In:	**KSC-BC-2020-07**
	The Prosecutor v. Hysni Gucati and Nasim Haradinaj
Before:	**Trial Panel II**
	Judge Charles L. Smith, III, Presiding Judge
	Judge Christoph Barthe
	Judge Guenael Mettraux
	Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Counsel for Nasim Haradinaj
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Submissions in Preparation for Trial Preparation Conference

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I. INTRODUCTION

1. On 21 July 2021, the Trial Panel II in its 'Order for Submissions and Scheduling the Trial Preparation Conference',[1] ordered the Specialist Prosecutor's Office ("SPO") and the Defence to file submissions on certain issues, and further, invited oral submissions in respect of others.

2. The Defence for Mr. Haradinaj now seeks to make written submissions on the following issues:

   a. The intention of the SPO to make an application for Protective Measures for its two witnesses;[2]

   b. The SPO's definition of the notion of 'witness';[3]

   c. The use of 'Bar Tables';[4] and

   d. Justification for 'Entrapment' being a valid defence.[5]

3. The Defence notes those other issues raised within the order, however, on the basis that there is a restrictive word count of 3,000 words, the Defence will exercise its right to adduce oral submissions in respect of those issues.

[1] KSC-BC-2020-07/F00267
[2] Transcript of Hearing 14 July 2021, public, pp.365-366, and, KSC-BC-2020-07/F00267 at paragraph 8.
[3] KSC-BC-2020-07/F00267 at paragraph 9
[4] KSC-BC-2020-07/F00267 at paragraph 10
[5] KSC-BC-2020-07/F00267 at paragraph 11

4. The Defence has used its best endeavours to meet the restrictive word limit and it is noted that it is only slightly above that which is ordered.

5. Further, it may be that the written submissions below are expanded upon further in oral submissions should there be a need to do so.

II. BACKGROUND

6. On 15 July 2021, the President assigned Trial Panel II ("Trial Panel") to the present case upon transmission of the case file.[6]

7. On 16 July 2021, the Pre-Trial Judge transmitted the case file to the Trial Panel pursuant to Rule 98 of the Rules.[7]

8. On 16 July 2021, the Trial Panel unanimously elected Judge Charles L. Smith, III as its Presiding Judge.[8]

III. SUBMISSIONS

Protective Measures

[6] F00263, President, *Decision Assigning Trial Panel II*, 15 July 2021, public.
[7] F00265, Pre-Trial Judge, *Decision Transmitting Case File to Trial Panel II*, 16 July 2021, public.
[8] F00266, Trial Panel II, *Decision Notifying the Election of a Presiding Judge*, 16 July 2021, public.

9. The SPO have previously indicated that it will seek 'protective measures' in respect of its two witnesses, both of whom are referred to as 'investigators', and therefore, cannot be considered to be 'civilian witnesses'.

10. The implementation of Protective Measures for any witnesses, is as per Article 23 of the 'Law' and Rule 80 of the 'Rules of Evidence and Procedure' (the Rules), those measures being implemented for the "*protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony given by witnesses, provided that the measures are consistent with the rights of the Accused*".

11. The Defence submits that such measures in the context of the instant case, and the two witnesses to be called by the SPO, cannot be justified under Rule 80, and further, are not in any event consistent with the rights of the Accused and his right to a public hearing, including the right to face those that accuse him.

12. The witnesses to be called by the SPO <u>are not</u> victims of any allegation contained within the indictment, or at all. The witnesses are referred to as 'investigators', and therefore can be appropriately referred to as 'professional' witnesses, rather than a civilian witness.

13. It is therefore respectfully submitted that the test insofar as whether such measures are to be granted, ought to be more stringent in its application.

14. If it is that such witnesses are granted protective measures and therefore anonymity, the Defendant is being denied the right to face his accuser, the Defendant thereby being placed at a significant disadvantage and thus a violation of the principle of the 'Equality of Arms', this principle being at the very core of the right to a fair trial.[9]

15. The Defence refers to the leading case of *Kostovski v. The Netherlands* in terms of the obvious dangers inherent in such a situation.[10]

16. The Chamber in *Kostovski* found there to be a breach of Article 6 of the Convention having regard to the fact that the conviction was based on a police report of statements by two anonymous witnesses that were taken in the absence of the accused and/or his Counsel, and thus an entirely analogous situation to the instant case.[11]

17. The European Court of Human Rights has unambiguously held that convictions based solely or to a decisive extent on anonymous witness

[9] *Prosecutor v. Delalić*, IT-96-21-T, 'Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence', 4 February 1998, para 45; *Gorraiz Lizarraga and others v. Spain*, Appl. no. 62543/00, 27 April 2004, para 56; *Kress v. France*, Appl. no. 39594/98, 7 June 2001, para 72; *Prosecutor v. Stakić*, IT-97-24-A, 22 March 2006, para 149.
[10] *Kostovski v. the Netherlands*, Appl. no. 11454/85, 20 November 1989, para 42.

[11] Further, see *Van Mechelen and Others v. The Netherlands*, Appl. nos. 21363/93, 21364/93, 21427/93 and 22056/93, 23 April 1997 where the trial was found unfair for numerous reasons, including the fact that the police officers refused to give their identities when testifying, were given random numbers and could only be questioned by the defendant through a sound link from another room. The Court held that the Defence could not sufficiently test the witnesses' credibility because it was unable to observe the demeanour of the witnesses under questioning. Further the Court was not persuaded that the protective measures were strictly necessary because the alleged threat to the physical integrity of the witnesses was never examined.[11]

testimony amount to a breach of Article 6(3)(d). More importantly, anonymity shall only be granted if there is a real threat to the well-being of the witness. In this present case, as it might be expected, their position as investigators carries an element of an inherent risk in relation to their safety for instance, since they are involved in searching and gathering evidence. However, this of itself does not mean that anonymity ought to be granted as of right. Arguably, the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness. The notion of a fair trial is based on a balancing of these interests.[12]

18. The submission of the SPO in its 'Prosecution request for protective measures'[13] is noted, in particular the suggestion at paragraph 5 that "*It is a clear mischaracterisation to refer to W04841 or W04842 as anonymous witnesses in the present proceedings*". However, given any definition of the word 'anonymous' the witnesses are precisely that, noting that in the submission the witnesses are referred to by a pseudonym, and therefore their identities are not known, and therefore they <u>are</u> anonymous; to suggest otherwise is entirely spurious. The Defence will be effectively prevented from cross-examining the witnesses on the basis of their identity.

[12] *Prosecutor v. Tadić*, IT-94-1-T, 'Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses', 10 August 1995, para 55.

[13] KSC-BC-2020-07/F00282

19. Furthermore, attention is drawn to the guidelines per *Tadic* as applied in subsequent matters before the ICTY.[14]

20. Further, it is respectfully submitted that to grant such a request sets a precedent that SPO investigators and/or witnesses (other than victims and/or civilian witnesses) ought to enjoy such anonymity as of right.

21. Such a position offends any principle of transparency and open justice and renders the entire proceedings opaque.

22. There is no evidence to suggest that any employee of the SPO and/or investigator requires protection, in terms of the need to protect either witnesses' safety, physical and psychological well-being, dignity, privacy, or any other reason that would suggest such a witness is 'at risk' on account of testimony being given.

Definition of the Notion of Witness

23. The Defence for Mr. Haradinaj seeks to address this issue by way of Oral submissions at the Trial Preparation Conference.

The Use of Bar Tables

[14] *Prosecutor v. Delalić et al.*, IT-96-21-T, 'Decision on the Motion by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M"', 28 April 1997, para 60; *Prosecutor v. Blaskić*, IT-95-14-T, 'Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses', 5 November 1996, para 41.

24. The Defence notes the invitation made by the panel, to the SPO to consider the possibility of filing bar-table motions.

25. Further the Defence notes that should this invitation be taken up by the SPO, the Trial Panel have also ruled that "*the Defence may respond*".

26. For the avoidance of doubt, the Defence will seek to object to the use of any 'Bar Table', it being wholly prejudicial to the Defendant, and particularly so given the intention of the SPO not to call any witness in respect of the exhibits.

27. The Defence would respectfully submit that the purpose of a Bar Table is not to simply 'make it easier' for the Prosecution to admit evidence that otherwise might not be considered admissible, and further, given the Trial Panel has acknowledged that the admissibility of a substantial number of exhibits is opposed by the Defence, it is submitted at this stage that the admissibility of those items subject to objection ought to be considered on an individual basis.

28. The Defence will however make detailed submissions on the suitability and legality of the use of Bar Tables in the instant case, should the SPO accept the invitation of the Trial Panel.

29. Further, it may be that the Defence seeks to expand on the above during oral submissions before the Panel should it be deemed necessary to do so.

Entrapment

30. The Court asks the Defendant[15] to justify the raising of the defence of Entrapment as a valid defence as per the Law or Rules.

31. At the outset, the Defence for Mr. Haradinaj notes that this has already been done by way of submitting the pre-trial brief. In any event, the Defence joins and adopts the submissions of the Gucati Defence and would seek to submit the following in addition.

32. Both the Law and Rules are silent on what constitutes a valid defence or otherwise.

33. Rule 95(5) states "…*the Defence shall notify the Specialist Prosecutor of its intent to offer a defence alibi or any other grounds excluding criminal responsibility, including that of diminished or lack of mental capacity, intoxication, necessity, duress, and mistake of fact or law*".

34. It is respectfully submitted that this is not an exhaustive list, given the words "*including that of*".

35. It is of note that neither the Law, nor the Rules provide for the admission of a defence that is not explicitly referred to, however, and conversely, neither the Law, nor the Rules preclude the admission of a defence that is not explicitly referred to therein, unlike for instance, the Rome Statute which notes at Article

[15] KSC-BC-2020-07/F00267 at paragraph 11

31(3) "*At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21*".

36. Article 21 provides:

"*1 The Court shall apply:*

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and riles of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards"

37. Having regard to the silence of the Law and the Rules on the point, it is submitted that guidance can be taken from those other international statutes, conventions, and domestic legislation, thus demonstrating that 'Entrapment' is a legitimate defence to raise.

38. Further, given the offences with which the Defendant is charged are ostensibly domestic crimes subsumed into the Law, and prosecuted by the Specialist Chambers, rather than international crimes *per se*, there is no requirement for it to be demonstrated that the defence is one that is available per Customary International Law.

39. It is submitted that this position is quite appropriate as it is not for the Court to limit what might or might not be deemed a valid defence prior to that defence being raised before the Court.

40. Rule 104 refers to the disclosure of the grounds excluding criminal responsibility where the Defence has filed a pre-trial brief, however, it again, remains silent on what is a valid defence or otherwise.

41. A similar position is adopted by the Law.

42. It is respectfully submitted that it is not for the Court to pre-determine whether a defence is valid or not prior to that defence being raised by the Defendant. To do so, would be an unlawful interference with the Defendant's right to a fair trial, and further, violate Article 40(2) of the Law, in terms of the right to a fair and expeditious trial, with full respect of the rights of the accused.

43. It is for the Defendant, in seeking to raise any positive defence, to discharge the associated burden with the raising of that defence, again, it is not for the

Court to determine what is a valid defence or otherwise prior to that defence being advanced at trial.

44. Accordingly, in raising the Defence, the "*conditions and requirements applicable to such a defence in the SC legal framework*" are those that would be ordinarily applicable in a domestic context, the defence of Entrapment being recognised as a legitimate defence domestically, and therefore the same must hold true for the purposes of the Specialist Chambers.

45. In terms of the type of evidence the Defence intends to adduce, reference is made to the distinct lack of investigation, or apparent lack of investigation by the SPO to identify who was responsible for the three separate 'leaks', and the inference that will be raised by the Defence.

46. Accordingly, as much as it is accepted that there may not have been direct contact between the Defendant and an officer of the SPO and/or tribunal and/or any other relevant body, indirect entrapment can still be raised as a legitimate defence.

47. Per *Ramanauskas v. Lithuania [GC]*,[16] where an officer involved has exerted such influence on the subject as to incite the commission of an offence that

[16] *Application no. 74420/01* (5 February 2008).

would otherwise not have been committed, in order to make it possible to establish the offence, then entrapment may have been established.

48. In terms of the relief sought by the Defendant if it is that Entrapment is established, it would naturally follow that the proceedings arising as a result might be deemed an 'Abuse of Process', and therefore all evidence emanating from an incidence of entrapment ought to be immediately rendered inadmissible, and any offences arising out of that entrapment withdrawn on account of it being an abuse of process to continue with the same, having regard to what would amount to a clear and flagrant breach of Article 6 of the Convention.

IV. WRITTEN OBSERVATIONS ON THE 'DRAFT ORDER ON THE CONDUCT OF PROCEEDINGS

49. At Part VII of the Draft Order, the Trial Panel observes "*Parties should consider the submission of evidence through bar table motions*".

50. The Order then goes on to provide a procedure for the admission of evidence from the Bar Table.

51. The Defence accepts that it may be simply a question of interpretation, and if it this is indeed the case, and the Defence have interpreted erroneously, simple clarification will be required.

52. If it is that it has not erroneously interpreted the position however, it would appear that there has been an acceptance that Bar Tables will be appropriate, and thus, Part VII of the Order, paragraphs 22 and 23 specifically, would appear to contradict the Order for Submissions.

53. For the avoidance of doubt, and to repeat the aforesaid, the Defence opposes the use of Bar Tables and submits the same to be prejudicial given the circumstances surrounding the proposed admission of SPO exhibits and the objections already filed.

54. Each and every exhibit ought to be considered singularly and thus preserve the fairness of proceedings and the rights of the Defendant(s) to challenge the admission of evidence where such a challenge is deemed appropriate. This is of particular relevance in the instant case where the SPO does not intend to call any witnesses other than two investigators, has not provided any chain of custody, and further, is actively preventing the Defence from confronting or challenging any individual party to the making of or collection of those exhibits mentioned, and further, any individuals mentioned within those

exhibits who might seek to provide evidence of the Defendant(s) culpability for those offences indicted.

55. At paragraph 42 the Trial Panel seeks to order "*Within 24 hours of notification of the aforementioned list of anticipated witnesses, each opposing Party shall file a notice with an estimate of the time it expects to take cross-examining each witness included on that weekly list*".

56. In terms of the two witnesses the SPO seeks to call, it is respectfully submitted that the Defence are unlikely to be in a position to provide an accurate assessment given that the two witnesses have not provided any real statement of note and therefore it remains unclear as to what evidence each witness will give. Consequently, it is difficult to assess how long any cross-examination is likely to take.

57. If the Panel is minded to insist on such an estimate being provided, perhaps the SPO can be ordered to disclose a full statement from each witness concerning the evidence that witness intends to give, and thus an informed assessment might be capable of being provided by the Defence.

58. At paragraphs 76 and 77 the Trial Panel provides a framework for bringing a challenge to either a witness' testimony or a proposed exhibit.

59. Two issues arise.

60. Firstly, this would appear to contract the position raised in connection with the use of Bar Tables, and therefore perhaps further clarification is required.

61. Second, given the nature of the objections already raised, it might be expeditious do to deal with such objections as a preliminary hearing and/or motion, on the basis that the rationale behind those objections is applicable across a number of proposed exhibits.

62. Accordingly, it might be preferrable to deal with issues of admissibility *en masse* rather than piecemeal, particularly given the number of exhibits subject to objection.

63. At paragraph 92 and 93 the Trial Panel seeks to order that the trial is to be conducted using Legal Workflow.

64. No objection is raised in principle to the handling of documents through this system, however, the Defence for Mr. Haradinaj would request that provision be made for Counsel to use their own IT/Computers for trial. This does not affect the handling of documents which can be processed through Legal Workflow.

65. Previously, Counsel have been prohibited from bringing a lap-top/tablet into the Courtroom, it is respectfully submitted that there is no justifiable basis for such a prohibition.

66. To prevent Counsel from using their own devices significantly impedes the ability of Counsel to prepare and represent their respective clients.

V. CONCLUSION

67. The submissions as outlined above, are made in respect of the specific issues raised within the Trial-Panel's Order.

68. Those issues raised upon which oral submissions are invited will be addressed accordingly at the hearing.

69. Further, if it is that further submissions are required on those issues addressed within the body of the above,[17] the Defence reserves its right to do so, again, per the Order of the Pre-Trial Panel.

Word Count: 3,078 words

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[17] It is highlighted that there be significant scope for further submissions concerning the use of 'Protective Measures', particularly in the context of non- civilian witnesses.