

1 Wednesday, 13 September 2023

2 [Open session]

3 [The accused entered the courtroom]

4 --- Upon commencing at 9.00 a.m.

5 PRESIDING JUDGE SMITH: Madam Court Officer, you may call the  
6 case.

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

10 PRESIDING JUDGE SMITH: We continue with the cross-examination  
11 of the witness.

12 Madam Usher, would you please escort the witness into the  
13 courtroom.

14 [The witness takes the stand]

15 PRESIDING JUDGE SMITH: Good morning, Witness. Are you hearing  
16 okay?

17 THE WITNESS: [Interpretation] Good morning.

18 PRESIDING JUDGE SMITH: We continue now with the  
19 cross-examination. Mr. Roberts, who is standing to your right,  
20 representing the Selimi Defence, will have the next  
21 cross-examination.

22 Go ahead, Mr. Roberts.

23 MR. ROBERTS: Thank you, Your Honour.

24 WITNESS: W04255 [Resumed]

25 [Witness answered through interpreter]

1 Cross-examination by Mr. Roberts:

2 Q. Good morning, Witness.

3 A. Good morning.

4 MR. ROBERTS: And, Your Honour, if we could move into private  
5 session, please.

6 PRESIDING JUDGE SMITH: Into private session, please,  
7 Madam Court Officer, for the protection of the witness.

8 [Private session]

9 [Private session text removed]

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Cross-examination by Mr. Ellis

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Cross-examination by Mr. Ellis

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Cross-examination by Mr. Ellis

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Cross-examination by Mr. Ellis

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Re-examination by Mr. Pace

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Re-examination by Mr. Pace

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Re-examination by Mr. Pace

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Re-examination by Mr. Pace

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Re-examination by Mr. Pace

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Further Cross-examination by Mr. Kehoe

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Further Cross-examination by Mr. Kehoe

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8 [Open session]

9 THE COURT OFFICER: Your Honours, we're in public session.

10 MR. EMMERSON:

11 Q. Witness, I want to ask you some questions about the history up  
12 to June 1998 of the use of masks by various -- by the two principal  
13 protagonists to the conflict.

14 First of all, you said that Serbian police officers would wear  
15 masks when carrying out certain duties in Kosovo; is that right?

16 A. Yes.

17 Q. And this was obviously a practice that had been going on for  
18 some time; is that right?

19 A. Yes, it continues to this day. There are special units within  
20 police forces of various countries who wear masks during various  
21 actions they undertake.

22 Q. I understand that. But in relation to Serbian police officers  
23 in Kosovo, was there a perception that police officers would wear  
24 masks on operations that often led to allegations of ill-treatment  
25 and torture by Serbian police?

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1 A. Dear counsel, dear Panel, we have had an awful experience at the  
2 hands of Serbia, and not only -- this is not confined to the use of  
3 masks. They trade in human cadavers, in human bodies it has killed  
4 and massacred. There are 15 or 16 places in Serbia with bodies of  
5 Kosovars.

6 PRESIDING JUDGE SMITH: Just try to answer the question  
7 Mr. Emmerson gives you. I understand that you --

8 THE WITNESS: [Interpretation] Thank you, thank you.

9 PRESIDING JUDGE SMITH: -- have things to say, but please just  
10 answer the questions.

11 THE WITNESS: [Interpretation] Thank you. By all means.

12 MR. EMMERSON:

13 Q. Let me ask the -- let me ask the question very -- oh, sorry.

14 A. And that was the reason. It was confined to identification  
15 issues, because Serbs could be -- could use anything and do anything  
16 and the blame would be shifted onto the Albanians. That was the only  
17 reason.

18 Q. And when the Kosovo Liberation Army very first made a public  
19 appearance, I'm going to suggest to you, it was on 28 November 1997  
20 at a funeral in Llaushe of the teacher who had been, it was thought,  
21 murdered by Serbian police officers; is that right?

22 A. Yes.

23 Q. That was the first time the KLA appeared at all in public as the  
24 members of the KLA, and they -- there were three people there, three  
25 KLA members who gave a three-gun salute to the dead teacher, and they

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1 were wearing masks at the time of the salute; is that right?

2 A. Yes.

3 Q. And, obviously, as an illegal organisation announcing its  
4 existence in front of the media, everybody understood the need for  
5 them to wear masks, didn't they?

6 A. Yes.

7 Q. And in the early days between that occasion, 28 November 1997,  
8 and, let us say, April, May -- let's say June 1998, so between the  
9 end of 1997 and June 1998, the early part of 1998, when attacks were  
10 being mounted by the KLA, for example, as they often were, on Serbian  
11 police outposts or on isolated military operations inside Kosovo,  
12 typically in or around police stations, the members of the KLA who  
13 would be mounting these clandestine operations would wear masks,  
14 wouldn't they? That was what was known and believed, is that right,  
15 at that stage, before the war was fully under way?

16 A. Yes, it would have been usual and necessary for them. I did not  
17 wear one.

18 Q. No, no, I understand. We're talking before the June period.  
19 We're talking up to that point, from the end of 1997, when specific  
20 military attacks were being launched and what was described by one  
21 expert witness as shoot-and-scoot type of attacks, masks were worn to  
22 conceal the identity of the people responsible on the KLA side for  
23 those attacks; is that right?

24 MR. PACE: Objection, Your Honour. We're now going far beyond  
25 the scope of Judge Barthe's questions. The fact Judge Barthe asked a

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1 question about masks doesn't give counsel carte blanche at this stage  
2 of the examination. So --

3 PRESIDING JUDGE SMITH: I will say that the questions about  
4 masks had to do with his zone after -- far after the period you are  
5 talking about. So I think you should confine it to --

6 MR. EMMERSON: Yes, I was just trying to -- because I think  
7 Judge Barthe's questions were [Overlapping speakers] ...

8 PRESIDING JUDGE SMITH: I think we've heard enough history. I  
9 think we know there is some history for it.

10 MR. EMMERSON:

11 Q. But once -- the proposition I was essentially moving towards was  
12 that whilst masks were common in the early period, from June onwards  
13 it wasn't policy for people to wear masks any longer because there  
14 was a fully fledged war ongoing, and the risk of reprisals from the  
15 Serbs on individuals wasn't there in the same way; is that right?

16 MR. PACE: Objection, Your Honour. It's a broad question.  
17 Could the witness be asked within his sphere of knowledge or could it  
18 be specified where he's being asked about the use of masks or not.

19 PRESIDING JUDGE SMITH: It was --

20 MR. EMMERSON: Yes, I will confine it.

21 PRESIDING JUDGE SMITH: It's a fair question.

22 MR. EMMERSON:

23 Q. Within your sphere of knowledge, did the use of masks by the KLA  
24 become much less common from June onwards?

25 A. Yes. Yes, it did. Even though this depended on every zone and



1 territory. I am not in a position to evaluate their assessment.  
2 Each and every one would have made their own assessments in their own  
3 zones.

4 Q. And within the area where you were during the period mid-1998  
5 till the end of the war, bearing in mind the evidence that you've  
6 already given, did you, in fact, encounter and have to attack members  
7 of the KLA that entered your area wearing masks at any time?

8 A. No, there hasn't been a single case.

9 Q. Yes, thank you.

10 MR. KEHOE: Your Honour, I spoke too quickly. I just have a  
11 very brief two questions to ask this individual. Very briefly. I  
12 apologise.

13 PRESIDING JUDGE SMITH: Go ahead.

14 Further Cross-examination by Mr. Kehoe:

15 Q. Witness, you noted in response to a question by Judge Barthe  
16 that the worst thing that anybody could say about you would be to  
17 describe you as a collaborator; isn't that right? You find that  
18 humiliating; is that correct?

19 A. We considered that as degrading, humiliating, and so on. That  
20 does not apply to me alone. It applies to the entire population.

21 Q. So, Witness, if an individual had a score to settle or had some  
22 revenge with somebody else in the village, the way to humiliate that  
23 person would be to describe that person as a collaborator; isn't that  
24 right?

25 A. If you want to be utterly humiliating, you call someone a

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1 collaborator.

2 Q. Thank you, Witness.

3 MR. KEHOE: Thank you for your indulgence, Your Honour.

4 PRESIDING JUDGE SMITH: [Microphone not activated]

5 MR. ELLIS: Yes, Your Honour. I have, I think, three questions.

6 PRESIDING JUDGE SMITH: Okay. We're now into the break time,  
7 and I really would like to get to this other witness that we have to  
8 see. Are these all connected to the questions that have been asked?

9 MR. ELLIS: Yes.

10 PRESIDING JUDGE SMITH: Go ahead.

11 MR. ELLIS: Thank you, Your Honour.

12 Further Cross-examination by Mr. Ellis:

13 Q. Witness, you were asked a question by His Honour Judge Barthe  
14 which began:

15 "And the purpose of that meeting was to discuss a communiqué  
16 written, or at least published, by Mr. Krasniqi ..."

17 And I wanted to ask you directly, Witness: You cannot  
18 positively confirm who wrote or who published the document we've been  
19 discussing, can you?

20 MR. PACE: Objection, Your Honour. That doesn't arise from the  
21 Judge's questions. The issue of authorship and the purpose of the  
22 meeting has been canvassed in the admitted statements, in my direct  
23 examination, and in cross-examination. This is unnecessary and  
24 should not be allowed.

25 PRESIDING JUDGE SMITH: [Microphone not activated]

Witness: W04255 (Resumed) (Open Session)  
Further Cross-examination by Mr. Emmerson

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1 MR. ELLIS:

2 Q. Witness, would you like me to repeat the question or did you  
3 understand it?

4 A. No, I understood it. At the time this was drafted, I thought  
5 this was drafted in relation to me and the KLA spokesperson,  
6 Mr. Krasniqi. At the time when I saw the communiqué, I realised it  
7 did not mention the name of Krasniqi, but it referred to the  
8 institution, and it did not contain my name.

9 MR. ELLIS: Yes, thank you, Your Honour.

10 MR. EMMERSON: Your Honour, I do apologise, and I appreciate the  
11 time issue, but I have one matter that I do need to raise --

12 PRESIDING JUDGE SMITH: If you can make a short question --

13 MR. EMMERSON: I can make it very, very short.

14 PRESIDING JUDGE SMITH: -- and not a 20-minute question.

15 MR. EMMERSON: I can make -- no, it will be a very short  
16 question.

17 Further Cross-examination by Mr. Emmerson:

18 Q. Both Judge Barthe and Judge Mettraux asked you about, A, whether  
19 you had yourself at the time conducted investigations into the  
20 abduction of Jakup Krasniqi [sic] and Cen Desku, and they asked you  
21 -- and you said no. And they asked you whether it had come up in  
22 your conversations after the war. Can you please -- and you said no  
23 again.

24 Could you please explain why you didn't conduct an investigation  
25 at that time in the light of what was going on in your area, and why

Witness: W04255 (Resumed) (Open Session)  
Further Cross-examination by Mr. Emmerson

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1 this never came up in conversation after the war?

2 A. First of all, this did not happen in my zone. It is in the  
3 municipality of Malisheve. And, secondly, I did not have the  
4 authority to investigate.

5 Q. That's helpful. And did you see either of them again during the  
6 war or only after the war?

7 A. No, I only met them after the war.

8 Q. And how long had elapsed between the time of their disappearance  
9 and the time you next met them? How long a period after the war was  
10 it that you met with them?

11 A. I wouldn't know exactly, but I know that it was immediately  
12 after the war. Those moments after the war.

13 Q. Very well. No doubt a great deal had happened in that  
14 intervening period to you and to them, given the ultimate outcome of  
15 the conflict. Why was that question of that period when they were in  
16 KLA custody not the top of your agenda when you met with them to  
17 discuss the war?

18 MR. PACE: Your Honour, I object as to relevance. And, again,  
19 not arising directly from the scope of the Judges' question --

20 PRESIDING JUDGE SMITH: He's already answered it, anyway.

21 MR. EMMERSON: I don't think he's given the reason.

22 PRESIDING JUDGE SMITH: He said it wasn't in his zone.

23 MR. EMMERSON: No, in -- that was to do with the investigation  
24 during the war [Overlapping speakers] ...

25 PRESIDING JUDGE SMITH: You're now on your fifth question. You

Witness: W04255 (Resumed) (Open Session)  
Further Cross-examination by Mr. Emmerson

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1 told me you had only one question. Finish the question and that's  
2 it.

3 MR. EMMERSON:

4 Q. Why was the topic of what had happened to them previously not at  
5 the top of the questions or a conversation that took place when you  
6 met them after the war? Both of the Judges were interested to know  
7 that this -- what the reason was, and I don't think you gave the  
8 reason why you didn't discuss that with them after the war. Can you  
9 help us with that?

10 A. This was my decision because I did not want to hurt them.

11 Q. And --

12 PRESIDING JUDGE SMITH: Mr. Emmerson, we're finished.

13 MR. EMMERSON: I'm not going to ask a further question --

14 PRESIDING JUDGE SMITH: We're finished.

15 MR. EMMERSON: -- if you think that answer is clear enough.

16 PRESIDING JUDGE SMITH: We will take a break -- no, we won't  
17 take a break.

18 We're finished with you, sir. I'm sure you're glad to hear that  
19 as well.

20 THE WITNESS: [Interpretation] Thank you very much.

21 PRESIDING JUDGE SMITH: We appreciate you being with us and  
22 sharing your information with us, and thank you for the time you  
23 spent. You are excused now, and the usher will escort you out of the  
24 room.

25 THE WITNESS: [Interpretation] Thank you very much.

1 [The witness withdrew]

2 [Trial Panel and Court Officer confers]

3 PRESIDING JUDGE SMITH: [Microphone not activated].

4 I'm told the witness from yesterday is or will be ready on time.  
5 We'll take a 30-minute break, and then we'll be ready for him. Thank  
6 you very much. We're adjourned.

7 --- Recess taken at 11.11 a.m.

8 --- On resuming at 11.40 a.m.

9 PRESIDING JUDGE SMITH: We will now continue with the testimony  
10 of W03827.

11 Court Officer, please allow the witness to join us via  
12 video-conference.

13 [The witness takes the stand via videolink]

14 PRESIDING JUDGE SMITH: Hello, Witness. Can you hear me?

15 THE WITNESS: [via videolink][Interpretation] Yes, I can.

16 PRESIDING JUDGE SMITH: We will continue with some questions for  
17 you. Mr. Misetic, representing the Thaci Defence, will be asking  
18 some questions at this time.

19 I am going to remind you you are under an obligation to tell the  
20 truth as set out in your statement yesterday. Do you understand  
21 that?

22 THE WITNESS: [via videolink][Interpretation] I do.

23 PRESIDING JUDGE SMITH: Thank you.

24 All right, Mr. Misetic.

25 MR. MISETIC: Thank you, Mr. President.

1 WITNESS: W03827 [Resumed]

2 [Witness answered through interpreter]

3 [Witness testified via videolink]

4 Cross-examination by Mr. Misetić:

5 Q. Good morning, Witness.

6 MR. MISETIĆ: Mr. President, I believe we should go into private  
7 session.

8 THE WITNESS: [via videolink][Interpretation] Good morning.

9 PRESIDING JUDGE SMITH: Madam Court Officer, into private  
10 session, please.

11 [Private session]

12 [Private session text removed].

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Witness: W03827 (Resumed) (Private Session)

Page 7935

Cross-examination by Mr. Misetić

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Witness: W03827 (Resumed) (Private Session)

Page 7936

Cross-examination by Mr. Misetić

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Witness: W03827 (Resumed) (Private Session)

Page 7937

Cross-examination by Mr. Miletic

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Witness: W03827 (Resumed) (Private Session)

Page 7938

Cross-examination by Mr. Misetić

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Witness: W03827 (Resumed) (Private Session)

Page 7939

Cross-examination by Mr. Miletic

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Witness: W03827 (Resumed) (Private Session)

Page 7940

Cross-examination by Mr. Misetić

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Witness: W03827 (Resumed) (Private Session)

Page 7941

Cross-examination by Mr. Tully

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Witness: W03827 (Resumed) (Private Session)

Page 7942

Cross-examination by Mr. Tully

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Witness: W03827 (Resumed) (Private Session)

Page 7943

Cross-examination by Mr. Tully

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Witness: W03827 (Resumed) (Private Session)

Page 7944

Cross-examination by Mr. Tully

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Witness: W03827 (Resumed) (Private Session)

Page 7945

Cross-examination by Mr. Tully

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[Open Session] *Reclassified Pursuant to Oral Order of 9 October 2023 and CRSPD364*

11 PRESIDING JUDGE SMITH: [Microphone not activated].

12 Private session or public?

13 MR. MISETIC: It will be a motion for reconsideration of the  
14 Panel's decision to admit this witness's statement. I don't know  
15 if -- I think it's probably best to do it in private session.

16 PRESIDING JUDGE SMITH: All right. We'll stay in private  
17 session then.

18 MR. MISETIC: May I have leave?

19 PRESIDING JUDGE SMITH: Yes, go ahead.

20 MR. MISETIC: Thank you.

21 Mr. President, members of the Panel, the Thaci Defence moves,  
22 pursuant to Rule 79, for reconsideration of the Panel's decision  
23 admitting the statement of Witness W03827 based on two grounds.  
24 First, because there has been a clear error of reasoning; and,  
25 second, because it is necessary in order to avoid injustice.

1 New facts obtained after the Trial Panel rendered its decision  
2 justified this request for reconsideration. Specifically, the  
3 Trial Panel has now had an opportunity to confirm that the accused  
4 have been denied an adequate and proper opportunity to cross-examine  
5 Witness W03827, and this requires the Trial Panel to reconsider its  
6 earlier decision admitting his statement.

7 On the first ground, with respect to the error in legal  
8 reasoning, the Trial Panel erred when it admitted the statement of  
9 this witness pursuant to Rule 143(2)(c) without having seen whether  
10 the accused would be able to adequately and properly cross-examine  
11 the witness. We have already cited to you the judgment of the  
12 Constitutional Court of the Kosovo Specialist Chambers. That  
13 citation again is KSC-CC-PR-2020-09, Judgment on the Referral of  
14 Amendments to the Rules of Procedure and Evidence Adopted by the  
15 Plenary on 29 and 30 April 2020, issued on 22 May 2020, at paragraphs  
16 76 to 81.

17 In paragraph 79 of that judgment, it is stated that the accused  
18 must have an "adequate and proper opportunity" to cross-examine the  
19 witness either when the prior statement was made or during trial.  
20 The Constitutional Court twice noted that the opportunity to  
21 cross-examine must be both an adequate and proper opportunity to  
22 cross-examine the witness. And that is at paragraphs 78 and 79 of  
23 the judgment.

24 We also wish to bring an additional authority to the attention  
25 of the Trial Panel. I don't know if we have it in the queue. We

1 sent an e-mail earlier. But it is the judgment of the Appeals  
2 Chamber in the ICC in the case of the Prosecutor versus William Ruto  
3 and Joshua Arap Sang, dated 12 February 2016. And we have it as  
4 DHT01971 to DHT02007.

5 Can we call it up? And if we could go to page DHT02005 at  
6 paragraph 93 of the Appeals Chamber judgment. This judgment, members  
7 of the Panel, dealt exactly with the issue that's before you today:  
8 The admission by the trial panel of the ICC of a prior statement for  
9 the truth of the matter asserted where the witness recanted his  
10 testimony in the prosecution's examination-in-chief.

11 There, the ICC Appeals Chamber held that it "considers that the  
12 prior recorded testimony was admitted without any proper opportunity  
13 for the accused to cross-examine the witnesses. The Appeals Chamber  
14 notes that the witnesses whose prior recorded testimony was admitted  
15 pursuant to rule 68(2)(d) of the Rules testified in court. However,  
16 in so doing they recanted the content of their prior recorded  
17 testimony. The Appeals Chamber considers that, where such  
18 recantation occurs, it cannot be expected that the accused would  
19 proceed by eliciting incriminating evidence from the witness in order  
20 to be able subsequently to challenge that evidence. This is the case  
21 regardless of whether or not they are on notice of a potential  
22 application by the Prosecutor under amended rule 68 of the Rules.  
23 The Appeals Chamber therefore considers that, even if the accused had  
24 an opportunity to question the witnesses because they appeared before  
25 the Court, in the absence of the Prosecutor eliciting incriminating

1 evidence from the witnesses in examination-in-chief, such questioning  
2 does not amount to a meaningful cross-examination. It follows that  
3 evidence was admitted for the truth of its contents in circumstances  
4 in which those witnesses denied the allegations made in that evidence  
5 and meaningful cross-examination was not possible."

6 The Appeals Chamber then struck down the offending decision of  
7 the trial panel. We submit that we have that exact situation before  
8 you now.

9 The ICC Appeals Chamber decision reflects common sense. I  
10 quote:

11 "... where such recantation occurs, it cannot be expected that  
12 the accused would proceed by eliciting incriminating evidence from  
13 the witness in order to be able to subsequently challenge that  
14 evidence."

15 And also:

16 "... even if the accused had an opportunity to question the  
17 witnesses because they appeared before the Court, in the absence of  
18 the Prosecutor eliciting incriminating evidence from the witnesses in  
19 examination-in-chief, such questioning does not amount to meaningful  
20 cross-examination."

21 In the case before you, the Prosecution did not elicit any  
22 incriminating evidence in its examination-in-chief. The Trial Panel  
23 cannot expect that the accused would try to elicit in  
24 cross-examination the incriminating information contained in the  
25 witness's statement so that the accused could then try to

1 cross-examine him on that information.

2 The way the questioning unfolded on cross-examination does not  
3 amount to meaningful cross-examination as the ICC Appeals Chamber  
4 confirms. You heard the witness repeatedly say he does not recall  
5 anything. And with respect to specific allegations at certain  
6 points, and I can cite the transcript to you, he explicitly recanted  
7 by saying "I did not say that" when I put to him:

8 "Did you say that Hashim Thaci, Rexhep Selimi, Sabit Geci  
9 ordered" the crimes committed?

10 The Trial Panel may have also noted in my questioning that many  
11 of my questions, but not all, that I put to the witness in  
12 cross-examination were almost verbatim repeats of the questions that  
13 were put to him by the Prosecutor in direct examination. We did that  
14 quite intentionally because the Prosecution took the position that  
15 the witness's answers to those questions were intentionally evasive.

16 The Prosecution's position, essentially, was that the witness's  
17 evasive answers denied the Prosecution the ability to elicit his  
18 *viva voce* testimony on direct examination and, therefore, the Panel  
19 should admit his prior statement into evidence for the truth of the  
20 matters asserted.

21 It is self-evident that when the witness gives the same answers  
22 to the exact same questions, this time posed by the Defence in  
23 cross-examination, those answers cannot amount to adequate, proper,  
24 or meaningful cross-examination. Because the accused has been denied  
25 an opportunity for an adequate and proper examination, the statement

1 of this witness is inadmissible under Rule 143(2) and under the  
2 holding of the Constitutional Court.

3 The Trial Panel committed a clear error of legal reasoning in  
4 admitting the statement.

5 Reconsideration is also necessary to avoid injustice. The  
6 Constitutional Court held in paragraph 77 of its judgment that what  
7 is at stake here is nothing less than "the right of a person charged  
8 with a criminal offence to examine witnesses against him or her under  
9 Article 31(4) of the Constitution and Article 6(3)(d) of the European  
10 Convention. This right is a specific aspect of the right to a fair  
11 trial set forth in Article 31(2) of the Constitution and Article 6(1)  
12 of the Convention, which must be taken into account in any assessment  
13 of the fairness of the proceedings."

14 THE INTERPRETER: The interpreters kindly ask the speaker to  
15 slow down when reading. Thank you very much.

16 MR. MISETIC: I'm reading too fast. I apologise.

17 Accordingly, if the Panel does not overturn its decision, it  
18 will result in injustice through the violation of the fundamental  
19 fair trial rights of the accused by admitting incriminating evidence  
20 against him without giving him an adequate and proper opportunity to  
21 cross-examine that evidence.

22 Moreover, this decision, if it stands, will serve as precedent  
23 for the remainder of this trial pursuant to which the Prosecution may  
24 again seek to admit witness statements through 143(2) without the  
25 accused having an opportunity to adequately and properly



1 cross-examine the witnesses who made those statements.

2 It is, therefore, entirely possible that by the time the  
3 evidence closes in this trial, you will have several such witness  
4 statements in evidence which you will have to incorporate into your  
5 final judgment and which will, therefore, threaten to taint your  
6 entire final judgment because it will rest, in part, on an injustice  
7 to the accused through the denial of his fundamental fair trial  
8 rights.

9 We, therefore, respectfully ask you to reconsideration your  
10 decision admitting the statement into evidence pursuant to  
11 Rule 143(2) and instead to exclude the statement from evidence. By  
12 doing so, the Panel will align itself with the judgment of the  
13 Constitutional Court as well as the jurisprudence of both the ICC  
14 Appeals Chamber and the European Court of Human Rights.

15 Reconsideration is necessary in order to correct a clear legal  
16 error to avoid injustice and to ensure that the Panel's final  
17 judgment in this case is not tainted by this error.

18 Thank you, Mr. President.

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

20 MR. EMMERSON: May I just briefly clarify the position of the  
21 Veseli Defence.

22 We entirely support the submission that has just been made. The  
23 witness's statements do not contain any evidence relevant to our  
24 client, Mr. Veseli, and we had not been intending to cross-examine,  
25 which is why we didn't join the motion in relation to the videolink,

1 because it seemed unreasonable for us to be requiring the attendance  
2 of a witness we had no questions for.

3 But this is a very different situation because this is a ruling  
4 of law. It is manifestly the wrong route by which the matter should  
5 have been considered. It will, of course, taint the entire  
6 proceedings for the reasons that Mr. Misetic has outlined. And it  
7 could happen again. We all make mistakes. The difficulty and the  
8 challenge is facing up to them when they've been made or a decisions  
9 have been made too quickly. That, we would respectfully submit, is  
10 the position here. And it must be corrected at this stage.  
11 Otherwise, the spectre arises of this judgment, this case continuing  
12 for a very long time, and then any resulting conviction of any of the  
13 accused being overturned on appeal and a retrial ordered.

14 Simply in the interests of justice and expeditious  
15 decision-making, this is the time to face up to the error and to put  
16 it right to avoid what will inevitably otherwise, in the submission  
17 of the Defence, be a procedural flaw in the trial, and, as  
18 Mr. Misetic says, may well set a precedent which in other witnesses'  
19 cases could affect my client, albeit that this witness in substance  
20 does not.

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

22 Mr. Tully.

23 MR. TULLY: We join the motion by Mr. Misetic. I don't have  
24 anything substantial to add. Simply to point out, it might be  
25 obvious to Your Honours, but for the record, the questions that I

1 asked, and I believe Mr. Misetic asked, were predicate questions upon  
2 which cross would follow if the witness had indeed given us answers  
3 in order to be able to do that, but they were specifically and  
4 manifestly frustrated by the answers we were given.

5 So to make it clear that this is not simply a question of  
6 whether meaningful cross-examination occurred but it was attempted by  
7 the Defence, and that did not happen based on the answers we were  
8 given.

9 Thank you, Your Honours.

10 PRESIDING JUDGE SMITH: Thank you, Mr. Tully.

11 Mr. Ellis.

12 MR. ELLIS: Your Honour, we too strongly support the application  
13 for the legal reasons advanced. In particular, that no adequate and  
14 proper opportunity for cross-examination was presented.

15 We are, in essence, in the same position as outlined by  
16 Mr. Emmerson. We weren't more vociferous earlier because it's not  
17 evidence that directly affected us, but we strongly support the legal  
18 principles enunciated.

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

20 Prosecution.

21 MS. MAYER: Yes, Your Honour.

22 First and foremost, primarily this is not the appropriate way to  
23 handle this application. The Panel, in announcing its decision on  
24 Monday, indicated that it intended -- that it was a decision and that  
25 it intended to follow it with a written decision. And, therefore,

1 procedurally, this is premature. There is no rationale or reasoning.

2 I understand that my colleague across the aisle, Mr. Misetic,  
3 has characterised the SPO's argument in a particular way, as well as  
4 the Panel's reasoning in a particular way, but we haven't actually  
5 received a detailed reasoning from the Panel. And so the appropriate  
6 time to do this would be after receiving that written decision and  
7 then making a written -- making written filings on this.

8 Briefly, though. On the ICC decision, we've just seen it while  
9 we were sitting here in court. That I completely understand and  
10 that's not a critique, but I'm not prepared to fully speak to it.  
11 That said, just from a quick review, it appears that it was a  
12 decision based on the ICC's analogous rule to our Rule 155, not 143,  
13 and I believe there are some other distinguishing factors, but I  
14 would like to wait so I can read the whole thing before making a  
15 submission.

16 And just finally, in the supreme -- Constitutional Court's  
17 judgment when it was reviewing the amendment, including the amendment  
18 to Rule 143, it ultimately found that that rule was consistent  
19 understanding exactly its application that it authorises the  
20 admission of a prior inconsistent statement for the truth of the  
21 matter. And the cases that are cited within, including other  
22 European Court of Human Rights cases, support the case that we cite  
23 yesterday, Vidgen, as well as the brief arguments we made yesterday.

24 So with that, I have nothing more to say at this point. We will  
25 wait for this Panel's ruling, and then we look forward to responding

1 to the written submissions, unless these oral submissions are the  
2 Defence's entire submissions and then we'll respond to those in  
3 writing with the permission of the Court.

4 MR. MISETIC: Mr. President, I'll be very brief.

5 I appreciate the Prosecutor's comments. I will just say that,  
6 in terms of the timing, it was an oral motion by the Prosecution, an  
7 oral decision by the Panel, and we do feel an obligation, even before  
8 you issue your written decision, to bring arguments to you, including  
9 legal authorities that you may want to review before either making a  
10 final decision or reviewing our motion for reconsideration or filing  
11 a written opinion. So that's why it was brought to your attention  
12 immediately.

13 However the Court wishes to proceed, obviously we will abide by  
14 that, but we stand by our application that this should be  
15 reconsidered.

16 PRESIDING JUDGE SMITH: First of all, we will file our decision.

17 MR. MISETIC: What did I say?

18 PRESIDING JUDGE SMITH: And then we will go from there. All  
19 right?

20 MR. MISETIC: Okay. Very good. Thank you.

21 PRESIDING JUDGE SMITH: I believe you're correct to -- I don't  
22 believe you are correct. You are correct. It was an oral motion for  
23 admission, and we did admit it and said we would follow it up with  
24 our written decision with our reasoning. That's still going to  
25 happen.

1 Judge Gaynor.

2 JUDGE GAYNOR: Thank you very much, Judge Smith.

3 Questions about the Ruto decision from the ICC Appeals Chamber.  
4 And my question would be this: The issue was there whether there was  
5 a rule not in existence at the beginning of trial could be applied  
6 during the trial. So the newly amended rule at issue could only be  
7 applied in accordance with Article 51(4) of the ICC's statute if  
8 there was no -- it could only apply retroactively if there was no  
9 detriment to the accused.

10 So the issue before the Appeals Chamber was is there detriment  
11 to the accused, and they found that there was. So here the rule in  
12 question existed at the start of this trial, so does that change your  
13 submissions in any way?

14 MR. MISETIC: It doesn't, because whether the rule was in  
15 existence or not in the Ruto judgment, the principle with respect to  
16 having a fair and proper opportunity to cross-examine remains the  
17 same. So even under the new rule, there must be an adequate and  
18 proper opportunity to cross-examine. At least as held by the Appeals  
19 Chamber, as held by the European Court of Human Rights, and I believe  
20 as held by the Constitutional Court in this Court.

21 And I would also say that regardless of the timing of the rule  
22 in Ruto, the Constitutional Court here authorised the rule but with  
23 expressly referencing the fact that there has to be an adequate and  
24 proper opportunity to conduct cross-examination in order for  
25 something to be admissible under 143(2), and that hasn't happened

1 here. And the Ruto opinion expressly deals with what is or isn't a  
2 fair or proper opportunity to cross-examine. And I think clearly on  
3 the four corners of paragraph 93, it's the same what happened here.  
4 We did not get a -- just because he showed up and answered questions  
5 by saying "I don't remember anything," "I don't remember any of these  
6 people," that's not a fair and proper opportunity for  
7 cross-examination.

8 And I would also -- and let me just finish, please, by saying,  
9 that's precisely why I repeated the questions of the Prosecution. So  
10 it cannot be the case that the unfairness to the Prosecution in the  
11 witness's answers to those questions results in a prior inconsistent  
12 statement coming in for the truth of the matter asserted, but when  
13 the Defence asks those same questions and gets the same answers in  
14 cross that's a fair and proper opportunity for cross-examination.

15 JUDGE GAYNOR: Let me ask you if you can develop your argument  
16 on a slightly separate issue.

17 In Ruto, the Appeals Chamber of the ICC said that the witnesses  
18 in question recanted the content of their prior recorded testimony.  
19 On the basis of the answers that this witness has given, is it your  
20 position that the witness recanted the content of his prior  
21 testimony?

22 MR. MISETIC: So I would say that coming in and saying he does  
23 not recall is tantamount to recanting because it essentially denies  
24 the accused the opportunity to challenge the evidence. And I think  
25 you need to read that recanting in the context of the later sentence

1 in that ruling, which says that what is key is that the Prosecutor  
2 elicit that incriminating evidence from the witness in  
3 examination-in-chief so that the accused can confront it.

4 But let me also draw your attention to this witness's express  
5 recanting of testimony, and I can do that, and this is at transcript  
6 page 7692, line 11, to 7693, line 8, question by the Prosecution:

7 "So do you remember telling them that the people who ordered the  
8 beating were Hashim Thaci, Rexhep Selimi, and Sabit Geci?"

9 Witness's answer:

10 "No, I did not say that, and neither do I recall it.

11 "Q. So I just want to understand your answer. You're saying  
12 that you recall that you didn't say it or that you don't recall it?

13 "I said I do not recall having said it, which means I did not  
14 say it."

15 So --

16 JUDGE GAYNOR: Can I ask you just another question on the same  
17 subject. Rule 143(2) of the Rules of Procedure and Evidence of this  
18 Court refers to a scenario where "the witness may reasonably be  
19 supposed to have knowledge about and which it appears to the Panel  
20 that, when questioned by a Party, the witness is not making a genuine  
21 attempt to give evidence." Those are the words used in the rule  
22 here.

23 Would you accept that that describes quite accurately what we  
24 saw when this witness was questioned both by you and by the  
25 Prosecution?



1 MR. MISETIC: If I may just have a moment to pull the rule up.

2 JUDGE GAYNOR: [Microphone not activated]

3 MR. MISETIC: Yes, I just have to scroll.

4 THE INTERPRETER: The interpreters would kindly ask the speakers  
5 to slow down a bit and pause between question and answer for the  
6 purposes of interpretation. Thank you.

7 MR. MISETIC: Yes, so, Judge, the reason I wanted to make sure  
8 on this point is that rule -- now that's an invocation of 143(2) (b).  
9 That provision does not -- is not related to a prior inconsistent  
10 statement.

11 So as I read that rule, it says that you may question a witness  
12 about a matter which is -- he's supposed to have knowledge and he's  
13 not making a genuine attempt. But then (c) is the invocation or use  
14 of a prior inconsistent statement. And so the admission of the  
15 statement has to be under 143(2) (c).

16 I do agree that as a factual matter he appears to have knowledge  
17 of the matters in his witness statement. He does not appear, based  
18 on the information we were provided, to have a medical reason why he  
19 would suddenly not be able to remember anything.

20 And the second part of your question was he's not making a  
21 genuine attempt. Yes, I would agree that he was not making a genuine  
22 attempt to answer our questions.

23 But it then has to fall under (c) in terms of a use of a prior  
24 inconsistent statement for admission, and I would again fall back on  
25 what is the distinction in admissibility between 143(2) (c) and

1 155(2). The distinction is precisely in the ability to  
2 cross-examine.

3 JUDGE GAYNOR: And I'm glad you brought that up because that was  
4 exactly where I was going.

5 I alluded to this two days ago on the same question. If a  
6 statement is admitted under 155 or were to be admitted under 143, you  
7 are, I think you agreed, in precisely the same position in terms of  
8 your ability to cross-examine the witness.

9 MR. MISETIC: That is correct.

10 JUDGE GAYNOR: So why is it that you would prefer to go down the  
11 Rule 155 route? Is it because the pre-conditions are stricter?

12 MR. MISETIC: Absolutely. So this is what I was perhaps  
13 inarticulately trying to explain, I believe Monday it was.

14 So there's a reason -- I could flip that question on you and  
15 say: Why is the Prosecutor moving under 143(2) and not under  
16 Rule 155? And I think the self-evident answer is because they don't  
17 believe they can satisfy the conditions of 155, which is now they're  
18 trying to open a new door through the misapplication of this rule.

19 The distinction, I would say, is that, first, 155 has past  
20 constitutionality by the Constitutional Court without  
21 cross-examination. Now, it puts us in the same condition, but I  
22 would argue that the conditions there were relatively strict in when  
23 that could be used, including that there has to be some element of  
24 interference; right? And in that situation, then the rights of the  
25 accused to cross-examination are being balanced against a competing

1 interest of interference with witnesses and denial of evidence to the  
2 Prosecution to be able to submit it.

3 143, there is no showing of some competing interest that would  
4 override the rights of the accused to confront and cross-examine  
5 under the European Convention and under the Constitution. So I guess  
6 my answer is that 155 was narrowly tailored to limit the rights of  
7 the accused to cross-examination in very specific circumstances. And  
8 this is why we're on our feet, is to say: In those circumstances if  
9 the criteria are satisfied, then the statement can come in even  
10 without cross-examination. But absent that - absent that - you can't  
11 just stick in a prior inconsistent statement for the truth because a  
12 witness is being obstructive to both the Prosecution and the Defence.

13 JUDGE GAYNOR: Let's be clear. The right of the accused to  
14 cross-examine is not limited under either 143 or 155. The Panel  
15 certainly here has given you the opportunity to cross-examine, so the  
16 error is not the Panel's, is it? You're not arguing that the Panel  
17 has restricted your right to cross-examine.

18 MR. MISETIC: The Constitutional Court has held, and this is why  
19 the Ruto decision is so important, it's not just that you can ask  
20 questions because the witness appeared in court. There has to be a  
21 meaningful cross-examination in order for it to be admissible.

22 So what we believe the error was was, under 143, to admit the  
23 statement without having seen whether the Defence will be able to  
24 have a meaningful cross-examination of the witness was error. We  
25 believe 143 should be applied going forward in the manner that the

1 witness -- if there's a situation similarly that arises in the  
2 future, the Panel MFIs the witness statement, sees what transpires on  
3 cross-examination, and then there can be a discussion about whether  
4 the Defence objects. If the Defence objects, if the Prosecutor  
5 wishes to persist to move it under 143 as opposed to 155, they can do  
6 that, and ultimately the Panel can rule.

7 JUDGE GAYNOR: One final question. I think you said two days  
8 ago that 155 is the *lex specialis* for this kind of situation.

9 MR. MISETIC: Yes.

10 JUDGE GAYNOR: What would you say to the observation that there  
11 appears to be two provisions in the rules which are essentially both  
12 *lex specialis*? And is there a reason -- one provision being  
13 Rule 143(2) and the other provision being Rule 155(2). Why is the  
14 Panel compelled to choose one *lex specialis* over the other? Aren't  
15 both available?

16 MR. MISETIC: Well, as I said, there's a couple of distinctions.  
17 One, 143(2) requires a fair and proper opportunity to have a  
18 meaningful cross-examination. 155 -- for example, 155(1), and we  
19 discussed this with Judge Mettraux on Monday, if there is a mental  
20 impairment that can be established with a witness that denies the  
21 accused an effective opportunity to cross-examine a witness who may  
22 have made a statement 15 years ago but because of dementia,  
23 Alzheimer's, or something like that, cannot answer questions, the  
24 statement would come in under 155(1), and then you, as the Panel,  
25 would have to give it the appropriate weight, taking into

1 consideration that there was no cross-examination of the witness.

2 But you couldn't get that same statement in under 143, right,  
3 because there has been no fair and proper opportunity to  
4 cross-examine the witness. They would have to go under 155 if there  
5 was an impairment. We think the similar situation under 155(2).

6 In terms of the application of 143, I think our experience has  
7 been that the use of a prior inconsistent statement under 143, where  
8 a witness is giving a statement on direct that's inconsistent, the  
9 statement can be used. But our understanding of the rule would have  
10 been that on a question-by-question basis you can use the statement  
11 and say: "You said this now. Do you recall you said five years ago  
12 in an SPO interview this?" And you can put that to them, with leave  
13 of the Panel, and then that can become used for the truth of the  
14 matter asserted.

15 It doesn't mean that it becomes a Trojan horse where you ask  
16 three questions that's inconsistent and then the entire statement  
17 comes in for matters that you never questioned the witness about in  
18 examination-in-chief. That would be another distinction between 143  
19 and 155, which is the whole statement comes in.

20 JUDGE GAYNOR: Thank you. Those are my questions.

21 MR. MISETIC: Thank you.

22 JUDGE GAYNOR: Thank you very much.

23 PRESIDING JUDGE SMITH: [Microphone not activated].

24 JUDGE METTRAUX: Thank you, Judge Smith.

25 Mr. Misetiç, while you're on your feet, I'd like to ask you a

1 few questions. First about your reliance on the Ruto case and its  
2 underlying basis, and then I'll come to what I understand you to be  
3 saying about the Constitutional Court decision and the European Court  
4 of Human Rights.

5 Regarding the Ruto precedent. What would you say to the  
6 suggestion that there is a relevant or even perhaps important  
7 difference between our Rule 143(2)(c) and Rule 68(2)(d) of the ICC  
8 rule, which is the basis on which the Ruto decision is based, in the  
9 sense that our Rule 143(2)(c) specifically provides for the admission  
10 of a statement for the truth of its content whereas the provision at  
11 the ICC does not do so?

12 MR. MISETIC: So, again, I perhaps was inarticulate with  
13 Judge Gaynor. Our interpretation of Rule 143(2)(c) is not that you  
14 can admit an entire statement through, unless you put every question  
15 you had in the statement to the witness and then it comes in. The  
16 language of the rule is that you can put a question to him whether  
17 the witness has at any time made a prior inconsistent statement, by  
18 which we think it doesn't mean "witness statement," it means you  
19 answered a question in a different manner previously and I can put  
20 that matter to you now.

21 Any such prior inconsistent statement may be admissible for the  
22 purposes of assessing the credibility of the witness as well as for  
23 the truth of its contents or for the purposes within the discretion  
24 of the Panel.

25 So I was at the scene -- a witness says, "I was at the scene of

1 the crime." In a witness statement he comes to court and says, "I  
2 wasn't there." Can you put that to the witness? Yes. Can that come  
3 in for the truth of the matter asserted, the prior statement? Yes.  
4 Does that mean that if the witness gave a 300-page statement on other  
5 matters, that all of it comes in? We would argue that it does not  
6 mean that.

7 JUDGE METTRAUX: Well, I think it was my question that was  
8 inarticulate, Mr. Misetić, not your response.

9 My question was simply a comparison between the legal basis at  
10 the ICC on which the Appeals Chamber relied, Rule 68(2)(d), I think  
11 it is, which does not provide for the admission of a statement for  
12 the truth of its content, whereas our rule does.

13 What I'm simply asking you is whether that makes a difference in  
14 terms of your reliance or the reliance we could place upon that  
15 decision where the nominative basis at the ICC does not appear to  
16 provide for such a scenario.

17 MR. MISETIĆ: I would argue that what we're arguing about is  
18 what constitutes meaningful cross-examination.

19 JUDGE METTRAUX: I'll come to that in a second.

20 MR. MISETIĆ: But that's why we're citing Ruto.

21 JUDGE METTRAUX: I will come to that in a second. I'm just, for  
22 the time being, interested in whether we can compare pear and apple.

23 MR. MISETIĆ: And I'm arguing it's an apple and apple, and  
24 that's what I'm trying to explain.

25 JUDGE METTRAUX: Would it make a difference? I'll come to, in a

1 second, the question of the cross-examination.

2 MR. MISETIC: If you're asking me if in one court there's a rule  
3 that allows admission of prior inconsistent statements and in another  
4 there isn't, then as a procedural matter obviously that's different.  
5 But as a substantive matter, there is no difference. That's my  
6 position.

7 JUDGE METTRAUX: Okay. I'll try.

8 MR. MISETIC: Okay.

9 JUDGE METTRAUX: The second thing is really about the basis of  
10 the reasoning in Ruto, where a core aspect of the paragraph you read  
11 to us is the fact that the witnesses, in this case, denied the  
12 allegations. I think that's the expression they use.

13 To say, well, in effect, there was a prior statement and  
14 in-court statement that rejected the version initially given. Are  
15 you saying that in factual terms we are in a similar scenario here?

16 MR. MISETIC: As I answered to Judge Gaynor, first of all, he  
17 did recant. And the word is "recant" what the -- the holding of the  
18 judgment of the Appeals Chamber says. So there is a portion, and I  
19 read it to Judge Gaynor, where he recants the testimony that the  
20 people who ordered the beating were Hashim Thaci, Rexhep Selimi, and  
21 Sabit Geci. That's the first point.

22 The second point is it does not matter as a matter -- in  
23 consideration of the right of cross-examination, because I think you  
24 have to read further in that paragraph, and it talks about the key is  
25 that it's elicited -- the incriminating evidence is elicited by the



1 Prosecutor in examination-in-chief. Now, whether he claims he  
2 doesn't remember or he claims he never said it, the key part of  
3 making a cross-examination effective is that you elicit it in direct.  
4 Why? Because the absurdity of the situation we were put in now.

5 The statement comes in. The witness either denies making the  
6 statement or denies any knowledge of having made the statement,  
7 right, because he's testified he doesn't even remember making the  
8 statement, which is a recantation. But let's say they put the  
9 statement in and now, somehow procedurally, this is his substantive  
10 direct evidence which he denies any knowledge of. So you put the  
11 Defence in the position, as the Appeals Chamber says here, of saying,  
12 "Oh, no, no, Witness, you said this." In other words, force the  
13 Defence counsel to elicit the incriminating information, to convince  
14 the witness that he did say something incriminating just so that we  
15 could then cross-examine him on the point.

16 And I think that's the key part of the Appeals Chamber reasoning  
17 here. That's the absurdity that makes cross-examination ineffective.

18 JUDGE METTRAUX: Okay. And I promised I'd come to the  
19 cross-examination point.

20 You've cited to the Constitutional Court decision. There's  
21 three little words you haven't cited, which is "as a rule," followed  
22 by a comma. And it proceeds to say that this possibility should  
23 normally account for a fair and effective opportunity to  
24 cross-examine.

25 Now, my question to you is: Are you reading the statement and

1 the authorities cited by the Constitutional Court in this case and by  
2 the ECHR as an absolute? In other words, is your position that, as a  
3 matter of constitutional law here and human rights law, that there  
4 can be no situation where a statement could be admitted in those  
5 circumstances without the possibility of cross-examination or without  
6 the possibility of effective cross-examination?

7 MR. MISETIC: Obviously I'm not saying that because we have  
8 rules that admit witness statements of deceased people, of other  
9 people, and so that's, on its face, not what I'm saying. But I would  
10 argue that beyond where you're reading "as a rule," there's a  
11 subsequent paragraph that then discusses the application of that  
12 principle in the context of Rule 143(2)(c) specifically. And there's  
13 a specific emphasis on the application of this rule and the  
14 requirement that there is an adequate and proper opportunity to  
15 challenge and question the witness, and the obligation of the  
16 Trial Panel that if it didn't happen at the time the statement was  
17 made, "the accused must as a general rule be given such an  
18 opportunity at a later stage of the proceedings. This opportunity,  
19 the Chamber observes, is specifically provided for in Rule 143(3)."

20 So whether in 155 you have the right to cross-examine a witness  
21 who is incapacitated, for example, obviously, there is no ECHR or  
22 other jurisprudence that says that statement can't come in. So no,  
23 that's not our position. But if you're going to apply this specific  
24 rule, we believe the Constitutional Court has said there must be a  
25 fair and adequate opportunity to cross-examine.

1 JUDGE METTRAUX: Thank you.

2 PRESIDING JUDGE SMITH: Yes, Mr. Emmerson.

3 MR. EMMERSON: I would like to address one issue which seems to  
4 touch on a number of the questions asked by Judge Gaynor and  
5 Judge Mettraux and, indeed, responds to the SPO.

6 The search for what is the *lex specialis* as between these two  
7 provisions is obviously something which, as Mr. Miletic submits, the  
8 Defence would say inevitably leads you to Rule 155(2). But *lex*  
9 *specialis* is not the only principle in play where two competing  
10 provisions with different rules are said, by the Prosecutor or by,  
11 indeed, the -- in discussion, to apply to the same set of facts.

12 The other is the fundamental principle that where two criminal  
13 law provisions apply to a situation, the provision most favourable to  
14 the accused must always prevail. Sometimes described as *lex mitior*.  
15 So whether one looks through *lex specialis* or *lex mitior* -- *lex*  
16 *mitior* is, if you like, the most fundamental principle of criminal --  
17 trial procedural as well as of substantive criminal law that one can  
18 conceive of.

19 And what we have here is a situation where the rule maker has  
20 decided that if a witness attends in court, and I think the exact  
21 words are -- bear with me just one moment. As in 155(2)(a), "having  
22 attended, has not given evidence at all or in a material respect."  
23 There's no question that those words apply to this witness.

24 And in those circumstances, the rule maker has decided that the  
25 prior statement of the witness may only be admitted if the cumulative

1 requirement of 155(2)(b), "the failure ... to give evidence has been  
2 materially influenced by improper interference, including threats,  
3 intimidation, injury, bribery, or coercion," is also satisfied.  
4 Those are cumulative requirements.

5 So what is for certain is that Rule 155(2) provides a  
6 protection, a safeguard for the accused, which applies to this  
7 situation without a doubt. In other words, that must be satisfied as  
8 a condition precedent. It is therefore not open to a Trial Panel to  
9 simply choose between the two provisions and decide which one will  
10 let the document in because that is to deprive the accused of a  
11 protection that the rule maker, in this case, effectively, the  
12 legislator, has said should apply in a situation such as this.

13 Now, there could not be a clearer example of a situation in  
14 which where two rules even arguably overlap. We suggest the *lex*  
15 *specialis* principle gives you enough guidance to say which is the  
16 appropriate one. But even if that were not the case, to adopt an  
17 interpretation which -- with a purpose of depriving the accused of a  
18 protection that the law allows him, namely, that that sort of -- the  
19 witness is there and they refuse to give evidence in a material  
20 respect, then their statement can only go in if their refusal to  
21 testify in support of it is the result of intimidation or coercion.

22 Now, that is the total answer to this situation. And without  
23 that being adequately addressed -- I mean, unless the Panel is going  
24 to find that the principle that the accused should not be deprived of  
25 a legal protection conferred by the legislature and that the

1 overlapping rules should be construed in the manner most favourable  
2 to the accused, principles which are very familiar, I think, to any  
3 experienced trial lawyer or judge as axiomatic principles for the  
4 conduct of a criminal trial, unless the Panel is going to say these  
5 principles don't apply, there really is no alternative to 155(2).

6 In a sense, I fail to see it really matters too much what the  
7 differences might be between the ICC provision or the wording of it  
8 or the precise facts of a particular case. You don't really need  
9 authority here. You've got two rules. If the Defence are right, the  
10 *lex specialis* is clear. But even if we're wrong about that and there  
11 is an overlap between the two, the principle which should guide your  
12 decision is not one which, with greatest of respect, and despite the  
13 eminence of the Bench, it's open at this stage, after so many  
14 hundreds of years, to undermine, overturn, simply for the purpose of  
15 admitting a statement prejudicial to some of the accused in  
16 circumstances where the legislator has said specifically that must  
17 not happen unless it can be proved by the Prosecution that the reason  
18 the witness isn't testifying is because they've been intimidated.

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

20 Mr. Tully.

21 MR. TULLY: Very briefly, Your Honour. Just on a point that  
22 Mr. Emmerson has raised regarding 155(2)(b) and the influence on the  
23 witness for improper interference with threats, intimidation, and so  
24 on.

25 There were pointed questions asked by the Prosecutor on Monday

1 going to the fear the witness had expressed in previous statements.  
2 I don't have the transcript reference, the official one, but the live  
3 transcript reference is on -- one example is on page 95, beginning at  
4 line 24, and the question was:

5 "But you've previously expressed fear about giving information  
6 in regards to the events [REDACTED]. Do you remember  
7 that?

8 "A. I never said that I was scared to give information."

9 And what followed afterwards was an application to include this  
10 witness statement because he was being evasive. So the clear  
11 intention of that question and the response received from the witness  
12 was to elicit that he had been interfered with in some way, in some  
13 improper manner, and that you can't trust his answer in court.

14 So if there is a question that pertains to Rule 155(2)(b) and  
15 whether it was satisfied, I believe that is what the Prosecution was  
16 aiming for.

17 I've nothing to add. Thank you, Your Honour.

18 PRESIDING JUDGE SMITH: Judge Barthe.

19 JUDGE BARTHE: Thank you, Judge Smith.

20 I have one, perhaps late, follow-up question for Mr. Misetic to  
21 a question asked by my colleague Judge Gaynor. Namely, Mr. Misetic,  
22 if you agree that this witness has not made a genuine attempt to give  
23 evidence, why is the exclusion of this -- or of his prior statement  
24 the proper or maybe the only way or the only remedy, and not for  
25 example, an intervention by the Panel to compel the witness to make a

1 genuine effort?

2 MR. MISETIC: I promise you that I was sitting in my chair  
3 regretting that I didn't address this question, so this is fantastic  
4 that you've asked me this question.

5 I agree with you 100 per cent. So the remedy we're seeking is  
6 not that the statement is permanently excluded. We just say that  
7 under this particular rule, this is not how it should proceed  
8 procedurally. It can be back in the Prosecution's lap to take any of  
9 several measures. And this is where we were in a little bit of a  
10 difficult position on Monday because why should we, as the Defence,  
11 be moving to compel the witness to give answers. It's the  
12 Prosecution's witness. They can seek a remedy from the Panel, either  
13 in terms of finding him in contempt, compelling a medical  
14 examination, putting him in jail until he's willing to remember  
15 things, or they can proceed under Rule 155 and see if they've  
16 satisfied the criteria there.

17 But our application does not say permanently exclude the  
18 statement. It's just that this is the wrong procedural framework  
19 that, again, threatens to taint the case because if this is allowed,  
20 I dare say that it probably won't be the last application under  
21 143(2) to admit statements where the other party hasn't had an  
22 opportunity to cross-examine.

23 JUDGE BARTHE: Thank you for making that clear.

24 PRESIDING JUDGE SMITH: Thank you very much.

25 We will break for -- oh, I'm sorry.

1 MS. MAYER: I'll be extremely brief.

2 PRESIDING JUDGE SMITH: No, no, that's all right. I didn't mean  
3 to cut you off.

4 MS. MAYER: I appreciate both Mr. Misetic and Mr. Tully  
5 surmising what the Prosecution was intending, but we would appreciate  
6 it if we are allowed to speak for ourselves.

7 Those question -- that line of questioning in terms of concern  
8 or not wanting to be here did not actually talk about any specific  
9 evidence of intimidation. And that's clear from the transcript, so  
10 I'll let that speak for itself.

11 In terms of what is apparent to this Panel is that there is a  
12 difference, as articulated by my colleagues across the aisle, between  
13 143 and 155, including the difference of element of improper  
14 interference, which is absolutely not included in 143. And so as the  
15 Panel considers it, as it rightfully did, it considers that those  
16 would not be *lex specialis* over the -- over situations that don't  
17 have all of those same elements.

18 PRESIDING JUDGE SMITH: [Microphone not activated]

19 MR. MISETIC: One brief -- one second. If I could just respond  
20 to that, because it's directly --

21 PRESIDING JUDGE SMITH: Well, Mr. Emerson wants to respond  
22 also.

23 MR. EMMERSON: I'll also only be one sentence as well.

24 PRESIDING JUDGE SMITH: Okay. One sentence each.

25 MR. MISETIC: Okay. That submission if -- that distinction



1 between 155 requiring interference and 143 doesn't, I cannot imagine  
2 a scenario where if you admit this under 143, that the Prosecutor  
3 will ever file an application under 155(2) to prove more things than  
4 they have to when they know that they can get everything in under  
5 143. Basically, you're making 155 irrelevant. Thank you.

6 MR. EMMERSON: Well, I was going to put the same point but in a  
7 rather different way. It's not about this Prosecution's conduct or  
8 what may happen hereafter that may involve speculation. What is the  
9 point of the legislature including the 155(2) route at all if the 143  
10 route is satisfied on the facts of this case?

11 And all judicial decisions on legislation have to proceed on the  
12 basis that you look at the rules as a whole. You seek to find a  
13 compatible construction. You can't simply read 143 in a matter that  
14 would render 155 completely otiose, and it would do because there  
15 would be no circumstances -- never mind what this Prosecution might  
16 choose to do. There would be no circumstances falling in 155 that  
17 didn't also fall within 143 which lacks the protection.

18 So with respect, whether you look at this on orthodox principles  
19 of interpretation or on the basis of the fundamental presumption of  
20 favourability to the accused, it doesn't really matter. You can't  
21 render that second provision and its additional safeguard otiose, and  
22 any judgment that does so is inconsistent with the principle that the  
23 rules must be read as a whole.

24 PRESIDING JUDGE SMITH: Thank you.

25 JUDGE METTRAUX: I have one more question for you, Mr. Misetic.

1 I'm sure you enjoy the sound of that two minutes from lunch, but --

2 MR. MISETIC: I don't have to go to the gym because I've gone up  
3 and down so much.

4 JUDGE METTRAUX: I'm sure it's good for you.

5 I just want to be clear that your submissions is that the  
6 correct path procedurally, in your understanding, was paragraph (2)  
7 of Rule 155. You are not, in other words, relying on paragraph (1)  
8 of that provision? Do I have that right?

9 MR. MISETIC: Let me just make sure. If you mean 155(1), yes, I  
10 have not seen any evidence that he has an impairment, and I believe  
11 the parties are actually in agreement on that point. So, yes, that  
12 is correct.

13 JUDGE METTRAUX: Thank you.

14 MR. MISETIC: Thank you.

15 PRESIDING JUDGE SMITH: All right. We will break until 2.30.  
16 We'll start with the next witness at that time.

17 We are in private session. We'll go to public session.

18 ~~{Open session}~~

19 THE COURT OFFICER: Your Honours, we're in public session.

20 PRESIDING JUDGE SMITH: All right. We're adjourned till 2.30.

21 --- Luncheon recess taken at 1.00 p.m.

22 --- On resuming at 2.30 p.m.

23 MR. ROBERTS: Your Honour, I just have one very brief matter to  
24 raise just before the witness enters, if that's appropriate.

25 PRESIDING JUDGE SMITH: [Microphone not activated]

1 MR. ROBERTS: It's very similar to submissions that have been  
2 made in relation to other witnesses of a similar type, in relation to  
3 the fact that, obviously, opinion evidence should not be elicited  
4 from that witness. But where it is, clear foundations must be  
5 established to -- for such an opinion, and that an opinion of a  
6 witness should not go to any of the ultimate issues.

7 Now, obviously, that seems to be a standing position of the  
8 Chamber, so it's not necessary, I would suggest, to issue the ruling.  
9 It's just, obviously, our position that this witness may enter into  
10 those areas, so I just wish to raise it and place it on the record at  
11 present.

12 PRESIDING JUDGE SMITH: [Microphone not activated].

13 Thank you, Mr. Roberts.

14 We will call in the witness now, Madam Usher, Witness W03724.

15 I take it we will be in public session?

16 MS. MAYER: My apologies, Your Honours. Primarily, yes.  
17 However, as I've discussed with the Defence *inter partes*, there are  
18 one or two matters that are confidential. The nature of the matter  
19 is confidential, so I will ask briefly to go into private session  
20 just to deal with those one or two things.

21 PRESIDING JUDGE SMITH: Okay.

22 One other thing, Madam Prosecutor. Following this witness  
23 tomorrow, is there another witness?

24 MS. MAYER: There is not. This is our last witness that we have  
25 ready for this week.

1 PRESIDING JUDGE SMITH: And estimates on time for you is short?

2 MS. MAYER: Less than one hour, including the 154. It might be  
3 closer to 30 to 40 minutes.

4 PRESIDING JUDGE SMITH: Any changes in your estimates at this  
5 point? Hard to say, I suppose.

6 MR. MISETIC: As I indicated, Mr. President --

7 PRESIDING JUDGE SMITH: Yours is shorter.

8 MR. MISETIC: Yes.

9 PRESIDING JUDGE SMITH: And we start with Mr. Roberts.

10 MR. ROBERTS: That's correct, yes, Your Honour. Mine is -- I  
11 think I'd estimated two hours. It's probably closer to an hour to an  
12 hour and a half, so slightly shorter.

13 PRESIDING JUDGE SMITH: Thank you.

14 MR. EMMERSON: We have no change to our estimate.

15 PRESIDING JUDGE SMITH: Okay, thank you.

16 Mr. Ellis.

17 MR. ELLIS: I think it is difficult to say at the moment, but I  
18 would thought no more than an hour, an hour and a half.

19 PRESIDING JUDGE SMITH: Okay. No problem.

20 [The witness entered court]

21 PRESIDING JUDGE SMITH: Witness, I'll ask you to stand again,  
22 please, just for a moment. Stand.

23 The usher is going to provide you with the text of the solemn  
24 declaration that we ask you to take pursuant to our Rules. Please  
25 take a look at it and then read it aloud.

1 THE WITNESS: Conscious of the significance of my testimony and  
2 my legal responsibility, I solemnly declare that I will tell the  
3 truth, the whole truth, and nothing but the truth, and that I shall  
4 not withhold anything which has come to my knowledge.

5 WITNESS: W03724

6 PRESIDING JUDGE SMITH: You can be seated now.

7 Witness, today we will start your testimony, which is expected  
8 to last today and into tomorrow. As you may know, the Prosecution  
9 will ask you questions first. Once they're finished, the Defence has  
10 the right to ask you questions, and the members of the Panel may have  
11 some questions for you as well.

12 The Prosecution's estimate for your examination is one hour.  
13 The Defence estimates that it will take approximately six to seven  
14 hours. As regards each estimate, we hope that the counsel will be  
15 judicious in the use of their time. The Panel may allow redirect  
16 examination if conditions for it are met.

17 Please try to answer the questions clearly with short sentences.  
18 If you don't understand a question, feel free to ask counsel to  
19 repeat the question, or tell them you don't understand and they will  
20 attempt to clarify. Also, please try to indicate the basis of your  
21 knowledge of facts and circumstances that you will be asked about.

22 In the event that you are asked by SPO to attest to some  
23 corrections made concerning your statements, you are reminded to  
24 confirm on the record that the written statement as corrected by the  
25 list of corrections accurately reflects your declaration.

1           Please also speak into the microphone and wait five seconds  
2 before answering a question and then speak at a slow pace for the  
3 interpreters to catch up with you.

4           During the next days while you are giving evidence in this  
5 Court, you are not allowed to discuss with anyone outside of this  
6 courtroom the content of your testimony. If any person asks you  
7 questions outside the courtroom, please report it to us immediately.

8           One final thing. Please stop talking if I ask you to or if I  
9 raise my hand. That means there may be an additional instruction  
10 that I need to give you.

11           If you feel the need to take breaks, let us know and we'll  
12 accommodate you.

13           So we will begin here on your left with the SPO and proceed  
14 after that.

15           Go ahead.

16           MS. MAYER: Thank you, Mr. President.

17                               Examination by Ms. Mayer:

18           Q. Good afternoon, Witness. We have met before, but I'll introduce  
19 myself again. I'm Deborah Mayer and I'm a Prosecutor with the SPO.

20           Can you please tell us your name.

21           A. Robert Macfie Douglas Young.

22           Q. And what do you go by?

23           A. Douglas or Doug.

24           Q. What is your date and place of birth, Mr. Young?

25           A. Inverness, Scotland, 23 October 1948.

1 Q. And what is your nationality?

2 A. British.

3 Q. Sir, did you give a statement to the SPO in May 2019 and October  
4 2019?

5 A. Yes, I did.

6 MS. MAYER: I'd ask the Court Officer to bring up 085942-085979  
7 in English, and 076162-076199-AT RED2 in Albanian. The first pages  
8 of both, please.

9 Q. Do you recognise this document as the record of your SPO  
10 interview?

11 A. Yes.

12 MS. MAYER: Can we please go to the last page of the English  
13 version.

14 Q. Is that is your signature at the end there?

15 A. Yes.

16 Q. Did you have a chance to review this document before you signed  
17 it?

18 A. Yes, I did.

19 Q. And did you also have an opportunity to review this statement  
20 last week?

21 A. Yes.

22 Q. Do you recall meeting with myself and my colleagues this past  
23 Sunday?

24 A. Yes, I do.

25 Q. In that meeting, were you given an opportunity to provide

1 clarifications in relation to this document?

2 A. Yes.

3 Q. And did you, in fact, provide clarifications to this statement?

4 A. Yes, I did.

5 Q. Do you recall these clarifications and corrections being  
6 included in a note which was read back to you?

7 A. Yes.

8 Q. Subject to the corrections set out in the note, is the  
9 information provided in your SPO statement accurate and truthful to  
10 the best of your knowledge and belief?

11 A. Yes, it is.

12 Q. And subject to the corrections set out in the note, does the  
13 information provided in your SPO statement accurately reflect what  
14 you would say if you were examined about the events recorded therein?

15 A. Yes.

16 MS. MAYER: Having addressed the Rule 154 criteria, we move for  
17 the admission of this witness's SPO statement along with the  
18 associated exhibits identified in F01625 Annex 4, which were  
19 provisionally admitted by the Court in F01700, along with the  
20 preparation note. I will list each of the items by ERN for the  
21 Court Officer.

22 The statement itself, as we have up on the screen in English, is  
23 085942-085979. The Albanian version of that is 076162-076199-AT  
24 RED2.

25 The first associated exhibit is 067049-067049.



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1 The second associated exhibit, 050549-050549.

2 The third associated exhibit, 067053-067055.

3 The next, 050557-050557.

4 The next, 067870-067896.

5 The next is 067057-067066.

6 The next is SPOE00059409-00059410.

7 The next is SPOE00233976-00233979.

8 The next is SPOE00059421 to 00059423.

9 The next is SPOE00116964-00116973.

10 The next has a lesser redacted version that's in the queue. In  
11 the motion, in the 154 motion and decision, it was SPOE00233678 to  
12 00233681. The lesser redacted version, which we are assuming that  
13 the Court and the Defence would want, is 00340840-00340843.

14 The next is SPOE00116952 to 00116963.

15 The next is -- also has a lesser redacted version that we just  
16 got authorisation for, which is SPOE00233674 to 00233677 was the one  
17 in the SPO's 154 motion and the Court's decision, but the updated  
18 version, the lesser redacted version, is SPOE00116760-00116763.

19 The remaining associated exhibits are U007-9610 to U007-9621  
20 RED2. That is a multi-language document that has two English  
21 translations, because there are only a couple of pages that have  
22 English translations. Most of it's in English. The two English  
23 translation pages are U007-9616 to U007-9616-ET, and the second is  
24 U007-9618 to U007-9620-ET RED2.

25 The last associated exhibit is 067045-067048 RED2 in English.

1 The Albanian version of that is 067045-067048-AT RED2.

2 And, finally, the preparation note that we're tendering is  
3 115157-115161.

4 PRESIDING JUDGE SMITH: Any objection?

5 MR. MISETIC: No objection.

6 MR. ROBERTS: No objection.

7 MR. ELLIS: No, Your Honour.

8 PRESIDING JUDGE SMITH: Thank you. Those enumerated documents  
9 plus the associated exhibits are admitted and will be assigned a P  
10 number.

11 THE COURT OFFICER: Thank you, Your Honours.

12 The first one, 085942 to 085972, and the Albanian translation  
13 076162 to 076199-AT Revised RED2 will be Exhibit P392.

14 The second one, 067049-067049 will be Exhibit P393.

15 The third one, 050549-050549 is Exhibit P394.

16 067053 to 067055 is Exhibit P395.

17 050557 to 050557, Exhibit P396.

18 067870 to 067896, Exhibit P397.

19 067057 to 067066 will be Exhibit P398.

20 SPOE00059409 to 00059410 will be Exhibit P399.

21 SPOE00233976 to 00233979 will be Exhibit P400.

22 SPOE00059421 to 00059423 will be Exhibit P401.

23 SPOE00116964 to 00116973 will be Exhibit P402.

24 SPOE00340840 to 00340843 will be Exhibit P403.

25 SPOE00116952 to 00116963 will be Exhibit P404.

1 SPOE00116760 to 00116763 will be Exhibit P405.

2 U007-9610 to U007-9621 RED2 and the two identified translations  
3 will be Exhibit P405. And the translations will be ET.1 and ET.2.

4 067045 to 067048 RED2 will be Exhibit P406.

5 And, lastly, the preparatory note, 115157 to 115161 will be  
6 Exhibit P407.

7 Thank you, Your Honours.

8 MS. MAYER: I know that was a very long list. If I could just  
9 ask for a clarification from the Court. I think I may have recorded  
10 that the SPOE00116760 to 763 was 405 and that the one after that is  
11 also 405. I just want to make sure I've got the correct numbers when  
12 I use them.

13 THE COURT OFFICER: Thank you. Yes, SPOE00116760 will be P405.  
14 The U007-9610 to U007-9621 should be P406. And I apologise if I  
15 misspoke. 067045 to 067048 RED2 will be P407. And the preparatory  
16 note, 115157 to 115161 will be P408. Thank you.

17 PRESIDING JUDGE SMITH: What was the last one?

18 THE COURT OFFICER: 408.

19 PRESIDING JUDGE SMITH: Just for the record, P932 to P408, as  
20 now stated, are admitted.

21 MS. MAYER: Thank you, Your Honour.

22 On 9 September, the SPO submitted a proposed summary of this  
23 witness's now admitted Rule 154 statement to the Panel, Defence, and  
24 Victims' Counsel. We have not received any objection to the proposed  
25 summary. So with the leave of the Panel I would like to read the

1 summary.

2 PRESIDING JUDGE SMITH: Go ahead.

3 MS. MAYER: Douglas Young served as a lieutenant-colonel in the  
4 British Army Reserve and was deployed as a member of the UK Kosovo  
5 Diplomatic Observer Mission (KDOM) and then the OSCE's Kosovo  
6 Verification Mission (KVM) in 1998 to 1999.

7 Mr. Young left Kosovo in March 1999 when the NATO bombing  
8 campaign was due to begin and returned to work for KFOR from October  
9 2001 to April 2002.

10 Mr. Young participated in establishing and running KVM  
11 Coordination Centre 1, of which he was the deputy director and which  
12 had responsibility over Rahovec and Malisheve and reported to  
13 Regional Centre 1 based in Prishtine. Through his work in Kosovo,  
14 Mr. Young engaged with the KLA regarding missing and abducted  
15 persons. Mr. Young engaged in meetings with the KLA in an effort to  
16 determine the whereabouts of individuals who were alleged to have  
17 been abducted by the KLA and to secure the release of such  
18 individuals.

19 In one such instance, Mr. Young began trying to secure the  
20 release of the abducted person Ymer Xhafiqi on the day that he was  
21 detained by the KLA, and in that regard had numerous interactions  
22 with KLA officials.

23 Q. Mr. Young, you've said that you served in the British Army  
24 Reserve, including several mobilisations and deployments in the  
25 1990s, in your SPO statement. Could you give the Court a very brief

1 overview of your military -- the military progression of your career.

2 A. Well, most of my service was at home in the reserves part-time  
3 and trained and worked in the United Kingdom and often in the British  
4 Army of the Rhine in Germany. There were also deployments to Norway  
5 and Cyprus.

6 I was promoted to major in 1980, having previously served as an  
7 infantry front commander, mortar platoon commander, and intelligence  
8 officer. I served with my infantry battalion until 1989, when I was  
9 transferred to a pool of watchkeepers and liaison officers and worked  
10 with the 2nd Infantry Division, and then with the 1st Armoured  
11 Division, with whom I was deployed as a volunteer to the Gulf in 1990  
12 serving through Operation Desert Storm in the desert with the  
13 armoured division headquarters.

14 I returned to civilian life. My main profession was as a lawyer  
15 working partly in private practice and for about 15 years in the  
16 public service in local government. I was then voluntarily mobilised  
17 again for Bosnia. In 1996, I was still a major. I served a tour as  
18 a operation staff officer as a major. At that point, I was put  
19 forward for a promotion through the main British Army system. In  
20 other words, for a substantive promotion, not acting. And I was  
21 asked to serve a further tour as the senior liaison officer from the  
22 British division to the theatre headquarters in Sarajevo.

23 So I was in Bosnia for a total of a year. And in -- following  
24 the start of the Kosovo emergency, I was asked by the British Foreign  
25 and Commonwealth Office to be seconded initially to the UK KDOM and

1 then to -- which would then transform into the OSCE KVM, Kosovo  
2 Verification Mission. I served in -- with them in Kosovo and in  
3 Macedonia.

4 After returning home and continuing my civilian life, I was  
5 again mobilised to serve with KFOR with whom my job was in  
6 developing -- helping to develop the Kosovo Protection Corps, which  
7 was mainly composed of veterans of the Kosovo Liberation Army. It  
8 was a very rewarding time. And I served with them for a further six  
9 months, which was really my last deployment in my army service.

10 Q. Thank you. As part -- and as you've heard in court here, your  
11 SPO statement is now in evidence, so I'm not going to ask you to  
12 repeat everything that's in that statement. But in that statement,  
13 you discussed the process of how you performed your duties in CC1,  
14 Coordination Centre 1, and that there were daily reports that were  
15 produced by CC1.

16 I'd like to bring your attention to a particular one of those  
17 documents.

18 MS. MAYER: And I'd ask the Court to bring up SPOE00116730 and  
19 ask you to take a look at that on the screen.

20 Q. So first at the top of the page there on page 1, the date on  
21 that is 26 January 1999. Were you still the deputy director of CC1  
22 at KVM in Kosovo on 26 January 1999?

23 A. Yes. I should say that I only became the deputy director in the  
24 course of that tour. Previously, I was a patrol commander. And the  
25 comment in that document, headlined as "Acting director's comment," I

1 think --

2 Q. If you just give me a minute to ask you the next question. I've  
3 just asked you about the date. So were you there on that date?

4 A. Yes, I was.

5 Q. All right.

6 MS. MAYER: If we can go to the bottom of page 2 of the  
7 document.

8 Q. And I'll ask you to look at the concluding block right above  
9 where the annexes are, and it lists your name with the title Acting  
10 CC1 Director. Can you explain that?

11 A. Yes. I -- my job title at the time was deputy director, but the  
12 director, Georges Bordet, was temporarily ill with a serious local  
13 infection and so he was basically out of the game at that point. And  
14 I, therefore, so that everyone understood my responsibilities, was  
15 designated as acting CC1 director.

16 Q. And in this document, since it's under your name, did you draft  
17 or approve of the contents of this document?

18 A. Yes, I did.

19 Q. I'd like to bring your attention back to page 1 of the document.  
20 Under item number 2, at the very bottom of the page, subparagraph 2  
21 of paragraph 2, which starts with reference to: "A CC1 two-vehicle  
22 patrol ..."

23 And I'd like to direct your attention to the last three lines of  
24 that paragraph, the sentence that reads:

25 "The KVM patrol was stopped by KLA, who claimed that they had

1 not been warned by their higher formation about the patrol: further  
2 details to follow - the same callsigns are again deployed (elsewhere)  
3 this evening."

4 I would like to ask you about that reference to "higher  
5 formation." When you use that term, what were you referring to?

6 A. "Higher formation" is a very specific military term applying to  
7 the next higher headquarters in a chain of command. So the higher  
8 formation would be whatever was senior to the KLA unit which was  
9 encountered by that patrol.

10 Q. All right.

11 MS. MAYER: I'd offer SPOE00116730 through SPOE00116733 into  
12 evidence.

13 PRESIDING JUDGE SMITH: [Microphone not activated]

14 MR. MISETIC: No objection.

15 MR. ROBERTS: No objection.

16 PRESIDING JUDGE SMITH: [Microphone not activated].

17 SPOE00116730 through 733 is admitted.

18 THE COURT OFFICER: Your Honours, that will be Exhibit P409.

19 PRESIDING JUDGE SMITH: Thank you.

20 You may continue, ma'am.

21 MS. MAYER: All right. I'd like to now show you on the screen  
22 SPOE00060949 to SPOE00060951 on the screen.

23 Q. Have you seen this document before?

24 A. Yes, it has been shown to me.

25 Q. And was that during your preparation session on Sunday?



1 A. That's correct.

2 Q. Do you recognise the type of document that this is?

3 A. Yes, I do.

4 Q. And did you arrive in Kosovo for this deployment, the one that  
5 we're talking about, between 1998 and 1999, in the month of November  
6 1998?

7 A. Yes, I did.

8 Q. And I'd like to draw your attention to page 2 of this document,  
9 paragraph -- well, we'll start at the top of the page. And it's a  
10 Kosovo Verification Mission interim report, and it covers the period  
11 24 November 1998.

12 Were you familiar with these types of documents when you were  
13 deployed in Kosovo?

14 A. I don't think I would routinely require to see this sort of  
15 document, but I believe I did see them from time to time.

16 Q. I understand. And to be clear, you did not author this  
17 document; is that right?

18 A. That's right.

19 Q. I'd like to draw your attention to paragraph or item number 2,  
20 rather, and the second paragraph under item 2. If you can look at  
21 that. And it refers to -- in this report, what's being reported  
22 under "Developments in the Mission area" is that there was a meeting  
23 with a KLA commander and KDOM was informed that that KLA commander  
24 had received a new directive from the "'top of the KLA'." And the  
25 directive was:

1            "It stated that the KLA has to: help and support international  
2            organisations; not build barriers on main roads; and not to provoke  
3            the Serb police."

4            Is that consistent with information that you learned when you  
5            were in Kosovo in 1998?

6            A.    Yes. I do recall hearing that sort of detail, not necessarily  
7            in the same words. But that was what was happening at the time. We  
8            were deployed, certainly as far as the OSCE is concerned, initially  
9            to monitor the implementation of the Milosevic-Holbrooke agreement.  
10           Therefore, nominally, we were responsible for monitoring the  
11           withdrawal of Serbian forces.

12           But, of course, increasingly we were getting information about  
13           the KLA and communication from the KLA, and we also were able to  
14           observe the same effects actually on the ground. So, yes, this is  
15           the sort of thing which I recall from that period.

16           MS. MAYER: I'd ask to bring up U002-2849 to U002-2851-ET, and  
17           the Albanian is the same ERN with no ET.

18           Q.    And when that comes up, Mr. Young, I'm going to ask you to look  
19           on your screen at the first page. Looking at the heading right there  
20           as well as the first full paragraph where it discusses or announces:

21           "Although the Kosovo Liberation Army General Staff /GS/ is not a  
22           signatory to any agreement ..."

23           And I'm just going to skip down. That's the paragraph that I'm  
24           talking about. I'm going to start in the middle of the paragraph,  
25           where it talks about:

1           "The KLA General Staff has long announced that it will offer  
2 assistance and cooperation to the stated mechanism, enabling it to  
3 freely carry out their own duties and obligations throughout the  
4 territory controlled by the KLA. They will not be blocked in their  
5 movements on the ground and we guarantee them full security."

6           Is that consistent with what we just discussed in the OSCE  
7 report, in terms of what the conditions were, what was happening on  
8 the ground at that time?

9           MR. MISETIC: Objection, Your Honour, as to how the question was  
10 formed. I'm not sure what's being asked. And also calls for  
11 speculation. There's no foundation for what the witness would know  
12 about this document. There's no foundation for the previous  
13 document, either.

14          MS. MAYER: I believe I've established a foundation for the  
15 previous document. If it was consistent with what this witness  
16 learned from his own --

17          PRESIDING JUDGE SMITH: [Microphone not activated]

18          MS. MAYER: And as to this, I haven't asked him. I've asked him  
19 if what's stated explicitly in the document is consistent with his  
20 experience on the ground in Kosovo, which I think is an appropriate  
21 question.

22          PRESIDING JUDGE SMITH: [Microphone not activated]

23          MS. MAYER: I'm not. I'm just going to --

24          PRESIDING JUDGE SMITH: Are you going to offer it?

25          MS. MAYER: I'm not. I'm going to ask him if it's consistent

1 with his experience.

2 PRESIDING JUDGE SMITH: Please look at your question again and  
3 re-ask it and perhaps refine it a bit.

4 MS. MAYER: I'll do my best.

5 PRESIDING JUDGE SMITH: I guess that's partially sustained.

6 MS. MAYER:

7 Q. Let me just ask explicitly: Did you author this document, this  
8 KLA document, Mr. Young?

9 A. Did I author it?

10 Q. Yes.

11 A. No, no.

12 Q. And had you read this KLA document prior to being shown it on  
13 Sunday?

14 A. No, I don't believe so.

15 Q. Okay. So understanding those caveats that this isn't your  
16 document, you haven't seen it before it was shown to you, is that  
17 sentence, that paragraph that you looked at and the sentence that I  
18 read to you about, again just on its face, the KLA's position of how  
19 it's going to expect conditions on the ground to be, is that  
20 consistent with the actual conditions that you experienced on the  
21 ground?

22 A. It is in general consistent. However, as to the statement that  
23 they will not be blocked, we were blocked at times or in particular  
24 locations. I was once filmed by the BBC being blocked at a  
25 particular checkpoint, a KLA checkpoint, which I could not pass. And

1 there was another location which was a permanent block. I, in fact,  
2 was able to negotiate to routinely pass it a short distance in order  
3 to refuel my vehicle, but most of our other patrols were not allowed.  
4 And that was the situation throughout the deployment. I'm sure there  
5 are other examples, but generally we were able to pass freely.

6 Q. I understand. And going back to --

7 MS. MAYER: If I can ask the Court to bring up the previous  
8 document, which is SPOE00060949 to SPOE00060951 on page 2 again.  
9 That second paragraph under item number 2.

10 Q. While that's coming up, let me just ask you. That previous  
11 document that we were looking at, it said "Kosovo Liberation Army  
12 General Staff" on the top. Do you have an understanding of  
13 whether -- where the General Staff fell in the KLA, whether it was at  
14 the bottom of the organisation or at the top of the organisation?

15 A. It was at the top of the organisation. The term "GHQ" was  
16 sometimes used as well either in English, and I think when we were  
17 speaking through interpreters, the interpreters used both phrases,  
18 General Staff and GHQ. But I was clear that they both meant the same  
19 thing: At the top.

20 Q. So now going back to this OSCE document that we looked at a  
21 minute ago from 24 November 1998, and that second paragraph under  
22 item 2, where it says that someone from KDOM had had a meeting with a  
23 KLA commander who had received a new directive "from the 'top of the  
24 KLA.'" Do you see that?

25 MS. MAYER: Oh, I'm so sorry, I'm jumping ahead before the item

1 is on the screen. No, I'm sorry, we were still on the OSCE document.

2 Q. Do you see that there on your screen?

3 A. In the second block, yes, "had received a new directive from the  
4 'top of the KLA'."

5 Q. And before we move off of this document, were you able to see  
6 the date on the KLA General Staff document? We've talked about the  
7 date of the OSCE report being 24 November 1998.

8 MS. MAYER: If we can just go back one last time to the KLA  
9 document, which is U002-2851. I'm sorry, that's the last page. It's  
10 U002-2849 through U002-2851 in both English and it's the same ERN in  
11 Albanian. If we go to the last page of that document in both  
12 languages.

13 Q. Do you see there on the bottom the date on that document?

14 A. Yes, I do.

15 Q. As being 19 November 1998, which is five days before 24 November  
16 1998?

17 A. Yes.

18 Q. Do you also see on the left-hand side of your screen the  
19 Albanian version, which is the original, a stamp and a signature?

20 A. Yes.

21 Q. Thank you. Mr. Young, I'd like to draw your attention to  
22 certain events that you talk about in what's now in evidence as P392  
23 and also Exhibit P407, which is your SPO statement and also a  
24 four-page statement that you drafted for the ICTY. And, again, I'm  
25 not going to ask you to repeat everything that's in that statement.

1 I just want to bring you to a particular part.

2 In that statement, starting at page 15 through page 26, so for  
3 quite a number of pages, you describe in detail your knowledge of the  
4 abduction of Ymer Xhafiqi. Specifically, you describe that you  
5 learned that the abduction happened on the -- you learned of the  
6 abduction on the day that it happened, 9 March 1999, and that you  
7 were at a meeting with KLA officials when you learned of the  
8 abduction. You describe that you met with several KLA officials at  
9 different locations on that day in an effort to locate this man, Ymer  
10 Xhafiqi.

11 I want to focus your attention first on a conversation that you  
12 had at what you describe as a group of houses near around Dubrava.  
13 Do you recall that part of your statement?

14 A. Yes, I do.

15 Q. And in that part of your statement, you identify that you ended  
16 up meeting with someone named Commander Drini, and that you spoke  
17 with Commander Drini about what he knew about this abduction. Can  
18 you tell the Panel what Commander Drini told you about whether he  
19 knew anything about this abduction prior to your bringing it to his  
20 attention?

21 A. Commander Drini was -- made it very clear to me that, according  
22 to him, he had known nothing about the abduction. It had not been  
23 done on his orders, but he was making inquiries. And he clearly took  
24 the matter very seriously. He had arrived very quickly along with  
25 our regional director, General Maisonneuve, after I had reported my

1 suspicions about who was responsible.

2 Q. You describe in that same statement that you ended up also  
3 meeting with someone named Skender who you understood to be the  
4 commander of the KLA's 124th Brigade. And can you just tell the  
5 Panel whether or not it was your understanding that he was -- was  
6 involved in any way with the Ymer Xhafiqi abduction?

7 A. Yes. My conversation with Skender took place before the arrival  
8 of Drini. Drini only came as a result of my reporting my  
9 conversation with Skender. Skender initially was indicating to me  
10 that he and, as far as he was concerned, the KLA were not involved in  
11 the disappearance of Mr. Xhafiqi. However, in the course of the  
12 conversation, due to something that Skender said, I realised that he  
13 must be involved. And that is what led me to report this development  
14 to our headquarters in Prizren by radio.

15 Q. All right. And I want to ask you, then, after you spoke with  
16 Commander Drini, did you then go to meetings in Terpeze to try to  
17 follow up on this abduction?

18 A. Yes, I did.

19 Q. And I want to focus you on your second meeting in Terpeze. And  
20 you say in P392 and also P407 that you ended up meeting with someone  
21 who was introduced or you believed to be Celik and that you later  
22 come to -- that you came to know person's identity. Who was the  
23 Celik that you met with at Terpeze about this Xhafiqi abduction?

24 A. Celik was Mr. Fatmir Limaj. I already knew that, that Celik was  
25 the nickname of Mr. Limaj. I'd never met him before. But during the



1 meeting, when it became difficult, it was indicated to me by my  
2 colleagues that this was Mr. Fatmir Limaj of whom I'd heard  
3 previously and that I already knew, as I say, that his nickname was  
4 Celik, Steel.

5 Q. And in the course of your conversation with Fatmir Limaj, did he  
6 acknowledge that the KLA had detained this man, Ymer Xhafiqi?

7 A. Yes, he did.

8 Q. How long did your conversation with Fatmir Limaj last?

9 A. Hard to say. Perhaps 15 minutes. It wasn't over in a short  
10 time, but it wasn't that extended. Essentially, we weren't reaching  
11 an agreement, and it broke up.

12 Q. And how far away from him were you when you had this  
13 conversation?

14 A. I was standing quite close to him.

15 Q. And did you come to an understanding of what level of authority  
16 Fatmir Limaj was speaking at when he was talking to you about the KLA  
17 being in control or having this man in detention?

18 A. Yes. One of my points for the meeting was that I was there with  
19 the authority of Commander Drini, who wished me to at least have  
20 access to see the detained man. And so, therefore, as far as I was  
21 concerned, I had the authority of Commander Drini behind me, and I  
22 pointed this out to Mr. Limaj. Mr. Limaj, however, responded that  
23 the detained man was out of the responsibility of the zone commander  
24 and was under the authority of the General Staff.

25 MS. MAYER: Your Honour, I'd ask that we move briefly into

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Examination by Ms. Mayer

1 private session for my next questions.

2 PRESIDING JUDGE SMITH: [Microphone not activated].

3 I'm sorry. Into private session, madam.

4 [Private session]

5 [Private session text removed]

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Witness: W03724 (Private Session)

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Examination by Ms. Mayer

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Witness: W03724 (Private Session)

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Examination by Ms. Mayer

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Witness: W03724 (Private Session)

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Examination by Ms. Mayer

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1 [Private session text removed]

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11 [Open session]

12 THE COURT OFFICER: Your Honours, we're in public session.

13 PRESIDING JUDGE SMITH: Witness, the Defence for Selimi,

14 Mr. Selimi, will be asking cross-examination questions.

15 Mr. Roberts, you have the floor.

16 MR. ROBERTS: Thank you, Your Honour. If you just bear with me  
17 for one more second while I just move the monitor.

18 Cross-examination by Mr. Roberts:

19 Q. Good afternoon, Witness. As the Presiding Judge has informed  
20 you, my name is Geoff Roberts. I'm counsel for Mr. Selimi, and I've  
21 got some questions that we'll go probably through this afternoon and  
22 also into tomorrow morning.

23 I know you've been very, very good at waiting for a pause in  
24 between questions and answers. I don't know if you've testified  
25 before with translation, but obviously if you can continue that so

1 there is a nice break and no overlap, it makes it much easier for the  
2 transcript.

3 Firstly, if I could just go into your background and experience.  
4 And, obviously, you answered questions from the Prosecution about  
5 this earlier, about your experience. I believe it was in the  
6 territorial army and then the reserve in Norway, Cyprus, and Germany.  
7 And you said you were part-time.

8 How did that function effectively? Was it a certain number of  
9 weeks you would be in service over the course of a year or how did it  
10 function?

11 A. Yes. It was a combination of weekends and one period of unit  
12 deployment of two weeks during the year and training courses. So I  
13 did training courses in the various appointments that I held as a  
14 mortar officer, as an intelligence officer, as a rifle platoon  
15 commander, and then as a combat team commander.

16 Q. And -- sorry.

17 A. And in addition, we went on what were effectively operational  
18 reconnaissances to Germany to our area of deployment.

19 I should add, though, that the earlier part to my service with  
20 the infantry unit, that was, if you like, typically part-time. It  
21 was hard work and many days and, obviously, I had a lot of  
22 responsibility, but it was very much part-time. But by the time that  
23 I served in the Balkans, whether in Bosnia or in Kosovo, I didn't  
24 have another full-time job. And particularly, during my time as a  
25 liaison officer for an armoured brigade, I spent a lot of time in

1 uniform. It was well paid at the level of lieutenant-colonel, and it  
2 combined well with other part-time work that I did.

3 So, actually, I was spending a lot of time in uniform on -- on  
4 sometimes quite relevant work. So it wasn't -- by that stage, it  
5 wasn't really a sort of, if you like, an amateur occupation.

6 Q. And just to be clear, the first time you saw active service,  
7 that was the Gulf War, wasn't it?

8 A. That's correct.

9 Q. And how long were you in active service during that conflict?

10 A. About three months.

11 Q. About three months. And then you moved -- and the next service  
12 that I think you set out was in 1996, so that was six years later in  
13 Bosnia; is that correct?

14 A. That's correct.

15 Q. And how long were you serving in Bosnia in that capacity?

16 A. A total of a year, a total of [Overlapping speakers] ...

17 Q. So all of 1996?

18 A. No. I was -- I went out and about May after initial training,  
19 and my appointment changed and I was promoted in the autumn. And  
20 then I finally returned to civilian life the following May. So it  
21 was 1996 into 1997.

22 Q. Okay. So May 1996 until May 1997. So between 1991 and 1996,  
23 you were, again, back working as a civilian, if I can use that  
24 expression, back at home?

25 A. Yes. Along with quite a lot of military occupations. Yeah.



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1 Q. And in Bosnia when you were there, I think you were involved  
2 in -- is this electoral assistance?

3 A. Yes. If I -- if I take my --

4 Q. Oh, sorry, short-term international polling officer; is that  
5 right?

6 A. That was a different thing. It wasn't -- that wasn't military.  
7 I was a short-term polling station officer under UK FCO and OSCE for  
8 some elections in Bosnia, but during my time with initially IFOR and  
9 then SFOR, I was asked to look after -- I was the, if you like,  
10 subject-matter expert in our headquarters on various subjects, one of  
11 which was elections, and I was the G3 operations cell's  
12 representative on the security planning for municipal elections that  
13 were coming up.

14 But that was simply one task I -- extended task that I had, an  
15 important one, but it wasn't my only one.

16 Q. Okay. And during that time when you were in Bosnia, obviously  
17 the conflict had finished, so there was no active armed force of  
18 either side during the time you were there; is that fair?

19 A. There was some sniping, but not -- there were no major  
20 engagements involving us at that time.

21 Q. So is it fair to say that you were -- before you went to Kosovo,  
22 you were never deployed in a situation where there was a non-state  
23 armed group operating?

24 A. Certainly in Bosnia there were factions, as you know. There  
25 were groups which were connected with the state but had actually been

1 forbidden under the Dayton Agreement. There were -- for example, the  
2 Bosniak side had some people called Black Swans who were a concern to  
3 us. They were -- ultimately, they came under the state, but they  
4 were not -- as far as we were concerned, they were not a legal or  
5 approved group. So it was a little more complex than simply post  
6 conflict.

7 Q. Okay. But certainly not a non or a potential non-international  
8 armed conflict, you hadn't been deployed -- that certainly didn't  
9 rise to that level in 1996 and 1997 in Bosnia when you were there?

10 A. Yeah, that's correct.

11 Q. And just to complete this section. You -- I know you're a  
12 solicitor. You've never been an expert military witness of any type  
13 in any court proceeding, have you?

14 A. Not a military witness, no.

15 Q. And obviously haven't published in relation to non-state groups  
16 or organisations in relation to these conflicts? I know you have  
17 published in relation to, I believe, voting in general elections for  
18 armed forces personnel. But in terms of non-state actors in  
19 non-international armed conflicts, there's no studies or publications  
20 that you have produced?

21 A. No, indeed.

22 Q. Okay. Now, can you just confirm when exactly you did deploy to  
23 Kosovo in 1998?

24 A. I don't know the exact date. It was -- I would say it was in  
25 November.

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1 Q. If it helps --

2 A. Yeah.

3 Q. -- your statement in confidence, if I can use that terminology,  
4 because I think that was yours, that you sent to the ICTY puts it in  
5 November 1998. I just wondered if you could be any clearer as to  
6 when in November, if it's towards the beginning or the end?

7 A. It wasn't at the end, but I wouldn't like to be more specific  
8 than that. And, of course, we did have training that preceded that  
9 in the United Kingdom.

10 Q. And just in terms of if one splits the difference then and puts  
11 you in the middle of November, the document you were shown earlier  
12 dated 19 November, I believe, that would be literally just as you  
13 arrived?

14 A. That may well be right, but I can't confirm it without the exact  
15 date of my deployment. I'm sorry.

16 Q. Understood. And can you explain just where exactly you were  
17 based throughout your deployment and whether this changed?

18 A. Yes, it did. We initially flew out to Belgrade where we spent  
19 one night and picked up our light armoured vehicles. I was one of  
20 the drivers of those vehicles. I'd already been trained on it.

21 We then travelled to Prizren in Kosovo, where all of us in my  
22 particular party, who were the UK -- the new, if you like, UK KDOM  
23 party. We were all initially in a base in a hotel in Prizren from  
24 where we went out on a daily basis to what was going to be our -- the  
25 area of our coordination centre.

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1 Q. And what was that area of your coordination centre?

2 A. It was based in Rahovec or Orahovac, and extending from there  
3 north to include Malisevo or Malisheve. It was an area where there  
4 had been considerable fighting during the summer 1998 and was  
5 regarded at the time as a very sensitive part of Kosovo. But  
6 initially we were patrolling by day and returned by -- before dark,  
7 but that did change fairly quickly.

8 Q. And did the -- I think we talked about the fighting in summer  
9 1998. The damage from that fighting and the destruction was still  
10 very visible, wasn't it --

11 A. Yes, it was.

12 Q. -- in Malisheve and Rahovec? Which zone was this located in?  
13 Which KLA zone? Do you recall where this area of responsibility was  
14 located in?

15 A. Zone 3 or also known as the Pashtrik, Pashtrik zone.

16 Q. And why do you consider that was called Zone 3? Is that what  
17 you were informed as the nature of the zone?

18 A. Yes.

19 Q. Or the number of the zone?

20 A. Yes, certainly that was -- that was my understanding. Probably  
21 Pashtrik was the more usual term, but it was -- clearly it was a zone  
22 of the KLA.

23 Q. Yes. If I was to say that it wasn't Zone 3 at all, that would  
24 surprise you or not?

25 A. I think it probably would surprise me, but I've no difficulty in

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1 accepting that, of course.

2 Q. Do you know which KLA brigades had responsibility over your area  
3 of responsibility over CC1?

4 A. 122 and 124 Brigades were the ones which I met, but I couldn't  
5 say that my knowledge of brigades have extended to, in military  
6 terms, things like boundaries and so on, which did, in any event,  
7 change or could be flexible. But 122 and 124 Brigades were the ones  
8 that -- the numbers I was most familiar with.

9 Q. Did you travel outside of your area of responsibility during  
10 your time?

11 A. Yes.

12 Q. And where did you go?

13 A. It was partly when I was a patrol commander based in Malisheve,  
14 we had to -- sorry, are you asking about our boundaries or the KLA  
15 boundaries?

16 Q. Sorry. I'm now asking about you personally --

17 A. Yeah.

18 Q. -- and what your deployment was.

19 A. Yeah, okay.

20 Q. So you were deployed in CC1 which covered Rahovec and Malisheve,  
21 and that was where the majority or the vast majority of your work was  
22 carried out, wasn't it?

23 A. Yes, it was. To qualify that, our CC more than once deployed  
24 people to where an incident had been reported. For example, if  
25 locals were reporting to us that there'd been bodies -- bodies had

1     been seen at some location, and because we didn't have boundaries  
2     like military boundaries -- you've got to be very careful if you've  
3     got weapons. Clearly, you can't go rushing out of your own  
4     boundaries. But since we weren't armed, we didn't regard the  
5     boundaries as being absolutely laid down and having to be  
6     coordinated.

7             So at times, our patrols arrived at incidents outside our own  
8     boundaries before the local -- before the OSCE headquarters  
9     responsible for that area had responded. It's partly because we were  
10    there first. We were experienced. We had good lightly armoured  
11    vehicles and a lot of experience and probably were better off for  
12    numbers.

13    Q.     But just to be clear, that was only a short distance outside  
14    your area of responsibility. You wouldn't be trekking off across the  
15    country into northern Kosovo or eastern, north-eastern Kosovo, or  
16    anything like that, would you?

17    A.     I didn't. Some of us did.

18    Q.     Right.

19    A.     We were seconded to other areas.

20    Q.     I'm interested in what you knew and can see and can testify to,  
21    obviously. And so just to be clear, you never went to any of the  
22    other KLA zones, apart from your, obviously, very short trips out.  
23    But in terms of other trips out to Kosovo, you were not deployed over  
24    to those areas?

25    A.     That's correct. Apart from an extended orientation tour which

1 we did right at the beginning of our deployment. So we were taken by  
2 the then defence attaché, British defence attaché --

3 Q. This is John Crosland?

4 A. Correct. And so I saw a good deal of the rest of the country,  
5 particularly in the western part during that period.

6 Q. And did he give you a briefing about his view on the level of  
7 organisation of the KLA at that time when you deployed in October and  
8 November?

9 A. I don't specifically recall a particular briefing.

10 Q. Okay. Well, we may come back to that tomorrow and to see  
11 whether what he has said is consistent with your understanding. But  
12 just back to in terms of your patrolling and your assessment. You  
13 accept, in general terms, that any comments you made or any opinion  
14 that you have given in your statement about the level of  
15 organisation, about the chain of command within the KLA is pretty  
16 strictly limited to your area of responsibility in CC1?

17 A. Yes.

18 Q. And can't go beyond, obviously, the time and dates that you were  
19 there? So we're talking 15 November, give or take, obviously without  
20 a specific date, up until, I believe, 19 March was when you left; was  
21 that right?

22 A. Yes.

23 Q. 1999 obviously. So I just want to go through some of your  
24 opinions, if I can use that term, about the organisation of the KLA  
25 within that specific area.

1           Now, in your statement -- I can obviously bring it up at any  
2 point, but obviously correct me if I'm wrong. I think this is  
3 paragraph 118 of your SPO statement, which I'll just get the P number  
4 for the record, which is P392. You told the SPO that, in your  
5 assessment, "the KLA were very organised and had reasonable  
6 communications, considering the terrain and distances involved."

7           Do you recall telling the SPO that?

8           A. I think just taking -- taking it perhaps out of context, "very  
9 organised," I'm not saying I -- I didn't use that phrase. But the  
10 organisation clearly was not comparable with, for example, a modern  
11 army in possession of its own territory.

12           Clearly, this is all in the context of a military organisation  
13 which was -- for one thing, was developing and indeed changing, but  
14 it wasn't, for example, simply a series of village militias that  
15 didn't connect with each other.

16           Q. Yes. I think that's what I'm trying to get to is to understand  
17 exactly what you meant in your statement. And, obviously, phrases  
18 such as that can have different meanings depending on the context.  
19 You're talking about there being a level of organisation at that  
20 point, and we're talking in February, March 1999, is that correct,  
21 when you're making this assessment?

22           A. Well, that's the point at which it would be the most developed.  
23 I think at the time of, for example, the kidnapping of Mr. Xhafiqi,  
24 it was as developed as I saw it by then. And I would hesitate to say  
25 that that was the same when we first arrived. And, indeed, if it had



1     been the same when we first arrived, I am not the witness that can  
2     say that because I personally didn't make that observation.

3     Q.    Okay.  And just to follow on other comments that you made in the  
4     context of your statement.  You stated that the KLA, this is  
5     paragraph 20, didn't use badges of rank, but you were clear that had  
6     he had a hierarchal command system, even without any outwards signs  
7     of ranks?

8     A.    Yes.

9     Q.    And what's your basis for that?

10    A.    My observations of particular commanders who I met and the fact  
11    that the -- that soldiers carried out their orders.  That was very  
12    visible and, indeed, very respected.  It was something which  
13    naturally I would notice was important to us.  It was a disciplined  
14    organisation of people very, very dedicated to their own people and  
15    to the future of their part of the world.

16    Q.    Yes, I think the dedication was not to be doubted.  I think the  
17    question is, obviously, in terms of how organised and what chains of  
18    command were in operation.  And talking about -- I think you're  
19    talking about your observations of particular commanders.

20            In your statement, you originally said that you were sure you'd  
21    met Drini, Commander Drini twice.  And then I believe in your  
22    preparation note --

23    A.    Yeah.

24    Q.    -- you corrected that and said, actually, it was only the one  
25    time; is that correct?  Sorry.

1 A. Yes, that's correct. I think looking at the -- my messages  
2 which have been produced to me by the Prosecution, I can see that I  
3 initially referred to meeting Drini twice and then at some point  
4 became aware, no, that wasn't quite working out. And I made a number  
5 of attempts to try to make sense of it. But I'm quite clear in what  
6 the actual -- the actuality is. That I met Drini on the day of --

7 Q. On 9 March.

8 A. On 9 March. And I have the clearest possible recollection of  
9 that. Not only that, there is the -- there are the notes in my  
10 notebook but also the note which I gave to General Maisonneuve, which  
11 I understand he produced for the ICTY, and that was a contemporaneous  
12 note. And, in fact, I have the very clearest recollection of  
13 everything in my conversation with Drini, which was in English. So  
14 that part of it is very, very clear.

15 Did I meet him some other time? And my -- I've reached the  
16 conclusion that I thought I might have met him on the day of the  
17 mortaring of Zocishte, and I didn't. I met a different commander  
18 which was Skender, the brigade commander rather than the division  
19 commander.

20 And the reason that Drini had been large in my memory of that  
21 day was that the mortaring was carried out on his orders and everyone  
22 was very clear about that. The KLA speaking to me was clear it's  
23 Drini who's ordered this, and, indeed, Drini had given that  
24 indication himself. That indication had been given to the Serbian  
25 side, because I then carried out --

1 Q. Sorry to cut you off. I'm just trying to get through these  
2 questions as quickly as we can.

3 A. Sure.

4 Q. But just to be clear, so you accept that you were mistaken in  
5 your earlier statements and that you believed you had seen him and  
6 that you hadn't? Twice, sorry. You'd seen him twice or met him  
7 twice and that was wrong?

8 A. That's correct. And I have corrected that in my --

9 Q. In your preparation note, yes.

10 A. Yes.

11 Q. But this was obviously the only time you met Drini, obviously,  
12 the one time. Did you meet anyone else from the Pashtrik zone  
13 command that you're aware of during your time in CC1?

14 A. Well, what level of command -- of course I met people from that  
15 organisation. But are you asking about a particular level or  
16 command?

17 Q. I'm talking about the staff --

18 A. Staff.

19 Q. -- of the Pashtrik zone command. Sorry, thank you for the  
20 indication. I should have been more specific.

21 A. There's nobody I can think of other than their liaison person  
22 with OSCE. They had a particular man I mentioned in my statement who  
23 was the nominated liaison with KVM and was part of that or came under  
24 that headquarters.

25 Q. Yes. Your interactions with the KLA and the zone staff were

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1 filtered. There was an intermediary, wasn't there? Effectively,  
2 this liaison officer that you met and were meeting on the morning of  
3 9 March, I believe, as well.

4 A. Yes.

5 Q. So you didn't have direct contact with the zone command staff is  
6 what I'm trying to get to?

7 A. That's correct.

8 Q. And I think in your interview, you were -- you even stated that  
9 you didn't have a detailed knowledge of the KLA brigade structure and  
10 locations within the Pashtrik zone. And that's paragraph 19 of your  
11 statement to the SPO. And that's fair, isn't it? You didn't have a  
12 detailed knowledge then and nor do you, obviously, have it now of  
13 what the structure of the brigades or where they were located?

14 A. That's correct.

15 Q. Just talking about the top of the organisation or what you've  
16 referred, I believe, as the General Staff. Now, you're very clear in  
17 your statement that you don't know when the General Staff was  
18 established. I'll just read that out very clearly. That's paragraph  
19 122. Yes, very clearly:

20 "I do not know when the KLA GHQ was established."

21 That's correct, isn't it?

22 A. That's correct.

23 Q. And you then proceed to say that:

24 "For various reasons CC1 did not seek to engage with KLA GHQ nor  
25 was it practicable to do so."

1 Do you recall saying that and is that still correct? Just "yes"  
2 or "no" for now would probably be of assistance, and then I'll ask  
3 some follow-up questions.

4 A. Yes, I'd rather you did follow up. But, yes, that is the --

5 Q. Well --

6 A. That is the position.

7 Q. That is the situation, that you didn't know when they were  
8 established and you did not seek to engage with them.

9 MR. ROBERTS: Your Honours, I note the time. I think I'm just  
10 about to move into a new area, so if it's convenient I'll stop there.

11 PRESIDING JUDGE SMITH: [Microphone not activated]

12 MR. ROBERTS:

13 Q. Thank you, Witness. We'll resume tomorrow morning.

14 PRESIDING JUDGE SMITH: [Microphone not activated]

15 Thank you for being with us today. We will start at 9.00  
16 tomorrow. And remember the warning I gave you not to speak about the  
17 case outside of the courtroom and to let us know if anyone tries to  
18 contact you. The usher will escort you out.

19 [The witness stands down]

20 PRESIDING JUDGE SMITH: Mr. Ellis.

21 MR. ELLIS: Your Honour, if there's a convenient moment, either  
22 now or tomorrow morning, there's one discrete matter on which I'd  
23 wish to address the Panel, to ask for a short extension for our  
24 response for filing 1764.

25 PRESIDING JUDGE SMITH: Hold on just a second. I'd unplugged my

1 microphone already.

2 Go ahead.

3 MR. ELLIS: Your Honour, there's one short matter I'd wish to  
4 address the Panel on, either now or tomorrow morning, and it was to  
5 ask for a short extension for our response to filing 1764, which was  
6 the Prosecution's filing, a Rule 107 filing in relation to two  
7 witnesses.

8 PRESIDING JUDGE SMITH: How much time do you need?

9 MR. ELLIS: Very short, Your Honour.

10 PRESIDING JUDGE SMITH: Well, tell me.

11 MR. ELLIS: Your Honour, it's simply, and I should have made  
12 this earlier, but we've been a little busy with preparation for the  
13 witnesses this week. The filing is due tomorrow, I think, in terms  
14 of our response, and I'd just seek a short extension until perhaps  
15 Monday next week.

16 PRESIDING JUDGE SMITH: Any objection?

17 MS. MAYER: No objection.

18 PRESIDING JUDGE SMITH: Okay. Granted.

19 MR. ELLIS: Thank you, Your Honour.

20 MR. EMMERSON: Your Honour, may I just raise at this stage two  
21 issues. First of all, the public/private divide as regards the legal  
22 argument that occurred earlier today. I think it must have been a  
23 collective oversight by all of us in court, but that legal argument  
24 took place in private session. And, clearly, there was nothing in  
25 the legal argument which justifies private session because there was

1 nothing in it which was potentially identifiable.

2 So may I ask for an order now or tomorrow morning releasing that  
3 legal argument into public session so that the transcript can be  
4 released and the video, if necessary, released? That's the first  
5 thing.

6 The second thing is despite a taking stock earlier in these  
7 proceedings of the extent to which things have been done in private  
8 session and public session, and the refrain that I think all of us  
9 have joined in with that we can always review the transcript  
10 afterwards and then release it, nothing to my knowledge has been done  
11 to advance that objective at any time.

12 And so at an appropriate moment, I'm going to invite Your Honour  
13 to lay a timetable for the parties to respond to, because we are now  
14 many months into the trial and there's a vast amount of material that  
15 should already have been released into the public domain in the form  
16 of redacted transcripts. And we can't allow this to continue -- or  
17 collectively allow it to continue because, obviously, there are  
18 concerns, as we are all well aware, about the degree to which the  
19 trial takes place in public.

20 So on the first issue, it seems to me, subject to anything  
21 anybody else might have to say, there is simply no argument to be had  
22 about it in relation to the legal argument on the last witness's  
23 evidence.

24 And in relation to the more general issue, which is also  
25 extremely important, I think we're all collectively to blame,

1 perhaps, for not implementing the system we've all promised to  
2 implement, which is to make sure that each witness, when they're  
3 finished, there is a process for working out what is truly  
4 identifying and the rest of it be released into the public record.

5 PRESIDING JUDGE SMITH: We will look into it.

6 First of all, do you wish to respond?

7 MS. MAYER: Very briefly. If we did do the argument in private  
8 session, again, I don't have a recollection of anything confidential,  
9 but since it was private, if we could just have the night to make  
10 sure there's nothing in there. I take my colleague at his word, but  
11 we'd just like to look at it. And then if there is nothing private,  
12 we have absolutely no objection.

13 As to the latter, again, we're happy to work *inter partes* to  
14 come up with a proposed timetable. We have actually undergone this  
15 procedure, because I personally was involved in a witness that I put  
16 on, so we have done that for one witness, and we certainly can  
17 undertake some --

18 PRESIDING JUDGE SMITH: I would certainly like to start this at  
19 *inter partes* discussions, if you could do that.

20 MR. EMMERSON: Yes, I'm not quite sure how it's fallen through  
21 the cracks, though, because I don't think any transcripts have  
22 actually been released into the public record. Or have they? Oh,  
23 they have.

24 PRESIDING JUDGE SMITH: Maybe we're going to be --

25 MR. EMMERSON: We'll start *inter partes* with -- perhaps with



1 counsel in court today --

2 PRESIDING JUDGE SMITH: We're going to have a week now after  
3 this where we're not in the courtroom every day, and perhaps by the  
4 end of next week you can come up with some sort of a plan and present  
5 it the Monday that we reconvene. Okay?

6 MR. EMMERSON: Thank you very much, Your Honour.

7 PRESIDING JUDGE SMITH: And if everybody would look at the --  
8 overnight the reviews of the argument, and then we'll take whatever  
9 action we can deal with.

10 Mr. Roberts, did you have something?

11 MR. ROBERTS: Two things, Your Honour. One, I might be slightly  
12 longer tomorrow morning, but not substantially more than what I'd  
13 said already. But, secondly, just the extension sought by Mr. Ellis  
14 and granted by the Panel, I assume it applies to all Defence teams.  
15 I just wanted it to be clear on the record that that's the case.

16 PRESIDING JUDGE SMITH: Barring some objection, yes, it will --  
17 it is --

18 MR. ROBERTS: Much obliged.

19 PRESIDING JUDGE SMITH: -- extended to all the Defence teams.

20 MR. ROBERTS: Thank you.

21 PRESIDING JUDGE SMITH: Anything else?

22 MS. MAYER: No, Your Honour.

23 PRESIDING JUDGE SMITH: All right. We are adjourned until  
24 tomorrow at 9.00 a.m.

25 --- Whereupon the hearing adjourned at 4.03 p.m.