



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEÇA KOSOVA

**In:** **KSC-BC-2020-04**  
**The Prosecutor v. Pjetër Shala**

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

**Registrar:** Dr Fidelma Donlon

**Date:** 30 April 2021

**Language:** English

**Classification:** **Public**

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**Framework Decision on Disclosure of Evidence and Related Matters**

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**Specialist Prosecutor**  
Jack Smith

**Counsel for the Accused**  
Jean-Louis Gilissen

**Registry**  
Head of Witness Protection and  
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**THE PRE-TRIAL JUDGE**,<sup>1</sup> 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 confirmed the indictment against Pjetër Shala ("Mr Shala" or "Accused").<sup>2</sup>
2. On 19 June 2020, the Specialist Prosecutor's Office ("SPO") submitted the Confirmed Indictment,<sup>3</sup> with redactions as authorised by the Pre-Trial Judge.<sup>4</sup>
3. On 16 March 2021, Mr Shala was arrested in the Kingdom of Belgium ("Belgium") by the Belgian Police in the presence of representatives of the SPO.<sup>5</sup>
4. On 15 April 2021, upon conclusion of judicial proceedings in Belgium, Mr Shala was transferred to the detention facilities of the Specialist Chambers ("SC") in The Hague, the Netherlands.<sup>6</sup>
5. On 19 April 2021, the initial appearance of Mr Shala took place, during which Mr Shala pleaded not guilty.<sup>7</sup>

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<sup>1</sup> KSC-BC-2020-04, F00001, President, Decision Assigning a Pre-Trial Judge, 14 February 2020, public.

<sup>2</sup> KSC-BC-2020-04, F00007, Pre-Trial Judge, *Decision on the Confirmation of the Indictment Against Pjetër Shala* ("Confirmation Decision"), 12 June 2020, strictly confidential and *ex parte*.

<sup>3</sup> KSC-BC-2020-04, F00010/A02, Specialist Prosecutor, *Submission of Confirmed Indictment*, 19 June 2020, confidential. A lesser redacted confidential version was submitted in F00016/A01, Specialist Prosecutor, *Annex 1 to Submission of Lesser Redacted and Public Redacted Versions of Confirmed Indictment and Related Requests*, 31 March 2021, confidential.

<sup>4</sup> Confirmation Decision, para. 140(c).

<sup>5</sup> KSC-BC-2020-04, F00013, Registrar, *Notification of Arrest Pursuant to Rule 55(4)*, 16 March 2021, public.

<sup>6</sup> KSC-BC-2020-04, F00019, Registrar, *Notification of Reception of Pjetër Shala in the Detention Facilities of the Specialist Chambers and Conditional Assignment of Counsel*, 15 April 2021, confidential, para. 2, with Annexes 1-2, confidential.

<sup>7</sup> KSC-BC-2020-04, Transcript of Hearing, 19 April 2021, public, p. 11, line 11.

6. On 21 April 2021, the Pre-Trial Judge issued the “Decision on Working Language”, determining that English shall be the working language of the present proceedings.<sup>8</sup>

7. On 23 April 2021, the first status conference (“Status Conference”) was held where the Parties made oral and written submissions on various issues relating to disclosure in anticipation of the present framework decision on disclosure.<sup>9</sup>

## II. APPLICABLE LAW

8. 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.

9. 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.

10. 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.

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<sup>8</sup> KSC-BC-2020-04, F00025, Pre-Trial Judge, *Decision on Working Language* (“Decision on Working Language”), 21 April 2021, public.

<sup>9</sup> KSC-BC-2020-04, Transcript, 23 April 2021 (“Transcript of 23 April”), public. *See also* KSC-BC-2020-04, F00024, Pre-Trial Judge, *Order Setting the Date for the First Status Conference and for Submissions* (“Order for Submissions”), 20 April 2021, public; F00026, Defence Counsel, *Submissions Pursuant to the Pre-Trial Judge’s Order Dated 20 April 2021* (“Defence Submissions”), 22 April 2021, public; F00027, Specialist Prosecutor, *Prosecution Submissions for First Status Conference* (“SPO Submissions”), 22 April 2021, public, with Annex 1, strictly confidential and *ex parte*.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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

26. The SPO submits that a small number of investigative steps remain ongoing, and depending on the outcome of these investigations, there is a likelihood further evidence may be adduced, without impact on the expeditious conduct of proceedings.<sup>10</sup> The SPO also submits that it has submitted some supporting material and will be able to disclose all indictment supporting material, pursuant to Rule 102(1)(a) of the Rules, including translations thereof, by end of the 30-day statutory timeframe.<sup>11</sup> The SPO further submits that it will be in a position to fulfil its disclosure obligation under Rule 102(1)(b) of the Rules by 30 July 2021<sup>12</sup> and to provide the Defence with a detailed notice of evidence material to it, pursuant to Rule 102(3) of the Rules, by 3 September 2021.<sup>13</sup> The SPO disclosed exculpatory evidence, pursuant to Rule 103 of the Rules, on 22 April 2021, and stated that it will continue to

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<sup>10</sup> SPO Submissions, para. 3; Transcript of 23 April, p. 19, lines 19-22.

<sup>11</sup> SPO Submissions, paras 7-8; Transcript of 23 April, p. 24, line 22 to p. 25, line 18.

<sup>12</sup> SPO Submissions, para. 9; Transcript of 23 April, p. 27, line 11 to p. 28, line 4.

<sup>13</sup> SPO Submissions, para. 15; Transcript of 23 April, p. 29, line 25 to p. 30, line 16, p. 31, lines 19-22.

do so on a rolling basis.<sup>14</sup> The SPO submits that a limited amount of Rule 107 material is subject to disclosure under Rules 102 or 103 of the Rules and therefore there is no anticipated impact on proposed deadlines.<sup>15</sup> Regarding the exceptions to disclosure, the SPO submits that some of the evidence falling under Rules 102(1)(a) and (b), 102(3), 103, and 107 of the Rules may require redactions<sup>16</sup> and that the Pre-Trial Judge should adopt the redaction regime applied in the *Gucati and Haradinaj* Case.<sup>17</sup> Regarding the disclosure procedure, pursuant to Rule 109 of the Rules, the SPO submits that case specific categorisation in Legal Workflow would be a time consuming process which would be of limited utility to the Accused.<sup>18</sup> The SPO further proposes that its Rule 109(c) chart be provided 15 days from the filing of any pre-trial brief.<sup>19</sup>

27. Mr Shala submits that he is unable, at this early stage, to provide an estimate of the time needed for investigations for the purposes of the presentation of its case.<sup>20</sup> He is also not in a position to indicate whether notice of an alibi and/or other grounds excluding criminal responsibility will be presented at a later stage.<sup>21</sup> With regard to Rule 102(1)(a) material, Mr Shala requests that such material be disclosed as soon as possible and at the very least within 30 days of the initial appearance.<sup>22</sup> Mr Shala argues that Rule 102(1)(b) material should be disclosed as soon as possible and that disclosure of such material 30 days prior to the opening of the Prosecution's case would be wholly inadequate.<sup>23</sup> With regard to the disclosure of material pursuant to Rules 102(3) and 103 of the Rules, Mr Shala submits that such material should be

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<sup>14</sup> SPO Submissions, paras 18, 20; Transcript of 23 April, p. 32, line 15 to p. 33, line 8.

<sup>15</sup> SPO Submissions, paras 22-23; Transcript of 23 April, p. 34, lines 7-17.

<sup>16</sup> SPO Submissions, paras 8, 12, 17, 21, 25.

<sup>17</sup> SPO Submissions, para. 30; Transcript of 23 April, p. 39, lines 7-8.

<sup>18</sup> SPO Submissions, paras 26-28; Transcript of 23 April, p. 35, line 24 to p. 37, line 5; p. 38, lines 14-18.

<sup>19</sup> SPO Submissions, para. 29; Transcript of 23 April, p. 39, line 22 to p. 40, line 10.

<sup>20</sup> Defence Submissions, para. 5; Transcript of 23 April, p. 21, lines 6-9.

<sup>21</sup> Defence Submissions, para. 6; Transcript of 23 April, p. 21, lines 10-14.

<sup>22</sup> Defence Submissions, para. 11.

<sup>23</sup> Defence Submissions, para. 12.



disclosed immediately or in any event by 22 May 2021.<sup>24</sup> Mr Shala tentatively agrees with the disclosure and redaction regime applied in the *Gucati and Haradinaj* Case.<sup>25</sup> Regarding the disclosure procedure, pursuant to Rule 109 of the Rules, Mr Shala supports the use of case specific categorization in Legal Workflow and proposes the following additional sub-categories: (i) “contextual elements: background” and (ii) “location: other”.<sup>26</sup> Mr Shala proposes that the Rule 109(c) chart be provided well in advance of the SPO’s pre-trial brief.<sup>27</sup>

#### IV. DISCUSSION

##### A. PRINCIPLES GOVERNING DISCLOSURE OF EVIDENCE

###### 1. Introduction

28. 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.<sup>28</sup>

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<sup>24</sup> Defence Submissions, para. 13.

<sup>25</sup> Defence Submission, paras 10, 14; Transcript of 23 April, p. 39, 12-16.

<sup>26</sup> Defence Submission, paras 7-8; Transcript of 23 April, p. 37, line 22 to p. 38, line 9.

<sup>27</sup> Defence Submission, para. 9; Transcript of 23 April, p. 21, lines 15-20.

<sup>28</sup> Order for Submissions, para. 20. *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.

## 2. Role of the Parties and the Registry

29. 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,<sup>29</sup> 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.<sup>30</sup>

30. 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.<sup>31</sup>

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<sup>29</sup> 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.

<sup>30</sup> KSC-BD-18, Registrar, Instruction on Uploading Records on Legal Workflow, 28 August 2019.

<sup>31</sup> 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.

### 3. Communication of Evidence to the Pre-Trial Judge

31. 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.<sup>32</sup>

32. 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; (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 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

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<sup>32</sup> See, *similarly*, ICC, [Yekatom Disclosure Decision](#), para. 12; [Al Hassan Disclosure Decision](#), para. 14.

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**

33. 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.

34. 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.<sup>33</sup> Disclosures past the deadlines established in this decision or as ordered by the Pre-Trial Judge shall be notified to the Pre-Trial Judge and the receiving Party, together with reasons for the late disclosure.

#### **5. Completeness and Relevance of the Disclosed Evidence**

35. 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.

36. The Parties shall also ensure that their disclosure packages are complete and properly linked to the relevant witness(es). In this regard, all documents and materials

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<sup>33</sup> Similarly, ICC, [Yekatom Disclosure Decision](#), para. 13; [Al Hassan Disclosure Decision](#), paras 20-21.

referred to in a particular witness statement shall be disclosed together with the relevant statement, in the same disclosure package. Furthermore, when evidence is related to a particular witness, such linkage shall be established by including the witness's pseudonym in the metadata field for the respective piece of evidence in Legal Workflow.

37. 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.<sup>34</sup>

## B. TIME-FRAME FOR DISCLOSURE OF EVIDENCE

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

38. 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.

39. In the present case, the SPO has disclosed a portion of the non-witness related indictment supporting material on 22 April 2021<sup>35</sup> and the Defence confirmed having received it.<sup>36</sup> Both the SPO and the Defence maintain that the remaining Rule 102(1)(a) material should be disclosed by the 30-day deadline.<sup>37</sup> The SPO, however, also adds that meeting such a deadline is contingent on protective measures requests being addressed.<sup>38</sup> In light of the Parties' submissions, the Pre-Trial Judge finds it

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<sup>34</sup> Transcript of 23 April, p. 19, lines 6-8. *Similarly*, ICC, [Yekatom Disclosure Decision](#), para. 18; [Al Hassan Disclosure Decision](#), para. 25; [Ongwen Disclosure Decision](#), para. 20.

<sup>35</sup> SPO Submissions, para. 7; Transcript of 23 April, p. 24, line 22 to p. 25, line 4.

<sup>36</sup> Transcript of 23 April, p. 26, lines 5-6.

<sup>37</sup> SPO Submissions, para. 8; Defence Submissions, para. 11; Transcript of 23 April, p. 24, lines 11-13.

<sup>38</sup> Transcript of 23 April, p. 25, lines 9-18.

appropriate to set Wednesday, 19 May 2021, as the deadline to complete disclosure of Rule 102(1)(a) material.

40. The Pre-Trial Judge notes that the SPO has provided a detailed outline of the supporting material, as mandated by Rule 86(3)(b) of the Rules (“Detailed Outline”).<sup>39</sup> In order to facilitate the Accused’s access to the various versions of this document and maintain the publicity of proceedings the SPO shall file a confidential (redacted) and a public (redacted) version of the Detailed Outline upon completion of its disclosure of Rule 102(1)(a) material on Wednesday, 19 May 2021.

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

41. 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.

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

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<sup>39</sup> KSC-BC-2020-04, F00002/A02, Specialist Prosecutor, *Annex 2 to Submission of Indictment for Confirmation and Related Requests*, 14 February 2020, strictly confidential and *ex parte*. An updated version was provided on 18 March 2020. F00004/A02, Specialist Prosecutor, *Annex 2 to Submission of Revised Indictment for Confirmation and Related Requests*, 18 March 2020, strictly confidential and *ex parte*.

43. 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.

44. The SPO submits that Rule 102(1)(b) material will likely include statements of approximately eight witnesses and 54 exhibits for trial, such as audio/video material, reports, photographs and open source publications.<sup>40</sup> It confirms that it is ready to disclose said material on a rolling basis until a final deadline of 30 July 2021, or no later than 30 days prior to the opening of its case.<sup>41</sup> The estimates provided by the SPO as to the amount and nature of Rule 102(1)(b) material, however, are subject to the outcome of some outstanding and limited investigative steps.<sup>42</sup> Transcription and translation of witness statements remains ongoing, but should not affect any deadlines.<sup>43</sup> The SPO submits that it will be necessary to apply redactions to forthcoming Rule 102(1)(b) disclosures and, as a consequence, the SPO anticipates filing a second protective measures request by 11 June 2021.<sup>44</sup> The SPO also submits that it will endeavour to disclose all documents and materials referred to in witness statements together with the relevant statement.<sup>45</sup> The Defence requests that disclosure under this rule should be made as soon as possible and that a deadline of 30-days before trial would be wholly inadequate.<sup>46</sup>

45. In light of the Parties' submissions on the proposed timeline for disclosure of Rule 102(1)(b) material, the Pre-Trial Judge considers it appropriate to set Friday,

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<sup>40</sup> SPO Submissions, paras 10-11; Transcript of 23 April, p. 27, lines 15-18.

<sup>41</sup> SPO Submissions, para. 9; Transcript of 23 April, p. 27, lines 11-14, p. 28, lines 23-24.

<sup>42</sup> SPO Submissions, para. 11.

<sup>43</sup> SPO Submissions, para. 10; Transcript of 23 April, p. 27, lines 19-23.

<sup>44</sup> SPO Submissions, para. 12; Transcript of 23 April, p. 27, line 24 to p. 25, line 4.

<sup>45</sup> SPO Submissions, para. 14.

<sup>46</sup> Defence Submissions, para. 12.

30 July 2021, as the deadline for disclosure under this Rule. In meeting its disclosure obligation, the SPO shall disclose all documents and material referred to in witness statements together with the relevant statement, in the same disclosure batch, as discussed in paragraph 36, above. As for any request for protective measures, the SPO shall file such a request as soon as possible, but no later than Friday, 11 June 2021, in order to ensure sufficient time to implement redactions, if granted, and to disclose this material to the Defence by the designated deadline.

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

46. Rule 102(3) material encompasses evidence deemed by the Defence to be material to its case 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.

47. The Pre-Trial Judge notes that Rule 102(3) of the Rules sets out a procedure involving the following steps: (i) the provision by the SPO of a detailed notice to the Defence of any material and evidence in its possession; (ii) requests by the Defence for the disclosure or inspection of material in the custody or control of the SPO, which is deemed by the Defence to be material for its preparation, or were obtained from or belonged to the Accused; and (iii) any disputes raised by the SPO as to the materiality of the material requested by the Defence.

48. As a first step, 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 Pre-Trial Judge notes that this requirement concerns any material and evidence in the SPO's possession. The detailed notice must include not only information the SPO assesses to be potentially material to the Defence preparation, but any material



and evidence in the SPO's possession, which has not been disclosed under Rules 102(1)(a)-(b) and 103 of the Rules and which is relevant *to the case*.

49. As expressly stipulated by Rule 102(3) of the Rules, thereafter, an indication as to the materiality of any such items is to be made by the Defence. 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.<sup>47</sup> 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.<sup>48</sup> The Defence *preparation* is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence,<sup>49</sup> or related to the SPO's case.<sup>50</sup>

50. The Defence may also request the disclosure or inspection of material not included in the SPO's notice, but claimed by the Defence to be material for its preparation. In such a case, however, the Defence must (i) provide suitable parameters for specification of any requested items, so as to enable the SPO to identify the items sought; and (ii) indicate the materiality of the requested items for Defence preparation. The Defence may not rely on mere general descriptions of or conclusory

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<sup>47</sup> Transcript of 23 April, p. 29, lines 4-11. 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.

<sup>48</sup> Similarly, STL, [2 October 2013 Decision](#), para. 22, and references therein.

<sup>49</sup> Similarly, ICC, [11 July 2008 Judgment](#), para. 77.

<sup>50</sup> Similarly, STL, [2 October 2013 Decision](#), para. 22, and references therein.

allegations on the requested information and should avoid making requests in the form of catch-all phrases.

51. Lastly, the SPO may seize the Pre-Trial Judge where grounds to dispute the materiality of the information, as indicated by the Defence, exist. If the SPO raises any disputes regarding such Defence requests, it may take issue with the parameters of specification as well as the materiality of the requested items.

52. The SPO submits that it will be in a position to disclose a detailed notice of Rule 102(3) material by Friday, 3 September 2021, shortly after finalisation of disclosure pursuant to Rule 102(1)(b).<sup>51</sup> This detailed notice will comprise any other residual information potentially material to the Defence after the items to be presented at trial and the exculpatory evidence have been disclosed.<sup>52</sup> Based on ongoing review, the SPO anticipates the number of Rule 102(3) items to be less than 3,000 in total.<sup>53</sup> Some of the material may require redactions, in particular pursuant to Rule 108(1) of the Rules.<sup>54</sup> The Defence requests that disclosure under this Rule be made immediately or as soon as possible and in any event by 22 May 2021.<sup>55</sup> During the Status Conference, the Defence indicated that it was amenable to disclosure pursuant to Rule 102(3) following disclosure of Rule 102(1)(a) and (b) material.<sup>56</sup>

53. In light of the Parties' submissions, the Pre-Trial Judge considers it appropriate to set Friday, 3 September 2021, 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, 17 September 2021, or at any time earlier. On the basis of such

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<sup>51</sup> SPO Submissions, para. 15; Transcript of 23 April, p. 30, lines 4-16, p. 31, lines 19-22.

<sup>52</sup> SPO Submissions, para. 15.

<sup>53</sup> SPO Submissions, para. 16; Transcript of 23 April, p. 30, lines 1-3.

<sup>54</sup> SPO Submissions, para. 17.

<sup>55</sup> Defence Submissions, para. 13.

<sup>56</sup> Transcript of 23 April, p. 31, lines 4-10.

indication, the SPO shall, no later than Friday, 24 September 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, 1 October 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 *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.<sup>57</sup> 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.<sup>58</sup>

55. On 22 April 2021, the SPO disclosed 15 potentially exculpatory items, including one witness statement and five statements obtained from the Accused.<sup>59</sup> Mindful of its continuing obligation under this rule, the SPO submits that it will continue to review

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<sup>57</sup> Transcript of 23 April, p. 32, lines 1-8. 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, ICC, [Yekatom Disclosure Decision](#), para. 16; [Ongwen Disclosure Decision](#), para. 18.

<sup>58</sup> Similarly, ICTR, [27 November 2006 Decision](#), para. 11, and references therein.

<sup>59</sup> SPO Submissions, para. 19; Transcript of 23 April, p. 32, lines 19 to p. 33, lines 1-2.

and, following application of required redactions, immediately disclose on a rolling basis Rule 103 material in its possession.<sup>60</sup> The SPO anticipates that some Rule 103 material may require redactions, in particular pursuant to Rule 108(1).<sup>61</sup> The Defence requests that Rule 103 material be disclosed immediately or as soon as possible and in any event by 22 May 2021.<sup>62</sup>

56. In light of the Parties' 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.

## **5. Rule 107: Protected Material**

57. 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.

58. 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.

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<sup>60</sup> SPO Submissions, para. 20; Transcript of 23 April, p. 33, lines 3-8.

<sup>61</sup> SPO Submissions, para. 21; Transcript of 23 April, p. 33, lines 6-8.

<sup>62</sup> Defence Submissions, para. 13; Transcript of 23 April, p. 33, lines 13-16.

59. The SPO submits that a limited amount of Rule 107 information is potentially subject to disclosure under Rules 102 and/or 103 of the Rules.<sup>63</sup> It is taking active steps to receive the requisite responses from external parties to meet its disclosure obligations under the Law and the Rules.<sup>64</sup>

60. Considering that the SPO is actively seeking clearances for material potentially falling under Rules 102 and/or 103 of the Rules, 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

61. 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 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.

62. 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 its 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.

63. Considering that the disclosure process has just started, the Pre-Trial Judge refrains from making any further determinations. Time limits regulating the filing of

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<sup>63</sup> SPO Submissions, para. 22; Transcript of 23 April, p. 34, lines 7-10.

<sup>64</sup> SPO Submissions, para. 22; Transcript of 23 April, p. 34, lines 10-17.

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 the disclosure of evidence, if any, will also be determined at a later stage.

#### D. TRANSLATION OF DOCUMENTS AND EVIDENCE

64. 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.<sup>65</sup>

65. 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.<sup>66</sup> 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.<sup>67</sup> Therefore, a balance must be achieved between these competing rights in order to make proceedings fair and expeditious at the same time.

66. 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.

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<sup>65</sup> Decision on Working Language, para. 29(a).

<sup>66</sup> In this context, it is noted that the Accused received the Arrest Warrant, Transfer Order, Confirmed Indictment and core legal texts of the SC in Albanian. KSC-BC-2020-04, F00021, Registrar, *Report on the Arrest and Transfer of Pjetër Shala to the Detention Facilities*, 16 April 2021, confidential, paras 17, 40, 50, with Annexes 1-3, strictly confidential and *ex parte*.

<sup>67</sup> Similarly, ICC, *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.

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

67. 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.<sup>68</sup> 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.<sup>69</sup> 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

68. 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.<sup>70</sup>

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<sup>68</sup> 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.

<sup>69</sup> 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.

<sup>70</sup> 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.

69. The SPO submits that a consolidated disclosure chart pursuant to Rule 109(c) of the Rules should be provided within 15 days of the filing of any Pre-Trial Brief.<sup>71</sup> With respect to case-specific sub-categorisation in Legal Workflow for material falling under Rules 102(1)(a) and (b) and 104(1), (5), and (6) of the Rules, the SPO submits that the nature of the evidence to be presented is such that many individual items of evidence will apply to all crimes and all modes of liability rendering such categorisation of very limited utility, especially when compared to the resources required for its implementation.<sup>72</sup>

70. The Defence submits that a consolidated disclosure chart should be provided as soon as possible and, in any event, well in advance of the filing of the Prosecution's Pre-Trial Brief.<sup>73</sup> The Defence also supports the adoption of case-specific sub-categorisation in Legal Workflow and proposes two additional sub-categories: "contextual elements: background" and "location: other".<sup>74</sup> The Defence submits that sub-categories may become more pertinent if there are additional charges or a joinder of cases.<sup>75</sup>

71. The Pre-Trial Judge recalls that Rule 109(c) of the Rules describes in general terms the generic categories that can be assigned to evidentiary material when it is uploaded on Legal Workflow and disclosed to the receiving Party: contextual elements of the crimes, underlying crimes, alleged conduct of the accused, and, where applicable, evidence to be presented by the SPO ("Standard Categories"). The Pre-Trial Judge considers, however, that further specification and sub-categorisation is required to ensure the fair and expeditious conduct of the proceedings. This ruling is informed, in particular, by the Defence submissions on the matter, the availability of the recently

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<sup>71</sup> SPO Submissions, para. 29.

<sup>72</sup> SPO Submissions, paras 26-27; Transcript of 23 April, p. 35, line 24 to p. 37, line 5, p. 38, lines 14-18.

<sup>73</sup> Defence Submissions, para. 9.

<sup>74</sup> Defence Submissions, paras 7-8; Transcript of 23 April, p. 37, line 23 to p. 38, line 9.



updated Legal Workflow facilitating the organised presentation of evidence, and the fact that, following the SPO, the evidence to be disclosed under Rule 102(1)(a) and (b) of the Rules is rather limited. Accordingly, such case-specific categorisation shall be applied in Legal Workflow and only in relation to material falling under Rules 102(1)(a) and (b) and 104(1), (5) and (6) of the Rules. The Pre-Trial Judge accordingly adopts, in addition to the Standard Categories, the following case-specific categorisation in Legal Workflow: (i) contextual elements: “war crimes”; (ii) underlying crimes: “count 1”, “count 2”, “count 3”, “count 4”, “all”; (iii) location: “Kukës”; (iv) alleged conduct of the Accused: “direct commission”, “JCEI”, “JCEII”, “JCEIII”, “aiding and abetting”, “all”; and (v) Accused: “Pjetër Shala”.

72. With regard to the Defence’s proposed additional categories, the Pre-Trial Judge does not adopt those categories at this time. The Pre-Trial Judge finds it more prudent, in the circumstances, to tailor the sub-categories to the charges as they stand now, which include only one charged location (Kukës). Furthermore, the Pre-Trial Judge notes that a contextual elements category already exists and that background information is not part of the legal elements of the charges.<sup>76</sup>

73. With regard to the Rule 109(c) chart, the Pre-Trial Judge considers it appropriate to adopt the proposed chart in the *Gucati and Haradinaj* Case, which includes the Standard Categories.<sup>77</sup> As the Detailed Outline already provides extensive analysis in relation to Rule 102(1)(a) material, the Rule 109(c) chart shall relate to Rule 102(1)(b)

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<sup>76</sup> Similarly, ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205 (OA15 OA16), Appeals Chamber, *Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor Against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”*, 8 December 2009, footnote 163.

<sup>77</sup> KSC-BC-2020-07, F00109/A01, Specialist Prosecutor, *Annex 1 to Submissions on Rule 109(c) Categorisation*, 1 February 2021, public.

and Rule 102(2) material with respect to the SPO and Rule 104(1), (5), and (6) material with respect to the Defence.<sup>78</sup>

74. In order not to disrupt the progress of disclosure, and in light of the efficiency in generating the Rule 109(c) chart around the time of the pre-trial brief, the Pre-Trial Judge considers that the most expeditious way of proceeding in the present case is to have the Rule 109(c) chart provided to the opposing Party around the time of filing any pre-trial brief. The Parties shall therefore file a Rule 109(c) chart within seven days from the filing of their respective pre-trial briefs.

## F. RESTRICTIONS TO DISCLOSURE

### 1. General Principles

75. The Pre-Trial Judge notes that full disclosure of all material and relevant evidence is the principle, while withholding information is the exception.<sup>79</sup> 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

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<sup>78</sup> Similarly, KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 9 October 2020, public, para. 71; KSC-BC-2020-07, F00121, Pre-Trial Judge, *Decision on Submissions on Rule 109(c) Categorisation*, 11 February 2021, public, paras 15-19; KSC-BC-2020-06, F00218, Pre-Trial Judge, *Decision on Categorisation of Evidence Under Rule 109(c) and Related Matters*, 12 March 2021, public, paras 9-10, 25.

<sup>79</sup> 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.

(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.<sup>80</sup>

76. 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*.<sup>81</sup> 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*.<sup>82</sup>

77. Lastly, the need for redactions is to be assessed on a case-by-case basis.<sup>83</sup> 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

78. In assessing if certain information may be withheld from the receiving party, it must be ascertained whether:<sup>84</sup>

- (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;

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<sup>80</sup> Similarly, ICC, [13 May 2008 Judgment](#), para. 68.

<sup>81</sup> Rule 108(1) and (6) of the Rules.

<sup>82</sup> Rule 80(1) and (3) of the Rules.

<sup>83</sup> Similarly, ICC, [13 October 2006 Judgment](#), para. 36; [13 May 2008 Judgment](#), paras 2, 59, 66.

<sup>84</sup> KSC-BC-2020-05, F00034, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters* (“Mustafa Disclosure Decision”), 9 October 2020, public, para. 76. Similarly, 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.<sup>85</sup> 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.<sup>86</sup>

### 3. Redaction Regime

79. The SPO and the Defence support the adoption of the redaction regime in the *Gucati and Haradinaj* Case.<sup>87</sup>

80. 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 following redaction regime. With the adoption of this regime in the present case the Parties have sufficient guidance in implementing redactions, if any, before disclosing the evidence in their possession.

81. 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.<sup>88</sup>

82. For any redactions falling outside the aforementioned pre-defined categories (“non-standard redactions”), the disclosing Party must submit a discrete application

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<sup>85</sup> Article 21(6) of the Law.

<sup>86</sup> Rule 80(1) of the Rules.

<sup>87</sup> SPO Submissions, para. 30; Defence Submissions, para. 10; Transcript of 23 April, p. 39, lines 2-16.

<sup>88</sup> See *infra* para. 85.

to the Pre-Trial Judge seeking authorisation to restrict disclosure, in accordance with the procedure set out below.<sup>89</sup>

83. 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.

84. 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.

85. 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

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<sup>89</sup> See *infra* para. 90.

within five days from notification of the challenge in the record of the case, unless otherwise decided by the Pre-Trial Judge.

86. 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.

87. 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 unredacted version of the evidence at the time the redacted version is disclosed to the receiving Party.<sup>90</sup> 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.

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<sup>90</sup> The former should be accessible in the electronic management system to the Pre-Trial Judge only. Similarly, ICC, [Al Hassan Disclosure Decision](#), para. 32; [Yekatom Disclosure Decision](#), para. 28.

#### 4. Standard Redactions

88. The categories for standard redactions are clearly delineated and well-entrenched in the practice of other courts<sup>91</sup> and have been adopted in other cases before the SC.<sup>92</sup> The Pre-Trial Judge herewith adopts the below categories of standard redactions and their justifications in light of the test set out above.<sup>93</sup> 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.

89. 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

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<sup>91</sup> For example, ICC, [Yekatom Disclosure Decision](#), paras 25-26; [Al Hassan Disclosure Decision](#), para. 29.

<sup>92</sup> [Mustafa Disclosure Decision](#), para. 86; KSC-BC-2020-06, F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters* ("Thaçi et al. Disclosure Decision"), 23 November 2020, public, para. 95; KSC-BC-2020-07, F00104, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters* ("Gucati and Haradinaj Disclosure Decision"), 22 January 2020, public, para. 82.

<sup>93</sup> See *supra* para. 78.

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 84 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 84 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,<sup>94</sup> 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.

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<sup>94</sup> 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”),<sup>95</sup> 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.

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<sup>95</sup> Rule 80(1) of the Rules. *Similarly*, ICC, [13 May 2008 Judgment](#), paras 1, 40, 56.

**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.<sup>96</sup> 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

90. 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.<sup>97</sup> In such cases, the disclosing Party shall submit an application to the relevant Panel sufficiently in

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<sup>96</sup> Article 37(1) of the Law.

<sup>97</sup> *Mustafa* Disclosure Decision, para. 88; *Thaçi et al.* Disclosure Decision, para. 97; *Gucati and Haradinaj* Disclosure Decision, para. 83. 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.

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; the receiving Party 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 Witness Protection and Support Office ("WPSO") shall submit, within five days of notification of the application for non-disclosure, an individual risk assessment for each witness in relation to whom non-disclosure of identity is requested or if, in relation to a witness, for whom a risk assessment has been submitted, updated information is necessary. With a view to avoiding multiple re-disclosures of the same evidence, 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"**.

91. 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

92. 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 28-37 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 **Wednesday, 19 May 2021**;

- c. **ORDERS** the SPO to complete disclosure of material falling under Rule 102(1)(b) of the Rules, by **Friday, 30 July 2021**, and to file any request for protective measures in relation to such material no later than **Friday, 11 June 2021**;
- d. **ORDERS** the SPO to provide to the Defence a detailed notice of evidence falling under Rule 102(3) of the Rules by **Friday, 3 September 2021**;
- e. **ORDERS** the Defence to indicate to the SPO, by **Friday, 17 September 2021**, or any time earlier, which items, among those listed in the detailed notice referred to under Rule 102(3) of the Rules, it seeks to have access to by way of disclosure or inspection;
- f. **ORDERS** the SPO, on the basis of any Defence indication(s) under point (e) above, to disclose to or provide the Defence with access to the selected material that does not require redactions no later than **Friday, 24 September 2021, or within one week of the Defence indication**, whichever is earlier;
- g. **ORDERS** the SPO, on the basis of any Defence indication(s) as referred to under point (e) above, to file any request for protective measures of selected material no later than **Friday, 1 October 2021, or within two weeks of the Defence indication**, whichever is earlier;
- h. **ORDERS** the SPO to seize the Pre-Trial Judge, **within five days of the Defence indication(s)** as referred to under point (e) above, should it dispute the materiality of evidence;
- i. **ORDERS** the SPO to disclose any remaining batch(es) of Rule 103 material immediately and on a rolling basis;

- j. **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;
- k. **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;
- l. **ORDERS** the Parties to follow the terms of the redaction regime as set forth in paragraphs 75-91 of this decision;
- m. **ORDERS** the Parties to use the Standard Categories and case specific sub-categories in the metadata field of each item of disclosure, as indicated in paragraph 71, above;
- n. **ORDERS** the Parties to file their respective Rule 109(c) charts, as indicated in paragraph 73-74, above, **within one week** of the filing of their respective pre-trial briefs; and
- o. **ORDERS** WPSO to submit, **within five 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 90 of this decision.



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**Judge Nicolas Guillou**  
**Pre-Trial Judge**

Dated this Friday, 30 April 2021  
At The Hague, the Netherlands.