

In: KSC-BC-2020-06
The Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: **Trial Panel II**
Judge Charles L. Smith, III, Presiding
Judge Christoph Barthe
Judge Guénaél Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 28 March 2023

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**Public Redacted Version of 'Thaçi Defence Request for Disclosure of Information
related to the Relocation of Prosecution Witnesses**

With Confidential Annexes 1 and 2'

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I. INTRODUCTION

1. In accordance with the Trial Panel's instructions of 20 March 2023,¹ the Defence for Mr Hashim Thaçi ("the Defence") hereby files the present request for disclosure of information related to the relocation, as part of the Specialist Chambers' witness protection programme, of [REDACTED] witnesses on the SPO witness list,² [REDACTED].³

2. The Defence respectfully requests the Trial Panel to order the SPO and/or the Witness Protection and Support Office ("WPSO") to disclose to the Defence:

- (i) The costs associated with the relocation and subsistence of [REDACTED];
- (ii) How many family members were involved with the relocation of these witnesses; and
- (iii) The date of relocation of these witnesses.

II. PROCEDURAL BACKGROUND

3. On 15 November 2022, the Defence applied to be provided with information related to the benefits provided to witnesses on the SPO's Witness List, in particular the witness code of the witnesses relocated, their dates of relocation and the amount of money allocated to each of them to facilitate their relocation, if any, pursuant to Rule 103 of the Rules. The Defence stressed that such material was exculpatory since it could affect the witnesses' credibility.⁴ In a response filed on 24 November 2022, the SPO objected to the Defence's request. It noted that the Defence would be notified of

¹ KSC-BC-2020-06, Transcript of the Status Conference, 20 March 2023, Confidential, p. 2120.

² KSC-BC-2020-06/F01291/A02, Amended List of Witnesses, 14 February 2023, Confidential.

³ The Defence notes that W04748 is the 3rd witness to testify and W04323 the 8th witness to testify.

⁴ KSC-BC-2020-06/F01101, Thaçi Defence Addendum to the Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), 14 November 2022, Confidential, para. 29.

the [REDACTED] witnesses who had been relocated, once their identity was disclosed to the Defence; in relation to the remaining benefits information requested, the SPO stated that it was discharging its disclosure obligations under Rule 103 in good faith, including in relation to any witness benefits which may reasonably impact on witness credibility.⁵

4. In his Decision on Joint Defence Motion for Disclosure Pursuant to Rule 103, the Pre-Trial Judge ruled as follow:

61. In relation to the Thaçi Defence's request for disclosure of "benefits provided to witnesses on the SPO's Witness List, in particular the witness code of the witnesses relocated, their date of relocation and amount of money allocated to each of them to facilitate their relocation", the Pre-Trial Judge notes that payments made to a witness may indeed be relevant to assess the credibility of witnesses testifying before the SC. In this regard, the SPO is under an obligation to disclose any benefits that go beyond reasonable expenses and could potentially impact witness credibility. The Pre-Trial Judge takes note of the SPO's assertion that it is discharging its disclosure obligations under Rule 103 of the Rules in this regard. The Pre-Trial Judge finds that the Defence's submissions to (sic) not give rise to any doubt, at this stage, about the SPO's discharge of this obligation in good faith, and therefore finds this part of the Defence Request moot.⁶

5. By email dated 17 February 2023, the SPO informed the Defence that [REDACTED] witnesses, [REDACTED], were relocated as part of the Specialist Chambers' witness protection programme.⁷

6. On 21 February 2023, the Defence asked the SPO to provide the following information for each of these witnesses:

- (i) The costs associated with the relocation of the witness;

⁵ KSC-BC-2020-06/F01121, Prosecution consolidated response to F01100 and F01101, 24 November 2022, Confidential, para. 48.

⁶ KSC-BC-2020-06/F01149, Decision on Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), 9 December 2022, Confidential, para. 61.

⁷ See Annex 1.

- (ii) How many family members were involved with the relocation of the witness; and
- (iii) The date of relocation of the witness.⁸

7. On 22 February 2023, the SPO replied that the information requested did not fall within the SPO's disclosure obligations, because the witnesses had been relocated as part of the Specialist Chambers' witness protection programme, which is overseen by the Registry.⁹

8. On the same date, the Defence asked the WPSO to provide the costs, number of family members involved, and date of relocation of [REDACTED].¹⁰

9. On 8 March 2023, the WPSO replied:

The Registry, in accordance with Article 34 of the Law on Specialist Chambers and Specialist Prosecutor's Office (the Law), is a neutral organ, with a wide range of responsibilities, including the implementation of necessary protective measures and security arrangements and other appropriate assistance for prosecution and defence witnesses and others who are at risk on account of testimony given by witnesses. The Witness Support and Protection Office, a part of the Registry, is required by the Law and Rule 27(4) of the Rules of Procedure and Evidence, to maintain confidentiality and act impartially at all times.

In discharging its functions related to the protection of witnesses and others who are at risk on account of testimony given by witnesses, WPSO complies with the legal framework applicable to the KSC. In particular, it ensures that the amounts spent are necessary and justifiable, and reflective of the actual costs incurred in the individual case. In order to ensure the continued ability of the Registry to discharge its functions, it is necessary that details of the costs and other information related to the relocation of witnesses and their families remain confidential.

Accordingly, it is not possible for WPSO to provide answers to your queries.¹¹

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Annex 2.

¹¹ *Ibid.*

10. On 1 March 2023, the SPO notified its intention to lift non-standard redactions protecting the identity of [REDACTED], because [REDACTED].¹²

11. During the Status Conference of 20 March 2023, the Defence informed the Trial Panel of its – unsuccessful – attempts to obtain information, through *inter partes* discussions, on the benefits granted to witnesses transferred to third countries. The Presiding Judge invited the Defence to file a written motion, which is the object of the present submissions.¹³

III. APPLICABLE LAW

12. The right to a fair trial is an essential component of any democratic society, enshrined in Article 31 of the Kosovo Constitution, Articles 1(2), 3(2)(e) and 21(2) of the Law N° 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Article 6(1) of the European Convention of Human Rights ("ECHR").

13. Thus the Panel is obliged, under Article 40(2), to ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.¹⁴

14. In this framework, the Panel must respect the Accused's right, under Article 21(4)(f), to examine, or have examined, the witnesses against him and to obtain the

¹² KSC-BC-2020-06/F01335, Delayed disclosure notification for four witnesses, 1st March 2023, Confidential, para. 1, footnote 4.

¹³ KSC-BC-2020-06, Transcript of the Status Conference of 20 March 2023, Confidential, pp. 2119-2120.

¹⁴ KSC-BC-2020-06/F01348, Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses, 6 March 2023, Confidential, para. 12.

attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him.¹⁵

15. In addition, to ensure the fairness of the trial, the SPO must disclose not only incriminating material in support of its case, but also material relevant for the preparation of the Defence, pursuant to Rule 102(3), and, more importantly, exculpatory material. Pursuant to Rule 103 of the Rules, and subject to Rules 107 and 108 of the Rules, the SPO is required to immediately disclose to the Defence any information as soon as it is in its custody, control or actual knowledge, which may reasonably affect the credibility or reliability of the SPO's evidence.¹⁶ The SPO's obligation to disclose exculpatory material is an essential and fundamental element of the guarantee of a fair trial and of equality of arms.¹⁷ Miscarriages of justice may occur where such material is withheld from disclosure; the golden rule is that full disclosure should be made.¹⁸

¹⁵ *Ibid.*, para. 13.

¹⁶ KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, Public, para 13.

¹⁷ KSC, *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00413/RED, Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, 3 November 2021 ("*Gucati Decision*"), para. 43; ICTY, *Prosecutor v Stakić*, No. IT-97-24-A, Judgement, 22 March 2006, para. 188; ICTY, *Prosecutor v Lukić & Lukić*, No. IT-98-32/1-A, Decision on Milan Lukic's Motion for Remedies Arising out of Disclosure Violations by the Prosecution, 12 May 2011, para. 13; ICC, *Prosecutor v. Lubanga*, Trial Chamber I Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other, 13 June 2008 ("*Lubanga Decision*"), paras 77-81; ICC, *Prosecutor v. Banda & Jerbo*, ICC-02/05-03/09-259, Decision on Article 54(3)(e) Documents, 23 November 2011, para. 14; ICC, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18-296, Decision on the Yekatom Defence Motion for Disclosure of Exculpatory Material, 28 August 2019, para. 12; ICC, *Prosecutor v. Yekatom & Ngaissona*, ICC-01/14-01/18, Decision on the Yekatom Defence Motion for Disclosure of Prior Statement of Witness P-[Redacted], 15 June 2020, para. 25; ECtHR, *Dowsett v. The United Kingdom*, Application no. 39482/98, Judgement, 24 June 2003.

¹⁸ KSC-CC-PR-2017-01/F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, para. 135, referring to *R v H* [2004] UKHL 3; [2004] 2 Cr. App. R. 10, House of Lords.

16. It is generally admitted before international criminal tribunals that benefits granted to prosecution witnesses, beyond ordinary expenses, may affect their credibility and are thus disclosable to the Defence, because they are material for the Defence's preparation and/or exculpatory.

17. Before the International Criminal Court ("ICC"), in the *Ruto & Sang* case, in response to a request made by the defence seeking disclosure of information concerning intermediaries including payments made to trial witnesses, Trial Chamber V(A) observed the following:¹⁹

59. The Chamber finds it pertinent to recall that only prima facie materiality is required to be shown by the Defence. The Chamber considers that it is not necessary for any showing of malfeasance in order to make a determination of materiality in respect of payments and benefits paid to witnesses. In the Chamber's view, benefits, payments or other assistance provided to a witness, in connection with their status as such, are prima facie material to preparation of the defence case as they could, amongst other things, go to the credibility of the witness.

60. Furthermore, the Chamber considers that the materiality of the information occurs whether the benefit or assistance was provided by or on behalf of the Prosecution, an intermediary or any other third party. The Chamber recalls that practical or logistical burdens in reviewing databases to extract such information have no bearing upon the determination of the materiality of the information for the purposes of a Rule 77 of the Rules.

61. Accordingly, the Chamber finds that the payment or provision of any assistance - financial or otherwise, including protective measures –to a witness in connection with his/her status as such, whether before the Court or in a related investigatory proceeding or before a domestic judicial body, falls within the disclosure obligations of the Prosecution under Rule 77 of the Rules, where such information is in the possession or control of the Prosecution. The general type of the benefit or assistance, together with its approximate value, where calculable, should also be provided. In confining disclosure to that information which is within the possession or control of the Prosecution, the Chamber recalls the ongoing obligations of the Prosecution under Article 54(1)(a) of the Statute with respect to the equal investigation of incriminating and exonerating circumstance

¹⁹ ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-904-Red2, Trial Chamber V(A), Decision on Disclosure of Information related to Prosecution Intermediaries, 11 December 2017, paras. 59-61.

18. In consequence, Trial Chamber V(a) ordered the Prosecution, pursuant to Rule 77 of the ICC Rules, to disclose to the Defence the following information to the extent it was within the possession or control of the Prosecution:²⁰

a schedule of all payments, benefits or assistance – financial or otherwise, including protective measures – provided to a witness in connection with his/her status as such, whether before the Court or a related investigation/domestic judicial procedure, together with a categorisation of the general type of benefit provided, its approximate value, where calculable, a copy of the receipt, where available, and a categorisation as to whether it was made by or on behalf of the Prosecution, an intermediary or some other third party;

19. In the *Bemba* case, ICC Trial Chamber III noted that “*international criminal jurisprudence has established the principle that information pertaining to payments, benefits or other forms of assistance that go beyond the ordinary requirements of subsistence may affect the credibility of witnesses and information related thereto may be material to the preparation of the defence and are therefore disclosable to the defence [...]*”.²¹

20. Similarly, at the International Criminal Tribunal for Rwanda (“ICTR”), Trial Chamber III observed that:

7. [...] Not all monies paid to a witness will fall within the category of material of an exculpatory nature or material which may affect the credibility of prosecution evidence. The management of witnesses and victims necessarily implies expenditure including, but not limited to, costs for transportation connected with the investigation and/or hearings. Materials relating to expenses paid which are reasonably required for the management of witnesses and victims do not fall within the ambit of Rule 68 and need not be disclosed. Material or information within the Prosecutor’s knowledge concerning any benefits paid to and/or promises made to witnesses’, and victims beyond that which is reasonably required has a different character and should therefore be disclosed as evidence which may affect the credibility of witnesses under Rule 68 of the Rules. [...]²²

²⁰ *Ibid.*, p. 26.

²¹ ICC, *Prosecutor v. Bemba et al*, ICC-01/05-01/08, Trial Chamber III, Public redacted version of “Decision on ‘Defence Motion concerning ‘Information on contacts [of] Witnesses 169 and 178 with other witnesses’”, 11 December 2014, para 19.

²² ICTR, *Prosecutor v. Karemera et al*. ICTR-98-44-T, Trial Chamber III, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 7.

21. The Special Tribunal for Lebanon (STL²³) also ruled that:

9. However, information concerning any benefits paid to and or promises made to witnesses beyond that reasonably required is different; it must be disclosed as potentially affecting a witness' credibility. It may also be exculpatory. This could also make it 'material' to defence preparations for trial. As a basic hypothetical example, paying a witness his or her bus fare to attend an interview location is normal and non-disclosable; giving the witness the bus is not, and would be disclosable.²³

22. In the current case, the Pre-Trial Judge noted that *"payments made to a witness may indeed be relevant to assess the credibility of witnesses testifying before the SC. In this regard, the SPO is under an obligation to disclose any benefits that go beyond reasonable expenses and could potentially impact witness credibility."*²⁴

IV. DISCUSSION

23. Given that the usual management of witnesses and victims *"implies expenditure including, but not limited to, costs for transportation connected with the investigation and/ or hearings"*,²⁵ the Defence maintains that physical and long-term relocation of witnesses goes far beyond this and constitutes an extraordinary measure, which does constitute, for a witness, an incentive to testify and may have an impact on his/her credibility. Therefore details surrounding that relocation, including the date of relocation, number of relatives involved, and related costs, including any subsistence payments, must be disclosed to the Defence, in order that the Defence be able to explore that line of questioning in its cross-examination of the witness, pursuant to Articles 21(2), 21(4)(f), 40(2) of the Law and Rules 102(3) and 103 of the Rules.

²³ STL, *Prosecutor v. Ayyash et al*, STL-11-01/T/TC, Decision on Prosecution Witness Expenses, 9 May 2014, para. 9.

²⁴ KSC-BC-2020-06/F01149, Decision on Joint Defence Motion for Disclosure Pursuant to Rule 103 (F00877/COR), 9 December 2022, Confidential, para. 61.

²⁵ ICTR, *Prosecutor v. Karemera et al*. ICTR-98-44-T, Trial Chamber III, Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T and Motion for Admission of Exhibit: Payments made for the Benefit of Witness G, 29 May 2008, para 16

24. Indeed, at the STL, the “normal expenses incurred” were described as “*travel by public transport or private fuel costs, accommodation and meals [...] for the location of the witness and the interview.*”²⁶

25. Further, the ICTY held that benefits, such as assistance in avoiding repatriation proceedings or obtaining residence in another state, can also be potentially exculpatory and therefore subject to disclosure. In *Karadžić*, the Chamber found that the Prosecution correspondence demonstrating assistance to witnesses “*obtain[ing] legal residence in a third state, by virtue of being a Prosecution witness*”,²⁷ may affect their credibility and therefore should be disclosed. Similarly, in *Haradinaj*, the Chamber found that the Prosecution had committed several serious violations of Rule 68 by failing to disclose, in a timely fashion, materials relevant to assessing a witness’ credibility, namely all the materials concerning the witness’ asylum case because this witness requested and, in fact, did receive a benefit from being a Prosecution witness, *i.e.* a letter from the prosecution confirming his status as witness, in support of his asylum claim.²⁸

26. Yet, to date, despite its *inter partes* requests, the Defence has not been disclosed any details regarding the relocation, outside of [REDACTED], of [REDACTED], by the Prosecution or WPSO.

27. While the SPO replied to the Defence that the information requested did not fall within the SPO’s disclosure obligations, because the witnesses had been relocated

²⁶ STL, *Prosecutor v. Ayyash et al*, STL-11-01/T/TC, Decision on Prosecution Witness Expenses, 9 May 2014, para 7.

²⁷ ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision On Accused's Sixtieth, Sixty-First, Sixty-Third, And Sixty-fourth Disclosure Violation Motions, 22 November 2011, paras. 25, 27.

²⁸ ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Trial Chamber II, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68 bis, 12 October 2011, paras. 45-46, 54-55.

within a protection programme overseen by the Registry, the Defence submits that the SPO is certainly aware of the date of relocation of the witnesses and should have disclosed this information to the Defence pursuant to Rule 102(3) and/or Rule 103. Indeed, the timing of such benefits is important to assess a witness' credibility, especially to determine whether a witness may have changed his testimony after his relocation, and is therefore both material for the Defence preparation and potentially exculpatory.

28. With regard to the WPSO's observations pursuant to which it is required "*by the Law and Rule 27(4)*" to maintain confidentiality "*to ensure the continued ability of the Registry to discharge its functions*", the Defence notes that the disclosure of the information requested, limited in its scope, and related to [REDACTED] witnesses only, would not put any of them at risk nor jeopardize the witness protection programme of the Registry²⁹ – the Defence does not request to be disclosed their new country of residence nor the working practice of the Registry with regard to relocation, but simply the costs and number of persons involved. In addition, the information sought would only be disclosed to the Defence and the Victims' Counsel, who are bound by confidentiality requirements³⁰ in accordance with the Code of Professional Conduct.³¹

29. The WPSO further argues that it "*ensures that the amounts spent are necessary and justifiable, and reflective of the actual costs incurred in the individual case.*" Yet, without providing any figure or scale of the expenses incurred for the relocation of each witness, WPSO does not allow the Defence or the Panel to assess whether such

²⁹ ICC, *Prosecutor v. Bemba et al*, ICC-01/05-01/08-2924-Red, Trial Chamber III, Public redacted version of "Decision on 'Defence Motion concerning 'Information on contacts [of] Witnesses 169 and 178 with other witnesses'", 11 December 2014, para. 20.

³⁰ *Ibid.*

³¹ KSC-BD-07/Rev1/2021, Registry Practice Direction, Code of Professional Conduct – for Counsel and Prosecutors Before the Kosovo Specialist Chambers, 28 April 2021.

expenses were necessary. In any event, the Defence stresses that the relocation itself is an extraordinary event, which has been made possible only because the witnesses have agreed to testify on behalf of the Prosecution, and because the KSC has provided the means for such relocation. It is reasonable to infer that the witnesses would not have had the means, financially or legally, to relocate, without the Prosecution and/or Registry's assistance – otherwise they would not have been included in the KSC witness protection programme. To move to a third country may be seen as an economic and social opportunity for the witnesses. Therefore relocation does constitute an incentive to testify, which goes to the witness' credibility. Accordingly, the information related to the relocation of [REDACTED] is both material for the Defence and potentially exculpatory, and must be disclosed.

30. This disclosure is further justified by the fact that each of these witnesses testifies about the role of Mr Thaçi and his co-accused within the KLA – the Defence must be in a position to explore the credibility issues raised by their relocation given that their testimony goes directly to the conduct of the Accused.

- [REDACTED].³² He provided his testimony to the SPO upon approval of an 'Agreement on Statement of Limited Use',³³ whose scope and legality are currently under discussion.³⁴ [REDACTED].³⁵

³² [REDACTED].

³³ [REDACTED].

³⁴ KSC-BC-2020-06/F01392, Thaci Defence Submissions on the SPO Agreements on Statement of Limited Use, 23 March 2023, Confidential.

³⁵ [REDACTED].

- [REDACTED],³⁶ which implies that he may have a particular incentive to incriminate Mr. Thaçi and/or see him convicted. [REDACTED].³⁷
[REDACTED].³⁸
- [REDACTED].³⁹ [REDACTED].⁴⁰ [REDACTED].⁴¹
- [REDACTED]. [REDACTED],⁴² [REDACTED].⁴³ [REDACTED]⁴⁴
[REDACTED].⁴⁵

31. The Defence notes that some of the information sought, such as the costs incurred by the relocation, may not be in the SPO's custody but in the Registry's custody. The question of whether the Defence should have access to information related to the relocation of witnesses as part of the KSC witness protection programme is a question which is not fully addressed by the Rules, in which case the Panel should determine that Rule 5 therefore applies. As previously noted by the Panel, it *"is required by Rule 5 to rule in accordance with Article 19(2) and (3) of the Law, and the principles set out in Rule 4. Where any ambiguity cannot be settled in accordance with Rule 4(1), the Panel must resolve it by the adoption of the most favourable interpretation to the suspect or the Accused in the given circumstances."*⁴⁶ In addition, Article 40(2) gives the Panel the authority to *"adopt such procedures and modalities as are necessary to facilitate*

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² KSC-BC-2020-06/F01335, Delayed disclosure notification for four witnesses, 1 March 2023, Confidential, para. 1, footnote 4.

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ KSC-BC-2020-06/F01348, Order on the Disclosure of Application Forms Pertaining to Dual Status Witnesses, 6 March 2023, Public, para. 18.

the fair and expeditious conduct of the proceedings".⁴⁷ In the present case, the Defence submits that the Panel has the authority to order the WPSO to disclose to the Defence the information sought, being noted that Rule 80 of the Rules explicitly provides that protective measures must always be "*consistent with the rights of the Accused*."

V. CONCLUSION

32. For the above reasons, the Defence respectfully requests the Trial Panel to order the SPO and/or the WPSO to disclose to the Defence:

- (i) The costs associated with the relocation of [REDACTED], including subsistence payments;
- (ii) How many family members were involved with the relocation of these witnesses; and
- (iii) The date of relocation of these witnesses.

[Word count: 3,983 words]

Respectfully submitted,



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Tuesday, 28 March 2023

At The Hague, The Netherlands

⁴⁷ Ibid., para. 19.