

1 Monday, 31 January 2022

2 [Status Conference]

3 [Open session]

4 [The accused not present]

5 --- Upon commencing at 9.30 a.m.

6 PRESIDING JUDGE SMITH: Good morning and welcome, everyone.

7 Madam Court Officer, please call the case.

8 THE COURT OFFICER: Good morning, Your Honours. This is
9 KSC-BC-2020-07, The Specialist Prosecutor versus Hysni Gucati and
10 Nasim Haradinaj.

11 PRESIDING JUDGE SMITH: For the appearances.

12 Ms. Bolici.

13 MS. BOLICI: Good morning, Your Honour. For the SPO, today we
14 have legal intern Helena Kruger. The remaining members of the SPO
15 remain the same.

16 PRESIDING JUDGE SMITH: Thank you.

17 Mr. Rees -- or Mr. Bowden. Who is speaking?

18 MR. BOWDEN: Your Honour will see that Mr. Rees appears
19 remotely. I am accompanied in court by Ms. Stephenson,
20 Mr. Joseph Bowden, and Ms. Wigmore.

21 PRESIDING JUDGE SMITH: Thank you.

22 Mr. Cadman.

23 MR. CADMAN: Good morning, Your Honour. I appear with
24 Mr. Soliman this morning.

25 PRESIDING JUDGE SMITH: Thank you.

1 Today we will discuss the next steps in the proceedings. On
2 Friday, we heard the last witness of the Haradinaj Defence. At that
3 time, neither Defence counsel was ready to close his case as a
4 Rule 102(3) matter was still pending.

5 The Panel wants to underline that a pending decision on
6 disclosure does not prevent the Defence from closing its case because
7 it does not pertain to calling additional witnesses or presenting
8 more evidence. This is consistent with our ruling on 8 November 2021
9 at pages 2030 and 2031 of the transcript. To permit a Defence case
10 to remain open for every possibility of future disclosure would make
11 progress in the proceedings unworkable.

12 That being said, in the current situation where a request was
13 already pending and given the very short deadline set by the Panel,
14 the Defence was permitted to have additional time before formally
15 closing their cases.

16 On Friday, 28 January, the Panel rendered a decision on the item
17 205, granting the SPO's request not to disclose this item.

18 Is the Defence ready to close its case at this time?

19 Mr. Rees.

20 MR. REES: [via videolink] Your Honour, no. Can I raise one
21 matter in relation to --

22 PRESIDING JUDGE SMITH: I can't hear you, Mr. Rees.

23 MR. REES: [via videolink] Oh. It was working moments before we
24 came into court.

25 PRESIDING JUDGE SMITH: Oh, I'm sorry. Hold on. We've been

1 through this before. Okay, Mr. Rees. Sorry.

2 MR. REES: [via videolink] Your Honour, you can hear me now; is
3 that right?

4 PRESIDING JUDGE SMITH: [Microphone not activated].

5 MR. REES: [via videolink] Very good.

6 Your Honour, there is one matter in relation to the decision
7 F00541. I propose a way forward which I hope means that we can deal
8 with this expeditiously, Your Honour.

9 I do seek leave to appeal that decision and/or a decision to
10 reconsider under Rule 79. In the first instance, can I deal with
11 timing.

12 I'm conscious that under Rule 9 of the Rules there is a very
13 large degree of flexibility afforded to the Trial Panel on timelines.
14 I'm also conscious that under Rule 75(2), there is a discretion of
15 the Trial Panel to allow oral submissions to take place on
16 submissions that are relatively short and not factually complex.

17 My proposal, Your Honour, is that I make an oral application for
18 leave to appeal that decision now. I can do so very quickly.

19 PRESIDING JUDGE SMITH: [Microphone not activated].

20 [Trial Panel confers]

21 PRESIDING JUDGE SMITH: [Microphone not activated].

22 That's your intention to appeal orally at this time; is that
23 correct?

24 MR. REES: [via videolink] Yes.

25 PRESIDING JUDGE SMITH: All right. And does the Prosecution

1 have a position on this?

2 MS. BOLICI: The Prosecution would object to the Defence request
3 for leave to appeal. We don't mind for them objecting orally at this
4 time.

5 PRESIDING JUDGE SMITH: No, I'm asking you do you have any
6 objection to them orally filing their motion at this time?

7 MS. BOLICI: No objection, Your Honour.

8 PRESIDING JUDGE SMITH: And, Mr. Cadman, do you?

9 MR. CADMAN: I have discussed this with Mr. Rees already. We
10 were seeking leave to appeal the decision as well.

11 PRESIDING JUDGE SMITH: You will join in that?

12 MR. CADMAN: I will, yes.

13 PRESIDING JUDGE SMITH: And will the Prosecution have any
14 problem responding at this time?

15 MS. BOLICI: We would like to have the benefit of hearing the
16 arguments of the Defence, and we were not provided any notice so I --
17 I believe we will not have any problem in responding at this time but
18 I would like to hear first. Thank you.

19 PRESIDING JUDGE SMITH: All right.

20 Now, before submitting your oral motion, is there anything else
21 you need to have decided?

22 MR. REES: [via videolink] No, thank you. I can make the
23 submission at this stage now, Your Honour.

24 PRESIDING JUDGE SMITH: Go ahead.

25 MR. REES: [via videolink] Your Honour, we seek leave to appeal

1 the following two issues.

2 The first issue: Did the Trial Panel err in refusing disclosure
3 to the Defence of material which, in their stated view, demonstrated
4 matters which were adverse to the Defence submissions on entrapment.

5 The second issue: In the absence of disclosure, was the
6 Trial Panel wrong to draw conclusions from the material which were
7 adverse to the Defence submissions on entrapment.

8 The two issues refer to paragraph 20 of the ruling F00541. By
9 way of background, both the Defence for Mr. Gucati and the Defence
10 for Mr. Haradinaj raised the prospect that item 205 may be capable of
11 demonstrating failures of the SPO to take adequate investigative
12 steps. The emphasis being on the word "may" because, as acknowledged
13 by both the Gucati and Haradinaj Defence, and, indeed, by the
14 Trial Panel, we hadn't of course seen item 205 or its contents. So
15 we simply drew the Trial Panel's attention to the possibility that
16 the material may be capable of demonstrating failures on the SPO's
17 part to take adequate investigative steps.

18 At the outset of paragraph 20, the Trial Panel observed that
19 item 205 did not contain any information or evidence that would
20 suggest any investigative shortcomings on behalf of the SPO.
21 Paragraph 20, however, did not stop there. It continued and
22 expressed the following conclusion on the material, that, in
23 particular, the interview of the third person by the SPO and the
24 questions posed by the SPO investigator suggest that the SPO is
25 taking investigative steps which appear to be reasonable and

1 professional in the circumstances, including the evaluation of the
2 credibility of the information received from the author of items 203
3 and from the individual interviewed in item 205.

4 That is a conclusion on material that the Defence have not seen
5 or been able to make submissions on which appears, on its face, to be
6 adverse to the submissions that have been and will be made on
7 entrapment. In the absence of the material, it is, frankly,
8 impossible for the Defence to understand the comments or put them
9 into any context.

10 I am conscious that in an application for leave to appeal, it's
11 not the position to argue that there was such an error. But the
12 Defence have consistently drawn the Trial Panel's attention to the
13 case of Edwards and Lewis in the United Kingdom before the European
14 Court of Human Rights, the judgement 27 October 2004, at page 17 in
15 particular, in which the European Court made it clear that the
16 accused ought to have access to all material that's put before the
17 tribunal of fact which may be relevant to the plea of incitement,
18 including material which may be adverse to the defendant's positions
19 on it. To order otherwise would not comply with the requirements to
20 provide adversarial proceedings and equality of arms and lead to a
21 violation of Article 6 of the Convention.

22 Those two issues, we say, are appealable issues. They are not
23 abstract or hypothetical. They derive directly from the decision.
24 They significantly affect both the fair and expeditious conduct of
25 the proceedings and the outcome of the trial, and immediate

1 resolution by the Appeals Chamber may materially advance proceedings.

2 We say that because we are at a critical point in the trial.
3 This is the last opportunity for the Defence to address any prejudice
4 that may arise from adverse conclusions drawn by the Trial Panel from
5 material that has not been shared with the Defence, and the Defence
6 have been unable to make any submissions on its content.

7 We do, therefore, seek leave to appeal the decision or, in the
8 alternative, we say that the Trial Panel could reconsider its
9 decision under Rule 79. That provides a power to reconsider where a
10 clear error has been demonstrated and reconsideration is necessary to
11 avoid injustice. We say that there is a clear error in the decision
12 in that the Trial Panel drew a conclusion from material which had not
13 been shown to the Defence which was adverse to its submission on
14 entrapment, and that reconsideration of the refusal to disclose
15 should be undertaken to avoid injustice of that conclusion being
16 allowed to go without the Defence having an opportunity to challenge,
17 address, or put otherwise into context.

18 Those are the two submissions I make, Your Honour. Thank you.

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

20 Mr. Cadman.

21 MR. CADMAN: The Haradinaj Defence joins those submissions and
22 doesn't add anything further at this stage.

23 PRESIDING JUDGE SMITH: Thank you. I will ask one other
24 question of the Defence.

25 Other than that pending matter, neither of you have any other

1 witnesses to call. Is that correct, Mr. Cadman?

2 MR. CADMAN: That is correct, Your Honour.

3 PRESIDING JUDGE SMITH: And, Mr. Rees.

4 MR. REES: [via videolink] That is correct, Your Honour.

5 PRESIDING JUDGE SMITH: All right. So depending on the ruling
6 that we will make, and we will make it in writing either later today
7 or by tomorrow, you will be asked to close your case officially, as I
8 said, depending on which way the ruling is.

9 Understood?

10 MR. REES: [via videolink] Understood, Your Honour.

11 MR. CADMAN: Understood, Your Honour.

12 PRESIDING JUDGE SMITH: All right. Thank you very much.

13 [Trial Panel confers]

14 PRESIDING JUDGE SMITH: [Microphone not activated].

15 MS. BOLICI: Yes.

16 PRESIDING JUDGE SMITH: I'm sorry. Now, Ms. Bolici, you may be
17 heard.

18 MS. BOLICI: Yes, we'll articulate our objections to the Defence
19 request very briefly today in court.

20 So in relation to the first issue that has been highlighted by
21 the Gucati Defence. We submit that the Defence simply highlighted
22 disagreement with the reasoning of the Trial Chamber and no error has
23 been shown in any way.

24 As to the second issue, we observe that the issue does not arise
25 from the Trial Panel's decision. The Gucati Defence actually

1 challenges the statutory framework that governs this Court by arguing
2 that not showing the item, the disclosure which has been challenged,
3 would be against supposed regulations or statutory framework.
4 Actually, Rules 102 and 108 of the Rules expressly provide for the
5 procedure that has been followed. So it's not a challenge to the
6 decision but a challenge to the Rules.

7 Finally, in relation to the possibility that such an appeal
8 advance the proceedings, the Prosecution observed that in light of
9 the late stage of the proceedings, the evidentiary case is finished
10 for all parties. An interlocutory appeal at this stage would not
11 advance but actually delay significantly the course of the
12 proceedings which the SPO advocates instead should be concluded as
13 expeditiously as possible.

14 Thank you.

15 PRESIDING JUDGE SMITH: Thank you. We will consider the request
16 for certification fully submitted orally, and we will make a decision
17 as soon as possible, and we will expect some decision -- we will give
18 directions as to further proceedings thereafter in our oral decision.

19 We will continue with the submissions yet today and take them
20 knowing that this certification request is in hand.

21 So the Panel will hear submissions on what comes next. We set
22 out our questions in an agenda filed last week in filing F527.
23 Written submissions have been received from both Defence teams, so
24 today we will go through the relevant questions.

25 We want to start with the agreed facts. The Panel notes that

1 the Haradinaj Defence indicated in its written submissions that it
2 adopts the 13 initial facts agreed between the Gucati Defence and the
3 SPO during the pre-trial stage.

4 Mr. Cadman, does this mean that you do not adopt the additional
5 fact agreed upon between the Gucati Defence and the SPO and
6 reproduced in the Gucati bar table motion?

7 MR. CADMAN: Your Honour, there may be some confusion. My
8 understanding is that we were adopting the facts that have been
9 agreed between the Gucati team and the SPO.

10 PRESIDING JUDGE SMITH: I'm sorry. [Microphone not activated].

11 MR. CADMAN: My understanding is that we were agreeing with the
12 facts as requested that have been agreed between the Gucati team and
13 the SPO in their entirety.

14 PRESIDING JUDGE SMITH: [Microphone not activated].

15 MR. CADMAN: Yes, yes.

16 PRESIDING JUDGE SMITH: [Microphone not activated].

17 The Gucati Defence also indicated in its written submissions
18 that it adopts the three facts agreed upon or agreed between the
19 Haradinaj Defence and the SPO during the pre-trial stage. Both
20 Defence teams also indicate that the agreed facts can become public
21 and that no further facts have been agreed to.

22 The Panel is grateful for these submissions and takes note of
23 the jointly agreed facts.

24 Ms. Bolici, anything to add to this? And, in particular, what
25 are your submissions on the classification of the one additional fact

1 agreed upon?

2 MS. BOLICI: It can be public in our view, Your Honour, and we
3 have no additional matter to raise on this point. Thank you.

4 PRESIDING JUDGE SMITH: Thank you. We'll take note of this in
5 due course.

6 In the agenda, we invited the parties to consider the submission
7 into evidence of certain material which was either used in court but
8 not tendered or was listed by one of the parties but not used. There
9 were three documents: DHG0075 to DHG0081, which is a 2014 statement
10 of the SITF chief prosecutor and was on the list of exhibits on the
11 Gucati Defence; next are portions of the ICTY judgement in the
12 Haradinaj case; and next, the portions of a Kosovo court judgement
13 dated 10 August 2006 used by the SPO during cross-examination, this
14 has ERN SPOE00248303 to 00248304.

15 The Panel made this invitation as a first step under Rule 132 of
16 the Rules.

17 The Panel notes that a part of the ICTY Haradinaj judgement was
18 admitted into evidence on Friday.

19 The Gucati Defence submits that it does not wish to tender the
20 statement of the chief prosecutor and that it opposes the admission
21 of the Kosovo court judgement.

22 The Haradinaj Defence submits that it does not anticipate
23 presenting any further evidence and does not advance any submissions
24 in respect of these items.

25 Does the SPO have anything to add on this?

1 MS. BOLICI: Your Honour, the SPO has conveyed to the Defence
2 already on 21 January 2022 the willingness to have all these items
3 admitted into evidence. We didn't hear back until last Friday. We
4 maintain the same position.

5 And as to the judgements that have been read in court, the SPO
6 position is that the portion of those judgements are on the record,
7 and that if the admission of the judgement is necessary to confirm
8 that the portions of the judgement have been accurately quoted and
9 that the judgement actually exists, this judgement should be admitted
10 into evidence. Thank you.

11 PRESIDING JUDGE SMITH: Mr. Rees, anything to add?

12 MR. REES: [via videolink] Only this. In relation to
13 Ms. Bolici's last observation about parts of the judgement from
14 SPOE00248303 to 00248304, of course, questions by Ms. Bolici do not
15 amount to evidence. The only evidence that arises out of putting
16 those parts are the answers of the witness.

17 We do not seek submission of the 2014 statement of the SITF
18 chief prosecutor. It was not used or tendered with any witness.

19 As we understand it, paragraph 6 of the Haradinaj judgement
20 3 April 2008 has already been admitted by Your Honours by oral order
21 on Friday.

22 And we've set out our position in relation to that -- the
23 judgement and the parts of the judgement, sorry, referred to in the
24 Prizren District Court matter P. No. 85/2005. A careful examination
25 of that passage reveals that only the first sentence relates

1 specifically to that case. And, indeed, the comment related
2 specifically to those individuals that gave evidence in the case of
3 No. 85/2005. The remaining part of the passage read by Ms. Bolici
4 was simply the recycle of a quotation from another case from the
5 ICTY, IT-03-63-T.

6 The Defence, we've had no opportunity to challenge whether any
7 statement was accurate as to circumstances in 2005, 2006, and we make
8 the submission that neither statement in any event can fairly be said
9 to be probative of any environment of witness intimidation in Kosovo
10 in September 2020, which is the time with which we are, of course,
11 concerned.

12 PRESIDING JUDGE SMITH: Thank you, Mr. Rees.

13 Mr. Cadman, anything to add?

14 MR. CADMAN: I have nothing further to add.

15 PRESIDING JUDGE SMITH: The Panel will decide in due course
16 whether to exercise its prerogative under Rule 132 and *proprio motu*
17 admit these items as additional evidence not produced by the parties.

18 Moving on to the next topic. The Panel notes that the SPO has
19 already indicated on Friday that it will probably not intend to seek
20 leave for rebuttal evidence.

21 Ms. Bolici, is this still the case?

22 MS. BOLICI: Yes, the SPO will not tender any evidence in
23 rebuttal, Your Honour. Thank you.

24 PRESIDING JUDGE SMITH: Thank you.

25 Since the SPO does not intend to call evidence in rebuttal, the

1 question whether the Defence intends to call evidence in rejoinder
2 becomes moot.

3 Let's move on to the final trial brief estimates. At the
4 Defence preparation conference, all parties indicated a tentative
5 estimate of three weeks from the closing of the evidentiary
6 proceedings for filing their final trial briefs.

7 In their written submissions, both Defence teams revised their
8 estimate and request 30 days from the closing of the evidentiary
9 proceeding to file the final trial briefs.

10 The Panel notes that 30 days is the maximum time limit provided
11 by Rule 134(b). The Defence submits that it revises its early
12 estimate because of significant additional expert and technical
13 evidence that has been heard by the Panel as a result of the Court of
14 Appeal Panel's decision.

15 In this regard, the Panel has two points to make. First, the
16 expert evidence heard was called by the Defence and, therefore, it
17 must have been aware of the scope and expertise of its own witness.
18 Second, we note that the estimate provided by the Defence was given
19 at the Defence preparation conference before the summary of the
20 decision to exclude the testimony of Mr. Reid was read into the
21 record.

22 With this in mind, we would like to hear from the Defence as to
23 what was so unexpected about the expert witness evidence heard and
24 that it now changes these estimates.

25 Mr. Rees.

1 MR. REES: [via videolink] Firstly, Your Honour, our submission
2 was not to request 30 days for the filing of the trial brief post
3 closing of evidentiary proceedings. We did request a longer period
4 than 21 days, up to the 30 days, and we have taken still a stance by
5 requesting more time in relation to the filing -- sorry, the
6 shortened period for the hearing of closing statements between the
7 filing of trial briefs and the hearing for closing statements.

8 I'll come back to that specific proposal in due course,
9 Your Honour. But what we invite the Court to do is to consider
10 setting down a slightly later tentative date for closing statements
11 and then work backwards, as it were.

12 In relation to the request for a longer period than 21 days, we
13 do stress that on 2 December that 21 days was a tentatively proposed
14 time scale. It was proposed initially by the SPO without any notice
15 being provided to the Defence, and we agreed at that stage that we
16 could -- it may be possible to deal with it in a period of 21 days.

17 It is certainly right that at that stage, Your Honour, the
18 closing of the evidentiary proceedings was envisaged to be
19 17 December. That closing date was pushed back later on 2 December
20 to 17 January. It's then been pushed back to 28 January, and we, of
21 course, have passed it now.

22 We are a considerably longer distance away from the beginning of
23 the evidence on 18 October than all parties anticipated that we would
24 be as of 2 December. That requires a greater degree of returning to
25 the transcripts and analysis and recall, as it were. We submit that,

1 in those circumstances, requesting a slightly longer period than the
2 21 days tentatively put forward on 2 December is appropriate.

3 Your Honour will know from the submissions that we have
4 requested that a new tentative date for closing statements to be
5 considered for 14 March. That is not a considerable extension on the
6 earlier tentative target date of 1 March. And we submit that if the
7 matters were extended by that two-week period, that would be both
8 proportionate, it would be reasonable, and it would allow us some
9 additional time, not the maximum periods that the Rules propose at
10 all, but some additional time to deal with preparing the final trial
11 brief and then preparing closing statements so that we can respond to
12 whatever is in the Prosecution final trial brief.

13 PRESIDING JUDGE SMITH: Mr. Rees, I will ask you a question.
14 I'll later on ask it to Mr. Cadman as well and to the Prosecution.

15 From the last day of February until 14 March, are you available
16 for that entire period in case we pick a day in there?

17 MR. REES: [via videolink] Can I just check for a moment,
18 Your Honour?

19 PRESIDING JUDGE SMITH: Yes.
20 You can be checking also, Mr. Cadman.

21 MR. REES: [via videolink] I do have another professional
22 commitment in the week of the 7th, Your Honour.

23 PRESIDING JUDGE SMITH: So all of those two weeks are available
24 except the 7th?

25 MR. REES: [via videolink] Yes, so the week of 28 February, and

1 then the week of the 14th.

2 PRESIDING JUDGE SMITH: Okay. I'm just trying to leave us
3 enough room to manoeuvre.

4 All right. Mr. Cadman?

5 MR. REES: [via videolink] If it assists, Your Honour, very
6 quickly, if it assists, I'm also available the following week, the
7 week of 21 March.

8 PRESIDING JUDGE SMITH: That may be out of reach.

9 Mr. Cadman.

10 MR. CADMAN: Your Honour, I'm not available the 14th to the 18th
11 February. And I'm not available 28 February, but I am available
12 throughout March.

13 PRESIDING JUDGE SMITH: I think originally we were scheduled for
14 28 February.

15 MR. CADMAN: Well, I can make myself available for that one day.

16 PRESIDING JUDGE SMITH: Okay.

17 MR. CADMAN: I'm just indicating what my current commitments
18 are, Your Honour.

19 MS. BOLICI: Your Honour, the SPO's position is that there has
20 been no change in circumstances since the estimates that were
21 provided in December that would justify an additional extension and
22 prolongment of these proceedings.

23 As the SPO argued from the outset, the factual issues in this
24 case are really straightforward. The legal issues have been
25 extensively addressed both in written and oral submission. The

1 Defence is well resourced, and the arguments that they have provided
2 for requesting an extension are unsustainable in the sense that the
3 scope of the evidence that has been presented is exactly the scope of
4 the evidence that was supposed to be presented, according to the
5 Defence estimation. The fact that it has been spread out in a longer
6 period of time upon Defence request for delays of the proceedings for
7 unavailability of the Defence is no justification for a further delay
8 of the proceedings.

9 The SPO's position is that the matter should be resolved as
10 expeditiously as possible, especially in the interests of the
11 accused.

12 So we will maintain our position that the parties should be
13 ready to file their final briefs within 21 days from the closing of
14 the evidentiary proceedings, and that the closing statements can be
15 held within a week from the filing of the final briefs. Thank you.

16 PRESIDING JUDGE SMITH: And you have no restrictions on any of
17 the other dates that we were talking about?

18 MS. BOLICI: The SPO would be available at any time.

19 PRESIDING JUDGE SMITH: Thank you.

20 So, thank you, we will decide this in due course.

21 Mr. Cadman, go ahead?

22 MR. CADMAN: I wasn't asked if I had any submissions.

23 Obviously, I don't want to repeat what Mr. Rees has already said.

24 Our position is the same. When we gave the indication at the Defence
25 preparation conference, it was an anticipated date that we wanted to

1 accommodate. A lot of matters have occurred since that time. What
2 we are requesting is not a substantial extension.

3 And just to be clear, we are not requesting additional time to
4 file our final trial brief on the basis that we are not available.
5 That's not the reason for making that. So Ms. Bolici referring to
6 the resources of the Defence and our availability is not something
7 that the Trial Panel should take into account. It is merely that we
8 gave an anticipated indication. We have revised that. And the
9 request that's being made should not be considered to be
10 unreasonable.

11 PRESIDING JUDGE SMITH: Thank you, Mr. Cadman. I didn't mean to
12 skip you either. I just thought you were making the same submission.

13 So we will decide this, as I said, in due course. In any case,
14 we remind everyone that written submissions in the final trial brief
15 should be focused. They should concentrate on the facts, issues, and
16 circumstances relevant to the cases of the parties, and avoid lengthy
17 recitations of the procedural background and/or verbatim citations of
18 laws or precedents. And political statements should be -- as we've
19 said many times, should be avoided.

20 Now as to closing statements. At the Defence preparation
21 conference, all parties indicated a tentative estimate of one week
22 from the filing of the trial briefs for the closing arguments. And I
23 know we've spoken about them -- this briefly already. But in their
24 written submissions, both Defence teams revised their estimate. The
25 Haradinaj Defence requests 14 days, and the Gucati Defence asks for

1 up to 21 days from the filing of their final trial briefs.

2 And, once again, the Panel notes that 21 days is the maximum
3 time limit under Rule 134(d).

4 Before asking the parties about their reasons for their
5 estimates, the Panel reminds everyone that closing statements should
6 avoid repeating submissions already made in the final trial brief and
7 focus instead on addressing the opposite side's arguments and
8 fleshing out those points not already made in writing, and that the
9 Court Panel may well have questions to be answered during that time
10 period as well.

11 Ms. Bolici, how long do you need for the closing statements?

12 MS. BOLICI: Our previous estimate was four hours, Your Honour,
13 in terms of presentation of the closing statements. We anticipate
14 that we can maintain this time estimate unless there is a need to
15 respond to an unexpected matter raised in the Defence final briefs.
16 Thank you.

17 PRESIDING JUDGE SMITH: Thank you.

18 Mr. Rees, you can address any of your submissions on this point
19 at this stage point.

20 MR. REES: [via videolink] Firstly, in relation to the time
21 requested between the filing of the final trial brief and the closing
22 statement. We haven't asked for the 21 days. We've asked for
23 slightly longer than the seven days. And, really, I've already made
24 the submission that I invite the Court to look at the week of
25 14 March for closing statements and then work a timetable backwards

1 from 14 March for filing of the trial brief.

2 In relation to the time required. We have estimated nine hours.
3 The Prosecution estimate four. We have estimated that on the basis
4 that, *inter alia*, we will need to go through some of the evidence
5 that hasn't yet been formally gone through. So, for example, I know
6 the Trial Panel has lengthy transcripts from interviews and the press
7 conferences, and the way in which the Prosecution presented the case
8 didn't take the Court through that. There's aspects of that evidence
9 that I will wish to take the Court through in my closing statement.

10 So the estimate I've given, we think, is a fair estimate. I
11 will, as I've always done with my estimates, seek to better it in the
12 event. But I'd request being allowed up to nine hours to make the
13 statement.

14 PRESIDING JUDGE SMITH: [Microphone not activated].

15 Sorry, we may have some questions about that.

16 Mr. Rees, did you have your hand up? Did you have something
17 else?

18 MR. REES: [via videolink] Your Honour, only that I could see you
19 addressing the court but I couldn't hear you.

20 PRESIDING JUDGE SMITH: That was my fault again.

21 Go ahead, Mr. Cadman.

22 MR. CADMAN: Your Honour, we've indicated how much time we
23 believe at this stage we would require. Of course, I don't want,
24 again, a common theme in this case, I don't want to go over material
25 that Mr. Rees is going to mention, so we will coordinate as much as

1 we can. But we have indicated up to half day, certainly no more than
2 two sessions would be required. No more.

3 PRESIDING JUDGE SMITH: No more than two sessions. All right.

4 Well, as you know, we have considerable discretion on this
5 issue, and we will consider it and make an order in due course.

6 We go to the next topic. Pursuant to paragraph 6 of Rule 159,
7 if the Panel finds the accused guilty of one or more offences, it
8 must hear the parties on whether appropriate sentence should be
9 imposed with the pronouncements of the trial judgement or in a
10 separate procedure.

11 The Panel reminds the parties that the decision whether or not
12 to impose a sentence with the pronouncement of the trial judgement is
13 within the discretion of the Panel.

14 Given that this decision affects the content of the final trial
15 briefs and the closing statements, the Panel finds it appropriate to
16 receive submissions from the parties at this point. This is, of
17 course, without prejudice to the Panel's determination of whether the
18 accused are guilty or not guilty of any of the counts.

19 The Panel notes that the Gucati Defence already submitted that
20 the Panel should proceed with the so-called bifurcated procedure
21 unless it found the accused guilty of one or more crimes and was of
22 the view that the accused already served the appropriate term of
23 imprisonment by the date of the pronouncement of the trial judgement.

24 And our first question, Mr. Rees, is how do you expect the Panel
25 to know at this point whether your client is to be convicted and, if

1 so, what sentence he should get? Or do you suggest that we do not
2 decide now, or whether to separate the two procedures?

3 MR. REES: [via videolink] So, obviously, the submission I make
4 at the invitation of the Trial Panel is without prejudice to my
5 submissions that Mr. Gucati is not guilty of any offence in the same
6 way as it is without prejudice to the Trial Panel's eventual decision
7 on judgement.

8 The fact that we have been asked to address the prospect of a
9 conviction on one or more offence, in part, demonstrates, frankly,
10 how uncomfortable it is for Defence counsel to address sentence in
11 this way before a judgement has been entered. And that is, in part
12 at least, our objection to the prospect of being requested to make
13 submissions in mitigation ahead of any judgement. But that is not
14 the only basis. Although, I urge the Trial Panel to give fair
15 consideration to that submission.

16 Our primary basis is that the bifurcated approach, as
17 Your Honour has described it, ought to be adopted. And in
18 particular -- although, I do not suggest that there are no
19 circumstances in which the Panel could exercise its discretion to
20 deal with sentence immediately, and I have proposed one possible
21 scenario where that may be appropriate. And another scenario might
22 be where a defendant faces a single count with a single basis of
23 liability alleged by the Prosecution so that one can predict what
24 Defence counsel may be dealing with in the event that the Trial Panel
25 convicts on that single count and that single basis of liability.

1 But we are not facing that situation by any means. We're
2 facing -- Mr. Gucati is facing an indictment with six counts and, as
3 Your Honours have observed previously, multiple alternative bases of
4 liability put forward by the Prosecution.

5 In relation to the offences themselves, offences originating
6 from the Kosovan criminal code, the precise scope of those offences
7 is yet to be determined with detailed submissions as to what are the
8 essential legal ingredients for those offences having been made
9 previously in the case, including at the half-time stage, and with
10 those essential legal ingredients still to be determined and
11 identified by the Trial Panel, we will not receive the Trial Panel's
12 decision on the scope of each of those offences until we receive the
13 trial judgement.

14 So there is an uncertainty in that regard as well as with regard
15 the number of counts and the alternative number of bases of liability
16 alleged.

17 We submit that it is neither practicable nor fair for the
18 accused in the circumstances of this case - I do not say in any every
19 case, but in the circumstances of this case - to be asked to prepare
20 abstract submissions in mitigation in advance of any trial judgement
21 identifying which count or counts and upon which basis or bases
22 Mr. Gucati might fall to be sentenced if he falls to be sentenced at
23 all.

24 We only raise the alternative scenario in paragraph 24 of our
25 submissions on the basis that if when the Trial Panel, post-closing

1 statements, is reaching the end of its deliberations, and if it finds
2 at that stage that the accused was guilty of one or more offence, and
3 if at that stage, without hearing anything further, it was of the
4 view that, taking into account the time the accused had already been
5 detained on remand, that he or they had or will have by the time
6 judgement is pronounced have served the appropriate time of
7 imprisonment, then of course we would not, in those circumstances,
8 object to the Trial Panel at that stage taking further time to hear
9 submissions in mitigation and then deal with sentence, because that
10 would only delay the time in which the accused were detained beyond
11 that which was appropriate because of the Trial Panel's previous
12 view.

13 But I concede that is a hypothetical situation we've raised.
14 We've raised it because we were invited to consider how we deal with
15 the hypothetical situation, as it is at present, that Mr. Gucati may
16 be found guilty of one or more offences.

17 Our primary submission is that in light of the fact that
18 Mr. Gucati's facing an indictment with six counts, multiple bases of
19 liability in relation to offences, the scope of which is at present
20 uncertain, the Trial Panel ought to proceed in accordance with
21 Rule 162 and 164.

22 That's the submission on behalf of Mr. Gucati, Your Honour.

23 PRESIDING JUDGE SMITH: Thank you.

24 Mr. Cadman.

25 MR. CADMAN: I fully concur with what Mr. Rees has presented and

1 do not need to add anything further.

2 PRESIDING JUDGE SMITH: Thank you.

3 Ms. Bolici.

4 MS. BOLICI: Thank you, Your Honour.

5 The Prosecution notes that pursuant to Rule 159(6), the
6 identification of -- the determination of the appropriate sentence at
7 the time of the judgement is the rule while the bifurcated procedure
8 is the exception.

9 In our submission, the Defence has not highlighted circumstances
10 specific to this case that would justify a bifurcated proceedings.
11 Considering that -- the fact that there are multiple counts of
12 multiple modes of liability is something to be normally expected in
13 criminal proceedings before international courts and it's no
14 exception. The facts of this case are particularly straightforward
15 and simple, and in this light, a bifurcated procedure is not
16 necessary.

17 The one matter that the SPO would like to highlight is that in
18 the framework of the sentencing procedure, the SPO does intend to
19 submit the relevance of the official notes on contact with witnesses
20 as previously anticipated both in oral and written submissions which
21 have been declared inadmissible for the purpose of the trial
22 judgement because falling under Rules 153 to 155.

23 The SPO notes that Rule 162(1) of the Rules permits the party to
24 submit at the time of sentencing any relevant information that can
25 assist the Panel in determining the appropriate sentence, and that

1 the principle of orality is also different at the time of the
2 sentencing procedure, according to Rule 162(4), which provides that
3 sentencing should be done via written procedure unless otherwise
4 provided.

5 So the only reason why the Prosecution would consider that a
6 bifurcated procedure is necessary in this case is if the
7 Trial Chamber was not willing to hear submission on these materials
8 together with the judgement. I would request, instead, a bifurcated
9 procedure for the SPO to provide submissions on these particular
10 documents. Thank you.

11 PRESIDING JUDGE SMITH: Thank you, Ms. Bolici.

12 Anything from the Panel on any subject?

13 Judge Mettraux.

14 JUDGE METTRAUX: Thank you, Judge Smith.

15 Mr. Rees, and I will turn to Mr. Cadman in a second, I have two
16 things that I would like you to clarify, if you may.

17 The first one is in relation to the length of the proposed oral
18 submissions. I think you mentioned nine hours that you would wish to
19 be granted, and you've indicated that the main reason for this is the
20 fact that you would like to expand upon certain aspects of the case -
21 exhibits or otherwise - that, to your mind, have not been explored
22 adequately during the trial.

23 What I want to ask you is what of that exploration could not be
24 included in your written submissions? Is there any particular
25 reasons why you would wish to present that information only at the

1 oral hearing? Is there anything preventing you from presenting, at
2 least in part or maybe even in its totality, these submissions in
3 your written submissions?

4 MR. REES: [via videolink] Your Honour, we will, of course,
5 endeavour to keep both our written submissions as concise as possible
6 and our oral submissions as concise as possible. But there is a
7 value to making oral submissions, and there is a value to the
8 principle of orality which I would wish, in the presentation of my
9 closing statement, to take advantage of.

10 And it does seem to me that on behalf of Mr. Gucati it is
11 appropriate for me to both take some time to argue some of the legal
12 principles that we will set out and have set out previously in
13 writing, and we will, again taking the Presiding Judge's exhortation
14 to heart, set out in our pre-trial brief, but concisely, without
15 reciting at length passages. But I will wish to argue some of those
16 principles and submissions that we make on the law during the course
17 of my closing statement, and I will seek to draw the Court's
18 attention to parts of the evidence when I do so.

19 And it does seem to me that it is an important matter, it's an
20 important part of the principle of orality, that I do that both on my
21 feet before Your Honours where Your Honours are able to make
22 interventions, like Your Honour has done now and has done throughout
23 the trial, and it gives me the opportunity to answer questions from
24 Your Honour directly and have Mr. Gucati able to see that take place
25 before him rather than the matters being as simply condensed into a

1 written filing.

2 I'm well aware of the Trial Panel's preference for oral
3 submissions rather than lengthy written documents that simply recite
4 matters that are already set out, and I wholeheartedly endorse that
5 preference and, therefore, wish to address the Trial Panel at some
6 length but with an eye as always -- and I hope that the Trial Panel
7 will concede this on my part, that I have tried to be concise and
8 direct and not waste any time at all.

9 JUDGE METTRAUX: Well, Mr. Rees, I can put that part of your
10 mind at rest, that no one feels or thinks that you are wasting
11 anyone's time, and no one wants to take away from you the possibility
12 of oral submission. We want to give you that opportunity because it
13 is, we see, to your benefit.

14 My question is really whether there is anything that you wish to
15 put orally that cannot be placed in writing, and it's really a matter
16 of balance that I'm asking you to address, not one of choosing
17 between one or the other.

18 So asking, perhaps, my question again: Is there a concern on
19 your part that there are things pertaining to this case, aspects of
20 the case that cannot, at the very least, be prefaced in your written
21 submissions and kept perhaps to a shorter version orally?

22 MR. REES: [via videolink] Your Honour, certainly our final trial
23 brief will preface what I intend to say in my closing statement. I
24 can assure the Court that. I also accept Your Honour's
25 categorisation of the issue as a matter of balance. It is a matter

1 of balance, and in my submission, it's a matter of balance for
2 Defence counsel to strike to consider where the balance falls and
3 take a tactical decision as to how I seek to employ, on Mr. Gucati's
4 behalf, the material as best I can.

5 It is a matter of balance. I will endeavour to keep both the
6 final trial brief as concise as possible as I will do with my closing
7 statement, Your Honour. But it is a balance that, in my respectful
8 submission, it is for counsel to strike.

9 JUDGE METTRAUX: Well, I won't say anything about that -- that
10 last proposition, Mr. Rees. I'll leave it to you.

11 But the second question that I have for you has to do with -- I
12 just want to be sure that I have a proper understanding of your
13 submission on the bifurcated or not bifurcated process.

14 Am I right to understand that the crux of your concern is that
15 you wish to have a clear understanding of the nature of a conviction
16 if a conviction is entered before you make your submission? In other
17 words, your submissions on that point are not linked to any wish on
18 your part to call any evidence in relation to that issue? Is that
19 correct? You want clarity, if a conviction was to be entered, as to
20 the nature of our decision; is that correct?

21 MR. REES: [via videolink] I would wish to have clarity as to
22 what has to be addressed on behalf of Mr. Gucati in the event, if it
23 is the event, that he is convicted on any offence.

24 That may, for example, Your Honour, once we -- again, dealing
25 with the hypothetical situation, Your Honour, that there is a

1 conviction or convictions. Once the basis is clarified, that may
2 lead to us calling further evidence in mitigation because we will
3 have an understanding of what it is that needs to be addressed for
4 the purposes of sentence.

5 I simply -- in an indictment with six counts and multiple bases
6 of liability in relation to offences, the precise scope of which are
7 not clear at present and are only to be clarified by the Trial
8 Judge's decision, in my submission, it is unfair for us to try and
9 draft both submissions in mitigation and to consider whether we wish
10 to call any further or adduce any further material in mitigation on
11 the hypothetical basis of a conviction in relation to one, two,
12 three, four, five, or six counts, on any numerous alternative basis
13 of liability on one, two, three, four, five, or six counts.

14 I, frankly, Your Honour, do not have the prescience to look
15 ahead and forecast the matter in that way or, indeed, to forecast how
16 I might wish to deal with such matters in mitigation. We are not
17 dealing with a more straightforward matter in which it might be
18 appropriate. It might be very simple to do that. We are not in that
19 scenario in this case.

20 So if in short Your Honour was asking me do I envisage if we are
21 faced with having to mitigate calling any further evidence or
22 adducing any further material, my answer at this stage is I simply do
23 not know, Your Honour, because I do not know upon what basis and on
24 what counts the Trial Panel may enter judgement and what I might seek
25 to do to deal with those matters in mitigation.

1 Can I say this in relation to the submission from Ms. Bolici.
2 The Trial Panel has refused to admit the official contact notes. And
3 without specifying ERNs, I hope the Trial Panel will understand, as I
4 did, the notes that Ms. Bolici was referring to. They have not been
5 admitted into evidence. They cannot be admitted before the
6 Trial Panel pronounces judgement.

7 If, as far as I understood the SPO submission, which is that
8 they would wish to invite the Trial Panel to take such matters into
9 account in relation to sentence, that can only be done under
10 Rule 162(1) if it can be done at all under the bifurcated procedure,
11 as it were.

12 Now, I'm not inviting, in due course, for that to happen, but
13 the submission that Ms. Bolici makes in effect is that -- and can
14 only be that a bifurcated approach should be taken, and really it
15 comes back to the position at the moment we have an indictment with
16 six counts, multiple bases in relation to offences the precise scope
17 of which is unclear. And I would wish to reserve my position, as the
18 SPO apparently seeks to do, to submit further material if judgement
19 was pronounced against Mr. Gucati and assist with mitigation.

20 JUDGE METTRAUX: One last thing, Mr. Rees, and thank you for
21 your submissions. I think we'll turn to the Prosecution in a second
22 to ask them to clarify this, maybe. But I understood Ms. Bolici's
23 submission to be that the non-bifurcated process is the norm and
24 bifurcation the exception.

25 Now assuming this to be the case, Mr. Rees, and assuming just

1 for the purpose of my question, can we take it that in that respect
2 you would have called what evidence you consider to be relevant in
3 case a conviction is entered. What would you say to such a
4 submission if Ms. Bolici is right about her legal proposition?

5 MR. REES: [via videolink] Well, I -- Your Honour, can I begin by
6 challenging the proposition that Ms. Bolici makes. I do not accept
7 that it is the rule that sentence should be imposed under 159(6) and
8 that the bifurcated approach of Rule 162 and 164 are the exception.

9 After all, as far as I'm aware, perhaps Your Honour can correct
10 me if I'm wrong, there's been no other sentencing exercise conducted
11 by the Kosovo Specialist Chambers yet. And what is the rule and what
12 is the exception is yet to be determined, perhaps, given that the
13 Specialist Chambers has not yet had to grapple with such a matter.
14 And it may not in this case, I hasten to add.

15 What I do note from Rule 159(6) is that it simply provides for a
16 sentence to be imposed with the pronouncement of trial judgement
17 unless the Panel decides otherwise. And it is clear to me, from the
18 scope of (6), that that is a wide discretion. It's simply -- the
19 only boundary to that discussion is that it must hear the parties on
20 the point. Otherwise, it is the widest of discretions.

21 In other words, Rule 159(6) provides for a very wide rule at the
22 Panel's discretion either to impose or sentence with trial judgement
23 or to do so later.

24 In relation to the point that Your Honour asked about, well,
25 hasn't all relevant material been already adduced. Well, the answer

1 to that, Your Honour, is that I do not know because I do not know at
2 this stage whether Mr. Gucati will be found guilty of one or more
3 offences and, if so, upon what basis. I do not know at this stage
4 indeed what are the essential ingredients of the offences that the
5 Trial Panel are to determine.

6 And it is by no means an unusual concept that for purposes of
7 considering a trial where guilt or innocence is at stake, there may
8 well, of course, be material that is relevant to the issue of
9 sentence, for example, in relation to personal circumstances which
10 may be relevant to mitigate sentence, which were not relevant to the
11 issue of guilt or innocence and, accordingly, not adduced during the
12 course of a trial.

13 So, one, I do not accept the proposition that Ms. Bolici puts
14 forward. And, secondly, I cannot say to Your Honour that all
15 relevant matters that we may wish to put before the Trial Panel for
16 sentence have been done during the course of the trial. That simply
17 is not how a trial and mitigation operate.

18 JUDGE METTRAUX: Thank you, Mr. Rees.

19 Mr. Cadman, before I turn to the Prosecution, anything you want
20 to add?

21 MR. CADMAN: No, I think Mr. Rees has covered all points
22 adequately.

23 The only point that I would seek to add specific to the
24 Haradinaj Defence. In terms of the balance between the written
25 submissions and the oral submissions, mindful of the time that

1 Mr. Rees has requested, we will, obviously, endeavour to put
2 concisely as much into our written my submissions as we can, and
3 then, of course, the oral submissions will merely be a summary of
4 what is contained within the written submissions. But we will keep
5 that to a minimum.

6 Now, on the basis that Mr. Rees is granted the time that he is
7 allowed, I may be able to shorten the amount of time that we are
8 requesting from half a day to one session, but a lot of that will
9 depend upon the presentation of the Gucati Defence, which I cannot
10 predict at this stage.

11 JUDGE METTRAUX: I'm grateful.

12 And, Ms. Bolici, anything you wish to respond in particular to
13 the submission of Mr. Rees on any of these issues? In particular,
14 something that I have to admit was not exactly clear to me, and
15 apparently not to Mr. Rees either, is whether you plan or you propose
16 to rely upon material not tendered in evidence for the purpose of
17 sentencing, or was that a misunderstanding on our part?

18 MS. BOLICI: Your Honour, yes. In relation to sentencing, it is
19 our position that the parties can rely on material that has not been
20 admitted yet -- has not been tendered for admission or has not been
21 admitted. And this is based on Rule 162 -- it's based on
22 Rule 162(1), which permits the party to submit any relevant
23 information that may assist the Panel in determining an appropriate
24 sentence.

25 So our position is that within the framework of a non-bifurcated

1 procedure, within the framework of the procedure under Rule 159(6),
2 the parties are allowed to present their submission on sentencing in
3 relation to materials and information other than the admitted
4 evidence.

5 So in this context --

6 JUDGE METTRAUX: So just to pin you there, Ms. Bolici. If I
7 understand it well, and also perhaps for Mr. Rees' benefit, if we
8 were to decide a non-bifurcated process, we would then be seized of
9 an application on your part to have certain additional documents
10 admitted, including the notes that we declined to admit as part of
11 case? Is that your submission?

12 MS. BOLICI: It would not be a request for admission of these
13 materials into evidence. It would be a submission of information
14 within the framework of Rule 162(1). So the circumstances that can
15 be relied upon only for the purpose of sentencing do not need to be
16 admitted evidence, in our submissions.

17 So within this framework only for the purpose of sentencing we
18 would seek to rely on information other than the admitted evidence.

19 JUDGE METTRAUX: But let me take you to task here a little bit.
20 But do you accept that an aggravating factor, if you were to put one
21 forward in case of a conviction, would have to be established to the
22 standard of proof of beyond reasonable doubt? Do you accept that?

23 MS. BOLICI: We would accept that, Your Honour. It's the nature
24 of the statutory framework in relation to information that can be
25 relied upon for sentencing purposes. Only for sentencing purposes.

1 In this framework, Rule 162(1), as well as the procedure highlighted
2 in Rule 162(4), so that is unless otherwise decided, sentence shall
3 be determined on the basis of written submissions alone. It is also
4 a derogation from the principle of orality in that respect.

5 We submit that for sentencing only, other information than the
6 admitted evidence can be relied upon.

7 JUDGE METTRAUX: So in your submission, we can make a finding
8 beyond reasonable doubt on non-admitted information. That's your
9 submission?

10 MS. BOLICI: Yes. The aggravating circumstances, yes, we agree
11 fully needs to be proven beyond reasonable doubt. Aggravating
12 factors can be dependent upon a number of different circumstances.
13 We argue that aggravating factors can be determined based on
14 information other than admitted evidence.

15 JUDGE METTRAUX: And do you have any authorities other than your
16 interesting reading of the rule for that? Do you know of any courts,
17 any legal system in the world where this is done?

18 MS. BOLICI: This is our reading of Rule 162(1), Your Honour.
19 And if required, we'll be happy to provide authorities if necessary.

20 JUDGE METTRAUX: Thank you.

21 MS. BOLICI: Thank you.

22 PRESIDING JUDGE SMITH: Ms. Bolici, I would ask you to -- just a
23 second, Mr. Rees.

24 Ms. Bolici, I'd ask you to consider the fact that there is some
25 difference between a document that was not admitted and a document

1 that was ruled inadmissible by the Court. And that is one of the
2 things we're struggling with, with your proposed introduction of
3 something that was not introduced by a person but is being introduced
4 by a document that somebody else drew up. And that was the problem
5 with the truth of the matter being admitted in the first place, and
6 I'm not so sure it doesn't continue on at the point of sentencing as
7 well.

8 And so that's what we are struggling with. And if you want to
9 make a submission on that, you may.

10 MS. BOLICI: The submission is simply based on Rule 162(1) and
11 the possibility of relying on other information. For example, the
12 Gucati Defence was referring to personal factors as a possible
13 mitigating circumstance. I mean, it's our submission that it is not
14 required that a witness comes to testify about the personal
15 circumstances of the accused in order to take into account personal
16 factors as mitigating circumstances.

17 In the same way for aggravating circumstances, it is our
18 submission that Rule 153 and 155 do not apply. That was the reason
19 why the specific documents I am talking about have been not admitted
20 through the bar table motion. And in this light, this is information
21 which may impact on sentencing, and we submit that this can and
22 should be taken into account.

23 PRESIDING JUDGE SMITH: I thank you for that information.

24 Mr. Rees, you had one more comment?

25 MR. REES: [via videolink] Yes, just one. Ms. Bolici says that

1 she relies on Rule 162(1). It's very clear, to me at least, that
2 Rule 162(1) does not apply where sentence is pronounced pursuant to
3 Rule 159(6). It expressly says that. It only applies where the
4 Panel decides to proceed in accordance with Rule 162 and Rule 164.

5 PRESIDING JUDGE SMITH: Thank you.

6 Judge Gaynor has a question.

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

8 Ms. Bolici, I just want to go back to the meaning of the
9 expression "any relevant information that may assist the Panel in
10 determining an appropriate sentence," which is the part of Rule 162
11 that you're relying upon.

12 Essentially if a conviction is entered, the Panel will be
13 interested in hearing evidence concerning mitigating factors which
14 are to be established on the balance of probabilities or aggravating
15 factors which, as Judge Mettraux pointed out, are to be established
16 beyond a reasonable doubt.

17 Do you accept that there may be a slightly different approach to
18 the Defence and to the Prosecution, that it may be that the Defence
19 will want to submit written statements which don't necessarily comply
20 with the rules of -- with the *lex specialis* of Rules 153, 154, and
21 155 and they should be permitted to do so? But that, on the other
22 hand, if the Prosecution wishes to establish an aggravating
23 circumstance, a different standard applies because the Prosecution
24 may have to comply with the strict rules of evidence in a way that
25 the Defence might not have to?

1 Would you agree that that's a potentially reasonable
2 interpretation of the words "any relevant information that may assist
3 the Panel" set out in Rule 162?

4 MS. BOLICI: No, Your Honour, we wouldn't agree with this
5 position at this stage. Considering that there is no differentiation
6 made in Rule 162 in this respect, and that we are not referring to
7 aggravating circumstances that establish but to aggravating factors,
8 which means circumstances that need to be taken into account in order
9 to assess the sentence which is appropriate in the specific
10 circumstances. So not as a part of the elements of the crimes to be
11 proven beyond a reasonable doubt but as elements to be considered for
12 assessing simply the determination of the appropriate sentence.

13 JUDGE GAYNOR: But don't aggravating factors have to be proven
14 beyond a reasonable doubt? Do you accept that or not?

15 MS. BOLICI: Yes. And in relation to information that is
16 relevant for sentencing, the proof does not need to be obtained based
17 on the same restrictions that is applied in relation to Rule 139 in
18 relation to evidence admitted for the purpose of establishing the
19 guilt or innocence of the accused.

20 JUDGE GAYNOR: I've no further questions. Thank you.

21 PRESIDING JUDGE SMITH: That is the entire agenda for today. So
22 thank you very much for your candour, for your cooperation, for your
23 submissions. We will do our best to get an order out as soon as
24 possible. Thank you also for bringing your certification request
25 orally. I think that will aid us a great deal in getting this

1 handled expeditiously.

2 We will be in adjournment. You will next hear from us in
3 writing. Thank you.

4 --- Whereupon the Status Conference adjourned
5 at 10.42 a.m.

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