

1 Wednesday, 18 November 2020  
2 [Status Conference]  
3 [Open session]  
4 [The accused appeared via videolink]  
5 --- Upon commencing at 11.00 a.m.

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

8 Mr. Court Officer, could you please call the case.

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

12 JUDGE GUILLOU: Thank you, Mr. Court Officer.

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

15 Mr. Prosecutor or Madam Prosecutor.

16 MS. LAWSON: Good morning, Your Honour, and to those in the  
17 courtroom and joining remotely.

18 For the Specialist Prosecutor's Office this morning are  
19 Specialist Prosecutor, Jack Smith; to my right, Alan Tieger, Senior  
20 Prosecutor; behind me, David Harbach, Prosecutor; and to my left,  
21 Marlene Yahya Haage, Disclosure and Legal Officer; and I'm  
22 Clare Lawson, Head of the Legal Office. Thank you.

23 JUDGE GUILLOU: Thank you very much.

24 Now I turn to the Defence. I will call the lead counsel of each  
25 accused as they are reflected in the case name, starting with counsel

1 for Mr. Thaci, then counsel for Mr. Veseli, then counsel for  
2 Mr. Selimi, and then counsel for Mr. Krasniqi. May the lead counsel  
3 introduce themselves and their team.

4 And I will start with Mr. Hooper, please.

5 MR. HOOPER: [via videolink] Good morning. David Hooper, lead  
6 counsel. And I am joined today by Dastig Pallaska, who's on  
7 video-link there, and by counsel Sophie Menegon, who is in court.  
8 And, yes, thank you.

9 JUDGE GUILLOU: Thank you, Mr. Hooper.

10 Mr. Emmerson, please.

11 MR. EMMERSON: [via videolink] This is Ben Emmerson on behalf of  
12 Kadri Veseli, and I am representing Mr. Veseli jointly with Kosovo  
13 counsel Kujtim Kerveshi, who is watching remotely.

14 JUDGE GUILLOU: Thank you, Mr. Emmerson.

15 Mr. Young, please.

16 MR. YOUNG: Your Honour, may it please you. My name is  
17 David Young. I am a counsel from England. I'm the appointed lead  
18 counsel for Rexhep Selimi. My co-counsel will be Mr. Geoffery  
19 Roberts. And if I may introduce my legal advisers, who will be  
20 Dr. Rudina Jasini and Furtuna Sheremeti. Thank you.

21 JUDGE GUILLOU: Thank you, Mr. Young.

22 And finally, Ms. Alagenda, please.

23 MS. ALAGENDRA: [via videolink] Your Honour,  
24 Venkateswari Alagenda, counsel for Mr. Krasniqi, appearing together  
25 with co-counsel, Mr. Aidan Ellis.

1 JUDGE GUILLOU: Thank you, Ms. Alagendra.

2 For the record, I note that Mr. Thaci, Mr. Veseli, Mr. Selimi,  
3 and Mr. Krasniqi are not physically present in the courtroom but  
4 attend this hearing via video-conference. And for the record, I am  
5 Nicolas Guillou, Pre-Trial Judge for this case.

6 Before we proceed with our agenda today, I would ask the parties  
7 to adhere to the following rules in order to make courtroom  
8 proceedings smooth:

9 Please talk slowly and clearly and wait five seconds before  
10 responding to me or a party or participant in order to allow the  
11 interpreters to finish interpretation.

12 I also inform everyone that six counsel are participating in  
13 this hearing via video-conference. In order to allow everyone to  
14 follow the proceedings, please do not speak at the same time and wait  
15 to be given the floor before switching on your microphone.

16 I am sure many of you are now familiar with Zoom, Skype, or  
17 Teams meetings, but it is even more important in our context because  
18 we have participants who attend the hearing both physically and  
19 remotely.

20 Should any party or participant wish to take the floor to raise  
21 a specific issue or respond to anything that has been said, please  
22 stand up if you are in the courtroom or raise up your hand if you are  
23 attending the hearing via video-conference.

24 Finally, should anyone attending the Status Conference via  
25 video-conference experience any technical difficulty, please inform

1 the Court Officer or myself immediately by waving your hand. If the  
2 connection has any problem for any of the remote participants, we  
3 will do our best to reconnect immediately. If the issue cannot be  
4 fixed immediately, I may have to adjourn the hearing for a couple of  
5 minutes to ensure that the line is reconnected.

6 Let me now move to the recent procedural history of the case.

7 On 11 November 2020, I scheduled this Status Conference, and I  
8 asked the parties to provide written submissions on the items listed  
9 in the annex to my Scheduling Order, the redaction regime to be  
10 adopted, and all the topics deemed necessary.

11 The SPO submitted its observations last Friday. The Defence  
12 teams submitted their observations yesterday. I thank all the parts  
13 for their written submissions, despite the tight deadlines.

14 The purpose of our hearing today is to review the status of the  
15 case and to organise exchanges between the parties to ensure  
16 expeditious preparation for trial. In particular, I wish to discuss  
17 the status of the Specialist Prosecutor's investigations, the  
18 estimated amount of documentary and testimonial evidence the parties  
19 will bring to trial, issues related to the disclosure of the  
20 supporting material to the indictment, additional material intended  
21 for use at trial, exculpatory evidence, and protected material. And  
22 I also wish to discuss about the procedure for disclosure, the  
23 redaction regime to be adopted for the present proceedings, and  
24 finally any other issue the parties may wish to raise.

25 I would invite the parties to present their views in a concise

1 fashion about each item. There is no need for each party to repeat  
2 their written submissions in detail. I would also like to inform the  
3 parties that the redacted version of my Confirmation Decision should  
4 be made available to the Defence today or before the end of the week  
5 at the latest.

6 In this context, I inform the Defence that in my Confirmation  
7 Decision I set a one-week deadline from the Initial Appearances from  
8 the SPO to submit any request for the protective measures in the  
9 supporting material so any current redactions will be conditional  
10 upon my Decision on Protective Measures.

11 Now, I invite the parties to follow the agenda set out for this  
12 Status Conference, and we will start with the general questions.

13 Before I give the floor to the parties on the general questions,  
14 I wish to remind them of the general principles of disclosure in the  
15 legal framework of the Specialist Chambers.

16 Disclosure is an *inter partes* process in electronic form  
17 organised and facilitated through the Registry's Court Management  
18 System. Disclosure shall be a priority for the Prosecution at this  
19 stage, and the parties shall disclose evidence of true relevance of  
20 the case and not the greatest volume of evidence.

21 In view of the publicity principle, evidence is registered as  
22 public unless there are reasons to classify otherwise. The  
23 disclosing party determines the appropriate level of classification  
24 of evidentiary items on a case-by-case basis.

25 I would like to first hear from the Prosecution on the topics in

1 this agenda, and I will give the floor to Mister or Madam Prosecutor  
2 on this topic of general questions.

3 Please.

4 MS. LAWSON: Thank you, Your Honour.

5 First, on the topic of investigations, certain investigative  
6 steps are continuing and a number of those steps could only be  
7 advanced once the case became public. The most obvious example of  
8 that is the searches which were conducted in connection with the  
9 arrest of each of the accused. A significant volume of potentially  
10 relevant material was seized during those searches, and it's possible  
11 that additional investigative steps will be required as a result.

12 The core issue here, though, is not any further investigations  
13 which the SPO is entitled to conduct; it is ensuring that disclosure  
14 is completed in a manner which is not prejudicial to the Defence.  
15 That is a matter of which the Chamber will have oversight. The SPO  
16 has set out a timeline for meeting those obligations, and should that  
17 timeline change, the Chamber and the parties will be notified  
18 accordingly.

19 With regard to the ability of the Defence teams to commence  
20 their investigations, within the next three weeks, a very substantial  
21 volume of material will be made available, including the voluminous  
22 indictment supporting material and over 1.000 potentially exculpatory  
23 items. Each of these disclosures will be discussed in more detail  
24 later during today's agenda.

25 In addition, the indictment itself contains very detailed

1 allegations regarding the charges. At this point and necessitated by  
2 the degree of detail with which the charges are specified in the  
3 indictment, certain redactions remain in place.

4 I can confirm that it is our intention, following the Chamber's  
5 ruling on our forthcoming request for protective measures, to review  
6 the indictment with a view to providing a lesser redacted version  
7 consistent with any protective measures which the Chamber may grant.

8 In summary, the Defence has ample information with which to  
9 immediately start investigations. We have outlined an expeditious  
10 disclosure timeline for providing the remainder of the information.  
11 However, the reality is that from the information already available,  
12 the Defence knows the case. The case is not a surprise. The lines  
13 of Defence, some of which have already been outlined in Mr. Veseli's  
14 submissions, are apparent, and none of the further disclosure  
15 supporting the Prosecution case as outlined in the indictment will be  
16 a surprise.

17 In the SPO's view, there is no reason why this case could not  
18 start in the summer of 2021. Thank you.

19 JUDGE GUILLOU: Thank you very much, Madam Prosecutor.

20 Now I turn to the Defence teams, starting with Mr. Hooper. You  
21 have the floor.

22 MR. HOOPER: [via videolink] In respect of the particular matter  
23 that we're dealing with just there, and with the last remark, that  
24 there be no surprise, well, not all of us have been onboard with  
25 respect to this case anywhere near as long as the Prosecution, and

1 we're going to need proper and adequate time.

2 The Prosecution have conducted extensive investigations, as I  
3 understand it, at least over five years, but also resourcing material  
4 that was available as a result of other investigations going back,  
5 perhaps, ten, perhaps 20 years. We're going to need adequate time.

6 Also, the Prosecution was able to discharge its functions  
7 largely pre-COVID. We're in a COVID world. And in our submissions,  
8 as you can see, we've said that, I think fairly because many of us  
9 have experience of these courts and these kinds of cases, that a  
10 minimum of 18 months is necessary before we would be, I think, even  
11 contemplating being trial-ready.

12 I find the suggestion that this case should go to trial in June  
13 absolutely absurd. We're not going to be put on a conveyor belt, a  
14 sort of judicial factory. This is a complicated case, and I cannot  
15 see this case taking place any time before the summer, June, not of  
16 next year, but the year after that.

17 And, again, I emphasise that those estimates were given in  
18 discussion with colleagues against, really, an ideal world without  
19 COVID, which are going to, obviously, handicap matters.

20 Secondly, with respect to the indictment, when you have an  
21 indictment that's redacted so that part of it reads "on the 'blank'  
22 day of 'blank,'" one really wonders if anyone has really truly put  
23 their mind to the inadequacy of the redactions in this case.

24 In respect of disclosure generally, I'd ask whether the  
25 Prosecution has a dedicated officer dedicated to reviewing the



1 material they've got to see whether it does qualify as exculpatory or  
2 in other ways -- in other ways material that should be open to the  
3 Defence. Our experience of other cases, both at the ICTY or at the  
4 ICC, is that there often isn't a dedicated officer and that these  
5 particular tasks - and they're onerous and very deeply responsible  
6 tasks - are not, in fact, discharged by a dedicated officer, and the  
7 result is that there's a great defect in terms of the adequacy of  
8 disclosure.

9 Those are all the matters I wish to raise in respect of those  
10 issues. Thank you.

11 JUDGE GUILLOU: Thank you, Mr. Hooper.

12 Mr. Emmerson, please.

13 MR. EMMERSON: [via videolink] May I take this as an opportunity  
14 to respond to the general questions section of the annex to the  
15 Pre-Trial Judge's agenda for today's hearing.

16 Firstly, as regards timing and scope of the obligations of the  
17 Prosecution during the pre-trial stage and the Defence investigation,  
18 clearly, the touchstone test is the adequacy of the time and  
19 facilities afforded to the accused for the preparation of their  
20 Defence. There is no fixed time limit, but a sensible and  
21 proportionate approach needs to be taken using, as the fundamental  
22 guideline, the basic right articulated in Article 6 of the European  
23 Convention on Human Rights, that there must be an equality of arms  
24 between the Prosecution and Defence, a reasonable level of  
25 proportionality in that regard, and that the Defence must be given

1 adequate time and facilities to examine and to prepare a defence  
2 after they have received sufficient particulars of the allegations to  
3 be able to conduct an effective investigation.

4 I would have thought that those basic propositions are entirely  
5 uncontroversial, and it therefore came as somewhat, I think, of a  
6 surprise and a disappointment to see the Prosecution suggesting, in  
7 its original written pleadings, that the trial could begin soon after  
8 the first set of disclosure was complete, and more of a surprise and  
9 disappointment to hear junior counsel for the Prosecution try to  
10 justify that just now on the basis that the accused must somehow know  
11 the allegations that are against them.

12 That is an extraordinary position for the Prosecution to be  
13 taking at the outset of a case of this magnitude and gravity, and we  
14 find it gravely disappointing that they should do so. It, perhaps,  
15 is an indication of the genuineness of the commitment to ensure that  
16 the proceedings are fairly conducted from the Prosecution's point of  
17 view and puts us all on notice of the need for great scrutiny of the  
18 positions that they adopt.

19 That said, it is absolutely clear based on experience of trials  
20 at the ICTY dealing with Kosovo, dealing particularly with  
21 allegations of joint criminal enterprise against members of the  
22 Kosovo Liberation Army, that the scope and nature of the  
23 investigations that are required by the Defence will be extensive.  
24 They will be extensive because the Prosecution's indictment - and I  
25 think we all can readily recognise this - is built of a patchwork of

1 multiple allegations over the entirety of the territory of Kosovo  
2 against large numbers of individual people alleged to be or claiming  
3 to be members of the Kosovo Liberation Army which are stitched  
4 together in a suggested joint criminal enterprise. And, therefore,  
5 it inevitably follows that each and every one of those allegations  
6 will need to be independently investigated and the crime base  
7 thoroughly examined.

8 Previous experience of trials at the ICTY regrettably shows that  
9 false evidence was presented in numerous instances by the  
10 Prosecution, not necessarily, of course, with any knowledge of its  
11 falsity, but nonetheless a very careful, forensic examination proved  
12 that certain parts of the evidence that had been adduced required the  
13 most careful and detailed scrutiny of the crime base allegations  
14 themselves.

15 So to hear Prosecution counsel stand up and say the Defence know  
16 the case against them, even though it is very substantially redacted,  
17 and don't really need an investigation is a shocking submission. The  
18 reality of the situation is that once we know the case against us,  
19 which will not be until the maximum due redaction process has been  
20 completed, then it will require 18 months minimum of investigation.

21 That time estimate is not plucked from the air. The previous  
22 trials at the ICTY involving Kosovo Liberation Army leadership, which  
23 had a very similar pattern but were far less extensive in scope,  
24 involved longer periods of pre-trial investigation at least as  
25 regards the first indictments, and it's inevitable that the same

1 thing will happen again.

2 We, for example, propose an investigation supervised by an  
3 extremely experienced international investigator who will go through  
4 methodically the allegations on the indictment one by one and  
5 investigate them one by one in the way in which any Defence counsel  
6 in these circumstances would require.

7 That's an important point, because, as Mr. Hooper has already  
8 pointed out, the Prosecution have had five years to investigate these  
9 allegations and largely unlimited resources, certainly gravely  
10 disproportionate resources. It is the job of the Pre-Trial Judge and  
11 of the Trial Judge to hold the scales evenly and to ensure that the  
12 Defence are not massively disadvantaged by that disproportionality.  
13 But to begin these proceedings by suggesting that there should be no  
14 need for an extensive Defence investigation is, we would say,  
15 entirely wrong-headed.

16 So realistically, we would support Mr. Hooper's suggestion that  
17 the trial cannot begin until the middle of 2022 at the earliest. I  
18 think, frankly, it's unlikely to begin then, realistically, because  
19 these things have a habit of not proceeding quite as planned. But  
20 assuming that the schedule is kept to, that the Prosecution does meet  
21 its obligations, that it doesn't drag its feet on full disclosure of  
22 the particulars necessary to enable an effective investigation, then  
23 a period of 18 months following the May disclosure date might be a  
24 realistic target.

25 As for the length of the trial, given that we have 200 proposed

1 witnesses, four accused, and numerous -- more than a hundred  
2 instances across the entire territory of Kosovo and parts of Albania  
3 over a two-year period, realistically, we're talking about a trial  
4 that will take between 18 months and two years.

5 So that is the overall length of the process, and we need to be  
6 realistic and square up to it at this stage rather than find  
7 ourselves having to drag the Prosecution into a position of basic  
8 fundamental procedural fairness. It's disappointing, as I said.

9 May I turn to the other part of my submission on the general  
10 matters, and that is the answers of the Defence to question 1(e) in  
11 the Judge's questionnaire in relation to matters which are specific  
12 defences or "other grounds excluding criminal responsibility."

13 As we've made clear in our written submission, we reserve our  
14 position about specific defences, such as alibi, until we know in  
15 detail what the allegations are being made against us. Plainly, we  
16 are not in the position to respond until we have the particulars, and  
17 by that I mean adequate details in a de-redacted form to enable us to  
18 know where it is alleged we were supposed to be and at what times.  
19 So on that -- in relation to alibi issues and other areas of specific  
20 defence, we would reserve our position to make disclosure at the  
21 appropriate time in the appropriate way, according to the rules.

22 However, on behalf of Mr. Veseli, I would like at this stage to  
23 put on the public record some other grounds excluding criminal  
24 responsibility which have already been averted to by Prosecution  
25 counsel when she said that we knew the case against us and therefore

1 had no need for an investigation.

2 Let me explain, first of all, what those points are; and  
3 secondly, why, far from showing no need for an investigation, they  
4 show exactly why an investigation will be so central and require so  
5 much detailed on-the-ground work.

6 First point: To the extent that the SPO is able to prove the  
7 commission of particular crimes by individuals who were or who  
8 claimed to be members of the Kosovo Liberation Army during the  
9 indictment period, the accumulation of those individual crimes does  
10 not, the Defence says, establish the existence of a joint criminal  
11 enterprise. No joint criminal enterprise existed, whether as alleged  
12 on the indictment or otherwise, and we say there is no other legal  
13 basis on which to hold Mr. Veseli liable for the criminal acts of  
14 others, which is what the Prosecution in this case is trying to do.

15 Second point: In the application of the international criminal  
16 law, context is everything. The Kosovo Liberation Army was a largely  
17 spontaneous and minimally organised popular uprising that operated in  
18 defence of the Albanian civilian population in the face of a  
19 carefully planned campaign of crimes against humanity, arguably  
20 amounting to an attempted genocide, the so-called crime of crimes.  
21 More than 10.000 Kosovo Albanian civilians were killed by the  
22 combined Serbian forces in numerous planned massacres as the country  
23 descended into chaos, lawlessness, and wholly asymmetrically civil  
24 war. They were buried in mass graves by the Serb forces and many  
25 were later exhumed and their remains taken to Serbia where they were

1 hidden, some of them in lorry-loads in the river Danube in order to  
2 cover up the dreadful mass crimes that had occurred in Kosovo.

3 The ICTY, the tribunal that was set up on a non-ethnic basis to  
4 try the crimes that were committed in that conflict, the ICTY has  
5 convicted six very senior Serbian army and military police personnel  
6 for their part in a coordinated plan to ethnically cleanse Kosovo of  
7 its Albanian civilian population through the commission of widespread  
8 crimes against humanity with the express purpose of driving almost  
9 the entire ethnic Albanian population out of the country and across  
10 the borders into Macedonia, Montenegro, and Albania.

11 To allege any sort of equivalence between that organised  
12 criminal conspiracy and the wrongful actions taken by a few members  
13 of the targeted community is a distortion of the facts and an  
14 inversion of the reality on the ground. When the SPO's evidence is  
15 viewed in its full context, the indictment will come to be seen as a  
16 travesty of the truth.

17 The third point: The joint objective of the Kosovo Liberation  
18 Army was self-defence. In the context of a coordinated and sustained  
19 attack by the combined professional armed forces of the SFRY, Kosovar  
20 Albanian civilians, who had taken up arms, tried to organise  
21 themselves village by village into some kind of fighting force to  
22 defend their communities. In that context, there were sporadic and  
23 dislocated acts of armed resistance, and it is no doubt also true  
24 that in the political upheaval and military maelstrom that swept  
25 across the country, some individual crimes were committed by certain

1 individuals on the Kosovo Liberation Army side. Those crimes, of  
2 course, each and every one of them, were inexcusable, but they were  
3 individual crimes on a minor scale in comparison with the industrial  
4 scale systematic slaughter that was inflicted on the ethnic Albanians  
5 by the SFRY.

6 The only joint enterprise that existed within the Kosovo  
7 Liberation Army was a joint enterprise to defend the civilian  
8 population against the crimes being perpetrated by the SFRY. There  
9 was no shared intention to commit their objective through the  
10 commission of crimes against civilians. The opposite is true. The  
11 modest victories, indeed the very existence of the Kosovo Liberation  
12 Army, depended on the continuing consent and support of the people of  
13 Kosovo. That is not something that they could have hoped to achieve  
14 or could, in fact, have achieved if they were pursuing a joint  
15 enterprise to commit war crimes and crimes against humanity against  
16 civilians.

17 The so-called leaders that sit in the dock in these proceedings  
18 were, like other individuals around Kosovo, the commanders of the men  
19 and women who, on any given day, chose to follow them. These people  
20 were farmers by day and volunteer soldiers by night if they chose to  
21 be. The one thing that they all had in common was a common purpose  
22 to act in self-defence of their community.

23 The fourth point: The issue of common purpose alleged by the  
24 Prosecution has already been extensively examined before in this  
25 context during two lengthy trials at the ICTY against Kosovo



1 Liberation Army leaders. The ICTY has previously recognised that in  
2 the particular context of the KLA an accumulation of individual  
3 crimes during the relevant indictment period simply cannot be equated  
4 with a joint criminal enterprise. It's not a question of totting up  
5 individual crimes and finding someone to blame. Nor did the  
6 commission of such crimes prove the existence of a joint criminal  
7 enterprise by inference. And the Defence of Mr. Veseli will rely on  
8 those judicial findings as persuasive conclusions of both mixed fact  
9 and law.

10 The fifth and last point I want to make is that the evidence  
11 will establish beyond a shadow of a doubt that the level of  
12 operational organisation and lines of authority in communication  
13 within the Kosovo Liberation Army during the indictment period were  
14 so fragmented and rudimentary that it is impossible to assert or  
15 prove any legal basis to justify the SPO's extravagant reliance on  
16 the doctrine of command responsibility.

17 This position was expressly recognised by the Prosecution in the  
18 ICTY proceedings, following an extensive investigation. No  
19 allegation of command responsibility was made, because it is simply  
20 unsustainable and unrealistic on the facts of the Kosovo Liberation  
21 Army's organisational deficiencies to be able to mount a command  
22 responsibility prosecution.

23 So those are the matters which we say exclude criminal liability  
24 and which at the end of these extremely lengthy proceedings will  
25 inevitably result in an acquittal of all four accused on joint

1 criminal enterprise.

2 Those are my submissions.

3 JUDGE GUILLOU: Thank you, Mr. Emmerson.

4 Now, I turn to Mr. Young, please.

5 MR. YOUNG: Your Honour, may it please you.

6 I completely endorse and support the submissions of Mr. Hooper  
7 and Mr. Emmerson, and for that reason I'll be very brief.

8 In short, the Prosecution's submissions are breathtakingly  
9 disappointing and, frankly, absurd. They're badly thought through,  
10 and, frankly, their submissions have no regard whatsoever to an  
11 accused's right to a fair trial.

12 Their suggested timeline makes a mockery of fair trial rights  
13 for Mr. Selimi. The Prosecution may have had five years, ten years -  
14 God knows how many years they've had - at least five years to  
15 investigate this, but I arrived here in The Hague last week. Are  
16 these accused, who have only recently had their indictments  
17 confirmed, expected to have foreseen, as if they had a crystal ball,  
18 that they would have their indictments confirmed? It's ridiculous.

19 So I submit, respectfully, that the timeline suggested is  
20 utterly unrealistic. If we're to have proper time and facilities to  
21 prepare, to investigate the Prosecution case, to analyse the  
22 Prosecution case, as well as to conduct extensive Defence  
23 investigations, then we need a fair and reasonable timeline. That's  
24 all I say.

25 JUDGE GUILLOU: Thank you very much, Mr. Young.

1 Ms. Alagendra.

2 MS. ALAGENDRA: [via videolink] Your Honours, we've heard what  
3 the Prosecution has to say, that the Defence is ready to commence,  
4 should be ready to commence its investigations now. We do not agree  
5 with the Prosecution. We say that the Defence will require adequate  
6 time and facilities to commence its investigations, and I adopt the  
7 submissions of my learned friends - Mr. Hooper, Mr. Emmerson, and  
8 Mr. Young just before me.

9 The earliest we say the investigations can commence would be,  
10 and most realistically, after substantial progress does take place on  
11 the Prosecution's part insofar as disclosure of material is  
12 concerned.

13 On the preparation of the case, we say we require adequate time  
14 and facilities, and in this regard, I would ask that "adequate" be  
15 measured by the current circumstances that the Defence will have to  
16 be in preparing its trial, the COVID times, as well as the time the  
17 Prosecution has had to bring these indictments before this Court.

18 I believe that is all I have to say on this -- on the  
19 investigations, Your Honour.

20 JUDGE GUILLOU: Thank you, Ms. Alagendra.

21 Now I turn to the Prosecution. Do you have anything to say  
22 after hearing the Defence teams?

23 MS. LAWSON: Yes, thank you, Your Honour. Only briefly.

24 I believe my submission was clear, that we're not suggesting  
25 that no Defence investigation is required. Indeed, careful Defence

1 investigation will be required.

2 Our submission is that in terms of understanding the Prosecution  
3 case, the Defence are in a position to commence such investigations  
4 immediately. Indeed, the lengthy submissions just made on  
5 Mr. Veseli's behalf belie the fact that they are not in a position to  
6 do so. The SPO has taken note of the points raised by Mr. Veseli's  
7 counsel, and no doubt they will be, to the extent relevant,  
8 exhaustively discussed at trial in light of the concrete evidence  
9 presented. We look forward to doing so.

10 Thank you.

11 JUDGE GUILLOU: Thank you, Ms. Lawson.

12 Unless any of the counsel has anything to add on this topic - it  
13 doesn't seem to be the case - we will move to the next item in the  
14 agenda.

15 But before that, I just want to mention, for the benefit of the  
16 public, that no date, of course, will be set for the beginning of the  
17 trial today, but what I can note is that the earlier the disclosure  
18 process from the SPO is completed, the earlier the Defence  
19 investigation can also not only start but also be handled in a speedy  
20 fashion. So we see that everything is connected, and the faster we  
21 can proceed from the SPO side, the faster it will be also from the  
22 Defence side.

23 Now let me move to the seconds item in our agenda, which is the  
24 supporting material to the indictment.

25 I would like to remind the SPO that within 30 days from the

1 Initial Appearance, all supporting material to the indictment and all  
2 statements of the accused shall be made available to the Defence.  
3 This is why the Status Conference had to be scheduled today rather  
4 than at the end of November as requested by some Defence counsel.

5 I invite the SPO to give their submission on the disclosure of  
6 the supporting material to the indictment. But before, I note  
7 Mr. Young's submission regarding a seeming discrepancy between the  
8 number of witnesses relied upon by the SPO for the purpose of the  
9 Confirmed Indictment, 153, and the number of witness statements, 130,  
10 that the SPO will disclose according to Rule 102(1)(a). So I invite  
11 the SPO to clarify this discrepancy.

12 And I also note that several counsel proposed that the SPO  
13 disclose the supporting material to the indictment on a rolling basis  
14 rather than in a unique batch 30 days after the Initial Appearance.

15 Considering the volume of evidence to be disclosed under  
16 Rule 102(1)(a), the significant number of witness statements to be  
17 disclosed, the SPO's indication that significant redactions are  
18 required, the Defence's ability to receive, digest and analyse the  
19 evidence disclosed, and the appropriate time needed for me to decide  
20 are redaction proposals, would it be possible to establish staggered  
21 disclosure deadlines that will ensure disclosure of the evidence on a  
22 rolling basis?

23 And in order to start before the 30 days' deadline, as requested  
24 by several Defence teams, would the SPO need a couple of days beyond  
25 the 30-day time limit to finalise its disclosure obligation as set

1 out in Rule 102(1) (a)?

2 These are the specific questions I would like to hear the  
3 parties on, starting with the Prosecution.

4 MS. LAWSON: Thank you, Your Honour.

5 The SPO's indictment supporting material consists of  
6 approximately 1.842 items. This includes the evidence of 153  
7 witnesses, some of which is in the form of statements and some of  
8 which is in the form of transcripts, and I believe that addresses the  
9 query on the discrepancy.

10 Translation of the indictment supporting material into Albanian  
11 has been worked on continuously since the date of submission of the  
12 indictment and is ongoing. Nonetheless, we anticipate having  
13 complete translations available to also disclose within the 30-day  
14 timeframe.

15 In addition, as Your Honour mentioned, the SPO will be seeking  
16 protective measures for a number of witnesses and victims identified  
17 in the supporting materials, and that filing will be submitted later  
18 this week in accordance with the order of the Chamber.

19 On timing of the disclosure of this material, I don't believe  
20 there is any difference in principle between the SPO and the Defence.  
21 As indicated in our submissions, we will disclose the Rule 102(1) (a)  
22 materials as soon as we are in a position to do so. However, the  
23 necessary marker that I must place is that in this instance, "as soon  
24 as possible" is unlikely to be significantly before the 30 days  
25 permitted to us. In fact, at this stage what remains of that

1 time-period is approximately three weeks.

2 We have been making preparations for this disclosure for many  
3 months, but as Your Honour noted, it is a large volume of material  
4 and there is some very practical and logistical factors impacting the  
5 timing. This includes steps which could not have been taken in  
6 advance of confirmation of the indictment, including, as just  
7 mentioned, the necessity of protective measures.

8 While not all material requires redaction, it does also take the  
9 full-time work of three people for two days simply to prepare a  
10 disclosure package of any reasonable size for release in  
11 Legal Workflow. Therefore, in this instance, diverting two or four  
12 or six days of work in order to provide rolling disclosure within the  
13 next three weeks could well jeopardise our ability to meet the 30-day  
14 timeframe.

15 So while we are committed to that timeframe and to the principle  
16 of disclosing as soon as possible, "as soon as possible" in this case  
17 may well be close to the 30 days which we are permitted.

18 Thank you.

19 JUDGE GUILLOU: Thank you very much.

20 Ms. Lawson, just to follow-up on what I mentioned before. Would  
21 that be of any help if you were benefitting from a couple of days  
22 beyond the 30-day deadline in order to start the disclosure process  
23 of a first batch before that? Because that's what has been  
24 suggested, or at least requested, by some Defence teams in order not  
25 to have everything disclosed in one batch.

1 MS. LAWSON: Any extension of the 30-day timeframe would  
2 certainly be of assistance. However, the reference made to "a couple  
3 of days" would not significantly assist in enabling rolling  
4 disclosure to commence more in advance than I have indicated.

5 Thank you.

6 JUDGE GUILLOU: Thank you very much, Ms. Lawson.

7 Now I turn to the Defence teams, starting with Mr. Hooper,  
8 please.

9 MR. HOOPER: [via videolink] I've got very little by way of  
10 response to those matters.

11 What I would say is this: That disclosure, in this sense, is  
12 seen as triggering investigations. Well, that's not going to be the  
13 case. When you've got a great amount of material to deal with, then  
14 you have to address that material - not only that, you have to  
15 assimilate it - in order to choose your target investigations. So we  
16 mustn't get that idea that once these disclosure obligations are  
17 fulfilled, the Defence is then -- it's a starting gun, as it were,  
18 for the investigations. It just doesn't, in fact, just work like  
19 that.

20 That's my only observation. Thank you.

21 JUDGE GUILLOU: Thank you very much, Mr. Hooper.

22 Mr. Emmerson.

23 MR. EMMERSON: [via videolink] Your Honour, I would like to make  
24 it clear that we recognise that the Prosecution has a great deal of  
25 material to work through and we recognise that the disclosure



1 obligations are extensive and that the work that they will be doing  
2 on translation and redaction is time-consuming. And, frankly, for  
3 the sake of a few days in advance of the 30-day deadline, it does not  
4 seem to me, with great respect to those Defence counsel who take a  
5 different position, that we are really talking about days, problems  
6 and delays measurable in days. The issue is once the material has  
7 been disclosed, is it in a workable form?

8 And my main concern - and I think I've made this clear both in  
9 writing and orally - is that the Defence should not be placed in the  
10 position of having to come back before the Pre-trial Chamber again  
11 and again and again, as has happened in some other proceedings in  
12 other courts, in order to seek de-redaction so that they can conduct,  
13 in fact, effective investigations on the material.

14 If the Prosecution over-redacts in the first instance and then  
15 resists requests for de-redaction so that we end up in the position  
16 where the Defence and the Judge are trying to pull teeth from a  
17 reluctant Prosecutor, that will delay the process enormously.

18 And so I, for my part, and this applies across the board as  
19 far as the procedural proposals of the Prosecution are concerned, I  
20 take the position that it's for the Prosecution to discharge its  
21 disclosure obligations and it's for the Prosecution, therefore, to  
22 devise the process by which that should be done.

23 I'm not going to make submissions on the proposals that they  
24 make. I will wait to see if they, first of all, keep to their own  
25 deadlines and conduct the disclosure exercise in a spirit of genuine

1 cooperation aimed at securing the interests of justice or whether the  
2 situation begins to become derailed as time goes on. And that can  
3 happen. Experience shows, sadly, almost in every case, that the  
4 realities do not meet the procedural expectations set out at the  
5 outset and things don't usually run as smoothly as one hopes that  
6 they will.

7 That doesn't mean to say there shouldn't be a careful plan at  
8 the outset. Our position is to sit back and wait and see how that  
9 plan begins to unfold and to reserve the submissions that we might  
10 make about its practicability and its fairness for perhaps the next  
11 Status Conference or the one after that when we see how it is  
12 operating.

13 I note, though, that here we are at the first Status Conference  
14 with junior counsel for the Prosecution saying any extension to the  
15 30-day deadline would be welcomed. So I think one can see, even  
16 before we've begun, that there are likely to be slippages and there  
17 are likely to be slippages from the Prosecution point of view.

18 The Defence will do everything we can to ensure that the  
19 proceedings are as efficient as possible to make the Pre-Trial  
20 Chamber's job as easy as it can.

21 Those are my submissions.

22 JUDGE GUILLOU: Thank you, Mr. Emmerson.

23 Now I turn to Mr. Young.

24 MR. YOUNG: Your Honour, thank you. Very briefly.

25 Firstly, may I thank my learned friend for the Prosecution for

1 clarifying and making it clear what the discrepancy was in the  
2 figures. That's understandable.

3 I say no more, really. Obviously, we'd like the material as  
4 soon as possible. We appreciate that the Prosecution have a massive  
5 responsibility, given the size and scale of the case. I don't really  
6 make any further submissions on this point.

7 But I would like to address you in a little deal on the  
8 procedure for disclosure later in the hearing. Thank you.

9 JUDGE GUILLOU: Thank you, Mr. Young.

10 I think in your written submissions, Mr. Young, you were  
11 requesting the disclosure to start before the 30-day deadline, at  
12 least for part of it. Is it still an important point for you?  
13 Because that's why I was suggesting at the beginning that we make it  
14 in different batches, so that you can have access to some part of the  
15 evidentiary material as early as possible, giving the couple of extra  
16 days to the SPO to finalise its obligations.

17 MR. YOUNG: Your Honour, as Mr. Emmerson said, in the scheme of  
18 things, a few days really matters very little, given the size of  
19 these proceedings and the length of these proceedings. So we take no  
20 strong point there.

21 JUDGE GUILLOU: Point taken. Thank you, Mr. Young.

22 Now I turn to Ms. Alagendra, please.

23 MS. ALAGENDRA: [via videolink] Your Honour, we too are seeking  
24 that disclosure begin as soon as possible and in batches so that we  
25 can at least receive what is available immediately.

1 JUDGE GUILLOU: Thank you, Ms. Alagendra.

2 I will give back the floor to the Prosecution. And I will add  
3 that if you had, for example, two more weeks for your disclosure  
4 obligation, would it help to start the disclosure process before or  
5 not?

6 Ms. Lawson.

7 MS. LAWSON: Your Honour, our position is that we currently  
8 envisage being able to meet the 30-day deadline. Our preference  
9 would be to do that. And I don't really have anything further to add  
10 to that.

11 Thank you.

12 JUDGE GUILLOU: Thank you very much, Ms. Lawson.

13 Unless any of the counsel has anything to add - I don't see  
14 anybody waving - so we'll move to the next item in the agenda, which  
15 is the additional material intended for use at trial, which is the  
16 Rule 102(1)(b) material.

17 I take note that the SPO intends to disclose further material  
18 under Rule 102(1)(b). The SPO expects to be ready to disclose this  
19 additional material to the Defence by 31 May 2021 or 30 days prior to  
20 the opening of the SPO's case.

21 I invite the SPO to explore the possibility of disclosing  
22 material falling under this category on a rolling basis, for example,  
23 every few months, in order to allow the Defence teams to familiarise  
24 themselves progressively with the evidence rather than in one very  
25 large batch.

1 Ms. Lawson, you have the floor on this item.

2 MS. LAWSON: In terms of the material the SPO intends to rely  
3 upon at trial, in addition to, again, relying upon the majority of  
4 the 153 witnesses whose evidence was used for the purposes of the  
5 confirmation of the indictment, the SPO anticipates relying upon the  
6 evidence of approximately 50 additional witnesses.

7 In terms of documentary evidence, the SPO anticipates presenting  
8 approximately 1.500 exhibits at trial. This is a preliminary  
9 estimate, which may vary as a result of the ongoing investigative  
10 steps.

11 On timing, the SPO has undertaken to provide this material in  
12 batches as and when it is available to disclose and with a view to  
13 completing the disclosure by 31 May 2021, subject only to any  
14 applicable protective measures.

15 What cannot be done at this point is to identify which  
16 particular subsets of the material will be disclosed at which  
17 particular time. It might seem at first glance, for example, that  
18 unredacted material or material not requiring redaction could all be  
19 disclosed first. However, in order to identify which materials do or  
20 do not require redaction, it would be necessary to first have  
21 completed redaction review of all of the materials.

22 Therefore, the material will simply be disclosed in batches as  
23 and when they're available regardless of redaction or other status.  
24 It will be a rolling disclosure.

25 Finally, with regard to the 31 May 2021 timeline indicated by

1 the SPO, this date was put forward with a view towards moving the  
2 case as expeditiously as possible towards trial. Should it be the  
3 case, as suggested by certain of the Defence teams, that they, in  
4 fact, envisage 18 months to prepare for trial, the SPO will be  
5 seeking an amendment of that date.

6 The framework does not envisage and it would be unreasonable to  
7 require exhaustive witness and exhibit disclosure more than a year  
8 ahead of any scheduled trial date.

9 Thank you.

10 JUDGE GUILLOU: Thank you very much, Ms. Lawson.

11 Now I turn to the Defence teams.

12 Mr. Hooper, please.

13 MR. HOOPER: [via videolink] Well, if they say they can achieve  
14 disclosure, full disclosure by May, then why shouldn't they do that?  
15 That's all I have to say.

16 JUDGE GUILLOU: Thank you, Mr. Hooper.

17 Mr. Emmerson, please.

18 MR. EMMERSON: [via videolink] Again, I find myself surprised and  
19 disappointed that the Prosecution should seek to take advantage of  
20 the fact that the Defence needs to conduct a detailed investigation  
21 to justify delaying the disclosure that it is required to provide.

22 On the contrary, the Defence time estimate for its investigation  
23 takes, as its starting point, the conclusion of the Prosecution's  
24 disclosure obligation. It is -- I'm going to choose my words  
25 extremely carefully. It is not appropriate prosecutorial conduct to

1 suggest that the disclosure of material in advance is an undesirable  
2 objective so that they will, which is what you've just been told,  
3 consciously delay their disclosure obligations so that they are  
4 discharged closer to the trial date and therefore reduce the  
5 available opportunities for the Defence to investigate.

6 That is what's just been submitted to you. It's an  
7 extraordinary proposition, that a Prosecutor who says, "I give you  
8 31 May next year as my deadline," but then comes back and says, "But  
9 if the trial isn't going to take place immediately after that," so as  
10 to railroad the Defence into a trial without preparation, "we want to  
11 delay the disclosure."

12 I mean, these are very poor signs of the approach that the  
13 Prosecution is intending to take to its professional obligations.  
14 And I know, Your Honour, that the Pre-Trial Chamber and indeed the  
15 Trial Chamber in due course will ensure that the Prosecution is kept  
16 to its fundamental duty, which is to ensure a fair trial.

17 It seems that those who have formulated the position that has  
18 just been articulated to you in the course of this process are  
19 slanting their tactics for the specific purpose of preventing a fair  
20 trial. I find it extraordinary that these submissions are being made  
21 by counsel in the course of this hearing in this way.

22 Of course, the Prosecution must keep to its deadlines of May  
23 next year, and then we have a reasonable period, adequate time and  
24 facilities, in the words of Article 6 of the European Convention,  
25 once we have been informed of the particulars of the case against us,

1 to investigate and defend ourselves.

2 Why is the Prosecution so keen to deprive the Defence of a fair  
3 opportunity to test this allegation? What is it that the Prosecution  
4 thinks it gains in terms of an disadvantage as far as the interests  
5 of justice are concerned by having this, the case, brought forward in  
6 a way that enables the disclosure to be given at the last possible  
7 minute? What was the justification for that position? I'd be  
8 interested to hear the reply.

9 JUDGE GUILLOU: Thank you very much, Mr. Emmerson.

10 Mr. Young, please.

11 MR. YOUNG: Your Honour, I'll be very brief.

12 If I may use a French expression, I would suggest that in these  
13 international cases, for good case management reasons, there  
14 sometimes needs to be a guillotine. There should be a guillotine  
15 where disclosure stops. With great respect, one of the lessons that  
16 we've learned from some of the very long international criminal  
17 trials in The Hague is that the Prosecution have too often been  
18 allowed to continue the disclosure exercise for a lengthy period, so  
19 they serve batches and batches over a long period of time, and it  
20 does not allow the Defence a period of time to breathe, to take  
21 stock, to see the overview of the Prosecution case.

22 And so what I would advocate, Your Honour, respectfully to Your  
23 Honour, is that Your Honour consider a guillotine where disclosure  
24 must stop, because if there is no firm case management, in my  
25 experience, prosecutors will continue to disclose and that will make



1 things more difficult, particularly for the accused who are on trial.

2 JUDGE GUILLOU: Thank you, Mr. Young.

3 Ms. Alagendra, please.

4 MS. ALAGENDRA: [via videolink] Your Honour, we ask that the  
5 Prosecution be stopped as at 31 May to provide the disclosure so that  
6 the Defence has adequate time thereafter to prepare for trial.

7 JUDGE GUILLOU: Thank you, Ms. Alagendra.

8 I give back the floor to the Prosecution to respond. And I will  
9 add that regarding what you were saying about the disclosure in  
10 batches, if a monthly deadline would assist when you disclose the  
11 different batches.

12 Ms. Lawson, you have the floor.

13 MS. LAWSON: Thank you, Your Honour.

14 To be clear, there is no suggestion that the SPO would  
15 deliberately delay or otherwise withhold disclosure. As I stated, it  
16 will be rolling disclosure as and when the material is available.

17 The only point that I was making was, in fact, in reference to  
18 the guillotine concept raised by Mr. Young. No guillotine should be  
19 applied so far in advance of trial. Nonetheless, the Prosecution  
20 intends to comply with the timeline that it itself has outlined and  
21 complete disclosure by 31 May 2021.

22 As for monthly disclosure deadlines, we do not consider that to  
23 be necessary. As I indicated, it will be a rolling disclosure as and  
24 when available. Sometimes we would hope more frequently than that;  
25 sometimes perhaps monthly. We would think it would be more

1 appropriate for the specific timeline of those disclosure packages to  
2 be left to the discretion of the Prosecution, which will be decided  
3 not based on our discretion around any withholding of information but  
4 as and when the material is available.

5 Thank you.

6 MR. EMMERSON: [via videolink] Judge, may I?

7 JUDGE GUILLOU: Thank you, Ms. Lawson.

8 Mr. Emmerson, you requested the floor.

9 MR. EMMERSON: [via videolink] Yes. For the purposes of the  
10 record, what Ms. Lawson has just said is not an accurate  
11 representation of the submission that she made earlier on. She's not  
12 true to say that she was referring to the guillotine. What she said  
13 in her earlier submission was that if the Defence envisaged a much  
14 later trial, the Prosecution would then seek to put back the 31 May  
15 date because it would be giving the Defence advance notice to too  
16 great an extent of the allegations. She then changed her submission  
17 in her response and claimed not to have made it, saying instead that  
18 the Prosecution would stick to the 31 May position.

19 I say that because it seems to me, with great respect,  
20 relatively clear that the Prosecution is boxing and coxing on the  
21 hoof, but fundamentally the aim is to make these proceedings as  
22 difficult as possible for the Defence. And the question I ask and  
23 which has still not been answered in reply is why the Prosecution is  
24 so keen to avoid a fair trial process.

25 JUDGE GUILLOU: Thank you, Mr. Emmerson.

1 Does any other counsel want to add anything? No?

2 Ms. Lawson, do you want to add anything on this?

3 MS. LAWSON: No, thank you, Your Honour. I believe my  
4 submission, with its clarification, was in fact clear.

5 JUDGE GUILLOU: Thank you, Ms. Lawson.

6 Now let us move to Rule 103 material, which refers to  
7 exculpatory evidence.

8 I remind the Specialist Prosecutor that it must disclose  
9 immediately to the Defence any exculpatory evidence as soon as it is  
10 in the custody, control, or actual knowledge of the  
11 Specialist Prosecutor, which may reasonably suggest the accused's  
12 innocence or mitigate the guilt of the accused or affect the  
13 credibility or reliability of the Specialist Prosecutor's evidence.

14 Disclosure of exculpatory evidence is a continuous obligation  
15 subject only to protective measures where necessary. I take note  
16 that the SPO intends to disclose some Rule 103 material at the time  
17 it discloses the supporting material to the indictment.

18 I'd like to give the floor to the SPO to provide further details  
19 regarding this category of disclosure.

20 Ms. Lawson.

21 MS. LAWSON: Yes, Your Honour. The SPO will be disclosing over  
22 1.000 potentially exculpatory items not later than disclosure of the  
23 indictment supporting material. And consistent with our obligations,  
24 we'll continue to immediately disclose any potentially exculpatory  
25 information on a rolling basis.

1           There were two other points in relation to exculpatory  
2 disclosure which I'd like to address.

3           With respect to the SPO's request to be exempted from having to  
4 formally disclose information which is known and accessible to all, I  
5 would like to emphasise that what we are proposing here is not a  
6 radical or wide-ranging proposition, and nor is it likely to result  
7 in litigious rabbit holes. Certainly, it does not extend to  
8 non-public information of which the SPO is aware, and such material  
9 will be disclosed pursuant to Rule 103.

10           The proposition is, in fact, one which is already well  
11 understood and circumscribed. It comports with common sense and has  
12 been acknowledged by the Appeals Chambers of the ICTY, ICTR, SCSL,  
13 and ICC, amongst other courts. It's a well-recognised and understood  
14 concept which would be appropriate to also apply in this context.

15           Finally, regarding the requests by Mr. Selimi's Defence for each  
16 piece of exculpatory information to be specifically referenced to  
17 indictment paragraphs or to other evidentiary material, such a  
18 request far exceeds the requirements of the disclosure framework and  
19 is not something that the SPO is in a position to do.

20           It's important to note in this context that a number of other  
21 tribunals do not even require the Prosecution to identify material  
22 being disclosed as exculpatory. The framework here does require that  
23 and the SPO will be complying with it, thereby giving the Defence  
24 notice of the potential importance of the material, and this should  
25 be more than sufficient to facilitate their review.

1 Thank you.

2 JUDGE GUILLOU: Thank you, Ms. Lawson.

3 Mr. Hooper, please.

4 MR. HOOPER: [via videolink] Yes, I'd rather jumped the gun on  
5 this issue, perhaps, at the outset of my submissions, so I won't  
6 repeat it all again.

7 But I've noted difficulties that have arisen in this process  
8 since the Prosecution, as it were, self-identifying the exculpatory  
9 material, and they also still remain in-house in terms of someone  
10 applying the criterion to the material they hold. I'd request the  
11 Prosecution to consider dedicating or having a dedicated officer to  
12 review that material so that the exercise is done by an identifiable  
13 person with an obligation to discharge what is, after all, quite a  
14 heavy responsibility.

15 Thank you.

16 JUDGE GUILLOU: Thank you, Mr. Hooper.

17 Mr. Emmerson.

18 MR. EMMERSON: [via videolink] I take a slightly different  
19 approach.

20 The proposal put forward by the Prosecution seems, to us,  
21 eminently sensible as regards material that is accessible in the  
22 public domain to all parties, with the proviso that by casting that  
23 burden on the Defence - that's to say, the investigative burden of  
24 material of that nature - obviously, that needs to be taken into  
25 account in making due allowance for the length and depth of the

1 Defence investigations. It will increase the burden on the Defence  
2 to identify material from the public domain which the Prosecution  
3 already has in its possession.

4 But I, nonetheless, entirely endorse the proposition that it is  
5 a reflection of the practice of other tribunals and of common sense  
6 that if material is genuinely available, it not ought necessarily be  
7 the Prosecution's obligation to identify it.

8 As far as the methodology of the Prosecution is concerned, the  
9 Defence of Mr. Veseli takes the position that it is not for the  
10 Defence to tell the Prosecution how to do its job in relation to  
11 disclosure. We will see how it is done and make our comments at that  
12 stage. I don't endorse any particular proposal for the appointment  
13 of a disclosure officer or of any other aspect of the Prosecution's  
14 discharge of its function. That is for them and the results will be  
15 what form the basis of my submissions to the Court in due course.

16 JUDGE GUILLOU: Thank you, Mr. Emmerson.

17 Mr. Young.

18 MR. YOUNG: Your Honour, may it please you. Two short points.

19 Firstly, I'm sure you will understand that in relation to  
20 exculpatory material, the Defence would never suggest there would be  
21 a guillotine at any stage. Clearly in the case of exculpatory  
22 material, which is so important to the rights of an accused, that  
23 should be disclosed at the earliest moment and any time, such is its  
24 importance.

25 The second point, Your Honour, in relation to our submission,

1 which is found in paragraph 27 of our filing, we stand by that  
2 submission. The Prosecution basically have now argued that the  
3 responsibility, we suggest -- let me just repeat what we drafted in  
4 the submissions. We advocated that the Prosecution should be  
5 required, when disclosing exculpatory material to the Defence, to  
6 explain how each piece of material is considered exculpatory by  
7 reference to the paragraph of the indictment, witness, or other  
8 documentary evidence to which it relates.

9 Your Honour, with respect, we do not accept what's just been  
10 submitted by the Prosecution that it far exceeds the disclosure  
11 framework. We would submit that this is an opportunity for good case  
12 management, and whereby the Court has an opportunity to direct that  
13 this important material - this is the most important category of  
14 disclosure, exculpatory material - that this important material is  
15 made meaningful to the parties rather than dumped on the parties.

16 I'm not suggesting that we need a treatise or a lengthy  
17 explanation of the importance, but a succinct, short statement which  
18 makes it clear how the concession has been made that the material is  
19 exculpatory. This is really important for the rights of Mr. Selimi.

20 Thank you.

21 JUDGE GUILLOU: Thank you, Mr. Young.

22 Ms. Alagenda.

23 MS. ALAGENDRA: [via videolink] Your Honour, we do not agree that  
24 the Prosecution should not be required to disclose potentially  
25 exculpatory open source items. We refer to the wording of Rule 103

1 on this, and it is unequivocal, we say, that the Prosecution shall  
2 immediately disclose to the Defence any information, "any  
3 information" here being rather including open source material. So in  
4 that regard, we ask that they not be relieved of that obligation.

5 And we also feel that it is not necessary for the Prosecution to  
6 make an assessment as to whether or not exculpatory material is  
7 accessible with due diligence. That would be reversing the burden on  
8 us.

9 I also wish to endorse the position taken by Mr. Young earlier  
10 on this.

11 JUDGE GUILLOU: Thank you, Ms. Alagendra.

12 Ms. Lawson, do you want to reply to the Defence submissions?

13 MS. LAWSON: Not other than to say that we obviously are aware  
14 of and accept our obligation to disclose potentially exculpatory  
15 material as being an ongoing obligation.

16 Thank you.

17 JUDGE GUILLOU: Thank you, Ms. Lawson.

18 Unless any of the counsel has anything to add on this topic, let  
19 me now move back in the agenda to the Rule 103(3) material, which is  
20 the evidence material to Defence preparation obtained from or  
21 belonging to the accused.

22 I would like to remind the SPO that disclosure or inspection of  
23 evidence, such as statements, documents, photographs, or tangible  
24 objects material to the Defence must be disclosed without delay.  
25 What is considered material to the preparation of the Defence must be



1 understood broadly.

2 I also remind the parties that disputes as to the materiality of  
3 the information, as claimed by the Defence, must be submitted  
4 immediately to the Pre-Trial Judge for resolution.

5 I also take note that the SPO, in its submissions, anticipates  
6 providing the Defence with detailed notice of evidence material to it  
7 by 30 April 2021.

8 I would now like to hear the Prosecution's submissions on this  
9 category of evidence.

10 Ms. Lawson, you have the floor.

11 MS. LAWSON: As Your Honour just noted, the SPO anticipates  
12 providing detailed notice of Rule 102(3) material by 30 April 2021,  
13 consistent with the applicable jurisprudence. What may be material  
14 to the preparation of the Defence is to be broadly interpreted, and  
15 therefore we do anticipate that there may be quite a lengthy list of  
16 material falling under this category. Identification of that list  
17 cannot be completed until witness and exhibit lists, as well as  
18 exculpatory disclosure, are well advanced.

19 In accordance with the applicable framework and based on the  
20 detailed notice which the SPO will provide, it will then be for the  
21 Defence teams to identify and request material which they believe to  
22 be material to their preparation. The potential relevance of  
23 material disclosed pursuant to Rule 102(3) is, therefore, relevance  
24 which the individual Defence teams themselves will have identified.

25 Regarding the submission from Mr. Selimi's Defence that material

1 obtained from the accused should be disclosed immediately, the vast  
2 majority of such material was, in fact, only very recently obtained  
3 as a result of the searches and seizures conducted in connection with  
4 the arrest of each of the accused.

5 There is a considerable volume of such material, some of which  
6 is in electronic form, other in paper format. The SPO is processing  
7 this material as expeditiously as possible, and within the four-month  
8 timeframe authorised by the Chamber, will be returning or destroying  
9 any items which are not relevant and, thereafter, processing and  
10 disclosing items of relevance in keeping with the timeline indicated  
11 in our submissions.

12 Finally, the Defence for Mr. Selimi requested a particular  
13 procedure and timeline for processing of Defence disclosure requests  
14 under Rule 102(3), to which I would like to respond.

15 We do appreciate that judicial intervention or, indeed,  
16 regulation may be appropriate in certain instances, in particular,  
17 where there are difficulties encountered and where the parties are  
18 unable to agree on an *inter partes* basis. That is not the current  
19 situation. The parties should be afforded a degree of discretion in  
20 managing their disclosure obligations in a reasonable and efficient  
21 way.

22 Indeed, at this stage a process of the type proposed could only  
23 be counterproductive. It is necessary for the benefit of each  
24 Defence team that disclosure of indictment supporting material and of  
25 exculpatory material be prioritised. The process for everyone could

1 be very significantly waylaid were one or more Defence teams to start  
2 making large, premature, and individualised requests in advance of  
3 having received and reviewed that core material.

4 Thank you.

5 JUDGE GUILLOU: Thank you, Ms. Lawson.

6 Before I give the floor to the Defence teams, I would just like  
7 to ask the interpreters if they agree that we continue for probably  
8 10 or 15 minutes before a short break in order to finish the  
9 discussion on the different categories of evidence material. If you  
10 can let me know.

11 THE INTERPRETER: That's fine, Your Honour. We can continue.

12 JUDGE GUILLOU: The interpreters told me that it's fine to  
13 continue for a couple more minutes, so we can break before we have a  
14 discussion on the procedure for disclosure, which will be a good time  
15 to have a short break.

16 Mr. Hooper, you have the floor.

17 MR. HOOPER: [via videolink] Yes, I've no comment to make other  
18 than this: Can we have formal service of the transcript of interview  
19 that Mr. Thaci participated in earlier in the year? Thank you.

20 JUDGE GUILLOU: Thank you, Mr. Hooper. The Prosecution will  
21 respond afterwards.

22 I give the floor to Mr. Emmerson.

23 MR. EMMERSON: [via videolink] Your Honour, I've nothing material  
24 to add. I think I've made our position clear as far as the  
25 disclosure regime is concerned; namely, that we accept that it is for

1 the Prosecution in the first instance to devise the method of  
2 discharging its obligations, and we recognise the force of the  
3 submission that the Prosecutor must be given a reasonable degree of  
4 latitude and discretion in the manner in which it does that. As I  
5 said before, we will reserve our position to see how it works in  
6 practice and whether or not disclosure is given with the spirit of  
7 fairness that is necessary.

8 JUDGE GUILLOU: Thank you, Mr. Emmerson.  
9 Mr. Young.

10 MR. YOUNG: Your Honour, thank you. I have nothing to add, save  
11 that we do stand by our submissions in paragraph 24 of our filings,  
12 and we submit this is a sensible proposal and we ask Your Honour to  
13 consider it.

14 JUDGE GUILLOU: Thank you, Mr. Young.  
15 Ms. Alagendra.

16 MS. ALAGENDRA: [via videolink] Your Honour, we reserve our  
17 position on this at this stage, and we'll see how it works in  
18 practice once we receive it.

19 JUDGE GUILLOU: Thank you, Ms. Alagendra.  
20 Ms. Lawson.

21 MS. LAWSON: I can confirm that copies of Mr. Thaci's  
22 transcripts will be included in the material to be disclosed within  
23 the 30-day timeframe.

24 Thank you.

25 JUDGE GUILLOU: Thank you, Ms. Lawson.

1           Let us move now to the protected material, which is the Rule 107  
2 material.

3           In its submission, the SPO mentions that it is actively seeking  
4 remaining Rule 107 clearances. I would like the SPO to further  
5 explain the amount and category of material that still require  
6 clearance.

7           Ms. Lawson.

8           MS. LAWSON: Yes, thank you, Your Honour.

9           As we outlined, we are actively working on obtaining remaining  
10 clearances. The material in question is material which we have  
11 identified as being potentially relevant, therefore, falling under  
12 Rule 102(3).

13           The SPO has been working with the institutions in question for  
14 over 18 months in respect of such clearances, and we have kept them  
15 apprised of applicable and anticipated disclosure deadlines.

16           We do not currently anticipate that obtaining such clearances  
17 will jeopardise the timeline that we have indicated, and therefore we  
18 envisage that requests to the Chamber, if any, would be made in  
19 sufficient time to meet that timeline. Should the assessment change,  
20 we will promptly inform the Chamber.

21           Thank you.

22           JUDGE GUILLOU: Thank you, Ms. Lawson.

23           Mr. Hooper.

24           MR. HOOPER: [via videolink] Yes, I have no comments to make.

25           Thank you.

1 JUDGE GUILLOU: Thank you.

2 Mr. Emmerson.

3 MR. EMMERSON: [via videolink] Nothing to add.

4 JUDGE GUILLOU: Mr. Young.

5 MR. YOUNG: No, thank you.

6 JUDGE GUILLOU: And Ms. Alagendra.

7 MS. ALAGENDRA: [via videolink] No comments, Your Honour.

8 JUDGE GUILLOU: Thank you.

9 It went faster than I thought. So it's now 12.27. I think it  
10 would be probably better for the interpreters to have a short break.  
11 We're going to have a break for, let's say, 30 minutes, so we will  
12 resume the hearing at 12.40.

13 The hearing is adjourned.

14 --- Recess taken at 12.27 p.m.

15 --- On resuming at 12.45 p.m.

16 JUDGE GUILLOU: Let us now move to the procedure for disclosure.

17 In its submission, the SPO indicates that *inter partes*  
18 discussions are still ongoing regarding the Rule 109(c) chart, but  
19 that it prefers an approach consistent with the one that has been  
20 taken in the Mustafa case.

21 I also note that several counsel requested disclosure charts for  
22 each package of disclosure rather than only after the pre-trial  
23 brief.

24 I first invite the SPO to give further detail on this topic.

25 Ms. Lawson.

1 MS. LAWSON: Thank you, Your Honour. Before we start, I would  
2 just like to note, for the record, that Specialist Prosecutor  
3 Jack Smith has left the courtroom.

4 With regard to categorisation of information pursuant to  
5 Rule 109(c), in accordance with Your Honour's direction, the SPO  
6 promptly initiated *inter partes* discussions on this topic on  
7 12 November, circulating a proposal to each of the Defence teams.  
8 The proposal was, as you largely, largely based on the approach  
9 previously in the Mustafa case before this Court.

10 On Monday morning, and in light of responses which had been  
11 received from certain of the Defence teams, we circulated a further  
12 revised proposal. We remain available to discuss the topic further,  
13 on an *inter partes* basis, with a view to reaching a common position.

14 However, there are just three points that I think are just worth  
15 making now. The first is one that I have made previously before this  
16 Court, albeit in the context of different proceedings, and that is  
17 that the requirement upon all parties under Rule 109(c) is for  
18 categorisation to be so far as practicable; that is, what can be done  
19 within the resources and means which are available. The  
20 categorisation should not and must not become a burden so onerous  
21 that the expeditiousness of proceedings are jeopardised.

22 Second, and relatedly, the format in which any categorisation is  
23 ultimately required and the timing by which that can be done are  
24 deeply interrelated. The proposed chart format which the SPO  
25 presented was conditional upon it being provided only after

1 production of the pre-trial brief. Should that timing be altered,  
2 the content and format of any chart may also need to be altered.

3 Finally, no navigational aid of this nature is going to prevent  
4 the need for the materials in question to be read and analysed in  
5 full by all parties. Consequently, imposing a categorisation  
6 requirement, which would delay provision of the materials themselves,  
7 which, for example, requiring production of a detailed chart together  
8 with each disclosure package would do, is in our view simply  
9 counterproductive. Nonetheless, as I indicated, we remain available  
10 to continue these discussions on an *inter partes* basis.

11 Separately, in their written submissions, Mr. Thaci's Defence  
12 raised an objection to material disclosed by the parties being made  
13 available to the Chamber indicating that it would be prejudicial to  
14 their client for the Trial Panel to be able to see such material.

15 The SPO considers that the question of access to such material  
16 is a discretionary matter for the Chamber. We can certainly see that  
17 it is beneficial for the Pre-Trial Judge, and ultimately the  
18 Trial Panel, to receive such material; in particular, in order to  
19 facilitate meaningful oversight of the disclosure process.

20 What the Defence appears to be suggesting is that a Panel of  
21 Professional Judges will not be able to separate out and distinguish  
22 the material which is submitted into evidence before it from other  
23 information, and that is a contention which we do not accept.

24 Turning to the proposed redaction regime.

25 As Your Honour has previously recognised, such a regime is



1 well-established and well proven --

2 JUDGE GUILLOU: Ms. Lawson, sorry to interrupt. Maybe we'll  
3 have a separate discussion on the redaction regime and we'll first  
4 start with the procedure, because it will be already quite -- if you  
5 don't mind, I'll give you back the floor on the redaction regime  
6 afterwards.

7 MS. LAWSON: Certainly, Your Honour.

8 JUDGE GUILLOU: Thank you, Ms. Lawson.

9 Mr. Hooper, you have the floor on the procedure for disclosure.

10 MR. HOOPER: [via videolink] Thank you, Your Honour. Well,  
11 you've seen our submissions. May I defer to Ms. Menegon, who is  
12 present in court and has had far more experience, if I may say so, at  
13 having to deal with issues of disclosure and the difficulties that  
14 arises, and particularly with the metadata and the like.

15 Can I invite Your Honour to invite Ms. Menegon to add any  
16 further comments that she might feel appropriate.

17 JUDGE GUILLOU: Absolutely.

18 Ms. Menegon, you have the floor.

19 MS. MENEGON: I thank you, Your Honours. What I wanted to  
20 stress is for the category of information provided by the Prosecution  
21 with each batch of disclosure, what we would like to is that each  
22 evidence be connected in the metadata in the Legal Workflow to the  
23 underlying crimes, contextual elements, conduct of the accused,  
24 et cetera.

25 The idea is that, for us, we can then issue a list of evidence

1 by topic, by crime, by contextual elements. We don't necessarily  
2 need, I think, the Prosecutor to issue a specific chart at each  
3 disclosure package, but we need to have at least the metadata. The  
4 link is done already by the Prosecution with this category of  
5 information envisaged by the Rules in the metadata in the  
6 Legal Workflow, and the IT system should allow us to export this data  
7 in table format for us to be able to organise our work.

8 And then, of course, after the filing of the pre-trial brief by  
9 each party, then we will need a consolidated chart by each party  
10 which details this category of information. And eventually with more  
11 details, because we have not received anything yet. So for us it's a  
12 bit difficult also to know exactly how everything has to be divided  
13 by the Prosecutor in his presentation of evidence.

14 I thank you.

15 JUDGE GUILLOU: Thank you, Ms. Menegon.

16 Mr. Emmerson.

17 MR. EMMERSON: [via videolink] Your Honour, as regards the  
18 relevance question and the preparation of a chart, we would endorse  
19 the approach urged upon you by the Prosecution, which is that this is  
20 no more than a preliminary navigational tool, and that the Defence  
21 will inevitably need to consider all of the material in very great  
22 detail for the purposes of its investigation.

23 And the touchstone here, in terms of obligations on the  
24 Prosecution and the Defence, must be one of proportionality. So I  
25 would not seek to go behind the Prosecution's emphasis on the words

1 "so far as practicable."

2 In relation to the categorisation exercise, it is useful as a  
3 starting point, but it ought not to result in a substantive delay in  
4 the disclosure process.

5 As far as the separate submission made on behalf of Mr. Thaci is  
6 concerned, we do not endorse that submission in relation to material  
7 being available to the Trial Chamber. We all have different  
8 experiences. Having sat myself as a judge in the ICTY, I am entirely  
9 satisfied that the Tribunal is perfectly capable of distinguishing  
10 that which is relevant and admissible from that which is irrelevant  
11 and inadmissible and prejudicial. So I certainly would not endorse  
12 that proposition. Those are my submissions.

13 JUDGE GUILLOU: Thank you, Mr. Emmerson.

14 Mr. Young.

15 MR. YOUNG: Your Honour, thank you.

16 In direct response to what's been said to Your Honour by the  
17 Prosecution. Your Honour, my learned friend for the Prosecution has  
18 said that these charts, as we suggested, would be an onerous burden  
19 upon them. And we do accept that if Your Honour were to accept our  
20 proposal, then it would require the Prosecution to exercise some more  
21 time than usual.

22 But we would submit that, in the longer term, more time would be  
23 saved by having regular rolling charts. And so I'm going to make  
24 some specific submissions on this.

25 We would like to, and Your Honour will know, for the record, in

1 our written submissions at page 10, paragraphs 33 to 36, we  
2 effectively welcomed and commended Your Honour's, what we would say,  
3 was an innovative initiative of ordering detailed disclosure charts.

4 As Your Honour knows, and Your Honour directed before my arrival  
5 in the case, that the parties consider a disclosure model chart which  
6 satisfies the requirement of Rule 109(c). And, obviously,  
7 Your Honour asked for that to be discussed today.

8 The SPO has put forward a proposal. And may I make it clear, we  
9 are completely prepared to engage constructively with the Prosecution  
10 on attempting, *inter partes*, to shape and create a suitable  
11 disclosure model for this case. What we strongly reject, however, is  
12 the Prosecution proposal in their 4 November filing on the  
13 Rule 109(c) categorisation chart, namely, in terms of the timing,  
14 which is just not acceptable. They propose it be submitted only one  
15 week before the submission of the SPO's pre-trial brief.

16 That is simply not acceptable to us. And far too late. And so  
17 we do comment our proposal in paragraph 34 of our filing for the  
18 Prosecution to provide these detailed charts on a rolling basis.  
19 But, as I say, given the size and scale of these proceedings, in the  
20 longer term, we would say that more time will, in fact, be saved if  
21 the parties have these categorisation charts.

22 And, with respect, Your Honour, it's not only the Defence that  
23 would benefit from this innovative model that Your Honour is  
24 suggesting. With respect to Your Honour, the Prosecutors themselves  
25 even may well find that these charts, if they were required to

1 undertake them, would concentrate the mind on relevance, on context.  
2 It would focus minds so that the parties in these proceedings can  
3 understand the Prosecution's journey in the evidence and journey in  
4 the proceedings. As opposed to having, effectively, a massive  
5 disclosure of evidence, effectively, at the last minute; whereby,  
6 everything falls into a legal black hole in a computer system.

7 So what we submit is this: That Rule 109 embodies good case  
8 management. As Your Honour knows well, there are no specific  
9 timelines, from my recollection, within the rule itself. But if  
10 reasonableness is the guiding test, which is implicit, then the aims  
11 of Rule 109, to make disclosure meaningful, in effect, are entirely  
12 consistent with our proposal, with respect.

13 And so we do submit that Your Honour should direct these charts  
14 to be produced on a regular rolling basis. And as I say, we will  
15 cooperate with the Prosecution, we'll engage with them, and attempt  
16 *inter partes* to create a model that's bespoke for this case. Thank  
17 you.

18 JUDGE GUILLOU: Thank you, Mr. Young.

19 Ms. Alagendra.

20 MS. ALAGENDRA: [via videolink] Your Honour, we are agreeing on  
21 the use of a detailed disclosure chart as proposed and revised by the  
22 Prosecution. We will also cooperate and participate in the ongoing  
23 discussions on the model of the chart with the Prosecution,  
24 Your Honour.

25 But we do also endorse the view of Mr. Young, that some

1 identification of the relevance of the material that's being  
2 disclosed is fundamental to our preparation. So we would request for  
3 that. That is all.

4 JUDGE GUILLOU: Thank you, Ms. Alagendra.

5 I give back the floor to the Prosecution.

6 And I'll also ask, Ms. Lawson, how long would this *inter partes*  
7 discussion last? Would you be in a position, according to your  
8 preliminary discussions, to have an agreement, or at least to be able  
9 to let me know where you are in the discussions within a couple of  
10 days or within a week?

11 You have the floor.

12 MS. LAWSON: Thank you, Your Honour. As you could tell from the  
13 submissions made, I believe there is room for us to make progress on  
14 this further in an *inter partes* manner.

15 With regard timing, I would -- well, it will obviously involve  
16 all of the parties. I would suggest that we could, perhaps, revert  
17 in a weeks' time, if that is agreeable to the counsel with whom I'll  
18 be interacting. Thank you.

19 JUDGE GUILLOU: Thank you, Ms. Lawson.

20 Now I turn to the Defence team. Would a one-week timeline for  
21 the discussions you would have with the Prosecution on the chart be  
22 sufficient to you, or do you need less or more time? If it's less,  
23 that would be wonderful, of course.

24 Mr. Hooper.

25 MR. HOOPER: [via videolink] I thought a week -- sorry, can you

1 hear me?

2 JUDGE GUILLOU: Absolutely.

3 MR. HOOPER: [via videolink] I would have thought a week  
4 appropriate. I'm not entirely clear what Your Honour has in mind  
5 will happen at the end of the week, presumably that we seek an  
6 agreement between us. I don't think we need a further hearing, do  
7 we? No.

8 JUDGE GUILLOU: No, we don't need a hearing. But it's mainly in  
9 order for me to be briefed before adopting the framework decision on  
10 disclosure.

11 MR. HOOPER: [via videolink] Well, in that case, then, I'd say a  
12 week, because we're scattered all over the place in different time  
13 zones and circumstances. And I think it would be far more convenient  
14 for the Defence, in those circumstances, to hopefully have a week  
15 [indiscernible] discussions with the Prosecution. In conclusion, in  
16 a week's time. So Thursday next week.

17 JUDGE GUILLOU: Thank you, Mr. Hooper.

18 Mr. Emmerson.

19 MR. EMMERSON: [via videolink] I don't think I need any time at  
20 all. I can say here and now that I have nothing to add to that  
21 process. As I've indicated throughout, I consider the disclosure  
22 obligations to be obligations that rest on the Prosecution. I will  
23 see the way in which they are discharged.

24 I have nothing beyond what I've already said to say about  
25 categorisation. And so in those circumstances, we don't require any

1 further time to have additional discussions with the Prosecution. We  
2 would be grateful to be kept informed.

3 JUDGE GUILLOU: Thank you, Mr. Emmerson.

4 Mr. Young.

5 MR. YOUNG: We'll endeavour to do this within one week. Thank  
6 you.

7 JUDGE GUILLOU: Ms. Alagendra.

8 MS. ALAGENDRA: [via videolink] One week is reasonable, Your  
9 Honour.

10 JUDGE GUILLOU: Thank you, Ms. Alagendra.

11 Thank you very much for your work on this issue. Given the  
12 timeline we have for the 30-day deadline for the disclosure, I may  
13 have to issue, actually, two decisions on the redaction and probably  
14 delay the ruling on this disclosure chart, because I don't want to  
15 delay the disclosure evidence within the 30-days deadline for that.  
16 But I thank you in advance for your work on this, because I think  
17 there is definitely an agreement that could be reached, at least on  
18 the structure of the chart.

19 Now let me move to the last topic, which is the redaction  
20 regime. And sorry again, Ms. Lawson, to have interrupted you before.

21 In adopting a redaction regime, it is necessary to ensure the  
22 efficiency of the disclosure process while striking a balance between  
23 the duty to protect the interest of the victims and witnesses and, of  
24 course, upholding the rights of the accused.

25 In its submissions, the SPO requests to adopt the redaction



1 regime that is applied in the Mustafa case. I invite the SPO to make  
2 further submissions on this topic.

3 MS. LAWSON: Thank you, Your Honour.

4 My submissions on this will, in fact, be very brief. As  
5 Your Honour has previously recognised, such a regime is  
6 well-established and well-proven as an efficient mean of expediting  
7 and overseeing the disclosure process. The regime applies a system  
8 of prior judicial authorisation for all redactions. This  
9 authorisation is simply done by way of a category in respect of  
10 certain limited types of information, and we endorse the submissions  
11 that we made in writing. Thank you.

12 JUDGE GUILLOU: Thank you, Ms. Lawson.

13 Mr. Hooper, please.

14 MR. HOOPER: [via videolink] Yes, no, we have no objection to the  
15 regime that was spoken of in the Mustafa case.

16 My only concern is this: I don't know whether the Prosecution  
17 effectively have already been putting this regime into practice. But  
18 if they have, then it's had some very strange results because we've  
19 seen redactions where, for example -- I'll come back to that,  
20 perhaps, at a later point.

21 But there does seem to have been a great number of quite  
22 unnecessary redactions on the face of documents that we've received.  
23 So I hope this isn't a practice that the Prosecution already consider  
24 that they employ, because it would have an unfortunate effect if  
25 that's the case. But we have no objection to the Mustafa regime

1 being the regime in this case.

2 JUDGE GUILLOU: Thank you, Mr. Hooper.

3 Mr. Emmerson.

4 MR. EMMERSON: [via videolink] What has come to be called the  
5 Mustafa regime is nothing more or less than the identification in  
6 advance of categories of material to which redactions could properly  
7 be applied. That is not a complicated exercise.

8 What is a complicated exercise is applying those general  
9 categories to the data in individual statements. It's inevitable  
10 that any generalised system that is category-based will result in  
11 over-redaction. We've seen it on the material that's already been  
12 served in this case. We've seen it in the submissions of junior  
13 counsel for the Prosecution, who's told us already that the pre-trial  
14 brief is going to have to be revised so as to lift some of the  
15 redactions that were initially implemented.

16 We will see this again and again in the pre-trial process, if we  
17 adopt that process. I'm not suggesting that it wasn't appropriate in  
18 the Mustafa case. I'm not suggesting that it cannot be adapted as a  
19 starting point in this case because, for proportionality reasons,  
20 given the huge volume of material here, one can well understand why  
21 it would be impractical to make individual prejudicial determinations  
22 in advance of each redaction.

23 But what we all have to recognise squarely is that if that is  
24 the case, what we will start with is material which has been vastly  
25 over-redacted, which makes it extremely difficult for the Defence to

1 comprehend the detail in certain instances and which will require a  
2 vigorous and muscular process; whereby, the Pre-Trial Chamber  
3 considers Defence applications for de-redaction in the interests of  
4 justice.

5 And as I said earlier on, there is a danger that that process,  
6 with a reluctant Prosecution - and so far, signs of the Prosecution's  
7 commitment to the underlying principles of a fair trial are not  
8 encouraging - that there is a danger that it becomes a process of  
9 pulling teeth, and it's slow and resisted. And I'm simply making  
10 that point on the record now because, as you see, my position  
11 throughout is we'll see how this works out.

12 But I'm not seeing any positive signs at the moment that the  
13 Prosecution is genuinely committed to a carefully calibrated  
14 redaction process which genuinely is designed and implemented in a  
15 manner best aimed at achieving the interests of justice.

16 And, of course, as I've said at the outset of Mr. Veseli's first  
17 appearance, the defendants have nothing to fear in this case from the  
18 truth. But what is a danger is a situation where unnecessary  
19 redactions make a full investigation of the truth impossible.

20 So, yes, by all means start that way. But I predict, here and  
21 now, that that will result in a great deal of *inter partes* litigation  
22 in the meantime, unless the Prosecution shows a marked change in  
23 attitude. Those are my submissions.

24 JUDGE GUILLOU: Thank you very much, Mr. Emmerson.

25 Before giving the floor to Mr. Young, just one small point. I

1 think Ms. Lawson is not a junior counsel of the Prosecution. She's a  
2 counsel for the Prosecution. So I think we should avoid using this  
3 term when we refer to the different teams, if you don't mind.

4 Mr. Young, please.

5 MR. YOUNG: Your Honour, thank you. Just very briefly.

6 Your Honour will know that in our submissions in relation to the  
7 redaction regime from paragraphs 37 through to 42, we did express  
8 some legitimate concerns about the adoption of the Mustafa procedure.  
9 And the way we put it, to summarise the position, is that this -- if  
10 there was an adoption of the Mustafa procedure, it would effectively  
11 shift the burden from the SPO to prove the necessity of redactions as  
12 an exception to general principle of full disclosure onto the Defence  
13 to seek to lift redactions that have already been imposed by the SPO  
14 with no judicial oversight. And we maintain and stand by that  
15 position.

16 JUDGE GUILLOU: Thank you, Mr. Young.

17 Ms. Alagendra.

18 MS. ALAGENDRA: [via videolink] Your Honour, we do not oppose the  
19 redaction regime in the Mustafa case. And whilst I say that, I do  
20 also wish to endorse the views of Mr. Emmerson taken earlier. Thank  
21 you.

22 JUDGE GUILLOU: Thank you, Ms. Alagendra.

23 Ms. Lawson, do you have anything to add or to reply to what has  
24 been said?

25 MS. LAWSON: Hopefully it will be reassuring to counsel to know

1 that none of the materials they have received to date have been  
2 redacted under this particular regime. Nothing further, thank you.

3 JUDGE GUILLOU: Thank you very much.

4 Unless any of the counsel has anything specific to say on this  
5 matter, I will move to the last topic, which is any other matter. At  
6 this point, I would like to ask the parties whether they have any  
7 other issues they would like to raise. And I remind the parties to  
8 give prior notice should any submission require the disclosure of  
9 confidential information so that appropriate measures may be taken.

10 I turn to the Prosecution.

11 MS. LAWSON: Nothing further from the Prosecution. Thank you,  
12 Your Honour.

13 JUDGE GUILLOU: Thank you.

14 Mr. Hooper.

15 MR. HOOPER: [via videolink] Yes, well, the matter is a very  
16 important matter concerning Mr. Thaci's continued detention.

17 I think at the Initial Appearance last week we made it very  
18 plain that we did not accept for one moment that the necessary  
19 criterion for his being detained, found in Article 41, were  
20 satisfied, and that it was our intention in those circumstances to  
21 apply for his interim release.

22 And we also suggested or I also suggested last week the  
23 modalities, as it were, in which that exercise should be conducted.  
24 Now, we've -- the first matter, of course, is that we need to have  
25 full disclosure of those arguments that have been placed before

1 Your Honour to justify the use of an arrest warrant as opposed to a  
2 summons in his case. And I've received from the Prosecution a  
3 redacted version of the SPO request for an arrest warrant.

4 I must say, looking at the face of that document, there are some  
5 strange redactions. In their paragraph 2, for example, we have a  
6 reference to, and I'll just read it, "having regard to articles"  
7 redacted "of the laws and rules" redacted. Now, I don't know what  
8 process of supervision those redactions took place, but that clearly  
9 can't be justified.

10 And not only that, but also there's references clearly to some  
11 behavioural or alleged misbehaviour of Mr. Thaci in the course of  
12 that document, which itself is redacted. And we well understand, of  
13 course, that witnesses' names and complainants and the like, if they  
14 feel they should, may have their names redacted, if that's necessary.

15 But we'd ask the Prosecution to reconsider their redactions and  
16 to let us have a less redacted version of that. And also to ensure  
17 that all the evidence that's quoted in the footnotes to the SPO  
18 request for that warrant is served on us within, well, as soon as  
19 possible and not later, because it's available to -- the three days.

20 Now once we have that material, and I think having spoken to  
21 Mr. Emmerson earlier this week on this matter, and I think we're  
22 suggesting a similar scheme, and perhaps together with my learned  
23 friends as well, that the way forward for each accused -- and they're  
24 not a job lot, even though the Prosecution in their filing, I see,  
25 try to treat them as such. They're not a job lot. Individual

1 applications will be made.

2 And we suggest that the appropriate modality is that once we are  
3 fully informed, not only are those matters that the Prosecution laid  
4 before Your Honour to justify the warrant, but also any additional  
5 matters that they'd wished to raise in the course of the debate  
6 before Your Honour, that those be disclosed to us. It can be by way  
7 of perhaps a filing or whatever on the part of the Prosecution to  
8 which we can respond. But that at the end of the day, the matter, in  
9 fact, has the benefit of an oral application.

10 Now as for the date of that oral application, I'm not suggesting  
11 a date today because we'll come before the Court, if I may say so,  
12 when we're fully prepared and with the agreement of Your Honour.  
13 And, of course, when is suitable. So that's the only matter, in  
14 fact, I'd wish to raise in respect of that matter.

15 And I suppose today we'd be asking Your Honour - if not today,  
16 very near future - if Your Honour can, in fact, adopt and agree those  
17 modalities. Thank you.

18 JUDGE GUILLOU: Thank you, Mr. Hooper.

19 In any case, I think before making any decision on this matter,  
20 I will need you to file an application. And then the question of an  
21 oral hearing will be dealt with. But first of all, it's up to the  
22 Defence team to file an application in that regard for interim  
23 release.

24 MR. HOOPER: [via videolink] Well, Your Honour, the process that  
25 has been undergone so far is, of course, that Mr. Thaci was arrested

1 on an arrest warrant as a consequence of matters that were raised  
2 before Your Honour. And in respect of that, of course, the Defence  
3 had no say. Your Honour hasn't heard, in fact, the arguments from  
4 the Defence.

5 And I'd submit as a simple rule of *audi partem*, that Your Honour  
6 is, in fact -- entitled, in fact, to hear from both sides.  
7 Your Honour has heard from the Prosecution. All I'm saying is by all  
8 means give them room, as it were, to include further matters so that  
9 the Defence, the applicant, is fully aware of what arguments he has  
10 to face. It seems entirely fair and entirely in line with other  
11 jurisdictions. And then we come before Your Honour and make our  
12 application, our formal application.

13 So I could make an application to Your Honour to say: Would  
14 Your Honour, in fact, accept these particular modalities; i.e., that  
15 we hear the full argument from the Prosecution, if there's any  
16 additional matters to those that they presented to Your Honour in the  
17 course of the application for the warrant? And then we respond to  
18 that. We don't mind exchanging our submissions in paper in order to  
19 assist and focus the parties on the issues that matter to assist  
20 Your Honour.

21 But should it really be our application at this stage? I ask  
22 that somewhat rhetorically. But should it? Because the Prosecution  
23 have already laid these matters before Your Honour. All we're asking  
24 is for us to be invested with that full knowledge in addition to any  
25 other matters they want to raise. Then we can make our application



1 fully informed, and that would be a simple and fair way of going  
2 forward.

3 Otherwise, Your Honour, we become, as it were, the protagonists  
4 in this system. And effectively, given that the Rules themselves,  
5 and indeed the Law of this particular Court, makes it plain that, in  
6 fact, detention is the exception and that, indeed, release is  
7 presumed in the absence of the criterion being fulfilled. Then it's  
8 my submission that that would be the most appropriate way of going  
9 about it: We get informed, we respond, and Your Honour decides.

10 JUDGE GUILLOU: Thank you, Mr. Hooper.

11 I think you said a very important point, which I agree, is that  
12 I need to be briefed from both sides - from the Prosecution, but also  
13 from the Defence. And now the party that I haven't heard on that  
14 issue is the Defence. This is why I think that it's perfectly  
15 appropriate that you file an application, then the SPO replies, and  
16 you can, of course, reply as much as you want after that, and more if  
17 needed.

18 And I said I didn't close the door to an oral hearing at all on  
19 that issue, because I think the more discussion that can be between  
20 the parties and the more I'm informed, the better. But it seems to  
21 me, appropriate to the legal framework, that you first file an  
22 application for interim release to trigger this process.

23 Unless the Prosecution wants to say something specific about  
24 this, I will give the floor to Mr. Emmerson?

25 But, Ms. Lawson.

1 MS. LAWSON: I'm happy to respond off each counsel have made  
2 their submissions, thank you.

3 JUDGE GUILLOU: I've just been told that, Mr. Hooper, I think  
4 you said something, but your microphone was off. So if I can ask you  
5 just to repeat what you said? Thank you very much. And sorry for  
6 this.

7 Your microphone is off at the moment, Mr. Hooper, so we cannot  
8 hear you.

9 MR. HOOPER: [via videolink] I see.

10 JUDGE GUILLOU: Yes, now it's fine.

11 MR. HOOPER: [via videolink] No, I'm saying --

12 JUDGE GUILLOU: Please, sorry.

13 MR. HOOPER: [via videolink] -- you don't want the whole lot  
14 again. You just want, I think, the last -- the last remarks I made,  
15 were merely: No, that's all I've got to say, and thank you. At  
16 least I hope that's what was missed. Okay. Thank you.

17 JUDGE GUILLOU: I think so. And thank you, Mr. Hooper.

18 Mr. Emmerson.

19 MR. EMMERSON: [via videolink] Your Honour, there are some slight  
20 differences of nuance between myself and Mr. Hooper. Although,  
21 perhaps, not any great differences of substance.

22 First of all, unlike Mr. Thaci, the Prosecution did hear  
23 representations on behalf of Mr. Veseli before deciding on the mode  
24 that he should be brought before the Tribunal. Some weeks before the  
25 process began, I wrote to Mr. Smith making detailed representations

1 as to why Mr. Veseli should be trusted to surrender if his attendance  
2 was required and the indictment was confirmed rather than being  
3 arrested at home as, I know, some of the other accused were.

4 And I'm pleased to say that that iterative process resulted in  
5 an arrangement for him to surrender by consent, which was honoured by  
6 both sides in a collaborative manner, so that he was notified in  
7 advance at the time which he should surrender and he did so, which  
8 would have been clear to all concerned was a strong signal and  
9 indication of his commitment, through me, to cooperate with the  
10 Tribunal so that a provisional release would inevitably be granted in  
11 due course.

12 And so I trust that -- it was never made clear to me whether  
13 that letter was shown to you, and I'm not asking you to indicate  
14 whether it was or it wasn't, because the Prosecution itself, as a  
15 result of that, entered into negotiations with me for the voluntary  
16 surrender of Mr. Veseli. So to that extent, we are on to a  
17 collaborative, cooperative start of a process which we trust will  
18 result in Mr. Veseli's provisional release on suitable terms to  
19 guarantee his attendance and to give the Court such reassurance as it  
20 considers necessary.

21 As far as the procedure is concerned, I am, of course, entirely  
22 in your hands as to the order of written submissions and the manner  
23 in which you would find them most useful. That said, you have before  
24 you today a formal application from Mr. Veseli in writing. You will  
25 find that at paragraph 15 of our submission for today's hearing

1 which, if you thought it appropriate, could be treated as the  
2 application for the purposes of triggering an exchange of written  
3 pleadings.

4 And you will see the way in which it is formulated, Mr. Veseli  
5 formally applies for provisional release pending trial and invites  
6 the Pre-Trial Judge to fix a timetable for the exchange of written  
7 submissions to be followed by a short oral hearing unless he - that  
8 is, you - is minded to grant provisional release on conditions on the  
9 basis of written submissions alone.

10 So the proposal is put forward in this way simply to give you  
11 the maximum degree of flexibility if you wished to treat this  
12 application as the triggering event, and then to put the Prosecution  
13 on notice of its obligation to outline its objections to provisional  
14 release.

15 Now, I understand Mr. Thaci's counsel's approach in relation to  
16 the grounds for arrest and so forth, but that is a different question  
17 in any event from the question of provisional release. I mean, of  
18 course there will be many issues that are in common, but it's a  
19 different framework: You have now the accused before you, and you  
20 have a legal framework within which to make the decision, and that  
21 legal framework provides not just the law itself but also in the  
22 overriding provisions of Article 5 of the European Convention on  
23 Human Rights. That there is a strong presumption in favour of  
24 provisional release pending trial for an accused presumed innocent.  
25 And that the burden of justifying -- this is the point, I think. The

1 burden, the legal burden of justifying pre-trial detention rests  
2 squarely on the prosecution, and it's one that can only be discharged  
3 by reference to specific and identified considerations.

4 Not in general or of a generalised character about Kosovo but  
5 relating to the particular accused whose case you are considering,  
6 and requiring the Prosecution to establish precisely how any  
7 particular risk it relies on would be prevented by holding the  
8 accused in custody for the duration of these proceedings, which are  
9 likely to be four or five years, despite a faithful application of  
10 the presumption of innocence.

11 So we're in this situation. It's not really a question of  
12 looking at what the grounds were for arrest of Mr. Thaci or, indeed,  
13 for the voluntary surrender of Mr. Veseli that was negotiated in  
14 advance. The question now is a new question, which is: Should the  
15 Court grant pre-trial release?

16 Now, we will file an application separately, in addition to the  
17 formal application that we filed today, if you consider that  
18 necessary. But it will be thin, because all it needs to say is that  
19 Mr. Veseli applies for provisional release. It's a formality.  
20 Because the burden then, inevitably, legally shifts to the  
21 Prosecution, and the real thrust of the debate will take place when  
22 the Defence responds to the Prosecution objections.

23 So by requiring another stage in the process in addition to that  
24 at this stage at the outset, one is simply delaying the process  
25 because there won't be anything much in it other than a formal

1 application, which, in any event, has been made in writing, in  
2 advance, by Mr. Veseli in these proceedings in the document you  
3 received last night.

4 So those are our submissions.

5 JUDGE GUILLOU: Thank you very much, Mr. Emmerson.

6 Would it be complicated for you to file a specific filing on  
7 this issue, if you don't mind?

8 MR. EMMERSON: [via videolink] Not at all.

9 JUDGE GUILLOU: And I say that it's really not to slow down the  
10 proceedings or not to be expeditious but for -- I think for the  
11 purpose of clarifying which, basically, which decision we have to  
12 take, which procedure it is within the proceedings. I think it would  
13 make things easier, if you don't mind.

14 MR. EMMERSON: [via videolink] I will certainly do that. And I  
15 can do that in very short order. But may I say now - and if anyone  
16 objects to this on the other side, or, indeed, if you consider it  
17 inappropriate, please tell me now - the application will simply say  
18 that Mr. Veseli is applying for provisional release under the  
19 relevant provisions.

20 So you'll it have within a very short time and then the process  
21 effectively can begin of the Prosecution justifying its position, if  
22 its objects. I understand, because I've made inquiries already, that  
23 the Prosecution has taken a default position of objection without, it  
24 seems, giving very serious consideration to the position. But we  
25 will see the way in which the Prosecution articulates it on an

1 individualised basis.

2 But that will be the effective moment when meaningful arguments  
3 are put forward. So my proposal is: Yes, of course, I will oblige  
4 by putting in a formal application, but it won't say anything in  
5 substance, unless you direct me otherwise, than that which you will  
6 find in paragraph 15 of the note for today's hearing. And that will  
7 then keep the proceedings orderly. But if that's not an acceptable  
8 process, please tell me now.

9 JUDGE GUILLOU: Thank you, Mr. Emmerson. Duly noted. And I  
10 think we will start from there.

11 Mr. Young.

12 MR. YOUNG: Your Honour, very briefly. Let me indicate that as  
13 soon as it is possible an application will be made for Mr. Selimi's  
14 preliminary or provisional release.

15 Once Your Honour is in possession of the full facts in relation  
16 to his situation, it will, we suggest, become very clear that  
17 contrary to the narrative you have evidently been given, that he  
18 should be given provisional release.

19 Your Honour, Mr. Selimi is a man of integrity who honours his  
20 obligations. Not only did he voluntarily cooperate when informed  
21 about a Confirmed Indictment. When asked to attend The Hague on  
22 5 November, he was there, he cooperated, and he voluntarily took the  
23 course that has led him to be here in detention.

24 But it wasn't only then on 5 November, last week, that he  
25 voluntarily cooperated when asked to attend The Hague. Your Honour

1 may or may not know that previously he was invited to attend The  
2 Hague in 2019, and again he voluntarily attended The Hague.

3 And so with respect to the Prosecution, for the Prosecution to  
4 seriously suggest, as appears to be the case, that he is a flight  
5 risk is absurd and, frankly, ridiculous. We will be urgently seeking  
6 from the Prosecution, in the next few days, any disclosure which  
7 relates directly to Mr. Selimi's previous attendance in The Hague,  
8 his previous cooperation, his previous engagement with the  
9 authorities, which may shed light on his cooperation, because  
10 Your Honour may think that's directly relevant to the issues that you  
11 will have to consider, because we want to apply as quickly as we can.

12 But as Mr. Hooper said, we want to make sure the application is  
13 properly prepared so a fair judgement can be made on the merits.  
14 Thank you.

15 JUDGE GUILLOU: Thank you very much, Mr. Young.

16 Ms. Alagenda.

17 MS. ALAGENDRA: [via videolink] Your Honour, we will be  
18 submitting a written application for provisional release. But what I  
19 want to say at this stage is that Mr. Krasniqi was not given an  
20 opportunity to surrender. He would have, as he did when he was  
21 previously summoned, to attend in The Hague. And he did attend  
22 voluntarily.

23 So we will put our written application in and wait to hear what  
24 the Prosecution has to say in response. Thank you.

25 JUDGE GUILLOU: Thank you, Ms. Alagenda.



1 I see Mr. Hooper asks for the floor.

2 Mr. Hooper.

3 MR. HOOPER: [via videolink] Well, Your Honour well knows that  
4 Mr. Thaci not only resigned as president of Kosovo in order to  
5 cooperate with the Court but also surrendered himself on a voluntary  
6 basis to the authorities in Kosovo and was, thereafter, brought to  
7 The Hague.

8 In terms of the application itself, of course, I've had the  
9 benefit of the discussion between Your Honour and Mr. Emmerson and  
10 his proposals and Your Honour's views. And similarly, we will  
11 undertake, probably today, to putting, as it were, a naked  
12 application for Mr. Thaci's interim release, release with or without  
13 such conditions as the Court requires.

14 And we do so in the expectation that that will be responded to  
15 by the Prosecution to address his personal circumstances and their  
16 arguments in respect of Mr. Thaci. And that Mr. Thaci or the Defence  
17 will then respond to that with a view, of course, to having an oral  
18 discussion and further submissions if necessary before Your Honour.

19 So that's my understanding. I hope I've read between the lines  
20 accurately. And that's the position. Thank you.

21 JUDGE GUILLOU: Thank you, Mr. Hooper.

22 I don't think it's up to me to tell you what you have to include  
23 or not in any requests, so I will then wait for the filings in due  
24 course.

25 Ms. Lawson, do you want to reply to what has been said by the

1 four Defence teams?

2 MS. LAWSON: Yes. Thank you, Your Honour.

3 In relation to the application for the arrest warrants itself,  
4 redactions which were applied were carefully considered and were  
5 required to protect individual witnesses or other confidential  
6 information. Additionally, to suggest that the Prosecution treated  
7 the accused as a job lot, as was done, is a misrepresentation of the  
8 submissions we made.

9 With regard to the material referenced in that application, as  
10 we advised each of the counsel by e-mail on Monday, a package of  
11 those materials is being prepared with a view to providing it this  
12 week.

13 Regarding the substance and process. Each of the accused are  
14 currently detained on remand pursuant to a judicial decision. It is  
15 the SPO's position that there are no circumstances warranting a  
16 change in that. Should any of the Defence teams wish to challenge  
17 that position, either for provisional release or otherwise, Rule 57  
18 provides a clear procedure and framework for doing so.

19 We do object to the proposition that the Defence teams will file  
20 a cursory, or I think Mr. Hooper described it as naked, submission.  
21 There are many matters which can usefully be briefed and decided  
22 solely by way of oral hearing. But in this instance, detention is  
23 not one of them.

24 The parties' submissions are likely to involve detailed legal  
25 and evidentiary points. Therefore, in the event that the Defence

1 teams wish to challenge detention, written briefing will be  
2 appropriate and the parties should submit fulsome briefs detailing  
3 all of their arguments so that Your Honour is fully apprised of the  
4 relevant circumstances. And should Your Honour then consider an oral  
5 hearing to be useful, having reviewed the written submissions, the  
6 SPO is certainly not opposed to that. Thank you.

7 JUDGE GUILLOU: Thank you, Ms. Lawson.

8 Mr. Emmerson, you asked for the floor.

9 MR. EMMERSON: [via videolink] Before Mr. Hooper replies, it  
10 seems that there may have been some misunderstanding on Ms. Lawson's  
11 part as to what was being proposed.

12 The suggestion is not that there should be a naked or bare  
13 application followed by an oral hearing. The suggestion is that that  
14 application will be put in that form simply to trigger the exchange  
15 of written pleadings. But because the burden is on the Prosecution,  
16 their substantive written pleading should go first so that the  
17 Defence knows the case it has to meet. Otherwise, we're making the  
18 application blind without knowing what the Prosecution is relying on.

19 I mean, an ordinary common sense default position here is that  
20 these men should be released today. That is the presumption. It's  
21 not true to say that there is a presumption in favour of their  
22 continued detention. There is no presumption in favour of their  
23 continued detention. They are before the Court today. The  
24 presumption is in favour of their release.

25 Now, you have asked us to indicate -- to file, for procedural

1 reasons, a separate document asserting that they should be released  
2 so that the Prosecution then can reply to that and put its  
3 objections. And it's at that stage that the detailed factual and  
4 legal submissions that Ms. Lawson refers to would first be made by  
5 the Prosecution, and then responded to in reply by the Defence.

6 What Ms. Lawson is trying to achieve is a situation where the  
7 Defence put all of their cards on the table at the outset, the  
8 Prosecution then replies to them. And our suggestion is that in  
9 whatever the form of the process, and I'm entirely happy to go with  
10 Your Honour's suggestion, the substance of the process is  
11 unquestionably a matter of law. The burden is on the Prosecution.

12 So if that is the case, then we must have the last word. And if  
13 we have the last word, we must have that after we know what the  
14 objections are. In the case of Mr. Veseli and Mr. Thaci, the  
15 Prosecutor broke the rules. We all know that. The Prosecutor made a  
16 public statement in June in flagrant violation of the rules on the  
17 confidentiality of Unconfirmed Indictments to announce that he had  
18 filed an indictment before you against Mr. Thaci and Mr. Veseli at  
19 that time with a large number of other co-defendants. It seems that  
20 their cases were not confirmed but only in respect of the four  
21 defendants in front of you today.

22 Those rules were broken very clearly. And the consequence of  
23 that is that the two accused, Mr. Veseli and Mr. Thaci, have known  
24 since June that they were the subject of an indictment. Now, in  
25 those circumstances, for the Prosecution to be saying that it is up

1 to them to outline their Defence case in relation to a provisional  
2 release before the Prosecution responds, in our submission, is wrong  
3 in substance, wrong in principle.

4 I'm entirely happy to maintain procedural orderliness to have a  
5 separate application filed, but it need do no more than assert their  
6 right to provisional release. The burden then is on the Prosecution.  
7 And in our submission, that is the way in which it should be dealt  
8 with.

9 And the reason I've intervened now is Ms. Lawson responded to a  
10 suggestion that wasn't being made, and so she obviously needs a right  
11 to respond to the suggestion that was being made. And I hope she now  
12 understands what that is.

13 JUDGE GUILLOU: Thank you, Mr. Emmerson.

14 Mr. Hooper, do you wish to take the floor?

15 MR. HOOPER: [via videolink] No, we agree with that procedure.  
16 It's the fairest procedure and the right procedure to follow.

17 JUDGE GUILLOU: Ms. Lawson, do you have anything to add?

18 MS. LAWSON: Yes. Thank you, Your Honour.

19 It is not the case that the Defence will be making their  
20 submissions blind or without knowing what the Prosecution is relying  
21 upon. We have already disclosed the application on which the arrest  
22 warrant was based, which forms the basis for the judicial decision  
23 that is in place.

24 Further, as counsel for Mr. Veseli indicated, what is important  
25 for the Defence is to have the last word. We have no objection

1       whatsoever to that. And, in fact, the appropriate procedure in order  
2       for that to occur is for the Defence to make their substantive  
3       application, including all relevant details, for the Prosecution to  
4       reply, and for the Defence -- for the Prosecution to respond and for  
5       the Defence to reply to that. And if necessary, further oral  
6       hearings to be heard.

7               Thank you.

8               JUDGE GUILLOU: Thank you, Ms. Lawson.

9               Mr. Emmerson.

10              MR. EMMERSON: [via videolink] Yes. Again, it seems to be a  
11       fundamental misunderstanding on the Prosecution's side. The position  
12       when the Prosecution broke the rules and announced the existence of  
13       what was confidential information -- they knew that there was an  
14       un-Confirmed Indictment present before the Pre-Trial Judge. They  
15       added -- as a justification, Mr. Smith added in his public statement,  
16       as a justification for breaking the rules, that he wished to make it  
17       public because an attempt was being made by Mr. Veseli and Mr. Thaci  
18       to "derail the proceedings" with no explanation and no particulars  
19       given.

20              As Mr. Hooper has explained, that information has been redacted  
21       from the arrest warrant, information that's been provided.

22              Now it's self-evident to anybody with any common sense that  
23       there is no conceivable objection to grant a provisional release  
24       against any of these accused, certainly against Mr. Thaci and  
25       Mr. Veseli, as regards non-appearance. That is simply not going to

1 be an issue. The question is whether or not the Prosecution has real  
2 identifiable grounds for alleging that if they are not -- if they are  
3 not detained in custody, those two defendants will themselves,  
4 personally, interfere with the course of justice. That is the only  
5 possible basis that the Prosecution could put forward.

6 The essence of that was mentioned by the Prosecutor in his  
7 statement when violating the rules in June, and it was mentioned in  
8 the material that has been provided to us in a redacted form in a way  
9 in which it's completely incomprehensible. In neither situation have  
10 we been given the gist of the real reason why it is said they should  
11 remain in custody.

12 Now, let's cut away the brush and look at the real issues here:  
13 Non-attendance, flight risk, just does not exist. So the only  
14 question, the only possible issue is what it is that the Prosecution  
15 says was an unlawful interference with the course of justice  
16 justifying the conclusion that continued detention is necessary to  
17 prevent the two accused personally from interfering with witnesses.  
18 A rather unlikely proposition, but nonetheless that is the case that  
19 the Prosecution has to raise in order to have any possible basis for  
20 objecting to release pending trial.

21 They have withheld that information from us, so how on earth  
22 could we file a meaningful brief? So, I mean, I'm sorry, but this is  
23 game playing again by a Prosecution that does not seem very  
24 interested in achieving a fair procedure in the interests of justice.

25 And Mr. Smith, who I see has absented himself from these

1 proceedings at this crucial moment, is responsible for part of that.  
2 These decisions go to the top.

3 So as far as the Defence for Mr. Veseli is concerned, we will be  
4 filing a bare application, and the Prosecution will need to respond  
5 to it in a manner that articulates realistically and in a detailed  
6 fashion the reason why its says that for a four- to five-year trial  
7 Mr. Veseli should remain in custody despite being presumed innocent  
8 in circumstances where there is not the slightest evidence or even  
9 possibility of flight risk being a --

10 JUDGE GUILLOU: Mr. Emmerson, I think we are already stepping in  
11 the discussion on the application that you're going to trigger.

12 MR. EMMERSON: [via videolink] Not really, because the  
13 Prosecution has just suggested to you that the Defence must file a  
14 detailed brief, including all the material on which it relies. While  
15 on the crucial issue, it doesn't know what the objection is. That's  
16 why the Prosecution -- in other words, this is not treading into the  
17 substance. This is pointing out the utter lack of regard for fair  
18 procedure that Ms. Lawson, Mr. Smith, and Mr. Tieger are urging upon  
19 you.

20 JUDGE GUILLOU: Thank you, Mr. Emmerson.

21 Unless any of the parties have anything to say on that issue, we  
22 will now move into the -- no, Ms. Lawson.

23 MS. LAWSON: Yes. Thank you, Your Honour.

24 I had been intending to let it pass. But given that counsel for  
25 Mr. Veseli repeated his allegation that the SPO broke the rules, I



1 would like to make very clear that that was not the case and that any  
2 steps the SPO took were taken with appropriate authorisation.

3 Secondly, the application for the flag that Mr. Emmerson has  
4 just been waving is a false flag. The application for the arrest  
5 warrant, as provided to each of the Defence counsel, provides more  
6 than ample grounds to justify the continuing detention of each of the  
7 accused. Thank you.

8 MR. EMMERSON: [via videolink] I'm sorry to interrupt --

9 JUDGE GUILLOU: Mr. Emmerson, very, very concisely, please.

10 MR. EMMERSON: [via videolink] I will. And I'm responding. I'm  
11 not raising a new issue.

12 Ms. Lawson has just said, responded publicly, and on the record,  
13 to my accusation of unlawfulness in the conduct of Mr. Smith in June,  
14 by saying, asserting that the conduct was not in breach of the rules  
15 because it was conducted with appropriate authority.

16 The statement of that kind cannot be left to go unremarked.  
17 Appropriate authority of who? Was it a judicial authority, was it an  
18 executive authority, and on what basis was it made? Because the  
19 rules are pretty clear. So if somebody in the system is adopting a  
20 power to arrogate to themselves an abridgement to the rules, then the  
21 Defence are entitled to know who that person is and on what basis  
22 that abridgement was made.

23 JUDGE GUILLOU: Thank you, Mr. Emmerson.

24 Does any party have anything to say on this? Ms. Lawson? Okay.

25 Now I would like to ask the parties on their views for a

1 suitable date for the next Status Conference. I note in that regard  
2 that counsel of the accused can participate via video-conference.  
3 For the next VTC, if you ask for a video-conference, I would kindly  
4 ask you to inform the Registry 24 hours in advance so that we can  
5 take appropriate measures to organise the connections. And I also  
6 remind all the Defence teams that such notice should include the  
7 written consent of the accused.

8 Organising a video-conference with several accused and counsel  
9 remote involves a lot of preparation for the Registry, so I kindly  
10 ask the parties to respect this process for the next Status  
11 Conference.

12 Can I ask the parties for their views on the date for the next  
13 Status Conference?

14 Ms. Lawson, please.

15 MS. LAWSON: Your Honour, we have no particular submissions on  
16 that. As you are aware, we are fulfilling onerous disclosure  
17 obligations at the moment, but we are nonetheless available at the  
18 Court's convenience. Thank you.

19 JUDGE GUILLOU: Thank you, Ms. Lawson.

20 Mr. Hooper. Mr. Hooper, your microphone, please. Mr. Hooper,  
21 your microphone is off.

22 MR. HOOPER: [via videolink] Well, I suppose it very much depends  
23 on the objectives that Your Honour feels should be met or discussed  
24 to justify a further Status Conference. But I hesitate to put a date  
25 on that, but I would have thought sometime in mid-December.

1 JUDGE GUILLOU: Thank you, Mr. Hooper.

2 Mr. Emmerson.

3 MR. EMMERSON: [via videolink] Mid-December for a Status  
4 Conference sounds sensible, but I would not want that to be thought  
5 that mid-December was the appropriate date for any oral hearing for  
6 provisional release application which may well be before then.

7 JUDGE GUILLOU: Thank you, Mr. Emmerson.

8 Mr. Young.

9 MR. YOUNG: Mid-December sounds entirely reasonable.

10 JUDGE GUILLOU: Thank you, Mr. Young.

11 Ms. Alagendra.

12 MS. ALAGENDRA: [via videolink] Mid-December, Your Honour, is  
13 suitable and reasonable, aside from the application for provisional  
14 release that we intend to submit.

15 JUDGE GUILLOU: Thank you very much.

16 [Microphone not activated] Before we end this hearing, I just  
17 want to -- I am told that my microphone was off.

18 Before we end this hearing, I just want to inform the parties  
19 that when asked for any submission on any topic or *proprio motu*,  
20 counsel are at liberty to make joint or common filings if they so  
21 wish.

22 This concludes today's public hearing. I want to thank the  
23 interpreters, the stenographer, audio-visual technicians, and  
24 security personnel for their assistance. The hearing is adjourned.  
25 Thank you.

1                    --- Whereupon the Status Conference at 1.54 p.m.

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25