



KOSOVO SPECIALIST CHAMBERS  
DHOMAT E SPECIALIZUARA TË KOSOVËS  
SPECIJALIZOVANA VEĆA KOSOVA

**In:** **KSC-BC-2023-11**  
**The Specialist Prosecutor v. Haxhi Shala**

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

**Registrar:** Dr Fidelma Donlon

**Date:** 19 December 2023

**Language:** English

**Classification:** **Public**

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

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> 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 4 December 2023, the Pre-Trial Judge confirmed the indictment against Haxhi Shala ("Mr Shala" or "Accused").<sup>2</sup> On the same day, the Pre-Trial Judge also issued an arrest warrant for the Accused, and ordered his transfer to the Detention Facilities of the Specialist Chambers ("SC") in The Hague, the Netherlands.<sup>3</sup>

2. On 6 December 2023, the Specialist Prosecutor's Office ("SPO") submitted the indictment, as confirmed by the Pre-Trial Judge ("Confirmed Indictment").<sup>4</sup>

3. On 11 December 2023, the Accused was arrested by the SPO in Kosovo.<sup>5</sup> The next day, the Accused was transferred to the SC Detention Facilities.<sup>6</sup>

4. Also on 11 December 2023, the SPO requested the Pre-Trial Judge, *inter alia*, to adopt in the present case the same framework for the handling of confidential information and contact with witnesses of the opposing Party that was adopted in

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<sup>1</sup> KSC-BC-2023-11, F00001, President, [Decision Assigning a Pre-Trial Judge](#), 20 November 2023, public.

<sup>2</sup> KSC-BC-2023-11, F00005, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 4 December 2023, confidential.

<sup>3</sup> KSC-BC-2023-11, F00006, Pre-Trial Judge, *Decision on Request for Warrant of Arrest and Transfer Order*, 4 December 2023, strictly confidential and *ex parte*, with Annexes 1-2, strictly confidential.

<sup>4</sup> KSC-BC-2023-11, F00007, Specialist Prosecutor, *Submission of Confirmed Indictment*, 6 December 2023, strictly confidential and *ex parte*, with Annex 1, confidential. A public redacted version was filed on 12 December 2023, [F00013/A01](#).

<sup>5</sup> KSC-BC-2023-11, F00008, Registrar, *Notification of Arrest of Haxhi Shala Pursuant to Rule 55(4)*, 11 December 2023, public.

<sup>6</sup> KSC-BC-2023-11, F00011, Registrar, *Notification of Reception of Haxhi Shala in the Detention Facilities of the Specialist Chambers*, 12 December 2023, public, with Annex 1, strictly confidential and *ex parte*. See also F00015, Registrar, *Report on the Arrest and Transfer of Haxhi Shala to the Detention Facilities* ("Registry Report on Arrest and Transfer"), 13 December 2023, confidential, with Annexes 1-3, strictly confidential and *ex parte*.

the case of *The Specialist Prosecutor v. Sabit Januzi and Ismet Bahtijari* (KSC-BC-2023-10) (“*Januzi and Bahtijari Case*”, “Confidential Information and Witness Contacts Framework”, and “SPO Request”).<sup>7</sup>

5. On 13 December 2023, the initial appearance of the Accused took place.<sup>8</sup>

6. On 14 December 2023, following an order from the Pre-Trial Judge,<sup>9</sup> the SPO made written submissions on matters related to the disclosure of evidence in the present case.<sup>10</sup> The Defence for Mr Shala (“Defence”) did not file written submissions.<sup>11</sup>

7. The same day, and having consulted the Parties,<sup>12</sup> the Pre-Trial Judge issued the “Decision on Working Language”, determining that English shall be the working language of the present proceedings (“Decision on Working Language”).<sup>13</sup>

8. On 15 December 2023, the first status conference (“Status Conference”) was held,<sup>14</sup> where: (i) the SPO and the Defence made (further) oral submissions on matters related to the disclosure of evidence;<sup>15</sup> (ii) the Pre-Trial Judge, having

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<sup>7</sup> KSC-BC-2023-11, F00009, Specialist Prosecutor, *Prosecution Request for Protective Measures and Related Request*, 11 December 2023, strictly confidential and *ex parte*, para. 13. A confidential redacted version was filed on 13 December 2023, F00009/RED.

<sup>8</sup> KSC-BC-2023-11, Transcript of Hearing, 13 December 2023 (“Transcript of 13 December 2023”), public, pp. 1-15.

<sup>9</sup> KSC-BC-2023-11, F00017, Pre-Trial Judge, [Order Setting the Date for the First Status Conference and for Submissions](#) (“Order for Submissions”), 13 December 2023, public, with Annex 1, public.

<sup>10</sup> KSC-BC-2023-11, F00018, Specialist Prosecutor, *Prosecution Submissions for First Status Conference* (“SPO Submissions”), 14 December 2023, public.

<sup>11</sup> This was due to the fact that the Defence was notified of the Pre-Trial Judge’s Order for Submissions with a delay. The Defence was given the opportunity to make oral submissions during the first status conference; *see* KSC-BC-2023-11, Transcript of Hearing, 15 December 2023 (“Transcript of 15 December 2023”), public, p. 18, lines 9-17.

<sup>12</sup> Transcript of 13 December 2023, p. 12, lines 8-20.

<sup>13</sup> KSC-BC-2023-11, F00019, Pre-Trial Judge, [Decision on Working Language](#), 14 December 2023, public, para. 28(a).

<sup>14</sup> Order for Submissions, para. 26(a); Transcript of 15 December 2023, pp. 16-44.

<sup>15</sup> Transcript of 15 December 2023, public, pp. 16-36.

consulted the Parties, adopted the case-specific subcategories to be applied by the Parties in Legal Workflow when disclosing material;<sup>16</sup> and (iii) the Accused pleaded not guilty.<sup>17</sup>

## II. SUBMISSIONS OF THE PARTIES

### A. DISCLOSURE OF EVIDENCE FRAMEWORK

9. The SPO intends to present at trial evidence consisting of testimonies of witnesses, records from seized mobile telephones, call data records, transcripts of statements, and official notes from contacts with witnesses.<sup>18</sup> The SPO advances that a limited number of investigative steps are still pending and, depending on their outcome, there is a likelihood that further evidence will be obtained, without however impacting the expeditious conduct of the proceedings.<sup>19</sup>

10. Regarding its disclosure obligations, the SPO submits that: (i) it will disclose the Rule 102(1)(a) material by no later than 11 January 2024, in line with the 30-day statutory timeframe;<sup>20</sup> (ii) it expects to be able to disclose the Rule 102(1)(b) material by 19 January 2024 and, in any case, no later than 30 days prior to the opening of its case;<sup>21</sup> (iii) it anticipates providing the Defence with the Rule 102(3) notice by 26 January 2024;<sup>22</sup> (iv) it will immediately disclose any Rule 103 material, subject to the application of any required redactions;<sup>23</sup> and (v) no Rule 107 clearances are necessary, at this point, for any of the material that it intends to

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<sup>16</sup> Transcript of 15 December 2023, p. 33, line 25 to p. 35, line 6; Order for Submissions, para. 21.

<sup>17</sup> Transcript of 15 December 2023, p. 40, line 22 to p. 42, line 22.

<sup>18</sup> SPO Submissions, paras 4-6; Transcript of 15 December 2023, p. 19, line 20 to p. 20, line 10.

<sup>19</sup> SPO Submissions, para. 3; Transcript of 15 December 2023, p. 19, lines 13-19; p. 29, lines 7-12; p. 30, lines 9-17.

<sup>20</sup> SPO Submissions, para. 9; *see also* Transcript of 15 December 2023, p. 24, lines 11-16.

<sup>21</sup> SPO Submissions, para 10; *see also* Transcript of 15 December 2023, p. 28, line 20 to p. 29, line 6.

<sup>22</sup> SPO Submissions, para. 16; *see also* Transcript of 15 December 2023, p. 31, line 22 to p. 32, line 4.

<sup>23</sup> SPO Submissions, para. 18.

present at trial.<sup>24</sup> The SPO adds that, to the extent possible, it will endeavour to disclose material in advance of the various deadlines it has proposed.<sup>25</sup>

11. The SPO further indicates that: (i) it agrees to provide and be provided with a consolidated disclosure chart within 15 days from the filing of any Pre-Trial Briefs; (ii) it proposes the adoption of the chart format used in the *Januzi and Bahtijari* Case, as well as other cases before the SC; and (iii) the Rule 109(c) chart should be limited to Rule 102(1)(b) material, since the detailed outline submitted with the Indictment, pursuant to Rule 86(3)(b) of the Rules (“Rule 86(3)(b) Outline”)<sup>26</sup> already provides extensive analysis of the Rule 102(1)(a) material.<sup>27</sup>

12. Lastly, the SPO agrees with the redaction regime adopted in the *Januzi and Bahtijari* Case.<sup>28</sup>

13. The Defence submits that the evidence in this case should be disclosed, as much as possible, ahead of the time limits set in the Rules, in order to make the defence of Mr Shala effective as soon as possible.<sup>29</sup> In particular, the Defence stresses that the Rule 102(1)(a) material should be disclosed speedily.<sup>30</sup>

14. The Defence agrees with the SPO’s proposal to provide and be provided with the Rule 109(c) chart within 15 days from the filing of any Pre-Trial Briefs<sup>31</sup> and with the adoption of the same redaction regime as in the *Januzi and Bahtijari* Case.<sup>32</sup>

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<sup>24</sup> SPO Submissions, para. 19.

<sup>25</sup> Transcript of 15 December 2023, p. 24, lines 17-19.

<sup>26</sup> KSC-BC-2023-11, F00002/A02, Specialist Prosecutor, *Annex 2 to Submission of Indictment for confirmation and related requests*, 20 November 2023, strictly confidential and *ex parte*.

<sup>27</sup> SPO Submissions, paras 22-23; Transcript of 15 December 2023, p. 35, lines 15-19.

<sup>28</sup> SPO Submissions, para. 24; Transcript of 15 December 2023, p. 36, lines 14-15.

<sup>29</sup> Transcript of 15 December 2023, p. 22, line 4 to p. 23, line 25.

<sup>30</sup> Transcript of 15 December 2023, p. 27, lines 3-24.

<sup>31</sup> Transcript of 15 December 2023, p. 35, lines 23-25.

<sup>32</sup> Transcript of 15 December 2023, p. 36, lines 18-19.

## B. CONFIDENTIAL INFORMATION AND WITNESS CONTACTS FRAMEWORK

15. The SPO submits that the Pre-Trial Judge should adopt the same Confidential Information and Witness Contacts Framework that was adopted in the *Januzi and Bahtijari* Case, as this will ensure the protection and privacy of witnesses, enable the preservation of evidence, and contribute to the expeditious conduct of the proceedings, without compromising the rights of the Accused.<sup>33</sup>

## 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 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 the 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,

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<sup>33</sup> SPO Request, para. 13.



*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 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 references to the underlying crimes, contextual elements of the crimes charged, the alleged conduct of the Accused or, where applicable, the 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), the 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 THE 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.<sup>34</sup>

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<sup>34</sup> [Order for Submissions](#), para. 20. See also KSC-BC-2023-10, F00076/RED, Pre-Trial Judge, [Public Redacted Version of the Framework Decision on Disclosure of Evidence and Related Matters](#) (“Januzi and Bahtijari Disclosure Decision”), 24 October 2023, para. 39; 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

## 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,<sup>35</sup> through the electronic software provided to this effect, as stipulated in Rules 98(1)(b) and 109(a) of the Rules.<sup>36</sup> The Parties shall abide by the Registry Instruction on Uploading Records to Legal Workflow when disclosing evidence electronically.<sup>37</sup>

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 the 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

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Chamber II, [Redacted First Decision on the Prosecutor's Request for Redactions and Related Requests](#), 3 July 2014, para. 17, and references therein.

<sup>35</sup> Similarly, ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-31-tENG, Pre-Trial Chamber I, [Decision on the Evidence Disclosure Protocol and Other Related Matters](#) ("Al Hassan Disclosure Decision"), 16 May 2018, para. 36; *Prosecutor v. Ongwen*, ICC-02/04-01/15-203, Pre-Trial Chamber II, [Decision Setting the Regime for Evidence Disclosure and Other Related Matters](#) ("Ongwen Disclosure Decision"), 27 February 2015, para. 10.

<sup>36</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 40; [Shala Disclosure Decision](#), para. 29.

<sup>37</sup> 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.<sup>38</sup>

### 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 the disclosure of evidence takes place under satisfactory conditions.<sup>39</sup>

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

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<sup>38</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 41; [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.

<sup>39</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 42; [Shala Disclosure Decision](#), para. 31. See, similarly, ICC, [Yekatom Disclosure Decision](#), para. 12; [Al Hassan Disclosure Decision](#), para. 14.

any other evidence upon which the Accused intends to rely to establish such alibi or grounds (Rule 104(1)(a) and (b) of the Rules); (h) all evidence in the Defence's custody or control, which is open to inspection by the SPO and is intended for use by the Defence at trial (Rules 104(5)(a) of the Rules); (i) all statements of witnesses, if any, whom the Defence intends to call to testify at trial or 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).<sup>40</sup>

#### 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.<sup>41</sup>

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.<sup>42</sup> 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 to the Pre-Trial Judge, together with reasons for the late disclosure.<sup>43</sup>

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<sup>40</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 43; [Shala Disclosure Decision](#), para. 32.

<sup>41</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 44; [Shala Disclosure Decision](#), para. 33.

<sup>42</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 45; *Similarly*, ICC, [Yekatom Disclosure Decision](#), para. 13; [Al Hassan Disclosure Decision](#), paras 20-21.

<sup>43</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 45; [Shala Disclosure Decision](#), para. 34.



## 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 a complete form within the time limit provided for in the Rules or as ordered by the Pre-Trial Judge.<sup>44</sup>

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.<sup>45</sup>

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.<sup>46</sup>

### 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)

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<sup>44</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 46; [Shala Disclosure Decision](#), para. 35.

<sup>45</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 47; [Shala Disclosure Decision](#), para. 36.

<sup>46</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 48; [Shala Disclosure Decision](#), para. 37. Similarly, ICC, [Yekatom Disclosure Decision](#), para. 18; [Al Hassan Disclosure Decision](#), para. 25; [Ongwen Disclosure Decision](#), para. 20.

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.<sup>47</sup>

50. In the present case, the SPO submits that: (i) it will disclose the Rule 102(1)(a) material by 11 January 2024,<sup>48</sup> which reflects the 30-day period prescribed by the Rules; (ii) there are a total of 32 items to be disclosed, including three statements obtained from the Accused; (iii) limited standard redactions are required for some of the items, but not for the Rule 86(3)(b) Outline; and (iv) the translation of certain material has already been completed.<sup>49</sup> The SPO adds that it will endeavour to disclose the Rule 102(1)(a) material, in particular material not requiring redactions, ahead of the 30-day deadline, but cannot commit to a date considering the judicial recess.<sup>50</sup>

51. The Defence stresses that the Rule 102(1)(a) material should be disclosed speedily, if possible before the 30-day deadline, and on a rolling basis, in order for the Defence to start its preparations.<sup>51</sup>

52. In light of the Parties' submissions, the Pre-Trial Judge finds it appropriate to set: (i) **Friday, 22 December 2023**, as the deadline for the disclosure of Rule 102(1)(a) material which does not require redactions; and (ii) **Thursday, 11 January 2024**, as the deadline for the disclosure of the Rule 102(1)(a) material requiring redactions. The Pre-Trial Judge further orders the SPO, notwithstanding the above time limits, to disclose Rule 102(1)(a) material on a rolling basis.

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<sup>47</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 49; [Shala Disclosure Decision](#), para. 38.

<sup>48</sup> Subject to the Pre-Trial Judge's decision on a request for protective measures it has made and the adoption of the Confidential Information and Witness Contacts Framework; see SPO Submissions, para. 9.

<sup>49</sup> SPO Submissions, paras 6-9; Transcript of 15 December 2023, p. 25, line 21 to p. 26, line 3.

<sup>50</sup> Transcript of 15 December 2023, p. 26, lines 2-17.

<sup>51</sup> Transcript of 15 December 2023, p. 22, line 6 to p. 23, line 25.

53. Further, noting the SPO's submission that the Rule 86(3)(b) Outline can be made available to the Defence without redactions,<sup>52</sup> the Pre-Trial Judge orders the Registry, pursuant to Rule 82(5) of the Rules, to reclassify the Rule 86(3)(b) Outline (filing F00002/A02) as confidential and lift the *ex parte* marking by **Friday, 22 December 2023**. In order to ensure the publicity of the proceedings, the SPO shall further file in the record of the case a public (redacted) version of the Rule 86(3)(b) Outline by **Friday, 12 January 2024**, upon completion of its disclosure of the Rule 102(1)(a) material.

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

54. 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.<sup>53</sup>

55. 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.<sup>54</sup>

56. Should the SPO wish to disclose additional statements of witnesses whom it intends to call to testify at trial, but fails to do so within the time limit set by the

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<sup>52</sup> SPO Submissions, para. 8.

<sup>53</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 52; [Shala Disclosure Decision](#), para. 41.

<sup>54</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 53; [Shala Disclosure Decision](#), para. 42.

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.<sup>55</sup>

57. The SPO submits that: (i) it expects to be ready to disclose Rule 102(1)(b) material by 19 January 2024 and, in any case, no later than 30 days prior to the opening of its case; (ii) it has currently identified 103 items under Rule 102(1)(b) of the Rules, including 15 witness statements, documentary evidence, such as records from seized mobile telephones, audio/visual material, and call data records; (iii) additional material may still be obtained; (iv) the Rule 102(1)(b) material currently in its possession has been translated where needed; and (v) some of the material may require redactions.<sup>56</sup>

58. The Defence reiterates its submissions that the disclosure should be done swiftly.<sup>57</sup>

59. Considering the Parties' submissions on the proposed timeline for the 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, 19 January 2024**, as the deadline for disclosure under Rule 102(1)(b) of the Rules. In meeting its disclosure obligation, the SPO shall disclose all documents and

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<sup>55</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 54; [Shala Disclosure Decision](#), para. 43.

<sup>56</sup> SPO Submissions, paras 10-15; Transcript of 15 December 2023, p. 28, line 20 to p. 29, line 12.

<sup>57</sup> Transcript of 15 December 2023, p. 29, lines 15-16, referring to p. 22, line 4 to p. 23, line 25.

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.<sup>58</sup> Further, the SPO shall file any requests for protective measures as soon as possible, but no later than **Monday, 8 January 2024**. The Defence may respond, if it so wishes, by **Thursday, 11 January 2024**. The Pre-Trial Judge will not entertain any reply. This briefing schedule will 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**

60. Rule 102(3) material encompasses evidence deemed by the Defence to be material to its case preparation, which is in the custody or control of the SPO or was obtained from or belonged to the Accused, including statements, documents, photographs, and other tangible objects.<sup>59</sup>

61. 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.<sup>60</sup>

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<sup>58</sup> SPO Submissions, para. 15.

<sup>59</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 59; [Shala Disclosure Decision](#), para. 46.

<sup>60</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 60; [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.

62. 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.<sup>61</sup> 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*.<sup>62</sup>

63. 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, in the exercise of the Accused's rights under the Law and the Rules.<sup>63</sup> 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.<sup>64</sup> The

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<sup>61</sup> 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").

<sup>62</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 61; [Shala Disclosure Decision](#), para. 48; [Gucati and Haradinaj Appeals Decision on Disclosure](#), paras 38, 40, 42, 44, 46.

<sup>63</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 62; [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.

<sup>64</sup> See [Gucati and Haradinaj Appeals Decision on Disclosure](#), para. 41. See similarly, STL, [2 October 2013 Decision](#), para. 22, and references therein.

Defence *preparation* is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence,<sup>65</sup> or related to the SPO's case.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

64. The Defence may also request the disclosure or inspection of material not included in the SPO's notice, but claimed by the Defence to be material for its preparation. In such a case, however, the Defence must: (i) provide suitable parameters for specification of any requested items, so as to enable the SPO to identify the items sought; and (ii) indicate the materiality of the requested items for Defence preparation. The Defence may not rely on mere general descriptions of or conclusory allegations on the requested information and should avoid making requests in the form of catch-all phrases.<sup>69</sup>

65. 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.<sup>70</sup> 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

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<sup>65</sup> Similarly, ICC, [11 July 2008 Judgment](#), para. 77.

<sup>66</sup> Similarly, STL, [2 October 2013 Decision](#), para. 22, and references therein.

<sup>67</sup> See [Gucati and Haradinaj Appeals Decision on Disclosure](#), para. 41.

<sup>68</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 62.

<sup>69</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 63; [Shala Disclosure Decision](#), para. 50.

<sup>70</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 64; [Shala Disclosure Decision](#), para. 51.



part or portion of said item, nor any discrete information therein, shall be disclosed.

66. The SPO submits that: (i) it anticipates providing the Defence with a detailed notice of the Rule 102(3) material by 26 January 2024; (ii) the items currently identified are less than 50, although the review is still ongoing; and (iii) the majority of the material will not require redactions.<sup>71</sup>

67. The Defence makes no specific observations on this point.<sup>72</sup>

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

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<sup>71</sup> SPO Submissions, paras 16-17; Transcript of 15 December 2023, p. 31, line 22 to p. 32, line 4.

<sup>72</sup> Transcript of 15 December 2023, p. 32, lines 7-8.

#### 4. Rule 103: Exculpatory Evidence

69. 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.<sup>73</sup> The initial determination as to whether or not certain information is exculpatory in nature falls upon the SPO and must be done in good faith.<sup>74</sup> 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.<sup>75</sup> The absence of a strict deadline for exculpatory evidence does not translate into delaying the disclosure process to a later stage.<sup>76</sup>

70. The SPO submits that: (i) it has currently identified approximately 14 items of exculpatory evidence; (ii) these items consist of documentary evidence and will

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<sup>73</sup> Transcript of 15 December 2023, p. 32, lines 12-18; See also [Januzi and Bahtijari Disclosure Decision](#), para. 68; [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, [Yekatombi Disclosure Decision](#), para. 16; [Ongwen Disclosure Decision](#), para. 18.

<sup>74</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 68; [Shala Disclosure Decision](#), para. 54. Similarly, ICTR, [27 November 2006 Decision](#), para. 11, and references therein.

<sup>75</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 68; [Thaçi et al. Disclosure Non-Compliance Decision](#), para. 28.

<sup>76</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 68; [Thaçi et al. Disclosure Non-Compliance Decision](#), para. 28.

require redactions; and (iii) its review is still continuing and the SPO will disclose any Rule 103 material immediately, subject to the application of required redactions.<sup>77</sup>

71. The Defence does not make any particular observations on this point.<sup>78</sup>

72. In light of the Parties' submissions, the Pre-Trial Judge considers it appropriate to order the SPO to disclose the Rule 103 material that it has already identified immediately and on a rolling basis, subject to the application of any redactions. Any further Rule 103 material shall be disclosed immediately upon its discovery and on a rolling basis, particularly if the material does not require redactions. To the extent that any potentially exculpatory material requires redactions, the SPO shall seize the Pre-Trial Judge/Panel at the earliest opportunity for a ruling on the matter, in order to facilitate the immediate disclosure of such material to the Defence.<sup>79</sup>

### 5. Rule 107: Protected Material

73. 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.<sup>80</sup>

74. 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.

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<sup>77</sup> SPO Submissions, para. 18; Transcript of 15 December 2023, p. 33, lines 1-8.

<sup>78</sup> Transcript of 15 December 2023, p. 33, lines 11-12.

<sup>79</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 70.

<sup>80</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 71; [Shala Disclosure Decision](#), para. 57.

The SPO may also apply for counterbalancing measures pursuant to Rule 108(2) of the Rules.<sup>81</sup>

75. The SPO submits that Rule 107 clearances are, at this time, unnecessary for material which the SPO currently anticipates tendering into evidence at trial.<sup>82</sup>

76. The Defence does not make any submissions on this point.<sup>83</sup>

77. Having taken note of the SPO's undertaking,<sup>84</sup> the Pre-Trial Judge orders the SPO to promptly bring to the attention of the Pre-Trial Judge any issues regarding material affected by Rule 107 of the Rules.

### C. DISCLOSURE OF EVIDENCE BY THE DEFENCE

78. 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.<sup>85</sup>

79. Accordingly, within a time limit set by the Pre-Trial Judge and after the submission of the SPO Pre-Trial Brief and list of witnesses and proposed exhibits, the Defence will be invited to file their Pre-Trial Briefs indicating the information requested in Rule 95(5) of the Rules, without prejudice to the Defence's right to

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<sup>81</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 72; [Shala Disclosure Decision](#), para. 58.

<sup>82</sup> SPO Submissions, para. 19.

<sup>83</sup> Transcript of 15 December 2023, p. 33, line 23.

<sup>84</sup> SPO Submissions, para. 20; Transcript of 15 December 2023, p. 33, lines 13-20.

<sup>85</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 75; [Shala Disclosure Decision](#), para. 61.

notify its intent to offer a defence of alibi or any ground for excluding criminal responsibility at any time earlier.<sup>86</sup>

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

81. The Pre-Trial Judge recalls that the disclosing Party must ensure that the evidence, including witness statements, is disclosed in English, the working language of the proceedings, as determined in accordance with Article 20 of the Law and Rule 8(3) of the Rules.<sup>87</sup>

82. On the other hand, Article 21(4)(a) of the Law stipulates that the Accused must be informed in a language he understands of the nature and cause of the charges against him, in the present case, Albanian.<sup>88</sup> However, this right does not equate to an unfettered and absolute right to receive all evidence, documents, and filings in the Accused's language. Translating the entire case file, including evidence, would prejudice the right under Article 21(4)(d) of the Law to be tried within a

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<sup>86</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 76; [Shala Disclosure Decision](#), para. 62.

<sup>87</sup> [Decision on Working Language](#), para. 28(a). See also [Januzi and Bahtijari Disclosure Decision](#), para. 78; [Shala Disclosure Decision](#), para. 64.

<sup>88</sup> In this context, it is noted that the Accused received the Arrest Warrant, Transfer Order, and Confirmed Indictment in Albanian; see Registry Report on Arrest and Transfer, paras 11, 30; Transcript of 13 December 2023, p. 4, line 14; p. 5, lines 20-22.

reasonable time.<sup>89</sup> Therefore, a balance must be achieved between these competing rights in order to make proceedings fair and expeditious at the same time.<sup>90</sup>

83. As a result of the above, the Rules establish that all statements of witnesses whom the SPO intends to call to testify at trial shall be made available in the language the Accused understands and speaks, as expressly required by Rule 102(1) of the Rules. All other evidence shall be submitted in English, in accordance with the Decision on Working Language, unless otherwise ordered by the Pre-Trial Judge.<sup>91</sup>

84. The free assistance of an interpreter together with Counsel's professional advice, as provided for in Article 21(4)(c) and (g) of the Law, will assist the Accused in understanding the evidence and related filings that are not in Albanian.<sup>92</sup> The Defence may also request the SPO to provide the Albanian translation of specific evidence, or parts thereof, other than statements of witnesses whom the SPO intends to call to testify at trial.<sup>93</sup> When making such requests, the Defence shall indicate the reasons why it is essential to receive these pieces of evidence in Albanian and why the Accused is not in a position to appreciate the content of such evidence with the assistance of an interpreter and Counsel's advice. In the event of disagreement between the Defence and the SPO in this regard, the Defence must seize the Pre-Trial Judge as soon as possible.<sup>94</sup>

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<sup>89</sup> Similarly, ICC, [Ongwen Disclosure Decision](#), paras 31-32; *Prosecutor v. Bemba*, ICC-01/05-01/08-307, Pre-Trial Chamber III, [Decision on the Defence's Request Related to Language Issues in the Proceedings](#), 4 December 2008, para. 15.

<sup>90</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 79; [Shala Disclosure Decision](#), para. 65.

<sup>91</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 80; [Shala Disclosure Decision](#), para. 66.

<sup>92</sup> See, similarly, ICC, *Prosecutor v. Yekatom*, ICC-01/14-01/18-56-Red, Pre-Trial Chamber II, [Public Redacted Version of "Decision on Language Proficiency of Alfred Yekatom for the Purposes of the Proceedings"](#), 11 January 2019, para. 18; [Ongwen Disclosure Decision](#), para. 33.

<sup>93</sup> Similarly, ICC, *Prosecutor v. Yekatom and Ngaiissona*, ICC-01/04-01/18-163, Pre-Trial Chamber II, [Second Decision on Disclosure and Related Matters](#), 4 April 2019, para. 38; [Al Hassan Disclosure Decision](#), para. 23.

<sup>94</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 81; [Shala Disclosure Decision](#), para. 67.

## E. PROCEDURE FOR DISCLOSURE OF EVIDENCE

85. The accompanying material foreseen in Rule 109(b) and (c) of the Rules is designed to put the receiving Party in the best possible position to familiarise itself with and navigate through the disclosed material, in order to focus its preparation and, more generally, to enhance the expeditiousness and fairness of the proceedings.<sup>95</sup>

86. 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.<sup>96</sup> The 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. The Pre-Trial Judge further recalls that he has adopted during the Status Conference the following case-specific subcategories in Legal Workflow, as adopted recently also in the *Januzi and Bahtijari* Case:<sup>97</sup> (i) “Count 1”, “Count 2”, “Count 3” (under the Standard Category “Offences”); (ii) “commission”, “co-perpetration”, “agreement”, “assistance”, and “attempt” (under the Standard

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<sup>95</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 82; [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.

<sup>96</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 86; [Shala Disclosure Decision](#), para. 71.

<sup>97</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 88; KSC-BC-2023-10, Transcript of Hearing, 3 November 2023, public, p. 80, lines 5-11, referring to F00084, Specialist Prosecutor, [Prosecution Submissions for Second Status Conference](#), 31 October 2023, public, para. 9.



Category “Alleged Conduct of the Accused”); and (iii) “Shala” (under the Standard Category “Accused”).<sup>98</sup> This matter will not be addressed further.

88. With regard to the Rule 109(c) chart, and having taken note of the Parties submissions,<sup>99</sup> the Pre-Trial Judge considers it appropriate to adopt the chart recently adopted also in the *Januzi and Bahtijari* Case.<sup>100</sup> As the Rule 86(3)(b) 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.<sup>101</sup>

89. 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 of 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.<sup>102</sup>

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<sup>98</sup> See Transcript of 15 December 2023, p. 35, lines 1-6, referring to Order for Submissions, para. 21.

<sup>99</sup> See *supra* paras 11 and 14.

<sup>100</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 90, referring further to KSC-BC-2020-07, F00109/A01, Specialist Prosecutor, [Annex 1 to Submissions on Rule 109\(c\) Categorisation](#), 1 February 2021, public; [Shala Disclosure Decision](#), para. 73.

<sup>101</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 90. 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.

<sup>102</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 91; [Shala Disclosure Decision](#), para. 74; [Gucati and Haradinaj Categorisation Decision](#), para. 21.

## F. RESTRICTIONS TO DISCLOSURE

### 1. General Principles

90. The Pre-Trial Judge notes that full disclosure of all material and relevant evidence is the principle, while withholding information is the exception.<sup>103</sup> As a combined reading of Article 21(6) of the Law and Rules 80(1) and 108(1) of the Rules indicates, any restrictions to full disclosure must be strictly necessary with a view to protecting: (i) the safety, physical and psychological well-being, dignity, and privacy of witnesses, victims participating in the proceedings, and other persons at risk on account of the testimony given by witnesses of the SC, provided that these measures are consistent with the rights of the Accused; (ii) ongoing or future investigations; and (iii) the public interest and the rights of third parties. In this context, it is also recalled that it is permissible to withhold certain information from the Defence prior to trial.<sup>104</sup>

91. Redactions for the purpose of protecting ongoing or future investigations or the public interest and the rights of third parties are applied only upon a request of the Specialist Prosecutor or the Defence, filed confidentially and *ex parte*.<sup>105</sup> Redactions for the purpose of protecting witnesses, victims participating in the proceedings, and other persons at risk on account of testimony given by witnesses,

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<sup>103</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 92; [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.

<sup>104</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 92; [Shala Disclosure Decision](#), para. 75. Similarly, ICC, [13 May 2008 Judgment](#), para. 68.

<sup>105</sup> Rule 108(1) and (6) of the Rules.

are applied either upon a request from the Parties, filed confidentially and *ex parte*, or *proprio motu*.<sup>106</sup>

92. Lastly, the need for redactions is to be assessed on a case-by-case basis.<sup>107</sup> In deciding upon the applicable redaction regime, the Pre-Trial Judge must thus strike a balance between the competing interests at stake, whilst ensuring that the proceedings are fair and expeditious.<sup>108</sup>

## 2. Legal Test

93. In assessing if certain information may be withheld from the receiving party, it must be ascertained whether:<sup>109</sup>

- (i) the disclosure of the information in question to the receiving Party, as opposed to the general public, poses an objectively justifiable risk to the protected person or interest;
- (ii) the protective measure is strictly necessary.<sup>110</sup> Thus, if less restrictive protective measures are both sufficient and feasible, such protective measures must be chosen; and
- (iii) the protective measure is proportionate in view of the prejudice caused to the Accused and a fair trial.<sup>111</sup>

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<sup>106</sup> Rule 80(1) and (3) of the Rules.

<sup>107</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 94; [Shala Disclosure Decision](#), para. 77. Similarly, ICC, [13 October 2006 Judgment](#), para. 36; [13 May 2008 Judgment](#), paras 2, 59, 66.

<sup>108</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 94; [Shala Disclosure Decision](#), para. 77.

<sup>109</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 95; [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.

<sup>110</sup> Article 21(6) of the Law.

<sup>111</sup> Rule 80(1) of the Rules.

### 3. Redaction Regime

94. The SPO and the Defence support the adoption of the redaction regime in place in the *Januzi and Bahtijari Case*.<sup>112</sup>

95. 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.<sup>113</sup>

96. 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.<sup>114</sup> In this case, the disclosing Party is not required to submit a discrete application. The receiving Party is entitled to challenge any redaction applied after the evidence has been disclosed.<sup>115</sup>

97. 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.<sup>116</sup>

98. 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

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<sup>112</sup> SPO Submissions, para. 24; Transcript of 15 December 2023, p. 36, lines 14-19.

<sup>113</sup> See also [Januzi and Bahtijari Disclosure Decision](#), para. 97; [Shala Disclosure Decision](#), para. 80.

<sup>114</sup> See *infra* para. 105

<sup>115</sup> See *infra* para. 100.

<sup>116</sup> See *infra* para. 106.

code, as listed below, unless such indication would defeat the purpose of the redaction. This format will allow the reader to immediately recognise the type of underlying information that is redacted or suppressed and the corresponding justification. In the event that the redacted information falls under more than one category, all relevant codes should be indicated.<sup>117</sup>

99. 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.<sup>118</sup>

100. 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.<sup>119</sup>

101. The disclosing Party must monitor the continued necessity of redactions and shall re-disclose evidence with lesser redactions without seeking the prior

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<sup>117</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 100; see also [Shala Disclosure Decision](#), para. 83.

<sup>118</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 101; see also [Shala Disclosure Decision](#), para. 84.

<sup>119</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 102; see also [Shala Disclosure Decision](#), para. 85.

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 may further be lifted following: (i) an agreement between the Parties that an objectively justifiable 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.<sup>120</sup>

102. In order to verify, at his discretion, the validity of any redactions applied by the disclosing Party and, if necessary, order the disclosing Party *proprio motu* to lift, partially or fully, any redactions, after having given the disclosing Party the opportunity to submit its observations, the Pre-Trial Judge considers it appropriate for him to receive the unredacted version of the evidence at the time the redacted version is disclosed to the receiving Party.<sup>121</sup> This will enable the Pre-Trial Judge to verify, pursuant to Rules 80(1) and 108(1) of the Rules, the scope and validity of any redaction, thus adding another layer of review for the benefit of the receiving Party. It will also enable the Pre-Trial Judge to react in a swift way if challenges are raised to the redactions applied, as the case may be. This is without prejudice to the fact that the disclosing Party may only rely on the redacted form of the evidence, as disclosed to the receiving Party.<sup>122</sup>

103. 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

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<sup>120</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 103; see also [Shala Disclosure Decision](#), para. 86.

<sup>121</sup> The former should be accessible in the electronic management system to the Pre-Trial Judge only. Similarly, ICC, [Al Hassan Disclosure Decision](#), para. 32; [Yekatom Disclosure Decision](#), para. 28.

<sup>122</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 104; see also [Shala Disclosure Decision](#), para. 87.

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.<sup>123</sup>

#### 4. Standard Redactions

104. The categories for standard redactions are clearly delineated and well-entrenched in the practice of other courts<sup>124</sup> and have been adopted in other cases before the SC.<sup>125</sup> The Pre-Trial Judge herewith adopts the below categories of standard redactions and their justifications in light of the test set out above.<sup>126</sup> In the Pre-Trial Judge's view, the disclosure of the information categorized below to the receiving Party regularly entails an objectively justifiable 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.<sup>127</sup>

105. 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

<sup>123</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 105.

<sup>124</sup> For example, ICC, [Yekatom Disclosure Decision](#), paras 25-26; [Al Hassan Disclosure Decision](#), para. 29.

<sup>125</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 107; [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.

<sup>126</sup> See *supra* para. 93.

<sup>127</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 106; see also [Shala Disclosure Decision](#), para. 88.



frequently to, or are based in, the field, insofar as disclosure of this information could put these persons at risk and/or hinder their work, thereby putting ongoing or future investigations at risk (to be further specified as “A.2.1.” for translators/interpreters, “A.2.2.” for stenographers, “A.2.3.” for psycho-social experts, “A.2.4.” for other medical experts, “A.2.5.” for other staff members falling within this category, and “A.2.6.” for other contractors falling within this category).

**Category “A.3”:** Identifying and contact information of investigators, insofar as, mindful that the Parties have only a limited pool of investigators, the disclosure of this information could put them at risk and hinder their work in the field, 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 99, 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 99, above, the disclosing Party shall indicate the unique pseudonym of the intermediary, in addition to the category code (e.g. “A.4.1.”, “A.4.2.”, “A.4.3.”, etc).

**Category “A.5”:** Identifying and contact information of leads and sources, including potential witnesses,<sup>128</sup> insofar as disclosure of this information could result in the leads and sources being intimidated or interfered with which, in turn, could prejudice ongoing or future investigations (to be further specified as “A.5.1.” for individual leads and sources, including potential witnesses, “A.5.2.” for non-governmental organizations, “A.5.3.” for international organizations, “A.5.4.” for national governmental agencies, “A.5.5.” for academic institutions, “A.5.6.” for private companies”, and “A.5.7.” for other sources). Where the lead or source provides material that is disclosed, their identity should be disclosed as the source in the context of that disclosure, provided that there are no additional security concerns and the lead or source is not protected under Article 35(2)(e) of the Law and Rule 107 of the Rules.

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<sup>128</sup> Potential witnesses are those that have either been or are about to be interviewed by the Parties. For the classification as “prosecution sources”, see ICC, *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-476 (OA2), Appeals Chamber, [\*Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”\*](#), 14 May 2008, paras 1-2, 46, 49. Potential witnesses differ from “innocent third parties” (see category B.3 below): whereas the former have been or will be approached by the Parties during their respective investigations in the context of proceedings before the SC, innocent third parties are not approached in the context of the Parties’ investigations and may not be aware that their name is mentioned in the context of such investigation. This distinction may be of importance for the receiving Party and should be marked by the use of different codes.

**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.

*(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 the Specialist Chambers’ proceedings and may not even be aware that a family member is a witness and are, therefore, at risk of being associated with the Specialist Chambers. Redactions to contact information should be ongoing. Where a redaction to identifying information is applied solely to protect a witness for whom redactions are no longer justified, the redaction under this category should equally be lifted when the identity of the witness is disclosed. Where the redaction to identifying information under this category is applied for a family member’s own security and that family member’s identity is of no relevance to any known issue in the case, redactions under this category should be ongoing. For redactions falling outside the above scenarios, the disclosing Party should make an application to the relevant Panel.

**Category “B.3”:** Identifying and contact information of individuals who are at risk on account of the testimony of witnesses, but who are not victims, current or prospective witnesses or sources or members of their families (“innocent third parties”),<sup>129</sup> including phone numbers, locations/addresses, email addresses, and photographs, insofar as disclosure of this information may pose a risk to their safety, dignity, privacy, and well-being. Such individuals have not agreed to be part of Specialist Chambers’ proceedings and may not even be aware that their name is mentioned in the context of those proceedings and are, therefore, at risk of being perceived as potential witnesses or collaborators with the Specialist Chambers. Redactions to contact information under this category should be ongoing. For individuals of no relevance to any known issue in the case,

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<sup>129</sup> Rule 80(1) of the Rules. *Similarly*, ICC, [13 May 2008 Judgment](#), paras 1, 40, 56.

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.

**Category “B.5”:** Other redactions under Rule 108(1)(b)-(c) of the Rules, insofar as disclosure of the redacted information would cause grave risk to the security of a witness, victims participating in the proceedings, or members of their family or be contrary for any other reason to the public interest or the rights of third parties.

*(c) Other information not subject to disclosure in accordance with the Rules:*

**Category “C”:** Internal work product contained in any material subject to disclosure, pursuant to Rule 106 of the Rules. Such redactions do not require the Panel’s approval.

**Category “D”:** Communications made in the context of the professional relationship between a person and his or her Specialist Counsel pursuant to Rule 111(1) of the Rules. Such redactions do not require the Panel’s approval. They may not be applied to information falling under Rule 111(2)-(6) of the Rules. In these cases, an application to the relevant Panel should be made.

**Category “F”:** Redactions authorised in prior proceedings pursuant to Rule 81(1)(a) of the Rules. Such redactions shall contain the relevant case and decision number.

Category A-D redactions should, pursuant to Rules 106 and 108(1) of the Rules, be applied, *mutatis mutandis*, to equivalent information from other national or international law enforcement agencies, including the Kosovo police and prosecution, the ICTY, KFOR, UNMIK, and EULEX Kosovo.<sup>130</sup> Where such redactions are applied, an identifier for the agency in question should be included in addition to the relevant redaction code.

## 5. Non-Standard Redactions

106. Non-standard redactions concern, in particular, the names of witnesses whose identity must be withheld from the opposing Party prior to the

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<sup>130</sup> Article 37(1) of the Law.

commencement of the trial and instances where entire pieces of evidence must be withheld.<sup>131</sup> In such cases, the disclosing Party shall submit an application to the relevant Panel sufficiently in advance so as to allow for a timely decision thereon and the subsequent disclosure of evidence within the time limits prescribed in the Rules or the Panel's decision. At the same time, a redacted version of the application should be provided to the receiving Party; 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"**.<sup>132</sup>

107. 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.<sup>133</sup>

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<sup>131</sup> [Januzi and Bahtijari Disclosure Decision](#), para. 108; [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.

<sup>132</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 108; see also [Shala Disclosure Decision](#), para. 90.

<sup>133</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 109; see also [Shala Disclosure Decision](#), para. 91.

## G. CONFIDENTIAL INFORMATION AND WITNESS CONTACTS FRAMEWORK

108. The Pre-Trial Judge notes, at the outset, that the SPO proposes the adoption of the Confidential Information and Witness Contacts Framework in place in the *Januzi and Bahtijari* Case.<sup>134</sup>

109. 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.<sup>135</sup>

110. The Pre-Trial Judge sees no reason to depart from the Confidential Information and Witness Contacts Framework adopted in the *Januzi and Bahtijari* Case and adopts the same framework in the present case, as attached to the present decision.

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<sup>134</sup> SPO Request, para. 13.

<sup>135</sup> See [Januzi and Bahtijari Disclosure Decision](#), para. 111. 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](#), 24 June 2022, public, paras 116, 121-125. The Court of Appeals Panel denied the appeals submitted against this decision, see 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”](#), 27 December 2022, public.

## V. DISPOSITION

111. 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 which does not require redactions **by Friday, 22 December 2023;**
- c) **ORDERS** the SPO to complete the disclosure of material falling under Rule 102(1)(a) of the Rules requiring redactions **by Thursday, 11 January 2024;**
- d) **ORDERS** the Registry to reclassify the Rule 86(3)(b) Outline (filing F00002/A02) as confidential and lift the *ex parte* marking **by Friday, 22 December 2023;**
- e) **ORDERS** the SPO to file a public (redacted) version of the Rule 86(3)(b) Outline **by Friday, 12 January 2024;**
- f) **ORDERS** the SPO to complete disclosure of material falling under Rule 102(1)(b) of the Rules **by Friday, 19 January 2024**, and to file any requests for protective measures in relation to such material as soon as possible, but no later than **Monday, 8 January 2024;**
- g) **ORDERS** the Defence to respond to any request for protective measures for Rule 102(1)(b) material, if it so wishes, **by Thursday, 11 January 2024;**
- h) **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;**
- i) **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;
- j) **ORDERS** the SPO, on the basis of any Defence indication(s) under point (i) 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;
- k) **ORDERS** the SPO, on the basis of any Defence indication(s) as referred to under point (i) 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;
- l) **ORDERS** the SPO to seize the Pre-Trial Judge, **within fourteen (14) days** of the Defence indication(s) as referred to under point (i) above, should it dispute the materiality of evidence;
- m) **ORDERS** the SPO to disclose any batch(es) of Rule 103 material immediately and on a rolling basis;
- n) **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;
- o) **ORDERS** the SPO to promptly bring to the attention of the Pre-Trial Judge any issues regarding material affected by Rule 107 of the Rules;
- p) **ORDERS** the Parties to follow the terms of the redaction regime as set forth in paragraphs 90-107 of this decision;



- q) **ORDERS** the Parties to use the Standard Categories in the metadata field of each item of disclosure and the case-specific subcategories, as indicated in paragraphs 86-87 of this decision;
- r) **ORDERS** the Parties to file their respective Rule 109(c) charts, as indicated in paragraphs 88-89 of this decision, **within one (1) week** of the filing of their respective Pre-Trial Briefs;
- s) **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 106 of this decision;
- t) **GRANTS** the SPO Request to adopt the Confidential Information and Witness Contacts Framework in place in the *Januzi and Bahtijari* Case and **ANNEXES** said framework to the present decision; and
- u) **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.



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

Dated this Tuesday, 19 December 2023

At The Hague, the Netherlands.