Wednesday, 18 January 2023

[Trial Preparation Conference]

[Open session]

[The accused entered court]

--- Upon commencing at 9.30 a.m.

PRESIDING JUDGE SMITH: Good morning and welcome everyone.

Madam Court Officer, will you please call the case.

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

PRESIDING JUDGE SMITH: Thank you.

I would now ask the parties to introduce themselves and their team, starting with the Specialist Prosecutor's Office.

MR. HALLING: Good morning, Your Honours. Appearing for the SPO today is Ward Ferdinandusse, Alan Tieger, Nathan Quick, Deborah Mayer, Julie Mann, and I am Matt Halling.

PRESIDING JUDGE SMITH: Thank you, Mr. Halling.

Now I turn to the Defence in order in which the accused are named in the indictment.

Mr. Kehoe, you're already on your feet. Thank you.

MR. KEHOE: Yes, Your Honour. Good morning, Your Honour, Gregory Kehoe, Luka Misetic, Sophie Menegon, and Bonnie Johnston on behalf of President Hashim Thaci.

PRESIDING JUDGE SMITH: Thank you.

Now, Mr. Emmerson, please, for the Veseli Defence.

MR. EMMERSON: Good morning. Ah, that's better. I'll get familiar with the buttons and which does what shortly enough.

Good morning, Your Honour. Ben Emmerson on behalf of Kadri Veseli, appearing today with Ms. Annie O'Reilly and Mr. Andrew Strong as co-counsel.

PRESIDING JUDGE SMITH: Thank you, Mr. Emmerson.

Mr. Roberts, please, for the Selimi Defence.

MR. ROBERTS: Thank you, Your Honour. Geoffrey Roberts on behalf of Mr. Selimi, together with, to my right, Mr. Eric Tully, Ms. Natasha Ryzhenko, Ms. Rudina Jasini, and then to my left just behind Riva Gjecaj and Sara Isufi. Thank you.

PRESIDING JUDGE SMITH: Thank you, Mr. Roberts.

Mr. Roberts, the Panel would also like to wish Mr. Young a prompt recovery, and I hope you would pass on our best wishes to him.

MR. ROBERTS: Thank you very much, Your Honour. I will do.

PRESIDING JUDGE SMITH: Ms. Alagendra, please, for the Krasniqi Defence.

MS. ALAGENDRA: Thank you, Your Honour. I am Venkateswari Alagendra on behalf of Mr. Krasniqi. I am appearing together with Mr. Aidan Ellis, co-counsel; Mr. Victor Baiesu, co-counsel; legal associates Jacopo Ricci and Melissa Gregg, in person; and via videolink legal associate Mentor Beqiri.

PRESIDING JUDGE SMITH: Thank you, Ms. Alagendra.

Mr. Laws, I now turn to you.

MR. LAWS: Good morning to Your Honours. I am Simon Laws

representing the victims in this case, together with my co-counsel Maria Radziejowska.

PRESIDING JUDGE SMITH: Thank you, Mr. Laws.

Now, from the Registry.

MR. ROCHE: [Microphone not activated]. Apologies. It's Ralph Roche appearing on behalf of the Registry. Thank you.

PRESIDING JUDGE SMITH: Thank you, Mr. Roche.

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

For the record, I am Charles Smith, Presiding Judge for this Panel. My colleague Judges are, to my left, Christoph Barthe; to my right, Guénaël Mettraux; and to my far right, Fergal Gaynor.

I just want to make a note it's the Panel's intention not to go through this process every time we get together, because over the next months and years I am sure we are all going to recognise each other and it's a waste of time, and so we will not be introducing ourselves every day. You will continue to please let the Registry know of your attendance on a regular basis.

As for today's session, we will take a break around 11.00 a.m. We will resume at 11.30 and continue until 1.00, when we will break for lunch. We will resume at 2.30 and continue until 4.00. We have reserved the courtroom for tomorrow if it is necessary to complete this conference. However, we hope that it will not be necessary. At least in looking at what I intend to ask and what my partners and colleagues here intend to ask, it does not appear that it will be

necessary. But if it is, it is.

We ask all the participants and parties to ensure that all submissions are as short and focused as possible so that we can get through this proceeding in an efficient way.

As indicated in our Order Scheduling the Trial Preparation Conference that we scheduled today, the Panel intends to ask the parties some procedural, as well as some more substantive, questions with a view to promptly planning the commencement of the trial.

I'll start with some procedural questions. The first four questions are primarily for the SPO, and we'll go through all four. And then if any of the Defence wants to respond to the SPO's answers, that will be allowed.

Has the SPO completed its disclosure of the evidence it proposes to present at trial and can the SPO confirm that its list of proposed witnesses and exhibits are final?

Mr. Halling.

MR. HALLING: Thank you, Your Honour.

Subject to protective measures, everything is so disclosed. We have no contemplated request to add witnesses at this time. We are preparing one request to add exhibits. This should be filed by the end of the month, and the filing will set out good cause for those additions for the timing.

PRESIDING JUDGE SMITH: Thank you, Mr. Halling.

In respect of the SPO's existing evidentiary holdings, can you please confirm that the SPO completed its review of those evidentiary

holdings and the disclosure of all exculpatory evidence, and has disclosed to the Defence all that is to be disclosed to them? There is no need to remind us that it is your obligations under the rule which is ongoing, and we are aware of that. We are interested to know about the material that is already in your possession, not what may come into your possession at a later stage.

MR. HALLING: Yes, we follow the Court.

In line with the procedure set out in our disclosure report, and this is filing No. 1019, we've completed an exculpatory review for all of our items up to the beginning of this week. There will be further Rule 103 disclosures, including for the reasons that you mentioned, and also for the reasons stated in that disclosure report.

We are in the final steps of preparing one further Rule 103 package. It's going to be disclosed this week, and it's got approximately 15 items in it. And there's going to be a corresponding application for protective measures for some of them. But that's the only Rule 103 package being prepared at this time. And, as I said, it's almost finished.

PRESIDING JUDGE SMITH: Is the SPO ready to submit its application pursuant to Rules 153 and 154 of the Rules for the first 40 witnesses by February 7th, as we suggested?

MR. HALLING: As we noted in our draft Conduct of Proceedings submissions last Friday, we don't have any Rule 153 witnesses in the top 40.

For Rule 154, we can do this for the top 12 witnesses by

7 February. For the rest of the top 40, we would ask for something closer to, like, six weeks before they testify for those Rule 154 applications.

We will be able to do more consolidated applications after this top 40 group. As you can see from our proposals on the Conduct of Proceedings, we're going to be in a position to file these applications for the next three months of witnesses at the same time as the information in paragraph 73 of the draft order is filed. But this is what we would ask for in terms of the timing for the Rule 154 applications.

PRESIDING JUDGE SMITH: All right.

MR. KEHOE: Your Honour, will we be heard on that issue?

PRESIDING JUDGE SMITH: Yes, just a second. I'm just looking at where I want to go with this next.

I will turn to the Defence at this time. Would you be able to respond by February 14th, apparently to the first 12?

MR. KEHOE: Your Honour, it depends. These documents are quite voluminous. They are detailed. It's difficult to know how many exhibits go with each one of these 154 witnesses. I do know that in talking to my colleagues that there are literally hundreds of exhibits involved potentially with these exhibits. So with regard to the first 12, we would ask for a two-week period of time in order to review that and respond.

PRESIDING JUDGE SMITH: Let me ask the Prosecutor. How many -- do you know at this time how many exhibits would be involved in that

material?

MR. HALLING: I don't know exactly the number of associated exhibits off hand, but, yes, for the first 12 witnesses, there are, I mean, at least, I would say, dozens of associated exhibits across that group.

PRESIDING JUDGE SMITH: Do you want to respond to their request for two weeks?

MR. HALLING: We have no objection to the standard response time running for these. It is important to have Rule 154 rulings for us sufficiently in advance of the trial, because they affect our witness preparation. But so long as the Panel is able us a ruling sufficiently in advance of trial, we don't object to what the Defence is proposing.

PRESIDING JUDGE SMITH: All right. Thank you.

Mr. Emmerson, do you want to respond to that?

MR. EMMERSON: Nothing to add, save to say to support the application.

PRESIDING JUDGE SMITH: Thank you.

Mr. Roberts, anything to add?

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

PRESIDING JUDGE SMITH: Ms. Alagendra, anything?

MS. ALAGENDRA: We support the application, Your Honour.

PRESIDING JUDGE SMITH: Thank you. We will take that under consideration and make a ruling on it later today.

In responding to this, we will expect no replies also. It will

just be one response from each of you.

Is the SPO ready to submit its application in respect of all deceased witnesses, pursuant to Rule 155 of the rules by March 1st?

MR. HALLING: Yes, so I'll give an answer globally, including deceased and other unavailable witnesses.

PRESIDING JUDGE SMITH: Yes.

MR. HALLING: Our first application can be filed by that date, and it will be over half of the Rule 155 witnesses that are identified in our list. We are anticipating the need --

PRESIDING JUDGE SMITH: List of first 40?

MR. HALLING: For Rule 155, it would be across the entire --

PRESIDING JUDGE SMITH: The entire.

MR. HALLING: -- witness list, yes.

PRESIDING JUDGE SMITH: Thank you.

MR. HALLING: We are anticipating the need to file more than one of those applications, however. As we stated last month, we've made our requests and we're trying to expedite receipt of some proof of death information, and also for incapacitation witnesses, medical assessments, and so this is why we aren't going to be able to file them all by that date. But, again, more than half and all that we can, we can file by that date.

PRESIDING JUDGE SMITH: And do you know now at what stage of the proceedings you intend to offer those?

MR. HALLING: At the moment of our Rule 155 application, that would be the moment that we would be tendering them.

PRESIDING JUDGE SMITH: Okay. So by -- you would be prepared to submit half by what date?

MR. HALLING: The first half would be by 1 March 2023, as Your Honours indicated.

PRESIDING JUDGE SMITH: All right.

Do you wish to respond, Mr. Kehoe?

MR. KEHOE: Yes, Your Honour. We have to look at what our response to that is in context. Number one, I believe it's about 32 155 witnesses, if my memory serves me correctly. Some of these witnesses have had a history, not the least of which, they've been struck in other cases by other judges by, in the ICTY, for instance, and elsewhere. We take that in conjunction with the fact that we are reviewing 46.000 pages of documents that we are getting on 1 February in the disclosure that is yet to come, plus the redactions of witness statements.

So we'd need an adequate period of time post-1 March 2023 in order to examine each one of these. So --

PRESIDING JUDGE SMITH: We're talking about 16.

MR. KEHOE: Excuse me?

PRESIDING JUDGE SMITH: We're talking about 16.

MR. KEHOE: We're talking about 16, I think, yes, 16 initially, but that's going to take a significant period of time. And I just don't want to look at this parenthetically. In it's conjunction with everything else the Defence teams are doing.

So in order to respond, we would need at least a month to

respond to the 155 disclosures that are going to be filed on 1 March.

PRESIDING JUDGE SMITH: And, of course, the case will be ongoing.

MR. KEHOE: Of course.

PRESIDING JUDGE SMITH: But it could be that those may be offered but not admitted at that point, based upon -- or giving you the opportunity to still enter an objection.

MR. KEHOE: Well, I would ask, Judge, that they not even be entered until we file our objections, so that we see what the evidence is and then we file our objections. And then counsel can tender them and then we can argue about their admissibility.

PRESIDING JUDGE SMITH: And I assume -- can I assume that is supported by the other three Defence teams?

MR. EMMERSON: Obviously the ergonomics here need some rethinking.

The answer to that question is this: We are obviously concerned in that category of witnesses with witnesses who give evidence directly, potentially directly, in relation to acts and conduct. And so from that point of view, the obligation of disclosure on the Prosecution is obviously an extremely high one to ensure that the Defence are in possession of everything that might touch upon the credibility of the witness if they've been called to give evidence.

So I know Your Honour is only asking me about timing, but the implications of the point I've just made is that there may be questions to be raised and possibly even litigation on disclosure

obligations of the Prosecution witness by witness. So I'm not sure that drives me to one conclusion or the other.

Your Honours' proposal, which is that we do it on a rolling base, I mean, clearly the Court is going to need to see the statements in order to rule on them and take them into consideration as professional judges would always do.

So the Veseli Defence is neutral as to whether this is done before they're tendered or in the course of the process. It's a question of case management, fundamentally. But so long as the disclosure issue is not overlooked.

PRESIDING JUDGE SMITH: Can the Prosecution cope with a 30-day delay before you would tender those Rule 155 statements? In other words, is that going to interrupt anything in your presentation?

MR. HALLING: It won't interrupt anything because of the nature of the witnesses.

I will say, just for clarification, we were intending to tender them at the moment of filing the application. And, I mean, at first blush, a month to respond sounds like quite a lot. They could always file a request for an extended response time once they've actually seen the specific witnesses involved, but we leave it to the discretion of the Trial Panel.

PRESIDING JUDGE SMITH: Have you considered maybe sharing with them which ones you're going to submit?

MR. HALLING: When we have the full list available, we can give the Defence notice.

PRESIDING JUDGE SMITH: The trial date is speaking up on us. I would think you would have those pretty soon.

I would suggest seriously that you come up with your 16 and let the Defence know who they are, and maybe we can resolve some of this. All right?

MR. HALLING: We can do that.

PRESIDING JUDGE SMITH: Okay.

Judge Gaynor has a question.

JUDGE GAYNOR: Mr. Halling, just a quick question. The Defence has referred to disclosure issues. Now, apart from the death certificates and any medical assessments you might want to submit, is there, in fact, a disclosure issue here? I assume you've already disclosed the statements of the deceased witnesses to the Defence; is that right?

MR. HALLING: You're correct, Your Honour. We don't anticipate any disclosure issues with this group.

JUDGE GAYNOR: Thank you.

PRESIDING JUDGE SMITH: Mr. Roberts, do you want to respond to this particular dispute?

MR. ROBERTS: Nothing particularly, Your Honour. I think, as Your Honour knows full well, the situation of these witnesses will not change. I don't see how the Prosecution wouldn't be able to tell us, well in advance, really, who these witnesses are, the first 16, and, obviously, that would allow us to prepare and, therefore, understand whether we would need extra time or not. I think

provisionally at the moment, without knowing that, a full month to respond is necessary given other obligations at that time. But beyond that, nothing further.

Thank you.

PRESIDING JUDGE SMITH: Thank you.

Ms. Alagendra.

MS. ALAGENDRA: We support the request for one month, Your Honour.

PRESIDING JUDGE SMITH: Thank you.

Turning now to my fifth question. Do the parties intend to request judicial notice of adjudicated facts pursuant to Rule 157(2) of the Rules; and, if yes, when are the parties ready to prepare and submit such applications?

First to the Prosecutor.

MR. HALLING: Yes, Your Honour. We are preparing an adjudicated facts request. We're anticipating it's going to be ready by the start of trial. This would be for all adjudicated facts that we would be in a position to identify prior to trial, but just to flag that developments during the proceedings may necessitate filing others.

One such development that we can already flag. Depending on the result of the Mustafa case appeals proceedings, we may be filing a further adjudicate facts motion related to the charge/crime site.

PRESIDING JUDGE SMITH: Mr. Kehoe.

MR. KEHOE: Yes, Your Honour. We will be in a position, I

believe jointly, to file adjudicated facts. I believe we can make a submission by the beginning of trial. There are some other issues on the adjudicated fact issue that play into some of the matters that come up in your paragraph 7(i), (ii), concerning the nature of the armed conflict timeframe, et cetera, and widespread and systemic, we can discuss those at that point. But we would be prepared to file adjudicated facts by the beginning of trial.

PRESIDING JUDGE SMITH: All right. I was going to ask my next question, could it be a consolidated response and it looks like you've already discussed that.

MR. KEHOE: We are discussing that. I do believe that, for the most part, that our colleagues agree on what those adjudicated -- the adjudicated facts should be advanced to the Chamber. So barring some exception, Judge, I do believe we're all on the same page, so to speak.

PRESIDING JUDGE SMITH: Okay.

Mr. Emmerson.

MR. EMMERSON: I agree.

PRESIDING JUDGE SMITH: Mr. Roberts.

MR. ROBERTS: The same, Your Honour.

PRESIDING JUDGE SMITH: Ms. Alagendra.

MS. ALAGENDRA: I agree, Your Honour.

PRESIDING JUDGE SMITH: Thank you.

Now, Rule 117 of our Rules of Procedure and Evidence provides that after hearing the parties, the Panel should set a time limit for

filing any motion to be made prior to trial. Such motions must be filed prior to trial or they will not be considered unless good cause is shown.

The obvious reason for this rule is that motions affecting the trial should be front-loaded and decided prior to trial when possible and will not be allowed later in the trial unless good cause is shown.

This is not to be taken as an invitation to file any motion with the Panel, because resources, as several people have stated, and we state, are scarce for all, so that we must trust that the parties will focus on what is necessary to their effective preparation.

Rule 117 is to be understood as an invitation to raise genuine issues of concern that have a direct bearing on the trial in which the Panel should be asked to resolve now rather than later if the issue concerned is already known to the parties.

It is not, of course, an invitation to raise issues before they have arisen, such as questions regarding the admissibility of evidence, which will be dealt with when an issue arises.

In other words, we do rely on your good judgement and experience as counsel to assess whether a matter should be raised now or later.

Do any of you foresee filing such a request or such a motion?

Mr. Prosecutor.

MR. HALLING: Yes, Your Honour. From your remarks now, it seems like the Trial Panel is interested in motions that would require resolution prior to the commencement of --

PRESIDING JUDGE SMITH: Yes.

MR. HALLING: -- the trial.

We can say for ourselves that we don't have any motions of this kind. All we would say in relation to the 15 February date proposed in the order for this hearing is that as long as the trial date stays on March 1st, that won't give much time for the rulings to be made unless our response timelines are shortened. So we maybe -- the deadline should maybe be set a little earlier in February if the trial date stays on March 1st, but we will meet whatever briefing schedule the Trial Panel prefers.

PRESIDING JUDGE SMITH: Well, let's see what we have coming first.

So, Mr. Kehoe, anything?

MR. KEHOE: Yes, Your Honour. I could just allow Mr. Misetic -- oh.

If I can just talk initially about a motion, which is the motion concerning -- that we have already filed on taking the deposition of the witnesses that we have listed. I believe we filed that on 9 January. I think that ties into Your Honour naming the rapporteur, et cetera. But we have that motion that's already pending. I'm not certain if that falls directly into the 117 category, but I raise it at this point just to put it before the Chamber at this point.

The other issue that we would have - and, again, this is going to involve rule -- on your paragraph 7(i), (ii) - is the possibility of bifurcating an issue on armed conflict. We have discussed that

among the teams, and we have notified counsel for the SPO that we intended to raise that. We will discuss that when we get to paragraph 7. But, again, that's a 116/117 motion that we would put before the Court, and we can discuss that in some detail at that point.

PRESIDING JUDGE SMITH: Thank you.

Mr. Emmerson.

MR. EMMERSON: The one broad area that may, and I think this probably falls on the judgement side of Your Honours' dichotomy, that may raise ongoing litigation is as we're approaching trial and carrying on thereafter, of course, is disclosure questions, because we're about to receive unredacted material, including, Your Honour knows I've been going on about a witness with a cypher number, one in particular, which will need thorough investigation, and potentially there could be disclosure applications arising out of that.

PRESIDING JUDGE SMITH: We will get do that in a few minutes.

MR. EMMERSON: Yes. Well, that broad category. Subject to that, I don't currently anticipate any other issues.

PRESIDING JUDGE SMITH: Thank you.

Mr. Roberts.

MR. ROBERTS: Beyond that, the issue raised by Mr. Kehoe, which I think we would very strongly support, there's no other issues we wish to raise under 117 at this time.

PRESIDING JUDGE SMITH: Thank you.

Ms. Alagendra.

MR. ELLIS: Your Honour, there won't be any additional issues from us either, apart from those that have been already outlined.

PRESIDING JUDGE SMITH: Thank you, Mr. Ellis.

Mr. Laws, do you wish to respond to any of this?

MR. LAWS: Yes, there will be nothing from us, Your Honour. Thank you.

PRESIDING JUDGE SMITH: The next question is for the Registry.

Mr. Roche, does the Registry anticipate that there will be further applications from persons applying for admission in the proceedings as participating victims?

MR. ROCHE: Thank you, Your Honour.

The Registry currently has no firm indication that there will be further applications from persons applying for admission in the proceedings as participating victims. For example, no one has been in contact with us as an individual or representative indicating that they're in the process of submitting an application.

For the Panel's information, there have been eight applications received since the case was transmitted to the Trial Panel on 15 December 2022, and these are currently being assessed by the Registry's Victim Participation Office.

It is assessed that a further number of applications may continue to be received as time progresses. And in the event that the Trial Panel decided to set a deadline for the submission of applications, this may, of course, trigger further submission of applications.

Thank you.

PRESIDING JUDGE SMITH: And we are aware of the fact that we need to, at some point, set that type of a deadline. And would February 15th be an appropriate date as far as the Registry is concerned?

MR. ROCHE: Thank you, Your Honour. This would not pose any difficulties. In particular, because we are not aware of any immediately pending applications. So, yes, we have no difficulty with that deadline.

PRESIDING JUDGE SMITH: Thank you.

Mr. Laws, do you wish to respond to that?

MR. LAWS: No, nothing to add on that. Thank you, Your Honour.

PRESIDING JUDGE SMITH: Anything from Prosecution on that series of questions? Anything from the Defence?

MR. KEHOE: No, Your Honour.

PRESIDING JUDGE SMITH: Thank you.

Turning to the parties and the participants. Has any new issue arisen since our last meeting that would cause anyone concern regarding our intention to commence this trial on March 1st as planned?

Mr. Halling.

MR. HALLING: There's no such issue. But just to explain our position, we maintain our position from the last hearing, that this trial should start in March, and that we're ready to start and open on 1 March.

We do note the Defence arguments at the last hearing for a date towards the end of March. And just to be clear for the record, we won't object to that, but the keys for us are that the trial start in that month, that we be able to open, and that we immediately proceed to the evidence presentation.

The last thing we'll say is that it obviously matters for our logistical arrangements with the witnesses whenever this trial is set to commence, and we just ask to be given as much notice as possible.

PRESIDING JUDGE SMITH: Thank you.

Mr. Kehoe.

MR. KEHOE: Yes, Your Honour. We are prepared to move forward on 1 March. My colleagues have some other comments in that regard, and I will turn the floor to them.

PRESIDING JUDGE SMITH: All right.

Mr. Emmerson.

MR. EMMERSON: Your Honour, yes. In principle, there's absolutely no current reason why we shouldn't be able to start 1 March.

It is to be appreciated, obviously, and I'm sure all Defence teams would concur, that we are encountering and entering into, from the end of this month, an extremely intense period of work as a result of which it is possible that there will be some overspill or some technical difficulties.

We, at the moment, are in liaison with the Registry over some difficulties concerning the focal point in Kosovo, for example. And

so some of these questions may not be possible to provide an absolute guarantee of everything, but I cannot anticipate that it won't be possible to start on 1 March.

PRESIDING JUDGE SMITH: Thank you.

Mr. Roberts.

MR. ROBERTS: Thank you, Your Honour.

Obviously, the incident that arose in the last conference does have an impact on our preparations. I won't go into detail. I think you're well aware.

We're obviously very conscious of the situation of the accused. We're very willing and we wish to start trial as soon as possible. And if at all possible, we would be very happy to do so on 1 March. We are, however, as you're aware, trying to deal with the consequences of what happened and, therefore, are seeking to try, with the accommodation of the Prosecution and obviously the Chamber, to start on 1 March or as soon as possible thereafter, but maybe have a few other measures which may temper the effect on our preparations and which will allow the trial to proceed but without any substantial delay.

And I'll flag those now. And to a large extent, it does depend on the identity of the first 12 witnesses that will come to testify. But a couple of potential suggestions that we could make would be that there be a brief break after opening statements. Again, I know we raised this last time or it was raised at the last conference. So if we start with opening statements on the 1st and 2nd March but then

have potentially a week break or a ten-day break or two-week break before we present evidence.

Secondly is to have a potential two-week break after the first block of three weeks, rather than the one-week break. Again, just to allow additional preparation in light of the suspected absence of Mr. Young during that period.

And, thirdly, and this is, again, potentially to raise in correspondence with the Prosecution, is that we would request that in the first block of 12 witnesses there are no witnesses that speak to specific individual allegations against Mr. Selimi. And I can, if the Chamber wishes, give the reference numbers -- the pseudonyms, sorry, of the witnesses I believe that impacts upon.

Now, I don't know if the Prosecution intends to call any of these in the first 12, so I don't know if it will have any impact. And obviously the sheer fact that a witness may have met Mr. Selimi during the conflict or had some interaction with him is not relevant. It's whether they go to a specific allegation of physical participation set out in the indictment or pre-trial brief.

So, again, I'm raising those as potential avenues. We're keen to start as soon as possible. Mr. Selimi is very keen to start as soon as possible, but we also need to ensure that he's effectively prepared and to take into account that obviously certain witnesses that were going to be cross-examined would not be able to be cross-examined by the person who was due to do that.

So I'm raising those now. We await the list of the first 12

witnesses on 1 February and the unredacted statements of those witnesses, and obviously we can make a more concrete and justified application at that time.

But in these circumstances, those are the issues I wish to raise for your attention.

PRESIDING JUDGE SMITH: Thank you. We will take those into consideration.

Ms. Alagendra, anything? Mr. Ellis.

MR. ELLIS: Your Honours, if I may on this point. As things stand at the moment, we are preparing for opening statements early in March, on 1 March. I do want to flag, though, that we're still in the shadow of the looming disclosure that's going to come at the end of this month. The figure of 46.000 pages has been mentioned in this Court before. And it will be once we see that material and we see exactly how much of that needs to be considered in relation to the witnesses who are coming first that we may be in a position where we have to come back to Your Honours and say that that's too much material in relation to the early witnesses for us to be ready to proceed to witness evidence at that point.

And we would also, of course, support the suggestion made by Mr. Roberts, that there be a gap between opening statements and the first witness being called. That's another way to enable more preparation time once this wave of disclosure hits us.

PRESIDING JUDGE SMITH: Everything that has been stated, and I refer back to you, Mr. Emmerson, what you stated, just illustrates

the fact that we are going to have a very intense February, and it would behove everyone to actually cooperate with each other a little bit and share some information that is shareable. We don't expect you to give away the farm, and if you have any doubt about what that means you can ask Mr. Kehoe. But it is essential that there be some conversation between the Defence and the Prosecution on some of these matters as soon as it's known to you. I don't expect you to guess, but as soon as you've made a decision it needs to be discussed.

At least that's the way I'm used to dealing with things.

MR. EMMERSON: Your Honour, to take one example, we've had some very fruitful correspondence about an *[REDACTED] Pursuant to In-Court Redaction Order F1214/RED*.

[REDACTED] Pursuant to In-Court Redaction Order F1214/RED. Because, if you remember, that's one of the questions that was dividing the parties, and we engaged in correspondence in relation to that, and we have all agreed, or both sides have agreed, that it would be premature to seek any order from the Bench at this stage to put -- get the witness's evidence back because we don't have the disclosure as yet.

So, I mean, we are doing what we can, I think, to make -- seek practical solutions to keep as little as possible that remains between the parties for litigation and adjudication. It's in everybody's interests.

PRESIDING JUDGE SMITH: One other point, Mr. Roberts, on your request. You have to understand that, as I told you last time, that we are sharing this courtroom, and an action of taking an additional two weeks instead of one week has an impact on the other trial.

You know, I've endeavoured to try to schedule out an entire year for your benefit so everyone will know what we're doing, and that also helps the other Panel make their schedule. So there are some limitations on what we can do, but we will take into consideration all the requests.

JUDGE METTRAUX: Mr. Roberts, I was tasked with making a suggestion to you, and that's maybe to communicate the witnesses of concern that you've mentioned to the SPO with a view to ensure that if any of them are among the first 12 witnesses to appear, that maybe discussions can take place between you and the SPO to see to it that they are being rescheduled for a later time.

MR. ROBERTS: Thank you, Your Honour. If it assists, I can read the pseudonyms now onto the record so the Prosecution but also the other parties would be aware. But, otherwise, I'm more than happy to do it *inter partes* with the Prosecution and hopefully we can come to a resolution.

Thank you.

JUDGE METTRAUX: I think it be better you do that *inter partes*. Thank you.

MR. ROBERTS: Understood.

PRESIDING JUDGE SMITH: Mr. Emmerson, you mentioned a pseudonym just a little while ago. Is that the one witness that you've been concerned about and you spoke about last week?

MR. EMMERSON: It is. If you remember --

PRESIDING JUDGE SMITH: We didn't have the pseudonym before, so

we were wondering what it was.

MR. EMMERSON: It may be that the SPO considers the pseudonym should not be used in open session. I see --

PRESIDING JUDGE SMITH: Now that you've already done it.

MR. EMMERSON: Yes, the number I've already used.

PRESIDING JUDGE SMITH: We will block that.

MR. EMMERSON: Do you want it blocked? Yes.

MR. HALLING: We are making the request now.

MR. EMMERSON: Yes, my apologies for that.

Yes, does that answer Your Honour's question?

PRESIDING JUDGE SMITH: Yes. And what we would like you to do, and we understand your request, and we're not at this point arguing with your request, is to file a very short written application for what you want by Friday.

MR. EMMERSON: Yes, we shouldn't need to -- until we've seen the documents --

PRESIDING JUDGE SMITH: Do you want --

MR. EMMERSON: What's been agreed between the parties is that we would postpone any litigation. And it was the SPO's very sensible suggestion there's no point litigating it until you've seen exactly what you've got and how much and how long an investigation is likely to take. And it seems to me that's obviously right because then we can make informed submissions once we have it.

PRESIDING JUDGE SMITH: We will stand down and await notice from all of you.

Okay, Mr. Laws, go ahead.

MR. LAWS: Your Honour, thank you. On readiness for trial, may I just say a few words.

PRESIDING JUDGE SMITH: Yes.

MR. LAWS: We, on behalf of the victims, are certainly not going to seek any delay in this trial, and we're not going to ask for the case to be put back from the date of 1 March, but it should be noted that that's a different thing from saying that we are, at the moment, ready for trial because, as Your Honour knows, we still have 84 victims applications pending. And in order to be ready for trial, clearly we would want to have had that matter resolved and to have met with them, ideally, and to understand their case in order properly to represent them.

It may be that that's not going to be possible, and we're quite content to catch up in the course of the trial. So we're not going to ask for it to be put back, but it's right that the Panel should know that we may, in fact, not be ready for trial in the strict sense of that word by 1 March.

PRESIDING JUDGE SMITH: Thank you. We will do what we can to expedite the applications once they're presented to us.

MR. LAWS: I believe that the applications have all been presented, apart from the ones that are --

PRESIDING JUDGE SMITH: Yes, that's what I meant. The eight that are yet to come.

MR. LAWS: Yes, thank you.

PRESIDING JUDGE SMITH: That assessment will happen soon, I'm sure.

I need to have your input on when you would like to hold or be part of the Specialist Prosecutor's Conference, and we will ask your opinion about what date would be applicable or appropriate, bearing in mind that it can't be prior to February 1st, because the trial must start within 30 days, according to our rules.

So I'll ask the comment from the Prosecution on this issue.

MR. HALLING: Yes. As Your Honour mentioned, it's indexed to the rules. What we would suggest is that once the trial date is set to have the Specialist Prosecutor's prep conference two weeks before.

PRESIDING JUDGE SMITH: Mr. Kehoe, two weeks before appropriate?

MR. KEHOE: Yes, Your Honour. The only issue that comes into play, that would be addressed during that conference, of course, are objections to exhibits and witnesses that are going to be disclosed. I believe Your Honour gave an oral ruling that we had 48 hours after the disclosure to file our objections, and we have a submission before the Court to expand that time. So we would not want the conference, of course, before we've had that expanded time to respond.

Frankly, Judge, there are just too many exhibits to get through and try to come up with a uniform position, if we can, which I'm sure the Chamber would like, on all of these exhibits. So we would ask the Court to take into consideration our request for an expanded response time and put the conference in thereafter.

PRESIDING JUDGE SMITH: Thank you.

Mr. Emmerson.

MR. EMMERSON: Two weeks before is entirely acceptable and helpful.

PRESIDING JUDGE SMITH: Thank you.

Mr. Roberts.

MR. ROBERTS: In principle, two weeks before is entirely acceptable as well.

The one issue is obviously potential Defence investigations that would arise after the receipt of the unredacted statements. We are intending to conduct further investigations over the course of February, so obviously as much advance notice of the specific date as possible so we can organise our investigations around that would be appreciated.

PRESIDING JUDGE SMITH: We will do that today. You will have a date.

Ms. Alagendra.

MS. ALAGENDRA: Two weeks is acceptable, Your Honour.

PRESIDING JUDGE SMITH: Thank you.

Turning to the Defence. Do you wish to waive your right to have the indictment read in full at the time of the opening of the case?

MR. KEHOE: Yes, Your Honour.

PRESIDING JUDGE SMITH: Mr. Emmerson.

MR. EMMERSON: Yes.

PRESIDING JUDGE SMITH: Mr. Roberts.

MR. ROBERTS: Yes, Your Honour.

PRESIDING JUDGE SMITH: And, Ms. Alagendra.

MS. ALAGENDRA: Yes, Your Honour.

PRESIDING JUDGE SMITH: Prosecution, do you agree to forego the reading of the indictment?

MR. HALLING: Yes. Thank you.

PRESIDING JUDGE SMITH: I had a feeling that would be answered in the affirmative.

I take it the SPO will make an opening statement; is that correct?

MR. HALLING: That's correct, Your Honour. We are so intending. We are currently estimating six hours, which would be the remainder of the first day after the preliminaries and into a second.

PRESIDING JUDGE SMITH: All right.

And, Mr. Laws, do you intend to make an opening statement?

MR. LAWS: Your Honour, yes, I do, and it won't take more than 45 minutes.

PRESIDING JUDGE SMITH: Thank you.

Is the Defence ready at this time to advise whether they will make an opening statement following the SPO or if they will make it at the end of the SPO's case or if they will give no opening statement?

MR. KEHOE: On behalf of President Thaci, we will give an opening statement following the opening statement by the SPO. That opening statement should be between three and four hours.

PRESIDING JUDGE SMITH: Thank you.

Mr. Emmerson.

MR. EMMERSON: With Your Honours' leave, we would reserve our position until that moment, save to say this: If we are on our feet to make an opening statement, it will be less than 45 minutes.

PRESIDING JUDGE SMITH: Thank you.

Mr. Roberts.

MR. ROBERTS: It's our current intention to make an opening statement at the same time after that of other Defence teams straight after the Prosecution opening statement. Ours will be a maximum of an hour, Your Honour.

PRESIDING JUDGE SMITH: All right.

Ms. Alagendra.

MS. ALAGENDRA: We will be making an opening statement, Your Honour, and we anticipate an hour and a half.

PRESIDING JUDGE SMITH: Made immediately after --

MS. ALAGENDRA: Immediately after.

PRESIDING JUDGE SMITH: -- the Prosecution? All right.

So we will probably need -- we will need to book two days for that opening, then, to reasonably get it done and to not pressure anyone with being pushed around too much by us during the process.

As previously explained to you, it is our intention to use this courtroom as much as possible in times ahead, bearing in mind that another Trial Panel will be hearing another pending case at the same time. We only have this one courtroom.

I suggested the following sitting schedule: Four days per week, Monday through Thursday, five hours a day; three consecutive weeks of those four-day weeks, followed by one week with no court; then three consecutive weeks followed by two weeks of no court; and then alternating back and forth between the one-week and the two-week break. And daily we would start at 9.00 a.m. and go until 11.00; take a half-hour break; second session from 11.30 to 13.00; with a one and a half hour lunch break; and then a third session from 14.30, or 2.30. Until 4.00.

Any comments on the sitting schedule from the Prosecution?

MR. HALLING: Your Honours, from our side, we would prefer a standard sitting schedule that would start at 9.30, like we did today. And if Your Honours are still inclined to sit five hours, to extend the last session by 30 minutes. Otherwise, the envisaged sitting schedule, we have no comments.

PRESIDING JUDGE SMITH: Is there a reason that 9.00 is not appropriate?

MR. HALLING: There are a few. Just from experience, having issues arising late in the day, it is helpful for the parties to have a small window during the work day before the hearing to discuss them. It may also be of assistance to the Registry and the interpreters. There are also some SPO staff that have personal obligations in the period from 8.30 to 9.00 in the morning and it may make it difficult to attend certain hearing days.

PRESIDING JUDGE SMITH: All right. We'll take that into

consideration.

Mr. Kehoe.

MR. KEHOE: Your Honour, we have no objection to the Court's proposed schedule.

PRESIDING JUDGE SMITH: Do you want to comment on the request by Prosecution?

MR. KEHOE: Your Honour, we take no position on that. I mean, obviously people have things to do.

PRESIDING JUDGE SMITH: Okay. That's fine. I just wanted to give you the opportunity.

MR. KEHOE: Yes.

PRESIDING JUDGE SMITH: Mr. Emmerson.

MR. EMMERSON: Without being in any way difficult, we would strongly prefer the suggested timetable proposed by the Court so that there is time at the end of the day for the Defence team to review the day's events and take short instructions from the client.

PRESIDING JUDGE SMITH: Understood.

And I will say, Mr. Prosecution, that that was our only concern, was to give an opportunity at the end of the day to prepare -- for all of you to prepare for the next day, if necessary.

Mr. Roberts.

MR. ROBERTS: We take no position, Your Honour. Either 9.00 or 9.30 is fine with us. Thank you.

PRESIDING JUDGE SMITH: All right. Thank you.

Ms. Alagendra.

MS. ALAGENDRA: Either is fine with us, Your Honour.

PRESIDING JUDGE SMITH: And now this will not be followed with a question, but I do want to say we continue to have very real concerns about the time estimate given for the presentation of the Prosecution's case.

We appreciate the efforts by the SPO thus far to pare that back a bit, but we encourage the SPO to give full consideration to the need to shorten the estimated length of this case and to use all available procedural instruments at their disposal to ensure that the trial is both fair but also expeditious.

We have just outlined our vision for sitting days in this case for the foreseeable future. If everything works perfectly, we will have 600 hours of testimony in one year, and I think I can safely say in my experience in trials nothing ever works perfectly and that the trial could be longer than is currently hoped for. It is quite a large commitment to get 600 hours in in one year, but that is our aim at least.

We have the authority under Rule 118 to take measures to reduce the number of witnesses, charges, crime sites, et cetera, and to require the SPO to reduce the estimated length of the direct examination of its witnesses. We will make use of those possibilities if - and I repeat, only if - we take the view that the court time is not being used most efficiently by SPO.

That being said, we ask the SPO to undertake a further review of its case to eliminate unnecessary repetitive witnesses, and to select

crime sites, incidents, or detention sites and related actions which are reasonably representative of the crimes charged. The expectation is that the SPO will do so not only before its case commences, but also throughout the case and to reassess the needs for and justification for the calling of any witness and for the time estimates given for each and all of them. The Panel will assess the way your case progresses and determine whether there is a need at any point for us to step in and ensure that things move along faster.

We expect this trial to be of a reasonable length. We also believe that the estimates of five years raises very serious concerns.

If I were the attorney for the Prosecution, I would make the adjustment myself rather than waiting for the Panel to do so. But make no mistake, we will make cuts if deemed necessary to preserve the rights of the accused and to ensure that these proceedings are not unreasonably lengthy.

We will further this discussion with the Prosecution at the Prosecution's Preparation Conference, and we'll ask for a final count of days at that time, or hours needed, for direction examination of all Prosecution witnesses and what steps have been taken to streamline your case.

We continue to believe that there is much room for *inter partes* discussions in order for the parties to identify the areas that are genuinely in dispute and those that are not. However, this must be done with a will to eliminate unnecessary testimony.

I ask the Prosecution to please give us an update on the number of the Prosecution witnesses. You previously gave us a list of 323. Do you still intend to call all 323, or are you just being on the safe side, naming potential witnesses to be called if needed?

Any comments on this, Mr. Prosecutor?

MR. HALLING: Yes, Your Honour.

In relation to the last question that you asked. There are certain witnesses on the list, those identified under Rule 153 and Rule 155, that we don't intend to call but whose evidence we intend to rely. So not all of those witnesses are going to be called to testify before the Court. Indeed, many cannot.

But for those that are on the list that we intend to call live, or pursuant to Rule 154, that is still the list. I don't know if we are necessarily just being on the safe side, but it is certainly possible during trial that early witnesses may present evidence in such a way that may render later witnesses so cumulative that we can make further reductions to writing or maybe even dropping witnesses, but this is something that depends on the developments at trial.

The last thing I wanted to say is Your Honours' instructions are very clear as to what you expect of us. In relation to a question Judge Barthe asked at the hearing last month, we are already looking at our Rule 154 witnesses to see if we can revise down some of the examination times for those witnesses. And when we have revisions like that, even in the top 12, at the point of our Rule 154 filings, we can already indicate those revised estimates then.

PRESIDING JUDGE SMITH: As you stand here today, what is your estimated duration for the presentation of your case?

MR. HALLING: It remains as it was on the last list, so it's just over 700 hours.

PRESIDING JUDGE SMITH: Of just your direct -- not with cross, just the direct?

MR. HALLING: That's correct.

PRESIDING JUDGE SMITH: All right. Thank you for that.

And turning back to -- oh, Mr. Kehoe. I'm sorry.

MR. KEHOE: I'm sorry, Judge. May I just be heard on one point there before the --

PRESIDING JUDGE SMITH: Briefly.

MR. KEHOE: -- next conference. And that has to do with structure.

Normally the Prosecutor, when he or she is putting evidence in on a particular incident, will group those witnesses together.

PRESIDING JUDGE SMITH: I'm just about to ask that question.

MR. KEHOE: Thank you, Judge.

PRESIDING JUDGE SMITH: I will turn back to one of the questions we asked during the Status Conference in December. Oh, I'm sorry.

MR. EMMERSON: I do apologise.

PRESIDING JUDGE SMITH: You guys won't let me get started.

MR. EMMERSON: I'm half standing, half sitting to see if you noticed me.

The issue I want to just flag up at the moment, and we've just

had the SPO indicate, that to the extent that they've clearly heard the message that the Bench is sending, the proposal would be to further shorten the time taken by the Prosecution in examining witnesses called under Rule 154.

Your Honours' questions to the parties referred to some submissions I'd made at the 14th Status Conference, which we'll come back to. But may I just reiterate that to the extent that the SPO is putting in evidence with 154 witnesses, which I understand is the intention, the entirety of their interviews with the SPO - so, often some cases run into eight separate sets of interviews where witnesses inevitably meander, rather than a signed witness statement - the net result of shortening their period of time for evidence in-chief will simply be to say, well, in relation to this, did you tell the SPO the truth. I mean, that's a very crude way of putting it. It can be done in other ways.

But the consequence will be that the Defence will necessarily have to labour through the interview, so essentially it's a false economy or rather a presentation of economy. It enables the SPO to squeeze their overall examination-in-chief time within the rather extraordinary estimate of 700 hours, but by transferring the emphasis onto the Defence in order to lay the foundation before they can cross-examine, effectively -- I mean, I don't mean that literally, but one is effectively reversing the burden to the Defence to elicit the story before seeking clarification, cross-examination in the ordinary way.

So I'd just -- I want to sound that note at this stage, that there are certain consequences that follow from the methodology that's been used throughout by the SPO; namely, to use the witness interviews as the document that is going to be relied on. In some cases, and there's one witness in particular, I won't mention his name in case -- and he's not protected, but I'm treading carefully in open session, for whom there are -- I mean, the witness has given evidence in four separate trials in the past, has eight sets of interviews with the SPO, has made numerous witness statements in other proceedings in an international character, all of which will go in.

Now, I'm sure in the case of that witness the SPO will take a number of hours to try and work out which parts of it it wishes to emphasise. And as I said to Your Honours last time, that's one witness who I can say now will take considerable time in cross-examination for the same reasons.

But generally speaking, saying we're going to squeeze down our timeframe by reducing the examination-in-chief of witnesses whose testimony will then be introduced by way of voluminous interviews, handing the burden over to the Defence to sort the wood from the trees, has a problem built into it from the outset. And the one thing the SPO has never committed to doing, and has constantly and consistently, it's fair to say, resisted, is to focus on whether it's really necessary to call of this evidence in any form or whether really the issues before the Trial Chamber have less to do with, for

example, the crime base and more to do with questions of coordination, responsibility, administration, and so forth.

But I put the marker down now because there is a difference between a situation where there's a five-page witness statement. That is the 154 evidence. And the witness can adopt it and then be cross-examined on it, and the situation that we're going to encounter at trial. And I think it's worth noting that now.

PRESIDING JUDGE SMITH: Thank you. It is worth noting. And, of course, we haven't started squeezing the Defence yet on the time of their cross-examination, and that may well come up, but we will take those things into consideration. And I do know what you're talking about, and that's why we haven't been overly burdensome on the Prosecution up until now, is because this is an adversarial proceeding and they should present the case that they think they should present. As should the Defence, of course.

Okay. As I started to say, one of the questions we asked at the last conference had to do with the structure, the proposed structure of your case, and Mr. Emmerson mentioned that somewhat in his most recent statement.

You indicated then that you could be ready to inform the Panel in more detail about how you were going to proceed, and now is the time to do that. Now, please provide us a clear understanding of how you propose to proceed, either by categories of issues, or chronologically, or crime base. Tell us in general blocks what we can expect from the Prosecution as a way of presenting this

complicated case.

MR. HALLING: Yes, Your Honour. And we actually already foreshadowed some of our submissions today in a written filing of last Friday. It's confidential, but it's paragraph 25 of F01208.

As we said in that filing, there's a lot of factors that we're considering, and what we're prioritising is securing our evidence over a traditional structure. This is not the only --

PRESIDING JUDGE SMITH: Say that again?

MR. HALLING: We are prioritising securing our evidence in the order in which we call witnesses over a traditional structure, like calling everyone from a particular crime site or calling people in a straight chronology. That's not the only factor that we're considering. Witness availability is an issue, grouping witnesses with similar issues is something that we are trying to accommodate when we can, the publicity of the proceedings is a factor that plays a role as well.

But we're confident that the way in which we have set out this order is going to allow for a presentation that is coherent and will allow the Trial Panel to follow. But a presentation that is grouped by crime site or chronologically is not practicable in this case, in our submission, when our focus is ensuring that all witnesses are heard in this case and that we need to beat the climate of witness intimidation in Kosovo in the way we set our witness order.

PRESIDING JUDGE SMITH: Mr. Laws, do you intend to be present throughout the entire trial, or -- is that your present intention?

MR. LAWS: It is, Your Honour, yes.

PRESIDING JUDGE SMITH: Okay, thank you. That's all I need to know.

MR. KEHOE: [Microphone not activated]. Something the Court would like us to comment on.

PRESIDING JUDGE SMITH: I hadn't anticipated it. If you have a comment, you certainly can make it.

MR. KEHOE: Just briefly, Judge.

Certainly the whole allegation of publicity and how that impacts, and I have no idea what counsel is talking about. This case has been going on for two years, and how that impacts the presentation of evidence is a mystery. And this whole allegation of witness intimidation. We've been through this for heaven knows how long in this case, and there's been absolutely none that has come across, to the knowledge of anybody on the Defence side. So that's an irrelevant factor.

Why we are departing from the traditional prosecutorial path of grouping, as Your Honour said, of events together with those witnesses is yet again a mystery to me. If someone is completely unavailable because they're ill or their incapacitated for a period of time, I understand that. But the traditional prosecutorial approach that Your Honour is familiar with of going through a particular crime base in a particular area advances this case in a timely manner, and it doesn't have two witnesses talking about an event in the first six months of this trial and two more witnesses

talking about this event down the line. That is the difficulty, I believe, that Your Honour was addressing with the structure and that we support.

PRESIDING JUDGE SMITH: Thank you.

Anybody else?

MR. EMMERSON: No, we're slightly in the dark as to understanding what it is the Prosecution is saying about the relationship between security and coherence, and so --

PRESIDING JUDGE SMITH: So is the Panel.

MR. EMMERSON: Yes.

PRESIDING JUDGE SMITH: I will say that we clearly expected a bit more meat on your presentation. I don't know what you mean by how the publicity has anything to do with this. I don't know how witness intimidation has anything to do with this.

We're only asking you how do you intend to structure the case. In straight words, straightforward, is it going to be based upon crime sites? Apparently no, right? Is it going to be chronological as to the way things unfolded? Apparently, no. So what's that leave?

MR. HALLING: To the extent there is a single guiding consideration, and, as I said, there's not just one, we are doing risk assessments to make sure that we can get all of our witnesses heard.

And so we appreciate that when you organise your case in that way, it isn't very transparent outside of our building as to why

exactly witnesses are called when they are. But there is a rationale to why we are prioritising the witnesses that we are.

As for publicity, this is one of the --

PRESIDING JUDGE SMITH: Wait a second. Is the rationale just availability?

MR. HALLING: It's --

PRESIDING JUDGE SMITH: Because that's what it sounds like.

MR. HALLING: Not availability in the sense of when are you free to come testify, but availability in the sense of we want to make sure that witnesses get called before anything happens to them, before there's any interference risks. And it's not that we're putting our most important witnesses first, but that this is a key consideration as to how we're deciding our order.

When I talked about the principle of publicity, this is one of the countervailing factors that's different from that. So there's going to be, for instance, a witness in our -- we don't want to call a whole series of protected witnesses in a row with no break, because we think that that might not be helpful for the public in order to understand the trial. So there are going to be some witnesses earlier in the order, some that have just personal obligations and availability issues in that sense, that we would call that don't have protected measures.

And so, like I said, there's not just one single factor, but if there was one organising principle, I hope we've clarified what that is.

PRESIDING JUDGE SMITH: I have to say that I still don't know how you're going to present this, and I still don't know what the theme is, where you're going with it. If you're just going to start presenting witnesses as you believe they are appropriate, there won't be any coherent structure to this case.

MR. HALLING: Yes. In this regard, we have tried to sequence it in a way so that there is a coherence and that there is an understanding as we go.

Needless to say, should there be any moments during the trial where Your Honours require context or clarification as to how a given witness fits in the broader case, we're always available to provide that kind of information. But we wouldn't be doing it this way unless we thought it was important and that the Trial Panel could follow what we are doing.

PRESIDING JUDGE SMITH: Well, we'll leave it for now. Thank you very much.

MR. ELLIS: Your Honour, if I may.

PRESIDING JUDGE SMITH: Yes, certainly, Mr. Ellis.

MR. ELLIS: Your Honour, I appreciate that the Court indicated that you're leaving this for now, and perhaps it will be a matter that's returned to at the next conference, but --

PRESIDING JUDGE SMITH: We have another conference coming up, yes.

MR. ELLIS: May I flag one particular concern, from a Defence point of view?

PRESIDING JUDGE SMITH: Yes.

MR. ELLIS: Which is simply this: We will have in this case a number of witnesses who are still protected when the trial starts, their identities only being disclosed 30 days before their testimony. And currently, as a result of that, large parts of their evidence, their interviews or statements, are redacted from us.

At the point when the first witness is called for the first location, I would want to know, in order to be able to cross-examine that witness, what the other witnesses from that location are saying, because often the witnesses refer to each other, often the witnesses have statements about conditions of detention that are relevant to each other, and we're going to hit a problem if the Prosecution is calling two witnesses from one location, two witnesses from another location, and then six months later we get a protected witness released who gives a different account.

And my fear is that, firstly, the cross-examination of those early witnesses is not going to be effective because we won't have sight of the whole picture of what other witnesses are saying. But also, that's going to lead to applications to re-call witnesses. When we find out what the protected witnesses are saying, there's a danger that we need to go back and put that to somebody who was called in the early days, and that's why we supported a location-by-location approach.

MR. EMMERSON: Can I just add, I think none of these submissions are intended towards inviting a ruling of any kind. It's simply to

put on record what the obviously anticipatable consequences of this approach are.

From a Defence point of view for a moment, if a witness is being called on -- for example, an international on a macro event or a macro analysis, followed by a crime base witness who saw something on the far flung corner of Kosovo, followed by a senior Kosovo Liberation Army insider, followed by a forensic witness, for example, there is no coherence but practicability, availability, suitability. Not only does it have the effect, the very obvious effect that there could be specific situations of re-call; but much more importantly from the Defence point, there will always be the need to, for example, prepare areas which are so comprehensively different from one another, one witness after the next. So within the same day, you might be moving from the depth of forensic analysis, for example, to something utterly factual, to an international or a senior member of the Kosovo Liberation Army, and back again.

And so on a practical level, that will inevitably slow the trial down very considerably. I simply make that prediction at this stage, because I know the Trial Chamber won't insist on the Defence being forced into a position of being unprepared. And the danger is, essentially -- I mean, I hear what the SPO says, and Your Honour has made it very clear it's up to them to present their case in an adversarial system, and I entirely agree with that, as they see fit. But if they see fit to present it chaotically in this way, leaving, with respect, the Trial Chamber to sort it out at the end and work

out the themes that have just passed rather than doing what would be traditionally regarded as the Prosecution's job to organise its case in advance. Which is something, it's fair to say, if you were to review the record of the pre-trial Status Conferences that the Defence have been asking for for a very, very long time.

So when the SPO says, as it does, we want the shortest possible time between notifying the Defence of the evidence of a witness supporting a currently redacted count on the indictment and the moment they come to give evidence, it must be seen, in the context of the case in which the SPO's been unable to articulate even an outline at this very late stage what the structure or presentation of its case is about.

So I'm putting that on the record because we will no doubt have to return to it.

PRESIDING JUDGE SMITH: Thank you.

You know, one of the -- go ahead, Mr. Halling.

MR. HALLING: Just in relation to Mr. Ellis's remarks, because it's a fair question by the Krasniqi Defence. We are mindful of this issue, the delayed disclosure 30 days before testimony witnesses may affect the examination of earlier witnesses in the order, and so this is another issue that is taken into account with the way we've set up our witness order, the ability to fairly confront witnesses, and there may be issues where witnesses may have their -- even protected measures varied in order to ensure that this occurs.

But this is something that's done on a case-by-case basis, but

it's just to reflect that this is reflected in the order that we have.

PRESIDING JUDGE SMITH: Thank you.

One of the beauties of the adversarial system is that for a prosecution to be successful, they have to present something that is coherent, that is understandable to these four people. And if it isn't, it won't be successful. That drives them, and I expect them to be driven by that thought. I'm asking the questions in order to illustrate that we're concerned about this.

I expect that the Prosecution will react to these concerns. Thank you.

We will now turn to ...

[Trial Panel confers]

PRESIDING JUDGE SMITH: Mr. Laws, I have an additional question for you. I'm sorry, I skipped it.

The Panel has been seized of a joint application of January 13th for an extension of the deadline in which to provide an indication of their intention to seek cross-examination of the first 12 SPO witnesses and a time estimate of cross-examination for each of the witnesses concerned until 13 February 2023.

Oh, I'm sorry, that isn't for Mr. Laws. That's for the Prosecution.

I'm sorry, Mr. Laws. I made my own notes wrong.

MR. HALLING: For that particular application, this is F01204 in the record, we have no objection to the request.

PRESIDING JUDGE SMITH: Okay. Thank you.

Now we will proceed with substantive questions. We will take a few and then we will take our morning break. We will start. Judge Barthe had a question that he wanted to ask. Go ahead.

JUDGE BARTHE: Thank you, Judge Smith.

I would like to seek a clarification from counsel for Mr. Veseli, Mr. Emmerson, regarding certain comments made during the Status Conference on 8 September 2022 in relation to the cross-examination time for SPO Rule 153 and Rule 154 witnesses.

Mr. Emmerson, the Panel has noticed that during the Status Conference on 8 September 2022, before the Pre-Trial Judge, you mentioned that, and I quote, on the transcript, this is page 1517, line 21, to page 1518, line 1:

"The general practice in other tribunals is where a witness is made available for cross-examination solely on a document which has been tendered or to stand in lieu of their evidence in-chief. The Defence are allowed approximately, if a rough timeframe is used by the Trial Chamber, twice the time that they would be allowed if the witness had given evidence in-chief and was being cross-examined."

My question is, Mr. Emmerson, is that still your position? And if so, can you provide now, or maybe later in a written submission, examples or references for this assertion?

Thank you.

MR. EMMERSON: So, first of all, I've anticipated, obviously, because of the note that had been given in advance of the hearing,

which passages that the question was relating to. And I can see that there is -- I'm just correcting the record at this point, but I can see that there is a reference -- it's in the same passage that Your Honour has just referred to, where there's a reference to Rule 153 when it is intended to be Rule 154. That doesn't answer the question that you're asking me.

So from the experience that certainly I have had at the ICTY, if a Trial Chamber says, right, the standard cross-examination time allowed for every witness is 30 minutes, let's say, and if you want more than 30 minutes you need to ask the Trial Chamber in advance with a reason and explain why that is.

Now, we're not at that stage in these proceedings, but it's a similar point to the point that I was making earlier on, which is that if the Prosecution effectively shortens the time of examination-in-chief, effectively simply tendering the witness for cross-examination, so shortens it down to a very short, "Was this statement true? Do you adopt it?" and then over to the Defence, then inevitably the time taken will be longer because the Defence then have to effectively conduct examination-in-chief and cross-examination, because obviously cross-examination continues from the evidence that's been given of the account by the witness in the witness box.

And it's the same essential underlying point, which is, it's a false economy for the SPO to bring back their time and just say, "Here's the witness, here's their statement," but it's even more of a

false economy where their statement consists of interviews because you don't actually have one version on which to go. The mathematical calculus is a matter of trial practice, and it will vary from Trial Chamber to Trial Chamber. It's not something on which there is authority as such, but it's only applicable in cases where a Trial Chamber takes the view that there should be a standard maximum time for each Defence team. I don't think it's -- it's not easy to say for the Defence teams as a whole, because that means that everybody has to agree. But if there is a rule that says the standard cross-examination time for each defendant is 15 minutes, 30 minutes, and if you know in advance that you're going to -- that's not going to be adequate, please give us notice and give reasons, in broad terms, as to why it is that this witness is likely to take longer, and how long they're likely to take. It's a different practice from that which is used in many national courts, but it certainly focuses the attention of all concerned on ensuring that they have brought that to the attention of the Bench.

So I'm not -- others may take a different view. We haven't consulted on this amongst the Defence teams. But it's certainly a discipline that I would have no objection to. If that's what if question was directed at, would it be a discipline that I would be fighting against the imposition of, the answer is no.

JUDGE BARTHE: Thank you, Mr. Emmerson. I think your point is well understood.

So the answer to my question would be: You were referring to

ICTY jurisprudence, in short, in a nutshell.

MR. EMMERSON: I think calling it jurisprudence might elevate it a little -- trial practice.

JUDGE BARTHE: Trial practice.

MR. EMMERSON: And, again, it's only those Trial Chambers, which is very much a matter of discretion, that take the view that you need to have a standard time and exceptions to it in order to keep things moving. But, I mean, again, that might be a view that the Bench would take in this case if after a period of time in trial it seems that it's necessary, in the same way as the conduct of the trial be kept under review.

JUDGE BARTHE: And would it be possible for you, maybe at a later stage, to just to provide, to support the Chamber, the Panel, with some references in this regard?

MR. EMMERSON: To where that has been done?

JUDGE BARTHE: Yes.

MR. EMMERSON: Yes, it will take a fair bit of digging. But, I mean, in the sense of when it was first proposed, it would usually have been at a trial management conference like this in advance of the trial, and so we'll have to go hunting for it. But I certainly -- I'm -- I'll certainly have no difficulty finding it. Absolutely.

JUDGE BARTHE: Thank you. I understand. Thank you.

Mr. Emmerson, you also made some very interesting comments on Rule 153 witnesses during the aforementioned Status Conference --

MR. EMMERSON: Yes.

JUDGE BARTHE: -- on 8 September 2022, namely that, I quote:

"The Trial Chamber has to allocate less weight to a witness who cannot be examined orally. That's the rules. That's the law," you said. "It doesn't mean that they are of no value, but it makes it extremely difficult to evaluate their testimony."

And this is taken from the transcript of the Status Conference of 8 September 2022, just for the records, page 1520, lines 10 to 14.

My question, of course, to which rules, to which law are you referring exactly here, Mr. Emmerson?

MR. EMMERSON: Well, 153 and 155 obviously need to be viewed together, them both occurring in the absence of a live witness.

153 is only background evidence in the sense that it cannot go to the acts and conduct of the accused and, therefore, could never be, no matter how much of it there was, decisive in any -- the outcome of any trial resulting in a conviction. So it's background material only.

155, same process, same procedure, but there where you have a dead or an absent witness, the substance of the account, the substance of the witness statement or, as in this case, for the first time, I mean, in this Tribunal for the first time, in my experience there is no witness statement but the interviews, they can be witnesses who go directly to the acts and conduct of the accused. And in those circumstances, the threshold of disclosure is obviously one which accompanies -- replaces as far as possible anything that

could be used if the witness had given evidence in cross-examination that might be relevant to undermining their credibility.

So it's not just evidence that's relevant in the sense that it's relevant to the facts in the case or it's relevant to the period of time. Because there is no witness to cross-examine, if that evidence is to be admitted, then it must always.

Now, in terms of rules in support, I will certainly give you a written briefing, but it's pretty much universally the domestic procedure process. And I think, if I -- just give me a moment.

[Specialist Counsel confer]

MR. EMMERSON: Yes, we will provide you in writing within 24 hours the references to the provisions and practice of international tribunals in relation to that.

It's a matter of common sense. If you're going to admit a 155 witness who can give -- on which a conviction could be based, then clearly it has to be accompanied by the most searching possible scrutiny of anything that might impact not just its admission but the weight that's attached to it.

And, I mean, as I say, I will give you a full list of references, but it's universal in domestic criminal procedure, and certainly in adversarial systems, and I'm pretty sure we'll find the jurisprudence in the ICTY and probably the ICC as well. But we'll get it all compiled to you.

[Trial Panel confers]

JUDGE BARTHE: Thank you, Mr. Emmerson. This would be much

appreciated, if you could do that.

My last question is also for you, Mr. Emmerson. According to your further observations during the said conference, and, again, I quote from the transcript of 8 September 2022, page 1520, lines 15 to 23, and page 1521, lines 1 to 4:

"The Prosecution's obligations of disclosure in those circumstances are much, much higher than - in terms of a disclosure adverse to credibility than would necessarily be the case for cases for witnesses who are being called to testify because the Prosecution must - and this again is the law -" you said, "disclose to the Trial Chamber and to the Defence anything that it has or could gain access to which might adversely impact the credibility of the witness whose statement they are tending," the SPO, the Prosecution. "Otherwise, they may not lawfully tender it."

And you said, Mr. Emmerson:

"The Prosecution must satisfy the Trial Chamber that they - the Trial Chamber and the Defence - have everything possible to evaluate what weight, if any, should be attached to the statement or transcript of a witness."

Again, Mr. Emmerson, can we assume that this is still your position. And, if so, can you provide again references and particular case law for that?

MR. EMMERSON: It's the same point. It's exactly the same point as the last point, which is there -- and, first of all, the general duty of disclosure always is not only to material that the

Prosecution has in its possession but that to which it could gain access. So if the Prosecution has a duty under 103 to disclose exculpatory evidence, it cannot close its mind to the existence of potential exculpatory evidence and not obtain it and thereby absolve itself from its obligations of investigation and disclosure.

So that applies in the conventional sense as well. It's not simply an obligation to look at what you happened to have. It's also an obligation with a witness, and, of course, it's proportionate to the relevance and importance of the witness, and most responsible prosecutors would do it anyway in order to evaluate whether their own witness was reliable before putting them in the witness box. Indeed, I would suggest that was part of the prosecutorial ethical responsibility as well as being part of the fundamental duty of disclosure to ensure a fair trial.

But we'll find it -- I mean, again, I'm very happy to go into a deep tissue dive of the Article 6 Strasbourg jurisprudence and the jurisprudence of the UN Human Rights Committee and a comparative law analysis, which is sometimes necessary in situations like this, in order to demonstrate that the disclosure obligation goes well beyond simply reviewing what the Prosecution happens to have. And if they're dealing with a witness of importance they'll want, for example, to check whether the person has a criminal record. Most obviously you can't be relying on a witness if they've got a criminal record unless, having looked at the criminal record, you can establish that it has no materiality to it. It might be a very minor

offence. It might have nothing to do with anything which would affect the credibility or reliability of their evidence. But if they have a criminal record for perjury, on the other hand, it's obviously the most material consideration possible.

Now, if a witness is in the witness box, some of that can be elicited through adversarial procedure. If the witness is being tendered on the basis of a witness statement, it cannot. So there is a concomitant increase in the duty of the Prosecution's due diligence before putting before the Trial Chamber evidence that might, in fact, be worthless or come from a source that, on proper evaluation, would be close to worthless. In a sense, these are principles that are so axiomatic to the fair conduct of proceedings that in some cases they are assumed.

I mean, at the end of the day, you, as a Trial Chamber, cannot properly exercise, in a fair trial due process manner, the discretion that you have, legal discretion, to admit evidence on paper that goes to the acts and conduct of the accused without first carrying out a thorough scrutiny of the Prosecution's discharge of its obligation, not merely to search the archives it's got, but to focus its mind on whether it has asked the right questions.

I mean, you're asking me to elaborate. I use criminal records as one example. Many of the witnesses that the Prosecution seek to call in this case have been involved directly or indirectly with the Serbian intelligence service. Now, that may not be apparent at all on the face of the evidence. Often it is deliberately suppressed.

That's been the experience at the ICTY of Kosovo cases.

So the first step that's been the subject of litigation, and it's ongoing, is to what extent must the Prosecution tell the Defence that this has come from Serbia. And if you remember, that was resisted by the Prosecution. It was ordered by the Trial Chamber in relation to RFAs, and the -- Pre-Trial Judge, I'm sorry. And the Trial Chamber has in its most recent decision upheld the Pre-Trial Judge.

Well, why is that relevant? Answer: It's the first step in an examination of how many of these witnesses are engaged in activities that could be manipulated by an intelligence service that, on the evidence and findings of the ICTY in the Limaj and Haradinaj cases, routinely manipulated evidence and put up false witnesses to testify.

In this case, we've got a fulcrum individual who is also involved with the Russian intelligence service. So we've got the RDB and also the FA --

PRESIDING JUDGE SMITH: Mr. Emmerson, we're getting way off base.

MR. EMMERSON: I'm sorry, I'm trying to answer the question how far the Prosecution's duty --

PRESIDING JUDGE SMITH: Well, I think we've gone far enough.

MR. EMMERSON: Fine.

PRESIDING JUDGE SMITH: Thank you.

It is time for a break and we will take a break at this time. Be back at 11.30. We'll reconvene at that time.

--- Recess taken at 11.00 a.m.

--- On resuming at 11.29 a.m.

PRESIDING JUDGE SMITH: I think Judge Mettraux had some questions. Go ahead.

JUDGE METTRAUX: I do. Thank you, Judge Smith.

And the first set of questions is for the SPO, so probably you, Mr. Halling. It has to do with the allegation in the indictment that there was at all relevant times and in all relevant places an armed conflict at the time; paragraph 18, 20, and 31 of your case.

Now, the first thing I would like to make sure that we're on the same page is that the armed conflict that you are alleging is one of a non-international nature; is that correct?

MR. HALLING: Yes, Mr. Tieger will be addressing this question, Your Honour.

MR. TIEGER: [Microphone not activated].

PRESIDING JUDGE SMITH: Microphone.

MR. TIEGER: Sorry. Good morning, Your Honours.

And, yes, the answer to your question is, yes, that is correct.

JUDGE METTRAUX: Thank you. That solves the first issue.

The second is this. The indictment doesn't appear to contain a specification of the time when you allege the armed conflict started, and that led the Selimi Defence to interpret your pleadings, which led them, and I think not unreasonably, to understand your case in that respect to be that there was a non-international armed conflict starting in March 1998.

So what we would like to know from you is whether that understanding of the Selimi Defence is indeed the correct one.

MR. TIEGER: Without any nuances, yes, essentially, that is correct.

JUDGE METTRAUX: And I will give a chance, of course, to the Defence to opine on that if they so wish.

The last question on this for you, Mr. Tieger, is about the end of the conflict. It seems to be the case that at least three of the Defence teams are not taking issue with the existence of such conflict, at least on what we have before us at this stage. They do seem to take issue, however, with the duration of the conflict. They seem to be taking the position that the conflict you alleged must have ended by June 1999; whereas, your case could suggest you go as far as September 1999.

And the question is this: Is whether your case is, indeed, that you are alleging an armed conflict up to and including September 1999; or, whether your case is that the conflict that might have ended earlier carried some legal or normative effect into September 1999? So, in other words, are you alleging and will you be proposing to establish that the conflict was still going on in September 1999, or are you saying something slightly different?

MR. TIEGER: Thank you for the opportunity to clarify that, Your Honour.

First, just so that that issue is not lost, we agree that there is some carry-over and normative effect when conflicts are, in fact,

concluded within the meaning of the law that provides protections for victims. However, it is our position that the conflict was not concluded until September 1999.

JUDGE METTRAUX: That's clear. Thank you, Mr. Tieger. I'll be back to the SPO.

But perhaps for the Selimi Defence first, and the other Defences. I'll come to you, Mr. Kehoe. We'll give the floor first to someone else for once.

MR. KEHOE: For sure.

JUDGE METTRAUX: But -- maybe the Selimi Defence first, and, Mr. Tully, I see you on your feet. If you could address any issue, of course, arising from the submission of the SPO, but also something slightly different but going to the same general issue, which is the apparent suggestion in your brief or your apparent questioning in your brief of the existence of a conflict in March 1998, and if, indeed, that is your case that there was no armed conflict at that point in time.

What we're interested in understanding from you is what normative body are you saying was applicable at that time? Let's say if there were incidents, attacks on police stations or other similar incidents at that time, what would be the body of law you would turn to to verify the legality of that, if you understand my question?

MR. TULLY: I believe I do, Your Honour.

For the beginning of the armed conflict, it is our case -- or it's our interpretation of the Prosecution's case that the conflict

did not begin in March. That is our stated position and that's our position today.

For us, Your Honour, the law, I don't believe, is really in dispute between all of the parties, and it was set out in the Pre-Trial Judge's Confirmation Decision, and this is a question of the threshold test. It's referred to in Article 14(2) of the Law, which reflected jurisprudence coming from the ICTY. And the two principles, if I can be very brief with them, are the organisation of the parties - specifically, in this case, which would be the KLA, as the non-state actor - and the second being the level of intensity which is required to reach the -- in the conflict before it can be determined as a non-international armed conflict.

And on that second point, Article 14(2) specifically points out the well-established point from the jurisprudence, which is that internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and acts of a similar nature do not qualify as a non-international armed conflict.

So to summarise it, essentially, Your Honour, is that all of the points beginning in March would be at this lower level of intensity. So it's basically a question of the threshold. So what we are challenging is the point at which the Prosecution says that threshold was crossed.

So if I can go a bit further with this. We didn't give any specific alternate date in the same way that the Prosecution didn't give any specific date for the beginning of the conflict because we

feel it's not for us to say that. It's not for us to give that alternate date.

What we do note, too, is that from the Limaj trial judgement it's very clear that any assessment as to the existence of a non-international armed conflict is assessed on a case-by-case basis, having regard to the facts on the ground.

But what we do say is Your Honours can take guidance from pronouncements from other jurisprudence on the matter. So we looked at the local cases, and specifically the ICTY jurisprudence, and the consensus is that it began more towards the middle of 1998. There are some that say April, some say May, and some that go as far as June. We found one outlier in the local cases that we looked at, and we submit that it should be ignored, if, indeed, it is relied upon as a persuasive jurisprudence. And that is from the Prosecutor v. Dejanovic and Bojkovic case of 27 May 2014 from the Court of Appeals in Kosovo. The case number is PAKR503/13. And at pages 18 and 19 it found an ongoing conflict between the KLA and the FRY from 28 February 1998 until June 1999 which, to put it mildly, Your Honour, is, in the face of the other jurisprudence, quite absurd.

The findings of the court in that case, especially looking at the references that they use, make it even more confusing. The line of the judgement, which says that: "This fact of the date of the" -- excuse me. That the date of the conflict is "common knowledge and needs no specific proof hereunder."

The court saw fit to refer to a web site form the US State Department last updated in 2001, I believe, which referred to the 1998-1999 crisis in Kosovo.

And besides the questionable nature of the source, it makes no significance of the date of 28 February as that court did. And confusing matters further, that same paragraph cites to District Court of Prishtine, the case P3710, in the case against FG, which relies on the jurisprudence from Haradinaj and Limaj. And that found that the conflict began at the end of April and May respectively.

The Court of Appeals further cited in the paragraph to Djordjevic which set the date as May 1998.

Now, to reiterate, we are not saying that Your Honours are bound by this jurisprudence. It is guidance to you. I don't wish to tell you something that you very clearly know already. But in our view, the reason I'm bringing this up, is that given this body of law there is a higher burden of proof on the Prosecution in arguing this conflict began in March 1998 as to why they are essentially swimming against the tide and effectively are saying that all of those judges are wrong.

As for your second question, what would be looked to, I believe it would be the applicable human rights law at the time, Your Honour, as well as the law applicable in that region of Serbia as it will have been then or the -- excuse me, the Federal Republic of Yugoslavia.

JUDGE METTRAUX: I'm grateful for your extensive answer,

Mr. Tully. And, of course, it's not for you to put a date on this issue. The only thing we're interested about is if and to the extent we were to be asked to assess the legality of certain actions that took place in February or, as you said in March, of 1998, the question in our mind is what body of law would we be asked to apply to that assessment.

And I'll give you a concrete hypothetical. But let's say there's an attack on a police station at a time when you say there was no armed conflict and, therefore, the laws of war were inapplicable, are we to assume that this attack, as you said a moment ago, is to be evaluated against local laws as they applied at the time in terms of the criminal nature of that attack?

And, again, I don't mean to put you on the spot on this. If you need more time to think about it, take the time you feel you need for it. And, as I said, it's not for you to make the case for the Prosecution. It's just that we want to be clear in understanding what your case is on that point.

And, Mr. Tully, you are suffering from a disease similar to mine. Apparently you are speaking too fast.

MR. TULLY: It always feels much slower when you're standing on your feet, Your Honour. I hope you can sympathise.

As for the body of law that the Court would apply at that point, I'd like to take that under consideration and refer to Your Honours. It's not something that I had considered having looked at the way the question was phrased in the order on the proceedings. However, any

of these crimes that are charged, if they are, indeed, to be charged by the Prosecution, would have to be set out clearly letting us know what, first of all, laws they see as applying to those crimes and, second, why the Court would have jurisdiction over those crimes.

And I'll leave it at that, Your Honour, if that's okay, unless there's anything further.

JUDGE METTRAUX: No, no, that's okay. I will now turn to Mr. Kehoe, or we might have the pleasure of hearing Mr. Misetic.

MR. KEHOE: Yes, I think at this juncture you will have the pleasure of hearing from Mr. Misetic on this score.

Thank you, Your Honour.

MR. MISETIC: Good morning, Your Honours.

First, I endorse what Mr. Tully said. I would add the following.

First, on the issue of armed conflict, the Prosecution bears the burden of proving the existence of an armed conflict beyond reasonable doubt. That is a holding of the Rutaganda Appeals Chamber, paragraphs 557 et seq. And so the question here is can the Prosecution prove that no reasonable trier of fact could conclude that there wasn't an armed conflict post-June 1999. And our submission obviously is based on all of the evidence and the prior jurisprudence here that they cannot meet that standard.

And the reasons for that are numerous. As I'm sure you've seen from our pre-trial brief, we have cited, first and foremost, the ICTY. And as Mr. Tully cited the holdings in several cases to you,

one of which is the Haradinaj retrial judgement at footnote 2039, the Chamber notes that the armed conflict in Kosovo ended in June 1999.

Now, just as importantly is, as I'm sure you're aware, the Office of the Prosecutor of the ICTY concluded that it could not investigate crimes committed in Kosovo after June 1999 precisely because there was no armed conflict. And so we have a situation where the prosecutor of the ICTY petitioned the Security Council, and that we have also referenced in our pre-trial brief, to change the Statute of the ICTY to give the ICTY jurisdiction to investigate crimes committed in Kosovo after June 1999.

And so if that's the case, the Prosecution's case here must be that the Office of the Prosecutor of the ICTY simply got it wrong. And not only did they get it terribly wrong, but that no reasonable prosecutor could have concluded what the ICTY prosecutor did, which is that there was no armed conflict in Kosovo in 1999. After June, I should say, of 1999.

And so the question that arises for the Defence is what is the Prosecution's position vis-à-vis the position of the OTP of the ICTY. Is it that this Prosecution has come up with new evidence that was unavailable to the OTP for ten years or more and that that now sheds new light on the existence of an armed conflict? If that's the case, we really should be focusing on that new evidence in this trial without having to go through everything de novo. Or are they simply arguing that the prosecution of the OTP just simply made an incorrect legal assessment of the applicability of or the existence of an armed

conflict at the time. We would submit that if it's the latter, that the OTP ICTY conclusion is, per se, reasonable doubt, and that there is no armed conflict post-June 1999.

With respect to the beginning of the conflict, we would -- I don't want to repeat what Mr. Tully said. I would just say and add that in the Haradinaj trial, one of the counts against Mr. Haradinaj was dismissed precisely because the incident was found to have occurred before 22 April 1998 and, therefore, that the court had no jurisdiction over it. So if the SPO is now moving the timeline back to March and the Jashari incident, in effect, what they are asking you to find is that in the Haradinaj case, the ICTY trial and appeal both got it wrong in dismissing that count on the basis that there was no armed conflict in that case.

So we submit that the authority coming from the ICTY is important to you in assessing the reasonable doubt standard and whether they can meet it in this case.

I would also add to further support our position, the Marty report itself in paragraph 3 states, and I quote:

"The international tribunal," meaning the ICTY, "was enjoined to try those suspected of crimes committed only up until June 1999, marking the end of the Kosovo conflict."

So there is a significant body of evidence. We've cited most of it in our pre-trial brief, and I won't repeat it here. But that will lead to another procedural issue that we intended to raise and Mr. Kehoe foreshadowed for you before, which is in an early

assessment by this Panel in the trial of the existence or non-existence of an armed conflict and a widespread or systemic attack, which I know is a question you're going to get to later, would, in effect, result in significant -- if you were to conclude there was no armed conflict early, and we understand from the Prosecution's pre-trial brief that they're relying mostly on documentary evidence to support the existence of an armed conflict, I believe there's up to four witnesses they intend to call of limited testimony on the existence of armed conflict post-June 1999.

If that evidence is heard early in the trial, and you conclude that they're not going to meet the beyond reasonable doubt standard of an existence of an armed conflict, there's a significant number of witnesses and documents that would not need to be called or introduced here that would save us a lot of time, rather than having to hear all of those crime base witnesses come in and then only for you to conclude at the end of the trial that you don't disagree with the ICTY's conclusions about the existence of armed conflict.

On your question of the applicability of which law would apply, let's say, in March 1999, we do wish to take instruction on that point. I agree with everything Mr. Tully said on that point.

I would also add it's a little bit -- it's not so straightforward. It's obviously domestic law would apply, but which domestic law is what we needed to consider. Obviously this is an institution of Kosovo, and so what we need to determine in light of certain positions that Kosovo has taken with respect to which law

applied - the 1989 law before autonomy was revoked for Kosovo, or whether the 1999 law and the law that Serbia had changed - we would need to take some instruction and do some research to see how the institutions of Kosovo today would review and assess which of those laws would apply, and we will certainly get back to you on those points.

JUDGE METTRAUX: I'm grateful, Mr. Misetic. But before you sit back down, may I also ask you about the point I raised with Mr. Tieger about the possibility of let's assume the Panel were to agree with your suggestion of a conflict ending in June 1999 of carry-over effects of that conflict from the point of view of international humanitarian law, of course, into September, is it something you've given some thought to and you're prepared to give us your position? If it's a matter you prefer to seek instruction for in the first place, I will give you that time, of course.

MR. MISETIC: Well, I would say, obviously, the crimes against humanity counts, if you were to find that there was a widespread or systemic attack that continued into September, then those counts would stay regardless of the existence of an armed conflict. But that is a point that, I think, in your outline for discussion today, that's another point that we're going to be addressing. So that's one point.

I wouldn't agree with Mr. Tieger's submission that an armed conflict, that international humanitarian law, with respect to war crimes, continues beyond the end of the armed conflict. It does

continue beyond the end of hostilities and until the end of the armed conflict itself. So if there is a conclusion, and I believe this is actually what the ICTY OTP concluded as well, is that once the armed conflict has concluded, then there is no basis to prosecute or investigate for the commission of war crimes.

So we would say that the practice and conclusions of the ICTY would be sufficient in and of themselves for you to conclude that there is reasonable doubt as to whether an armed conflict existed after June of 1999.

JUDGE METTRAUX: Thank you, Mr. Misetic.

MR. MISETIC: Thank you.

JUDGE METTRAUX: Mr. Emmerson.

MR. EMMERSON: First of all, there's nothing between the Veseli Defence and the submissions that have already been made, there's no dispute at all. We take exactly the same position.

It is necessary for the Trial Chamber, or will be necessary at some point, for the Trial Chamber to determine the bookends of an armed conflict, because that is the period during which the law of war is applicable.

As regards events occurring prior to that time or after that time, clearly there is a domestic law regime in place during those periods which, as Mr. Misetic has indicated, would mean that if you were to find that there was a widespread or systematic attack on the civilian population and that those crimes formed part of that, then theoretically those crimes, if the conduct would be potentially

evidenced or within the crimes against humanity, but none of this is charged on the indictment. There is no charge of domestic criminal law on the indictment, and it would therefore fall entirely outside this Court's jurisdiction.

As far as the bookends are concerned, this is just for Your Honours' references. A number of dates have been postulated. I just give you the reference for the sake of the transcript. In chronological order of the judgements, in the Limaj judgement, which was issued on 30 November 2005, at paragraph 171, the Chamber was satisfied that by the end of May an armed conflict was in existence. That doesn't obviously say definitively when the Trial Chamber thought it began, but by the end of May was the date given in Limaj.

In the first Haradinaj trial judgement, which was issued on 3 April 2008, paragraph 100, and -- I mean, that needs to be read with some care. There was a charge on the indictment, I think it's been mentioned, dated 18 April, and there was a charge on the indictment dated some days after, I think it was 23 April, and a great deal of evidence was directed to the growing post-Jashari, the Jashari compound attack, and post the attack by Serbian forces on the Haradinaj compound on 24 March. There were sporadic instances of increasing intensity in the western region. And in that context, the court, at paragraph 100, concluded that there was an armed conflict in existence by the time of the second count, that's at the 23rd, because by that time it had come into existence, but at the time of the 18th, it was not. In other words, focused in quite closely on

the events as they were intensifying in the Dukagjin zone on the western side of Kosovo, the court concluded within quite a narrow window that that was the tipping point.

Now, that may be Dukagjin-focused, and we would certainly not dispute the proposition put forward on behalf of Mr. Selimi and Mr. Thaci that other trial chambers have put it later in the summer, but it's certainly, we would submit, cannot be before 22 April - cannot be. And here it's worth recalling the principle of legality, the applicability under the Statute of this Court of Article 7, and the need to have legal certainty and consistency.

That doesn't mean, of course, if widely different evidence is adduced that wasn't adduced in those proceedings that a different conclusion couldn't follow. But that's quiet a specific not before date on which the Trial Chamber in these proceedings can rely subject to there being anything that the Prosecution is able to point to other than a second try or another bite of the cherry in these proceedings which would point to a different conclusion.

In Milutinovic, that's 26 February 2009, at paragraph 841, the conclusion was that the armed conflict had come into existence no later than the summer of 1998. So that wasn't as specific.

In Djordjevic, judgement 23 February 2011, it had come into existence by the end of May 1998. That's paragraph 1579. So that is in accordance with the Limaj trial chamber finding.

And in the Haradinaj retrial, it was an agreed fact between the parties, presumably in light of the -- well, I say presumably, I was

there, so it must have been in light of the earlier judgement that an armed conflict existed at all times relevant to the retrial indictment, which was a subset of the original indictment and did not, therefore, include anything before that date. So it wasn't necessary for the retrial chamber to go into a deep tissue analysis because it was concerned with events significantly later, by which time it was clear that an armed conflict had come into existence.

So as for the beginning, we would say the balance of authority on the evidence called in those cases points towards the end of May, beginning of June, that sort of time. The outlier being Haradinaj, which points toward a very specific date between the 18th and 23rd April. But that, as I say, has the capacity to be analysed through the prism of an armed conflict within a region of Kosovo. Namely, the border with Albania.

So the weight of the authority overall points to June, but it cannot, we would say, consistent with the principles of legal certainty, legality, and non-retroactivity, in the Article 7 sense, be any date before 22 April, and that does have implications for this case because there are a number of instances which are on the indictment which, in reality, are --

JUDGE METTRAUX: Go ahead, Mr. Emmerson.

MR. EMMERSON: Which in reality are outside the purview of the war crimes indictment allegations and for other reasons we'll submit are not capable of constituting crimes against humanity when we come to consider the question of widespread and systematic in a short

while.

So, at the other end, very briefly, just to recall: 3 June, President Milosevic accepted the international peace plan and agreed to end fighting in terms passed by the Serbian parliament. So the agreement to end the conflict was officially endorsed on 3 June.

On 10 June, the North Atlantic Council ratified the Kumanovo Agreement and suspended air operations, so the UN Security Council also on that date, 10 June, adopted Resolution 1244, deploying an international -- a civilian and military authorities to Kosovo.

And on 12 June, NATO forces entered Kosovo.

By 20 June, all Serbian forces had withdrawn from the territory. And whilst there may have been skirmishes after that date, they are -- not across the border in one way or another. They are, we would respectfully submit, not of an intensity or organisation that could constitute the continuation of an armed conflict. I am leaving, in parenthesis, Your Honour's question about a sort of lingering effect.

I can say that our position, subject to what may be argued by the Prosecution and not having seen the way it is put, is that the distinction, as always, is going to be between war crimes and crimes against humanity. As far as this indictment is concerned, war crimes charges necessarily cease when the conflict ceases to exist. As far as crimes against humanity, that is the only lingering effect, we would respectfully submit, that is catered for by crimes against humanity but only in a case where there's a widespread and systematic

attack by the protagonist in that event on a civilian population. And for reasons we'll come to, we respectfully submit that proposition is unarguable.

JUDGE METTRAUX: Stay on your feet, Mr. Emmerson. I think Judge Barthe has a question for you.

MR. EMMERSON: Sorry.

JUDGE BARTHE: Thank you, Judge Mettraux.

Actually, I wanted to seek some clarification from Mr. Misetic, but maybe I can also come back to you, Mr. Emmerson, after I have sought some or got some clarification.

But it pertains to the same issue you just raised, Mr. Emmerson, and you also raised in your submissions, Mr. Misetic.

My question is, and I come back to what Judge Mettraux called the normative effect or carry-over effect of probably international humanitarian law. My question is simply this: Assuming that a person is, be it legally or illegally, detained before the end of an armed conflict, and assuming that that person is still detained after the end of the armed conflict, is your submission that that person loses the protection under international humanitarian law?

MR. MISETIC: We would submit that clearly under existing law they would have protection beyond the cessation of hostilities.

On the very specific point now that you're raising of if there's a definitive end to the armed conflict that's been concluded, I would have to research that very specific point. I can't give you that exact answer right now. I'm not sure how many of those people are

actually in this case, but I will certainly get back to you hopefully by the end of today.

JUDGE BARTHE: Thank you, Mr. Misetic. I was just speaking hypothetically.

Maybe Mr. Emmerson would like to comment on this as well. I don't know.

MR. EMMERSON: Yes, we've dealt with a related issue in our pre-trial brief, and perhaps you'd care just to, after the hearing, have a look at the section relating to detention as a crime.

Our position, and it's supported by the UN Working Group on Arbitrary Detention, is that detention of an individual for security reasons is not a crime for the purposes of humanitarian law, but -- and particularly in the context of non-international armed conflict that is where the finding is made. Now, that's obviously an issue that will need to be -- potentially need to be litigated anyway.

But if we are right about that, then it wouldn't have been a crime before or after cessation of hostilities.

JUDGE BARTHE: Thank you very much.

JUDGE METTRAUX: Any additional comment from the Krasniqi Defence on that issue?

MR. ELLIS: No additional comment, Your Honour. We support the submissions that have been made.

PRESIDING JUDGE SMITH: Thank you, Mr. Ellis.

Mr. Halling, anything in response at this stage? And, again, if you choose to -- or Mr. Tieger, I apologise. That you wish to add at

a later stage, you should, of course, be free.

But one point that's been made, and I was to ask you the same question in relation to the crimes against humanity counts that we're coming to in a second is, is it your position, in general terms, that you have new evidence that wasn't at your disposal in your previous capacities at the ICTY to demonstrate a broader, longer conflict than was found to exist at the ICTY; or, is it that there's a broader geographical picture taken in this case that should lead to a different conclusion; or is it, as some of the counsel have suggested, in effect a suggestion on your part, that the ICTY got it wrong?

MR. TIEGER: Well, let me take -- thank you, Your Honour.

Let me take an overarching approach to the issue you just raised, because it applies to both the commencement date for the conflict and the concluding date as well.

And that is it's not the position of the Prosecution that the previous judges got it wrong. It's the position of the Prosecution, as the Court is well aware, that the determinations in those cases, the findings that the court made, were based on the facts adduced in that case, and the analysis of those facts was, in turn, informed by the issues presented in that case and are limited in that way to those cases.

In terms of the, for example, the position of the Prosecutor, I don't know that document. I don't happen to know. I don't think anyone else in the courtroom actually does, unless it's Mr. Misetic,

on what purported facts that determination was based. But there's been reference to a number of cases and to a number of different dates, all of which underscore the point I've just made: That those are limited to the facts of those particular cases and the reasons or the context in which those facts were considered.

For example, the Milutinovic case was raised which made a broad kind of assessment that not later than summer. Well, that was in the context of a case where the indictment didn't allege any armed conflict, so they made some observation based on evidence that wasn't necessary to be led and reached a conclusion that wasn't necessary to the determination of the case.

In Djordjevic, the charges concerned crimes from January to June 1999. And I would suggest again that the evidence produced in relation to that indictment would be different than one would expect in a case where the issues were different.

Limaj was also raised, and that's also interesting. Limaj, as the point was fairly made, found the existence of an armed conflict from no later than, or at least by the end of May. And that was in the context of a case when the -- in which the indictment alleged an armed conflict from May. But in making that determination and pointing out why the armed conflict clearly, and beyond a reasonable doubt, existed by that time, the Limaj judgement looked back to earlier events and noted sporadic attacks in 1997, and then also noted and emphasised attacks in late February and early March that internationals had observed marked a turning point in the development

of the conflict in Kosovo.

So if you're reading into that case, you can see clear indications that the Limaj chamber considers that that was essentially, had they been forced to do so, when the conflict commenced.

And in connection with the turning point, I point you to the Thaci Defence, pre-trial Defence brief in paragraphs 37 and 38, where they refer to the escalation in response to the earlier sporadic attacks that began in 1994. And as the evidence in this case will show, continued to intensify deeply into 1997, such that in September of 1997 the KLA in one day launched a synchronised attack on 12 different sites, 12 different police stations in various geographic areas.

But, again, the Thaci Defence referred to the weaponry and the military attack in January and February in which 24 civilians were killed and hundreds tortured, according to their brief. And then in paragraph 39 begins, "Then a turning point," referring to events in early March.

And I'd also point you to the Kordic case, which very much mirrors this factual finding. In Kordic, to the best of my recollection, the court affirmed the trial chamber's finding that there was an armed conflict prior to April 1993, and what it looked to were events in January 1993 that very much resembled the events in January and February 1998 in Kosovo, as you read the account in that case.

As for the cessation of the conflict. I mean, that's been briefed, and you can find it also in addition in the Confirmation Decision. I would simply say briefly for purposes now that the Defence briefs seem to rely on the demilitarisation agreement, the transformation agreement, and so on, and commentaries and jurisprudence certainly urge caution in relying on such agreements for genuine historical reasons that are borne out in this case. And you will see evidence in this case of a KLA reluctance to disband, of a failure to comply with the demilitarisation and transformation agreements, and you will see evidence that as late as September 1998 there were reports of the Serbian forces massed on the border and a report about a Serbian general who was announcing that Serbian forces were still considering returning to resume the conflict.

Thank you, Your Honour.

JUDGE METTRAUX: Just maybe in a nutshell, Mr. Tieger. So what I get from your submissions, or one of the things I get from your submissions, is the Panel can expect, and the Defence should prepare for, you presenting evidence of the existence of such a conflict before the date suggested by, among others, Mr. Emmerson and into September. So you are intent on presenting evidence about these two, the beginning and the end period, that's obviously being questioned by the Defence?

MR. TIEGER: Yes, Your Honour. That's correct. Thank you.

JUDGE METTRAUX: And I have, in effect, a similar question in

relation to the crimes against humanity counts. So I don't know if, Mr. Tieger, you will be the one taking the issue again.

But the question, and I'm not inviting any submission on the merit or the evidence that will go to these issues, and I actually disincentivise that, if I can. But simply the question is again, there are two judgements that I'm sure the Defence will seek to rely upon at the ICTY that make a similar finding to the effect that no widespread or systematic attack was found beyond reasonable doubt to have existed in, of course, case-specific and with pleadings that might have been different from yours.

But the point we would like to understand at this stage is what is your position in relation to these findings? Are you again suggesting that they are not to be relied upon because they queued differently in terms of the geographical timeframe of relevance; or is it your position that another reasonable Panel, as we hope to be, could come to a different conclusion; or, again, a third possibility, are you saying that the ICTY got it wrong not once but twice?

MR. TIEGER: Well, thank you, Your Honour.

Well, first of all, I think it -- well, the first point I should make is that with respect to the Haradinaj and Limaj cases, that -- I don't remember if you explicitly noted those, but I think that's exactly what we're referring to, in fact, as it happened, the Haradinaj case did not purport to address widespread or systematic directly. Instead, it made a finding about the size of the population, which is another issue. Now, I know they're related, and

I can understand if we start parsing it out we begin to approach the same issue, but it's nevertheless a significant point.

The Limaj case found that there was not evidence to support the finding of a widespread attack but it found evidence to support a systematic attack. And, again, it too found that the population, that the evidence presented to it did not allow it to conclude that a civilian -- a nexus to the attack on a civilian population. So it was a slightly different formulation.

More importantly than all that and more overarching than all that, those cases, as I think is very clear when you look at them, are based on their particular facts and evidence, and you will be seeing a wealth of evidence that pertains to this issue that was not adduced in those cases. And just as a matter of framing, I think it's clear the cases are different simply based on scope.

A recurring theme in ICTY jurisprudence and other jurisprudence is the illuminating value of pattern evidence, which not only reveals crime base but has a great deal to say about policy, objectives, targets, command and control, and many other things.

To put it in a slightly different way, if you just look at one crime it may look completely isolated. If you just look at one particular site or two sites, it may raise some issues but still unable to resolve those. If you expand the scope to the proper geographic focus, and the illuminating factor is much different. So just as a starting point, we're considerably different from those cases, and the evidence adduced will be different.

JUDGE METTRAUX: Thank you, Mr. Tieger.

Anything from the Defence? And, again, I'm not inviting Mr. Misetic or any of the other counsel to go into the facts of the case. But any reaction on the submissions that have just been made?

MR. MISETIC: Yes, thank you, Judge Mettraux.

Just briefly, Mr. Tieger mentioned me in his submissions. I obviously don't have access to the prosecution of the OTP's internal assessments, but I do have access to the SPO's evidence for the existence of armed conflict. I have it in a spreadsheet, because it's listed in their pre-trial brief. And you can flip through that evidence yourself, but this is obviously all material, or most of it is material, available to the ICTY OTP.

A Human Rights Watch report, ICTY testimony of a certain witness in 2005, KFOR news conference in June 1999, Radio Free Europe reports. There's nothing here that is new evidence that the SPO uncovered after 2010 that would substantially impact the ICTY OTP's conclusions that there was no armed conflict.

So, again, our position is that the SPO must have considered the OTP's conclusions because they were so important. It wasn't just the judicial findings. It was the fact that an international criminal tribunal authorised by a Chapter 7 resolution of the Security Council to investigate and prosecute crimes concluded that it couldn't do it because there was no armed conflict. And this office of the SPO must have considered that and must have considered what are they going to bring to this Court to challenge those conclusions, or are they going

to simply say that the OTP of the ICTY was completely wrong, so completely wrong that you cannot find that their conclusions are even reasonable. And that's the standard that has to be met here.

With respect to the widespread or systematic attack. Obviously we believe that the conclusions of the ICTY are of some significance to you with respect to the non-existence of those elements necessary to prove crimes against humanity. But in particular, I would call your attention and dispute the conclusion that the Limaj Trial Chamber, in particular, only considered crimes in a certain geographical area. And beginning at paragraph 209 of the trial chamber judgement there, it does try to consider the crimes committed in that case in the context of, for example, a Human Rights Watch report about the overall commission of crimes in Kosovo. And then it concludes at paragraph 210:

"History confirms, regrettably, that wartime conduct will often adversely affect civilians. Nevertheless, the Chamber finds that even if it be accepted that those civilians of whatever ethnicity believed to have been abducted by the KLA in and around the relevant period were in truth so abducted then, nevertheless, in the context of the population of Kosovo as a whole the abductions were relatively few in number and could not be said to amount to a widespread occurrence for the purposes of Article 5 of the Statute."

So the question now is, and I'm sure that Mr. Tieger was alluding to when he says we have pattern evidence and a voluminous amount of evidence, what he's referring to is the cases that have

been prosecuted either at the ICTY or in the EULEX or the local courts in Kosovo, but at the end of the day you're going to have to do the math and see how many additional cases above the 150 that the tribunal in the Limaj case took into account, such that it is now a significant portion of the population of Kosovo.

And then the other thing I would point out with respect to systematic, if I may. Just a second. The Chamber there also concluded though, with respect to systematic, that there was no attack directed against the civilian population per se, but it -- this is at paragraph 215. It was -- the finding there was that the persons targeted were those perceived to be collaborators but "the KLA evinced no policy to target civilians per se," and so that would go into the assessment of whether the Limaj trial panel found a systematic attack against a civilian population.

Thank you.

PRESIDING JUDGE SMITH: Thank you, Mr. Misetic.

Mr. Emmerson, anything to add?

MR. EMMERSON: One or two relatively short comments.

First of all, perhaps I'm stating the obvious, but in the light of the discussion that we have just had previously concerning beginning and end dates, this is a really important point. Because if there is no reasonably arguable basis for the Prosecution to allege a widespread or systematic attack, then crimes against humanity will fall from the indictment, which, as we submit, means that the Trial Chamber in this case on the indictment as it is has

no, in reality, substantial jurisdiction to deal with events outside the bookends of the armed conflict because there were no charges that can sensibly reflect that.

And I don't know to what extent that may have motivated the decision to swim against the tide on the part of the SPO, but -- so the way that Mr. Tieger put it isn't entirely accurate as far as the findings of the trial chambers in Limaj and Haradinaj are concerned, neither of which were appealed by the prosecution in the ICTY. Even though, in the case of Haradinaj, there was an appeal limited to certain particular counts, the Prosecution never sought to argue that the trial chambers had got this wrong.

And the evidence base is no different fundamentally. I accept that you will need to compare, if the Prosecution really pushed this, you will need to compare the evidence that they've adduced with the evidence that was adduced in Limaj and Haradinaj.

But when Mr. Tieger made the submission to you that the trial chambers in those cases were only focused on the crimes on those indictments and it's very important for this Trial Chamber to look at the pattern, I'm afraid that misrepresents the exercise that was undertaken in both of those cases.

In addition to the passages your attention has been drawn to, in the Limaj case, paragraph 228, it's very clear where the trial chamber indicates that there was:

"... the Chamber finds that there was no attack directed against a civilian population, whether of Serbian or Albanian ethnicity. In

the required sense discussed earlier in the judgement, it has not been established by the Prosecution that the acts of the three accused which are alleged to constitute the crimes of humanity charged ... in the indictment were part of a widespread or systematic attack ..."

So no civilian population targeted, no widespread or systematic attack. That is the pattern against which the trial chamber examined the counts on the indictment. Mr. Tieger was seeking to persuade you it was the other way around. They were looking at the counts on the indictment and asking whether they amounted to a widespread and systematic attack. It's perfectly clear that the court had everything available to it to examine the conduct, policy, and alleged crimes committed against civilians anywhere in Kosovo at any point during the relevant indictment period.

Now, we're dealing with Haradinaj and Limaj, two quite separate areas of Kosovo. And in each case, they need to look at the whole of the picture. So certainly the finding in Limaj unequivocally is that there was no evidence that the KLA was engaged in a policy of attacking a civilian population. That wasn't what it was about. Whereas, and I'm not going to traverse into it, that was the distinction in the Milutinovic and Djordjevic cases because that was, said the court, exactly what in those cases the Serbian -- combined Serbian forces were about but the KLA was not. And that's one of the factors in asymmetrical armed conflict that's going to loom very large in the course of the evidence in this trial.

In Haradinaj, the court went further on the same evidence. And this is paragraph 122. I won't read it out. But the court's conclusion there was that there was no attack similar to Limaj on a civilian population, so it wasn't even necessary to ask the question whether it was widespread or systematic, because it wasn't an attack on a civilian population in the first place, which, in a sense, is the concomitant of the reasoning in Limaj.

So two trial chambers looking at the whole of the evidence that the Prosecution is seeking to rely on come to the conclusion that it wasn't KLA policy to target a civilian population. Now, that places extremely clear, focused, and a definable burden on Mr. Tieger to explain what it is not just in general terms talking about patterns. Patterns were as much an issue there as they are here. But what it is that he says distinguishes these cases from those.

And, once again, we have to think about the principle of legality, the crime of legal certainty. Of course, the evidence base may make a difference. But unless he is able to identify the difference, and Your Honours are able to assess it and come to the conclusion that it requires an entirely different approach, we are wasting this Court's time, money, and resources with allegations that not just map over. It's not the situation where they are either war crimes or crimes against humanity within the same period, because if that were the case it wouldn't necessarily, other than legal time, take up a huge amount of court time that was going to be wasted.

But in this case it does, because if a Prosecution is permitted

to continue with the crimes against humanity allegation against all of the evidence that this is not what the KLA was about. Whatever it was about, it wasn't about that. We are going to be trying events way beyond the bookends of an armed conflict for no reason.

So these two points then dove-tail very significantly in the case management issues that face this Court, because if the Defence is right -- and it's notable, with great respect to Mr. Tieger, that that was not the clearest of responses, and it didn't properly characterise the authorities. And with respect to the SPO as a whole, they have no clear plan on the presentation of their case, and certainly not chronologically, which is what would be directly impacted by a ruling that the bookends are the bookends of this trial.

And so I simply lay the point there that we are potentially going to be sitting -- I mean, this is not quantifiable, but this is --

JUDGE METTRAUX: We got the point. Thank you.

Mr. Ellis, any further submissions?

MR. ELLIS: No, nothing to add, Your Honour.

JUDGE METTRAUX: I have a few more questions for the SPO. This time on the issue of -- Mr. Tieger, I suppose you want to add a quick word in response to the response.

MR. TIEGER: Well, I understand that the Chamber wants to move on from this point, but I do have to address at least one point, and that was the point that Mr. Emmerson made and Mr. Misetic made

alleging that the finding in Limaj that I am ignoring was that there was no policy and it bears on the -- no policy that bears on the issue in this case.

In fact, the Limaj indictment alleged a widespread and systematic attack against Serbian civilians and against Albanian collaborators. And the Limaj chamber dealt with that separately. They made a finding that there was insufficient evidence to show a widespread or systematic attack against civilians per se, meaning the Serbian civilians, and then they went on to say, in paragraph 216:

"The Chamber accepts that there was evidence of a KLA policy to target perceived Kosovo Albanian collaborators."

And in paragraph 217:

"However, the effect of the evidence is to indicate that the KLA had a policy of targeting those who were believed or suspected to have ties with the Serbian regime," people who were called traitors or so on.

And it went on to note: The existence of the Llapushnik prison camp itself "demonstrates the coordinated and organised nature of the targeting of suspected collaborators."

So I think that point needs to be made. Forgive me for rising again, but I didn't want to let that go unanswered.

JUDGE METTRAUX: No need to be forgiven, Mr. Tieger. That's your responsibility. But it's quite clear what the issues, I think, are that the Defence is taking issue with, so we are all on notice of that.

Moving on now to the issue of command responsibility. And perhaps briefly, I have three questions in relation to the case that you make or allegations that you make in respect of all four of the accused, and it's really to try to clarify your case on those. Again, if you feel that these are issues that you would prefer to advise on later, we'll grant you the time to do that, but they are questions that are in our mind.

So the first one has to do with an understanding of how you plead your case in relation to the four accused in terms of how they relate to each other. In other words, are you alleging that any of the four accused was the superior of any of the others, or is your case instead that they are each responsible for their respective subordinates and there's no allegation on your part of subordination between the four accused?

MR. HALLING: Thank you, Your Honour. I'll address this issue.

In relation to your question, the way the case is pled, each of the accused is found to have effective control, in our submission, over all of the direct perpetrators of the crimes in the indictment. And so the indictment alleges that the accused exercised effective control over JCE members and tools. That is a defined term which includes the accused and is set out in paragraphs 55 to 57 of the indictment, in the corresponding parts of our pre-trial brief.

What we are intending to prove is that each of the accused had authority over the entire KLA/PGoK's structures and effective control over those who committed the charged crimes.

In relation to the accused's authority over each other, what we have pled is what applies across the entire indictment period, even though the accused have different levels of authority, including over each other, as the indictment period goes along. And we are going to elicit evidence on that. In particular, by virtue of their positions in the Provisional Government of Kosovo, there are charged crimes where accused had the requisite authority to prevent or punish crimes committed by each other. So this is our case and it is part of our case.

The last point that I would say on this, though, is that the issue raised by the Trial Panel relates to a factual assessment of how the KLA/PGoK is organised. It's actually not a point on which our case necessarily depends because regardless of the accused's level of effective control over each other at any given point in the indictment period, each accused had effective control over the direct perpetrators throughout the period and, therefore, can all be convicted under a theory of command responsibility.

JUDGE METTRAUX: Well, you've answered my second question at the same time, Mr. Halling, so I'm grateful for that.

The third one, if I may, has to do with paragraph 55(b) of the indictment. And giving you the time to get to it, if necessary. But that is a general allegation that, again, you make in respect of all four accused, that among the failures you attribute to them is a failure, and I quote, "to report information about the commission or possible commission of crimes by JCE members and tools to appropriate

authorities." And the words I'm interested in here are "to appropriate authorities."

Who do you say under your case are those authorities they should, and you allege they didn't, report to?

MR. HALLING: Yes, Your Honour. And just to make sure I follow. I understand this to be paragraph 57(b) of the indictment? This is what you're referencing?

JUDGE METTRAUX: You're right.

MR. HALLING: Yes. So the answer is the responsible authorities within the KLA that are responsible for disciplining soldiers and punishing offences. It also -- and this is actually stated clearly in our pre-trial brief, I can give you the paragraph, it is paragraph 712(d), "that each accused had the ability to report the information about the commission or possible commissions of crimes to appropriate authorities either within the structure they themselves created or outside the KLA."

So outside the KLA in particular would be the international authorities that come into Kosovo in June 1999. This is also an available authority that the accused could have reported offences to either during the time that the international forces were there or for crimes committed before their arrival.

JUDGE METTRAUX: You invited a follow-up question, Mr. Halling. Do you have any precedent for your -- the last part of your answer? In other words, the suggestion that a superior, assuming they are, would have, under doctrine of command responsibility, a

responsibility to report to third parties? And, again, I don't mean to put you on the spot, if you -- I just know your encyclopaedic knowledge of these things. So if you have a reference, I'd be grateful for it; if you don't, I'd be grateful for you looking for it.

MR. HALLING: Yes, I can give an answer now. And then if Your Honour is interested, we can come further with further authority if you are interested.

So to focus on the Popovic appeals judgement, and this would be paragraph 1929, this is talking about the responsibility of referring things to appropriate authorities when the commander knows those authorities are non-functional. There is going to be a lot of discussion in this case as to whether there was a KLA legal department that could be a responsible authority for committing crimes, and it's going to be our case that they are non-functional.

And what they say in Popovic is as follows:

"If the superior knows that the appropriate authorities are not functioning or if he knows that a report was likely to trigger an investigation that was a sham, this entails that such a report would not be sufficient to fulfil the obligation to punish offending subordinates. It does not mean that the action of reporting becomes impossible in the circumstances."

So it is not available to the commander to simply throw their hands up and say, "Well, there's no place that I can go with this." There must be some way of reporting these offences to discharge their

responsibility if there is an authority available. In our submission, these international forces qualify.

JUDGE METTRAUX: I'm grateful.

Anything, Mr. Kehoe?

MR. KEHOE: Yes, Your Honour. We will split our very brief comments between me and Mr. Misetic.

With regard to the last issue that you raised on paragraph 57(b). Of course, what is not taken into account anywhere in this indictment and in the recitation that Your Honour just heard was that as of June 10th, with the resolution from the UN, 1244, that the entire body of law within Kosovo had been taken over by the UN. So they were the ones responsible for law and order.

Here, they are trying to usurp that authority, ignore the fact that the UN was actually in control come June 10th. Of course, KFOR came in a few days later, there was a demilitarisation order, but the UN resolution was quite clear. That the UN was -- as a Chapter VII Resolution, that the UN was in charge.

Now, where does that fit in to this responsibility to take care of subordinates or to report crimes when yet another legal authority is in place? And that is the convoluted, if you will, indictment that we have before us, and that doesn't take that into account at all. That kind of plays into, of course, the first issue on the armed conflict, but those two issues with UN Resolution 1244 and the ability or inability of anybody else to do anything given the fact they didn't have legal authority is also tied into the continuation

of the armed conflict.

And regard to the effective control and command responsibility issue, I'll turn to Mr. Misetic.

MR. MISETIC: Yes, Judge Mettraux, I just wanted to reserve, in light of the submissions by the Prosecution, an objection on notice because to the extent that the Prosecution is, in fact, arguing throughout the indictment period that each of the accused has command responsibility over each of the other accused, as you very well know, one of the elements of command responsibility is superior-subordinate relationship. And we should be given notice of which of them is the superior and which of them is the subordinate at various points in the indictment period, which I don't think it can be left to just saying that they're all each other's superiors and all each other's subordinates for purposes of command responsibility, to the extent that we understood their submissions correctly. So there is an objection on notice.

I wanted to also just note, without getting into it, I have an answer for Judge Barthe. I'm ready to address it whenever the Panel believes it's the appropriate time to address it, but --

JUDGE METTRAUX: Please do now, Mr. Misetic.

MR. MISETIC: We accept the proposition as found in Additional Protocol II, that persons who were detained in connection with the armed conflict would continue to enjoy protection in the sense that they're required to be released at the conclusion of that armed conflict and would, therefore, continue to be protected.

But in this particular case, that's obviously a significant distinction between someone who was detained prior to June 20th and then any actions that arose after June 20th is what our arguments are about. Thank you.

JUDGE METTRAUX: Mr. Emmerson.

MR. EMMERSON: Yes, if I may.

So if I can just address the question of superior-subordinate relationships within the context of the point the way the matter has just been put.

Obviously for command responsibility to arise, there has to be a superior-subordinate relationship, there has to be knowledge of the likely or actual commission of crimes, and there has to be a failure either to prevent them from occurring or to take the reasonable appropriate steps to secure accountability and punishment afterwards.

The category error that the Prosecution's approach to command responsibility suffers from is illustrated by the submission that's just been made referring to Popovic, referring to a command-and-accountability question in relation to an existing armed forces structure. This case isn't about that. It's about the creation of structures, such as they were, under fire when a war has already begun. In other words, the army did not exist before the war, it didn't exist in a practical sense of being large numbers of people operating.

It came into existence during the course of 1998, and we know that, at the very highest level, a legal department was created at

the end of 1998. But in terms of its operability and its ability to organise we know that not much was effectively achieved before the -- the NATO bombing campaign then created an entirely different scenario.

The reason I say that is because obviously in order to -- it's very similar to the question of armed conflict in this sense, that the degree of organisation within the KLA is something which was emerging and changing over time but was at an extremely rudimentary stage all the way through. And I just want to, if I may, just to trace the way in which that's been approached in the ICTY --

JUDGE METTRAUX: No need to go into that detail, Mr. Emmerson. We will have plenty of time to do that, I think.

MR. EMMERSON: Yes.

JUDGE METTRAUX: Just on the two points in the indictment that counsel were asked about. The rest will come in due course.

MR. EMMERSON: Yes, well, perhaps I can just sit down by confining myself to inviting you to note paragraph 566 and particularly 568 of the Limaj judgement in which the court found that a command responsibility doctrine simply couldn't apply. And in consequence of that, the SPO, of course, at the time Mr. Tieger was there, did not allege command responsibility at all in Haradinaj as a principle because of the degree of disorganisation.

JUDGE METTRAUX: And I apologise to you, Mr. Roberts, because I think I forgot you on the previous question, so I'll give you the chance now if you feel you need to add anything to what was said and

at the same time to address the issue of command responsibility, if you so wish.

MR. ROBERTS: Thank you, Your Honour.

Very briefly in relation to crimes against humanity. There was, obviously, very little I could add to what was already presented by my colleagues. The one thing that I would suggest is that it's not just Limaj and Haradinaj that found that there was no widespread and systematic attack. We've yet to find a domestic case where it was found that there was crime against humanity on the side of the perpetrators from the KLA during that period.

So it's not isolated ICTY cases. It's also supported by the various cases that were held before EULEX, UNMIK, and other Kosovo domestic courts. So it's not just swimming against the tide. It's swimming against an entire tsunami of other interpretations of that conflict.

So that's just a very brief point in relation to the crimes against humanity.

In relation to command responsibility, it was quite interesting from my perspective, and I echo very much what Mr. Misetic said about notice of the case in relation to accused having effective control and command responsibility over their co-accused.

I've read the indictment various times. I certainly did not perceive that to be the case of the Prosecution. It did not appear to be that case set out in the pre-trial brief. And there doesn't seem to be a clear explanation and presentation of how each accused

exercised effective control over the other accused. So I would suggest that if that is the Prosecution's case, there is significantly greater notice they would need to provide than that which has been provided already today. It's not enough to place us on notice to simply say, "Yes, that's our case." We need to know how, when, why, and, obviously, in relation to the pre-trial brief, exactly what evidence that's being relied upon in order to prove that.

So that's the first aspect in relation to command responsibility.

Secondly, the question of exactly what crimes are being alleged or our accused are being allegedly responsible for as a commander. And this is a point that I just wish to raise in relation to command responsibility, that obviously in paragraph 55 of the indictment, the Prosecution alleges that this includes not just commission but other forms of liability.

Now, it's our position that that's not true and that commission has to relate solely to direct perpetrators. Now, in an admission from Mr. Halling a few moments ago, my understanding is that their case is that we did have effective control over direct perpetrators, so it may be academic. But given paragraph 55 of the indictment, we just wish to lay our objection on the record that that's not what we consider the law to amount to.

Obviously, I'm not going to go into detailed submissions at this time, but that is the position of the Defence on this issue.

JUDGE METTRAUX: Thank you.

Mr. Ellis.

MR. ELLIS: Yes, Your Honour. Clearly not the occasion for detailed submissions on this, but we do share the notice objection that's been raised. It appears to be kept -- being kept deliberately vague who the Prosecution says had effective control over who as between the accused. If there is a case being advanced on that, let them say against which accused and in which time period and on what basis, because that was not our understanding from the indictment.

Beyond that, Your Honours, the issues on command responsibility are clear between the parties and we look forward to the evidence.

JUDGE METTRAUX: Thank you.

And, Mr. Kehoe, I had a last question for you, and you're going to be off the hook today so that we save a bit of time. May I put you on notice, however, that I will be persistent in my question, and I will be asking you at the next opportunity to address paragraph 45 and 61 of your pre-trial briefs, and in particular there are, I think, four references that are contained there in to a so-called horseshoe plan or operation. So for the sake of expeditiousness, I will not ask you the questions today but just be on notice that I will the next time.

MR. KEHOE: I can give Your Honour a brief overview and answer in detail thereafter if Your Honour --

JUDGE METTRAUX: I will say no, Mr. Kehoe, but thank you for the offer.

MR. KEHOE: Thank you.

JUDGE METTRAUX: And I will pass the floor to Judge Gaynor.

MR. HALLING: Your Honours, just before leaving command responsibility, could we say something about the notice question?

JUDGE METTRAUX: Please.

MR. HALLING: Yes, thank you.

PRESIDING JUDGE SMITH: We are running out of time here, so make it short.

MR. HALLING: Yes. In short, our indictment is we are obliged to plead material facts, and these are the facts that are indispensable for reaching a conviction.

As I said in my original submission, this particular question is not one on which our case depends, so we are under no obligation to plead them in this way. The question is one of whether some accused are the intermediate subordinates of other accused. And in the words of the Oric appeals judgement, this is paragraph 20:

"Whether the effective control descends from the superior to the subordinate culpable of the crime through intermediary subordinates is immaterial as a matter of law; instead, what matters is whether the superior has the material ability to prevent or punish the criminally responsible subordinate."

And that is our position. Thank you.

JUDGE GAYNOR: Thank you very much, Judge Smith.

I've a few questions for the SPO on the nature of the widespread or systematic attack against the civilian population of opponents.

I'll ask you the sequence of questions, and then I'll give the Defence an opportunity to speak.

So the first question for the Prosecution is, from your pre-trial brief, we understand that the SPO has referred to crimes allegedly committed against detainees who were, at the time that they were detained, members of the KLA. Now, is it the SPO's position that those detainees fall within the bounds of the civilian population of opponents?

MR. QUICK: Yes, Your Honour. The SPO's position is that the detained members of the armed forces, those who were *hors de combat*, by reason of their detention, were -- do fall within the civilian population of opponents, and this is pleaded in the indictment and it was confirmed in the Confirmation Decision.

The term "civilian population of opponents" is used in paragraph 16 of the indictment, which concerns the contextual elements for crimes against humanity. And the indictment goes on to allege in paragraph 17 that all acts and omissions charged in the indictment are charged as crimes against humanity were part of a widespread or systematic attack directed against opponents.

The acts and omissions charged in the indictment, as you note, include a limited number of victims who were members of an armed force. And in confirming the charges, and this is in the Confirmation Decision at paragraph 126, the Pre-Trial Judge acknowledged that a small number of the alleged victims among the civilian population of opponents were employed by or were affiliated

with the Serbian/Yugoslavian military or police. However, he concluded that they were not actively taking part in hostilities at the relevant time, and they were targeted because of their perceived opponent status. And for that reason, he found that they fell within the definition of opponents or they fall within the definition of opponents in paragraph 32 of the indictment.

The fact that such individuals may be victims of crimes against humanity, provided all other requirements are met, is settled law. As found by the ICTY Appeals Chamber in the Martic appeal judgement, and this is paragraphs 303 to 314, and reaffirmed in other cases and other tribunals, individuals who are not civilians may be the victims of crimes against humanity. And this includes members of an armed force or other persons who were *hors de combat*.

Of course, the status of the victims, and this goes to another question on the agenda, but, of course, the status of victims and the number of non-civilians among the civilian population are relevant factors in assessing whether an attack is, indeed, directed against a civilian population. The ICTY appeals chamber in the Blaskic appeal judgement, paragraph 115, has held that a determination as to whether the presence of soldiers within a civilian population deprives that population of its civilian character will depend on the number of soldiers as well as the circumstances of the soldiers at that time. And in that appeal judgement they referred to whether they were on leave.

However, once it has been found that an attack is directed

against the civilian population, the presence of non-civilians does not alter its character.

So the Prosecution's position is that those members of the armed force who were detained and who were *hors de combat* do fall within the civilian population of opponents.

JUDGE GAYNOR: My question focused initially on members who were members of the KLA at the time of detention. They were perceived traitors, according to the allegations which you've set out in your pre-trial brief.

Do persons who are members of an armed force who are targeted because of their perceived status as traitors, do they fall within the notion of civilian population?

MR. QUICK: So I think there are some distinctions between the victims that might fall within the bounds of your question.

First, there are the alleged collaborators and the alleged traitors, and then there are also former KLA members who are also alleged to have been collaborators or traitors. And in relation to members of one's own forces or KLA members, it is unnecessary in the circumstances of this case for the Panel to reach a determination of whether they qualify as civilians. What matters in this case is if they are *hors de combat*, they are entitled to the same protections as any other person, the same basic humane treatment and guarantees.

And in relation to the collaborators or the alleged or perceived collaborators or traitors or sympathisers who were not members of any armed force, they are civilians and whether or not they are taking

active part in hostilities is to be determined on a case-by-case basis. But they would only lose their protections as civilians for so long as they were taking active part in hostilities.

I'm not sure if that was fully responsive or --

JUDGE GAYNOR: I do have a couple of follow-up questions.

MR. QUICK: Sure.

JUDGE GAYNOR: I am still interested in the concept of directing an attack against persons who happened to be soldiers at the time that they're detained, whether they are soldiers of the KLA or whether they are soldiers of the FRY forces. They are being targeted, as I understand it, from the indictment and the pre-trial brief, because they are either members of the attacking Serbian forces or because they are traitors. So they are being targeted. That is your allegation, I understand it. They are not incidental victims of an attack. They are the actual target of the attack.

So do soldiers or armed persons, if you like, at the time of detention, in those circumstances, still fall within the concept of a civilian population?

MR. QUICK: Yes, Your Honour. I think I now understand the main thrust of your point. And the answer is yes. The SPO's position is that members of the armed force who are victims in this case do fall within both the opponent group, as defined in paragraph 32 of the indictment, and within the opponent civilian population or were present among the civilian population and do not deprive it of its character.

For this, I think -- well, first, in relation to the indictment, when it's read wholistically, the definition of opponents in paragraph 32, with the allegation that all crimes charged in the indictment were allegedly committed against opponents, and the fact that the indictment includes certain members of the armed forces, demonstrates that it is part of the charges in this case. And the Pre-Trial Judge acknowledged as much when confirming it.

And, further, members of the armed forces were arrested and mistreated at the same locations by the same perpetrators and for the same purposes as civilian opponents who were detained and mistreated at these locations. Their interrogations and the treatment demonstrate that they were targeted due to their affiliation with the opposing force, their Serbian ethnicity, and/or that they were otherwise not supporting the aims or means of the KLA and provisional government.

JUDGE GAYNOR: You've led me on to another issue.

MR. QUICK: Sure.

JUDGE GAYNOR: And, again, we will give the Defence an opportunity to respond on this.

When you refer to persons who were targeted on the basis of their Serbian ethnicity, you have not alleged, in this case, that there was a widespread or systematic attack directed at Serb civilian population, but you have alleged that there was an attack directed at persons on the basis, among other things, of their Serbian ethnicity. So what exactly is the difference between the allegation you haven't

made, which is that there was a widespread or systematic attack against the Serb civilian population, and the allegation that you have actually made?

MR. QUICK: I think the key difference is that the allegation that has been made is that the widespread and systematic attack was against the opponent civilian population, and that opponent civilian population includes these different groups that are identified in the definition in paragraph 32. And that includes those persons who were perceived as or who were not supporting the aims and means of the KLA and provisional government, and that included persons of these ethnicities, such as persons of Serb ethnicity.

JUDGE GAYNOR: But I do understand from what we've received in your brief that certain persons were simply targeted because they were Serbs regardless of any connection to anything else. They were targeted in kind of an ethnically discriminatory manner. Is that your case?

MR. QUICK: Right. So our case is that would fall within the common purpose and within the scope of the opponents definition in paragraph 32, because along with that Serbian -- that discrimination or that targeting on the basis of their ethnicity, that also goes along with and doesn't foreclose the fact that they were also targeted because on the basis of that Serbian ethnicity they were perceived as being opponents.

JUDGE GAYNOR: Thank you. I'd like to give any members of the Defence who wish to do so an opportunity to respond.

MR. KEHOE: Your Honour, I must say that explanation was a tad confusing for me as to who is the individual who can be detained and not detained as part of the armed force.

The position of the Defence, as least for Mr. Thaci, is clear, that if you take an active part in the hostility, you are a combatant and you can be detained. Let's look at FARK, for instance. There was some degree of conflict between the KLA and FARK during that period of time. During that, could FARK be considered to be -- have an active part in the hostilities? Of course. Of course. And they can be detained. Can a collaborator who was collaborating with FRY forces during the course of this matter be someone who was taking an active part in hostilities? Of course, and they can be detained. That is crystal clear.

And I don't understand exactly people moving in and out. And, yes, there is some issues under the second protocol of people putting down arms and coming back in and taking up arms and what rights they don't have. But if you are taking active part in hostilities, be you part of FARK or be you part of another military unit or be you a collaborator, then you can be detained because you are a threat to the other side. That is clear.

What is not clear is how the SPO is evolving through this indictment to establish that.

JUDGE GAYNOR: Thank you.

Mr. Emmerson.

MR. EMMERSON: Yes. We would entirely endorse the way in which

it's been put on a practical basis on behalf of Mr. Thaci. And, indeed, in the Haradinaj case, the prosecution did include allegations of conflict between the two Kosovo Albanian forces, KLA and FARK, at one point. Although, based on -- the reality is that the two were eventually merged, but the trial chamber in that case pointed out and rejected that approach on the basis that members of FARK couldn't be a civilian population for the purposes of crimes against humanity, couldn't be included within a civilian population.

But can I just step back for a moment, because listening to the discussion and listening to the attempts from the Prosecution to explain their position, it seems to me, with respect, that the term "civilian population of opponents" is an oxymoron. It's a contradiction in terms. And indeed, it's not a legal concept at all. It's a hybrid between the first part, which is drawn from the test for crimes against humanity, civilian population, and the second part, opponents, which is drawn from the Prosecution's approach to the JCE, the object of the JCE.

But by putting them together, you create an oxymoron because people who have been identified or targeted because they are opponents do not fall within those who are targeted for the purposes of crimes against humanity. And, indeed, there are findings in all of the judgements we've discussed - Limaj and Haradinaj - when dealing with crimes against humanity, that people were being detained for a reason specific to them, not because they were part of a civilian population. That's a great deal in relation to detentions

of the reason why none of that was found to constitute crimes against humanity.

Fundamentally, any person participating in hostilities, whether they are member, and that's in inverted commas, of an armed force, which is complicated in the case of non-state armed groups in asymmetrical conflict, because how do you become a member, how do you cease to become a member, but anybody who is actively participating in hostilities on either side is not a civilian.

Indeed, the ICRC, Rule 5 of the ICRC Study on Customary International Humanitarian Law defines civilians as "persons who are not members of the armed forces." So you see why cobbling together civilian population of opponents is an oxymoron. If you are a member of the armed forces, you are not a civilian.

And that applies not just to people who have enrolled in an army and are being paid a salary by the government but also to civilians who directly participate in hostilities. Let's be clear here. All of the KLA were civilians directly participating in hostilities. They were DPH. This was not a state entity. They were farmers by day with guns by night.

And the same was true to some extent on the Serbian side. They were enlisted forces, they were paramilitary forces, but all Serbian civilians were issued with guns. So in answer to the question, does Serbian population of opponents include those who were members or, indeed, fighting for one side or the other, the answer is this is not a legal question because, at the end of the day, the term "civilian

population of opponents" is an intellectually self-contradictory hybrid that's been stitched together for the purposes of trying to enlarge the number of people who are on the indictment as potential victims. But it actually makes no legal sense and runs completely fundamentally contrary to the basic precepts of humanitarian law.

So I would strongly urge the Trial Chamber to require the Prosecution to reformulate that aspect of its case if the case is to be tried at all, because "civilian population of opponents" is a Frankenstein.

PRESIDING JUDGE SMITH: Thank you, Mr. Emmerson.

JUDGE GAYNOR: I don't know if the Presiding Judge wants to break, because Mr. Ellis or Mr. Roberts, if you wish to speak, perhaps we do so very briefly now, or we leave it until after the break.

MR. ROBERTS: Your Honour, I was merely rising to say that I had very little to add or nothing to add to the submissions that were already made. But suffice to say that I didn't really understand the answer of the Prosecutor and I'm no clearer as to what their position is. And so to further support submissions made by Mr. Emmerson in relation to that, I don't know what the case is in relation to this point, and I would welcome any further elucidation.

[Trial Panel confers]

MR. ELLIS: Your Honours, we also support for the same reasons. The core problem here is that the indictment is vaguely and badly defined on this issue.

JUDGE GAYNOR: And, finally, if Mr. Laws has anything to say.

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

JUDGE GAYNOR: Thank you. Then, I'll revert to the Presiding Judge. Thank you.

PRESIDING JUDGE SMITH: We'll go slightly over the time period. I know lunch is pending.

On the draft Order on the Conduct of Proceedings. We have received all your comments. We are considering them. We will enter an order next week. However, the Defence asked to discuss two issues. I don't know why you didn't just put it in the written proceedings, but who was it that wanted to -- was that you, Mr. Kehoe?

MR. KEHOE: Yes, Your Honour. Just two brief issues. One had to do with the Special Rapporteur and how it plays into the motion that we had filed before to take depositions and seeking some clarity on that score.

I should have probably been clearer, if you will, in my submission.

PRESIDING JUDGE SMITH: [Microphone not activated].

MR. KEHOE: Well, I understand, Judge. And upon reflection, I realised that we'd just sought some clarity on that score when it came to we file a motion, is that the Special Rapporteur, if Your Honour grants that motion, who will be the person to do that? Is that person one of the Trial Chamber's, et cetera. That was the additional question that I had.

PRESIDING JUDGE SMITH: I can tell you we hadn't considered that question yet. But now that we know what it is, we will.

MR. KEHOE: Yes, sir.

The other issue with regard to the actual witness protocol. If I can, I understand that when we were before you the last time we had the witness protocol pending before the Appeals Chamber. What they basically ruled was that the Pre-Trial Judge did not abuse his discretion. However, we are still back before Your Honour because we would seek a carve-out to talk to international witnesses.

As I told Your Honours the last time, I had been in contact with senior international witnesses, military witnesses who had agreed to see me. And, of course, I cut that off because the protocol order came down. And I certainly would seek a carve-out for some of those international witnesses, who clearly are not under threat and had agreed to meet with us in their -- the comfort of their home, his or her home, I might say, and for the Court to consider that, and what fashion Your Honour would like to address that.

That also dove-tails with the issue of whether or not the SPO cuts witnesses off their witness list, that they tell us promptly so that we can interview those people as they are no longer part of the protocol.

And one last issue, Judge, which I have, and this is something that I didn't put in but I just wanted to address. I understand, Your Honour, that English is the working language of the Court. I think my client has asked me to address, of course, we accept the

fact that, of course, when we are looking at Kosovo legislation, we would accept the English translation, but that the Court would be mindful of the Albanian translation of that legislation. There have been some issues concerning the legislation, certainly as it pertains to Serbian. But we would certainly accept, if Your Honour so rules, that English and Albanian be the interpretive languages -- should be the languages of the legislation that the Court interprets. And should there be any question, that those two documents be used to assess what the legislation actually sees.

PRESIDING JUDGE SMITH: Thank you.

MR. KEHOE: What it actually says, excuse me.

PRESIDING JUDGE SMITH: Thank you. We will break -- oh, Mr. Laws, go ahead.

MR. LAWS: Your Honour, forgive me. And I appreciate that I'm on borrowed time here. May I raise just one matter.

Your Honour has said, I think just a moment ago, that the Panel will issue an order or ruling in relation to the various submissions that have been made to the Panel.

May I just say this. So far as joint Defence submissions are concerned, the submissions that are made at paragraph 9 on page 3 about the participation of victims, and which continue over the next two pages, that they raise matters that are very fundamental to the question of victim representation. And I would, on behalf of the participating victims, ask to be heard in relation to those before the Panel makes a decision on them.

PRESIDING JUDGE SMITH: Are you suggesting you want to hear orally or you want to submit a document?

MR. LAWS: Either. Ready to do it orally today. Very happy to submit a document if that assists with the timings for today.

PRESIDING JUDGE SMITH: How long would it take you to prepare the document?

MR. LAWS: We could have a document prepared by very early next week.

PRESIDING JUDGE SMITH: [Microphone not activated]. I'm sorry, I was off mic. We will take that up during the noon hour and come back to you.

MR. LAWS: Yes. When I say "very early next week," by Monday.

PRESIDING JUDGE SMITH: Yes.

MR. LAWS: Thank you.

PRESIDING JUDGE SMITH: We will take the lunch break, be back here at 2.30. We will endeavour to be finished by 4.00.

--- Luncheon recess taken at 1.12 p.m.

--- On resuming at 2.30 p.m.

PRESIDING JUDGE SMITH: Mr. Laws, we kind of reconsidered your request right before lunch. Would you like to make your submission now orally rather than going through the process of doing it on paper?

MR. LAWS: Your Honour, we're entirely happy to do it either way. Happy to proceed now.

PRESIDING JUDGE SMITH: Feel free, you may proceed.

MR. LAWS: Shall we do that?

PRESIDING JUDGE SMITH: Yes.

MR. LAWS: Thank you.

Thank you very much for the opportunity to address this topic.

In the joint Defence submissions, the proposal is made of a modification to that which the Panel set out as its preliminary view of how victims participation should take place in this case, and it's a modification or a set of modifications which would have a very real impact on the ability of the victims to participate and on their representation by us. And it takes some careful reading to see why that is.

But in summary, what is proposed by my colleagues opposite is this: That the victims participating in the proceedings should notify the questions that they want to ask in the proceedings through me, Victims' Counsel, and that I then pass those questions on to the witness in due course but, more importantly, give you, the Panel, notification of the questions that they want to ask.

Now, from that first step, they then go on to say that as we, as Victims' Counsel, represent the victims as individuals, it becomes incumbent upon us to disclose the names of the victims on behalf of whom we ask questions. And so I hope the Panel can see already that there are two very important modifications to the proposals of the Panel.

One is that it's the victims who come up with the questions and we just act as a mailbox, passing them on to the Panel. And the

second is that, almost inevitably, the anonymity of the single-status victims, if I can call them that, those victims who are not witnesses, the anonymity has to be lifted.

And what I want to say in summary is that we strongly disagree with every part of this proposed regime. We say it is an ingenious and quite subtle attempt to stifle participation by the victims, but it doesn't reflect the reality of the practice of representing victims either at this Court or anywhere else. And what I propose to do, if I may, is to break it down into two component parts.

The first part is the issue of notification by the victims through us rather than us coming up with questions that we consider on their behalf to be appropriate. And if I may, I'll take you, first of all, to your own preliminary view of the matter, which is at page 9, paragraph 33, Participation of Victims.

What paragraph 33 is plainly attempting to do is to set up a sensible way of us, on behalf of the victims, giving notice of the issues that we wish to raise, and we can't disagree with that and we don't. And so what it says is that:

"Upon receiving the schedule of witnesses to be called by the SPO or the Defence, Victims' Counsel shall notify the Trial Panel and the other Parties and Participants of those witnesses which he wishes to cross-examine, with a general description of the issues or areas."

The Defence proposal is to be found on page 3 at paragraph 10 of their joint document, and it amends the wording in a manner that is, we say, as dramatic as that in which I have outlined it to the Panel.

It says this, that:

"Upon receiving the schedule of witnesses to be called by the SPO or the Defence, VPPs shall notify through Victims' Counsel the Trial Panel and the other Parties and Participants of those witnesses which they wish to cross-examine with a general description of the issues or areas of evidence in relation to which they wish to cross-examine each witness, including a brief explanation as to how," and so it goes on.

The second part of that we'll have to come back to, because the second part of paragraph 10 is the issue of VPPs retaining their anonymity when questions are asked. But I want to stay with that first bit, that it's the victims who notify the Panel through us of the questions that they wish to be asked and what those questions are.

We ask the question where does this scheme come from, and it's suggested that it comes from Article 22(6), but Article 22(6) is no authority at all for this radical change. We need to look at the wording quite carefully here too, because at paragraph 11 of the Defence submissions, what they have done is to -- quite inadvertently, but to rework Article 22(6) so that it carries a meaning that is consistent with their submission as to how this should work.

And so what it says at paragraph 11 is that:

"Pursuant to Article 22(6) of the KSC Law, victims are permitted to make representations via the Victims' Counsel."

That's the words that's used, "via the Victims' Counsel," and that chimes entirely with the scheme that's proposed, the victims notify you via us. But that's not what Article 22(6) says. It's nothing like Article 22(6), which has nothing to say about anybody doing anything via us. It says that:

"The Specialist Chambers may permit representations by Victims' Counsel on behalf of Victims during the pre-trial and trial proceedings ..."

And "on behalf of," we say, is a quite different term than "via." I can do something on behalf of someone without them knowing anything about it or having any input into it. Nothing can happen via me without the involvement of the person who is attempting to act via me, and that's a very important consideration.

So Article 22(6) is cited, but it's no precedent at all --

MR. EMMERSON: I was just going to say, listening to these submissions, and I check with my learned friends, we see the force of what is being said, and we are prepared to withdraw the way in which the amendment is put.

MR. LAWS: [Overlapping speakers] ... that's the whole of --

PRESIDING JUDGE SMITH: I'm sorry, you said you would withdraw your request?

MR. KEHOE: Yes, Your Honour.

MR. EMMERSON: [Microphone not activated].

PRESIDING JUDGE SMITH: You're withdrawing the request for --

MR. EMMERSON: I mean, the amendment that is proposed is

withdrawn.

PRESIDING JUDGE SMITH: Okay.

MR. LAWS: Well, if I take it that it's the whole of the proposed amendment, the entire scheme of it, then I'll sit down, but I'm not clear at the moment.

PRESIDING JUDGE SMITH: Is that correct, that the entire --

MR. LAWS: I've got two amendments in mind, not just one.

PRESIDING JUDGE SMITH: Withdrawn in its entirety?

MR. KEHOE: Yes, Your Honour. We -- going back to agreeing with Your Honours' proposals at the outset.

MR. LAWS: Thank you very much.

PRESIDING JUDGE SMITH: Thank you.

By the way, Mr. Laws, the pending applications for admission of victims participating in the proceedings will be ruled on by 15 February.

MR. LAWS: Your Honour, thank you very much.

PRESIDING JUDGE SMITH: We will now turn to our oral orders.

The first oral order, setting deadline for motion to amend exhibit list.

The SPO is ordered to file its motion to amend the exhibit list by 4.00 p.m. on 30 January 2023, with responses and reply following the time limits set out in Rule 76 of the Rules.

Second oral order, order on the deadline for other motions pursuant to Rule 117(2) of the Rules.

The parties and participants are ordered to file any motions

pursuant to Rule 117(2) of the Rules by 1 February 2023 at 4.00 p.m.

The parties and participants are ordered to file any responses to any such motions, if they so wish, no later than 8 February 2023 at 4.00 p.m.

The Panel will not entertain any reply.

The third oral order, setting deadline for motions pursuant to Rules 153 and 154.

The SPO is ordered to file its Rule 154 motion in respect of the first 12 witnesses by 7 February 2023 at 4.00 p.m.

The Defence and Counsel for Victims are ordered to file any responses to such motion, if they so wish, no later than 20 February 2023 at 4.00 p.m.

The Panel will not entertain any reply.

The SPO is ordered to file its Rules 153, 154 motion in respect of the following set of 12 witnesses by 15 March 2023 at 4.00 p.m.

The Defence and Counsel for Victims are ordered to file any responses to such motion, if they so wish, no later than 27 March 2023 at 4.00 p.m.

The Panel will not entertain any reply.

The fourth oral order, order setting deadline for applications for admission of victims participating in the proceedings.

Pursuant to Rule 113, paragraphs (1), (2), and (5) of the Rules, the Registry is ordered to file any applications for admission of victims participating in the proceedings by 15 February 2023 at 4.00 p.m.

The parties are ordered to file any submissions on legal grounds regarding admissibility and common representation, if they so wish, no later than 22 February 2023 at 4.00 p.m.

The Panel will not entertain any reply.

The fifth oral order, order setting deadline for motion on adjudicated facts.

The SPO and the Defence are ordered to file motions for adjudicated facts pursuant to Rule 157(2) by 1 March 2023 at 4.00 p.m.

Parties and participants are ordered to file responses to such motions by 3 April 2023 at 4.00 p.m.

Any replies shall be filed no later than 10 April 2023 at 4.00 p.m.

Sixth oral order, order setting deadline for motion pursuant to Rule 155.

The SPO is ordered to file its first Rule 155 motion by 1 March 2023 at 4.00 p.m.

The Defence and Counsel for Victims are ordered to file any responses to such motions, if they so wish, no later than 22 March 2023 at 4.00 p.m.

The SPO is ordered to file any reply, if it so wishes, by 29 March 2023 at 4.00 p.m.

Seventh oral order, order setting dates for Specialist Prosecutor Preparation Conference and commencement of trial.

Subject to any exceptional circumstances arising in the coming weeks, the Panel sets the date for the commencement of the trial to 1 March 2023.

The Specialist Prosecutor's Preparation Conference will be held on 17 February 2023.

Eighth oral order, order to SPO to provide revised estimate of the length of its case.

The SPO is ordered to provide, at the Specialist Prosecutor's Preparation Conference, a revised estimate of the length of its case and to illustrate the measures it took to try to shorten its case.

Ninth oral order, order granting extension of time for Defence response to SPO submissions on first 12 witnesses.

Having found the requisite good cause, the Panel grants the joint Defence motion request, F01204.

The Defence shall file the submissions providing information on SPO's first 12 witnesses no later than 13 February 2023 at 4.00 p.m.

This concludes the Trial Preparation Conference. I thank the parties and the participants and the Registry for their attendance. I also wish to thank the interpreters, stenographers, audio-visual technicians, and security personnel for their assistance, and I also thank the accused for being present in court at this conference.

Anything further, gentlemen?

MR. KEHOE: Yes, Your Honour, the issue -- of course, we are prepared to address the Serb crimes issue. I don't know if we talked about that, if you want to push that off to the --

PRESIDING JUDGE SMITH: I think we'll push that off today. All right?

MR. KEHOE: That's fine, Judge.

PRESIDING JUDGE SMITH: Thank you.

That concludes this hearing. We are adjourned.

--- Whereupon the Trial Preparation Conference at 2.46 p.m.