



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

Annex 1 to

Order for Submissions on the Draft Order on the Conduct of Proceedings

Public

DRAFT ORDER ON THE CONDUCT OF PROCEEDINGS

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I. PUBLIC CHARACTER OF PROCEEDINGS

1. In accordance with Article 40(4) of the Law,¹ the Specialist Prosecutor's Office ("SPO"), the Defence, and the Victims' Counsel ("Parties and participants") shall respect the public character of the proceedings. Legal arguments and presentation of evidence by the Parties and participants shall be heard in closed or private session only where strictly necessary in accordance with Rule 120 of the Rules.²

2. Parties and participants shall endeavor to file all written submissions as public documents, and to confine confidential matters as much as possible to confidential or strictly confidential annexes.

3. Where a Party files a motion confidentially or strictly confidentially, it is presumed, until it is demonstrated to the contrary, that there is good cause for that status, and, pursuant to Rule 82(4), the opposing Party must respect that status until the Trial Panel issues an order altering that status. Parties and participants shall promptly file, where possible, public redacted versions of submissions that are filed on a confidential or strictly confidential basis.

4. Parties and participants are instructed to refrain as much as possible from filing submissions or annexes *ex parte*. The Trial Panel will exercise heightened scrutiny of the reasons presented to justify *ex parte* filings.

II. FAIR AND EXPEDITIOUS CHARACTER OF PROCEEDINGS

5. The responsibility to ensure a fair and expeditious trial is a matter in the hands of both of the Trial Panel and of the Parties and participants. The Trial Panel will not tolerate any delaying tactics by any Party. It will seek to ensure at all times that

¹ Any reference to "Article" in this order is a reference to a provision of the Law on Specialist Chambers and Specialist Prosecutor's Office.

² Any reference to "Rule" in this order is a reference to a provision of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers.

proceedings progress in a timely and effective manner. The Trial Panel expects the Parties and participants to contribute to this goal within the scope of their responsibilities and in a manner that is consistent with the rights of the Accused and those of participating victims.

6. Parties and participants' submissions, whether orally or in writing, shall be focused and brief. Parties and participants shall avoid lengthy speeches, repetitious submissions or submissions in respect of issues not relevant to the proceedings.

7. Parties and participants shall avoid raising any issue in the courtroom that could unnecessarily delay the course of proceedings prior to the commencement of a witness's evidence, unless that issue has a direct bearing on that witness or for other legitimate purposes. Before raising any such issue, a Party or participant shall give timely written or oral notice to the Trial Panel and to the other Parties and participants of its intention to do so, providing adequate details of the nature of the application and the basis for it. Each of the other Parties, and where appropriate Victims' Counsel, shall, without delay, provide a written or oral indication to the Trial Panel and the other Parties and participants of its position regarding the proposed application and, in particular, whether it opposes it and, if so, on what basis. The Trial Panel will decide whether additional submissions are required and will direct the Parties and participants accordingly. Parties and participants are generally expected to conduct *inter partes* discussions with a view to find agreeable solutions to any issue that arises during trial and, only if this cannot happen, to seize the Trial Panel.

8. Consistent with Rule 17, the Presiding Judge, in consultation with the Judges of the Trial Panel, may designate a Judge Rapporteur to deal with specific issues relevant to ensuring fair and expeditious proceedings.

III. WORKING LANGUAGE

9. The Trial Panel adopts the approach taken by the Single Judge in respect of the language of proceedings as specified in his Decision on Working Language of 11

November 2020³ and determines that English shall be the working language for trial proceedings in the present case and that the Parties and participants should otherwise continue to comply with the directions contained in that Decision.⁴

IV. ATTITUDE TOWARDS THE TRIAL PANEL AND THE PARTIES AND PARTICIPANTS

10. In accordance with Article 10 of the Code of Professional Conduct for Counsel and Prosecutors Before the Kosovo Specialist Chambers (“Code of Conduct”), Counsel and Prosecutors have a general duty of candour towards the Trial Panel.

11. Parties and participants shall at all times demonstrate courtesy to each other, in and out of court. Personal comments relating to, and personal criticism of, any Party or participant will not be tolerated by the Trial Panel. Parties and participants shall refrain from sharp tactics and shall, as far as possible, inform other Parties and participants in advance of oral and written applications they intend to make to the court.

12. The Trial Panel expects Parties and participants to regularly discuss issues arising from the case among themselves with a view to finding solutions that do not require litigation or reduce the scope thereof.

13. Communications with the Judges are regulated by Article 11 of the Code of Conduct. Communications from a Party or other participant with the Trial Panel should in general be copied to, or otherwise notified to, the opposing Party.

14. Any problem that a Party or participant has with any other Party or participant, or with Counsel acting on behalf of a Party or participant, shall first be raised, in compliance with the Code of Conduct, with the Party or Counsel concerned. When a dispute cannot be resolved, it shall be raised with the authorities provided for under the Code of Conduct or with the Trial Panel.

³ F00072, Pre-Trial Judge, *Decision on Working Language*, 11 November 2020, public.

⁴ Transcript of Hearing, 16 December 2022, public, p. 1772, lines 3-8.

V. CONTACTS WITH THE MEDIA

15. The public has an interest in being informed about the course of these proceedings. At the same time, the rights of all involved – in particular, the Accused and victims – shall be respected, including in the context of discussions pertaining to these proceedings. The Trial Panel is mindful of the need to preserve and protect the presumption of innocence of the Accused as well as the security and reputation of witnesses and potential witnesses. In order to find a balance between those interests, it is essential that all information placed in the public domain by any Party or other participant is accurate. It is also essential that non-public or confidential information is not disclosed, directly or indirectly, to the public. Counsel of Parties and participants must ensure that all those acting under their authority, including investigators, interns and other staff, are made aware of their own obligations in that regard, and of their potential criminal liability for disclosure of confidential information.

16. The Trial Panel draws to the attention of Counsel Article 13 of the Code of Conduct, which regulates their communications via social media, the press and to the public.

17. The Trial Panel considers that ‘false’ or ‘defamatory’ statements under Article 13(a) of the Code of Conduct include statements that are intentionally or knowingly misleading.

18. Counsel are not to comment publicly upon any application pending before the Trial Panel until it has been decided by the Trial Panel. The Trial Panel expects the Parties and participants to litigate exclusively before the Trial Panel any issue that is relevant to the case and that is placed before it to decide.

19. Any comment made by Counsel in the media about decisions or orders of the Trial Panel shall comply with their obligations of candour, diligence, dignity and integrity.

20. Counsel are responsible for the acts and statements of those that act under their guidance and authority, including statements made to the media.

VI. DISCLOSURE

21. The three-step process for the disclosure of Rule 102(3) material applicable before the KSC has been outlined by this Trial Panel in the *Gucati and Haradinaj* case.⁵ The Trial Panel will apply this standard in the present case and orders the Parties and participants to adhere to it strictly and in good faith.

22. The SPO is under a continuing duty to disclose without delay any material in its possession which must be disclosed pursuant to Rule 102(3) or Rule 103. Nevertheless, the SPO shall endeavor to disclose all such material prior to the commencement of trial. After the SPO has received the pre-trial briefs of the Defence, the SPO shall take without delay all steps necessary to disclose any additional material that is subject to disclosure in light of what it then knows of the nature of the cases to be presented by each Defence team. The SPO shall pay special attention to ensuring the prompt disclosure of additional exculpatory material, in particular material that could negatively affect the credibility of any of its witnesses.

⁵ KSC-BC-2020-07, F00304, Trial Panel II, *Order on the Updated Rule 102(3) Detailed Notice*, 7 September 2021, public, with confidential and *ex parte* annex, paras 16, 20; F00413, Trial Panel II, *Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice*, 3 November 2021, public, with strictly confidential and *ex parte* annex, para. 36; F00435, Trial Panel II, *Decision on the Prosecution Request Related to Rule 102(3) Notice Item 201*, 15 November 2021, confidential, para. 11; F00479, Trial Panel II, *Decision on Item 202 Disclosure*, 7 December 2021, confidential, para. 11; F00533, Trial Panel II, *Decision on the SPO Request Regarding Items 203 and 204*, 25 January 2022, confidential, para. 14; F00541, Trial Panel II, *Decision on the SPO Request Regarding Item 205*, 28 January 2022, confidential, para. 12. See also KSC-BC-2020-07, IA005-F00008, Court of Appeals Panel, *Public Redacted Version of Decision on the Appeals Against Disclosure Decision*, 29 July 2021, para. 39; F00172, Pre-Trial Judge, *Public Redacted Version of Decision on the Materiality of Information Requested under Rule 102(3) and Related Matters*, 1 April 2021, para. 22.

23. Consistent with Rule 102(4), the SPO shall be prepared to provide reasons, where sought by the Trial Panel, for any late disclosure.

24. Where, following the commencement of trial, the SPO comes into possession of new material that it must disclose pursuant to Rule 102(3) or Rule 103, it shall immediately disclose such material and give notice to the Trial Panel of its disclosure together with a short description of the content of each of the newly disclosed documents.

25. Disclosure requests are not to be treated as fishing expeditions. When making requests for disclosure, the Defence shall therefore be sufficiently precise in its description of the material that it seeks, to enable the SPO to identify, without delay, the material sought. Requests should also be sufficiently clear so as to enable the SPO to challenge any category requested.

VII. REDACTIONS

26. Subject to variations ordered by this Panel, the Trial Panel will otherwise adopt the redaction procedure set out in the Pre-Trial Judge's Framework Decision on Disclosure of Evidence and Related Matters of 23 November 2020 ("Framework Decision").⁶ The Trial Panel expects the Parties and participants to fulfil their responsibilities in respect of redactions in a timely manner, in good faith, and in a manner consistent with the principle of publicity of proceedings and the rights of the Accused.

27. The Trial Panel notes as a preliminary matter that the onus of establishing the need and justification for redactions remains upon the Party that is seeking them.

28. The Trial Panel emphasises that:

⁶ F00099, Pre-Trial Judge, *Framework Decision on Disclosure of Evidence and Related Matters*, 23 November 2020, public.

- The Party or participant that has implemented redactions in documents disclosed to any other participant in compliance with the Framework Decision is under an ongoing duty to monitor the continued necessity of all redactions and must re-disclose a lesser redacted version of each document, without seeking leave, as soon as the reasons justifying the redaction cease to exist.
- The receiving Party or participant may challenge any specific redaction it believes to be unwarranted, to undermine the effective exercise of its rights and responsibilities 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 as soon as circumstances thought to warrant the removal of redactions have arisen. The Parties and participants shall consult in good faith with a view to resolving the matter.
- If the Parties and participants are unable to agree, the receiving Party should approach the Trial Panel without delay to seek an appropriate relief. The Trial Panel may also, *proprio motu*, conduct its own inquiry into such matters in order to guarantee the fairness and expeditiousness of proceedings.

29. The Panel emphasises that redactions to documents or to statements tendered in evidence should be limited to those absolutely necessary to protect a legitimate interest and proportionate to the objective they seek to achieve, taking into account the rights of the Accused and the principle of the publicity of proceedings. The Panel therefore directs the tendering party to review existing redactions and determine whether they remain absolutely necessary.⁷

⁷ For general guidance, see KSC-BC-2020-07, F00503, Trial Panel II, *Decision on Proposed Redactions of Certain Admitted Exhibits*, 17 December 2021, public, paras 13-18.

30. The SPO is under an ongoing duty to continuously assess the necessity of all redactions in documents disclosed pursuant to Rule 102(3) and/or Rule 103. The SPO shall ensure, in particular, that any redactions that appear in an SPO exhibit to be tendered in evidence at trial shall be limited to that which is absolutely necessary.

31. The SPO shall have *inter partes* discussions with the Defence and Victims' Counsel with a view to identifying possible areas of agreement and concern in respect of redactions which it intends to maintain.

VIII. PARTICIPATION OF VICTIMS

32. Participation of victims should be effective, in the sense of ensuring that Victims' Counsel makes a genuine contribution to the proceedings without duplicating or interfering with the responsibilities of the SPO or the Defence.

33. Upon receiving the schedule of witnesses to be called by the SPO or the Defence, Victims' Counsel shall notify the Trial Panel and the other Parties and participants of those witnesses which he wishes to cross-examine with a general description of the issues or areas of evidence in relation to which he wishes to cross-examine each witness.

34. Questioning of witnesses by Victims' Counsel shall be limited in principle to: (i) the harm or injury done to victims and circumstances in which this occurred; (ii) the consequences of those acts, on the victim, close relatives or the community to which he or she belongs; and (iii) the appropriate relief to remedy the harm done to the victim.

35. Where Victims' Counsel wishes to ask questions on any other issue, he shall seek leave from the Trial Panel together with: (i) a brief indication of the issue; (ii) a justification for the request; and (iii) an estimate of the time necessary for the additional questioning.

36. Subject to the Trial Panel's prior approval, Victims' Counsel shall be permitted to call evidence, and instruct experts, only in relation to issues (i)-(iii) identified in paragraph 34.

IX. MATTERS NOT IN DISPUTE AND *INTER PARTES* COMMUNICATIONS

37. As noted above, the responsibility to ensure a fair and expeditious trial is that of the Trial Panel and of the Parties and participants. To contribute to this common goal, Parties and participants should ensure that the proceedings focuses on what is truly in dispute between them.

38. Consistent with Rule 95(4)(a),⁸ the Trial Panel, therefore, invites the Parties and participants to conduct *inter partes* discussions with a view to identifying whether there is a dispute in relation to the following aspects of the SPO case and, if so, the nature and extent of the dispute:

- a. Alleged underlying crimes;
- b. Existence, timeframe and nature of the alleged armed conflict;
- c. Existence and timeframe of the alleged *chapeau* requirement for crimes against humanity;
- d. Background and personal information of the Accused, as set out in paragraphs 1-12 of the indictment; and
- e. Relevance and admissibility of the SPO's proposed exhibits.

39. Parties and participants are also instructed to conduct *inter partes* discussions with a view to identifying witnesses whose evidence could be tendered, by agreement, pursuant to Rules 153, 154 or 155. Where the Parties and participants agree on the admission of a witness's evidence pursuant to Rule 153, the Parties and participants

⁸ Rule 95(4)(a) requires that the SPO's Pre-Trial Brief include any admissions by the Defence, as well as a statement of matters that are not in dispute.

are encouraged to reach an agreement as to whether they wish the Trial Panel to request the witness to appear for cross-examination.

40. Parties and participants are instructed to report upon their discussions to the Trial Panel with an indication of: (i) areas of agreement (or non-dispute) in relation to any of these issues; and (ii) to the extent that there is a dispute, the basis and nature of the dispute.

41. In accordance with Rule 156, the Trial Panel shall generally refrain from requiring admission of evidence pertaining to facts and issues not in dispute between the Parties and participants, but may take notice of an agreement between the Parties and participants regarding such matters. When a Party decides, nevertheless, to call evidence in respect of an agreed fact, it should do so efficiently.

42. The Trial Panel shall only exceptionally, and upon showing of good cause, permit questions to witnesses on matters which are not in dispute between the Parties and participants.

43. Generally, the Parties and participants are expected to try to resolve issues arising between them before seeking the assistance of the Trial Panel. When it proves impossible for Parties and participants to resolve issues between themselves, the Party or participant wishing to raise an issue with the Trial Panel shall notify the Trial Panel at least 24 hours in advance of the hearing in which it plans to do so. That Party or participant shall notify the Trial Panel concisely of: (i) the issue in question; (ii) the state of the Parties and participants' discussions; and (iii) the relief sought and the legal basis on which it is sought.

X. NOTICE OF DEFENCES

44. Consistent with Rule 95(5), the Defence has given notice to the SPO of its intent to offer any defence or grounds excluding criminal responsibility listed in that

provision.⁹ The Trial Panel will set a deadline for the Defence to file any amended version of their notices of alibi once the redactions in the indictment have been lifted.

45. Where the Defence intends to raise a defence not expressly provided for in Rule 95(5), and where that defence has not already been outlined in the Defence's Pre-Trial Brief, it shall give notice of that defence to the SPO, to Victims' Counsel and to the Trial Panel no later than 20 February 2023. Its notice shall include: (i) a general description of that defence; (ii) an indication of the legal basis relied upon to advance such a defence; and (iii) the relief sought.

XI. AUTHENTICITY AND RELIABILITY OF PROPOSED EXHIBITS

46. In accordance with Rule 138(1), a Party shall not seek to tender or present evidence that it knows or suspects to be false. The Trial Panel expects the tendering Party to have taken reasonable steps to ensure that the evidence placed before the Trial Panel is capable of reasonable belief for the purpose for which it is being offered. It is the Party's responsibility to be in a position to provide information regarding the origin of an exhibit and what steps were taken to verify that the information in question is capable of reasonable belief, when requested to do so by the Trial Panel.

47. A Party which objects to an exhibit shall make its objection clear prior to or at the time that the exhibit is tendered for admission in evidence.

XII. PRESENTATION AND ADMISSION OF EVIDENCE

48. A Party should only include on its lists of proposed witnesses and exhibits those witnesses who it intends to call and those exhibits that it has a genuine intention to

⁹ F01065, Specialist Counsel, *Thaçi Defence Notice of Alibi*, 28 October 2022, paras 2, 5-6; F01066, Specialist Counsel, *Veseli Defence Notice of Alibi*, 28 October 2022, para. 4; F01067, Specialist Counsel, *Selimi Defence Notice of Alibi*, 28 October 2022, paras 3-5. See also F01051, Specialist Counsel, *Pre-Trial Brief of Jakup Krasniqi*, 21 October 2022, confidential, paras 19, 79; F01052/COR, Specialist Counsel, *Corrected Version of the Pre-Trial Brief on Behalf of Kadri Veseli*, 25 October 2022, public, with Annexes 1-3, confidential, paras 40, 41, 48, 52, 118.

produce at trial. As soon as it has decided not to call a witness or not to tender a listed exhibit, the Party concerned shall give notice to the other Parties and participants. Any request to amend those lists shall be done at the earliest possible opportunity and, but for exceptional circumstances, sufficiently in advance of the commencement of the Party's case.

49. In evaluating which exhibits to tender for admission, whether from the bar table or through a witness, the Trial Panel encourages the Parties and participants to set for themselves a high threshold of evaluation so as to ensure that only evidence of high probative value is tendered. It is for the tendering Party to demonstrate the relevance and probative value of an exhibit, and the connection of an exhibit with the testimony of the witness through whom the Party seeks to tender the exhibit. Parties and participants should only seek to tender exhibits through a witness that are clearly relevant to that witness's evidence.

50. In relation to lengthy documents or books of which only a part is relevant or relied upon by the Party, the offering Party shall indicate the pages of the document, in both the original language and in English, which it seeks to have admitted into evidence. Where the entire document is tendered in evidence, the Party should likewise endeavour to the greatest extent possible to identify those sections of the document on which it seeks to rely for the purpose of its case.

51. The Trial Panel strongly encourages the Parties and participants to consider making effective use of Rules 153, 154 and 155, to the greatest extent possible, with a view to expediting proceedings. Parties and participants shall file any such application no later than 3 months before a witness is to be called consistent with the three-month timeframe set out at para. 73 below.

52. An exhibit submitted during trial may in appropriate circumstances (such as matters of authenticity, translation or disclosure) be marked for identification ("MFI") pending the receipt of further information. Such proposed evidence will not be

admitted until the Trial Panel makes a ruling on its admissibility, either orally or in writing, at which point it will be given an official exhibit number.

53. Untranslated documents used during the examination of a witness may either be marked for identification pending translation and further order of the Trial Panel, or denied admission.

54. The Registrar or the Presiding Judge shall assign an exhibit number when it is admitted.

55. In the courtroom and in written submissions, Parties and participants shall ensure that they refer to documents admitted into evidence or marked for identification by their exhibit or MFI number.

56. If a Party uses a different version or translation of a document already admitted in evidence, or marked for identification, it shall make this clear to the Trial Panel prior to using the different version. It shall also refer to the exhibit or MFI number of the admitted document to which the different version relates.

XIII. DISPUTES REGARDING TRANSLATION AND/OR INTERPRETATION

57. Parties and participants shall, to the extent possible, provide copies of their opening and closing statements to the court interpreters so as to ensure the accuracy and efficiency of the interpretation in court.

58. As soon as a Party or participant receives from another Party or participant any document that the other Party intends to use as evidence, the receiving Party shall review the translation of the document for accuracy and completeness. The receiving Party shall raise with the Registry, without delay, any issue it has with the translation. Where the issue cannot be resolved with the assistance of the Registry, the receiving Party shall promptly raise it before the Trial Panel.

59. Parties and participants are expected to raise without delay any issue of interpretation or accuracy of the transcript or of the record of the proceedings. Such an issue shall first be raised with the Registry and, where it cannot be resolved, with the Trial Panel.

XIV. BAR TABLE MOTIONS

60. With a view to ensuring the expeditiousness of proceedings, Parties and participants should consider the submission of evidence through bar table motions.

61. Prior to filing a bar table motion, a Party shall provide to the other Parties and participants a list of the exhibits that it proposes to submit. It shall seek an indication from the other Parties and participants whether they have any objection to the admission of some or all of the proposed exhibit(s).

62. In a request for the admission of evidence from the bar table, the requesting Party shall:

- i. provide a short description of the proposed exhibit of which it seeks admission;
- ii. clearly specify the relevance of the proposed exhibit by reference to the relevant paragraph(s) of the Indictment and the probative value of each proposed exhibit; and
- iii. provide indicators of the proposed exhibit's authenticity, where the document does not on its face contain sufficient indicators of authenticity.

XV. WITNESSES

A. PROTECTIVE MEASURES

63. Where not already ordered, Parties and Victims' Counsel are instructed to file applications for protective measures in compliance with Rules 80-81 as early as possible, and in any event sufficiently early to permit the other Parties and participants to meaningfully respond.

64. Applications for variation of protective measures shall clearly specify the protective measures sought, and shall indicate with specificity the circumstances objectively justifying the issuance of those protective measures.

65. Should a witness inform the presenting Party that he or she no longer requires some or all of the protective measures granted to him or her, the presenting Party shall immediately apply for variation or rescission of that witness's protective measures.

66. Protective measures will only be granted where there is an objective basis justifying such a measure in respect of the witness concerned. The onus of establishing the existence of such a basis is with the Party requesting protective measures. It is for the Party concerned to obtain any relevant evidence, statement and information to support its application.

67. Applications for protective measures shall be made in a timely manner and as soon as practical. This requires the Parties and participants, *inter alia*: a) to consider on an ongoing basis whether measures already granted are still necessary; and b) to contact each and all of their witnesses as soon as practical and sufficiently in advance of their testimony to verify whether they wish to obtain protective measures or maintain those granted and to inform the Trial Panel and other participants accordingly.

68. The Trial Panel reminds the Parties and participants that proceedings are presumed to be public and that it will not grant protective measures based on generic

claims or allegations that do not specifically pertain to the witness concerned or which have not been adequately established.¹⁰

69. Where the Registry intends to make submissions regarding protective measures, it shall do so immediately after an application for protective measures has been made by a Party or participant in the proceedings and before the Trial Panel has made a ruling on that application.¹¹

70. Parties and participants are invited to engage in *inter partes* discussions with a view to identifying those protective measures for which there is no objection. All Parties and participants are to be guided by the need to find an adequate balance between to respect the security of witnesses, the publicity of the proceedings, and the rights of the Accused.

B. INTERVIEW OF WITNESSES BY OPPOSING PARTY

71. With respect to the procedure and safeguards applicable to contacts with the opposite Party's or participant's witnesses, Parties and participants will abide by the standard to be set out by the Court of Appeals Panel in its upcoming Decision on the *Veseli* Appeal of 8 September 2022.¹² If, after that Decision is rendered, further guidance is thought necessary, a Party and/or participant can seize the Trial Panel to obtain such guidance.

¹⁰ See KSC-BC-2020-07, F00303, Trial Panel II, *Decision on the Prosecution Request for Protective Measures*, 7 September 2021, para. 15; F00373, Trial Panel II, *Decision on the WPSO Request for Protective Measures*, 15 October 2021, para. 24. See also Transcript of Hearing, 5 November 2021, p. 1926.

¹¹ See KSC-BC-2020-07, F00373, Trial Panel II, *Decision on the WPSO Request for Protective Measures*, 15 October 2021, paras 19, 28(b).

¹² IA024/F00004, Specialist Counsel, *Veseli Defence Appeal against Decision on Framework for the Handling of Confidential Information during Investigations and Contact between a Party or Participant and Witnesses of the Opposing Party or of a Participant (F00854)*, 8 September 2022.

C. SCHEDULING OF WITNESSES AND MATERIAL TO BE USED IN EXAMINATION

72. The presenting Party is instructed to present its case in a logical manner, and to notify the Trial Panel of the overall sequence in which it proposes to present its case. When more than one Defence team intends to call the same witness, Defence Counsel shall consult with each other regarding the nature and scope of their case and endeavour to avoid repetitions in the presentation of their respective cases.

73. The Trial Panel notes that the SPO submitted a provisional list of the first forty witnesses to be called at trial.¹³ The Trial Panel further requires that, one month prior to the completion of the testimony of these witnesses, the SPO shall provide to the Panel and the other Parties and participants a list of the witnesses it intends to call in the ensuing three-month period and to continue this practice every three months thereafter or until a further order from the Trial Panel. Accompanying this list should be any bar table motion that the calling party intends to submit in compliance with paragraphs 60 through 62, above, in respect of documents which the SPO intends to use with or tender through any of the witnesses called during that three-month period or which are relevant to parts of the SPO case addressed by those witnesses.

74. The SPO shall list the witnesses in the tentative order in which they are to be called, identifying them if necessary by groupings. The SPO shall, thereafter, notify the Trial Panel and the Parties and participants in a timely fashion of any change in the proposed order of presentation of witnesses. The list shall include:

- i. The name and pseudonym of the witness;
- ii. All prior statements or transcripts of evidence of the witness;¹⁴

¹³ F01117, Specialist Prosecutor, *Prosecution Submission of Provisional List of First 40 Witnesses to Be Called at Trial*, 18 November 2022, public, with Annex 1, strictly confidential and *ex parte*, and Annex 2, confidential.

¹⁴ 'Statement' should be understood for the purpose of this Order as defined in KSC-BC-2020-07, Transcript of Hearing, 19 October 2021, pp. 937-939; F00334, Trial Panel II, *Decision on the Prosecution Request for Admission of Items Through the Bar Table*, 29 September 2021, paras 85-87.

- iii. Whether the SPO proposes that the witness should give evidence partly or wholly live, and whether the SPO intends to tender the witness's statement or transcript of evidence pursuant to Rule 154;
- iv. The issues, facts and circumstances in relation to which the witness will be examined;
- v. Time estimate for direct examination;
- vi. Documents and exhibits which the SPO proposes to use with this witness, and the exhibit or MFI number of any of those already admitted or marked for identification; and
- vii. Protective measures ordered in relation to the witness (with reference to relevant orders).

75. At the same time, the SPO shall file submissions on the necessity and proportionality of any redactions and/or withholding of any evidentiary material associated to the proposed witnesses. The SPO shall set forth clearly, for each existing protected witness, fact-specific reasons justifying the necessity and proportionality at this stage of the proceedings of the relevant protective measure.

76. The Defence and Victims' Counsel shall:

- i. Within 5 days of receiving the list, file any application for a variation of protective measures in respect of any of the witnesses in that list, setting out clear and concrete reasons in support. Any response shall be filed within 5 days. No reply will be entertained.
- ii. Within 5 days of receiving the list, provide an indication of:
 - a. Which witnesses it intends to cross-examine and, a time estimate for cross-examination of each witness;

- b. Any objection to the admission of witness statements/transcripts of interview and/or exhibits, which the SPO proposes to tender through the witnesses;
 - iii. The Defence teams shall consult among themselves to discuss the scope and nature of cross-examination with a view to: (i) avoiding repetitive questioning and (ii) agreeing that one Defence team shall conduct all the cross-examination of a witness or the bulk thereof, where doing so would not impinge upon an Accused's right to confront the witnesses against him.
77. At the end of any three-week block of hearings, the Party calling witnesses shall notify the Trial Panel and the other Parties and participants of the witnesses which it intends to call during the following three-week block of hearings.
78. No later than 24 hours before a witness is due to testify, the calling Party shall upload to Legal Workflow its final presentation queue that includes all documents it intends to use with the witness.
79. It is the duty of the presenting Party to notify the Trial Panel, the other Parties and participants, and the Registry as soon as possible of any changes to the order of witnesses and/or any amendment to the list of (proposed) exhibits that it intends to use with a witness.
80. It is the presenting Party's responsibility to ensure that, at the conclusion of the evidence of a witness, there is another witness ready to begin to testify. If one of the proposed witnesses is not able to testify at the scheduled time or if there is no cross-examination of a witness, or if cross-examination proceeds faster than expected, the presenting Party shall ensure that an alternative witness can be called so as to avoid any delay in the proceedings.
81. It is the obligation of the presenting Party to file a list of (proposed) exhibits it intends to use during direct examination of its witnesses. However, should the presenting Party become aware of any additional material, which it wishes to use

during the direct examination of that witness, the presenting Party shall: (i) notify the other Parties and participants and the Trial Panel without delay; (ii) submit no later than 24 hours prior to the testimony of the witness a final list of the material to be used and upload any additional material to its presentation queue. If any of the additional material that the presenting Party wishes to use during the direct examination of the witness is not included on its exhibit list filed pursuant to Rule 102(1)(b)(iii) or Rule 104(5)(c), the Party shall apply to the Trial Panel to amend its exhibit list.

82. A presentation queue listing all documents or other material to be used by the cross-examining Party must be released to the Trial Panel and the other Parties and participants immediately upon the completion of the direct examination of that witness at the latest. This list shall indicate the exhibit number of any exhibit already admitted in evidence by the Trial Panel or the ERN of the document if not already admitted. The presentation queue shall also list any documents or other material not previously disclosed that form part of the list of documents or material for use during cross-examination. Any other Party or participant may then request a short adjournment in order to examine the new material.

83. Parties and participants are instructed to seek agreement, where possible, regarding the order in which witnesses are to be called in the following week. The Trial Panel reserves its right to order the Parties and participants to amend the order in which they propose to call witnesses.

D. WITNESS PREPARATION

84. The Trial Panel shall permit witness preparation in accordance with the principles in this section.

85. The purpose of witness preparation is:

- i. To assist the witness who will be giving evidence during the proceedings:

- (a) to help ensure that the witness gives relevant, accurate and structured testimony; and
 - (b) to help ensure the well-being of the witness.
 - ii. For the calling Party to assess and clarify the witness's evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings.
86. Any attempt to influence a witness to testify to factual events that the witness did not observe or perceive is prohibited. Coaching, training or practising are not allowed.
87. Witness preparation is to be carried out in good faith and in keeping with the applicable standards of professional conduct and ethics.
88. Witness preparation is the responsibility of the calling Party, who shall determine practical arrangements in coordination with the Registry. The calling Party shall exercise particular care with regard to vulnerable witnesses, and the Registry should be available to assist with such witnesses if necessary.
89. When conducting witness preparation, the lawyer should be accompanied by at least one other lawyer of the calling Party's team unless exceptional circumstances render this impossible.
90. If the witness so requests, his or her legal adviser shall be permitted to attend the preparation session.
91. In determining where to conduct witness preparation, the calling Party shall give due regard to the security of the witness.
92. The calling Party shall conduct its preparation session after witness statements have been taken, if applicable, and disclosed to the other Parties and participants.

93. Subject to the witness's availability and travel logistics, the calling Party shall endeavour to complete its preparation sessions as early as possible and, in any event, at least 24 hours before the witness's testimony is due to commence.

94. The calling Party shall keep a log of each preparation session which shall list the location and duration of the session, and the attendees at the session. After conducting a witness preparation session, the calling Party shall promptly provide the non-calling Parties and participants and the Trial Panel with a copy of the log.

95. At least 24 hours before testimony, the calling Party shall provide the non-calling Parties and participants and the Trial Panel with all of the information that is subject to the calling Party's disclosure obligations, including: (i) any clarifications, changes or corrections made by the witness to his or her previous statements and the reasons advanced by the witness, if any, to justify the change or correction; and (ii) any new information obtained from the witness. This information shall be recorded into a note and read back to the witness, who shall confirm that it reflects his/her account fully and accurately. The note shall be signed by the person who prepared it and then sent to the Panel and the Parties and Victims' Counsel through Legal Workflow. If the Party wishes to tender the witness's statement under Rule 154, it shall, at the commencement of direct examination, ask the witness to confirm, that subject to the corrections set out in the note, "the written statement or transcript accurately reflects his or her declaration and what he or she would say if examined" as required by Rule 154. The Party may then tender the witness's statement and the note of corrections for admission pursuant to Rule 154.

96. During preparation sessions, the questioning lawyer must:

- i. Reiterate the witness' obligation to tell the truth;
- ii. Explain the purpose of the preparation session;
- iii. Provide the witness with an opportunity to review his or her prior statements;

- iv. Provide the witness with an opportunity to confirm whether his or her prior statements are accurate and to explain any changes as necessary; and
- v. Indicate that if the witness is concerned that information could be self-incriminatory that he or she is permitted to seek the advice of a counsel before answering such questions;

97. During preparation sessions, the questioning lawyer shall not:

- i. Seek to influence the substance of the witness's answers, either directly or indirectly (including, for instance, by informing the witness of the type of evidence that would assist the calling Party's case, by suggesting whether or not the witness's answers are right, or leading the witness in an inappropriate way);
- ii. Train the witness or practice the questions and answers expected during the witness's in-court testimony so that the witness memorises those questions and answers;
- iii. Inform the witness of the evidence of other witnesses (including oral testimony and prior recorded statements of other witnesses); and
- iv. Disclose information that is subject to protective measures ordered by a Panel.

98. Where, as part of the investigation, a person was given a notification in accordance with Rule 43 and he or she is re-interviewed by the SPO prior to giving evidence, the SPO shall renew that notification where there remains a reasonable suspicion that the person committed or participated in the commission of a crime within the jurisdiction of the Specialist Chambers. Where an individual was interviewed during the investigation without being given such notification, but the SPO at the time of the preparation session has grounds to believe that the person

committed or participated in the commission of a crime within the jurisdiction of the Specialist Chambers, the SPO shall provide a Rule 43 notification to the person.

E. ORDER OF QUESTIONING

99. Where the SPO calls a witness, the order of questioning the witness is:

- SPO
- Victims' Counsel, with leave of the Trial Panel
- Counsel for the Accused

100. Where Counsel for an Accused calls a witness, the order of questioning the witness is:

- Counsel for the Accused
- SPO
- Victims' Counsel, with leave of the Trial Panel
- Remaining Counsel for the Accused

101. The Presiding Judge may, when the interests of justice require, vary the order of questioning.

F. QUESTIONING OF WITNESSES

102. Parties and participants shall limit their questioning of witnesses to issues strictly relevant to these proceedings.

103. When questioning a witness, and when presenting material during questioning, a Party shall focus on the allegations set forth in the indictment, and valid lines of arguments which may be advanced by the Defence in response thereto. Parties and participants shall refrain from asking questions, or tendering exhibits, intended to advance a *tu quoque* defence or any other defence that has been ruled by the Trial Panel

to be invalid. Similarly, questions regarding the justness or legitimacy of the war are not matters relevant to these proceedings and will not be permitted. Parties and participants should, therefore, be prepared to provide an explanation, if requested by the Trial Panel, of the basis and reason for any particular line of questioning.

104. A Party shall structure its questioning of a witness so that as much of it as possible may be heard in public session; questions requiring the Trial Panel to enter closed or private session shall to the extent possible be grouped together.

105. Cross-examination will be limited to matters set out in Rule 143(3), *i.e.*: (i) the subject-matter of the direct examination and/or (ii) matters affecting the credibility of the witness. Where the witness is able to give evidence relevant to the case of the cross-examining Party, he or she may be examined on the subject-matter of that case, provided that the cross-examining Party puts to that witness the nature of that case. The cross-examining Party will use its best efforts to avoid unnecessary, irrelevant or repetitive questioning of witnesses. Defence Counsel are therefore advised to coordinate their cross-examination with other Defence Counsel and, where possible and consistent with the rights of the Accused, to designate one counsel to cross-examine a witness in respect of common issues in order to avoid repetitive questions.

106. Consistent with Rule 143(2), where a witness gives evidence unfavourable to the calling party, is evasive or contradicts a prior statement he/she made, the calling Party can seek leave from the Panel to: (i) confront the witness with an earlier statement and, where appropriate; (ii) to have such statement admitted; and/or (iii) to ask leading questions of the witness in respect of the issues affected by one of the above circumstances.

107. The order in which the Defence teams conduct their cross-examination of SPO witnesses will follow the order in which their clients are listed in the Indictment, unless Counsel agree otherwise among themselves.

108. The Trial Panel shall exercise strict control over cross-examination that appears to duplicate questions already asked of a witness by Counsel for another Accused.

109. The Trial Panel will not, at the present time, set a time limit for the cross-examination of witnesses. Parties and participants are instructed to ensure, however, that they make effective use of time. The Trial Panel reserves the possibility of setting time-limits should this be necessary to guarantee the expeditiousness of proceedings.

110. The Trial Panel shall permit redirect examination in accordance with Rule 127(3) only on matters arising in cross-examination. Redirect examination on new matters shall only be permitted with the Trial Panel's leave.

111. The Trial Panel shall only permit re-cross-examination if new material is introduced during re-direct examination or cross-examination by any Party or participant. In such circumstances, a Party is entitled to further cross-examine the witness on that new material. Where questions put to a witness by the Trial Panel after cross-examination and re-direct examination raise entirely new matters, any Party may orally apply for leave to further examine the witness on those new matters.

112. Parties and participants shall avoid lengthy or complicated questions that may confuse a witness, and shall put questions one by one in sequence to a witness, rather than in combined questions. Parties and participants shall be mindful of the need for interpreters to interpret questions and answers so as to ensure that the record provides a complete and accurate account of both questions and answers.

113. The Trial Panel directs the Parties and participants to ensure that only one Counsel per Accused and, as far as the SPO is concerned, one Counsel on behalf of the SPO, shall be asking question of any one witness.

G. OBJECTIONS

114. Any Party wishing to object to a question during testimony of a witness shall stand and concisely state the objection. All objections, comments or other statements made in the courtroom shall be directed to the bench and not to opposing Counsel.

115. Objections to the admission of a document or to a line of questioning of a witness shall be limited to stating, briefly, the basis for the objection. The objecting Party should avoid making lengthy submissions unless directed by the Trial Panel. In particular, the objecting Party shall refrain from any 'speaking objection' that provides guidance or information to a witness present in the courtroom. Where the objecting Party must make an objection that is likely to provide guidance or information to the witness, it shall ask the Trial Panel to excuse the witness so that the objection can be heard in full.

116. Unless otherwise decided, the Trial Panel shall rule on the objection orally and immediately.

117. Where a Party expects to challenge a witness's testimony or a proposed exhibit on the basis of a particularly complex factual or legal objection, it shall in principle submit to the other Parties and participants and to the Trial Panel notice outlining broadly its objection with any relevant supporting authority at least one day prior to the date of the testimony or tendering of a proposed exhibit. The Trial Panel will rule on the objection having heard the Parties and participants.

118. The Trial Panel will generally hear and rule upon submissions from the Parties and participants about the admissibility of each exhibit at the time that the exhibit is tendered in evidence. Where it is more practical to do so, the Trial Panel might also decide to postpone decisions on admission until the end of a witness's testimony.

H. USE OF PRIOR STATEMENTS

119. Where a witness does not have a clear recollection of relevant circumstances or testifies contrary to his or her prior statements, a prior witness statement or transcript may be used to refresh the memory of a witness whether or not it has been admitted in evidence. When presenting a witness with something that the witness has previously stated during testimony, or in a prior written statement, the Parties and participants shall avoid paraphrasing what the witness said and shall quote directly from the transcript or prior statement, giving the relevant page and line numbers. Pursuant to Rule 143(2)(c), the Parties and participants may seek admission of any prior inconsistent statement for the purpose of assessing the credibility of the witness, as well as for the truth of its contents or for other purposes within the discretion of the Trial Panel.

I. EXPERT WITNESSES

120. Pursuant to Rule 149, the calling Party shall file with the expert report a concise summary of the instructions provided by the calling Party to the expert before the expert produced its first draft of the report, and of any further instructions provided by the calling Party to the expert after receipt of the first and any subsequent drafts of the report.

121. The calling Party shall seek leave to amend its witness list to add an expert, to amend or supplement a report or to provide an annex to it, only upon showing of good cause. Leave to do so shall precede the instruction of such a witness. The SPO is therefore instructed to ensure before their case commences that the report of any expert it intends to call is finalised and ready to be tendered in evidence. A similar regime will apply to the Defence should the Trial Panel find that any or some of the Accused have a case to answer pursuant to Rule 130. Where this is the case, the

Defence shall produce and disclose any proposed expert reports within 10 days of any Rule 130 Decision.

122. When an expert witness produces a report, that report may be admitted in evidence, subject to the requirements of relevance and probative value. Source material will be admitted upon request, when justified.

123. Proposed expert witnesses shall strictly meet the requirements of expertise and impartiality. The Trial Panel shall not hear as expert witnesses individuals who possess no expertise which the Trial Panel does not possess, nor will it regard as experts individuals who have been employed as a staff member or as a team member by a Party.

124. Individuals who do not meet the above requirements can still be called as witnesses to give evidence about relevant facts and circumstances pertaining to the investigation of the case or to offer evidence in respect of documents tendered in evidence. The Trial Panel will not authorise such a witness to transgress on its fact-finding responsibilities.

125. The Trial Panel may direct the Defence teams to call any of the expert witnesses on their list of witnesses at an early stage of the presentation of the Defence case for each Accused.

126. Having heard the expert witnesses called by the Parties and participants, the Trial Panel may *proprio motu* instruct and call additional expert witnesses in accordance with Rule 132, or direct the Parties and participants to jointly instruct additional expert witnesses.

XVI. STATUS CONFERENCES ON PROCEDURAL MATTERS

127. The Trial Panel wishes to ensure that trial proceedings focus primarily on the legal and factual issues relevant to the case against the Accused. While certain procedural issues might arise in the course of the proceedings (*e.g.* issues of disclosure,

redaction or protective measures), the Trial Panel wishes to ensure that these do not unnecessarily prolong or delay the course of the trial. For that reason, the Trial Panel instructs the Parties and participants to seek to resolve any such dispute before bringing it to the attention of the Trial Panel. The Trial Panel may also hold, as necessary and pursuant to Rule 116(5), status conferences on procedural matters to resolve any issue that cannot be resolved by the Parties and participants themselves. Where such an issue arises, the Parties and participants shall immediately inform the Trial Panel of its existence, general nature, and manner in which it is proposed to be resolved.

XVII. PRESENCE IN COURT AND REPRESENTATION BY COUNSEL

128. Attendance in court shall in principle be limited to Counsel and case managers. Where a Party wishes to bring in the courtroom another team member, it shall give 24-hour advance notice to all Parties and participants, to the Registry and to the Trial Panel.

129. Counsel for the Accused shall ensure that at least one Counsel is present at all times in the courtroom to represent the Accused. The Trial Panel will not delay the proceedings due to the absence of lead or co-Counsel.¹⁵

130. The Panel may order that attendance in court and/or access to the transcript of proceedings be limited to Counsel and identified members of the Parties and participants.

XVIII. RECORDING OF USE OF TIME

131. A system for monitoring the use of time shall be established by the Registry, which will be responsible for recording time used during the evidence of each witness:

¹⁵ KSC-BC-2020-07, Transcript of Hearing, 7 December 2021, pp. 2144-2146.

- i. by the calling Party or participant for its direct examination, noting in each case whether part of the witness's evidence was given in the form of a statement under Rule 154;
- ii. by each Party or participant that conducts cross-examination;
- iii. by the relevant Party or participant for re-direct examination;
- iv. by the Judges as result of putting questions to the witnesses; and
- v. for all other matters, including procedural and administrative matters.

132. Regular reports on the use of time shall be compiled by the Registry in conjunction with the Trial Panel, which shall be provided periodically to the Parties and participants.

133. The Trial Panel shall continually monitor the use of time, and may make further orders, as it considers necessary, concerning the time used by the SPO or the Accused.

XIX. FINAL TRIAL BRIEFS

134. Final Trial Briefs shall be filed in accordance with Rule 134(b) at a date set by the Trial Panel. All Parties and participants' Final Trial Briefs will be filed on the same date.

135. Each Party and participant shall specifically identify exhibits and sections of the transcript of the proceedings that it seeks to rely upon. No Party or participant shall tactically withhold from its Final Trial Brief an argument in relation to an exhibit or section of the transcript in order to raise such argument in subsequent proceedings. Copies of references and authorities not readily available shall be filed as an annex together with the brief.

XX. LEGAL WORKFLOW

136. This trial will be conducted using Legal Workflow. The general principle is that all documents shall be handled through this system. Hard copies of a document may be used by a Party or participant only where the Party or participant has been unable, due to unforeseen circumstances, to upload a document into Legal Workflow or where its physical use in court is necessary.

137. When the use of hard copies of a document is permitted, the tendering Party or participant is responsible for producing copies for the Trial Panel, witness, other Parties and participants, Registry, and the interpreters.