

**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

**Date:** 31 March 2021

**Language:** English

**Classification:** Public

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**AMENDED FILING WITH PUBLIC REDACTIONS**

**Preliminary Motion on the Issue of the Indictment Being Defective**

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**Specialist Prosecutor**

Jack Smith

**Counsel for Nasim Haradinaj**

Toby Cadman

Carl Buckley

**Counsel for Hysni Gucati**

Jonathan Elystan Rees QC

Huw Bowden

## I. CLASSIFICATION

1. **NOTE:** in an abundance of caution, this Preliminary Motion on the Issue of the Indictment being Defective is filed as “Strictly Confidential” until the Pre-Trial Judge has ruled on the **Prosecution Request for Reclassification of Filing KSC-BC-2020-07-F000113**.
2. For the avoidance of doubt, it is not intended that this Preliminary Motion requires classification as “Strictly Confidential” and there is nothing contained herein that contains confidential information. However, due to the reference to matters contained in Filing KSC-BC-2020-07-F000113 it is classified as such on an interim basis pending the ruling.

## II. INTRODUCTION

3. Counsel for Mr. Haradinaj seek to challenge the indictment on the basis of:
  - a. Rule 97(1)(a), in that he seeks to “*challenge the jurisdiction of the Specialist Chambers*”; and
  - b. Rule 97(1)(b), in that that the below submissions “*allege defects in the form of the indictment*”.

4. These submissions will follow the usual form; however, an additional section has been added at **Part V** to deal with a preliminary matter deemed to be fundamental to the ongoing matter.

### III. BACKGROUND

5. The chronology is of specific importance in terms of these submissions and therefore the same is repeated in full.
6. 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.<sup>1</sup>
7. 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.<sup>2</sup>

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<sup>1</sup> 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*.

<sup>2</sup> 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.

8. 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.
9. On 29 September 2020, Mr. Haradinaj filed a request for his immediate release from detention.<sup>3</sup>
10. On 27 October 2020, the Single Judge rendered a decision rejecting this request.<sup>4</sup>
11. On 30 October 2020, the SPO submitted an indictment for confirmation against Mr. Haradinaj and Mr. Gucati.<sup>5</sup>
12. On 9 December 2020, the Pre-Trial Judge requested the Parties to file written submissions on Mr. Haradinaj's continued detention, the deadline being 18 December 2020.<sup>6</sup>
13. On 11 December 2020, the Pre-Trial Judge confirmed, in part, the indictment, and ordered the SPO to submit a revised indictment as confirmed.<sup>7</sup>

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<sup>3</sup> Initial appearance, preliminary motion to dismiss the charges and motion for immediate release, KSC-BC-2020-07, F00030, Public, 29 September 2020.

<sup>4</sup> Decision on Request for Immediate Release of Nasim Haradinaj, KSC-BC-2020-07, F00058, Public, 27 October 2020.

<sup>5</sup> Submission of Indictment for Confirmation and Related Requests, KSC-BC-2020-07, F00063, Strictly Confidential and *ex parte*, 30 October 2020.

<sup>6</sup> Order for Submissions on the Review of Detention, KSC-BC-2020-07, F00073, Public, 9 December 2020.

<sup>7</sup> Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07, F00074/RED, Public, 11 December 2020.

14. On 14 December 2020, the SPO submitted the Confirmed Indictment with redactions.<sup>8</sup>
15. On 18 December 2020, [REDACTED] was appointed as new Specialist Counsel to Mr. Haradinaj.<sup>9</sup> On the same day, the withdrawal of previous Specialist Counsel was confirmed.<sup>10</sup>
16. On 18 December 2020, Mr. Haradinaj was produced before the KSC where an 'initial appearance' was held.<sup>11</sup>
17. On 18 December 2020, Mr. Haradinaj filed 'Submissions on the Review of Detention by 27 December 2020',<sup>12</sup> the SPO filing its 'consolidated submissions on review of detention' on the same day.<sup>13</sup>
18. On 23 December 2020, the appointment of Specialist Co-Counsel for Mr. Haradinaj, [REDACTED], was confirmed.<sup>14</sup>

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<sup>8</sup> Submission of confirmed Indictment with strictly confidential Annexes 1 and 2, KSC-BC-2020-07, F00075, Public, 14 December 2020.

<sup>9</sup> Notification of the Appointment of Counsel to Nasim Haradinaj with one confidential Annex, KSC-BC-2020-07, F00086, Public, 18 December 2020.

<sup>10</sup> Decision Approving the Withdrawal of Counsel, KSC-BC-2020-07, F00084, Public, 18 December 2020.

<sup>11</sup> Initial Appearance of Nasim Haradinaj, Transcript, KSC-BC-2020-07, 18 December 2020.

<sup>12</sup> Submissions on the Review of Detention by 27 December 2020, KSC-BC-2020-07, F00090, Public, 18 December 2020.

<sup>13</sup> Prosecution consolidated submissions on review of detention, KSC-BC-2020-07, F00088, Public, 18 December 2020.

<sup>14</sup> Notification of Approval of Co-Counsel for Nasim Haradinaj with one confidential Annex, KSC-BC-2020-07, F00092, Public, 23 December 2020.

19. On 24 December 2020, the Pre-Trial Judge refused Mr. Haradinaj's application for release.<sup>15</sup>
20. On 5 January 2021, the Defence for Mr. Haradinaj filed a Notice of Appeal of the Decision on Detention of 24 December 2020 before the Court of Appeals Panel.<sup>16</sup>
21. On 4 January 2021, the SPO claims to have made its Rule 102(1)(a) disclosure.<sup>17</sup>
22. On 6 January 2021, the President of the KSC constituted an Appeals Panel for the Defence Appeal against the Decision on Detention.<sup>18</sup>
23. On 6 January 2021, a Decision was made to order Mr. Haradinaj to attend the first part of the first Status Conference in order to enter a plea.<sup>19</sup>
24. On 7 January 2021, the Defence for Mr. Haradinaj filed its submissions for the Status Conference.<sup>20</sup>
25. On 8 January 2021, the first Status Conference took place.<sup>21</sup>

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<sup>15</sup> Decision on Review of Detention of Nasim Haradinaj, KSC-BC-2020-07, F00094, Public, 24 December 2020.

<sup>16</sup> Notice of Interlocutory Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, KSC-BC-2020-07/IA002/F00001, Public, 4 January 2021 (notified 5 January 2021).

<sup>17</sup> Prosecution Submissions for first Status Conference, KSC-BC-2020-07, F00096, Public, 5 January 2021.

<sup>18</sup> Decision Assigning a Court of Appeals Panel, KSC-BC-2020-07, IA002-F00002, Public, 6 January 2021.

<sup>19</sup> Decision on Defence Request to Hold Hearing in the Absence of the Accused, KSC-BC-2020-07, F00097, Public, 6 January 2021.

<sup>20</sup> Defence Submissions for First Status Conference on Behalf of Nasim Haradinaj, KSC-BC-2020-07, F00099, Public, 7 January 2021.

<sup>21</sup> Status Conference, Transcript, KSC-BC-2020-07, 8 January 2021.

26. On 8 January 2021, the SPO reported on the seized material to the Pre-Trial Judge.<sup>22</sup>
27. On 15 January 2021, the SPO filed its Response to the Defence Appeal against the Decision on Detention of Nasim Haradinaj.<sup>23</sup>
28. On 20 January 2021, the Defence filed its Reply to the SPO Response regarding the Appeal against the Decision on Detention.<sup>24</sup>
29. On 22 January 2021, the Pre-Trial Judge handed down a Framework Decision on Disclosure of Evidence and other Matters.<sup>25</sup>
30. On 29 January 2021, the SPO filed a confidential request for non-disclosure of certain information pertaining to contacts with witnesses.<sup>26</sup>
31. 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.<sup>27</sup>

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<sup>22</sup> 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.

<sup>23</sup> Prosecution response to Defence appeal of decision on review of detention of Nasim Haradinaj, KSC-BC-2020-07, IA002-F00003, Public, 15 January 2021.

<sup>24</sup> Defence Reply to Specialist Prosecutor's Response to Appeal against the Decision on Pre-Trial Detention on behalf of Nasim Haradinaj, KSC-BC-2020-07, IA002-F00004, Public, 20 January 2021.

<sup>25</sup> Framework Decision on Disclosure of Evidence and Related Matters, KSC-BC-2020-07, F00104, Public, 22 January 2021.

<sup>26</sup> Prosecution request for non-disclosure of certain information pertaining to contacts with witnesses, KSC-BC-2020-07, F00107, Confidential, 29 January 2021.

<sup>27</sup> 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. On 2 February 2021, Counsel for Mr. Gucati filed a Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b).<sup>28</sup>
33. On 3 February 2021, the SPO filed the Prosecution Request for Reclassification of Filing KSC-BC-2020-07-F000113.<sup>29</sup>
34. On 3 February 2020, the Registry informed the Parties that the Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b) submitted by Counsel for Mr. Gucati had been reclassified as Strictly Confidential pending a decision by the Pre-Trial Judge.

#### IV. THE LAW

35. As per Rule 97(1) of the Rules of Evidence and Procedure:

(1) *The Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which:*

- a. Challenge the jurisdiction of the Specialist Chambers;*
- b. Allege the defects in the form of the indictment; and*

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<sup>28</sup> KSC-BC-2020-07/F00113, Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b).

<sup>29</sup> KSC-BC-2020-07/F00114, Prosecution Request for Re-Classification



c. *Seek the severance of indictments pursuant to Rule 89(2)*

36. Further, per Rule 97(2):

*“Such motions shall be in writing and shall be brought within thirty (30) days from the disclosure of all material and statements referred to in Rule 102(1)”*

37. As noted above, the SPO will maintain that it disclosed all relevant information in terms of Rule 102(1)(a), on 4 January 2021.

38. Accordingly, the position maintained by the SPO will be that any challenge in terms of Rule 97 must be made by 3 February 2021.

#### **IV. WHETHER RULE 102(1)(a) HAS BEEN UNDERTAKEN**

39. We would respectfully submit that disclosure per Rule 102(1)(a) has not been concluded.

40. Further, the issue of whether further documents are disclosable is still a live issue before the Pre-Trial Judge, as evidenced by the ruling following the first status conference in which Prosecution submissions on the point were invited.

41. The SPO currently adopts the position that that information and evidence said to have been seized at the KLA War Veterans Association, is non-disclosable, per its submissions made.<sup>30</sup>
42. The fact of the matter however is that this evidence ought to be disclosable as it is upon this basis that the indictment has been proffered and thereafter confirmed, although it has not been confirmed as to whether the Pre-Trial Judge confirming the said indictment had sight of the information upon which it was proffered.
43. In any event, the Defence have 10 days to respond to the aforementioned SPO submissions per the order of the Pre-Trial Judge, where a ruling will be made as to whether that evidence is to be disclosed or otherwise.
44. Regardless of the eventual decision to be made on the issue, the fact remains that there is no conclusive answer as to whether the SPO have complied with their obligations to disclose all relevant evidence under Rule 102(1)(a) at this stage, given that the issue is currently being considered by the Pre-Trial Judge.
45. It must therefore naturally follow that the timeframe as noted in Rule 97(2) has yet to commence, and cannot commence until the issue of disclosure has been determined conclusively.

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<sup>30</sup> Prosecution Submissions on the Disclosure of Certain Documents Seized from the KLA War Veterans Association, KSC-BC-2020-07, F00110, Confidential, 1 February 2021.

46. Accordingly, therefore, any submission by way of preliminary motion per Rule 97(1) is at this stage premature.
47. Further, having regard to the obligations placed upon the SPO in terms of disclosure, and without a conclusive ruling on the issue by the Chamber, the SPO has failed to comply with its disclosure obligations.
48. As a consequence, we would seek a stay of proceedings *per* Rule 110 until the issue has been considered and ruled upon conclusively.
49. It is upon that ruling that the SPO will be deemed to have satisfied its obligations or otherwise *per* Rule 102(1)(a), and therefore it is at that juncture, or otherwise, subject to the Court's determination on disclosure obligations, that the limitation period, *per* Rule 97(2) in terms of any submissions to be made *per* Rule 97(1), commences, and not before.

## V. RULE 97(1) SUBMISSIONS

50. Having regard and without prejudice to the aforementioned at Part IV above, it is respectfully submitted that the indictment as confirmed is defective.

### *The Law Concerning Indictments*

51. Rule 86(3) of the Rules requires the indictment to "set forth the name and particulars of the suspect and a concise statement of the facts of the case and

of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged pursuant to Article 16 of the Law”.

52. In circumstances where an indictment proffered and/or confirmed fails to provide a Defendant with a specific statement of facts and the crimes that the Defendant is said to have committed, it will be held to defective.<sup>31</sup>

53. Further:

*“...allegations within an indictment are defective in their form if they are not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and the cause of the charges brought against him”.*<sup>32</sup>

54. The indictment must be sufficiently clear so as to enable the accused to understand the nature and cause of the charges brought against him.<sup>33</sup>

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<sup>31</sup> *Prosecutor v. Tadic*, Decision on Defence Motion on the Form of the Indictment, 14 November 1996, at paragraph 12.

<sup>32</sup> *Prosecutor v. Karemera*, Decision on the Defence Motion, pursuant to r.72 of Rules of Procedure and Evidence, pertaining to, *inter alia*, Lack of Jurisdiction and Defects in the form of the Indictment, 25 April 2001, para.16

<sup>33</sup> *Prosecutor v Kanyabashi*, Decision on Defence Preliminary Motions for Defects in the Form of the Indictment, 31 May 2000, ICTR-96-15-1, para.5

55. In a similar vein, in *Kupreskic*,<sup>34</sup> the Appeals Chamber found that it was impermissible to charge the accused in a general way where the Prosecution “could, and should, have been more specific in setting out the allegations in the Amended Indictment”.

56. By way of extension to this point, the Chamber’s attention is drawn to *Prosecutor v. Blaskic*,<sup>35</sup> wherein it was determined that the indictment ought to contain the identity of any victim where that victim is known, and further, where possible, the Prosecutor ought to clearly indicate the precise line of conduct and mental elements satisfied.

57. This reasoning is sustained in *Prosecutor v. Kunarac*,<sup>36</sup> where, the Defence, having challenged the failure to identify two victims in the indictment, the Trial Chamber, in upholding the challenge found “the identity of the two women is necessary because it is a material fact to be proved at Trial”.

58. The Defence further challenged, on the basis:

“pursuant to the provisions of r.96(ii), the Prosecutor must state in the Amended Indictment ‘in what manner were the victims exposed to violence,

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<sup>34</sup> *Prosecutor v. Kupreskic*, Appeal Judgment, 23 October 2001,

<sup>35</sup> Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form thereof, 4 April 1997, IT-95-14, para.20.2

<sup>36</sup> *Prosecutor v. Kunarac*, Decision on the Form of the Indictment, 4 November 1999, para.18

*force, confinement and physical duress, threats and failing that, 'an important element of the criminal act is missing.'*

59. In upholding that challenge, the Trial Chamber found:

*"as the Prosecutor does not rely upon the circumstances mentioned in r.96(ii), those circumstances, amongst others, constitute material allegations, particulars of which the accused is entitled to know in order to properly prepare his defence. The Amended Indictment as it stands, lacks such particulars."*

60. Again, on the subject of specificity, where an indictment which fails to elucidate and confirm the specific material facts that substantiate the charges, that indictment will be found to be defective.<sup>37</sup>

61. Where vague or ambiguous language is used within the indictment such as *"among others"* or *"included but not limited to"*, then the indictment may be deemed to be too vague for the purposes of identifying the crimes against which the accused must defend himself, *per Blaskic*.<sup>38</sup>

*Submissions Made on Behalf of Hysni Gucati*

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<sup>37</sup> *Prosecutor v Nahimana*, Appeals Judgment, 28 November 2007, ICTR-99-52-A, para.322

<sup>38</sup> *Prosecutor v Blaskic*, Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form thereof, 4 April 1997, IT-95-14, paras.22-24; *Prosecutor v Kanu*, Decision and Order on Defence Preliminary Motion for Defect in the Form of the Indictment, 19 November 2003, SCSL-2003-13-PT, para.17

62. Counsel for Nasim Haradinaj join with Counsel for Hysni Gucati and their submissions '*Preliminary Motion Alleging Defects in the Form of the Indictment Pursuant to Rule 97(1)(b)*'.

63. Specifically, the submissions outlined at paragraph 16-19 and the table included, are adopted here and for the purposes of Mr. Haradinaj.

64. In adopting and joining those submissions, there is no intention, nor any need, to rehearse or duplicate the same here.

*Submissions per Rule 97(1)(a)*

65. Further to that which has been submitted by Counsel for Mr. Gucati, we would add, with reference to paragraph 18 of those submissions, that on the basis that the offences are not known to the law, the Specialist Chamber has no basis upon which to assume jurisdiction.

66. The Specialist Chamber can exercise jurisdiction over those offences contained within the Law itself, and certain offences already enacted domestically under the Kosovo Criminal Code.

67. As per para. 18 of the Gucati submissions, as the Law has not been amended to apply the 2019 Code, the offences noted at paragraph 48 of the Indictment are not known to the law, and accordingly, fall outside of the jurisdiction of the Specialist Chamber.

*Submissions per Rule 97(1)(b)*

68. It is further submitted that the indictment is defective in that its evidential foundation has not been disclosed.
69. It is acknowledged that the issue of disclosure is still subject to a formal ruling, however, it would appear that the Pre-Trial Judge confirming the indictment did not have sight of the evidence and/or documentation that is said to form the foundation of that indictment.
70. At the hearing of 8 January 2021, prosecuting counsel, [REDACTED], appearing for the SPO, stated unequivocally that it would not be disclosing the seized material, referred to as Batches 1-3, on the basis that they did not intend to provide the defence with *“the weapons which the accused used to commit the alleged crimes...doing so would run counter to the purpose for which the proceedings were brought...and confirmed in the indictment...”* and that the SPO Investigator had given a statement describing the contents of the seized material and that would be sufficient. Apart from the very obviously inappropriate language adopted by the SPO, it should be clear to the Chamber that the statement of an investigator employed by the SPO falls far short of that which the law requires.



71. It is of some concern, that the indictment has been confirmed without the Pre-Trial Judge, having had sight of, and being able to scrutinise, the material that forms the basis of the allegations.

72. It is respectfully submitted that the indictment cannot possibly be said to be valid on account of it only being the SPO that has sight of the evidence upon which it is based.

73. Rule 86(3) and (4) reads:

(3) *“The indictment filed pursuant to Article 38(4) of the Law shall set forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime(s) with which the suspect is charged, in particular the alleged mode of liability in relation to the crimes charged pursuant to Article 16 of the Law. The indictment shall be filed together with supporting material, which shall include:*

(a) *Evidentiary material supporting the material facts; and*

(b) *A detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s).*

(4) *The Pre-Trial Judge shall examine the supporting material in relation to each of the charges and shall determine whether a well-grounded suspicion has been established against the suspect.*

74. There is no confirmation at this stage that the evidence the SPO seeks to withhold from the Defence for the reasons it cites, was considered by the Pre-Trial Judge when reviewing and thereafter confirming the indictment. On the contrary, there is a clear statement from the SPO that it was **not** given to the Pre-Trial Judge.
75. Accordingly, it is submitted that without having sight of the evidential foundation of the indictment, there cannot be said to have been an informed decision on the issue of whether there was a 'well-grounded suspicion'.
76. Conversely, if it is that the Pre-Trial Judge has seen that evidence, which would run contrary to the submissions in court by the SPO, it is evidence that the Defence have not had sight of, or alternatively, it is evidence upon which a decision as to disclosure has not yet been made for the reasons set out above, and the ongoing proceedings before the Pre-Trial Chamber.
77. Further, if it is that the Pre-Trial Judge has had sight of evidence that the Defendant has not, the Defence are prejudiced in terms of any application, the principle of the 'Equality of Arms' *per* Article 6 having been violated.
78. The raising of this issue adds further weight to the argument that, as per paragraphs 34-44 above, that the consideration of submissions on the challenge to the indictment is at this stage premature, given the ongoing disclosure issues that are yet to be resolved.

## VII. CONCLUSION

79. As is argued at the outset, the issue of whether the indictment is to be challenged either on the basis of jurisdiction and/or on the basis that the indictment is defective, is at this stage premature.
80. This argument is advanced on the basis that the issue of disclosure, specifically, whether disclosure *per* Rule 102 has been completed or otherwise.
81. Until this issue has been resolved to conclusion, argument ought not to be heard on the issue of the indictment specifically.
82. Further, subject to the decision of the Chamber on the issue of disclosure, it may give rise to further arguments being raised concerning the validity of the indictment.
83. Accordingly, a further order is sought from the Pre-Trial Judge, ordering that the issue of submissions to be made under Rule 97 are to be ‘stayed’ until a final decision is rendered on the issue of disclosure.<sup>39</sup>

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<sup>39</sup> ‘Final’ in this context is to be when the issue has been heard before all relevant branches of the appellate chambers, should any application to appeal be lodged by either the SPO or the Defence.

84. In the alternative, and without prejudice to the aforementioned, for the reasons outlined, the Chamber, in the first instance, does not have jurisdiction to hear charges under the indictment.

85. Secondly, and without prejudice to the aforementioned, the indictment is defective for the reasons outlined.

Word Count: 3858 words



**Toby Cadman**

**Specialist Counsel**



**Carl Buckley**

**Specialist Co-Counsel**