



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2020-05**
The Prosecutor v. Salih Mustafa

Before: **Pre-Trial Judge**
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 9 October 2020

Language: English

Classification: **Public**

Framework Decision on Disclosure of Evidence and Related Matters

Specialist Prosecutor

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(1) and (13) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 95(2)(b) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 12 June 2020, the Pre-Trial Judge issued the "Decision on the Confirmation of the Indictment Against Salih Mustafa" ("Confirmation Decision"),² together with, *inter alia*, an arrest warrant and transfer order for Salih Mustafa ("Mr Mustafa" or "Accused").³
2. On 19 June 2020, the Specialist Prosecutor's Office ("SPO") submitted the Confirmed Indictment.⁴
3. On 24 September 2020, Mr Mustafa was arrested⁵ and transferred to the detention facilities of the Specialist Chambers ("SC") in The Hague, the Netherlands.⁶

¹ KSC-BC-2020-05, F00001, President, *Decision Assigning a Pre-Trial Judge*, 14 February 2020, public.

² KSC-BC-2020-05, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Salih Mustafa*, 12 June 2020, strictly confidential and *ex parte*. A public redacted version was filed on 5 October 2020.

³ KSC-BC-2020-05, F00009/A01, Pre-Trial Judge, *Arrest Warrant for Mr Salih Mustafa*, 12 June 2020, strictly confidential and *ex parte*; F00009/A02, Pre-Trial Judge, *Order for Transfer to Detention Facilities of the Specialist Chambers*, strictly confidential and *ex parte*. Public redacted versions of the two documents were filed on 24 September 2020.

⁴ KSC-BC-2020-05, F00011/A02, Specialist Prosecutor, *Annex 2 to Submission of Confirmed Indictment*, 19 June 2020, confidential. A public redacted version of the Confirmed Indictment was filed on 28 September 2020 (KSC-BC-2020-05, F00019/A01, Specialist Prosecutor, *Annex 1 to Submission of Further Redacted Version of Confirmed Indictment*, 28 September 2020, public).

⁵ KSC-BC-2020-05, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 24 September 2020, strictly confidential and *ex parte*.

⁶ KSC-BC-2020-05, F00014, Registrar, *Notification of Reception in the Detention Facilities of the Specialist Chambers*, 24 September 2020, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*.

4. On 28 September 2020, the Pre-Trial Judge issued the “Order for Submissions on the Redaction System”.⁷ Related submissions were filed on 1 October 2020 by the SPO⁸ and on 5 October 2020 by the Defence (“Defence Submissions on Disclosure and Redactions”).⁹

5. Also on 28 September 2020, the initial appearance of Mr Mustafa took place.¹⁰ During the hearing, the Accused stated that he understands and speaks Albanian.¹¹

6. On 30 September 2020, the Pre-Trial Judge issued the “Order Setting the Date for a Status Conference”, in which he convened a status conference in the presence of the SPO, the Defence, and the Witness Protection and Support Office (“WPSO”) for Monday, 5 October 2020, at 15:00 hours.¹² He also requested the SPO and the Defence to provide submissions, if they so wished, on any items listed in the agenda to the status conference or other topics they deemed necessary, by Monday, 5 October 2020, at 12:00 hours.¹³ Related submissions were filed by the SPO¹⁴ and the Defence in its Defence Submissions on Disclosure and Redactions.

7. On 5 October 2020, the first status conference pursuant to Rule 96(1) of the Rules took place (“Status Conference”).¹⁵

⁷ KSC-BC-2020-05, F00022, Pre-Trial Judge, *Order for Submissions on the Redactions System* (“Order for Submissions on Redactions”), 28 September 2020, public.

⁸ KSC-BC-2020-05, F00024, Specialist Prosecutor, *Observations on a Redaction Regime* (“SPO Submissions on Redactions”), 1 October 2020, public.

⁹ KSC-BC-2020-05, F00029, Defence, *Defence Observations for the Status Conference to be held on 5 October 2020*, 5 October 2020, public.

¹⁰ KSC-BC-2020-05, Transcript of Hearing, 28 September 2020 (“28 September 2020 Transcript”), public.

¹¹ KSC-BC-2020-05, 28 September 2020 Transcript, p. 4, line 14.

¹² KSC-BC-2020-05, F00023, Pre-Trial Judge, *Order Setting the Date for a Status Conference* (“Scheduling Order Status Conference”), 30 September 2020, public, with Annex 1, public, para. 21(a).

¹³ Scheduling Order Status Conference, para 21(b).

¹⁴ KSC-BC-2020-05, F00030, Specialist Prosecutor, *Public Redacted Version of Prosecution Submissions for the First Status Conference* (“SPO Submissions on Disclosure”), 5 October 2020, public.

¹⁵ KSC-BC-2020-05, Transcript of Hearing, 5 October 2020 (“5 October 2020 Transcript”), public.

8. On 8 October 2020, the Pre-Trial Judge issued the “Decision on Working Language”,¹⁶ determining that English shall be the working language of the present proceedings.

II. APPLICABLE LAW

9. Pursuant to Article 21(6) of the Law, all material and relevant evidence or facts in possession of the SPO which are for or against the Accused shall be made available to the Accused before the beginning of and during the proceedings, subject only to restrictions which are strictly necessary and when any necessary counter-balance protections are applied.

10. Pursuant to Rule 46(1) of the Rules, and subject to the Registrar’s obligations under Rule 24 of the Rules, the SPO shall be responsible for the retention, storage, and security of information, physical, and electronic material obtained in the course of its investigations.

11. Pursuant to Rule 95(2)(b) of the Rules, after the initial appearance of the Accused in accordance with Rule 92 of the Rules, the Pre-Trial Judge shall set time limits for disclosure of evidence, take any measure to ensure timely disclosure, and prepare a disclosure report for the Trial Panel.

12. Pursuant to Rule 96(1) of the Rules, the Pre-Trial Judge shall convene a status conference as soon as possible after the initial appearance of the Accused in order to, *inter alia*: (i) organise exchanges between the Parties and, where applicable, Victims’ Counsel, so as to ensure the expeditious preparation for trial; and (ii) take steps to ensure that all necessary preparations are being conducted by the Parties in a timely and diligent fashion.

¹⁶ KSC-BC-2020-05, F00032, Pre-Trial Judge, *Decision on Working Language*, 8 October 2020, public.

13. Pursuant to Rule 102(1)(a) of the Rules, and subject to Rules 105, 106, 107, and 108 of the Rules, the SPO shall make available to the Defence and, where applicable, Victims' Counsel, as soon as possible and at least within 30 days of the initial appearance, the supporting material to the Confirmed Indictment as well as any statement obtained from the Accused.

14. Pursuant to Rule 102(1)(b) of the Rules, within a time limit set by the Pre-Trial Judge, and no later than 30 days prior to the opening of the Specialist Prosecutor's case, the SPO shall make available to the Defence the following material: (i) the statements of all witnesses whom the SPO intends to call to testify at trial, in a language the Accused understands and speaks; (ii) all other witness statements, expert reports, depositions, or transcripts that the SPO intends to present at trial; and (iii) the exhibits that the SPO intends to present at trial.

15. Pursuant to Rule 102(2) and (4) of the Rules, any statements of additional SPO witnesses, which have not been disclosed up to the 30-day time limit prior to the opening of the Specialist Prosecutor's case and whom the SPO intends to call to testify at trial, shall be made available to the Defence as soon as possible, in a language the Accused understands and speaks, and shall be accompanied by reasons for late disclosure. Any such disclosure shall be finalised during the pre-trial stage.

16. Pursuant to Rule 102(3) of the Rules, the SPO shall disclose to the Defence, upon request and without delay, any statements, documents, and photographs and allow inspection of other tangible objects in the custody or control of the SPO, which are deemed by the Defence to be material to its preparation, or were obtained from or belonged to the Accused.

17. Pursuant to Rule 103 of the Rules, and subject to Rules 107 and 108 of the Rules, the SPO shall immediately disclose to the Defence any information as soon as it is in its custody, control or actual knowledge, which may reasonably suggest the innocence

or mitigate the guilt of the Accused or affect the credibility or reliability of the SPO's evidence.

18. Pursuant to Article 23(1) of the Law, Rules 80(1) and 108(1)(b) of the Rules, a Panel may order, *proprio motu* or upon request, appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings, as well as other persons at risk on account of testimony given by witnesses.

19. Pursuant to Rule 80(4)(a)(i)-(iii), (d), and (e) of the Rules, such measures may include the redaction of names and other identifying information in order to prevent disclosure to the Accused and/or the public, where necessary, of the identity and/or whereabouts of a witness, a victim participating in the proceedings or of a person related to or associated with them.

20. Pursuant to Rule 107(2) of the Rules, the SPO shall apply to the Panel to be relieved in whole or in part of its obligation under Rules 102 and 103 of the Rules to disclose initial material if the information, of which it has custody or control, has been provided on a confidential basis and solely for the purpose of generating new evidence and for which it has not received the information provider's consent to disclose.

21. Pursuant to Rule 108(1)(a) and (c) of the Rules, the SPO may apply to the Panel to withhold information in whole or in part where the disclosure of such information may prejudice ongoing or future investigations or be contrary for any other reason to the public interest or the rights of third parties. Pursuant to Rule 108(6) of the Rules, the same applies *mutatis mutandis* to the Defence.

22. Pursuant to Rule 109(b) and (c) of the Rules, both the SPO and the Defence, should it choose to disclose any evidence, shall submit, when disclosing: (i) a clear and concise description of the items, or categories thereof, disclosed to the other Party; and (ii) a

categorisation of the information disclosed, in accordance with the charges in the Confirmed Indictment, with specific reference to the underlying crimes, contextual elements of the crimes charged, the alleged conduct of the Accused or, where applicable, evidence to be presented by the SPO.

23. Pursuant to Rule 95(4) of the Rules, the Pre-Trial Judge shall order the SPO to file, within a set time limit, its Pre-Trial Brief, the list of witnesses that the SPO intends to call to testify at trial, and the list of proposed exhibits it intends to present at trial.

24. Pursuant to Rule 95(5) of the Rules, after the submission of the SPO Pre-Trial Brief and list of witnesses and proposed exhibits, the Pre-Trial Judge shall invite the Defence to file, within a set time limit, a Pre-Trial Brief indicating: (i) in general terms, the nature of the Accused's defence; (ii) the charges and matters which the Accused disputes, by reference to particular paragraphs in the SPO Pre-Trial Brief and the reasons why the Accused disputes them; (iii) a list of potential witnesses that it intends to call at trial, including to which relevant issue their evidence relates, without prejudice to any subsequent amendment or filing thereof. The Pre-Trial Judge shall also request the Defence, within a set time limit, to notify the SPO and the Panel of its intent to offer a defence of alibi or any grounds for excluding criminal responsibility.

25. Pursuant to Rule 104(5) of the Rules, within a time limit set by the Panel and no later than 15 days prior to the opening of the Defence case, the Defence shall: (i) permit the SPO to inspect and copy any statements, documents, photographs, and other tangible objects in the Defence's custody or control, which are intended for use by the Defence as trial; (ii) provide the SPO with all statements, if any, of witnesses whom the Defence intends to call to testify at trial or intends to present at trial; and (iii) provide the SPO with all exhibits that the Defence intends to present at trial.

26. Pursuant to Rules 106, 107(1), and 111(1) of the Rules, certain categories of material are, in principle, exempted from disclosure, subject to the Rules and unless

otherwise ordered by the Panel. These include: (i) reports, memoranda or other internal documents prepared by the SPO (including the Special Investigative Task Force), Defence and Victims' Counsel (Rule 106 of the Rules), including their assistants and representatives; (ii) material provided to the SPO on a confidential basis and solely for the purpose of generating new evidence (Rule 107(1) of the Rules); and (iii) privileged communication as defined by Rule 111(1) of the Rules.

III. SUBMISSIONS OF THE PARTIES

27. Regarding disclosure of evidence, the SPO submits, *inter alia*, that a small number of investigative steps remain ongoing in this case and that, depending on their outcome, further evidence may be disclosed by the SPO.¹⁷ The SPO, however, does not foresee an impact on the expeditious conduct of the pre-trial proceedings.¹⁸ The SPO also submits that it is in a position to fulfil its disclosure obligation under Rule 102(1)(b) of the Rules by 1 December 2020 and to provide the Defence with a detailed notice pursuant to Rule 102(3) of the Rules by the same date.¹⁹

28. Regarding the exceptions to disclosure, the SPO submits that the Pre-Trial Judge should adopt a redaction regime pursuant to which the Parties may redact information contained in material falling within their disclosure obligations under Article 21(6) of the Law and Rules 102-104 of the Rules according to a set of pre-approved categories.²⁰

29. Regarding disclosure of evidence, the Defence submits that, at this stage, it does not provide notice of its intention to raise an alibi or any ground for excluding criminal

¹⁷ SPO Submissions on Disclosure, para. 3; 5 October 2020 Transcript, p. 4, lines 13-17.

¹⁸ SPO Submissions on Disclosure, para. 3; 5 October 2020 Transcript, p. 4, lines 18-22.

¹⁹ SPO Submissions on Disclosure, paras 12, 16; 5 October 2020 Transcript, public, p. 14, lines 23-25; p. 19, lines 22-25.

²⁰ SPO Submissions on Redactions, paras 1, 4.

responsibility but that it reserves the right to do so later in the proceedings.²¹ In addition, the Defence submits that it is not in a position to give any indication as to the time frame for its investigations. It notes, however, that investigations will be conducted and that the Defence will give notification thereof as soon as there is a feasible estimate for it.²²

30. Regarding the exceptions to disclosure, the Defence submits that it does not oppose the SPO's proposed redaction regime, as the regime will apply *mutatis mutandis* to the Defence.²³

IV. DISCUSSION

A. PRINCIPLES GOVERNING DISCLOSURE OF EVIDENCE

1. Introduction

31. The legal framework of the SC provides for several procedural steps to be taken by the Pre-Trial Judge, the Parties and Victims' Counsel, where applicable, between the initial appearance of the Accused and the transmission of the case file to the Trial Panel, in accordance with Rule 98 of the Rules. A critical step, among others, is the establishment of a system regulating the exchange of evidence between the Parties and its communication to the Pre-Trial Judge. Adopting a system that ensures efficiency of the disclosure process is fundamental for the Pre-Trial Judge to achieve a balance between the duty to safeguard certain interests, including the protection of

²¹ Defence Submissions on Disclosure and Redactions, para. 3.

²² Defence Submissions on Disclosure and Redactions, para. 4; 5 October 2020 Transcript, p. 6, lines 5-9.

²³ Defence Submissions on Disclosure and Redactions, para. 5.

witnesses, participating victims, and other persons at risk, and the obligation to uphold the rights of the Accused under Article 21 of the Law.²⁴

2. Role of the Parties and the Registry

32. Disclosure of evidence, and the Parties' ensuing obligations under the Rules, is a process that takes place between the SPO and the Defence. This process must be organised and facilitated by the Registry, acting as a communication channel between the Parties and the Panel,²⁵ through the electronic software provided to this effect, as stipulated in Rules 98(1)(b) and 109(a) of the Rules. The Parties shall abide by the Registry Instruction on Uploading Records to Legal Workflow when disclosing evidence electronically.²⁶

33. According to Article 34(1) of the Law and Rule 24(1) and (2) of the Rules, the Registrar shall maintain a full and accurate record of proceedings and shall preserve all evidence and other material produced during the proceedings, in accordance with the principles set out in this decision and any future rulings on the matter. Such record must be accessible to the Parties and participants, as the case may be, subject to any necessary restriction regarding protection and level of confidentiality, as provided for in Articles 23 and 58 of the Law, as well as Rules 80, 82, 105, 106, 107, and 108 of the Rules, or as ordered by the Pre-Trial Judge. In this regard, when disclosing evidence, the Parties shall determine the appropriate level of classification of each item and shall

²⁴ Order for Submissions on Redactions, para. 9. *Similarly*, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-117-Red3, Pre-Trial Chamber II, [Redacted First Decision on the Prosecutor's Request for Redactions and Related Requests](#), 3 July 2014, para. 17, and references therein.

²⁵ *Similarly*, ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-31-tENG, Pre-Trial Chamber I, [Decision on the Evidence Disclosure Protocol and Other Related Matters](#) ("Al Hassan Disclosure Decision"), 16 May 2018, para. 36; *Prosecutor v. Ongwen*, ICC-02/04-01/15-203, Pre-Trial Chamber II, [Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#) ("Ongwen Disclosure Decision"), 27 February 2015, para. 10.

²⁶ KSC-BD-18, Registrar, Instruction on Uploading Records on Legal Workflow, 28 August 2019.

register evidence as public, unless there exist reasons to classify the material otherwise, in accordance with Rule 83(1) of the Rules.²⁷

3. Communication of Evidence to the Pre-Trial Judge

34. The Pre-Trial Judge recalls that he has the duty to take all necessary measures for the expeditious preparation of the case for trial, as required by Article 39(1) and (13) of the Law and Rule 95(2) of the Rules, including preparing a disclosure report for the Trial Panel, as stipulated in Rule 95(2)(b) of the Rules. In order to fulfil this duty, all evidence exchanged between the Parties, regardless of whether it will be relied upon at trial, shall be communicated to the Pre-Trial Judge. Such communication will also assist the Pre-Trial Judge to ensure that disclosure of evidence takes place under satisfactory conditions.²⁸

35. Accordingly, the Pre-Trial Judge shall have access to the following disclosed evidence: (a) all evidence relied upon by the SPO to support the Confirmed Indictment, including statements obtained from the Accused, if any (Rule 102(1)(a) of the Rules); (b) all statements of witnesses whom the SPO intends to call to testify at trial (Rule 102(1)(b)(i) of the Rules); (c) all other witness statements, expert reports, depositions, or transcripts that the SPO intends to present at trial (Rule 102(1)(b)(ii) of the Rules); (d) the exhibits that the SPO intends to present at trial (Rule 102(1)(b)(iii) of the Rules); (e) all evidence which is deemed by the Defence to be material to its preparation, or was obtained from or belonged to the Accused (Rule 102(3) of the Rules); (f) all exculpatory evidence in the SPO's custody, control or actual knowledge (Rule 103 of the Rules); (g) all evidence the Defence may present to establish an alibi

²⁷ See, similarly, ICC, *Prosecutor v. Yekatom*, ICC-01/14-01/18-64-Red, Pre-Trial Chamber II, [Public Redacted Version of "Decision on Disclosure and Related Matters"](#), ("Yekatom Disclosure Decision") 23 January 2019, para. 17.

²⁸ See, similarly, [Yekatom Disclosure Decision](#), para. 12; [Al Hassan Disclosure Decision](#), para. 14.

or a ground for excluding criminal responsibility, including names and current contact information of witnesses and any other evidence upon which the Accused intends to rely to establish such alibi or grounds (Rule 104(1)(a) and (b) of the Rules); (h) all evidence in the Defence's custody or control, which is open to inspection by the SPO and is intended for use by the Defence at trial (Rules 104(5)(a) of the Rules); (i) all statements of witnesses, if any, whom the Defence intends to call to testify at trial or intends to present at trial (Rule 104(5)(b) of the Rules); and (j) all exhibits that the Defence intends to present at trial (Rule 104(5)(c) of the Rules).

4. Deadlines for Disclosure

36. Under the SC legal framework, the disclosure of some categories of material is subject to explicit deadlines provided for in the Rules, while for other categories of material the determination of the appropriate time-frame for disclosure is left to the Pre-Trial Judge, taking into account the specificities of the case, the size and features of the evidentiary record, and the submissions of the Parties.

37. While the present decision sets out a calendar for disclosure of the different categories of evidence, such deadlines are indicative of the minimum notice only. When possible, the disclosing Party should endeavour to disclose the material ahead of the established deadlines, so as to allow proper preparation by the receiving Party.²⁹

5. Completeness and Relevance of the Disclosed Evidence

38. Either Party shall ensure that the disclosed evidence is complete. Evidentiary items that were inadvertently disclosed in incomplete form may be re-disclosed in a

²⁹ Similarly, [Yekatom Disclosure Decision](#), para. 13; [Al Hassan Disclosure Decision](#), paras 20-21.

complete form within the time limit provided for in the Rules or as ordered by the Pre-Trial Judge.

39. The SPO and the Defence, should it choose to do so, shall disclose only evidence of true relevance that underpins the particular factual allegations fulfilling the requisite legal requirements, as opposed to the greatest volume of evidence, so as to allow the receiving Party to focus its preparation.³⁰

B. TIME-FRAME FOR DISCLOSURE OF EVIDENCE

1. Rule 102(1)(a): Supporting Material to the Indictment

40. Rule 102(1)(a) of the Rules regulates the disclosure of the material relied upon by the SPO in support of the Confirmed Indictment, including any statement obtained from the Accused. Such material must be disclosed as soon as possible but at least within 30 days of the initial appearance of the Accused. Early disclosure of such material is important, *inter alia*, to assist the Accused in deciding whether to admit guilt or plead not guilty pursuant to Rule 92(2)(c) of the Rules, which may also take place at the latest 30 days after the initial appearance, unless he or she has already admitted guilt or pleaded not guilty at the time of the initial appearance.

41. In the present case, Mr Mustafa has chosen not to admit guilt or plead not guilty during his initial appearance.³¹ Consequently, he will be called to do so at the Rule 92(2)(c) hearing, which will have to take place on Wednesday, 28 October 2020, at the latest. The SPO submits that it disclosed to the Defence on 29 September 2020 two batches of Rule 102(1)(a) material, which included non-witness related material and statements obtained from the Accused, totalling more than half of the entire

³⁰ 5 October 2020 Transcript, p. 4, lines 1-2. Similarly, [Yekatom Disclosure Decision](#), para. 18; [Al Hassan Disclosure Decision](#), para. 25; [Ongwen Disclosure Decision](#), para. 20.

³¹ KSC-BC-2020-05, 28 September 2020 Transcript, p. 11, lines 24-25.

evidence falling under this category.³² The remaining material concerns the five witnesses relied upon by the SPO for the purposes of seeking confirmation of the Indictment and comprises 52 items for a total of 964 pages of evidence (both in English and Albanian).³³ This evidence will be the object of the first SPO request for protective measures,³⁴ to be filed within two weeks from the initial appearance of the Accused, as prescribed in the Confirmation Decision.³⁵ Importantly, the SPO stated that the Albanian translations of Rule 102(1)(a) material, including witness-related material, is virtually complete.³⁶

42. Accordingly, the SPO anticipates being in a position to disclose the remaining material falling under Rule 102(1)(a) of the Rules, at the earliest, within two weeks from the date of the Status Conference, or in any case by the 30-day deadline as stipulated in the same provision.³⁷

43. Taking into consideration the timing of the upcoming SPO request for protective measures, the time needed for the Pre-Trial Judge to rule on it, and the time for the SPO to subsequently implement redactions, if granted, it is appropriate to set Friday, 23 October 2020 as the deadline to complete disclosure of the Rule 102(1)(a) material. This timeframe will provide the Accused and his Counsel with a sufficient amount of time to familiarise themselves with the disclosed material ahead of the Rule 92(2)(c) hearing.

³² SPO Submissions on Disclosure, para. 6; 5 October 2020 Transcript, p. 8, lines 13-16.

³³ SPO Submissions on Disclosure, paras 8, 11; 5 October 2020 Transcript, p. 8, lines 7-12.

³⁴ SPO Submissions on Disclosure, para. 8; 5 October 2020 Transcript, p. 8, lines 17-24.

³⁵ Confirmation Decision, para. 163(c).

³⁶ SPO Submissions on Disclosure, para. 10; 5 October 2020 Transcript, p. 9, lines 11-14.

³⁷ SPO Submissions on Disclosure, para. 9; 5 October 2020 Transcript, p. 9, lines 7-10.

2. Rule 102(1)(b): Additional Material Intended for Use at Trial

44. Rule 102(1)(b) of the Rules governs the disclosure of any additional material intended for use at trial, which was not relied upon by the SPO as supporting material to the Indictment submitted for confirmation. This material must be disclosed within a time limit set by the Pre-Trial Judge and in any case no later than 30 days prior to the opening of the SPO case, pursuant to Rule 124 of the Rules.

45. The timeframe for disclosure of such material may depend on factors such as: (i) the amount and type of material to be disclosed; (ii) when the material was collected by the SPO; (iii) the need to complete investigative steps (including obtaining the necessary clearances from information providers) before disclosing such material; (iv) the need to translate (parts of) this material, notably statements of witnesses whom the SPO intends to call to testify; (iv) and the need to implement protective measures, including redaction of information.

46. Should the SPO wish to disclose additional statements of witnesses whom it intends to call to testify at trial, but failed to do so within the time limit set by the Pre-Trial Judge under Rule 102(1)(b) of the Rules, such late disclosure shall comply with the requirements of Rule 102(1), (2), and (4) of the Rules, including with regard to translation. The Defence may seize the Pre-Trial Judge where grounds to dispute the late disclosure exist.

47. The SPO submits that Rule 102(1)(b) material will likely include statements and/or testimonies of at least another 11 witnesses as well as approximately 50 exhibits for trial.³⁸ Regarding the witness-related material, transcription and translation of those statements and/or testimonies remains ongoing in respect of eight out of the eleven witnesses.³⁹ The SPO also states that it will make a second request for protective

³⁸ SPO Submissions on Disclosure, paras 13-14; 5 October 2020 Transcript, p. 15, lines 2-9.

³⁹ SPO Submissions on Disclosure, para. 13; 5 October 2020 Transcript, p. 15, lines 4-5.

measures concerning eight witnesses.⁴⁰ The estimates provided by the SPO as to the amount of Rule 102(1)(b) material, however, are subject to the outcome of some outstanding and limited investigative steps, as well as an assessment of the relevance of the items recently seized.⁴¹

48. Accordingly, the SPO anticipates being in a position to disclose Rule 102(1)(b) material at the earliest on Tuesday, 1 December 2020, or in any case 30 days prior to the opening of the SPO case.⁴²

49. Considering the breakdown of this material as provided by the SPO and the need for a second request for protective measures for (at least) eight witnesses, the Pre-Trial Judge considers it appropriate to establish staggered deadlines for disclosure of Rule 102(1)(b) material. Accordingly, the SPO shall disclose on a rolling basis, and no later than Monday, 16 November 2020, any material that does not require redactions. As for the request for protective measures regarding the eight witnesses and related material, the SPO shall file it no later than Monday, 9 November 2020, in order to ensure sufficient time to implement redactions, if granted, and to disclose this material to the Defence by Tuesday, 1 December 2020.

3. Rule 102(3): Evidence Material to the Preparation of the Defence, Obtained from or Belonging to the Accused

50. Rule 102(3) material encompasses evidence deemed to be material to the Defence preparation, which is in the custody or control of the SPO or was obtained from or belonged to the Accused, including statements, documents, photographs, and other tangible objects. The formulation *material to the Defence preparation* shall be construed

⁴⁰ SPO Submissions on Disclosure, para. 15; 5 October 2020 Transcript, p. 15, lines 23-24.

⁴¹ SPO Submissions on Disclosure, paras 13-14; 5 October 2020 Transcript, p. 15, lines 9-12.

⁴² SPO Submissions on Disclosure, para. 12; 5 October 2020 Transcript, p. 14, lines 23-25; p. 16, lines 3-4.

broadly and refers to all documents and objects of relevance to the preparation of the Defence case, in the exercise of the Accused's rights under the Law and the Rules.⁴³ What is *relevant* in this context should not necessarily be limited by the temporal scope of the Confirmed Indictment nor should it be confined to material relevant to countering the SPO's case.⁴⁴ The Defence *preparation* is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence,⁴⁵ or related to the SPO's case.⁴⁶

51. As expressly stipulated by Rule 102(3) of the Rules, an indication as to the materiality of any such items is to be made by the Defence. To this effect, the SPO shall prepare and disclose a detailed notice of all material and evidence in its possession without delay, as prescribed by Rule 102(3) of the Rules. The SPO may also seize the Pre-Trial Judge where grounds to dispute the materiality of the information, as indicated by the Defence on the basis of the SPO detailed notice, exist.

52. The SPO submits that it will be in a position to disclose a detailed notice of Rule 102(3) material by Tuesday, 1 December 2020, upon finalisation of and together with disclosure of Rule 102(1)(b) material.⁴⁷ This detailed notice will comprise any other residual information potentially material to the Defence after the items to be

⁴³ 5 October 2020 Transcript, p. 19, lines 13-14. *Similarly*, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0004, Appeals Chamber, [Public Redacted Version of 19 September Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records"](#), ("2 October 2013 Decision") 2 October 2013, para. 21, and references therein; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1433 (OA 11), Appeals Chamber, [Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008](#), ("11 July 2008 Judgment") 11 July 2008, paras 77-78; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1330 (OA 3), Appeals Chamber, [Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses"](#), 20 May 2016, para. 23, and references therein.

⁴⁴ *Similarly*, [2 October 2013 Decision](#), para. 22, and references therein.

⁴⁵ *Similarly*, [11 July 2008 Judgment](#), para. 77.

⁴⁶ *Similarly*, [2 October 2013 Decision](#), para. 22, and references therein.

⁴⁷ SPO Submissions on Disclosure, para. 16; 5 October 2020 Transcript, p. 19, line 25 to p. 20, line 1.

presented at trial and the exculpatory evidence have been disclosed.⁴⁸ The SPO anticipates that the number of items falling under Rule 102(3) of the Rules will be significantly less than 1,000,⁴⁹ and that some of this material will require redactions pursuant to Rule 108(1) of the Rules.⁵⁰

53. In light of the SPO submissions, the Pre-Trial Judge considers it appropriate to set Tuesday, 1 December 2020, as the deadline for the SPO to disclose the detailed notice of evidence falling under Rule 102(3) of the Rules. Thereafter, the Defence shall indicate to the SPO which items among those listed in the detailed notice it seeks to have access to, by way of disclosure or inspection. The Defence shall provide such indication by Friday, 8 January 2021, or at any time earlier. On the basis of such indication, the SPO shall, no later than Friday, 15 January 2021, or within one week of the Defence indication, whichever is earlier, disclose or provide access to the selected material that does not require redactions. Should the Defence seek access to and disclosure of Rule 102(3) material that requires redactions, the SPO shall make a prompt request for protective measures to the Pre-Trial Judge, no later than Friday, 22 January 2021, or within two weeks of the Defence indication, whichever is earlier. Should the SPO wish to dispute the materiality of the evidence indicated by the Defence, it shall seize the Panel within five days of the Defence indication.

4. Rule 103: Exculpatory Evidence

54. Rule 103 material (exculpatory evidence) encompasses any information in the custody, control or actual knowledge of the SPO, which may reasonably suggest the innocence or mitigate the guilt of the Accused or affect the credibility or reliability of the SPO's evidence. The requirement that the SPO shall disclose exculpatory evidence

⁴⁸ SPO Submissions on Disclosure, para. 16; 5 October 2020 Transcript, public, p. 20, lines 2-5.

⁴⁹ SPO Submissions on Disclosure, para. 16, footnote 15; 5 October 2020 Transcript, p. 15, lines 9-12.

⁵⁰ SPO Submissions on Disclosure, para. 17; 5 October 2020 Transcript, p. 20, lines 5-7.

immediately, as soon as it is in its custody, control or actual knowledge, identifies a continuous obligation for the SPO to disclose such material to the Defence, unless justifiable reasons prevent immediate disclosure.⁵¹ The initial determination as to whether or not certain information is exculpatory in nature falls upon the SPO and must be done in good faith.⁵²

55. The SPO submits that it disclosed a first batch of potentially exculpatory evidence to the Defence on 29 September 2020,⁵³ comprising 61 items, including three witness statements, 11 transcripts and 47 other documents, totalling 613 pages.⁵⁴ Limited redactions to protect contacts details and names of investigators were applied in order to facilitate immediate disclosure of this material and will be reviewed following the Pre-Trial Judge's first ruling on redactions.⁵⁵ The SPO is currently reviewing a second batch of potentially exculpatory evidence, which is also likely to require certain redactions pursuant to Rule 108(1) of the Rules.⁵⁶

56. In light of the SPO submissions, the Pre-Trial Judge considers it appropriate to order the SPO to disclose any further batch(es) of Rule 103 material as soon as practicable and on a rolling basis, particularly if the material does not require redactions. Should any future batch(es) of potentially exculpatory material require redactions, the SPO shall first seize the Panel at the earliest opportunity for a ruling on the matter, in order to facilitate immediate disclosure of such material to the Defence.

⁵¹ Similarly, ICTR, *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Appeals Chamber, [Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Request for Leave to Present Additional Evidence of Witness ABC1 and EB](#) ("27 November 2006 Decision"), 27 November 2006, para. 11, and references therein. See also, [Yekatom Disclosure Decision](#), para. 16; [Ongwen Disclosure Decision](#), para. 18.

⁵² Similarly, [27 November 2006 Decision](#), para. 11, and references therein.

⁵³ SPO Submissions on Disclosure, para. 18; 5 October 2020 Transcript, p. 20, lines 16-18.

⁵⁴ SPO Submissions on Disclosure, para. 19.

⁵⁵ SPO Submissions on Disclosure, para. 18 and footnote 16; 5 October 2020 Transcript, p. 20, lines 18-21.

⁵⁶ SPO Submissions on Disclosure, para. 20; 5 October 2020 Transcript, p. 20, line 25 to p. 21, line 3.

57. With regard to the batch already disclosed to the Defence on 29 September 2020, the SPO shall review the redactions applied on the basis of the principles and categories set out in the present decision on protective measures and disclose again the material, or part(s) thereof, if need be.

5. Rule 107: Protected Material

58. Rule 107 of the Rules, together with Article 58 of the Law, regulate the disclosure of material which has been provided to the SPO on a confidential basis and solely for the purpose of generating new evidence. Such material is, in principle, not subject to disclosure unless the information provider consents to such disclosure.

59. Where protected material is subject to disclosure under Rules 102 and/or 103 of the Rules, the SPO shall apply confidentially and *ex parte* to the Panel to be relieved in whole or in part of its obligation to disclose the material in question. The SPO may also apply for counterbalancing measures pursuant to Rule 108(2) of the Rules.

60. The SPO submits that all necessary clearances have been obtained in relation to protected material in its custody or control, and which it intends to disclose either under Rule 102(3) or 103 of the Rules.⁵⁷

61. In light of the SPO submissions, the Pre-Trial Judge does not need to make any further determination and reminds the SPO to promptly bring to the attention of the Pre-Trial Judge any issue regarding future material affected by Rule 107 of the Rules.

⁵⁷ SPO Submissions on Disclosure, para. 22; 5 October 2020 Transcript, p. 23, lines 1-5.

C. DISCLOSURE OF EVIDENCE BY THE DEFENCE

62. The principles and procedures enunciated in the present decision apply equally to the Defence, subject to its respective disclosure obligations. The Pre-Trial Judge recalls that the disclosure obligations of the Defence, pursuant to Rule 104 of the Rules, will only be triggered if the Defence elects to present evidence and, in any case, only after the SPO has filed its Pre-Trial Brief and the list of witnesses to be called at trial and proposed exhibits, in accordance with Rule 95(4) of the Rules.

63. Accordingly, within a time limit set by the Pre-Trial Judge and after the submission of the SPO Pre-Trial Brief, and list of witnesses and proposed exhibits, the Defence will be invited to file a Pre-Trial Brief indicating the information requested in Rule 95(5) of the Rules, without prejudice to the Defence's right to notify its intent to offer a defence of alibi or any ground for excluding criminal responsibility at any time earlier.

64. Considering that the Rule 92(2)(c) hearing has not taken place at this stage, and taking into account that the Defence has yet to receive evidence that will inform its course of conduct, the Pre-Trial Judge refrains from making any further determinations. Time limits regulating the filing of the SPO Pre-Trial Brief and list of witnesses and exhibits, which will in turn inform the deadlines for filing the Defence Pre-Trial Brief and disclosure of evidence, if any, will also be determined at a later stage.

D. TRANSLATION OF DOCUMENTS AND EVIDENCE

65. The Pre-Trial Judge recalls that the disclosing Party must ensure that the evidence, including witness statements, is disclosed in English, the working language of the

proceedings, as determined in accordance with Article 20 of the Law and Rule 8(3) of the Rules.⁵⁸

66. On the other hand, Article 21(4)(a) of the Law stipulates that the Accused must be informed in a language he understands of the nature and cause of the charges against him, in the present case, Albanian.⁵⁹ However, this right does not equate to an unfettered and absolute right to receive all evidence, documents, and filings in the Accused's language. Translating the entire case file, including evidence, would prejudice the right under Article 21(4)(d) of the Law to be tried within a reasonable time.⁶⁰ Therefore, a balance must be achieved between these competing rights in order to make proceedings fair and expeditious at the same time.

67. As a result of the above, the Rules establish that all statements of witnesses whom the SPO intends to call to testify at trial shall be made available in the language the Accused understands and speaks, as expressly required by Rule 102(1) of the Rules. All other evidence shall be submitted in English, in accordance with the Decision on Working Language, unless otherwise ordered by the Pre-Trial Judge.

68. The free assistance of an interpreter together with Counsel's professional advice, as provided for in Article 21(4)(c) and (g) of the Law, will assist the Accused in

⁵⁸ KSC-BC-2020-05, F0032, Pre-Trial Judge, *Decision on Working Language*, 8 October 2020, public.

⁵⁹ In this context it is noted that the Accused received the Confirmed Indictment, the Arrest Warrant and the core legal texts of the SC in Albanian (KSC-BC-2020-05, F00018, Registrar, *Report on the Arrest and Transfer of the Accused to the Detention Facilities*, 27 September 2020, strictly confidential and *ex parte*, para. 8; KSC-BC-2020-05, F00031, Registrar, *Report on Compliance with Oral Order by the Pre-Trial Judge*, 7 October 2020, public, para. 2). A confidential redacted version of the Confirmation Decision has also been provided to the Accused in Albanian on 5 October 2020 (KSC-BC-2020-05, F00008/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Decision on the Confirmation of the Indictment Against Salih Mustafa*, 5 October 2020, confidential)

⁶⁰ Similarly, [Ongwen Disclosure Decision](#), paras 31-32; *Prosecutor v. Bemba*, ICC-01/05-01/08-307, Pre-Trial Chamber III, [Decision on the Defence's Request Related to Language Issues in the Proceedings](#), 4 December 2008, para. 15.

understanding the evidence and related filings that are not in Albanian.⁶¹ In the interests of fairness, and with a view to increasing the Accused's ability to comprehend the evidence, the Defence may also request the SPO to provide the Albanian translation of specific evidence, or parts thereof, other than statements of witnesses whom the SPO intends to call to testify at trial.⁶² When making such requests, the Defence shall indicate the reasons why it is essential to receive these pieces of evidence in Albanian and why the Accused is not in a position to appreciate the content of such evidence with the assistance of an interpreter and Counsel's advice. In the event of disagreement between the Defence and the SPO in this regard, the Defence must seize the Pre-Trial Judge as soon as possible.

E. PROCEDURE FOR DISCLOSURE OF EVIDENCE

69. The accompanying material foreseen in Rule 109(b) and (c) of the Rules is designed to put the receiving Party in the best possible position to familiarise itself with and navigate through the disclosed material, in order to focus its preparation, and, more generally, to enhance the expeditiousness and fairness of the proceedings.⁶³

70. The Pre-Trial Judge recalls that at the time of submitting its Indictment for confirmation, the SPO provided a detailed outline of the supporting material, as mandated by Rule 86(3)(b) of the Rules ("Detailed Outline").⁶⁴ As stipulated by this

⁶¹ See, similarly, ICC, *Prosecutor v. Yekatom*, ICC-01/14-01/18-56-Red, Pre-Trial Chamber II, [Public Redacted Version of "Decision on Language Proficiency of Alfred Yekatom for the Purposes of the Proceedings"](#), 11 January 2019, para. 18; [Ongwen Disclosure Decision](#), para. 33.

⁶² Similarly, ICC, *Prosecutor v. Yekatom and Ngaiisona*, ICC-01/04-01/18-163, Pre-Trial Chamber II, [Second Decision on Disclosure and Related Matters](#), 4 April 2019, para. 38; [Al Hassan Disclosure Decision](#), para. 23.

⁶³ See similarly, ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-47, Pre-Trial Chamber II, [Decision Setting the regime for Evidence Disclosure and Other Related Matters](#), 12 April 2013, paras 31-32; *Prosecutor v. Bemba*, ICC-01/05-01/08-55, Pre-Trial Chamber III, [Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties](#), 31 July 2008, paras 72-72.

⁶⁴ KSC-BC-2020-05, F00002/A02, Specialist Prosecutor, *Annex 2 to Submission of Indictment for Confirmation and Related Requests*, 14 February 2020, strictly confidential and *ex parte*.

provision, the Detailed Outline demonstrates 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). The SPO submits that it will redact and reclassify the Detailed Outline upon completion of disclosure of the Rule 102(1)(a) material.⁶⁵

71. The Pre-Trial Judge is of the view that the format of the Detailed Outline satisfies in general the requirements of Rule 109(c) of the Rules, as the content and linkage requirement, stipulated for both documents in the Rules, is the same. Therefore, it may be used, with layout adjustments if necessary, for the purpose of informing the Defence within the meaning of Rule 109(c) of the Rules when submitting any future disclosure packages of incriminating evidence (other than supporting material to the Confirmed Indictment), falling under Rule 102(1)(b) of the Rules. The Defence shall provide a document with the same degree of precision as the Detailed Outline, categorising the information as required by Rule 109(c) of the Rules. The Parties are informed that a consolidated version of their respective disclosure charts will be requested at the end of the pre-trial stage.

72. Considering that the Detailed Outline will be submitted to the Defence, the SPO is not requested to prepare a new Detailed Outline when concluding the disclosure of the remaining Rule 102(1)(a) material. Accordingly, the SPO shall only file a confidential (redacted) and, if possible, a public (redacted) version of the Detailed Outline by Friday, 23 October 2020.

⁶⁵ KSC-BC-2020-05, F00026, Specialist Prosecutor, *Submissions on the Reclassification of Filings*, 2 October 2020, strictly confidential and *ex parte*, para. 8.

F. RESTRICTIONS TO DISCLOSURE

1. General Principles

73. The Pre-Trial Judge notes that full disclosure of all material and relevant evidence is the principle, while withholding information is the exception.⁶⁶ As a combined reading of Article 21(6) of the Law and Rules 80(1) and 108(1) of the Rules indicates, any restrictions to full disclosure must be strictly necessary with a view to protecting: (i) the safety, physical and psychological well-being, dignity, and privacy of witnesses, victims participating in the proceedings, and other persons at risk on account of the testimony given by witnesses of the SC, provided that these measures are consistent with the rights of the Accused; (ii) ongoing or future investigations; and (iii) the public interest and the rights of third parties, In this context, it is also recalled that it is permissible to withhold certain information from the Defence prior to trial.⁶⁷

74. Redactions for the purpose of protecting ongoing or future investigations or the public interest and the rights of third parties are applied only upon a request of the Specialist Prosecutor or the Defence, filed confidentially and *ex parte*.⁶⁸ Redactions for the purpose of protecting witnesses, victims participating in the proceedings, and other persons at risk on account of testimony given by witnesses are applied either upon a request from the Parties, filed confidentially and *ex parte*, or *proprio motu*.⁶⁹

⁶⁶ See also, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-568 (OA3), Appeals Chamber, [Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 \(2\) and \(4\) of the Rules of Procedure and Evidence"](#) ("13 October 2006 Judgment"), 13 October 2006, paras 1, 39; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-475 (OA), Appeals Chamber, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"](#) ("13 May 2008 Judgment"), 13 May 2008, para. 70.

⁶⁷ [13 May 2008 Judgment](#), para. 68.

⁶⁸ Rule 108(1) and (6) of the Rules.

⁶⁹ Rule 80(1) and (3) of the Rules.

75. Lastly, the need for redactions is to be assessed on a case-by-case basis.⁷⁰ In deciding upon the applicable redaction regime, the Pre-Trial Judge must thus strike a balance between the competing interests at stake, whilst ensuring that the proceedings are fair and expeditious.

2. Legal Test

76. In assessing if certain information may be withheld from the receiving party, it must be ascertained whether:⁷¹

- (i) the disclosure of the information in question to the receiving Party, as opposed to the general public, poses an objectively justifiable risk to the protected person or interest;
- (ii) the protective measure is strictly necessary.⁷² Thus, if less restrictive protective measures are both sufficient and feasible, such protective measures must be chosen; and
- (iii) the protective measure is proportionate in view of the prejudice caused to the Accused and a fair trial.⁷³

⁷⁰ [13 October 2006 Judgment](#), para. 36; [13 May 2008 Judgment](#), paras 2, 59, 66.

⁷¹ ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-773 (OA5), Appeals Chamber, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended requests for Redactions under Rule 81"](#), 14 December 2006, paras 21, 33-34; [13 May 2008 Judgment](#), paras 95-99; ECtHR, *Rowe and Davis v. United Kingdom*, no. 2890/95, [Judgment](#), 16 February 2000, para. 61; *Botmeh and Alami v. United Kingdom*, no. 15187/03, [Judgment](#), 7 June 2007, para. 37.

⁷² Article 21(6) of the Law.

⁷³ Rule 80(1) of the Rules.

3. Redaction Regime

77. With a view to expediting the proceedings and establishing an efficient, predictable, and sustainable redaction regime, the Pre-Trial Judge agrees with the redaction system proposed by the Specialist Prosecutor and accepted by the Defence, subject to the amendments set out in the present decision. With the adoption of this decision the Parties thus have sufficient guidance in implementing redactions, if any, before disclosing the evidence in their possession.

78. According to this regime, evidence may be disclosed by either Party with redactions applied directly to certain pre-defined categories of information (“standard redactions”) without prior judicial authorisation. In this case, the disclosing Party is not required to submit a discrete application. The receiving Party is entitled to challenge any redaction applied after the evidence has been disclosed.⁷⁴

79. For any redactions falling outside the aforementioned pre-defined categories (“non-standard redactions”), the disclosing Party may disclose the evidence with redactions, but must submit, at the same time, a discrete application to the Pre-Trial Judge seeking authorisation to restrict disclosure, in accordance with the procedure set out below.⁷⁵

80. In the case of both standard and non-standard redactions, the information to be withheld may be blackened or suppressed, or replaced with the text element “[REDACTED]”. In addition, the disclosing Party shall indicate the type of redaction in the redaction box or at any other appropriate place by using a specific code, as listed below, unless such indication would defeat the purpose of the redaction. This format will allow the reader to immediately recognise the type of underlying information that is redacted or suppressed and the corresponding justification. In the event that the

⁷⁴ See para. 82 below.

⁷⁵ See para. 88 below.

redacted information falls under more than one category, all relevant codes should be indicated.

81. When disclosing evidence with redactions, the disclosing Party shall assign unique pseudonyms to any person whose identity is redacted under categories A.3 and A.4, as set out below, accompanying the respective redaction code(s). The purpose of such pseudonyms is to allow the reader of the redacted material to identify whether the same person is referenced across multiple pieces of evidence. The disclosing Party need not provide the category code and/or a pseudonym when doing so would defeat the purpose of the redaction but shall make clear which codes/pseudonyms are missing for this reason.

82. The receiving Party may challenge any specific redaction it believes to be unwarranted or if it believes that a specific redaction should be lifted as a result of changed circumstances. To this end, it shall approach the disclosing Party directly. The Parties shall consult in good faith with a view to resolving the matter. If the Parties are unable to agree, the receiving Party may apply without undue delay to the Pre-Trial Judge for a ruling, thereby creating an obligation for the disclosing Party to justify the redaction in question. In this case, the disclosing Party shall file a response within five days from notification of the challenge in the record of the case, unless otherwise decided by the Pre-Trial Judge.

83. The disclosing Party must monitor the continued necessity of redactions and shall re-disclose evidence with lesser redactions without seeking the prior leave of the relevant Panel as soon as the reasons justifying them cease to exist, or, if applicable, make an application under Rule 81(1) and (2) of the Rules. Redactions may further be lifted following: (i) an agreement between the Parties that an objectively identifiable risk to the person or interest concerned has ceased to exist; or (ii) an order of the relevant Panel. If the redacted information falls under more than one category, the

redaction should be lifted when all relevant deadlines have expired. If the disclosing Party wishes to maintain redactions after the relevant deadline for the lifting thereof, it should apply to the relevant Panel.

84. In order to verify, at his discretion, the validity of any redactions applied by the disclosing Party and, if necessary, order the disclosing Party *proprio motu* to lift, partially or fully, any redactions, after having given the disclosing Party the opportunity to submit its observations, the Pre-Trial Judge considers it appropriate for him to receive the evidence as disclosed to the receiving Party, as well as in non-redacted form.⁷⁶ This will enable the Pre-Trial Judge to verify, pursuant to Rules 80(1) and 108(1) of the Rules, the scope and validity of any redaction, thus adding another layer of review for the benefit of the receiving Party. It will also enable the Pre-Trial Judge to react in a swift way if challenges are raised to the redactions applied, as the case may be. This is without prejudice to the fact that the disclosing Party may only rely on the redacted form of the evidence, as disclosed to the receiving Party.

4. Standard Redactions

85. The categories for standard redactions are clearly delineated and well-entrenched in the practice of other courts.⁷⁷ The Pre-Trial Judge has carefully reviewed the SPO's proposals for standard redactions and their proposed justifications in light of the test set out above.⁷⁸ In the Pre-Trial Judge's view, the disclosure of the information categorized below to the receiving Party regularly entails an objectively identifiable

⁷⁶ The latter should be accessible in the electronic management system to the Pre-Trial Judge and the disclosing Party only. *Similarly, Al Hassan Disclosure Decision*, para. 32; *Yekatom Disclosure Decision*, para. 28.

⁷⁷ For example, *Yekatom Disclosure Decision*, paras 25-26; *Al Hassan Disclosure Decision*, para. 29.

⁷⁸ See para. 76 above.

risk to the interests concerned and requires the adoption of protective measures that are strictly necessary, while taking into account the rights of the Accused and a fair trial.

86. The categories of information which may be redacted by the disclosing party without prior judicial authorisation are:

(a) Redactions under Rule 108(1)(a) of the Rules:

Category "A.1": Locations of interviews and accommodation, insofar as disclosure would unduly attract attention to the movements of the Parties' staff, victims, witnesses, and other persons at risk on account of the activities of the Specialist Chambers, thereby posing an objective risk to ongoing or future investigations. This information is also in principle not relevant to the other Party. Any such redactions shall be lifted when the location is no longer used in ongoing or future investigations.

Category "A.2": Identifying and contact information of Party, Registry or Specialist Chambers' staff or contractors (excluding investigators), who travel frequently to, or are based in, the field, insofar as disclosure of this information could put these persons at risk and/or hinder their work thereby, putting ongoing or future investigations at risk (to be further specified as "A.2.1." for translators/interpreters, "A.2.2." for stenographers, "A.2.3." for psycho-social experts, "A.2.4." for other medical experts, "A.2.5." for other staff members falling within this category, and "A.2.6." for other contractors falling within this category).

Category "A.3": Identifying and contact information of investigators, insofar as, mindful that the Parties have only a limited pool of investigators, the disclosure of this information could put them at risk and hinder their work in the field, thereby putting ongoing or future investigations at risk, or pose security risks to witnesses or other persons whom they interview or contact. In accordance with paragraph 81 above, the disclosing Party shall indicate the unique pseudonym of the investigator, in addition to the category code (e.g. "A.3.1.", "A.3.2.", "A.3.3.", etc).

Category "A.4": Identifying and contact information of intermediaries, insofar as disclosure of this information may put these persons at risk and hinder their work in the field, thereby putting ongoing or future investigations at risk, or pose security risks to witnesses or other persons with whom they have contact. In accordance with paragraph 81 above, the disclosing Party shall indicate the unique pseudonym of the intermediary, in addition to the category code (e.g. "A.4.1.", "A.4.2.", "A.4.3.", etc).

Category “A.5”: Identifying and contact information of leads and sources, including potential witnesses,⁷⁹ insofar as disclosure of this information could result in the leads and sources being intimidated or interfered with which, in turn, could prejudice ongoing or future investigations (to be further specified as “A.5.1.” for individual leads and sources, including potential witnesses, “A.5.2.” for non-governmental organizations, “A.5.3.” for international organizations, “A.5.4.” for national governmental agencies”, “A.5.5.” for academic institutions, “A.5.6.” for private companies”, and “A.5.7.” for other sources). Where the lead or source provides material that is disclosed, their identity should be disclosed as the source in the context of that disclosure, provided that there are no additional security concerns and the lead or source is not protected under Article 35(2)(e) of the Law and Rule 107 of the Rules.

Category “A.6”: Means used to communicate with witnesses, insofar as disclosure of this information may compromise investigation techniques and the location of witnesses. This information is also, in principle, not relevant to the other party.

Category “A.7”: Other redactions under Rule 108(1)(a) of the Rules, insofar as disclosure of the redacted information would prejudice ongoing or future investigations.

(b) *Redactions under Article 23(1) of the Law and Rules 80(4)(a)(i)-(ii) and 108(1)(b)-(c) of the Rules:*

Category “B.1”: Contact information of witnesses, including phone numbers, locations/addresses, and email addresses, insofar as disclosure of this information may pose a risk to the safety, dignity, privacy, and well-being of the person concerned.

Category “B.2”: Identifying and contact information of family members of witnesses, including photographs, as well as contact information, such as phone numbers, locations/addresses, and email addresses, insofar as disclosure of this information may pose a risk to their safety, dignity, privacy, and well-being. Such individuals are extremely vulnerable given that they have not agreed to be part of

⁷⁹ Potential witnesses are those that have either been or are about to be interviewed by the Parties. For the classification as “prosecution sources”, see ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-476 (OA2), Appeals Chamber, [*Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”*](#), 14 May 2008, paras 1-2, 46, 49. Potential witnesses differ from “innocent third parties” (see below category B.3): whereas the former have been or will be approached by the Parties during their respective investigations in the context of proceedings before the SC, innocent third parties are not approached in the context of the Parties’ investigations and may not be aware that their name is mentioned in context of such investigation. This distinction may be of importance for the receiving Party and should be marked by the use of different codes.

Specialist Chambers' proceedings and may not even be aware that a family member is a witness and are, therefore, at risk of being associated with the Specialist Chambers. Redactions to contact information should be ongoing. Where a redaction to identifying information is applied solely to protect a witness for whom redactions are no longer justified, the redaction under this category should equally be lifted when the identity of the witness is disclosed. Where the redaction to identifying information under this category is applied for a family member's own security and that family member's identity is of no relevance to any known issue in the case, redactions under this category should be ongoing. For redactions falling outside the above scenarios, the disclosing Party should make an application to the relevant Panel.

Category "B.3": Identifying and contact information of individuals who are at risk on account of the testimony of witnesses, but who are not victims, current or prospective witnesses or sources or members of their families ("innocent third parties"),⁸⁰ including phone numbers, locations/addresses, email addresses, and photographs, insofar as disclosure of this information may pose a risk to their safety, dignity, privacy, and well-being. Such individuals have not agreed to be part of Specialist Chambers' proceedings and may not even be aware that their name is mentioned in the context of those proceedings and are, therefore, at risk of being perceived as potential witnesses or collaborators with the Specialist Chambers. Redactions to contact information under this category should be ongoing. For individuals of no relevance to any known issue in the case, redactions to identifying information under this category should be ongoing. Otherwise, the disclosing Party should make an application to the relevant Panel.

Category "B.4": Location of witnesses admitted into a witness protection programme and information revealing the places used for present and future relocation of such witnesses, including before they enter the witness protection programme, insofar as disclosure of this information may compromise the confidentiality of such places, thereby putting protected witnesses at risk. This information is also, in principle, not relevant to the other Party.

Category "B.5": Other redactions under Rule 108(1)(b)-(c) of the Rules, insofar as disclosure of the redacted information would cause grave risk to the security of a witness, victims participating in the proceedings, or members of their family or be contrary for any other reason to the public interest or the rights of third parties.

(c) Other information not subject to disclosure in accordance with the Rules:

Category "C": Internal work product contained in any material subject to disclosure, pursuant to Rule 106 of the Rules. Such redactions do not require the Panel's approval.

⁸⁰ Rule 80(1) of the Rules. *Similarly, [13 May 2008 Judgment](#), paras 1, 40, 56.*

Category “D”: Communications made in the context of the professional relationship between a person and his or her Specialist Counsel pursuant to Rule 111(1) of the Rules. Such redactions do not require the Panel’s approval. They may not be applied to information falling under Rule 111(2)-(6) of the Rules. In these cases, an application to the relevant Panel should be made.

Category “F”: Redactions authorised in prior proceedings pursuant to Rule 81(1)(a) of the Rules. Such redactions shall contain the relevant case and decision number.

87. Category A-D redactions should, pursuant to Rules 106 and 108(1) of the Rules, be applied, *mutatis mutandis*, to equivalent information from other national or international law enforcement agencies, including the Kosovo police and prosecution, the ICTY, KFOR, UNMIK, and EULEX Kosovo.⁸¹ Where such redactions are applied, an identifier for the agency in question should be included in addition to the relevant redaction code.

5. Non-Standard Redactions

88. Non-standard redactions concern, in particular, the names of witnesses whose identity must be withheld from the opposing Party prior to the commencement of the trial and instances where entire pieces of evidence must be withheld.⁸² In such cases, the disclosing Party should mark the redaction as **category “E”** and disclosure of the relevant material should be accompanied by an application to the relevant Panel justifying such redaction. A redacted version of the application should be provided to the receiving Party, who may respond thereto within five days as of notification of the application. Moreover, in order to enable the Pre-Trial Judge to take an objective decision, the WPSO shall submit, within five days of notification of the application for

⁸¹ Article 37(1) of the Law.

⁸² Similarly, ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-224, Pre-Trial Chamber II, [Decision on issues related to disclosure and exceptions thereto](#), 23 April 2015, para. 7; [Yekatom Disclosure Decision](#), para. 32; [Al Hassan Disclosure Decision](#), para. 33.

non-disclosure, an individual risk assessment on each witness in relation to whom non-disclosure of identity is requested.

89. Redactions falling under this category shall be lifted upon order of the relevant Panel or as soon as the reasons justifying them cease to exist. Should a Party intend to lift a non-standard redaction concerning the name of a witness because it believes that the reasons justifying the withholding of identity have ceased to exist, it shall notify the Pre-Trial Judge and the WPSO thereof five days prior to the lifting of any such redaction.

V. DISPOSITION

90. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- a. **ORDERS** the Parties and the Registrar to apply the principles governing disclosure of evidence as set forth in paragraphs 31-39 of this decision;
- b. **ORDERS** the SPO to complete the disclosure of material falling under Rule 102(1)(a) of the Rules, together with the Detailed Outline (in confidential (redacted) and public (redacted) form), by **Friday, 23 October 2020**;
- c. **ORDERS** the SPO to file any request for protective measures of witness-related material falling under Rule 102(1)(b) of the Rules no later than **Monday, 9 November 2020**, and to complete the disclosure of such material with redactions, if granted, by **Tuesday, 1 December 2020**;
- d. **ORDERS** the SPO to disclose any other material falling under Rule 102(1)(b) of the Rules, which does not require redactions, on a rolling basis and no later than **Monday, 16 November 2020**;

- e. **ORDERS** the SPO to disclose a detailed notice of evidence falling under Rule 102(3) of the Rules by **Tuesday, 1 December 2020**;
- f. **ORDERS** the Defence to indicate to the SPO, by **Friday, 8 January 2021**, or any time earlier, which items, among those listed in the detailed notice under Rule 102(3) of the Rules, it seeks to have access to by way of disclosure or inspection;
- g. **ORDERS** the SPO, on the basis of any Defence indication as referred to under point (f) above, to disclose or provide access to the selected material that does not require redactions, no later than **Friday, 15 January 2021, or within one week of the Defence indication**, whichever is earlier;
- h. **ORDERS** the SPO, on the basis of any Defence indication as referred to under point (f) above, to file any request for protective measures of selected material no later than **Friday, 22 January 2021, or within two weeks of the Defence indication**, whichever is earlier;
- i. **ORDERS** the SPO to seize the Pre-Trial Judge, **within five days of the Defence indication** as referred to under point (f), should it dispute the materiality of evidence;
- j. **ORDERS** the SPO to disclose any material falling under Rule 103 of the Rules immediately and on a rolling basis;
- k. **ORDERS** the SPO, should any future material falling under Rule 103 of the Rules require redactions, to make a request for protective measures at the earliest opportunity and to disclose thereafter such material with redactions, if granted, immediately;
- l. **ORDERS** the SPO to promptly bring to the attention of the Pre-Trial Judge any issue regarding future material affected by Rule 107 of the Rules;

- m. **ORDERS** the SPO to disclose any future incriminating material falling under Rule 102(1)(b) of the Rules together with a disclosure chart as specified in paragraphs 71-72 of this decision;
- n. **ORDERS** the Defence, should it choose to disclose any evidence, to provide a disclosure chart, as specified in paragraph 71 of this decision, for each batch of disclosed evidence;
- o. **ORDERS** the Parties to follow the terms of the redaction regime as set forth in paragraphs 73-89 of this decision;
- p. **ORDERS** the WPSO to submit, **within five days of either Party's application for non-disclosure**, an individual risk assessment of each witness in relation to whom non-disclosure of identity is requested, as set forth in paragraph 88 of this decision.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Friday, 9 October 2020
At The Hague, the Netherlands.