

1 Wednesday, 20 March 2024

2 [Open session]

3 [The accused appeared via videolink]

4 --- Upon commencing at 10.00 a.m.

5 PRESIDING JUDGE SMITH: Good morning, everyone. Today we will  
6 continue to hear the evidence of Prosecution Witness W04571.

7 Before the videolink -- well, it is connected. But before the  
8 witness comes into the room, the Panel has considered the submissions  
9 of the SPO and the Defence about the admissibility of the documents  
10 marked for identification yesterday; that is, P01064 and P01065.

11 Any idea what that noise is?

12 [Trial Panel and Court Officer confers]

13 PRESIDING JUDGE SMITH: Following the request of Ms. Rowan, and  
14 so the Panel's decision is fully informed by all relevant  
15 considerations, the Panel will in this particular instance reserve  
16 its ruling on the admissibility of the documents until after  
17 cross-examination.

18 However, in advance of its ruling, the Panel would like further  
19 oral submissions from the SPO on the admissibility criteria, in  
20 particular in respect of both documents. The Panel seeks further  
21 oral submissions on how the documents were originally obtained, how  
22 the documents came into possession of the SPO, and whether the SPO  
23 intends to call anyone to testify about the provenance of the  
24 documents.

25 In this regard, the Panel refers to paragraph 46 of the Order on

1 the Conduct of Proceedings stating that the Panel expects the  
2 tendering party to have taken reasonable steps to ensure that the  
3 evidence placed before the Panel is capable of a reasonable belief  
4 for the purpose for which it is being offered. It is the party's  
5 responsibility to be in a position to provide information regarding  
6 the origin of an exhibit and what steps were taken to verify that  
7 information in question is capable of reasonable belief when  
8 questioned to do so by the Trial Panel.

9 Next, the Panel would like to know more about what the SPO says  
10 this document establishes that is relevant to the SPO's case. In  
11 other words, what does the SPO intend to prove with these two  
12 documents, will the documents be shown to other witnesses, and why  
13 have they been tendered through this particular witness. This will  
14 assist the Panel in the Panel's determination in regarding the  
15 relevance and probative value of these items.

16 Finally, are the purported translations shown to the witness  
17 complete? In other words, are the pages in the entire notebook that  
18 has been tendered and the single-page document translated completely  
19 as the volume of handwriting does not necessarily match the volume of  
20 translation shown in English. The Panel invites the SPO to make  
21 further oral submissions after the conclusion of the evidence of this  
22 witness.

23 So we are ready to begin. We will call the witness into the  
24 courtroom.

25 Madam Court Officer, thank you.

1 [Trial Panel and Court Officer confers]

2 PRESIDING JUDGE SMITH: [Microphone not activated].

3 THE COURT OFFICER: Thank you, Your Honours.

4 Just for the record, this is KSC-BC-2020-06, The Specialist  
5 Prosecutor versus Hashim Thaci, Kadri Veseli, Rexhep Selimi, and  
6 Jakup Krasniqi. Thank you.

7 [The witness takes the stand via videolink]

8 PRESIDING JUDGE SMITH: [Microphone not activated].

9 THE COURT OFFICER: [via videolink] Your Honours, for the record,  
10 in the transmission room present are Witness W04571 and myself,  
11 Court Officer.

12 PRESIDING JUDGE SMITH: Thank you very much.

13 Witness, we will continue with the cross-examination.

14 Mr. Misetic will continue with his questions. Please give him your  
15 attention.

16 Mr. Misetic, you have the floor.

17 MR. MISETIC: Thank you, Mr. President. Before I begin, I just  
18 didn't know if you wanted to note for the record that the accused are  
19 not present in court.

20 PRESIDING JUDGE SMITH: [Microphone not activated].

21 None of the accused are present in court, all attending by  
22 videolink, and waivers have been filed.

23 Go ahead.

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

25 WITNESS: W04571 [Resumed]

Witness: W04571 (Resumed) (Private Session)  
Cross-examination by Mr. Misetic (Continued)

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1 [The witness testified via videolink]

2 [The witness answered through interpreter]

3 Cross-examination by Mr. Misetic: [Continued]

4 Q. Good morning, Witness.

5 A. Good morning.

6 MR. MISETIC: Mr. President, if we could go into private  
7 session.

8 PRESIDING JUDGE SMITH: [Microphone not activated].

9 Private session, Madam Court Officer.

10 [Private session]

11 [Private session text removed]

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Witness: W04571 (Resumed) (Private Session)  
Cross-examination by Mr. Misetic (Continued)

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Cross-examination by Mr. Misetic (Continued)

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Cross-examination by Mr. Misetic (Continued)

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Cross-examination by Mr. Misetic (Continued)

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Cross-examination by Mr. Misetic (Continued)

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Witness: W04571 (Resumed) (Private Session)  
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Witness: W04571 (Resumed) (Private Session)  
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Witness: W04571 (Resumed) (Private Session)  
Cross-examination by Mr. Misetic (Continued)

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Cross-examination by Mr. Misetic (Continued)

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Cross-examination by Mr. Misetic (Continued)

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Witness: W04571 (Resumed) (Private Session)  
Cross-examination by Mr. Misetic (Continued)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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20 [Open session]

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

22 PRESIDING JUDGE SMITH: We are adjourned until 11.30.

23 --- Recess taken at 11.03 a.m.

24 --- On resuming at 11.32 a.m.

25 PRESIDING JUDGE SMITH: Madam Court Officer, you may bring the

1 witness back into the room.

2 [The witness takes the stand via videolink]

3 THE WITNESS: [via videolink] [Interpretation] My glasses are  
4 there.

5 THE COURT OFFICER: [via videolink] Your Honours, the witness  
6 needs to step out for his glasses.

7 PRESIDING JUDGE SMITH: All right.

8 THE COURT OFFICER: [via videolink] Found them.

9 PRESIDING JUDGE SMITH: All right. Witness, we will continue  
10 with the questions. Ms. Rowan will continue.

11 Go ahead.

12 THE WITNESS: [via videolink] [Interpretation] Yes.

13 MS. ROWAN:

14 Q. Witness, I'm going to now ask you about another document that  
15 you've already looked at.

16 PRESIDING JUDGE SMITH: Ms. Rowan, do we need to be in private  
17 session?

18 MS. ROWAN: We do, Your Honour, yes. Thank you.

19 PRESIDING JUDGE SMITH: All right.

20 Private session, please, Madam Court Officer.

21 My mistake, sorry. Sorry to interrupt.

22 MS. ROWAN: No, not at all. Thank you

23 [Private session]

24 [Private session text removed]

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Cross-examination by Ms. Rowan

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Witness: W04571 (Resumed) (Private Session)

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Re-examination by Ms. Hattabi

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Witness: W04571 (Resumed) (Private Session)

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Re-examination by Ms. Hattabi

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Witness: W04571 (Resumed) (Private Session)

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Re-examination by Ms. Hattabi

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Questioned by the Trial Panel

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Questioned by the Trial Panel

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Witness: W04571 (Resumed) (Private Session)

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Further cross-examination by Mr. Misetic

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Witness: W04571 (Resumed) (Private Session)

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Further cross-examination by Mr. Misetic

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Witness: W04571 (Resumed) (Private Session)

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Further cross-examination by Mr. Misetic

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15 [Open session]

16 THE COURT OFFICER: Your Honours, we are now in open session.

17 PRESIDING JUDGE SMITH: [Microphone not activated].

18 Madam Prosecutor, after the lunch break, we will be ready for  
19 your submissions on the issues that we raised this morning, and we  
20 will be in a position, hopefully, to make a ruling on the tender at  
21 that time.

22 So we are adjourned until -- something, Ms. Rowan?

23 MS. ROWAN: Simply, Your Honour, dependent upon how long my  
24 learned friend's submissions are, we could deal with it briefly now  
25 and go slightly into the lunch break.



1 PRESIDING JUDGE SMITH: [Microphone not activated].

2 MS. ROWAN: Very well.

3 PRESIDING JUDGE SMITH: So thank you very much. We'll see you  
4 at 2.30. We're adjourned.

5 --- Luncheon recess taken at 1.01 p.m.

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

7 PRESIDING JUDGE SMITH: We are in public session.

8 Madam Prosecutor, this morning we outlined some concerns that we  
9 had and we asked you to make oral submissions on that. So we give  
10 you the floor at this time.

11 MS. HATTABI: Thank you, Your Honour.

12 Following this morning's order, I will address the following --  
13 the concerns that Your Honours mentioned this morning.

14 In relation to MFI P1064. In relation to the authenticity of  
15 the document, the document was provided to the SPO by the ICTY and  
16 the MICT. The documents were originally provided by the Serbian  
17 authorities which had seized them from KLA bases during the war. And  
18 in this regard, I refer to the declaration of an ICTY investigator  
19 filed in the Haradinaj case. And it's the Haradinaj case,  
20 Prosecution's submissions of chain of custody information for  
21 exhibits tendered through Bislim Zyrapi, 7 November 2007, Annex A,  
22 paragraph 6 and 13.

23 As there are sufficient indicia of reliability, the SPO does not  
24 intend to call a witness to testify specifically about the provenance  
25 of this document, although it is noted that there are witnesses who

1 speak to the seizure of KLA documents by Serb forces.

2 This document includes, on its face, indicia that it is a  
3 contemporaneous KLA record with dated entries which refer,  
4 *inter alia*, to KLA members, meetings, and operations around the time  
5 of the witness's detention. For example, if you take page U001-8212  
6 of the Albanian version or page 4 of the PDF in English, you'll see  
7 there's information about having received ten sacks with uniforms  
8 from a specific individual; or at page U001-8215 of the Albanian,  
9 page 6 of the PDF in English, specific requests for assignment to a  
10 particular village post.

11 It is also corroborated by this witness and other evidence,  
12 which I will also refer to when addressing what the SPO intends to  
13 rely on for it at this stage.

14 But to note more generally, the authenticity, relevance,  
15 probative value of the document cannot be viewed in isolation but in  
16 light of the totality of the evidence. When you see numerous  
17 contemporaneous documents reflecting the same focus on collaboration,  
18 the aggregated value is something more than what the individual  
19 documents reveal about what was happening in the individual areas.  
20 To require absolute proof of a document's authenticity as a  
21 pre-condition of admissibility will be to require a far more  
22 stringent test than the standard envisions in the rules and the  
23 jurisprudence which provide for *prima facie* proof.

24 When objections against evidence are raised on the ground of  
25 authenticity, a Trial Chamber may admit documents and then decide

1 what weight to give them within the context of the trial record as a  
2 whole. And I refer Your Honours to the Panel's decision F02157,  
3 paragraph 12 and 14. And I note that the SPO included additional  
4 supporting authorities from the Panels in Cases 05 and 07 and  
5 Chambers at the ICTY in filing F02135, footnotes 15 and 29.

6 As to what the SPO intends to prove with this document. The SPO  
7 intends to rely on this document in relation to the potential reasons  
8 for the detention of the witness and that of others, including a  
9 person he identifies as his co-detainee. The perceived association  
10 with one of the persons mentioned multiple times in the document  
11 falls within the pattern we see in relation to other victims of  
12 detention in this case, and that is association with the Serbian  
13 authorities.

14 In his SPO statement and in his testimony today, the witness  
15 acknowledges having had a good relationship with one of the persons  
16 mentioned multiple times in the document, including ...

17 As mentioned yesterday, I note that admitted associated exhibit  
18 P1062 contains a statement along with an arrest warrant for this  
19 witness, and refers to the same person also mentioned multiple times  
20 in the document.

21 Another admitted document, which is P00651, page PU00-6593,  
22 mentions the witness and provides additional corroboration. This  
23 underscores the point that the document, which has *prima facie*  
24 indicia of reliability, should be admitted so that its probative  
25 value can be assessed at the end of the trial in light of the entire

1 record.

2 As held by an ICTY trial chamber, the admissibility standard  
3 should not be excessively high, as often documents sought to be  
4 admitted are not intended as proof on their own of guilt or  
5 innocence, but to provide context and a complete picture presented by  
6 the evidence in general. And I refer Your Honours to Delalic case,  
7 decision of 19 January 1998, paragraph 20. And that's what both  
8 documents at issue would do.

9 The SPO seeks admission of this document through this particular  
10 witness because he's named on multiple time -- on multiple pages and  
11 is familiar with other names and locations. The witness has  
12 therefore shown sufficient knowledge of the people mentioned in the  
13 document. And due to this clear link to an associated exhibit which  
14 was admitted through this witness.

15 Thus, this is the SPO's position that there is a sufficient  
16 connection to the witness's testimony pursuant to paragraph 49 of the  
17 Order on the Conduct of Proceedings.

18 In relation to translations. My colleagues have checked and  
19 confirmed that the translation is complete. Many of the same  
20 submissions above are also related to MFI P1065, so I won't repeat  
21 them. However, I will make the following specific submissions  
22 concerning this item.

23 As to its origin and authenticity. The document was provided to  
24 the SPO by the Serbian authorities, and pages 099927-099932-ET from  
25 this document indicate the place, the time, and circumstances of

1 seizure from a KLA's member's residence on 19 July 1998. And it  
2 includes also a general description which does not purport to be a  
3 complete and exhaustive representation of the item.

4 In relation to what the SPO intends to prove through this  
5 document, the reasons are very similar to those submitted in relation  
6 to the previous document since this item also indicates an intent to  
7 arrest the witness and one of his co-detainees. The same reason  
8 applies for why we're seeking admission through this witness.

9 And as to translation, my colleague also have checked and  
10 confirmed that the translation is complete.

11 This concludes my submissions.

12 PRESIDING JUDGE SMITH: [Microphone not activated].

13 JUDGE METTRAUX: Yes, thank you, Judge Smith. I have a couple  
14 of questions for you, counsel, if you may assist.

15 Am I right to understand that you are not seeking to tender  
16 these two documents for the actual truth of the content in the sense  
17 of the allegations that are being made in them, but that, according  
18 to you, they reflect the beliefs of the drafters of this document?  
19 Is that a correct understanding?

20 MS. HATTABI: That is correct, Your Honour.

21 JUDGE METTRAUX: And specifically about document MFI P01065. Is  
22 the witness we've just finished to hear, 4571, is he the only person  
23 on this document that you say is relevant to this case, or is there  
24 anyone else on that particular document that you say is material to  
25 your case?

1 MS. HATTABI: There is also his co-detainee, and there may be  
2 others. But at the time, this is all, the extent of my submissions.

3 JUDGE METTRAUX: So at this stage it's the witness plus the  
4 fellow detainee.

5 MS. HATTABI: That's correct.

6 JUDGE METTRAUX: Thank you.

7 JUDGE GAYNOR: Madam Prosecutor, I just have a question about  
8 the evidential status of the statement of an ICTY investigator. And  
9 I believe that in your bar table motion for the Llap operational  
10 zone, in one of your footnotes you've referred to, the Prosecution's  
11 submission of chain of custody information for exhibits tendered  
12 through Bislím Zyrapi, 7 November 2007, Annex A, which is an  
13 investigator declaration, a signed investigator declaration.

14 What is the evidential status of that as far as the SPO is  
15 concerned? You're not going to call anyone to testify, so what do we  
16 do with that investigator's statement?

17 MS. HATTABI: Thank you, Your Honour. It is not tendered into  
18 evidence. We rely on it to provide full transparency of what we  
19 know. But this is not tendered as evidence.

20 JUDGE GAYNOR: I see. Thank you.

21 PRESIDING JUDGE SMITH: [Microphone not activated].

22 Ms. Rowan, you have the floor.

23 MS. ROWAN: Your Honour, thank you. Just briefly. And  
24 confining the response only to the information that we've now been  
25 provided with by the SPO.

1           Firstly, in relation to the first document discussed, P01064,  
2           and it follows on from Judge Gaynor's question that was just asked.  
3           The SPO are seeking to rely, in terms of chain of custody to support  
4           arguments of authenticity, on documents that are not in evidence. We  
5           do not have disclosed and we do not have in evidence the declaration  
6           referred to by this investigator.

7           In my submission, it is impermissible for a decision to be based  
8           upon submissions made by the Prosecution because, of course, the  
9           Prosecution can't give evidence. If the Prosecution seek to rely  
10          upon the content of a statement in support of admissibility of these  
11          documents, firstly, that document must be disclosed so that we can  
12          consider it, read it, respond to it, see the extent to which it does  
13          in fact deal with these documents, what it says about them, and  
14          whether or not it does actually stand up to the submissions made by  
15          the SPO as opposed to what they can't do, which is give evidence.

16          And in turn, what would be impermissible for the Trial Chamber  
17          to do, in my submission, would be to find a document to be authentic  
18          on the basis of a document that the Trial Chamber has not even seen,  
19          let alone that the parties have not been able to consider.

20          So the difficulty is the starting point for the SPO's  
21          submissions on origin fall down as they're not in a position to do  
22          what they're seeking to do, which is make submissions in that way.  
23          And as such, origin and authenticity and authorship, because they  
24          also appear to seek to rely on what is currently a proposition not in  
25          evidence, that these documents, they say, were found in a KLA base.

1 The evidential position at present is that there is no evidence of  
2 where these documents were found. And until the point comes that  
3 evidence is adduced to support that proposition, that cannot be a  
4 proposition relied upon in the absence of evidence to that fact.

5 So where we are at present is nil evidence on origin and nil  
6 evidence on authorship. And as such, nil evidence on authenticity.

7 Again, seeking to clarify in relation to the second document  
8 then that they raised. My learned friend for the Prosecution says  
9 that what the cover sheet document purports to show is a search  
10 record of an apartment. But when one actually looks at the body of  
11 that document, and the document is conflicting, and Your Honours will  
12 see when time is taken to review it, the start of the document  
13 appears to suggest it is a search record of an apartment. But when  
14 one looks at two of the bullet points contained on the first page of  
15 that document, in the bottom half of it, it speaks of items seized of  
16 a person.

17 So it appears that in part it reads like the search record of a  
18 person and in part reads like the search record of a premises, so  
19 it's inconsistent and unclear what that document actually is dealing  
20 with and as such is unhelpful.

21 And then finally, just picking up on Judge Mettraux's question  
22 in relation to the purpose for which this document is sought to be  
23 adduced. In my submission, the purpose for which this document is  
24 sought to be adduced is irrelevant to the considerations of its  
25 authenticity. Regardless of whether or not a document is being



1 sought to be admitted for truth or whether or not a document is  
2 sought to be adduced to undermine the credibility of a witness, for  
3 any other purpose, that is a latter consideration. What we are  
4 considering now is authenticity as far as it relates to  
5 admissibility.

6 If a document is being put in for one purpose or another does  
7 not in any way impact or change the test under 138. The test under  
8 138 remains the same, which is: Is this document a document which  
9 meets each of those four criteria? A document can be, logically, no  
10 more or less authentic dependent on the purpose to which it's sought  
11 to be used. Those questions relate to the document itself and the  
12 evidence surrounding the document and where that document comes from,  
13 and those are the three matters to be raised. Thank you.

14 PRESIDING JUDGE SMITH: [Microphone not activated].

15 JUDGE METTRAUX: I even have two.

16 The first one is you've just made the submission a moment ago  
17 that there was no evidence of origin and no evidence of authorship.  
18 Now, put aside the submission about an affidavit or a statement by an  
19 ICTY investigator. I understand the Prosecution to be saying that  
20 part of their argument regarding authenticity is the actual content  
21 of the document. In other words, that the content is a reflection of  
22 where this document, they say, comes from. And I want to hear you on  
23 this.

24 And I'll add a second question that would assist me, at least.  
25 Of course, you don't have the onus of establishing the requirements

1 for admission or to dispel them. It's for the Prosecution as  
2 offering party to do so. But I want to understand what your case is  
3 in relation to that document. Are you telling us that these are  
4 fake, forgeries, or that you've established evidence of fabrication  
5 in these documents? Or are you simply underlining your proposition  
6 that the Prosecution has failed to meet its own burden? Thank you.

7 MS. ROWAN: Dealing with Your Honour's first question in  
8 relation to content.

9 Of course, content of a document can be supporting evidence of  
10 authenticity, and that is a proposition we, of course, accept to be  
11 true. I believe that the example I used making submissions in  
12 relation to this area of law previously was were we to have, for  
13 example, a photocopy of a passport, we would have a --

14 JUDGE METTRAUX: What about -- I'll stop you there. What about  
15 what the SPO says. Not in theory --

16 MS. ROWAN: Yes.

17 JUDGE METTRAUX: -- but the fact that it refers to known members  
18 of the KLA, that it refers to locations held by the KLA, that it  
19 refers to operations known to have been led by the KLA. What's --

20 MS. ROWAN: Yeah.

21 JUDGE METTRAUX: -- your position on this?

22 MS. ROWAN: The starting position is, considering the vacuum in  
23 which this document appears, this document is incapable of  
24 self-authenticating. When we consider both the background of the  
25 facts of this case and the context in which this war occurred, and if

1 one looks at the content of the document, the content of that  
2 document and the knowledge that would have been required to be  
3 possessed to author that document is not a document that could be  
4 said to be unique to the KLA.

5 The Panel and the SPO are not able to set aside any other  
6 inference. This document is just as likely to have been authored by  
7 Serb intelligence themselves because, of course, for example, Serb  
8 intelligence may well -- were the document to be true -- that's not  
9 our case, but were the document to be true, there are Serbian  
10 authority figures, perhaps, Serbian persons who may well have had  
11 similar knowledge that would have enabled them to write such a  
12 document.

13 Likewise, of course, one possibility is that the KLA would have  
14 had such knowledge. Equally, such knowledge could be in the hands of  
15 local civilians. As already established this morning, Kosovo is a  
16 small country, rumours are rife, everybody knows everybody's  
17 business. And what we say in a context such as that, it is no more  
18 likely in the evidential vacuum in which we are operating that any  
19 one of those three propositions is true, let alone that it is more  
20 likely to be true, let alone that it is beyond reasonable doubt true.

21 Of course, we're not at the latter burden at this stage. But  
22 what we are suggesting in a circumstance where this document exists  
23 with nothing else, that the SPO must show that there is some evidence  
24 on which they could rely to support the proposition that this KLA  
25 authored.

1           For example, were the KLA to be in a position to prove, or there  
2           was video evidence to record, a document being seized from an active  
3           KLA soldier in uniform and there was video footage of a notebook  
4           being taken out of his pocket and shown on camera, there is evidence  
5           there of origin and authenticity. The difficulty is what we are  
6           being provided with is scraps of notebook paper from the Serbian  
7           Ministry of Intelligence, which we know, because of the ICTY trials  
8           that have come before us, that there are members, unfortunately, of  
9           the Serbian intelligence with quite a chequered history --

10           JUDGE METTRAUX: I'll stop you there again. I mean, we are  
11           talking about this document. I don't think it assists me, at least,  
12           to suggest that something happened somewhere else. I'll ask you the  
13           question simply: Do you have any indication that this document is  
14           anything other than what it purports to be; and if so, on what basis?

15           MS. ROWAN: Well, Your Honour, in my submission, that is  
16           reversing the burden of this trial.

17           JUDGE METTRAUX: No, no, you are free to tell me that you have  
18           no such basis for it and you don't have to do it. As I've indicated  
19           earlier, you don't bear that onus. What I'm --

20           MS. ROWAN: No.

21           JUDGE METTRAUX: -- trying to understand is whether you have a  
22           basis for the suggestion that this document is anything other than  
23           what it purports to be. If the answer is no, then it's no.

24           MS. ROWAN: Well, Your Honour, if we were to phrase it such as  
25           this: There is nothing that supports the proposition it is what it

1 purports to be. There is nothing supportive of that proposition.  
2 This is a document that comes out of nowhere with no supporting  
3 material whatsoever, could have been authored by anyone, any time,  
4 anywhere. There is nothing that supports the contention that a KLA  
5 member wrote this document. Nothing.

6 Now, the obligation to prove that proposition not to be true but  
7 at least that there is a *prima facie* case to answer that it's true or  
8 any indication that it's true, that burden is borne by the  
9 Prosecution.

10 JUDGE METTRAUX: Thank you.

11 JUDGE GAYNOR: Can I ask one follow-up question, please? You  
12 say there's nothing to support -- let me see what you said now. The  
13 document comes out of nowhere. There is nothing to support the  
14 contention that a KLA member wrote this document.

15 I think what we've seen in these handwritten documents is that  
16 the same names appear across different documents. The time of  
17 arrest, the time of release of certain individuals can be traced  
18 through different documents. And sometimes those details appear in a  
19 typewritten KLA document which bears a signature that we can read.

20 Does that not satisfy the Prosecution's burden of proof of  
21 establishing a *prima facie* case of authenticity? The fact that we  
22 see the same details across a different range of these documents.

23 MS. ROWAN: No, for two reasons. Firstly because a collection  
24 of poorly authenticated or non-authenticated documents cannot create  
25 one authenticated document. But more importantly, that proposition

1 would hold more weight were this to be information held by few people  
2 or information that was to be uniquely held by the KLA.

3 As we know, in Kosovo, and in circumstances that we're dealing  
4 with, everybody knew who was arrested in the village. Everybody knew  
5 when they were arrested in the village. And everybody knew how long  
6 they were held in the village. That information is not uniquely held  
7 by the KLA. That information is information that we've heard from  
8 witnesses was widely shared and widely available both during the war  
9 and post war. So it also can't assist us temporally as to when that  
10 document may have been created because that information and the fact  
11 that that information appears in multiple documents simply means that  
12 the authors, be they the same or be they different, had access or  
13 knowledge of the same facts.

14 Now, it's widely known facts, so that can't narrow us back to  
15 the KLA or draw a line back to them as being the authors because  
16 there's no link.

17 JUDGE GAYNOR: Thank you.

18 MS. ROWAN: Thank you.

19 PRESIDING JUDGE SMITH: [Microphone not activated].

20 MR. MISETIC: Yes, Mr. President. I'll be brief.

21 Just in a more broad sense just to express our concern that --  
22 in terms of some of the submissions. The SPO is relying on, when  
23 pressed, an affidavit or a declaration signed in a case that was  
24 filed in 2007. And when asked by the Panel, their response is, well,  
25 we're just telling you what we know, which to me indicates that there

1 hasn't been an independent investigation by the SPO into the  
2 authenticity of the documents that are being put forward to the  
3 Panel, and it hasn't been put to KLA people, it hasn't been put to  
4 witnesses mentioned in the document other than witnesses as they come  
5 to court.

6 So it's a general concern that we have.

7 The second point I wanted to make is I have had an opportunity  
8 now to check that declaration because it's available online. The  
9 source does appear to be the Serbian intelligence service for the  
10 document. I would say that there has been evidence before the Panel  
11 of manipulation of evidence and fabrication of evidence by the  
12 Serbian intelligence service in this very case and including a  
13 witness who testified to a fabricated witness statement fabricated by  
14 that very intelligence agency.

15 So these are all factors that should be considered.

16 The fact that the document purports to be what it is is  
17 equivalent to the witness statement that you had in front of you  
18 earlier in this trial that would -- had it not been exposed on  
19 cross-examination, also would have purported to be a witness  
20 statement of a witness that appeared before you but for the fact that  
21 we got to challenge that in cross-examination.

22 And then the next point I would make is you will hear testimony  
23 relatively soon about the fact that Serbian intelligence had, in  
24 fact, penetrated the KLA in the conflict. And so the fact that this  
25 information is known outside the KLA, it's in fact the case that will

1 be put forward to you by a Prosecution witness that the Serbian  
2 intelligence service was not only in the KLA, it was at high levels  
3 in the KLA. So this information was not unique to the KLA. It was  
4 also in the possession of the Serbian intelligence service or could  
5 have been in the possession of the Serbian intelligence service back  
6 in 1998.

7 And ultimately what this comes down to is what happens if the  
8 Panel accepts the documents, relies on the documents, and then  
9 subsequently it's uncovered that this is another fabricated piece of  
10 evidence because no one who had actual involvement in the document,  
11 or potentially involvement in the document, testified as to its  
12 authenticity, including to the investigators who are now being cited  
13 but whose declarations are not being tendered.

14 PRESIDING JUDGE SMITH: Isn't that exactly the reason we sit  
15 here and that is to sort out materials with -- if cross-examination  
16 later on shows us something was false, it's up to us to deal with  
17 that.

18 MR. MISETIC: Unfortunately, on the substance I would agree with  
19 that. But on where does the document come from, we're not going to  
20 have the opportunity to cross-examine anybody on.

21 PRESIDING JUDGE SMITH: No, I'm just answering your first  
22 question, your first statement there.

23 MR. MISETIC: As a broad principle, yes. But in terms of why we  
24 authenticate documents, it's not --

25 PRESIDING JUDGE SMITH: Well --



1 MR. MISETIC: -- and this is one of my least favourite phrases  
2 in international criminal law is: We're professional judges.  
3 Professional judges are everywhere, and yet we still have rules of  
4 admission and regarding foundation --

5 PRESIDING JUDGE SMITH: We do.

6 MR. MISETIC: -- et cetera, precisely to avoid situations like  
7 this.

8 PRESIDING JUDGE SMITH: We do, but they are not the -- but you  
9 must admit the rules that we have use a *prima facie* level. They're  
10 not quite as strict as they might be in your country or your country.  
11 The levels are different.

12 MR. MISETIC: We could argue about whether that level means  
13 there's no level at all.

14 PRESIDING JUDGE SMITH: No, there's a level.

15 MR. MISETIC: Okay.

16 PRESIDING JUDGE SMITH: But I said different level.

17 MR. MISETIC: Okay. Well, then we're arguing about where that  
18 level is, I guess.

19 PRESIDING JUDGE SMITH: Yeah. Okay.

20 MR. MISETIC: Thank you.

21 PRESIDING JUDGE SMITH: Thank you.

22 Mr. Roberts, anything you want to add?

23 MR. ROBERTS: Nothing to add, Your Honour. Thank you.

24 PRESIDING JUDGE SMITH: Mr. Ellis.

25 MR. ELLIS: Your Honour, only to endorse the concerns that

1 others have raised, and we fully support the submissions made by the  
2 Defence already.

3 And just to emphasise on the point in relation -- I think it was  
4 His Honour Judge Gaynor's question about the evidential status of the  
5 ICTY declaration. Your Honours have, of course, held previously that  
6 the Panel will not base its assessment on reliability or probative  
7 value on material not offered for admission. That was in rejecting  
8 some submissions the Defence had made about the admissibility of  
9 Rule 155 statements in filing F1603, paragraph 50.

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

11 Do you wish to respond?

12 MS. HATTABI: Yes, Your Honour. Very briefly.

13 Firstly, counsel seek to raise the admissibility threshold far  
14 beyond what the jurisprudence I cited set it at. I also note that  
15 the ICTY filing referred to is publicly available. And the  
16 information we provided is that the SPO has -- the information that  
17 we provided is what we have -- the SPO has about its provenance, but  
18 there are multiple indicia of authenticity and reliability as laid  
19 out in my earlier submissions. In particular, the mundane details in  
20 the document that I referred to earlier are a strong indication of  
21 authorship by the KLA.

22 The second document also lists others to be arrested, so its  
23 relevance is also generally broader than the witness and his  
24 co-detainee.

25 And, finally, it's not necessary to set aside every other

1 inference for meeting the *prima facie* standard for admission.

2 PRESIDING JUDGE SMITH: [Microphone not activated].

3 MS. HATTABI: Thank you, Your Honour.

4 JUDGE METTRAUX: I have a question, counsel. Stay up.

5 Mr. Ellis has helpfully reminded us of a prior ruling on the  
6 basis of our decisions of admission. In particular, the fact that  
7 this Panel, at least in its prior decision, was not prepared to rely  
8 on material not offered for admission. My question to you is what do  
9 you expect the Panel to do with the affidavit; and if something, on  
10 what basis? Are you asking us to admit it? Are you asking us -- or  
11 are you offering to call that individual?

12 MS. HATTABI: We're not offering to call the individual. It's  
13 offered to your consideration. It's up to you whether you want to  
14 consider it or not.

15 JUDGE METTRAUX: And what about Mr. Ellis' point, that should  
16 the Panel wish to be consistent with itself, we should not consider  
17 it?

18 You can take a joker, if necessary, on that one, but I think  
19 Mr. Ellis, in my view, has a point.

20 MS. HATTABI: I would say that admitting the item, the MFI item  
21 would be consistent with prior decisions. So that's my answer.

22 PRESIDING JUDGE SMITH: [Microphone not activated].

23 I believe we've heard all the submissions. We will take it into  
24 consideration. I am guessing you can all leave. We will probably  
25 submit this decision on Monday following.

1 MR. MISETIC: I did have one issue to raise.

2 PRESIDING JUDGE SMITH: Certainly. Go ahead.

3 MR. MISETIC: If we can do it in private session, Mr. President.

4 PRESIDING JUDGE SMITH: All right.

5 One other question: Next week, two witnesses; is that correct?

6 MS. HATTABI: Yes, it's correct, Your Honour.

7 PRESIDING JUDGE SMITH: And the same two that you had projected?

8 MS. HATTABI: Yes.

9 PRESIDING JUDGE SMITH: All right.

10 Now we'll go into private session.

11 [Private session]

12 [Private session text removed]

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1 [Private session text removed]

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3 [Open session]

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

5 PRESIDING JUDGE SMITH: We stand adjourned until 9.00 a.m. on  
6 Monday.

7 --- Whereupon the hearing adjourned at 3.04 p.m.

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