very shortly how and why

1 that is. We did, in fact, raise it in part -- in brief terms in  
2 relation to that document, but our deadline for submitting our  
3 arguments in relation to specific admitted exhibits, I'm told, is 16  
4 April -- 17 April. So that's the first thing.

5 Secondly, I don't object to its admission into the record. So  
6 it's not an objection that would require the Court to exclude it.  
7 Therefore, it's not too late to make the objection as to how it can  
8 legitimately be used. Clearly it's admissible as against Mr. Selimi,  
9 but it's very well-established that the out-of-court statement of a  
10 co-accused if not attested to obviously is of very little weight.

11 Well, when you're balancing prejudice and probative, the rule  
12 quite specifically says that the Court must make that evaluation. It  
13 you haven't made that evaluation. You --

14 JUDGE METTRAUX: I stop you there. Weight is a separate issue.  
15 And, of course, we will not prevent any of the Defence to make  
16 submissions on these points, which are perfectly legitimate, to  
17 suggest that in the absence of a confrontation, these statements, to  
18 call them that, should be given little weight.

19 The concerns I have, and I repeat it, is why didn't we get the  
20 benefit of these submissions you are now making as regards, what you  
21 say or what I understand you to say, the fact that the statements of  
22 Mr. Selimi should not be used in relation to your client, which is  
23 not the same as giving it weight?

24 MR. EMMERSON: Well, it's not a question of admissibility.  
25 That's the short answer. It's admissible. It's a question of the



1 purpose for which it can be used. It's self-evidently not in breach  
2 of that requirement to notify in advance because it's not a challenge  
3 to admissibility.

4 JUDGE METTRAUX: Well, I would direct you, and I don't want to  
5 start a full discussion on that, but at the precedent of the ICTY  
6 that we've cited, and there's one in the Boskoski case as well, which  
7 was dealt with as an issue of admissibility on that very point.

8 So, again, I'm just indicating to you that if you were to seek  
9 to make these submissions, that there would be an expectation, at  
10 least on my part, that we be explained why these submissions did not  
11 come in the first place when the statements, quote/unquote, were  
12 being offered as associated exhibits. That's all I want to tell you,  
13 Mr. Emmerson.

14 MR. EMMERSON: Very well. Well, we will ensure that that is  
15 done in the 16 April submission, which is the current deadline for us  
16 to deal with this issue. My concern is that by then it will already  
17 be in evidence. So if you don't mind, we will file an early  
18 submission before the witness gives evidence explaining the basis on  
19 which we don't contest admissibility; namely that it can't be used  
20 against the co-accused because its prejudicial weight against the  
21 co-accused would outweigh any probative value given the circumstances  
22 in which it was taken.

23 And that's obviously going to be explored in the  
24 cross-examination of the witness as well, so it would be very  
25 difficult to see how one could fully explore that in advance when

1 it's just being tendered and there's no challenge to admissibility.  
2 So that, in short, is the answer why the appropriate time to raise it  
3 is now.

4 JUDGE METTRAUX: Thank you.

5 PRESIDING JUDGE SMITH: We should have on the record that the  
6 amended submission required of the SPO as requested by the Selimi  
7 Defence should be on file by 24 March and the response is due by  
8 April 17, 2023.

9 One final thing, just in the exercise of extreme caution. I  
10 just want to go over the fact that, in April, we are meeting the 3rd,  
11 4th, and 5th for opening statements; April 11, 12, and 13, and 17  
12 through 20 for evidence. And in May, the 10th, 11th, 12th, the 16th  
13 through the 23rd, and the 22nd through the 24th. Just so we all have  
14 the dates in mind.

15 Any questions by anybody? Yes.

16 Just a second --

17 MR. EMMERSON: Only one which is --

18 PRESIDING JUDGE SMITH: Mr. Emmerson got to his feet first.

19 MR. EMMERSON: Sorry.

20 PRESIDING JUDGE SMITH: Go ahead.

21 MR. EMMERSON: Only one, which is on the published suggested  
22 timetable, I think you've just corrected it in what you said, but in  
23 the published current time timetable, the 10th is shown as a sitting  
24 day which, in fact, it is an official holiday.

25 PRESIDING JUDGE SMITH: [Microphone not activated]

1 MR. EMMERSON: So 10 April is Easter. It's shown as a sitting  
2 day, but it's in fact --

3 PRESIDING JUDGE SMITH: [Microphone not activated]

4 MR. EMMERSON: That's what I assume.

5 THE INTERPRETER: Microphone for the Presiding Judge, please.

6 PRESIDING JUDGE SMITH: The sitting days will not include the  
7 10th, which is Easter Monday. And I think I explained once again  
8 that we have several days. This courtroom takes a lot of  
9 maintenance. And so I'd love to be able to have a fourth day some of  
10 these weeks, but that maintenance of the courtroom and all of the  
11 facilities in it requires it to be vacant for those days.

12 So thank you very much.

13 Anything else by anybody?

14 Mr. Misetic.

15 MR. MISETIC: I just wanted to confirm that there's no chance  
16 that the Trial Panel wants to hear evidence on the 5th if we go short  
17 in terms of the use of time; correct?

18 PRESIDING JUDGE SMITH: Well, no.

19 MR. MISETIC: Okay, thank you.

20 PRESIDING JUDGE SMITH: That's the short answer.

21 Go ahead, Mr. Kehoe.

22 MR. KEHOE: Yes, Your Honour. I raised an issue that -- it was  
23 some part of *inter partes* concern, and that had to do with this  
24 concept of limited use immunity and what that means. I have tried to  
25 get some clarity, and I have been directed by the SPO to Article 38

1 of the Statute. I must say in my career, Your Honour, I've had quite  
2 a bit of experience with use immunity, transactional immunity. I  
3 have no idea what limited use immunity means. And I tried to delve  
4 into this in the Statute and then also the Kosovo Statutes, and there  
5 is no clarity whatsoever in that regard.

6 Candidly, the outline of any agreement that the SPO has  
7 concerning limited use immunity, you know, fails to clarify the  
8 ramifications of what is generally known as use immunity. The way it  
9 appears here, it is transactional immunity. Transactional immunity  
10 use meaning you can't use its against you and we are not going to  
11 prosecute you. Transactional immunity means as soon as you come in  
12 and you start talking about something, we're not prosecuting you at  
13 all.

14 There is no clarification in any of this to say: Mr. X, you  
15 have use immunity, I can't use your information against you, but I  
16 can do two things. I can develop evidence to prosecute you. Oh, and  
17 by the way, if you're a suspect, you're still a suspect.

18 The concept in Anglo-American law in use immunity is you can't  
19 even use the information that person gives you to develop other  
20 evidence against you.

21 Now, generally in the jurisprudence of a country, or  
22 international tribunals, there would be some clarity as to what use  
23 immunity is. There is none here. And I have attempted to try to  
24 garner some clarity from the SPO, and I've just been directed to  
25 Article 38(3) and that's that.

1           And given the fact that we have witnesses coming up somewhat  
2 rapidly that have been given what they call "limited use immunity," I  
3 don't know what the "limited" means, limited use immunity, I ask the  
4 Court for some clarity as to what this means, what's the basis for  
5 it, and what are the ramifications of limited use immunity as opposed  
6 to just use immunity or transactional immunity, and what is this  
7 witness protected from and not protected from.

8           Clearly, there's a dramatic difference between use immunity and  
9 transactional immunity. Limited use immunity is a concept that is  
10 foreign to me individually. It may be clear to others, but it's  
11 certainly not clear in the Statute and certainly not clear under  
12 Kosovo law.

13           So I raise that because, obviously, it goes to the credibility  
14 of these witnesses who have received limited use immunity, which I  
15 suggest they believe thinks they have transactional immunity, which  
16 is certainly not the case under the term of art "use immunity." I  
17 put a footnote to that because I am uncertain as to what limited use  
18 immunity means *vis-à-vis* use immunity.

19           Suffice it to say there's been no clarity whatsoever from the  
20 SPO in responding to our questions in this regard, and certainly  
21 there is no clarity within Article 38 nor the Kosovo law. So I would  
22 ask the Court if we could have some clarity coming from the SPO as to  
23 what the basis in law is for limited use immunity, what is limited  
24 use immunity compared to use immunity or transactional immunity, and  
25 is it the understanding of these witnesses that are being given

1 limited use immunity that they are not going to be subject to  
2 prosecution other than for false statements? Because those are very  
3 crucial issues that go to the credibility of witnesses and examining  
4 whether or not they believe they are prosecutable.

5 PRESIDING JUDGE SMITH: Anything else?

6 MR. KEHOE: That's it, Your Honour. Thank you.

7 PRESIDING JUDGE SMITH: Mr. Halling, do you want to respond or  
8 answer that?

9 MR. HALLING: Yes, briefly, Your Honour, just the mere premise  
10 of counsel needing to put a footnote into his oral submission is a  
11 good sign that this should be addressed in writing, and that's what  
12 we would suggest. These statements of limited use are voluntary,  
13 intelligent, knowing waivers. The conditions of them are set out  
14 within them, and they are in full conformity with the statutory  
15 framework. But we'll respond in writing, if that's Your Honours'  
16 preference.

17 PRESIDING JUDGE SMITH: Thank you.

18 MR. KEHOE: If I may just respond.

19 Your Honour has encouraged us, and rightfully so, to have  
20 *inter partes* discussions on things so we resolve this and we're not  
21 taking up the Court's time. And we did that in several  
22 correspondence with counsel, and all we got back was, "Oh, this was a  
23 knowing waiver under Article 38," and that's it.

24 Now, if there is something other -- if there is some other part  
25 of the law here that I'm missing, and it could be, and it could be,

1 Judge, that I'm missing it, all I was asking for the SPO was to  
2 advise us as to what it was and where I should go look for that law,  
3 and is there some explanation between limited use immunity, use  
4 immunity and transactional immunity, and I've received none. Thank  
5 you.

6 PRESIDING JUDGE SMITH: Well, I think for your protection, and  
7 the protection of your client, having the Prosecution file a written  
8 answer to that question is probably the best.

9 MR. KEHOE: Your Honour, absolutely right. With the threat to  
10 forests in the world that this case has brought about, I thought we'd  
11 maybe expedite the matter and get it resolved, but I suppose that's  
12 not the case.

13 PRESIDING JUDGE SMITH: We're always hopeful in that regard, but  
14 I'm afraid we failed in quite a few of those instances.

15 Yes, go ahead.

16 MR. FERDINANDUSSE: Your Honour, just a very practical question.  
17 The last two weeks in May. I'm not sure if I heard it correctly. I  
18 looked at the transcript, but I just want to check that our schedule  
19 says that we're seated 15 May till 18 May, and then 22nd until the  
20 23rd, and the 24th.

21 PRESIDING JUDGE SMITH: Hang on a second. Let me get my  
22 calendar. We're 15th through the 18th.

23 MR. FERDINANDUSSE: 15th through the 18th, and then 22nd, 23rd,  
24 and 24th?

25 PRESIDING JUDGE SMITH: Yes, exactly right.

1 MR. FERDINANDUSSE: Thank you. I just wanted to check that.

2 PRESIDING JUDGE SMITH: And, well, also May 10th through 12th.  
3 Thank you.

4 When can you have that response?

5 MR. HALLING: Your Honours, when the application is filed, I was  
6 expecting a written application from the Thaci Defence.

7 PRESIDING JUDGE SMITH: Yes.

8 MR. HALLING: We could respond in the statutory timeline or  
9 whatever timeline you require.

10 PRESIDING JUDGE SMITH: Well, we have a witness coming up in  
11 which that is an issue.

12 MR. HALLING: Yes, not number 1 in the order, so I think there  
13 would be time if the Thaci Defence filed quickly, but we're available  
14 on whatever schedule you require.

15 PRESIDING JUDGE SMITH: When are you going to file, Mr. Kehoe?

16 MR. KEHOE: It's going to be brief, Your Honour, so the next few  
17 days. I don't really think it's going to take that long.

18 PRESIDING JUDGE SMITH: Well, have it on file on Thursday? This  
19 is Monday.

20 MR. KEHOE: Yes, Your Honour.

21 PRESIDING JUDGE SMITH: And you can respond by Monday.

22 MR. HALLING: Understood.

23 PRESIDING JUDGE SMITH: Oh, Mr. Emmerson.

24 MR. EMMERSON: I'm so sorry, Your Honour, but there seems to  
25 still be some uncertainty about the sitting days during May.



1 Did Your Honour indicate we will not be sitting on the 8th and  
2 9th but will be sitting on the 10th, 11th, 12th? Is that correct?

3 PRESIDING JUDGE SMITH: That is correct.

4 MR. EMMERSON: Very well. And then the next two weeks, it's 15  
5 to 18, and 22 to 25?

6 PRESIDING JUDGE SMITH: [Microphone not activated]

7 MR. EMMERSON: 22 to 24. Very well. Thank you very much,  
8 indeed.

9 PRESIDING JUDGE SMITH: [Microphone not activated]

10 If there is nothing else, we are adjourned.

11 --- Whereupon the Status Conference at 12.10 p.m.

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