

In: KSC-BC-2020-07

The Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: Pre-Trial Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Nasim Haradinaj

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Public Redacted Defence Response to Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association (KSC-BC-2020-07/F00110) and Prosecution Request for Non-Disclosure of Certain Information Pertaining to Contact with Witnesses (KSC-BC-2020-07/F00107)

Specialist Prosecutor

Jack Smith

Counsel for Nasim Haradinaj

Toby Cadman

Carl Buckley

Counsel for Hysni Gucati

Jonathan Elystan Rees QC

Huw Bowden

I. INTRODUCTION

1. On 29 January 2021, the Specialist Prosecutor's Office ("SPO") filed its Request for Non-Disclosure of Certain Information Pertaining to Contact with Witnesses¹ that seeks to withhold the Underlying Information pursuant to Rule 108 on the broadly stated, and largely unsubstantiated, basis that it is of limited use to the Defence it will suffer minimal, if any, prejudice. That is not accepted, and it is not for the SPO to make such a determination.
2. On 1 February 2021, SPO filed its submissions² concerning whether certain documents, namely those documents that are referred to as Batch 1, Batch 2, and Batch 3, those alleged to have been documents leaked from the SPO's office and said to have been given to the KLA War Veterans Association, ought to be disclosed to the Defence, pursuant to the Framework Decision³ following the First Status Conference.⁴
3. It is submitted that filings KSC-BC-2020-07/F00107 and KSC-BC-2020-07/F00110 are inextricably linked and form part and parcel of the same argument, that being that the refusal by the SPO to disclose material that forms a substantial basis of the case

¹ Prosecution Request for Non-Disclosure of Certain Information Pertaining to Contact with Witnesses, KSC-BC-2020-07/F00107

² Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07/F00110

³ Framework Decision on Disclosure of Evidence and Related Matters KSC-BC-2020-07/F00104, Public 22 January 2021.

⁴ See KSC-BC-2020-07, Transcript, Public, 8 January 2021

against the Defendant fundamentally impacts on his right to receive a fair trial and the counterbalancing procedures put forward by the SPO fall woefully short of that required.

4. The SPO maintains that in part certain of those documents are *prima facie* disclosable, and in part not.
5. Where those documents are found to be disclosable, the SPO submits that the Pre-Trial Judge ought to order that those same documents are to be withheld on the basis that:
 - a. Disclosure poses an objective and grave risk to protected persons and interests;
 - b. Non-disclosure is strictly necessary i.e. no less restrictive measures are sufficient or feasible; and
 - c. Non-disclosure is proportionate, balancing the grave risk of disclosure with the minimal, if any, prejudice to the defence.
6. It is noted that, as far as the Defence have been made aware, none of the material contained in Batches 1, 2 and 3 is alleged to be subject to any protective measures orders pursuant to Rules 80, 105, 107, 108.
7. The SPO therefore maintains that on the basis of (3) above, Batches 1 and 2 ought to be deemed non-disclosable under Rule 108.

8. Further, the SPO maintains that the information contained within Batch 3 of the aforementioned, is not subject to disclosure having regard to Rule 106, and further, does not fall within the scope of Rule 103 and therefore remains non-disclosable.
9. By way of further submission, at paragraph 5 of the SPO submission, it is averred that the Defendant(s) would seek to prejudice ongoing or future investigation, and threaten the security of potential witnesses and others, if it is that they gained access to those documents. The SPO does not seek to advance argument that restricting disclosure to counsel, with an undertaking not to disclose to the Defendant(s), taking into account counsel's overriding obligation to the Court, or [REDACTED] would amount to a less prejudicial counterbalancing measure. Nor does the SPO seek to argue that the material, in its entirety, should be considered by a Judge to determine to what extent the material should be disclosed.
10. The Defence for Mr. Haradinaj opposes the SPO's application to withhold evidence, be it by way of an order per Rule 108 or otherwise.
11. The Defence for Mr. Haradinaj would respectfully submit that to fail to disclose essential evidence, including the very evidential basis upon which the indictment is said to have been proffered, is a fundamental breach of the Defendant's rights pursuant to Article 6 of the European Convention for the

Protection of Human Rights and Fundamental Freedoms (“Convention”), and a violation so egregious, that the Defendant cannot be guaranteed a fair trial.

12. It is respectfully submitted that the situation in the present case is analogous to that of the *Lubanga Case*⁵ at the International Criminal Court. In *Lubanga*, the ICC Trial Chamber, upheld by the Appeals Chamber, stayed the proceedings on the basis that the Prosecution had refused to disclose material, which included exculpatory material. A stay was ordered to protect the rights of the defendant, including his right to a fair trial. The Appeals Chamber upheld the stay and can be applied to the instant case as follows:

- a. Reliance can only be “exceptional”⁶ and “for a specific purpose, namely in order to generate new evidence.”⁷
- b. Second, it “must not lead to breaches of his obligations vis-à-vis the suspect or the accused person”⁸ and importantly “[the] investigatory activities of the Prosecutor must be directed towards the identification of evidence that can eventually be

⁵ International Criminal Court, ICC-01/04-01/06 OA 13, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008,” at para. 45 (‘Lubanga First Stay of Proceedings Appeal Judgment’).

⁶ Lubanga First Stay of Proceedings Appeal Judgment, at para. 55.

⁷ Lubanga First Stay of Proceedings Appeal Judgment, at para. 1.

⁸ Lubanga First Stay of Proceedings Appeal Judgment, at para. 2.

presented in open court, in order to establish the truth and to assess whether there is criminal responsibility under the Statute.”⁹

c. Third, the provision has to be applied *“in a manner that will allow the Court to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial.”¹⁰* [emphasis added]

d. Fourth: *“A conditional stay of the proceedings may be the appropriate remedy where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused person is of such a nature that a fair trial might become possible at a later stage because of a change in the situation that led to the stay.”¹¹*

13. Accordingly, the Defence invites the Court to refuse the application under Rule 108 and disclose the material that forms Batches 1, 2 and 3 and stay proceedings until such time as the SPO has complied with an order for disclosure. In the event that the SPO refuses to comply and considers that the material in question ought not to be disclosed, it is invited to make a ruling under Rule 108(4) in that there are no measures suggested that would ensure

⁹ Lubanga First Stay of Proceedings Appeal Judgment, at para. 41.

¹⁰ Lubanga First Stay of Proceedings Appeal Judgment, at para. 2.

¹¹ Lubanga First Stay of Proceedings Appeal Judgment, at para. 4.

the Defendant's right to a fair trial, and therefore, the SPO is to either amend or withdraw the charges faced by the Defendant.

II. BACKGROUND

14. A full chronology and background is not exhaustively set out below, and the following selective points are considered of relevance to the issue being considered as to disclosure.
15. On 22 September 2020, the SPO requested the arrest of Hysni Gucati and Nasim Haradinaj, for alleged dissemination of confidential information relating to the work of the SITF and/or the SPO at three press conferences held on 7, 16, and 22 September 2020, and sought their transfer to the detention facilities of the KSC.¹²
16. On 24 September 2020, the Single Judge issued arrest warrants for Mr. Gucati and Mr. Haradinaj in connection with allegations of attempted intimidation of witnesses, retaliation, and violation of secrecy proceedings, and ordered their transfer to the KSC detention facilities.¹³

¹² Urgent Request for Arrest Warrants and Related Orders, KSC-BC-2018-01, F00125, Strictly Confidential and *ex parte*, with Strictly Confidential and *ex parte* Annexes 1-2, 22 September 2020. A supplement to the Request was submitted on 23 September 2020, Prosecution Notice and Related Request, KSC-BC-2018-01, F00126, Strictly Confidential and *ex parte*, 23 September 2020, with Annex 1, Strictly Confidential and *ex parte*.

¹³ Annex 2 - Public Redacted Version of Order for Transfer to Detention Facilities of the Specialist Chambers, KSC-BC-2020-07, F00012, Public, 24 September 2020.

17. On 25 September 2020, Mr. Haradinaj was arrested and held in detention in the Republic of Kosovo until the following day when he was transferred to the KSC detention facilities.
18. On 30 October 2020, the SPO submitted an indictment for confirmation against Mr. Haradinaj and Mr. Gucati,¹⁴ it is of note and of particular relevance for the purposes of the current submission that it is our understanding that the evidence now referred to as Batch 1, Batch 2, and Batch 3, was not submitted with that draft indictment, and therefore, the Pre-Trial Judge had no opportunity to consider the evidential foundation upon which the indictment was proffered, instead, being asked to rely upon an assurance of the SPO.
19. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment, and ordered the SPO to submit a revised indictment as confirmed.¹⁵
20. On 14 December 2020, the SPO submitted the Confirmed Indictment with redactions.¹⁶

¹⁴ Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-07, F00063, Strictly Confidential and *ex parte*, 30 October 2020.

¹⁵ Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07, F00074/RED, Public, 11 December 2020.

¹⁶ Submission of confirmed Indictment with strictly confidential Annexes 1 and 2, KSC-BC-2020-07, F00075, Public, 14 December 2020.

21. On 18 December 2020, Mr. Haradinaj was produced before the KSC where an 'initial appearance' was held.¹⁷
22. On 18 December 2020, Mr. Haradinaj filed 'Submissions on the Review of Detention by 27 December 2020',¹⁸ the SPO filing its 'consolidated submissions on review of detention' on the same day.¹⁹
23. On 4 January 2021, the SPO claims to have made its Rule 102(1)(a) disclosure.²⁰
24. On 7 January 2021, the Defence for Mr. Haradinaj filed its submissions for the Status Conference.²¹
25. On 8 January 2021, the first Status Conference took place.²²
26. On 8 January 2021, the SPO reported on the seized material to the Pre-Trial Judge.²³

¹⁷ Initial Appearance of Nasim Haradinaj, Transcript, KSC-BC-2020-07, 18 December 2020.

¹⁸ Submissions on the Review of Detention by 27 December 2020, KSC-BC-2020-07, F00090, Public, 18 December 2020.

¹⁹ Prosecution consolidated submissions on review of detention, KSC-BC-2020-07, F00088, Public, 18 December 2020.

²⁰ Prosecution Submissions for first Status Conference, KSC-BC-2020-07, F00096, Public, 5 January 2021.

²¹ Defence Submissions for First Status Conference on Behalf of Nasim Haradinaj, KSC-BC-2020-07, F00099, Public, 7 January 2021.

²² Status Conference, Transcript, KSC-BC-2020-07, 8 January 2021.

²³ Prosecution report pursuant to decisions KSC-BC-2020-07-F00005 and KSC-BC-2020-07-F00007, KSC-BC-2020-07, F00102, Public, 8 January 2021.

27. On 22 January 2021, the Pre-Trial Judge handed down a Framework Decision on Disclosure of Evidence and other Matters,²⁴ in which he *inter alia* ordered the SPO to indicate:

- a. Whether the Three Batches or parts thereof will serve as evidence at trial;
- b. Whether and what portions, if any, of the Three Batches have been identified for disclosure and which provision(s) of the Law and/or Rules mandates this disclosure;
- c. Whether and what portions, if any, of this material have been identified for non-disclosure and which provisions of the Law and/or Rules allow for this non-disclosure;
- d. The amount of material in question and the SPO's overall position with regard to the disclosure of the seized material in question; and
- e. Whether this material includes the CCTV footage of the alleged initial provision of the material.

28. On 29 January 2021, the SPO filed a confidential request for non-disclosure of certain information pertaining to contacts with witnesses.²⁵

²⁴ Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07, F00104, Public, 22 January 2021.

²⁵ Prosecution request for non-disclosure of certain information pertaining to contacts with witnesses, KSC-BC-2020-07, F00107, Confidential, 29 January 2021.

29. On 1 February 2021, the SPO filed a confidential filing, Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, with confidential annexes.²⁶

III. THE LAW

30. Article 21(6) of the Law on Specialist Chambers and Specialist Prosecutor's Office No.05/L-053 ('Law') enshrines the obligation of the SPO to disclose relevant material to the Accused.
31. Rule 102(3) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ('the Rules') requires the SPO, pursuant to Article 21(6) of the Law, to provide detailed notice to the Defence of any material and evidence in his or her possession. The Specialist Prosecutor shall disclose to the Defence, upon request, any statements, documents, photographs and allow inspection of other tangible objects in the custody or control of the Specialist Prosecutor, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused. Such material shall be disclosed without delay.

²⁶ Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07, F00110, Confidential, 1 February 2021.

32. Rule 103 obliges the SPO to immediately disclose exculpatory evidence subject to Rule 107 (protected information not subject disclosure) and Rule 108 (other information not subject to disclosure).

33. Rule 80 additionally provides that the measures available to a Panel for the protection of witnesses may include, where consistent with the rights of the Accused, orders of:

(d) non-disclosure to the Accused by Specialist Counsel of any material or information that may lead to disclosure of the identity of a witness or victim participating in the proceedings; and

(e) in exceptional circumstances, and subject to any necessary safeguards: (i) nondisclosure to the Parties of any material or information that may lead to the disclosure of the identity of a witness or victim participating in the proceedings.

34. Article 21(6) of the Law and Rules 80, 102, 103 and 108 must be applied in the context of the right to a fair trial, and therefore within the context of Article 6 of the European Convention on Human Rights; this right also includes an entitlement to disclosure of exculpatory material. The disclosure of exculpatory material to the defence is of paramount importance to ensure the fairness of proceedings. The public interest is excluded where its application would deny to the accused the opportunity to establish his or her innocence.²⁷

²⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1401, 13 June 2008.

35. The right (i) to disclosure of evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused or which may affect the credibility of prosecution evidence and the right (ii) to inspect any book, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence, are fundamental rights of the accused.
36. The obligation to disclose is as important as the obligation to prosecute.²⁸
37. Restrictions on disclosure to the Accused in order to make it easier for the prosecution to present other cases against other persons are to be rejected.²⁹ The rights of the accused in the case in which the order for non-disclosure is sought take priority over the protection of prospective victims and witnesses in other cases.³⁰ The rights of the accused are not to be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases.³¹
38. An objectively founded fear of some danger or risk from any source, in addition to exceptional circumstances, may be sufficient for the grant of

²⁸ *Prosecutor v. Kordic & Cerkez*, IT-95-14/2-A, 17 December 2004

²⁹ *Prosecutor v. Brdjanin and Tadic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000.

³⁰ *Ibid*

³¹ *Ibid*

protective measures involving non-disclosure of the witness' identity to the public, but it is not sufficient to justify non-disclosure of that identity to the accused and the defence team.³²

39. Notwithstanding the existence of other disclosed material that may be similar, fairness dictates that the accused should be provided with all of the exculpatory material. The use of summaries containing information potentially exculpatory or otherwise material to the defence has been explicitly rejected as insufficient for discharging the Prosecution's obligations for the purposes of trial in other cases before the ICC.³³

IV. Submissions

Preliminary

40. The Defence for Haradinaj supports and joins the submissions of the Defence for Gucati of 10 February 2021. In particular, the Defence for Haradinaj emphasises the point that the SPO is to be put to strict proof in determining that the information leaked to the KLA WVA HQ is genuine, contained confidential and/or protected information and that it was material that can

³² *Prosecutor v. Brdjanin and Tadic*, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000

³³ *Prosecutor v. Katanga and Chui*, ICC-01/04-01/07-621, 20 June 2008

be shown to have emanated from the SPO. The SPO will further be put to strict proof as to the alleged intimidation or threats to actual or potential witnesses and whether those witnesses came forward or were contacted by the SPO.

41. As has been explicitly argued by the Defence for Gucati, and noted earlier in this submission, that material can be disclosed to Specialist Counsel, but not to the Accused, or submitted in redacted form.
42. The Defence makes no observation in terms of the 'volume' of evidence contained within the three batches, as it is not in a position to do so, and therefore remains neutral in respect of this position.
43. In respect to paragraph 2 of the SPO submissions it is noted that the *"the SPO will provide the Defence with detailed notice of, and, as appropriate, access to the CCTV footage"*, highlighting at footnote 7 of that submission that the CCTV falls within Rule 102(3), and further, that disclosure of the same has already been requested.
44. The Defence would question the position of the SPO in terms of *"as appropriate"*, and seek clarification; is the SPO confirming that the CCTV evidence will be disclosed following it being accepted that it falls within Rule 102, or is the SPO suggesting that a decision will be made in terms of what it deems to be 'appropriate access'?

45. The position of the Defence is that having already accepted that the material in question falls within Rule 102(3) then that material ought to be disclosed *“without delay”*, having regard to the fact that no grounds have been advanced by the SPO to dispute the materiality of that evidence.
46. We would therefore seek clarification on this issue in the absence of immediate disclosure of that CCTV evidence.

Substantive

47. The SPO in its submissions seeks to withhold the contents of Batches 1, 2, and 3, that isn't already in the public domain, on the basis of the following principle grounds:
- a. That as much as the evidence contained within Batches 1 and 2 *“fall within the scope of Rule 102(3), consistent with what the SPO characterises as a “broad interpretation”, that it should be authorised to withhold the evidence per Rule 108 it being “strictly necessary and-in light of available counter-balancing measures-proportionate measure to avoid objectively justifiable and grave risks to protected persons and interests”*; and
 - b. That Batch 3 is not disclosable on the basis that it is documentation that falls within Rule 106, and that the material does not fall within Rule 103.

Rule 108

48. Having accepted that the material contained within the first two batches is *prima facie* disclosable pursuant to Rule 102, and therefore seeking to withhold that evidence under Rule 108, the determination, given that which might be characterised as the 'competing interests' of the parties, is on the issue of 'fairness' and whether the Defendant can be afforded a fair trial.
49. Counsel for Mr. Haradinaj would submit that he cannot be guaranteed a fair trial without disclosure of the evidence subject to these submissions, and it is on this ground that proceedings must be stayed until such time as the SPO has complied.
50. The prosecution case, taken at its highest, is that the Defendant disclosed information that had been given to him by at least one, and possibly three, unknown individuals; the suggestion of the SPO at paragraph 24 of its submissions that the mandate of the SPO must not be "*sabotaged by persons such as the Accused, whose stated aim is to undermine and obstruct SC proceedings...*", is deliberately inflammatory and entirely unsupported.
51. It is noted that at no point is the Defendant alleged to have intentionally procured any information, he is merely said to have received documents that were taken from, presumably, the offices of the SPO by an SPO employee, or at least a KSC employee.

52. At paragraph 25, the SPO advances the position that “*The Accused’s conduct has already had a significant negative impact on the SPO’s investigations*”, however, that claim is not substantiated.
53. It is recognised that principles of fair trial require that the interests of defence are balanced against those of witnesses or victims.³⁴ In *Lubanga*,³⁵ it was determined to be a case-by-case assessment, taking all relevant factors into account and evaluating the infeasibility or insufficiency of less restrictive measures. The Trial Chamber in Katanga noted that the non-absoluteness of the disclosure obligations does not exempt the Chamber from ensuring the Defence has an effective opportunity to challenge incriminating testimony.³⁶ That goes to the very core as to whether proceedings are fair. It is clear that if the defence are deprived of information necessary to challenge a witness’s credibility this may amount to an insurmountable obstacle to a fair trial.
54. The SPO suggests at paragraph 30 that the evidence within the three Batches is not to be introduced into evidence and therefore it is not the contents of the ‘Batches’ that is important, “*but rather their confidential nature*”.

³⁴ Eur. Court HR, *Kovač v. Croatia*, (App. No. 503/05), 12 July 2007, para 27

³⁵ Ibid. paras. 36-37

³⁶ Ibid. para. 31

55. With respect, this is a mischaracterisation of the position, regardless of whether the documents are to be entered into evidence or otherwise.
56. The Defendant stands accused of not just disseminating confidential material, but further, the intimidation of witnesses, and the offence of retaliation.
57. The 'violation of secrecy' only refers to two (2) counts on the indictment.
58. To suggest that the offences as indicted rely on the "*confidential nature*" of the information, rather than their content, is quite simply and demonstrably, false.
59. For instance, it is the content of those documents that will confirm whether an individual is a witness, whether he or she has requested protective status, and therefore, an individual who is capable of being intimidated for the purposes of the offence charged.
60. If the offences surrounded just the violation of confidentiality, the other offences would fall away.
61. Accordingly, the SPO must prove each element of the offence, including that an individual witness was in fact a witness, required protective status, and thereafter that that witness was intimidated, and the Defendant puts the SPO to strict proof on these and all other issues.

62. The submission of the SPO therefore fundamentally misrepresents its case.
63. The SPO goes on to suggest that *“the SPO has provided sufficient information about the contents of the Three Batches for the Defence to advance its investigations”*. With respect, it has not at all.
64. In any event, the SPO has conceded that the evidence in question falls within Rule 102(3) and thus this would appear to be contradictory to the position being advanced that *“it is difficult to see how the confidential contents of the Three Batches will assist the defence”*. With respect, that is not the test, and that is not for the SPO to decide.
65. The whole foundation of the indictment is the evidence that is said to have been in Batches 1, 2, and 3, and therefore, the SPO cannot bring a charge based upon that evidence and then refuse to disclose the contents and open it to scrutiny.
66. Such a position is palpably unfair and entirely prejudicial to the Defendant. In simple terms, he is unable to determine precisely what he is defending against.
67. The SPO, at the hearing of 18 December 2020, stated in no uncertain terms, that the Defendant would not be provided with the ‘weapons with which it committed its crime’. Leaving for one moment, the inappropriateness of

such a statement, what the SPO is effectively seeking is to prosecute a charge without even producing the weapon or establishing if it was in fact loaded.

68. The SPO refers, at paragraph 26 of its submissions, to the decision of the Constitutional Court.³⁷

69. The Defence recognises that, on occasion, there may be exceptional circumstances that require counter-balancing procedures. However, in the instant case, consideration is not being given to an element or part of the evidence, we are considering the entire evidential foundation of the indictment itself.

70. The SPO has previously, upon submission of the indictment, asked the Single Judge to take at face value that the documentation the SPO states was in those batches, was in those batches, and further, it is of the character as described by the SPO. It relies on the statement of its own investigator to satisfy the Court, and the parties, of what goes to the very core of the case.

³⁷ *Referral of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law, KSC-CC-PR-2017-01* Specialist Chamber of the Constitutional Court, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, Public, 26 April 2017, para.135, fn.77 citing ECtHR jurisprudence ('Judgement of the Specialist Chamber of the Constitutional Court').

71. Now, it is asking the Pre-Trial Court to do the same, and accordingly, the eventual Trial Chamber, and at the same time tie the hands of the Defence and prevent it from challenging the foundational basis of the charges.
72. In order for the Defendant to take an active part in the proceedings and put forward a defence to charges brought, that Defendant must be allowed to scrutinise and challenge the evidence, and have the SPO prove each element of their case.
73. Without disclosure of that evidence, not only can the SPO not prove their case, but the Defendant also cannot advance his own defence as he is not appraised of the evidential basis upon which those charges are based.
74. A failure to disclose the evidence in the circumstances of the instant case not only fails to satisfy the Law, and the Rules of Procedure and Evidence, but would result in a flagrant breach of the Defendant's Article 6 rights, in that a fair trial cannot be guaranteed.
75. If the evidence is withheld, the principle of 'Equality of Arms' is compromised, as the Defendant is not privy to the same evidence as the SPO, and is therefore at a distinct disadvantage.³⁸

³⁸ *Ternovskis v. Latvia*, no. 33637/02, 29 April 2014.

76. To be clear, it is not just the seized batches which is relevant, it is the content of the material, to what extent it constitutes confidential or protected material and what prompted witnesses to come forward. Those are all relevant considerations.
77. Pursuant to Article 6(3)(b) of the Convention, the Defendant must be allowed adequate time and facilities to prepare a defence. In the instant case, should the evidence be withheld, the Defendant is being prevented from putting all relevant arguments before the Trial Chamber, and therefore is in part, being denied the opportunity to influence proceedings.³⁹
78. There is a clear relation between sub-paragraphs (b) and (a) of Article 6(3), in that the right to be informed of the nature and cause is necessary for the preparation of the defence.⁴⁰ Noting that the evidence that forms the subject of these submissions underpins the entire case and is the very foundation of the indictment, accordingly, to deny access prevents the Defendant from being informed as to the 'cause' of the charges.

Counter Balancing Measures

³⁹ *Connolly v. the United Kingdom* (dec.) no. 27245/95, 26 June 1996; *Mayzit v. Russia*, no. 63378/00, 20 January 2005; *Galstyan v. Armenia*, no. 26986/03, 15 November 2007.

⁴⁰ *Pelissier and Sassi v. France* [GC], no. 25444/94, ECHR 1999-II; *Block v. Hungary* no. 56282/09, 25 January 2011

79. It is respectfully submitted that the Investigator's Declaration, as referred to at paragraph 31 takes us no further forward in terms of adequate protections for the Defendant.
80. That Declaration, and the submissions of the SPO may indeed offer what has been referred to as a *"detailed review and description of the relevant information contained in the portions of Batches 1 and 2 which have not been disclosed"*, from the position of the SPO, albeit hardly an objectively independent assessment. Without sight of that evidence, there is no basis upon which it can be confirmed, and further, of equal importance, there is no basis upon which that review and/or description can be challenged.
81. The suggestion that the fact that the Investigator will give evidence at trial as a sufficient counterbalance is, with respect, absurd, as although the Investigator will be available for cross-examination, that investigator will not be in a position to answer any questions in relation to the documents themselves, presumably for the same reasons that the SPO suggests precluding those documents from being disclosed in the first place.
82. The Investigator cannot be effectively challenged as to their findings, and their evidence that is to be given, noting that the Defendant does not accept the content of that statement and therefore the SPO is required to prove its contents.

83. Again, the Court, and importantly, the Defence, is being asked to accept at face value that the information is what the SPO says it is. Such a position fundamentally undermines the concept of an adversarial process and/or the concept of a fair trial
84. Accordingly, what is referred to as a 'counterbalancing measure' and therefore safeguard in terms of the Defendant's rights, falls woefully short of that what is required. It is merely a further level of opacity in terms of the evidence and the proceedings, and does not adequately remedy the restriction to the adversarial procedure.⁴¹
85. The fact that "*the Investigator's Declaration confirms that the portions of Batch 1 published in the media correspond with the pages of the seized materials*", is with respect, irrelevant, as that portion of the material has been published and is therefore in the public domain, and therefore is capable of being considered.
86. The remainder of Batch 1 remains undisclosed and therefore cannot be confirmed as to its contents, despite the SPO's inaccurate assertion at paragraph 31.
87. The further assertion that the Defendant "*...previously received and had the opportunity to review the material in the context of its unlawful dissemination, and therefore are clearly aware, at a minimum, of its general, and confidential, nature*"

⁴¹ *A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009

underpins the wholly inappropriate position advanced by the SPO, failing to appreciate the burden that falls on it having to prove each element of each offence with reference to the evidence.

88. The fact that the SPO is confirming that the Pre-Trial Judge will be able to “*fully scrutinize the basis for the SPO’s request, review the undisclosed portions of Batches 1 and 2...*” (emphasis added), is of significant concern as the Pre-Trial Judge was not afforded this same courtesy during the confirmation of the indictment and is not being provided with the entirety of the material.
89. Accordingly, we are now in a position where evidence fundamental to the charges brought was **not** disclosed upon submission of the draft indictment, and will only now be disclosed in part, and *ex parte*, whereupon a decision is made as to whether, that part of it, is to be disclosed to the Defence.

Batch 3

90. The SPO states that the information contained within Batch 3 is not capable of disclosure on the basis that it is information that falls within Rule 106 and therefore not subject to disclosure.
91. The Defence acknowledge Rule 106 and the fact that in the ordinary course of events, such information is not subject to disclosure. However, the SPO fails to acknowledge that the information may have started as Rule 106 information, but upon that information formulating the basis of one or more

Counts within the indictment, it fails to be Rule 106 information, and becomes information that is disclosable under Rule 102.

92. This is advanced on the basis that it is not the 'strategy' or 'work product' that is being sought, but rather the evidence that demonstrates how an offence has been committed by allegedly disclosing that information.
93. In short therefore the information is not appropriately categorised as Rule 106 information given its relation to the indicted offences. Furthermore, a blanket ban on disclosure made unilaterally by the SPO where there may be exculpatory material fails to meet the standard required.
94. The position advanced by the SPO at paragraph 36 is therefore demonstrably incorrect, as the suggestion that "*unauthorised persons provided them to the KLA WVA and the Accused further unlawfully disseminated them*", and therefore the character of the information does not change, is an oversimplification
95. of the issue, in that Batch 3 forms part and parcel of the indictment and therefore the evidential foundation of the charges.
96. If it is that the Defence are incorrect on this point, and Batch 3 does not form part of the evidential foundation or basis of those offences listed within the indictment, the SPO is invited to amend the indictment accordingly, otherwise, as it remains, Batch 3 cannot be said to be Rule 106 information simply because this was how it was initially characterised.

VII. CONCLUSION

97. The Defendant would submit that the evidence subject to these submissions must be disclosed both in accordance with the Law, and the Rules of Procedure and Evidence, on the basis that the justification provided within the Rules has not been satisfied by the SPO noting specifically that:

- a. The circumstances as outlined are not 'exceptional';
- b. The SPO has not demonstrated or evidenced a 'grave risk' to the security or safety of witnesses or victims; and
- c. The SPO have not evidenced a single witness or potential witness being subjected to a threat, grave or otherwise.

98. Further, to withhold the evidence would represent a flagrant breach of Article 6 of the Convention having regard both to the above submissions, and the fact that a conviction based solely, or to a decisive extent on evidence that has not been subjected to examination, testing, or scrutiny, is generally, incompatible with Article 6(3)(d).⁴²

⁴² *Luca v. Italy*, no.33354/96, ECHR 2001-II; *Al-Khawaja and Tahery v. the United Kingdom* [GC] nos 26766/05 and 22228/06, ECHR 2011

99. On the above basis, the evidence must be disclosed and that the proceedings stayed until such time as the material has been disclosed or sufficient counterbalancing measures put in place.
100. If it is that the Pre-Trial Judge takes the position that the evidence cannot be disclosed, in any form and subject to any counterbalancing measures, the submissions in respect of their being a lack of adequate safeguard is rehearsed, the Pre-Trial Judge is invited to direct the SPO to either amend the indictment accordingly, or where this is refused by the SPO, to stay the proceedings in their entirety.

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Toby Cadman

Specialist Counsel



Carl Buckley

Specialist Co-Counsel