



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2020-06**

**The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi,
and Jakup Krasniqi**

Before: **Pre-Trial Judge**

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 23 November 2020

Language: English

Classification: **Public**

Framework Decision on Disclosure of Evidence and Related Matters

Specialist Prosecutor

Jack Smith

Registry

Head of Witness Protection and Support
Office

Counsel for Hashim Thaçi

David Hooper

Counsel for Kadri Veseli

Ben Emmerson

Counsel for Rexhep Selimi

David Young

Counsel for Jakup Krasniqi

Venkateswari Alagendra

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. Between 9 and 11 November 2020, initial appearances pursuant to Rule 92 of the Rules were held for Mr Krasniqi,² Mr Thaçi,³ Mr Veseli,⁴ and Mr Selimi.⁵ During the initial appearances, the Accused all stated that they understand and speak Albanian.⁶

2. On 11 November 2020, the Pre-Trial Judge issued the "Decision on Working Language" ("Working Language Decision"), determining that English shall be the working language of the present proceedings, which the Parties had agreed to.⁷

3. Also on 11 November 2020, the Pre-Trial Judge issued the "Order Setting the Date for a Status Conference and for Submissions", in which he convened a status conference in the presence of the Specialist Prosecutor's Office ("SPO") and the Defence for Wednesday, 18 November 2020.⁸ He also requested the SPO and the

¹ KSC-BC-2020-06, F00001, President, *Decision Assigning a Pre-Trial Judge*, 21 April 2020, public.

² KSC-BC-2020-06, Transcript of Hearing (Mr Krasniqi), 9 November 2020.

³ KSC-BC-2020-06, Transcript of Hearing (Mr Thaçi), 9 November 2020.

⁴ KSC-BC-2020-06, Transcript of Hearing (Mr Veseli), 10 November 2020.

⁵ KSC-BC-2020-06, Transcript of Hearing (Mr Selimi), 11 November 2020.

⁶ KSC-BC-2020-06, Transcript of Hearing (Mr Krasniqi), 9 November 2020, p. 5, lines 2-3; Transcript of Hearing (Mr Thaçi), 9 November 2020, p. 29, lines 14-16; Transcript of Hearing (Mr Veseli), 10 November 2020, p. 59, lines 18-22; Transcript of Hearing (Mr Selimi), 11 November 2020, p. 79, lines 21-22.

⁷ KSC-BC-2020-06, F00072, Pre-Trial Judge, *Decision on Working Language*, 11 November 2020, public, paras 7, 26(a).

⁸ KSC-BC-2020-06, F00074, Pre-Trial Judge, *Order Setting the Date for a Status Conference and for Submissions* ("Scheduling Order Status Conference"), 11 November 2020, public, with Annex 1, public, para. 21(a).

Defence to provide, by Friday, 13 November 2020, and Tuesday 17 November 2020, respectively, written submissions on any items listed in the agenda to the status conference, the redaction regime to be applied in the present proceedings, and/or other related relevant topics.⁹ Related submissions were filed by the SPO¹⁰ and the Defence for Mr Krasniqi,¹¹ Mr Selimi,¹² Mr Thaçi,¹³ and Mr Veseli.¹⁴

4. On 18 November 2020, the first status conference pursuant to Rule 96(1) of the Rules took place (“Status Conference”).¹⁵

II. APPLICABLE LAW

5. 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.

6. 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

⁹ Scheduling Order Status Conference, para. 21(b)-(c).

¹⁰ KSC-BC-2020-06, F00076, Specialist Prosecutor, *Prosecution Submissions for First Status Conference (“SPO Written Submissions”)*, 13 November 2020, public.

¹¹ KSC-BC-2020-06, F00082, Defence for Mr Krasniqi, *Defence Submissions for First Status Conference on Behalf of Jakup Krasniqi (“Krasniqi Written Submissions”)*, 17 November 2020, public.

¹² KSC-BC-2020-06, F00083, Defence for Mr Selimi, *Defence Submissions for First Status Conference (“Selimi Written Submissions”)*, 17 November 2020, public.

¹³ KSC-BC-2020-06, F00085, Defence for Mr Thaçi, *Defence for Hashim Thaçi’s Submissions for First Status Conference (“Thaçi Written Submissions”)*, 17 November 2020, public.

¹⁴ KSC-BC-2020-06, F00087, Defence for Mr Veseli, *Submissions on Behalf of Kadri Veseli – Status Conference – Wednesday 18 November (“Veseli Written Submissions”)*, 17 November 2020, public.

¹⁵ KSC-BC-2020-06, Draft Transcript of Hearing, 18 November 2020 (“18 November 2020 Transcript”), public.

security of information, physical, and electronic material obtained in the course of its investigations.

7. 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.

8. 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.

9. 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.

10. 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 understand and speak; (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.

11. 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 understand and speak, and shall be accompanied by reasons for late disclosure. Any such disclosure shall be finalised during the pre-trial stage.

12. 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 their preparation, or were obtained from or belonged to the Accused.

13. 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.

14. Pursuant to Article 23(1) of the Law and 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.

15. 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.

16. 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.

17. 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.

18. Pursuant to Rule 109(b) and (c) of the Rules, both the SPO and the Defence, should the latter 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.

19. 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.

20. 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, their respective Pre-Trial Briefs indicating: (i) in general terms, the nature of the Accused's defence; (ii) the charges and matters which the Accused dispute, by reference to particular paragraphs in the SPO Pre-Trial Brief and the reasons why the Accused dispute them; (iii) a list of potential witnesses that they intend 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 their intent to offer a defence of alibi or any grounds for excluding criminal responsibility.

21. 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 at trial; (ii) provide the SPO with all statements, if any, of witnesses whom the Defence intend to call to testify at trial or intend to present at trial; and (iii) provide the SPO with all exhibits that the Defence intend to present at trial.

22. 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, including their assistants and representatives (Rule 106 of the Rules); (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

1. SPO

23. Regarding the conduct of its investigations, the SPO submits that a number of investigative steps remain outstanding in the present case, some of which could only

be advanced once the case became public.¹⁶ While there is a likelihood that further evidence will be adduced as a result of such investigations, the SPO does not currently foresee an impact on the expeditious conduct of the proceedings, and is working to finalise these investigative activities during pre-trial proceedings.¹⁷

24. Regarding disclosure of evidence, the SPO submits that it requires the full 30-day deadline provided for in Rule 102(1)(a) of the Rules in order to disclose the supporting material to the Confirmed Indictment, including the detailed outline accompanying the indictment supporting material prepared in accordance with Rule 86(3)(b) of the Rules (“Detailed Outline”), given the volume of such material, the need for extensive redactions, and translation requirements.¹⁸ In respect of such material, the SPO has already made a request for protective measures.¹⁹

25. Regarding Rule 102(1)(b) material, the SPO expects to be in a position to disclose such material by 31 May 2021, or in any case, no later than 30 days prior to the opening of the SPO case.²⁰ It anticipates such material to include approximately 50 further witnesses and approximately 1,500 exhibits.²¹ In respect of such material, the SPO anticipates being in a position to file a second request for protective measures in February 2021.²²

26. Regarding Rule 102(3) material, the SPO expects to be able to provide the Defence with a detailed notice of evidence that may be material to their preparation by 30 April 2021.²³ The items to be included in the Rule 102(3) notice will comprise any

¹⁶ SPO Written Submissions, para. 3.

¹⁷ SPO Written Submissions, para. 3.

¹⁸ SPO Written Submissions, paras 7-9.

¹⁹ KSC-BC-2020-06, F00094, Specialist Prosecutor, *Request for Protective Measures*, 19 November 2020, strictly confidential and *ex parte*, with Annexes 1-13, strictly confidential and *ex parte*.

²⁰ SPO Written Submissions, paras 2, 10.

²¹ SPO Written Submissions, paras 5, 11-12.

²² SPO Written Submissions, para. 13.

²³ SPO Written Submissions, para. 15.

residual evidence potentially material to the Defence's preparation, after the items falling under Rule 102(1)(b) of the Rules and the potentially exculpatory items falling under Rule 103 of the Rules have been disclosed.²⁴ Based on its ongoing review, the SPO submits that there will be close to 100,000 Rule 102(3) items, and that a significant percentage thereof will require redactions.²⁵

27. Regarding Rule 103 material, the SPO submits that it will disclose over 1,000 potentially exculpatory items no later than the supporting material under Rule 102(1)(a) of the Rules, and will continue to review and disclose any similar material on a rolling basis, with redactions if necessary.²⁶ In this regard, however, the SPO requests to be relieved of its obligation to disclose material under Rule 103 of the Rules when such material is known to the Defence and the material is accessible with the exercise of due diligence.²⁷

28. Regarding Rule 107 material, the SPO submits that it has been actively seeking certain remaining clearances for all protected material in the present case.²⁸ It does not foresee, at this stage, that obtaining such clearances will jeopardise its proposed timeline for disclosure.²⁹

29. Regarding translation matters, the SPO submits that translations into Albanian of statements of witnesses that the SPO intends to rely upon at trial falls within the SPO's responsibilities, while translations of further documents and evidence is primarily a matter between the Defence and the Registry.³⁰

²⁴ SPO Written Submissions, para. 15.

²⁵ SPO Written Submissions, para. 16.

²⁶ SPO Written Submissions, para. 17.

²⁷ SPO Written Submissions, para. 18.

²⁸ SPO Written Submissions, para. 19.

²⁹ SPO Written Submissions, para. 20.

³⁰ SPO Written Submissions, paras 21-22.

30. Regarding the procedure for disclosure of evidence, the SPO submits that, with a view to fulfilling the categorisation requirements of Rule 109(c) of the Rules, a disclosure chart similar to the one adopted in the case of *The Prosecutor v. Salih Mustafa* (“*Mustafa* case”)³¹ should be used in the present case.³² The SPO also proposes that such chart be provided after submission of the Parties’ respective Pre-Trial Briefs, pursuant to Rule 95(4) and (5) of the Rules.³³

31. Regarding the redaction regime, the SPO submits that the redaction regime applied in the *Mustafa* case³⁴ shall be adopted, pursuant to which the Parties may redact information contained in material falling within their disclosure obligations under the Law and the Rules according to a set of pre-approved categories.³⁵ As far as the procedure for the authorisation of non-standard redactions is concerned, the SPO submits that, in order to avoid unnecessary disclosure of the same material multiple times, the disclosing Party should not be required to disclose material which contains non-standard redactions simultaneously with filing an application for authorisation to apply such redactions, and should instead be permitted to await the relevant ruling, unless doing so would jeopardise an applicable disclosure deadline.³⁶

2. Defence for Mr Thaçi

32. Regarding the disclosure of evidence, the Defence for Mr Thaçi objects to disclosure to the Pre-Trial Judge of all evidence exchanged between the Parties, regardless of whether it will be relied upon at trial, which it avers is not envisaged in

³¹ KSC-BC-2020-05, F00046, Pre-Trial Judge, *Decision on Specialist Prosecutor’s Request for Reconsideration or Certification for Appeal*, 5 November 2020, public, para. 16.

³² SPO Written Submissions, para. 23.

³³ SPO Written Submissions, para. 23.

³⁴ KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and related Matters* (“*Mustafa* Framework Decision on Disclosure”), 9 October 2020, public, paras 77-89.

³⁵ SPO Written Submissions, para. 24.

³⁶ SPO Written Submissions, footnote 26.

the Law or the Rules.³⁷ It submits that such general disclosure would be prejudicial to the Defence given that any material disclosed to the Pre-Trial Judge will ultimately be transferred to the Trial Panel to be appointed, which could then forge its opinion on evidence exchanged between the Parties but not tendered at trial.³⁸

33. Regarding the procedure for disclosure of evidence, the Defence for Mr Taçi submits that, at the time of disclosure, the disclosing Party shall indicate, as far as practicable and through the metadata available in Legal WorkFlow, whether each disclosed item primarily relates to either one of the categories referred to in Rule 109(c) of the Rules, which will allow for the issuance of a corresponding chart through an export of the relevant metadata registered for each item.³⁹ A consolidated chart may be issued by each Party within 15 days of filing of its respective Pre-Trial Brief.⁴⁰

34. Regarding the redaction regime, the Defence for Mr Taçi does not oppose the adoption of the regime currently in use in the *Mustafa* case.⁴¹

3. Defence for Mr Veseli

35. The Defence for Mr Veseli does not, at this stage, oppose any of the SPO's proposals concerning disclosure of evidence and the procedure therefor, but reserves the right to make further submissions at the next status conference.⁴²

³⁷ Taçi Written Submissions, paras 12-13.

³⁸ Taçi Written Submissions, paras 14-15.

³⁹ Taçi Written Submissions, para. 19.

⁴⁰ Taçi Written Submissions, para. 20.

⁴¹ Taçi Written Submissions, para. 21.

⁴² Veseli Written Submissions, paras 13-14.

4. Defence for Mr Selimi

36. Regarding disclosure of evidence, the Defence for Mr Selimi submits that if no redactions are requested for some of the material falling under Rule 102(1)(a) of the Rules, this material should be disclosed to the Defence ahead of the 30-day deadline provided for in the same provision.⁴³

37. Regarding Rule 102(1)(b) material, the Defence for Mr Selimi similarly submits that disclosure of items that do not require redactions should begin sooner than the deadline proposed by the SPO and should, in any case, only in exceptional circumstances be disclosed 30 days before the opening of the SPO case.⁴⁴

38. Regarding Rule 102(3) material, the Defence for Mr Selimi submits that evidence obtained from or belonging to the Accused should be disclosed immediately and, at the latest, together with the supporting material to the Confirmed Indictment.⁴⁵ Moreover, the Defence for Mr Selimi contends that the SPO should respond to any Defence request for disclosure of Rule 102(3) material within three working days, or sooner if the nature of the request so requires.⁴⁶ If the SPO accedes to the disclosure request, it should make the material available to the Defence within two working days.⁴⁷

39. Regarding Rule 103 material, the Defence for Mr Selimi submits that the SPO should explain, when disclosing such material, how each piece of evidence is exculpatory by reference to the relevant paragraph of the Confirmed Indictment, witness or other documentary evidence to which it relates.⁴⁸ Moreover, it contends that non-disclosure of exculpatory material based on the Defence's knowledge of such

⁴³ Selimi Written Submissions, para. 13.

⁴⁴ Selimi Written Submissions, paras 19-20.

⁴⁵ Selimi Written Submissions, para. 22.

⁴⁶ Selimi Written Submissions, para. 24.

⁴⁷ Selimi Written Submissions, para. 24.

⁴⁸ Selimi Written Submissions, para. 27.

material through the exercise of due diligence may not necessarily be imputed to all Accused and their respective Counsel.⁴⁹

40. Regarding the procedure for disclosure of evidence, the Defence for Mr Selimi opposes the SPO's proposal to provide only one consolidated disclosure chart within one week from the filing of its Pre-Trial Brief.⁵⁰ It maintains that filing disclosure charts with each package of Rule 102(1)(b) material is the only way to ensure that the Defence can properly assess the disclosed evidence.⁵¹ As to the format of such disclosure charts, the Defence for Mr Selimi submits that Legal Workflow's capabilities should form the basis for any *inter partes* discussions as to format.⁵²

41. Regarding the redaction regime, the Defence for Mr Selimi opposes the adoption of the regime currently in use in the *Mustafa* case, in particular the lack of prior judicial authorisation for standard redactions.⁵³ It argues that this mechanism shifts the burden from the SPO to justify each redaction onto the Defence to seek the lifting of redactions imposed without judicial oversight.⁵⁴ The Defence for Mr Selimi further submits that it does not oppose the procedure established in the *Mustafa* case whereby applications for non-standard redactions are filed concurrently with the disclosure of the proposed redacted material, as this allows the Defence to analyse the redacted material pending any judicial authorisation of the proposed redactions.⁵⁵

⁴⁹ Selimi Written Submissions, para. 28.

⁵⁰ Selimi Written Submissions, para. 33.

⁵¹ Selimi Written Submissions, para. 34.

⁵² Selimi Written Submissions, para. 36.

⁵³ Selimi Written Submissions, paras 37-40, 42.

⁵⁴ Selimi Written Submissions, para. 39.

⁵⁵ Selimi Written Submissions, para. 41.

5. Defence for Mr Krasniqi

42. Regarding disclosure of evidence, the Defence for Mr Krasniqi submits that disclosure of material falling under Rule 102(1)(a) of the Rules should begin as soon as possible and take place on a rolling basis, particularly in respect of material that does not require redactions.⁵⁶

43. Regarding Rule 103 material, the Defence for Mr Krasniqi submits that the wording of Rule 103 of the Rules is unequivocal and establishes an obligation upon the SPO to disclose any exculpatory information in its custody, control or actual knowledge, including open sources items.⁵⁷ It should therefore not be necessary for the SPO to make an assessment as to whether or not exculpatory evidence is accessible to the Defence with the exercise of due diligence.⁵⁸

44. Regarding the procedure for disclosure of evidence, while agreeing with the use of a detailed disclosure chart as proposed by the SPO, the Defence for Mr Krasniqi contends that such charts should be prepared for each disclosure package and not only at the end of the disclosure process, after the filing of the Parties' respective Pre-Trial Briefs.⁵⁹

45. Regarding the redaction regime, in its written submissions, the Defence for Mr Krasniqi avers that there should be judicial approval of any redactions, as opposed to approval only for non-standard redactions, as proposed by the SPO.⁶⁰ It submits that approval for any requested redactions is a natural consequence of the principle that redactions are exceptional and must be strictly necessary.⁶¹ At the Status

⁵⁶ Krasniqi Written Submissions, para. 9.

⁵⁷ Krasniqi Written Submissions, para. 11.

⁵⁸ Krasniqi Written Submissions, para. 11.

⁵⁹ Krasniqi Written Submissions, para. 10.

⁶⁰ Krasniqi Written Submissions, para. 13.

⁶¹ Krasniqi Written Submissions, para. 13.

Conference, the Defence for Mr Krasniqi indicated that it does not oppose the redaction regime adopted in the *Mustafa* case.⁶²

IV. DISCUSSION

A. PRINCIPLES GOVERNING DISCLOSURE OF EVIDENCE

1. Introduction

46. 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 witnesses, participating victims, and other persons at risk, and the obligation to uphold the rights of the Accused under Article 21 of the Law.⁶³

2. Role of the Parties and the Registry

47. 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

⁶² 18 November 2020 Transcript, p. 156, lines 18-19.

⁶³ Scheduling Order Status Conference, para. 18. *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.

the Parties and the Panel,⁶⁴ 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.⁶⁵

48. 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 register evidence as public, unless there exist reasons to classify the material otherwise, in accordance with Rule 83(1) of the Rules.⁶⁶

3. Communication of Evidence to the Pre-Trial Judge

49. As regards the objection of the Defence for Mr Thaçi to communicate all evidence disclosed between the Parties to the Pre-Trial Judge, it is recalled that the Pre-Trial Judge 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

⁶⁴ 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.

⁶⁵ KSC-BD-18, Registrar, Instruction on Uploading Records on Legal Workflow, 28 August 2019.

⁶⁶ 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.

Rules. These include 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 is intended, essentially, to assist the Pre-Trial Judge in ensuring that disclosure of evidence takes place under satisfactory conditions,⁶⁷ and that relevant evidence, whether material to the Defence preparation or potentially exculpatory, is disclosed within the given timeframe. Concerns that the appointed Trial Panel may forge its views on the basis of the evidence disclosed are unjustified. The Parties remain at liberty to rely at trial on selected evidence of their choice and the Trial Panel, composed of professional judges, may only assess evidence admitted before it at trial. Lastly, any disclosed evidence that is not intended for use at trial will be duly reflected in the Handover Document under Rule 98(1)(e) of the Rules.

50. In light of the above considerations, 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, including the notice of open source material referred to in paragraph 67 of this decision (Rule 103 of the Rules); (g) all evidence the Defence may

⁶⁷ Similarly, [Yekatom Disclosure Decision](#), para. 12; [Al Hassan Disclosure Decision](#), para. 14.

present to establish an alibi or a ground for excluding criminal responsibility, including names and current contact information of witnesses and any other evidence upon which the Accused intend 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 intend to call to testify at trial or intend to present at trial (Rule 104(5)(b) of the Rules); and (j) all exhibits, if any, that the Defence intend to present at trial (Rule 104(5)(c) of the Rules).

4. Deadlines for Disclosure

51. 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.

52. 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.⁶⁸

⁶⁸ *Mustafa* Framework Decision on Disclosure, para. 37. Similarly, [Yekatom Disclosure Decision](#), para. 13; [Al Hassan Disclosure Decision](#), paras 20-21.

5. Completeness and Relevance of the Disclosed Evidence

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

54. The SPO and the Defence, should the latter 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.⁶⁹

B. TIME-FRAME FOR DISCLOSURE OF EVIDENCE

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

55. 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(s) 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.

56. In determining the deadline for disclosure of Rule 102(1)(a) material, the Pre-Trial Judge takes into consideration: (i) the Parties' submissions, in particular the proposal to receive evidence in batches as soon as possible;⁷⁰ (ii) the time needed to rule on the SPO request for protective measures; (iii) the time needed for the SPO to implement the redactions, if granted, and to prepare the material for disclosure; and (iv) the time the SPO requires to identify and prepare material that does not require redactions for

⁶⁹ *Mustafa* Framework Decision on Disclosure, para. 39. Similarly, [Yekatom Disclosure Decision](#), para. 18; [Al Hassan Disclosure Decision](#), para. 25; [Ongwen Disclosure Decision](#), para. 20.

⁷⁰ 18 November 2020 Transcript, p. 123, lines 23-25.

immediate disclosure and its impact on the compliance with the 30-day deadline.⁷¹ Accordingly, it is appropriate to set Friday, 11 December 2020, as the deadline to complete disclosure of Rule 102(1)(a) material.

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

57. 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.

58. 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; and (v) and the need to implement protective measures, including redaction of information.⁷²

59. The SPO submits that Rule 102(1)(b) material, whether requiring redactions or not, will be disclosed on a rolling basis, as and when available, up until the deadline set by the Pre-Trial Judge.⁷³ The SPO further submits that monthly deadlines for disclosure of such material are not necessary, and it would be preferable to leave the specific timeline of those disclosure packages to the SPO's discretion.⁷⁴

⁷¹ SPO Written Submissions, para. 7; 18 November 2020 Transcript, p. 119, lines 8-14.

⁷² *Mustafa* Framework Decision on Disclosure, para. 45.

⁷³ 18 November 2020 Transcript, p. 125, lines 17-24, p. 129, line 16.

⁷⁴ 18 November 2020 Transcript, p. 129, line 22 to p. 130, line 4.

60. In order to strike a balance between the SPO's discretion in deciding which Rule 102(1)(b) material is ready for disclosure, on the one hand, and ensuring that decisions on protective measures are rendered in time so that the Defence receive the evidence on a rolling basis, on the other hand, it is appropriate to establish a calendar for disclosure for this category of material. Accordingly, the SPO shall submit its requests for protective measures, if any, by Friday, 8 January; Friday, 5 February; Friday, 5 March; Friday, 2 April; and Friday, 7 May 2021, and disclose such material with redactions, if granted, within two weeks from the Pre-Trial Judge's decision on protective measures. The amount of material subject to the monthly requests for protective measures, as well as the amount of material that does not require redactions and the timeline for the latter's disclosure, are left to the SPO's discretion. However, the SPO is urged to disclose, as far as practicable, material equal in size each month, as opposed to releasing disclosure packages of markedly different amounts of material. Disclosure of Rule 102(1)(b) shall be finalised by Monday, 31 May 2021, as proposed by the SPO.

61. With regard to the request of some Defence teams that a cut-off date be imposed upon the SPO for its disclosure obligations,⁷⁵ the Pre-Trial Judge stresses that the SC legal framework allows for additional disclosure, albeit exceptionally, beyond the deadlines stipulated in the Rules, including that in Rule 102(1)(b) of the Rules.⁷⁶ Accordingly, 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. In particular, given the exceptional nature of late disclosure, the SPO shall resort thereto only as last measure and shall provide proper reasons for the late

⁷⁵ 18 November 2020 Transcript, p. 128, lines 22-24; p. 129, lines 4-6.

⁷⁶ Rule 102(2) of the Rules.

disclosure of each piece of evidence. The Defence may seize the Pre-Trial Judge where grounds to dispute the late disclosure exist.

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

62. 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 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.⁷⁷ 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.⁷⁸ The Defence *preparation* is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence,⁷⁹ or related to the SPO's case.⁸⁰

63. 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, based on each team's

⁷⁷ *Mustafa* Framework Decision on Disclosure, para. 50. 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.

⁷⁸ Similarly, [2 October 2013 Decision](#), para. 22, and references therein.

⁷⁹ Similarly, [11 July 2008 Judgment](#), para. 77.

⁸⁰ Similarly, [2 October 2013 Decision](#), para. 22, and references therein.

strategy, and is not contingent on the SPO's determination on behalf of 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.

64. In establishing deadlines for disclosure of Rule 102(3) material, the Pre-Trial Judge takes into consideration: (i) the Parties' submissions; (ii) the potentially large amount of items falling under this category (close to 100,000); (iii) the time needed for the Defence to go through the detailed notice to be provided by the SPO; (iv) the need for redactions to a significant percentage of the Rule 102(3) items to be disclosed; and (v) the need to ensure that disclosure is completed expeditiously.

65. The Pre-Trial Judge considers the timeline proposed by the Defence for Mr Selimi⁸¹ to be potentially burdensome to the SPO and the Panel, particularly in light of the fact that it is unknown how many items each Defence team will request to access or inspect and whether and to what extent this material requires redactions. Accordingly, it is appropriate to set Friday, 30 April 2021, as the deadline for the SPO to provide the Defence with a detailed notice of Rule 102(3) material. Thereafter, the Defence shall indicate to the SPO by Monday, 14 June 2021, or at any time earlier, which items among those listed in the detailed notice they seek to have access to, by way of disclosure or inspection. On the basis of such indication, the SPO shall, no later than Monday, 5 July 2021, or within three weeks of the Defence indication(s), whichever is earlier: (i) disclose or provide access to the selected material that does not require redactions; and (ii) submit its request for protective measures, if any, in respect of the material sought by the Defence. The SPO shall disclose to the Defence

⁸¹ Selimi Written Submissions, para. 24.

the material for which redactions are granted as soon as possible after the Pre-Trial Judge has ruled on the requested protective measures. Should the SPO wish to dispute the materiality of the evidence sought by the Defence, it shall seize the Panel within 10 days of the Defence indication.

9. Rule 103: Exculpatory Evidence

66. 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 *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.⁸² 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.⁸³

67. With regard to the SPO request to be relieved from its obligation to disclose open source evidence when such material is known and accessible to the Defence with due diligence,⁸⁴ the Pre-Trial Judge is of the view that the regime proposed by the SPO leaves an excessive latitude to the SPO to decide what material falls under the exception to disclosure pursuant to Rule 103 of the Rules. Instead, the Pre-Trial Judge considers it fair and expeditious, given the considerable size of the evidentiary record

⁸² *Mustafa Framework Decision on Disclosure*, para. 54; *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.

⁸³ *Similarly*, [27 November 2006 Decision](#), para. 11, and references therein.

⁸⁴ SPO Written Submissions, para. 18; 18 November 2020 Transcript, p. 132, lines 3-14.

in this case, that the SPO notifies the Defence and the Pre-Trial Judge, by way of a filing, of all open source material in relation to which it wishes to be exempted from disclosure under Rule 103 of the Rules. Such notice(s) shall contain the exact source, for example the URL, under which the material can be found. If the Defence cannot access or retrieve one or more items in the notice(s), it shall so inform the SPO, on an *inter partes* basis. In this case, the SPO shall disclose such items to all Defence teams as soon as possible. In case of dispute, the Parties shall seize the Panel immediately.

68. Regarding the material that does not fall under the above exception, the SPO shall disclose, as indicated,⁸⁵ over 1,000 potentially exculpatory items no later than by Friday, 11 December 2020 and 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.

10. Rule 107: Protected Material

69. 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.

70. 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

⁸⁵ 18 November 2020 Transcript, p. 131, lines 21-23.

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.

71. Considering that the SPO is actively seeking clearances for material potentially falling under Rule 102(3) of the Rules,⁸⁶ the Pre-Trial Judge reminds the SPO to promptly bring to the attention of the Pre-Trial Judge any issue regarding the outstanding clearances sought.

C. DISCLOSURE OF EVIDENCE BY THE DEFENCE

72. The principles and procedures enunciated in the present decision apply equally to the Defence, subject to their 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 elect 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.

73. 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 their respective Pre-Trial Briefs indicating the information requested in Rule 95(5) of the Rules, without prejudice to the Defence's right to notify their intent to offer a defence of alibi or any ground for excluding criminal responsibility at any time earlier.

74. Considering that the disclosure process has just started, 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

⁸⁶ 18 November 2020 Transcript, p. 141, lines 9-12.

the deadlines for filing the Defence Pre-Trial Briefs and disclosure of evidence, if any, will also be determined at a later stage.

D. TRANSLATION OF DOCUMENTS AND EVIDENCE

75. 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.⁸⁷

76. On the other hand, Article 21(4)(a) of the Law stipulates that the Accused must be informed in a language they understand of the nature and cause of the charges against them, in the present case, Albanian.⁸⁸ 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.⁸⁹ Therefore, a balance must be achieved between these competing rights in order to make proceedings fair and expeditious at the same time.

77. 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 understand and speak, as expressly required by Rule 102(1) of the Rules. All

⁸⁷ Working Language Decision, para. 26(a).

⁸⁸ In this context it is noted that the Accused received the Confirmed Indictment and the Arrest Warrants in Albanian (KSC-BC-2020-06, F00065/RED, Registrar, *Report on the Arrest and Transfer of Hashim Thaçi to the Detention Facilities*, 18 November 2020, public, paras 7, 19, 28; F00070/RED, Registrar, *Report on the Arrest and Transfer of Kadri Veseli to the Detention Facilities*, 18 November 2020, public, paras 7, 22, 30; F00071/RED, Registrar, *Report on the Arrest and Transfer of Rexhep Selimi to the Detention Facilities*, 18 November 2020, public, paras 5, 20, 28; F00064/RED, Registrar, *Report on the Arrest and Transfer of Jakup Krasniqi to the Detention Facilities*, 18 November 2020, public, paras 5, 37-38.

⁸⁹ *Mustafa* Framework Decision on Disclosure, para. 66. 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.

other evidence shall be submitted in English, in accordance with the Working Language Decision, unless otherwise ordered by the Pre-Trial Judge.

78. 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 understanding the evidence and related filings that are not in Albanian.⁹⁰

E. PROCEDURE FOR DISCLOSURE OF EVIDENCE

79. 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.⁹¹

80. At the Status Conference, the Parties informed the Pre-Trial Judge that *inter partes* discussions as to the format and timing of disclosure charts that comply with the categorisation requirements of Rule 109(c) of the Rules are ongoing.⁹² In these circumstances, the Pre-Trial Judge considers it appropriate to defer his ruling on this matter until discussions among the Parties are exhausted. To this effect, the Pre-Trial Judge orders the SPO to file a joint proposal as to the format and timing of disclosure

⁹⁰ *Mustafa* Framework Decision on Disclosure, para. 68. 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.

⁹¹ *Mustafa* Framework Decision on Disclosure, para. 69. 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.

⁹² 18 November 2020 Transcript, p. 143, lines 1-13; p. 145, line 19 to p. 146, line 13; p. 146, line 17 to p. 147, line 4; p. 147, line 16 to p. 149, line 17; p. 149, line 20 to p. 150, line 3; p. 150, lines 12-18; p. 151, lines 11-16; p. 152, lines 5, 8.

charts under Rule 109(c) of the Rules for the purposes of the present case by Friday, 27 November 2020.

81. With regard to the upcoming deadline for disclosure of Rule 102(1)(a) material, the Pre-Trial Judge determines that, following the approach adopted in the *Mustafa* case,⁹³ the SPO shall disclose the Detailed Outline, with redactions if necessary.

F. RESTRICTIONS TO DISCLOSURE

1. General Principles

82. The Pre-Trial Judge notes that full disclosure of all material and relevant evidence is the principle, while withholding information is the exception.⁹⁴ 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.⁹⁵

⁹³ *Mustafa* Framework Decision on Disclosure, para. 72.

⁹⁴ *Mustafa* Framework Decision on Disclosure, para. 73. 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.

⁹⁵ *Mustafa* Framework Decision on Disclosure, para. 73; [*13 May 2008 Judgment*](#), para. 68.

83. 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*.⁹⁶ 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*.⁹⁷

84. Lastly, the need for redactions is to be assessed on a case-by-case basis.⁹⁸ 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.⁹⁹

2. Legal Test

85. In assessing if certain information may be withheld from the receiving party, it must be ascertained whether:¹⁰⁰

- (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;

⁹⁶ Rule 108(1) and (6) of the Rules.

⁹⁷ Rule 80(1) and (3) of the Rules.

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

⁹⁹ *Mustafa* Framework Decision on Disclosure, para. 75.

¹⁰⁰ *Mustafa* Framework Decision on Disclosure, para. 76. *See also*, 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.

- (ii) the protective measure is strictly necessary.¹⁰¹ 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.¹⁰²

3. Redaction Regime

86. With a view to expediting the proceedings and establishing an efficient, predictable, and sustainable redaction regime, the Pre-Trial Judge considers it appropriate to adopt the redaction regime applied in the *Mustafa* case, subject to the amendments set out in this 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.

87. 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.¹⁰³

88. For any redactions falling outside the aforementioned pre-defined categories (“non-standard redactions”), the disclosing Party must submit a discrete application to the Pre-Trial Judge seeking authorisation to restrict disclosure, in accordance with the procedure set out below.¹⁰⁴

¹⁰¹ Article 21(6) of the Law.

¹⁰² Rule 80(1) of the Rules.

¹⁰³ See *infra* para. 91.

¹⁰⁴ See *infra* para. 97.

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

90. 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.

91. 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.

92. 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.

93. 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.¹⁰⁵ 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.

¹⁰⁵ 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.*

4. Standard Redactions

94. The categories for standard redactions are clearly delineated and well-entrenched in the practice of other courts¹⁰⁶ and were adopted in the *Mustafa* case.¹⁰⁷ The Pre-Trial Judge herewith adopts the below categories of standard redactions and their justifications in light of the test set out above. In the Pre-Trial Judge's view, the disclosure of the information categorized below to the receiving Party regularly entails an objectively identifiable 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.

95. 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,

¹⁰⁶ For example, [Yekatom Disclosure Decision](#), paras 25-26; [Al Hassan Disclosure Decision](#), para. 29.

¹⁰⁷ *Mustafa* Framework Decision on Disclosure, para. 86.

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 90 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 90 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,¹⁰⁸ 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.

¹⁰⁸ 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 category B.3 below): 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.

(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 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”),¹⁰⁹ 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

¹⁰⁹ Rule 80(1) of the Rules. *Similarly, [13 May 2008 Judgment](#), paras 1, 40, 56.*

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.

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.

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.¹¹⁰ Where such redactions are applied, an identifier for the agency in question should be included in addition to the relevant redaction code.

96. The Pre-Trial Judge notes the opposition of the Defence for Mr Selimi Mr Krasniqi¹¹¹ to the application of standard redactions without prior judicial authorisation.¹¹² The Pre-Trial Judge notes that the aforementioned categories of

¹¹⁰ Article 37(1) of the Law.

¹¹¹ Krasniqi Written Submissions, para. 13. The Pre-Trial Judge notes that, during the Status Conference, the Defence for Mr Krasniqi indicated that it does not oppose the redaction regime as adopted in the *Mustafa* case (18 November 2020 Transcript, p. 156, lines 18-19).

¹¹² Selimi Written Submissions, paras 37-40, 42.

standard redactions do not typically pertain to information essential to the receiving Party and the legal test for assessing whether such information may be withheld from the receiving Party is clearly defined.¹¹³ The Pre-Trial Judge further recalls that the receiving Party may challenge the appropriateness of a specific redaction, thereby creating an obligation on the disclosing Party to justify the redaction,¹¹⁴ and that the Pre-Trial Judge may, on his own motion, review the appropriateness of standard redactions.¹¹⁵ In these circumstances, the Pre-Trial Judge finds that the established redaction regime streamlines and increases the efficiency of the disclosure process with due regard to the rights of the Accused.

5. Non-Standard Redactions

97. 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.¹¹⁶ In such cases, the disclosing Party shall submit an application to the relevant Panel sufficiently in advance so as to allow for a timely decision thereon and the subsequent disclosure of evidence within the time limits prescribed in the Rules or the Panel's decision. At the same time, a redacted version of the application should be provided to the receiving Party, that may respond thereto in accordance with Rules 9 and 76 of the Rules. Moreover, in order to enable the Pre-Trial Judge to take an objective decision, the Witness Protection and Support Office ("WPSO") shall submit, within ten days of notification of the application for non-disclosure, an individual risk assessment for

¹¹³ See *supra* para. 85. See also, *Mustafa* Framework Decision on Disclosure, para. 76.

¹¹⁴ See *supra* para. 91.

¹¹⁵ See *supra* para. 93.

¹¹⁶ *Mustafa* Framework Decision on Disclosure, para. 88. 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.

each witness in relation to whom non-disclosure of identity is requested. With a view to avoiding multiple re-disclosures of the same evidence and considering the expected volume of evidence to be disclosed in the present case, the Pre-Trial Judge considers that the disclosing Party need not disclose the relevant material concurrently with the request for non-standard redactions. Upon authorisation, any non-standard redactions shall be marked as **category “E”**.

98. 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 WPSO thereof five days prior to the lifting of any such redaction.

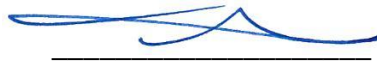
V. DISPOSITION

99. 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 46-54 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, 11 December 2020**;
- c. **ORDERS** the SPO to file any request for protective measures of material falling under Rule 102(1)(b) of the Rules by **Friday, 8 January; Friday, 5 February; Friday, 5 March; Friday, 2 April, and Friday, 7 May 2021**, and to disclose such material with redactions, if granted, within two weeks of the Pre-Trial Judge’s decision on protective measures;

- 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;
- e. **ORDERS** the SPO to complete the disclosure of all material falling under Rule 102(1)(b) of the Rules by **Monday, 31 May 2020**;
- f. **ORDERS** the SPO to provide to the Defence a detailed notice of evidence falling under Rule 102(3) of the Rules by **Friday, 30 April 2021**;
- g. **ORDERS** the Defence to indicate to the SPO, by **Monday, 14 June 2021**, or any time earlier, which items, among those listed in the detailed notice referred to under point (f) above, they seek to have access to by way of disclosure or inspection;
- h. **ORDERS** the SPO, by **Monday, 5 July 2021**, or within three weeks of the Defence indication(s) under point (g) above, whichever is earlier, to:
 - (i) disclose to or provide the Defence with access to the selected material that does not require redactions; and
 - (ii) submit its request for protective measures, if any, in respect of the material sought by the Defence and to disclose as soon as possible such material with redactions, if granted;
- i. **ORDERS** the SPO to seize the Pre-Trial Judge, **within ten days of the Defence indication(s)** as referred to under point (g) above, should it dispute the materiality of evidence;
- j. **ORDERS** the SPO to disclose any material falling under Rule 103 of the Rules, subject to the terms of paragraphs 67-68 of this decision;
- k. **ORDERS** the SPO, should any material falling under Rule 103 of the Rules require redactions, to make a request for protective measures at the earliest opportunity and to disclose immediately such material with redactions, if granted;

- l. **ORDERS** the SPO to promptly bring to the attention of the Pre-Trial Judge any issue regarding material affected by Rule 107 of the Rules;
- m. **ORDERS** the SPO to file a joint proposal, after consultation with all Defence teams, as to the format and timing of disclosure charts under Rule 109(c) of the Rules for the purposes of the present case by **Friday, 27 November 2020**;
- n. **ORDERS** the Parties to follow the terms of the redaction regime as set forth in paragraphs 82-98 of this decision;
- o. **ORDERS** WPSO to submit, **within ten days of either Party's application for non-disclosure**, an individual risk assessment for each witness in relation to whom non-disclosure of identity is requested, as set forth in paragraph 97 of this decision.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 23 November 2020
At The Hague, the Netherlands.