



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2023-10**
The Prosecutor v. Sabit Januzi and Ismet Bahtjari

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

Registrar: Dr Fidelma Donlon

Date: 24 October 2023

Language: English

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Public Redacted Version of the
Framework Decision on Disclosure of Evidence and Related Matters

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(1) and (13) of the Law No. 05/L-053 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 2 October 2023, the Pre-Trial Judge confirmed the indictment against Sabit Januzi and Ismet Bahtjari ("Mr Januzi", "Mr Bahtjari", and together, "Accused").² On the same day, the Pre-Trial Judge also issued arrest warrants for the Accused, and ordered their transfer to the Detention Facilities of the Specialist Chambers ("SC") in The Hague, the Netherlands.³
2. On 4 October 2023, the Specialist Prosecutor's Office ("SPO") submitted a revised indictment, as confirmed by the Pre-Trial Judge ("Confirmed Indictment").⁴
3. On 5 October 2023, the Accused were arrested in Kosovo.⁵ On the next day, the Accused were transferred to the SC Detention Facilities.⁶

¹ KSC-BC-2023-10, F00001, President, [Decision Assigning a Pre-Trial Judge](#), 11 September 2023, public.

² KSC-BC-2023-10, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 2 October 2023, strictly confidential and *ex parte*. A confidential redacted version and a corrected version of the public redacted version of the decision were filed on 12 October 2023, F00008/CONF/RED and [F00008/RED/COR](#);

³ KSC-BC-2023-10, F00009, *Decision on Request for Arrest Warrants and Transfer Orders*, 2 October 2023, strictly confidential and *ex parte*, with Annexes 1-4, strictly confidential. A public redacted version of the decision was filed on 12 October 2023, [F00009/RED](#).

⁴ KSC-BC-2023-10, F00010, SPO, *Submission of Confirmed Indictment*, 4 October 2023, strictly confidential and *ex parte*, with Annex 1, strictly confidential; F00016, SPO, *Submission of Public Redacted Version of Confirmed Indictment*, 6 October 2023, public, with [Annex 1](#), public.

⁵ KSC-BC-2023-10, F00011, Registrar, *Notification of Arrest of Ismet Bahtjari Pursuant to Rule 55(4)*, 5 October 2023, strictly confidential and *ex parte*; F00012, Registrar, *Notification of Arrest of Sabit Januzi Pursuant to Rule 55(4)*, 5 October 2023, strictly confidential and *ex parte*.

⁶ KSC-BC-2023-10, F00014, Registrar, *Notification of the Reception of Ismet Bahtjari in the Detention Facilities of the Specialist Chambers*, 6 October 2023, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*; F00015, Registrar, *Notification of the Reception of Sabit Januzi in the Detention*

4. On 9 October 2023, the hearings on the initial appearances of the Accused took place, during which the Accused pleaded not guilty.⁷
5. On 12 October 2023, the Pre-Trial Judge, after having consulted the Parties,⁸ issued the “Decision on Working Language”, determining that English shall be the working language of the present proceedings (“Decision on Working Language”).⁹
6. On the same day, 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.¹⁰ In particular, the Pre-Trial Judge issued an oral order in which he instructed: (i) the SPO to file its request concerning the adoption of a framework governing the handling of confidential information and witness contacts by Monday, 16 October 2023; and (ii) the Defence for Mr Januzi and the Defence for Mr Bahtjari to file a response to said request, by Wednesday, 18 October 2023.¹¹
7. On 16 October 2023, the SPO submitted a request for the adoption, with certain modifications, of the framework governing the handling of confidential information and witness contacts from the *Prosecutor v. Hashim Thaçi* case (KSC-

Facilities of the Specialist Chambers, 6 October 2023, strictly confidential and *ex parte*, with Annex 1, strictly confidential and *ex parte*.

⁷ KSC-BC-2023-10, [Transcript of Hearing](#) (“Bahtjari Initial Appearance Transcript”), 9 October 2023, public, p. 12, lines 6-14; [Transcript of Hearing](#) (“Januzi Initial Appearance Transcript”), 9 October 2023, public, p. 27, lines 18-20.

⁸ [Bahtjari Initial Appearance Transcript](#), p. 12, line 18 to p. 13, line 6; [Januzi Initial Appearance Transcript](#), p. 27, line 22 to p. 28, line 7.

⁹ KSC-BC-2023-10, F00033, Pre-Trial Judge, [Decision on Working Language](#), 12 October 2023, public, para. 28(a).

¹⁰ KSC-BC-2023-10, Transcript of Hearing (“Transcript of 12 October 2023”), 12 October 2023, public, pp. 33 *et seq*; F00022, Pre-Trial Judge, [Order Setting the Date for the First Status Conference and for Submissions](#) (“Order for Submissions”), 9 October 2023, public; F00025, Defence for Mr Bahtjari, *Submission on the Agenda for the Status Conference* (“Bahtjari Submissions”), 11 October 2023, public; F00026, Specialist Prosecutor, *Prosecution Submissions for First Status Conference* (“SPO Submissions”), 11 October 2023, public; F00027, Defence for Mr Januzi, *Submission on the Agenda for the Status Conference* (“Januzi Submissions”), 11 October 2023, confidential.

¹¹ Transcript of 12 October 2023, p. 71, lines 5-10. *See also* SPO Submissions, para. 9.

BC-2020-06) (“*Thaçi et al. Case*”) (“Confidential Information and Witness Contacts Framework”) (“SPO Request”).¹²

8. On 18 October 2023, the Defence for Mr Bahtjari submitted its response to the Request.¹³ The Defence for Mr Januzi did not respond.

II. SUBMISSIONS OF THE PARTIES

A. DISCLOSURE OF EVIDENCE FRAMEWORK

9. Regarding the disclosure of evidence, 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 disclosed, without impact on the expeditious conduct of proceedings.¹⁴ The SPO also submits that it will be able to disclose all indictment supporting material, pursuant to Rule 102(1)(a) of the Rules, including translations thereof, by the end of the 30-day statutory timeframe.¹⁵ 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 Friday, 26 January 2024¹⁶ and to provide the Defence for Mr Januzi and the Defence for Mr Bahtjari with a detailed notice of evidence material to the Defence, pursuant to Rule 102(3) of the Rules, by Friday, 23 February 2024.¹⁷ During the Status Conference, the SPO indicated that it is amenable to the disclosure of a preliminary detailed notice of Rule 102(3) material by the end of January 2024, if it were later permitted to

¹² KSC-BC-2023-10, F00034, Specialist Prosecutor, *Prosecution Request for the Adoption of Protocols Governing the Handling of Confidential Information and Witness Contacts*, 16 October 2023, confidential. A public redacted version of this request was filed on 10 October 2023, F00034/RED.

¹³ KSC-BC-2023-10, F00073, Defence for Mr Bahtjari, *Defence Reaction on Prosecution Request for the Adoption of Protocols Governing the Handling of Confidential Information and Witness Contacts* (“Bahtjari Response”), 18 October 2023, confidential.

¹⁴ SPO Submissions, para. 3.

¹⁵ SPO Submissions, para. 9; Transcript of 12 October 2023, p. 41, lines 21-23.

¹⁶ SPO Submissions, paras 2, 10; Transcript of 12 October 2023, p. 46, lines 10-20.

¹⁷ SPO Submissions, para. 15.

supplement said list as needed.¹⁸ The SPO also proposes that the deadlines for any protective measures and materiality challenges should be two (2) weeks from the Defence request for material on the Rule 102(3) notice.¹⁹ Moreover, the SPO avers that it has not identified any Rule 103 material at this time.²⁰ It maintains in this regard that the review of any such material in its custody, control, or actual knowledge, is ongoing, and that it shall, upon its discovery and following the application of required redactions, immediately disclose it.²¹ The SPO also maintains that Rule 107 clearances are at this time unnecessary for material which the SPO currently anticipates tendering into evidence at trial in the present case.²²

10. Furthermore, the SPO contends that the Pre-Trial Judge should adopt the redaction regime in the *Prosecutor v. Pjetër Shala Case* (KSC-BC-2020-04) (“*Shala Case*”).²³

11. Regarding the disclosure procedure, pursuant to Rule 109 of the Rules, the SPO submits that case-specific sub-categorisation in Legal Workflow would be a time-consuming process, delay the disclosure process, and would be of limited utility to the Accused.²⁴ According to the SPO, should the Defence for Mr Januzi and the Defence for Mr Bahtjari find sub-categorisation of some of the Rule 109(c) categories to be of assistance, the SPO will endeavour to find a mutually agreeable solution.²⁵ The SPO further proposes that its Rule 109(c) chart, with the format adopted in the *Shala Case*, be provided fifteen (15) days from the filing of any pre-trial brief.²⁶

¹⁸ See Transcript of 12 October 2023, p. 51, line 10 to p. 52, line 25. See also SPO Submissions, para. 15.

¹⁹ SPO Submissions, para. 17.

²⁰ Transcript of 12 October 2023, p. 55, lines 3-4.

²¹ SPO Submissions, para. 18; Transcript of 12 October 2023, p. 55, lines 4-8.

²² SPO Submissions, para. 19; Transcript of 12 October 2023, p. 55, lines 21-25.

²³ SPO Submissions, para. 25; Transcript of 12 October 2023, p. 62, lines 21-23.

²⁴ SPO Submissions, para. 21; Transcript of 12 October 2023, p. 57, line 10 to p. 58, line 4.

²⁵ SPO Submissions, para. 22.

²⁶ SPO Submissions, para. 23; Transcript of 12 October 2023, p. 58, lines 7-10.

12. Regarding the disclosure of evidence, both the Defence for Mr Januzi and the Defence for Mr Bahtjari indicate that they agree with the proposed disclosure procedure.²⁷ Moreover, both the Defence for Mr Januzi and the Defence for Mr Bahtjari indicate that they support the adoption of the redaction regime in the *Shala Case*.²⁸

B. CONFIDENTIAL INFORMATION AND WITNESS CONTACTS FRAMEWORK

13. The SPO submits that the Confidential Information and Witness Contacts Framework should be adopted in the present case with two modifications relating to the contacts between a Party or participant and witnesses of the opposing Party or of a participant (“Contact Protocol”).²⁹ First, the SPO requests that the Contact Protocol be extended to all – including, but not limited to, post-testimony – contacts with witnesses of the opposing Party or participant (“First Modification”).³⁰ Second, the SPO requests that the Contact Protocol clearly prohibit not just Parties and participants but also relatives, friends, or associates of Parties and participants from contacting opposing Party witnesses or their relatives (“Second Modification”).³¹ The SPO avers that the requested modifications are necessary to avoid further interference with Witness 1, and any attempted obstruction of the trial proceedings generally, as well as to safeguard the privacy, dignity, and physical and psychological well-being of Witness 1 and any other witnesses.³²

14. The SPO contends that the facts and charges alleged in the present case, when considered in light of the pervasive climate of witness interference and intimidation in which the proceedings before the SC operate, support the need for

²⁷ Januzi Submissions, para. 4; Bahtjari Submissions, para. 4.

²⁸ Transcript of 12 October 2023, p. 62, lines 17-19, p. 63, lines 5-10.

²⁹ SPO Request, paras 2-3, 12.

³⁰ SPO Request, paras 3, 5-6.

³¹ SPO Request, paras 3, 7-10.

³² SPO Request, para. 4.

the Contact Protocol to, *inter alia*: (i) protect witnesses; (ii) respect their reasonable expectation of privacy; (iii) safeguard witness consent and enable witnesses to seek assistance regarding contacts; (iv) establish a transparent and accessible record of contacts; (v) facilitate the assessment of any interference allegations; and (vi) concretise the obligations of the Parties and participants through a predictable and consistent procedure that applies to all contacts with witnesses of the opposing Party.³³

15. The Defence for Mr Bahtjari indicates that it supports the adoption of the Confidential Information and Witness Contacts Framework.³⁴ As regards the modifications requested by the SPO, it submits that the request for these modifications is premature.³⁵ The Defence for Mr Bahtjari also submits that the Contact Protocol, as envisaged by the SPO, might create more problems than it aims to prevent.³⁶

III. APPLICABLE LAW

A. DISCLOSURE

16. 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.

17. 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

³³ SPO Request, para. 4.

³⁴ Bahtjari Response, para. 2.

³⁵ Bahtjari Response, para. 3.

³⁶ Bahtjari Response, paras 4-5.

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

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

B. CONFIDENTIAL INFORMATION AND WITNESS CONTACTS

34. Pursuant to Article 21(2) of the Law, in the determination of charges against him or her, the Accused shall be entitled to a fair and public hearing, subject to Article 23 of the Law and any measures ordered by the SC for the protection of victims and witnesses.

35. Pursuant to Article 23(1) of the Law and Rule 80(1) of the Rules, the Pre-Trial Judge shall provide for the protection of witnesses and victims and may, *proprio motu* or upon request, order appropriate measures for the protection, safety, physical and psychological well-being, dignity and privacy of witnesses, victims participating in the proceedings and others at risk on account of testimony given

by witnesses, provided that the measures are consistent with the rights of the Accused.

36. Pursuant to Article 35(2)(f) of the Law, the authorities and responsibilities of the Specialist Prosecutor and other Prosecutors in the SPO include taking necessary measures, or requesting that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

37. Pursuant to Article 39(1) of the Law, the Pre-Trial Judge shall have the power to make any necessary orders or decisions to ensure the case is prepared properly and expeditiously for trial.

38. Pursuant to Article 39(11) of the Law, the Pre-Trial Judge may, where necessary, provide, *inter alia*, for the protection and privacy of victims and witnesses, and the preservation of evidence.

IV. DISCUSSION

A. PRINCIPLES GOVERNING DISCLOSURE OF EVIDENCE

1. Introduction

39. The legal framework of the SC provides for several procedural steps to be taken by the Pre-Trial Judge and the Parties, 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, victims,

and other persons at risk, and the obligation to uphold the rights of the Accused under Article 21 of the Law.³⁷

2. Role of the Parties and the Registry

40. 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,³⁸ through the electronic software provided to this effect, as stipulated in Rules 98(1)(b) and 109(a) of the Rules.³⁹ The Parties shall abide by the Registry Instruction on Uploading Records to Legal Workflow when disclosing evidence electronically.⁴⁰

41. 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

³⁷ [Order for Submissions](#), para. 21. See also KSC-BC-2020-04, F00033, Pre-Trial Judge, [Framework Decision on Disclosure of Evidence and Related Matters](#) ("Shala Disclosure Decision"), 30 April 2021, public, para. 28. 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.

³⁸ 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.

³⁹ See also [Shala Disclosure Decision](#), para. 29.

⁴⁰ KSC-BD-18, Registrar, Instruction on Uploading Records on Legal Workflow, 28 August 2019.

public, unless there exist reasons to classify the material otherwise, in accordance with Rule 83(1) of the Rules.⁴¹

3. Communication of Evidence to the Pre-Trial Judge

42. 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.⁴²

43. 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

⁴¹ See also [Shala Disclosure Decision](#), para. 30. 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.

⁴² See also [Shala Disclosure Decision](#), para. 31. See, similarly, ICC, [Yekatom Disclosure Decision](#), para. 12; [Al Hassan Disclosure Decision](#), para. 14.

or grounds (Rule 104(1)(a) and (b) of the Rules); (h) all evidence in the Defence's custody or control, which is open to inspection by the SPO and is intended for use by the Defence at trial (Rules 104(5)(a) of the Rules); (i) all statements of witnesses, if any, whom the Defence intends to call to testify at trial or intends to present at trial (Rule 104(5)(b) of the Rules); and (j) all exhibits that the Defence intends to present at trial (Rule 104(5)(c) of the Rules).⁴³

4. Deadlines for Disclosure

44. 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.⁴⁴

45. 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.⁴⁵ In case of disclosures past the deadlines established in this decision or as ordered by the Pre-Trial Judge, the disclosing Party shall address a request, together with reasons for the late disclosure, to the Pre-Trial Judge.⁴⁶

5. Completeness and Relevance of the Disclosed Evidence

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

⁴³ See also [Shala Disclosure Decision](#), para. 32.

⁴⁴ See also [Shala Disclosure Decision](#), para. 33.

⁴⁵ Similarly, ICC, [Yekatom Disclosure Decision](#), para. 13; [Al Hassan Disclosure Decision](#), paras 20-21.

⁴⁶ See also [Shala Disclosure Decision](#), para. 34.

a complete form within the time limit provided for in the Rules or as ordered by the Pre-Trial Judge.⁴⁷

47. 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 material 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.⁴⁸

48. 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.⁴⁹

B. TIME-FRAME FOR DISCLOSURE OF EVIDENCE

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

49. 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.⁵⁰

50. In the present case, the SPO submits that it will disclose Rule 102(1)(a) material, including the statements of the Accused,⁵¹ until 8 November 2023, which

⁴⁷ See also [Shala Disclosure Decision](#), para. 35.

⁴⁸ See also [Shala Disclosure Decision](#), para. 36.

⁴⁹ See also [Shala Disclosure Decision](#), para. 37. Similarly, ICC, [Yekatom Disclosure Decision](#), para. 18; [Al Hassan Disclosure Decision](#), para. 25; [Ongwen Disclosure Decision](#), para. 20.

⁵⁰ See also [Shala Disclosure Decision](#), para. 38.

⁵¹ SPO Submissions, para. 9 and footnote 5.

marks the expiry of 30-day period prescribed by the Rules.⁵² The SPO, however, also adds that meeting such a deadline is contingent on the forthcoming requests on protective measures as well on the adoption of protocols governing the handling of confidential information and contact with witnesses of the opposing Party being addressed.⁵³ The SPO further avers that it aims to disclose Rule 102(1)(a) material in advance of that date and is willing to disclose said material on a rolling basis.⁵⁴ Lastly, according to the SPO, the detailed outline of the supporting material, as mandated by Rule 86(3)(b) of the Rules⁵⁵ (“Detailed Outline”), does not require redactions for the purposes of disclosure to the Defence on a strictly confidential basis.⁵⁶ The Defence for Mr Januzi concurs that the Rule 102(1)(a) material should be disclosed by the 30-day deadline, as foreseen in the Rules.⁵⁷ Both the Defence for Mr Januzi and the Defence for Mr Bahtjari request to receive the evidence as soon as it is ready to be disclosed and on a rolling basis.⁵⁸

51. In light of the Parties’ submissions, the Pre-Trial Judge finds it appropriate to set **Wednesday, 8 November 2023**, as the deadline to complete disclosure of the Rule 102(1)(a) material. The Pre-Trial Judge further orders the SPO to disclose said material on a rolling basis and to disclose material that does not require redactions as soon as possible. As regards the Detailed Outline, in order to facilitate the Accused’s access to this document and maintain the publicity of proceedings, the SPO shall file in the record of the case a confidential version of the Detailed Outline by **Tuesday, 31 October 2023**, and a public (redacted) version of the

⁵² SPO Submissions, para. 8; Transcript of 12 October 2023, p. 41, lines 21-23.

⁵³ SPO Submissions, para. 9.

⁵⁴ Transcript of 12 October 2023, p. 41, line 21 to p. 42, line 2, p. 43, lines 4-10, p. 44, lines 21-24.

⁵⁵ KSC-BC-2023-10, F00002/A02, Specialist Prosecutor, *Annex 2 to Submission of Indictment for Confirmation and Related Requests*, 11 September 2023, strictly confidential and *ex parte*.

⁵⁶ SPO Submissions, para. 8.

⁵⁷ Transcript of 12 October 2023, p. 38, lines 14-17.

⁵⁸ Transcript of 12 October 2023, p. 43, lines 19-23, p. 44, lines 11-18.

Detailed Outline upon completion of its disclosure of Rule 102(1)(a) material on **Wednesday, 8 November 2023**.

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

52. 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.⁵⁹

53. The timeframe for disclosure of such material may depend on factors such as: (i) the amount and type of material to be disclosed; (ii) when the material was collected by the SPO; (iii) the need to complete investigative steps (including obtaining the necessary clearances from information providers) before disclosing such material; (iv) the need to translate (parts of) this material, notably statements of witnesses whom the SPO intends to call to testify; and (v) the need to implement protective measures, including redaction of information.⁶⁰

54. 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.⁶¹

55. The SPO anticipates that Rule 102(1)(b) material will include documentary evidence, such as records from seized mobile telephones, audio/visual material,

⁵⁹ See also [Shala Disclosure Decision](#), para. 41.

⁶⁰ See also [Shala Disclosure Decision](#), para. 42.

⁶¹ See also [Shala Disclosure Decision](#), para. 43.

and call data records.⁶² The SPO also maintains that it: (i) is in the process of reviewing additional items that may constitute Rule 102(1)(b) material; (ii) expects to obtain additional material since the investigation is ongoing; and (iii) is unable to provide at this time an accurate estimate of the volume of such material.⁶³ The SPO also alleges that it estimates the investigation to take at least three months and recalls that, following the review, material may require redactions, transcription or translation, before it can be disclosed.⁶⁴ It submits, however, that it expects to be able to disclose Rule 102(1)(b) material by Friday, 26 January 2024, or no later than thirty (30) days prior to the opening of its case,⁶⁵ and to proceed with the disclosure of Rule 102(1)(b) material on a rolling basis, like for Rule 102(1)(a) material.⁶⁶

56. The SPO further submits that Rule 102(1)(b) material currently in the SPO's possession has been translated where needed and that the translation process concerning any additional material to be obtained would be completed within the above-mentioned deadline.⁶⁷ The SPO also avers that it will be necessary to apply redactions to forthcoming Rule 102(1)(b) disclosures.⁶⁸ Lastly, the SPO advances that it will endeavour to disclose all documents and material referred to in witness statements together with the relevant statement.⁶⁹

57. The Defence for Mr Januzi and the Defence for Mr Bahtjari submit that the deadline suggested by the SPO is not justified, especially in light of the SPO's averment that the volume of material to be disclosed is relatively limited compared to other cases; they suggest that the Pre-Trial Judge set a shorter

⁶² SPO Submissions, para. 11; Transcript of 12 October 2023, p. 46, lines 3-6.

⁶³ SPO Submissions, paras 10, 12; Transcript of 12 October 2023, p. 45, line 21 to p. 46, line 3.

⁶⁴ Transcript of 12 October 2023, p. 48, lines 7-11.

⁶⁵ SPO Submissions, para. 10; Transcript of 12 October 2023, p. 46, lines 10-20.

⁶⁶ Transcript of 12 October 2023, p. 49, line 23 to p. 50, line 16.

⁶⁷ SPO Submissions, paras 11-12; Transcript of 12 October 2023, p. 46, lines 7-10.

⁶⁸ SPO Submissions, para. 13; Transcript of 12 October 2023, p. 46, lines 7-10.

⁶⁹ SPO Submissions, para. 14.

deadline.⁷⁰ The Defence for Mr Bahtjari points out that, if a shorter deadline were to be set, the SPO would still be able to request an extension of time, if needed, to fulfil its disclosure obligations.⁷¹

58. Considering the Parties' submissions on the proposed timeline for disclosure of Rule 102(1)(b) material, the Pre-Trial Judge pays heed in particular to (i) the limited volume of evidence to be disclosed in the present case; (ii) the fact that the material currently in the SPO's possession has been translated, where needed; (iii) the need to ensure an expeditious preparation for trial; and (iv) the fact that the current case concerns the alleged commission of offences under Article 15(2) of the Law as opposed to crimes under Articles 13 and 14 of the Law. Accordingly, the Pre-Trial Judge considers it appropriate to set **Friday, 15 December 2023**, 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 47, above. The Pre-Trial Judge takes note with approval of the SPO's undertaking to disclose witness statements and their corresponding translation in the same disclosure batch.⁷² As for any request for protective measures, the SPO shall file such a request as soon as possible, but no later than **Friday, 17 November 2023**, 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

59. 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

⁷⁰ Transcript of 12 October 2023, p. 49, lines 2-11.

⁷¹ Transcript of 12 October 2023, p. 48, lines 7-11.

⁷² SPO Submissions, para. 14.

was obtained from or belonged to the Accused, including statements, documents, photographs, and other tangible objects.⁷³

60. 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.⁷⁴

61. 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.⁷⁵ 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*.⁷⁶

62. As expressly stipulated by Rule 102(3) of the Rules, thereafter, an indication as to the materiality of any such item 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,

⁷³ See also [Shala Disclosure Decision](#), para. 46.

⁷⁴ See also [Shala Disclosure Decision](#), para. 47; KSC-BC-2020-07, IA005/F00008/RED, Court of Appeals, [Public Redacted Version of Decision on the Appeals Against Disclosure Decision](#) ("*Gucati and Haradinaj Appeals Decision on Disclosure*"), 29 July 2021, public, para. 38.

⁷⁵ See [Gucati and Haradinaj Appeals Decision on Disclosure](#), para. 54 ("The Panel recalls that the Prosecution cannot disclose that which it does not have and is not obliged to undertake investigations, perform analyses, or create work products which are not in its custody or control, possession or actually known to it").

⁷⁶ See also [Shala Disclosure Decision](#), para. 48; [Gucati and Haradinaj Appeals Decision on Disclosure](#), paras 38, 40, 42, 44, 46.

in the exercise of the Accused's rights under the Law and the Rules.⁷⁷ What is *material* in this context should not necessarily be limited by the temporal scope of the Confirmed Indictment or confined to issues which would either directly undermine the SPO's case or support a line of argument of the defence.⁷⁸ The Defence *preparation* is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence,⁷⁹ or related to the SPO's case.⁸⁰ Conversely, items that are of a purely personal nature, too remote, hypothetical or speculative, not related to the charges against the Accused, or which have only an abstract logical relationship to the issues, may be considered as not material to the preparation of the Defence.⁸¹ If an item is considered material (and that remains unchallenged), then the item shall be disclosed in its entirety and not only the material parts thereof.

63. 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

⁷⁷ See [Gucati and Haradinaj Appeals Decision on Disclosure](#), para. 41. See similarly, STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.4, F0004, Appeals Chamber, [Public Redacted Version of 19 September Decision on Appeal by Counsel for Mr Oneissi Against Pre-Trial Judge's "Decision on Issues Related to the Inspection Room and Call Data Records"](#), ("2 October 2013 Decision") 2 October 2013, para. 21, and references therein; ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-1433 (OA 11), Appeals Chamber, [Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008](#), ("11 July 2008 Judgment") 11 July 2008, paras 77-78; *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1330 (OA 3), Appeals Chamber, [Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses"](#), 20 May 2016, para. 23, and references therein.

⁷⁸ See [Gucati and Haradinaj Appeals Decision on Disclosure](#), para. 41. See similarly, STL, [2 October 2013 Decision](#), para. 22, and references therein.

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

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

⁸¹ See [Gucati and Haradinaj Appeals Decision on Disclosure](#), para. 41.

of or conclusory allegations on the requested information and should avoid making requests in the form of catch-all phrases.⁸²

64. 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.⁸³ Upon challenge, the Pre-Trial Judge will assess the materiality of the item itself in its entirety, and not discrete information contained therein or specific parts thereof. If an item is found not to be material to the preparation of the Defence, no part or portion of said item, nor any discrete information therein, shall be disclosed.

65. The SPO submits that it is ready to submit a preliminary detailed notice of Rule 102(3) material by the end of January 2024,⁸⁴ if it were later permitted to supplement said list as needed.⁸⁵ The SPO specifies that the 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.⁸⁶ This will include call data records and the full contents of the mobile telephones that have been seized from the Accused and Co-Perpetrator 1, as named in the Confirmed Indictment.⁸⁷ The SPO avers that is not able to provide an accurate estimate of volume at this time, arguing that the scope of Rule 102(3) material is impacted by, and to a large extent dependent upon, the witnesses and evidence intended to be presented at trial.⁸⁸ The SPO maintains that it will endeavour to make available as soon as possible to the Accused any material that

⁸² See also [Shala Disclosure Decision](#), para. 50.

⁸³ See also [Shala Disclosure Decision](#), para. 51.

⁸⁴ Transcript of 12 October 2023, p. 52, lines 10-25.

⁸⁵ Transcript of 12 October 2023, p. 51, lines 10-15.

⁸⁶ SPO Submissions, para. 15.

⁸⁷ Transcript of 12 October 2023, p. 50, line 20 to p. 51, line 2.

⁸⁸ SPO Submissions, para. 15; Transcript of 12 October 2023, p. 50, lines 17-20, p. 51, lines 10-15.

is important for the Defence's review.⁸⁹ The SPO adds for instance that images of the seized mobile telephones of the Accused and Co-Perpetrator 1 will be made available to the Accused at or around the time the SPO makes its disclosure of Rule 102(1)(a) material.⁹⁰ Lastly, the SPO requests that the default timeline for the SPO to present a materiality challenge be set having regard to with the deadlines for any protective measures, namely two (2) weeks from the Defence request for material on the Rule 102(3) notice.⁹¹

66. Both the Defence for Mr Januzi and the Defence for Mr Bahtjari agree that the Pre-Trial Judge ought to set a shorter deadline than the one initially proposed by the SPO for the disclosure of Rule 102(1)(a) material, i.e. Friday, 23 February 2024.⁹²

67. In light of the Parties' submissions, the Pre-Trial Judge considers it appropriate to set **Friday, 26 January 2024**, 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, 9 February 2024**, or at any time earlier. On the basis of such indication, the SPO shall, no later than **Friday, 16 February 2024**, or **within one (1) 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, 23 February 2024**, or **within fourteen (14) days** of the Defence indication, whichever is earlier. Should the SPO wish to dispute the materiality of the evidence indicated by the

⁸⁹ Transcript of 12 October 2023, p. 51, lines 6-9.

⁹⁰ SPO Submissions, para. 16; Transcript of 12 October 2023, p. 51, lines 2-6.

⁹¹ SPO Submissions, para. 17; Transcript of 12 October 2023, p. 62, line 24 to p. 63, line 2.

⁹² Transcript of 12 October 2023, p. 53, line 6 to p. 54, line 9.

Defence, it shall seize the Panel **within fourteen (14) days** of the Defence indication.

4. Rule 103: Exculpatory Evidence

68. 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, such as the need for redactions.⁹³ 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.⁹⁴ At the beginning of the pre-trial phase, the requirement is that the SPO *immediately* starts the review and *immediately* discloses the evidentiary items when it assesses that they potentially contain exculpatory information.⁹⁵ The absence of a strict deadline for exculpatory evidence does not translate into delaying the disclosure process to a later stage.⁹⁶

⁹³ Transcript of 12 October 2023, p. 54, lines 13-20; See also [Shala Disclosure Decision](#), para. 54; KSC-BC-2020-06, F00936/RED, Pre-Trial Judge, [Public Redacted Version of Decision on Thaçi and Krasniqi Defence Motions Seeking Remedies for Non-Compliance with Disclosure Obligations](#) ("Thaçi et al. Disclosure Non-Compliance Decision"), 26 August 2022, public, para. 28. 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.

⁹⁴ See also [Shala Disclosure Decision](#), para. 54. Similarly, ICTR, [27 November 2006 Decision](#), para. 11, and references therein.

⁹⁵ See also [Thaçi et al. Disclosure Non-Compliance Decision](#), para. 28. In this regard, the Pre-Trial Judge attaches weight to the SPO's own admission that, in the present case, there is "relatively limited volume of material to be disclosed as compared to other [SC] cases", thus allowing the SPO to disclose immediately exculpatory evidence, see SPO Submissions, para. 21.

⁹⁶ See also [Thaçi et al. Disclosure Non-Compliance Decision](#), para. 28.

69. The SPO submits that it has not identified any Rule 103 material at this time.⁹⁷ It maintains that the review of any such material in its custody, control, or actual knowledge, is ongoing, and that it shall, upon its discovery and following the application of required redactions, immediately disclose it.⁹⁸ The Defence for Mr Januzi and the Defence for Mr Bahtjari did not make any submissions on this issue.⁹⁹

70. In light of the Parties' submissions, the Pre-Trial Judge considers it appropriate to order the SPO to disclose any Rule 103 material, immediately upon its discovery and on a rolling basis, particularly if the material does not require redactions. Should any 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

71. 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.¹⁰⁰

72. 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.¹⁰¹

⁹⁷ Transcript of 12 October 2023, p. 55, lines 3-4.

⁹⁸ SPO Submissions, para. 18; Transcript of 12 October 2023, p. 55, lines 4-8.

⁹⁹ Transcript of 12 October 2023, p. 55, lines 10-12.

¹⁰⁰ See also [Shala Disclosure Decision](#), para. 57.

¹⁰¹ See also [Shala Disclosure Decision](#), para. 58.

73. The SPO submits that Rule 107 clearances are at this time unnecessary for material which the SPO currently anticipates tendering into evidence at trial in the present case.¹⁰² The Defence for Mr Januzi and the Defence for Mr Bahtjari did not make any submissions on this point.¹⁰³

74. The Pre-Trial Judge reminds the SPO to promptly bring to the attention of the Pre-Trial Judge any issue regarding material affected by Rule 107 of the Rules.

C. DISCLOSURE OF EVIDENCE BY THE DEFENCE

75. 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.¹⁰⁴

76. 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 for Mr Januzi and the Defence for Mr Bahtjari will be invited to file their Pre-Trial Briefs 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.¹⁰⁵

77. Considering that the disclosure process has just started, the Pre-Trial Judge refrains from making any further determinations. Time limits regulating the filing of the SPO Pre-Trial Brief and list of witnesses and exhibits, which will in turn

¹⁰² SPO Submissions, para. 19; Transcript of 12 October 2023, p. 55, lines 21-25.

¹⁰³ Transcript of 12 October 2023, p. 56, lines 3-5.

¹⁰⁴ See also [Shala Disclosure Decision](#), para. 61.

¹⁰⁵ See also [Shala Disclosure Decision](#), para. 62.

inform the deadlines for filing the Defence for Mr Januzi and the Defence for Mr Bahtjari's respective Pre-Trial Briefs and the disclosure of evidence, if any, will also be determined at a later stage.

D. TRANSLATION OF DOCUMENTS AND EVIDENCE

78. 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.¹⁰⁶

79. 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.¹⁰⁷ 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.¹⁰⁸ Therefore, a balance must be achieved between these competing rights in order to make proceedings fair and expeditious at the same time.¹⁰⁹

¹⁰⁶ [Decision on Working Language](#), para. 28(a). See also [Shala Disclosure Decision](#), para. 64.

¹⁰⁷ In this context, it is noted that the Accused received the Arrest Warrant, Transfer Order, and Confirmed Indictment in Albanian. KSC-BC-2023-10, F00020/COR, Registrar, *Report on the Arrest and Transfer of Sabit Januzi to the Detention Facilities*, 9 October 2023, strictly confidential and *ex parte*, paras 12, 22, with Annexes 1-3, strictly confidential and *ex parte*; F00021, Registrar, *Report on the Arrest and Transfer of Ismet Bahtjari to the Detention Facilities*, 9 October 2023, strictly confidential and *ex parte*, paras 11, 24, with Annexes 1-3, strictly confidential and *ex parte*; [Bahtjari Initial Appearance Transcript](#), p. 6, lines 14-16; [Januzi Initial Appearance Transcript](#), p. 22, lines 3-7.

¹⁰⁸ 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.

¹⁰⁹ See also [Shala Disclosure Decision](#), para. 65.

80. As a result of the above, the Rules establish that all statements of witnesses whom the SPO intends to call to testify at trial shall be made available in the language the Accused understand and speak, as expressly required by Rule 102(1) of the Rules. All other evidence shall be submitted in English, in accordance with the Decision on Working Language, unless otherwise ordered by the Pre-Trial Judge.¹¹⁰

81. 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.¹¹¹ The Defence for Mr Januzi and the Defence for Mr Bahtjari 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.¹¹² 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.¹¹³

E. PROCEDURE FOR DISCLOSURE OF EVIDENCE

82. 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

¹¹⁰ See also [Shala Disclosure Decision](#), para. 66.

¹¹¹ 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.

¹¹² Similarly, ICC, *Prosecutor v. Yekatom and Ngaïssona*, 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.

¹¹³ See also [Shala Disclosure Decision](#), para. 67.

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.¹¹⁴

83. 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 limited volume of and the nature of the evidence to be presented is such that many individual items of evidence will apply to all offences and all modes of liability rendering such sub-categorisation of very limited utility, especially when compared to the resources required for its implementation.¹¹⁵ According to the SPO, such sub-categorisation would also delay the disclosure process and potentially cause “confusion” during the review process.¹¹⁶

84. In addition, the SPO submits that a consolidated disclosure chart pursuant to Rule 109(c) of the Rules should be provided within fifteen (15) days of the filing of any Pre-Trial Briefs and proposes the adoption of the chart format used in the *Prosecutor v. Hysni Gucati and Nasim Haradinaj* case (KSC-BC-2020-07) (“*Gucati and Haradinaj Case*”) and the *Shala Case*.¹¹⁷

85. Both the Defence for Mr Januzi and the Defence for Mr Bahtjari agree with the proposed disclosure procedure.¹¹⁸

86. 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.¹¹⁹ The

¹¹⁴ See also [Shala Disclosure Decision](#), para. 68. 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 72-73.

¹¹⁵ SPO Submissions, para. 21; Transcript of 12 October 2023, p. 57, line 10 to p. 58, line 4.

¹¹⁶ SPO Submissions, para. 21.

¹¹⁷ SPO Submissions, para. 23. Transcript of 12 October 2023, p. 58, lines 7-10.

¹¹⁸ Januzi Submissions, para. 4; Bahtjari Submissions, para. 4.

¹¹⁹ See also [Shala Disclosure Decision](#), para. 71.

categories available on Legal Workflow are: “Accused”; “Alleged Conduct of the Accused”; “Contextual Elements of the Crimes”; “Location”; and “Underlying Crimes” (“Standard Category” and “Standard Categories”). In this regard, the Pre-Trial Judge notes that the Standard Categories “Underlying Crimes” and “Contextual Elements of the Crimes” are not relevant to the present case. Accordingly, the Pre-Trial Judge instructs the SPO to create a new Standard Category entitled “Offences”.

87. Moreover, the Pre-Trial Judge finds that case-specific sub-categorisation is required to ensure the fair and expeditious conduct of the proceedings.¹²⁰ In this respect, the Pre-Trial Judge is not persuaded by the SPO submissions, as rehearsed in paragraph 83, above, that remain generic, unspecified and speculative. Notably, the agreement of the Defence, and the limited volume and nature of the evidence militate in favour of a clean, intelligible, and orderly organisation of the evidence in Legal Workflow.

88. That being said, the Pre-Trial Judge notes that, during the Status Conference, the Parties indicated their willingness to engage in *inter partes* discussions as concerns case-specific sub-categorisation to 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.¹²¹ The Pre-Trial Judge notes that the following case-specific sub-categories are useful in the present case: (i) Count 1, Count 2, and Count 3 (under the Standard Category “Offences”); (ii) direct commission, co-perpetration, assistance, agreement, and attempt (under the Standard Category “Alleged Conduct of the Accused”); and (iii) Mr Januzi, Mr Bahtjari, and both (under the Standard Category “Accused”).

¹²⁰ See Transcript of 12 October 2023, p. 58, lines 15-22. See also [Shala Disclosure Decision](#), para. 71.

¹²¹ SPO Submissions, para. 22; Transcript of 12 October 2023, p. 58, lines 4-6, p. 60, line 17 to p. 61 line 4, p. 61, lines 7-20, p. 62, lines 8-9.

89. In these circumstances, the Pre-Trial Judge considers it appropriate to instruct the Parties to agree on case-specific sub-categories to be applied in Legal Workflow and to report on their agreement to the Pre-Trial Judge in the next status conference.

90. 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 and the *Shala* Case.¹²² As the Detailed Outline already provides extensive analysis in relation to Rule 102(1)(a) material, the Rule 109(c) chart, or any addendum made thereto, as the case may be, shall relate to Rule 102(1)(b) and Rule 102(2) material with respect to the SPO and Rule 104(1), (5), and (6) material with respect to the Defence.¹²³

91. In order not to disrupt the progress of disclosure, mindful of the limited factual and legal complexity, involving alleged Article 15(2) offences of limited temporal and geographical scope, and in light of the efficiency in generating the Rule 109(c) chart around the time of the Pre-Trial Briefs, 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 one (1) week from the filing of their respective Pre-Trial Briefs.¹²⁴

¹²² KSC-BC-2020-07, F00109/A01, Specialist Prosecutor, [Annex 1 to Submissions on Rule 109\(c\) Categorisation](#), 1 February 2021, public. See also [Shala Disclosure Decision](#), para. 73.

¹²³ Similarly, [Shala Disclosure Decision](#), para. 73; 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. 71; KSC-BC-2020-07, F00121, Pre-Trial Judge, [Decision on Submissions on Rule 109\(c\) Categorisation](#) (“Gucati and Haradinaj Categorisation Decision”), 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.

¹²⁴ See also [Shala Disclosure Decision](#), para. 74; [Gucati and Haradinaj Categorisation Decision](#), para. 21.

F. RESTRICTIONS TO DISCLOSURE

1. General Principles

92. The Pre-Trial Judge notes that full disclosure of all material and relevant evidence is the principle, while withholding information is the exception.¹²⁵ As a combined reading of Article 21(6) of the Law and Rules 80(1) and 108(1) of the Rules indicates, any restrictions to full disclosure must be strictly necessary with a view to protecting: (i) the safety, physical and psychological well-being, dignity, and privacy of witnesses, victims participating in the proceedings, and other persons at risk on account of the testimony given by witnesses of the SC, provided that these measures are consistent with the rights of the Accused; (ii) ongoing or future investigations; and (iii) the public interest and the rights of third parties. In this context, it is also recalled that it is permissible to withhold certain information from the Defence prior to trial.¹²⁶

93. 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*.¹²⁷ 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*.¹²⁸

¹²⁵ See also, [Shala Disclosure Decision](#), para. 75. Similarly, 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.

¹²⁶ See also [Shala Disclosure Decision](#), para. 75. Similarly, ICC, [13 May 2008 Judgment](#), para. 68.

¹²⁷ Rule 108(1) and (6) of the Rules.

¹²⁸ Rule 80(1) and (3) of the Rules.

94. Lastly, the need for redactions is to be assessed on a case-by-case basis.¹²⁹ 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.¹³⁰

2. Legal Test

95. In assessing if certain information may be withheld from the receiving party, it must be ascertained whether:¹³¹

- (i) the disclosure of the information in question to the receiving Party, as opposed to the general public, poses an objectively justifiable risk to the protected person or interest;
- (ii) the protective measure is strictly necessary.¹³² 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.¹³³

¹²⁹ See also [Shala Disclosure Decision](#), para. 77. Similarly, ICC, [13 October 2006 Judgment](#), para. 36; [13 May 2008 Judgment](#), paras 2, 59, 66.

¹³⁰ See also [Shala Disclosure Decision](#), para. 77.

¹³¹ See also [Shala Disclosure Decision](#), para. 78; [Mustafa Disclosure Decision](#), 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.

¹³² Article 21(6) of the Law.

¹³³ Rule 80(1) of the Rules.

3. Redaction Regime

96. The SPO and the Defence support the adoption of the redaction regime in the *Shala* Case.¹³⁴

97. 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.¹³⁵

98. 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.¹³⁶

99. For any redactions falling outside the aforementioned pre-defined categories (“non-standard redactions”), the disclosing Party must submit a discrete application to the Pre-Trial Judge seeking authorisation to restrict disclosure, in accordance with the procedure set out below.¹³⁷

100. 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

¹³⁴ SPO Submissions, para. 25; Transcript of 12 October 2023, p. 62, lines 17-23, p. 63, lines 5-10.

¹³⁵ See also [Shala Disclosure Decision](#), para. 80.

¹³⁶ See *infra* para. 102.

¹³⁷ See *infra* para. 108.

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.¹³⁸

101. 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.¹³⁹

102. The receiving Party may challenge any specific redaction it believes to be unwarranted or if it believes that a specific redaction should be lifted as a result of changed circumstances. To this end, it shall approach the disclosing Party directly. The Parties shall consult in good faith with a view to resolving the matter. If the Parties are unable to agree, the receiving Party may apply without undue delay to the Pre-Trial Judge for a ruling, thereby creating an obligation for the disclosing Party to justify the redaction in question. In this case, the disclosing Party shall file a response within five (5) days from notification of the challenge in the record of the case, unless otherwise decided by the Pre-Trial Judge.¹⁴⁰

103. 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, in case the redactions shall continue to have effect in subsequent proceedings. Redactions

¹³⁸ See also [Shala Disclosure Decision](#), para. 83.

¹³⁹ See also [Shala Disclosure Decision](#), para. 84.

¹⁴⁰ See also [Shala Disclosure Decision](#), para. 85.

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.¹⁴¹

104. 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.¹⁴² 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.¹⁴³

105. Lastly, the Pre-Trial Judge recalls that, pursuant to Rule 81(1)(a) of the Rules, protective measures once ordered shall continue to have effect in any other subsequent proceedings unless and until varied. Accordingly, it is not necessary for the Pre-Trial Judge to order the continued application of protective measures, that have been ordered in other SC proceedings, in the present case. This occurs automatically by virtue of Rule 81(1)(a) of the Rules.

¹⁴¹ See also [Shala Disclosure Decision](#), para. 86.

¹⁴² 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.

¹⁴³ See also [Shala Disclosure Decision](#), para. 87.

4. Standard Redactions

106. The categories for standard redactions are clearly delineated and well-entrenched in the practice of other courts¹⁴⁴ and have been adopted in other cases before the SC.¹⁴⁵ The Pre-Trial Judge herewith adopts the below categories of standard redactions and their justifications in light of the test set out above.¹⁴⁶ 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.¹⁴⁷

107. 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).

¹⁴⁴ For example, ICC, [Yekatom Disclosure Decision](#), paras 25-26; [Al Hassan Disclosure Decision](#), para. 29.

¹⁴⁵ See [Shala Disclosure Decision](#), para. 89; [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 2021, public, para. 82.

¹⁴⁶ See *supra* para. 95.

¹⁴⁷ See also [Shala Disclosure Decision](#), para. 88.

Category “A.3”: Identifying and contact information of investigators, insofar as, mindful that the Parties have only a limited pool of investigators, the disclosure of this information could put them at risk and hinder their work in the field, thereby putting ongoing or future investigations at risk, or pose security risks to witnesses or other persons whom they interview or contact. In accordance with paragraph 101, 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 101, 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,¹⁴⁸ 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.

¹⁴⁸ 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”),¹⁴⁹ 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.

¹⁴⁹ 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.¹⁵⁰ 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

108. 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.¹⁵¹ In such cases, the disclosing Party shall submit an application to the relevant Panel sufficiently in advance so as to allow for a timely decision thereon

¹⁵⁰ Article 37(1) of the Law.

¹⁵¹ [Shala Disclosure Decision](#), para. 90; [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.

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 (5) 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 (5) 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. Upon authorisation, any non-standard redactions shall be marked as **category "E"**.¹⁵²

109. 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 (5) days prior to the lifting of any such redaction.¹⁵³

G. CONFIDENTIAL INFORMATION AND WITNESS CONTACTS FRAMEWORK

110. The Pre-Trial Judge notes at the outset that both the SPO and the Defence for Mr Bahtjari support the adoption of the Confidential Information and Witness Contacts Framework,¹⁵⁴ whereas the Defence for Mr Januzi did not express its views on the SPO Request.¹⁵⁵

¹⁵² See also [Shala Disclosure Decision](#), para. 90.

¹⁵³ See also [Shala Disclosure Decision](#), para. 91.

¹⁵⁴ See *supra* paras 13, 15.

¹⁵⁵ See *supra* para. 8.

111. The Pre-Trial Judge recalls that the essential functions of the Confidential Information and Witness Contacts Framework consist of: (i) ensuring the protection and upholding the privacy of witnesses by defining the appropriate procedure for contacts between a witness and an opposing Party or participant; (ii) enabling the preservation of evidence by establishing a transparent and accessible record in relation to interviews conducted by the Parties and participants; and (iii) contributing to the expeditious conduct of the proceedings by concretising the obligations of the Parties and participants, laying down a predictable and consistent procedure to be followed, and clarifying the roles and responsibilities of all sections and organs of the SC and the SPO involved.¹⁵⁶

112. The Pre-Trial Judge also recalls that, on 27 December 2022, the Court of Appeals Panel denied the appeals submitted in the *Thaçi et al.* Case against the Confidential Information and Witness Contacts Framework Decision.¹⁵⁷ The Pre-Trial Judge further notes that a similar framework was subsequently adopted in the *Shala* Case.¹⁵⁸

113. The Parties disagree only on two modifications proposed by the SPO to the Confidential Information and Witness Contacts Framework. The Pre-Trial Judge will therefore focus his assessment on the two modifications.¹⁵⁹

¹⁵⁶ KSC-BC-2020-06, F00854, Pre-Trial Judge, [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](#) (“*Thaçi et al.* Confidential Information and Witness Contacts Framework Decision”), 24 June 2022, public, paras 116, 121-125.

¹⁵⁷ See KSC-BC-2020-06, IA024/F00019, Court of Appeals, [Decision on Defence Appeals 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”](#) (“Appeals Decision on Confidential Information and Witness Contacts Framework”), 27 December 2022, public.

¹⁵⁸ KSC-BC-2020-04, F00537, Trial Panel I, [Decision on the 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](#), 8 June 2023, public, with Annex 1, public.

¹⁵⁹ [Thaçi et al. Confidential Information and Witness Contacts Framework Decision](#), para. 212(II)(a). See also KSC-BC-2020-04, F00537/A01, Trial Panel I, *Annex 1 to Decision on the 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*, 8 June 2023, public, p. 3, Section II(a).

114. As regards the First Modification, the SPO specifically requests that the “prior to testimony” limitation be removed from the Contact Protocol to make it clear that that it applies to all contacts with witnesses of the opposing Party.¹⁶⁰ The SPO adds that a similar request is currently pending before Trial Panel II in the *Thaçi et al.* Case.¹⁶¹ The SPO avers that the First Modification is necessary to: (i) resolve any ambiguity about the Confidential Information and Witness Contacts Framework’s application to witnesses the Parties do not intend to call live; and (ii) give full effect to the purposes underpinning the Contact Protocol, such as protection, privacy, evidence preservation, and expeditiousness.¹⁶² The SPO adds that said rights and interests apply throughout the proceeding, not just pre-testimony.¹⁶³ Moreover, the SPO underscores that there is no unlimited or automatic right to interview witnesses of the opposing Part at any time.¹⁶⁴ The SPO further contends that, in the exceptional circumstance where there is a legitimate forensic purpose for post-testimony contacts, such contacts should be regulated by the Contact Protocol.¹⁶⁵ The SPO refers in support to the ICC Protocol¹⁶⁶ which, according to the SPO, does not include any language limiting its application *vis-à-vis* the opposing Party witness’s date of testimony.¹⁶⁷

115. As regards the Second Modification, the SPO contends that relatives, friends, and associates of the Accused could be used, including by the Accused, to make contact with opposing Party witnesses, as well as their relatives.¹⁶⁸ The SPO also contends that the Contact Protocol is intended to govern any contacts with

¹⁶⁰ SPO Request, para. 5.

¹⁶¹ SPO Request, footnote 9.

¹⁶² SPO Request, para. 5.

¹⁶³ SPO Request, para. 5.

¹⁶⁴ SPO Request, para. 6.

¹⁶⁵ SPO Request, para. 6.

¹⁶⁶ See ICC, [Chambers Practice Manual](#), Annex: Protocol on the Handling of Confidential Information during Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant, July 2023, pp. 38-47.

¹⁶⁷ SPO Request, para. 6 and footnote 24.

¹⁶⁸ SPO Request, para. 7.

opposing Party witnesses contacts, which includes both direct or indirect contacts.¹⁶⁹ According to the SPO, the Contact Protocol should thus be amended to clarify that it applies to (i) contacts with opposing Party witnesses or the opposing Party witnesses' *relatives* (ii) by counsel, clients and their teams, as defined in Article 2 of the Code of Conduct, as well as *associates of the Accused*.¹⁷⁰ In support, the SPO avers that given the pervasive climate of fear and intimidation in Kosovo and the specific charges in the present case, this clarification is necessary to: (i) protect SPO witnesses, including specifically Witness 1, from further interference and intimidation and to safeguard the witnesses' privacy, dignity, and physical and psychological well-being; (ii) forestall any further attempts to obstruct SC proceedings; (iii) preserve evidence to be presented at SC proceedings; and (iv) ensure the expeditious conduct of proceedings without compromising the rights of the Accused.¹⁷¹ The SPO further avers that the implementation of restrictions on witness contacts by associates of the Accused and with the relatives of witnesses is consistent with the jurisprudence of past international criminal tribunals.¹⁷²

116. The Defence for Mr Bahtjari submits that the allegations in the Confirmed Indictment or the reference to a pervasive climate of witness interference and intimidation are insufficient to support the First Modification and the Second Modification.¹⁷³ The Defence for Mr Bahtjari avers that the expansion requested by the SPO under the Second Modification would cover contacts the relevant Party has no control over.¹⁷⁴ The Defence for Mr Bahtjari also points out that incidental or non-avoidable contacts between the relatives of the Accused and Witness 1 may

¹⁶⁹ SPO Request, para. 7.

¹⁷⁰ SPO Request, para. 7.

¹⁷¹ SPO Request, paras 8-9.

¹⁷² SPO Request, para. 10.

¹⁷³ Bahtjari Response, para. 3.

¹⁷⁴ Bahtjari Response, paras 4-5.

occur and, following the Second Modification, may be unfairly assessed as harassment.¹⁷⁵ The Defence for Mr Bahtjari further contends that the SPO did not specify the circle of relatives or friends concerned under the Second Modification.¹⁷⁶

117. At the outset, the Pre-Trial Judge notes that whether any issue of interference or witness intimidation actually materialised in the case is irrelevant to the adoption of the Confidential Information and Witness Contacts Framework since the latter is meant as a preventative instrument.¹⁷⁷ Therefore, the Pre-Trial Judge rejects the Defence for Mr Bahtjari's above-mentioned submission in this regard.

118. As concerns the First Modification, the Pre-Trial Judge pays heed to the essential function of the Confidential Information and Witness Contacts Framework, namely the need to protect and uphold the privacy of witnesses as recalled above.¹⁷⁸ In this regard, the Pre-Trial Judge is of the view that this essential function ought to apply to witnesses throughout the proceedings. It encompasses both the pre-testimony and post-testimony period and must include also those witnesses the Parties do not intend to call live, such as under Rules 153 and 155 of the Rules. Limiting contacts, for the purpose of protecting the privacy of witnesses, does not entail an absolute contact prohibition, but means that any contact is subject to the Contact Protocol.

119. Considering the above, the Pre-Trial Judge is persuaded that the First Modification will add value and clarify the scope of application of the Contact Protocol. Thus, the Pre-Trial Judge grants the SPO Request as regards the First Modification and decides to amend the Contact Protocol accordingly.

¹⁷⁵ Bahtjari Response, para. 5.

¹⁷⁶ Bahtjari Response, para. 5.

¹⁷⁷ [Appeals Decision on Confidential Information and Witness Contacts Framework](#), para. 34.

¹⁷⁸ *See supra* para. 111.

120. As concerns the Second Modification, the Pre-Trial pays special attention to the facts alleged in the present case, namely that Witness 1 was approached on two occasions [REDACTED] in order to induce him to withdraw his testimony in SC proceedings while members of his family were present.¹⁷⁹ The Pre-Trial Judge finds however that it is clear that the Contact Protocol is intended to cover both indirect and direct contacts with witnesses of the opposing Party. To hold otherwise would mean that the restrictions on contacts with witnesses of the opposing Party could easily be circumvented through the use of intermediaries. Moreover, mindful of the need to adopt a framework that is both clear and straightforward, the Pre-Trial Judge considers that the categories of persons the SPO wishes to include as prohibited from contacting witnesses of the opposing Party (“witnesses’ *relatives*” and “*associates of the Accused*”) are vague and undefined. Such wording in the Contact Protocol would lead to uncertainty and bears the risk that it cannot be enforced. The Pre-Trial Judge also sees merit in the argument of the Defence of Mr Bahtjari insofar as incidental contacts between the relatives of the Accused and a witness could be considered as inappropriate contacts, constituting automatically a violation of the Contact Protocol.

121. Accordingly, the Pre-Trial Judge rejects SPO Request as regards the Second Modification.

¹⁷⁹ Confirmed Indictment, paras 72, 74, 88. *See also* Confirmed Indictment, para. 82.

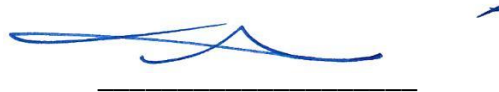
V. DISPOSITION

122. 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 39-48 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 public (redacted) version of Detailed Outline, **by Wednesday, 8 November 2023**;
- c) **ORDERS** the SPO to disclose the confidential version of the Detailed Outline, **by Tuesday, 31 October 2023**;
- d) **ORDERS** the SPO to complete disclosure of material falling under Rule 102(1)(b) of the Rules, **by Friday, 15 December 2023**, and to file any request for protective measures in relation to such material as soon as possible, but no later than **Friday, 17 November 2023**;
- e) **ORDERS** the SPO to provide to the Defence a detailed notice of evidence falling under Rule 102(3) of the Rules **by Friday, 26 January 2024**;
- f) **ORDERS** the Defence to indicate to the SPO, **by Friday, 9 February 2024**, 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;
- g) **ORDERS** the SPO, on the basis of any Defence indication(s) under point (f) above, to disclose to or provide the Defence with access to the selected material that does not require redactions by no later than **Friday, 16 February 2024, or within one (1) week of the Defence indication(s)**, whichever is earlier;
- h) **ORDERS** the SPO, on the basis of any Defence indication(s) as referred to under point (f) above, to file any request for protective measures of selected

- material no later than **Friday, 23 February 2024, or within fourteen (14) days of the Defence indication(s)**, whichever is earlier;
- i) **ORDERS** the SPO to seize the Pre-Trial Judge, **within fourteen (14) days of the Defence indication(s)** as referred to under point (f) above, should it dispute the materiality of evidence;
 - j) **ORDERS** the SPO to disclose any remaining batch(es) of Rule 103 material immediately and on a rolling basis;
 - k) **ORDERS** the SPO, should any material falling under Rule 103 of the Rules require redactions, to make a request for protective measures at the earliest opportunity and to disclose immediately such material with redactions, if granted;
 - l) **ORDERS** the SPO to promptly bring to the attention of the Pre-Trial Judge any issue regarding material affected by Rule 107 of the Rules;
 - m) **ORDERS** the Parties to follow the terms of the redaction regime as set forth in paragraphs 92-109 of this decision;
 - n) **ORDERS** the Parties to use the Standard Categories in the metadata field of each item of disclosure and to report on the case-specific sub-categories in the next status conference, as indicated in paragraphs 86-89 of this decision;
 - o) **ORDERS** the Parties to file their respective Rule 109(c) charts, as indicated in paragraphs 90-91 of this decision, **within one (1) week** of the filing of their respective Pre-Trial Briefs;
 - p) **ORDERS** WPSO to submit, **within five (5) 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 108 of this decision;

- q) **GRANTS** the SPO Request to adopt the Confidential Information and Witness Contacts Framework, as determined in the present decision, and **ANNEXES** it to the present decision; and
- r) **ORDERS** the Parties to comply with the Confidential Information and Witness Contacts Framework as annexed to this decision in relation to any ongoing and impending investigative activities and contacts with witnesses.



Judge Nicolas Guillou
Pre-Trial Judge

Dated this Tuesday, 24 October 2023
At The Hague, the Netherlands.