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 Respect of Trial Panel Case Status Hearing Oral Order Number 3

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I. INTRODUCTION

1. During the Trial Preparation Conference held on 1 and 2 September 2021, the Trial Panel II issued a number of 'Oral Orders'.

2. Oral Order Number 3,[1] as per the draft transcript of that hearing, at provisional page 28 reads:

> "*…the Haradinaj Defence is ordered to file written submissions on the legal basis relied upon them in respect of entrapment and to provide any Kosovo legislation on whistle-blowers*".

3. The second part of that Oral Order, at provisional page 29 of the draft transcript goes on to read:

> "*Both Defence teams are further ordered to file written submissions on a question asked by a member of the Panel, namely, what legal avenues are available to the SPO other than relying on national authorities when inquiring about evidence located on their territory*"

4. It is further acknowledged that although having two parts, any submissions filed in compliance with that order are to be in the form of a 'consolidated submission' addressing both parts.

[1] Trial Preparation Conference, 2 September 2021, Public, Page 601 Line 17 to Page 602 to Line 10

5. The Defence for Mr. Haradinaj seeks to file the following submissions in compliance with that Oral Order

II. SUBMISSIONS

The Legal Basis for Entrapment

6. As per the preliminary transcript of proceedings, at provisional page 60, 09/01/2021, Judge Mettraux, highlights that:

> *"…in some jurisdictions, the notion of a defence of entrapment does not exist. In some other jurisdictions it does exist. And then you have other jurisdictions, national jurisdiction where it could be, for instance, grounds for exclusion of evidence – France for instance – or it could be mitigating factor as is the case in Switzerland…"*

7. The Defence for Mr. Haradinaj acknowledges that neither the Criminal Procedure Code of the Republic of Kosovo ("KCPC")[2] nor the Criminal Code of the Republic of Kosovo ("KCC")[3] explicitly refers to 'Entrapment' as a defence defined in such a manner.

[2] Law No. 04/L-123, Official Gazette of the Republic of Kosovo No. 2012/37 of 28 January 2012

[3] Law No. 06/L-074, Official Gazette of the Republic of Kosovo No. 2019/02 of 14 January 2019

8. It is however respectfully submitted that it is irrelevant as to whether the applicable Codes, the Law on the Kosovo Specialist Chambers and Specialist Prosecutor's Office ("Law"),[4] or the Rules of Procedure and Evidence of the Specialist Chambers ("Rules") refer to the Defence defined in this manner for the following reasons:

a. Firstly, the principle is recognised albeit defined and referred to in a different manner; and

b. Secondly, Kosovo, and the Specialist Chambers, are explicitly bound by the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), as a part of domestic law, and the jurisprudence that flows from the Convention; that jurisprudence explicitly recognising 'Entrapment' as a legitimate defence.

9. In terms of the first point above, it is perhaps a question of terminology.

10. It is submitted that 'Entrapment', 'Coercion', 'Incitement', and 'Influence', in the instant case are interchangeable terms in the context whether there is a basis in the domestic law of Kosovo to raise such a Defence.[5] It is of course

[4] Law No. 04/L-123, Official Gazette of the Republic of Kosovo No. 2012/37 of 28 January 2012

[5] Article 14 of the KCC recognition is given to circumstances where an offence may be committed under the influence of 'violence or threat' and Article 15 of that same Code, recognition is given to 'Acts committed under coercion'.

accepted that there are differences in terms of elements to be satisfied, however, that is the factual basis, rather than the legal basis that demonstrates such a defence exists.

11. Further, the point should also be read in the context of the Defence not necessarily seeking to suggest that in raising 'Entrapment', that a complete Defence to the indicted offences can be raised, but rather, that the issue goes to the admissibility of evidence and the availability of a fair trial.

12. Article 249 of the KCPC, dealing with 'Objections to Evidence' notes as follows:

> *1. Prior to the second hearing, the defendant may file objections to the evidence listed in the indictment, based upon the following grounds:*
>
> *1.1. the evidence was not lawfully obtained by the police, state prosecutor, or other government entity;*
>
> *1.2. the evidence violates the rules in Chapter XVI of the present Code;*
>
> *1.3. there is an articulable ground for the court to find the evidence intrinsically unreliable.*
>
> *2. The state prosecutor shall be given an opportunity to respond to the objection verbally or in writing.*

> *3. For all evidence where an objection has been filed, the single trial judge or presiding trial judge shall issue a written decision with reasoning that permits or excludes the evidence.* (emphasis added)

13. There is therefore a basis upon which evidence can be rendered inadmissible if it has not been lawfully obtained, the Defence submitting that the circumstances being advanced would constitute a situation where purported evidence of the commission of a crime has not been lawfully obtained on the basis that the crime itself was committed at the instigation and/or with the coercion of a State Agent.

14. It is therefore respectfully submitted to be clear that there is a basis to raise the issue of Entrapment as a Defence, albeit that the Defence is not referred to explicitly in the Statutory authority, its principles and consequences are recognised and thus the defence is legitimate and one that has appropriate legal character for the purposes of these proceedings.

15. In terms of the second issue referred to above, it is respectfully submitted that the question of a legal basis and/or authority domestically is not one that needs to be considered, because of the position of the ECHR and the jurisprudence of the European Court.

16. The European Court recognises 'Entrapment' and/or 'Incitement', and accordingly, that recognition ought to extend to the Specialist Chambers, as

domestic judicial institution bound by the ECHR as a part of domestic law, having regard to Article 3(2)(e) of the Law.

17. The basis for the Defence capable of being raised is therefore respectfully submitted to be settled.

18. Reference has previously been made in the pre-trial briefs of both Defendants and supplanted by oral submissions, to the Grand Chamber decision of *Ramanauskas v. Lithuania*,[6] where tests were developed, in terms of what constitutes Entrapment and/or Incitement, noting in particular that it was deemed to fall to the prosecution to prove that there was no incitement, provided that the Defendant's allegations are not wholly improbable.

19. In *Teixeira de Castro v. Portugal*,[7] the question of supervision and control was considered as relevant, as also set out by the Gucati Defence in its written submissions on this point. In *Teixeira de Castro*, the Court cautioned the approach adopted where there was no judicial authorisation and in particular the Court held:

[6] Application No. 74420/01, (2010) 51 EHRR 11 (2008). See also *Ludi v. Switzerland* (1993) 15 E.H.R.R. 173 where the European Court held a violation of Article 6 of the ECHR on the basis that there was no opportunity to cross-examine the undercover officer, rather than to determine that the evidence, in that case telephone recordings, was not admissible

[7] Application No.25829/94 (1999) 28 E.H.R.R. 101

> "36…The general requirements of fairness embodied in Article 6 apply to proceedings concerning all types of criminal offence, from the most straightforward to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement.
>
> "39. In the light of all these considerations, the Court concludes that the two police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial. Consequently, there has been a violation of Article 6 § 1."

20. The Court attached two significant and linked features. First, the absence of evidence to suggest the applicant was engaged in criminal activity of the kind. Second, the evidence that officers had instigated the offence.[8]

21. The *Texeira* approach was followed in *Edwards and Lexis v. United Kingdom*,[9] a case that concerned the use of public interest immunity to prevent disclosure of evidence vital to an entrapment submission:

> "The applicants claim to have been victims of entrapment. The Court recalls that, although the admissibility of evidence is primarily a matter for regulation by national law, the requirements of a fair criminal trial under Article 6 entail that the public interest in the fight

[8] *Ibid*. paras. 38-39

[9] [2003] Crim L.R. 891, judgment of 22 July 2003, affirmed by the Grand Chamber, (2005) 40 E.H.R.R.

against crime cannot justify the use of evidence obtained as a result of police incitement…"

22. The Court in *Edwards and Lexis* went on to consider the point that:[10]

> "Under English law, although entrapment does not constitute a substantive defence to a criminal charge, it does place the judge under a duty either to stay the proceedings as an abuse of process or to exclude any evidence obtained by entrapment on the grounds that its admission would have such an adverse effect on the fairness of the proceedings that the court could not admit it (see *R. v. Looseley*, cited in paragraph 28 above, and the earlier case-law referred to therein)."

23. At the Trial Preparation Hearing on 1 September 2021, Judge Mettraux raised the point, set out at paragraph 7 of these submissions, that in different jurisdictions raising entrapment is dealt with differently, and in some jurisdictions, it is not provided in the applicable legal framework. It may be a defence, full or partial, an abuse of process or part of mitigation.

24. In *R v. Looseley*,[11] in the UK House of Lords, addressed this position in the following way:

[10] *Ibid.* para. 50

[11] [2001] UKHL 53, para. 1

> "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen."

25. It further addressed the issue of a remedy in different jurisdictions and settled on the following explanation:[12]

> "(15) …It is unlawful for the court, as a public authority, to act in a way which is incompatible with a Convention right. Entrapment, and the use of evidence obtained by entrapment ('as a result of police

[12] *Ibid.* paras. 15-16

incitement'), may deprive a defendant of the right to a fair trial embodied in article 6: see the decision of the European Court of Human Rights in *Teixeira de Castro v Portugal* (1998) 28 EHRR 101.

"(16) Thus, although entrapment is not a substantive defence, English law has now developed remedies in respect of entrapment: the court may stay the relevant criminal proceedings, and the court may exclude evidence pursuant to section 78…Of these two remedies the grant of a stay, rather than the exclusion of evidence at the trial, should normally be regarded as the appropriate response in a case of entrapment. Exclusion of evidence from the trial will often have the same result in practice as an order staying the proceedings. Without, for instance, the evidence of the undercover police officers the prosecution will often be unable to proceed. But this is not necessarily so. There may be real evidence, or evidence of other witnesses. Exclusion of all the prosecution evidence would, of course, dispose of any anomaly in this regard. But a direction to this effect would really be a stay of the proceedings under another name… A prosecution founded on entrapment would be an abuse of the court's process. The court will not permit the prosecutorial arm of the state to behave in this way."

26. Therefore, whilst there may be power to stay proceedings as an abuse, to exclude evidence or order some other remedy, the most appropriate remedy for entrapment is a stay of proceedings on the basis that the 'entrapment' deprives a person from the outset of a fair trial. That is all the more so when, as in the instant case, the entirety of the prosecution case relies on the material subject to entrapment.

27. Further, where there is *prima facie* evidence of entrapment, the judicial authorities must examine the facts of the case and take the necessary steps to investigate the issue and determine whether there was any entrapment or incitement.

28. It is noted that this is a truly extraordinary case and not one where there is an easy precedent to follow.

29. The SPO in both written and oral submissions have suggested that there is no such *prima facie* evidence and therefore the defence cannot be brought.

30. For the purposes of this submission however, it is submitted that the position of the SPO on this point is irrelevant, the issue not being whether there is merit in the defence being raised, but rather, whether there is a legal (not factual) basis for the defence being raised.

31. Accordingly, the Defence do not seek to rehearse the position of the SPO investigation, or its inadequacies thereof, the various disclosure requests that

have been made and refused, and the recent astonishing revelation that the investigation remains ongoing, again, it not being relevant to the issue raised. The Defence do seek to reserve the right to address the panel on the factual issues at the appropriate time.

32. In sum, the ECHR recognises Entrapment and/or Incitement, and that where this is demonstrated, it may constitute a violation of Article 6(1), accordingly, the legal basis for advancing the defence is established.

Kosovo Legislation on Whistleblowers

33. The relevant list of legislation is set out in a separate filing.

34. The Trial Panel will be mindful of Article 200(4) of the KCC as set out at the hearing of 1 September 2021 by Judge Mettraux.

35. The Defence do not seek to make any further submissions on the point as the panel has not invited the same; however, should the panel require submissions on the issue, the Defence will of course comply with any such directions.

The Legal Avenues Available to the SPO other than Reliance on National Authorities

36. It is respectfully submitted that the purpose of this question is not entirely clear.

37. First, it is not clear whether the question is framed, or should be interpreted, as the applicable procedure to be adopted where the Specialist Prosecutor's Office ("SPO") seeks the cooperation of any other State, or whether it refers solely to cooperation with the Republic of Serbia, a central and controversial aspect of this case.

38. Second, in our respectful submission, it is not for the Defence to seek to justify the legality, or otherwise, of any steps that may have been taken by the SPO during its investigation and/or prosecution, it is for the SPO to set out the legal basis for the steps taken.

39. Third, it is not for the Defence to seek to assist the SPO in considering what legal avenues may or may not be open to it.

40. Article 35(2)(d) of the Law empowers the SPO to "seek the cooperation" and to enter into "agreements as may be necessary" and Article 35(3) provides the SPO with sweeping police powers and Article 35(4) provides for cooperation from national authorities and other such states as have agreed to cooperate.

41. Article 55(3) provides that the Law on International Legal Co-operation in Criminal Matters,[13] does not apply, and Article 55(2) provides that it may submit 'letters of request' directly.

[13] Law No. 04/L-031

42. What the Law does not say is that it is absolved entirely from any existing provisions of national law or agreements on mutual legal assistance.

43. It is important to remind ourselves that the SPO is a domestic institution of the Republic of Kosovo, not an international organisation, and possesses the same powers as the Kosovo Police Force and Prosecutor's Office, in that it has the power to investigate in accordance with domestic Law, and where there is a requirement to seek the assistance of another State, it is mandated to use any mutual legal assistance agreements entered into by Kosovo.[14]

44. The Law does not explicitly provide for cooperation with the Republic of Serbia, a State which does not recognise the independence of the Republic of Kosovo, still considers it to be a part of its own territory and in the absence of a peace agreement may still be considered a belligerent State. Cooperation with the Republic of Serbia cannot therefore be measured in the same terms as cooperation with any other State.

45. This does raise a wider issue which the Defence are not asked to comment upon at this state, but is one that ought to be raised.

46. Where any request is made in such circumstances where there is zero oversight either by parliamentary body or any other appropriate oversight,

[14] Article 55(2) of the Law

the SPO is effectively given *carte blanche* to request and importantly, exchange, any information that it sees fit, without any appropriate procedure in place, and without regard for the domestic and international legal framework.

47. The SPO, and the Specialist Chambers, do not exist in a form of legal and accountability vacuum, despite the former seemingly seeking to operate as such.

III. CONCLUSION

48. The Defence for Mr. Haradinaj submits the above in accordance with Oral Order 3, noting that the submissions ordered deal with the legal foundation of the issues raised, and not the factual application.

49. It is on that basis, that no submissions have been made in terms of whether the relevant elements have been satisfied and upon what basis, this being an issue that is correctly reserved for the trial upon hearing evidence.

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