



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: KSC-BC-2023-10

**The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and
Haxhi Shala**

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 17 May 2024

Language: English

Classification: Public

**Public Redacted Version of Decision on Prosecution Request to Amend the
Indictment**

Specialist Prosecutor

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39 of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), and Rules 86(3)-(4) and (9), and 90(1)(b) and (2) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 2 October 2023, the Pre-Trial Judge confirmed the indictment against Sabit Januzi ("Mr Januzi") and Ismet Bahtijari ("Mr Bahtijari") ("Case 10 Confirmation Decision").² On 4 October 2023, the Specialist Prosecutor's Office ("SPO") filed the indictment against Mr Januzi and Mr Bahtijari, as confirmed by the Pre-Trial Judge ("Case 10 Confirmed Indictment"), together with a Rule 86(3)(b) outline ("Rule 86(3)(b) Outline").³

2. On 10 November 2023, the SPO filed a request seeking leave to amend the Case 10 Confirmed Indictment, in particular to correct: (i) the spelling of Mr Bahtijari's last name; and (ii) evidentiary details relevant to material facts, consistent with revisions to a transcript relied upon in the supporting materials of the Case 10 Confirmed Indictment ("First Amendment").⁴

3. On 4 December 2023, the Pre-Trial Judge confirmed the indictment against Haxhi Shala ("Mr Shala").⁵ On 6 December 2023, the SPO filed the indictment

¹ KSC-BC-2023-10, F00001, President, *Decision Assigning a Pre-Trial Judge*, 11 September 2023, public; KSC-BC-2023-11, F00001, President, *Decision Assigning a Pre-Trial Judge*, 20 November 2023, public.

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

³ KSC-BC-2023-10, F00010, Specialist Prosecutor, *Submission of Confirmed Indictment*, 4 October 2023, strictly confidential and *ex parte*, with Annex 1, strictly confidential. A public redacted version of the submission and of the annex were filed on 6 October 2023, F00016 and F00016/A01.

⁴ KSC-BC-2023-10, F00098, Specialist Prosecutor, *Prosecution Request for Leave to Amend the Indictment*, 10 November 2023, public, with Annex 1, strictly confidential, and Annex 2, public.

⁵ KSC-BC-2023-11, F00005, Pre-Trial Judge, *Decision on the Confirmation of the Indictment*, 4 December 2023, confidential. A public redacted version of the decision was filed on 30 January 2024, F00005/RED.

against Mr Shala, as confirmed by the Pre-Trial Judge (“Case 11 Confirmed Indictment”).⁶

4. On 13 December 2023, the SPO filed a request to join the case against Mr Januzi and Mr Bahtijari (“Case 10”) with the case against Mr Shala (“Case 11”) (“Request for Joinder”).⁷

5. On 12 January 2024, in support of the Request for Joinder and pursuant to an order of the Pre-Trial Judge,⁸ the SPO filed in Case 10 and Case 11 a proposed joint indictment (“Joint Indictment”) and joint Rule 86(3)(b) outline (“Joint Rule 86(3)(b) Outline”).⁹ In the Joint Indictment, the SPO included the First Amendment and further amendments with respect to Case 10, namely the factual allegations that Mr Januzi conveyed to Witness 1 the offer of Mr Shala that he and unnamed others would “help” Witness 1 if he agreed to withdraw his testimony, to which Witness 1 responded that, if Mr Shala and/or the others brought him 200,000 Euros, they would have a deal (“Second Amendment”).¹⁰

6. On 8 February 2023, the Pre-Trial Judge issued a decision (i) granting the Request for Joinder, and (ii) granting the SPO leave to amend the Case 10 Confirmed Indictment in relation to the First Amendment, while rejecting the Second Amendment (“Joinder Decision”).¹¹ The Pre-Trial Judge thus ordered the

⁶ KSC-BC-2023-11, F00007, Specialist Prosecutor, *Submission of Confirmed Indictment*, 6 December 2023, public, with Annex 1, confidential. A public redacted version of the submission and of the Annex were filed on 12 December 2023, F00013 and F00013/A01.

⁷ KSC-BC-2023-10, F00132, Specialist Prosecutor, *Prosecution Request for Joinder*, 13 December 2023, public; KSC-BC-2023-11, F00016, Specialist Prosecutor, *Prosecution Request for Joinder*, 13 December 2023, public.

⁸ KSC-BC-2023-10, Transcript of Hearing, 14 December 2023, public, p. 132, line 20 to p. 133, line 10; KSC-BC-2023-11, Transcript of Hearing, 15 December 2023, public, p. 37, line 8 to p. 38, line 23.

⁹ KSC-BC-2023-10, F00146, Specialist Prosecutor, *Submission of Joint Indictment*, 12 January 2024, public, with Annexes 1-2, confidential; KSC-BC-2023-11, F00031 Specialist Prosecutor, *Submission of Joint Indictment*, 12 January 2024, public, with Annexes 1-2, confidential (collectively, “Joint Indictment Submissions”).

¹⁰ Annex 1 to Joint Indictment Submissions, paras 16-17.

¹¹ KSC-BC-2023-10, F00161, Pre-Trial Judge, *Decision on Request for Joinder and Amendment of the Indictment*, 8 February 2024, confidential; a public redacted version of the decision was issued on the same day, F00161/RED; KSC-BC-2023-11, F00041, Pre-Trial Judge, *Decision on Request for Joinder and*

SPO to file an amended version of the Case 10 Confirmed Indictment, incorporating only the First Amendment.¹² The Pre-Trial Judge further invited the SPO to file a proper request with respect to the Second Amendment, in accordance with the provisions of Rule 86 of the Rules.¹³ The Pre-Trial Judge also considered the Joint Indictment non-operative, and indicated that the joint case will proceed under the case record number KSC-BC-2023-10 and, at that stage, on the basis of the Case 10 Confirmed Indictment and Case 11 Confirmed Indictment.¹⁴

7. On 16 February 2024, pursuant to the Joinder Decision, the SPO filed an amended version of the Case 10 Confirmed Indictment, incorporating the First Amendment (“Revised Case 10 Confirmed Indictment”).¹⁵ On the same day, the SPO filed its Pre-Trial Brief and accompanying materials.¹⁶

8. On 27 February 2024, pursuant to the Joinder Decision and Rule 90(1)(b) of the Rules, the SPO filed a request to amend the Revised Case 10 Confirmed Indictment and the Case 11 Confirmed Indictment (“Request”),¹⁷ and resubmitted the Joint Indictment¹⁸ and the Joint Rule 86(3)(b) Outline.¹⁹

9. On 7 March 2024, the Defence for Mr Januzi (“Januzi Defence”) submitted a response to the Request, objecting to it.²⁰ The SPO replied on 15 March 2024.²¹

Amendment of the Indictment, 8 February 2024, confidential; a public redacted version of the decision was issued on the same day, F00041/RED.

¹² Joinder Decision, para. 58(d).

¹³ Joinder Decision, paras 55, 58(e).

¹⁴ Joinder Decision, paras 55, 56(i), 58.

¹⁵ KSC-BC-2023-10, F00176, Specialist Prosecutor, *Submission of Amended Indictment*, 16 February 2024, public, with Annex 1, confidential, and Annex 2, public.

¹⁶ KSC-BC-2023-10, F00177, Specialist Prosecutor, *Submission of Prosecution Pre-Trial Brief, Witness and Exhibit Lists, and Rule 109(c) Chart*, 16 February 2024, public, with Annexes 1-4, confidential.

¹⁷ KSC-BC-2023-10, F00189, Specialist Prosecutor, *Request to Amend Pursuant to Rule 90(1)(b)*, 27 February 2024, confidential, with Annexes 1-2, confidential.

¹⁸ Annex 1 to the Request.

¹⁹ Annex 2 to the Request.

²⁰ KSC-BC-2023-10, F00199, Specialist Counsel for Sabit Januzi, *Response to the Request to Amend Pursuant to Rule 90(1)(b)* (“Defence Response”), 7 March 2024, confidential.

²¹ KSC-BC-2023-10, F00216, Specialist Prosecutor, *Prosecution Reply to ‘Response to the Request to Amend Pursuant to Rule 90(1)(b)’* (“SPO Reply”), 15 March 2024, confidential.

II. SUBMISSIONS

10. The SPO requests leave to amend the Revised Case 10 Confirmed Indictment and the Case 11 Confirmed Indictment.²² The proposed amendments consist of (i) adding for Mr Januzi and Mr Bahtijari, the “promise of gift or other form of benefit” limb of intimidation during criminal proceedings under Article 387 of the of the 2019 Criminal Code of Kosovo, Code No. 06/L-074, including the factual allegations in support thereof (“Main Amendments”);²³ and (ii) making minor adjustments as necessary to include Mr Januzi, Mr Bahtijari and Mr Shala (jointly, the “Accused”) in one indictment (“Minor Amendments”) (together, the “Proposed Amendments”).²⁴

11. The SPO asserts that the Proposed Amendments are in conformity with Rule 86(9) of the Rules. It affirms that the recording of Mr Januzi’s approach to Witness 1 (“Recording” and “12 April 2023 Approach”) constitutes “new evidentiary material” under this rule, given that the SPO was not aware of its existence until after the issuance of the Case 10 Confirmation Decision.²⁵

12. The SPO further submits that the Proposed Amendments are factually supported and improve the accuracy, clarity, consistency and detail in the Joint Indictment.²⁶ In its view, the Proposed Amendments more accurately describe the nature of the 12 April 2023 Approach, and the persistence and scope of the overall alleged interference.²⁷ The SPO further submits that charging all three Accused in a single indictment promotes clarity and precision, given that: (i) the same Accused participated in the alleged crimes, the crimes and charges are based on the same facts, and the crimes and charges form or are part of a series of alleged

²² Request, paras 1-2, 12.

²³ Request, para. 1. *See* Annex 1 of the Request, paras 15-16, 23-24.

²⁴ Request, para. 1. *See* Annex 1 of the Request.

²⁵ Request, para. 10.

²⁶ Request, paras 2-4, 12.

²⁷ Request, para. 3.

crimes of the same or similar character or conduct; and (ii) doing so promotes judicial economy, avoids evidence duplication, ensures consistency in verdicts, and avoids conflicts of interest.²⁸

13. The SPO further asserts that the SPO exercised diligence when requesting the Proposed Amendments.²⁹ In particular, the SPO claims that it was not aware of the existence of the Recording until after the Case 10 Confirmation Decision. The SPO further affirms that, following the disclosure of the Recording shortly after the arrest of Mr Shala, the SPO promptly filed the Request for Joinder and the Joint Indictment.³⁰ The SPO likewise affirms that it submitted the current Request pursuant to the Joinder Decision, following its filing of the pre-trial brief summarising the evidence intended to be relied upon at trial.³¹ The SPO claims that its expeditiousness also led to the Proposed Amendments being requested while the pre-trial phase is ongoing.³²

14. Lastly, the SPO submits that the Proposed Amendments are not prejudicial to or inconsistent with the rights of the Accused, particularly the right to be tried within a reasonable time.³³ According to the SPO, the Accused have adequate time to prepare their defence and suffer no prejudice, considering: (i) the stage of proceedings, namely pre-trial; (ii) the limited modification to the charges; and (iii) and the earlier notice of this potential modification.³⁴

15. In response, the Januzi Defence seeks to have the Request dismissed.³⁵ It submits that the Pre-Trial Judge does not have general discretion to reconsider an amendment request in identical terms as previously refused.³⁶ In this regard, the

²⁸ Request, para. 4.

²⁹ Request, paras 2, 5-6, 12.

³⁰ Request, para. 5.

³¹ Request, para. 5.

³² Request, para. 6, with further references.

³³ Request, paras 2, 7-9, 12.

³⁴ Request, paras 7-9.

³⁵ Defence Response, paras 32-33.

³⁶ Defence Response, paras 16-17, 32(a).

Januzi Defence claims that (i) the SPO seeks leave to amend the Revised Case 10 Confirmed Indictment in exactly the same terms as previously refused by the Pre-Trial Judge in the Joinder Decision;³⁷ (ii) the Joint Rule 86(3)(b) Outline annexed to the Request is identical to the one provided in support of the previously refused Second Amendment, as it does not identify any additional evidence;³⁸ and (iii) the SPO has not sought to bring an interlocutory appeal against or a request for reconsideration of the Joinder Decision.³⁹ In this respect, the Januzi Defence asserts that the Pre-Trial Judge: (i) has already dismissed the allegation of “a promise of a gift or any other form of benefit”, because the SPO had neither properly pled nor provided evidence supporting it at the time of the Case 10 Confirmation Decision; and (ii) has since refused the SPO’s request for leave to add the abovementioned allegation without following the “proper procedure”, in the Joinder Decision.⁴⁰

16. Furthermore, the Januzi Defence submits that the Request is not supported by “additional” and “new” evidence, as per Article 39(2) of the Law and Rule 86(9) of the Rules, since nothing suggests that the Recording was “not available at the time of [the earlier ruling] and could not have been discovered with the exercise of due diligence”, within the meaning of Rule 181(3) of the Rules.⁴¹

17. Additionally, the Januzi Defence submits that the SPO acted without due diligence, since repeated opportunities to discover the Recording were negligently missed.⁴² In particular, it affirms that the SPO does not explain why seemingly no steps were taken to secure [REDACTED], on or shortly after April 2023, when the SPO learned of their existence and evidentiary value.⁴³

³⁷ Defence Response, paras 5, 14, 18, 32(a).

³⁸ Defence Response, paras 6, 19, 32(a).

³⁹ Defence Response, paras 7, 15.

⁴⁰ Defence Response, paras 20-21.

⁴¹ Defence Response, paras 9, 22, 29, 32(b).

⁴² Defence Response, paras 30, 32(c).

⁴³ Defence Response, paras 23-28, 30, 32(b).

18. The SPO replies that leave to amend was properly sought. In this regard, the SPO asserts that it is not required to seek certification to appeal under Rule 77 of the Rules or reconsideration under Rule 79 of the Rules, since the Pre-Trial Judge concluded in the Joinder Decision that the request to amend was not “proper” under Rule 86 of the Rules and declined to consider its merits.⁴⁴ In addition, the SPO submits that nothing in the Rules expressly limits the number of times the SPO may seek leave to amend an indictment.⁴⁵

19. Lastly, the SPO replies that it exercised diligence such that there is no prejudice to the Accused, since (i) the meaning of “additional evidence” under Rule 181 of the Rules is not applicable to pre-trial proceedings;⁴⁶ and (ii) the relevant due diligence metric is whether the SPO requested leave to amend in a timely manner that avoids creating an unfair advantage, which is satisfied.⁴⁷

III. APPLICABLE LAW

20. Pursuant to Article 39(8) of the Law and Rule 90(1)(b) of the Rules, the Specialist Prosecutor may amend the indictment between its confirmation and the assignment of the case to the Trial Panel, with leave of the Pre-Trial Judge after having heard the Parties.

21. Pursuant to Rule 90(2) of the Rules, the Pre-Trial Judge may grant leave to amend the indictment, if satisfied that the amendment is not prejudicial to or inconsistent with the rights of the Accused. Where the SPO seeks to include new charges or substitute more serious charges, Rule 86(3) and (4) of the Rules shall apply *mutatis mutandis*.

⁴⁴ SPO Reply, paras 2-3.

⁴⁵ SPO Reply, para. 4.

⁴⁶ SPO Reply, paras 5-9.

⁴⁷ SPO Reply, paras 9, 12.

22. Pursuant to Rule 86(9) of the Rules, the non-confirmation of any charge in an indictment shall not preclude the Specialist Prosecutor from subsequently filing an amended indictment or from including the same charge in an indictment supported by new evidentiary material.

IV. DISCUSSION

A. PRELIMINARY MATTERS

23. As a first preliminary matter, the Pre-Trial Judge finds it appropriate to address the submissions of the Januzi Defence regarding the proper legal basis.

24. The Pre-Trial Judge recalls that, in the Joinder Decision, he invited the SPO to file a proper request to amend the Revised Case 10 Confirmed Indictment with respect to the Second Amendment.⁴⁸ In doing so, the Pre-Trial Judge deferred the decision on the merits, in accordance with the provisions of Rule 86 of the Rules, to a later stage. Accordingly, the SPO was not expected to seek certification to appeal under Rule 77 of the Rules or reconsideration under Rule 79 of the Rules in relation to the findings on the Second Amendment, as suggested by the Januzi Defence.⁴⁹

25. Furthermore, the Pre-Trial Judge notes that Rule 90 of the Rules does not limit the SPO from seeking leave to amend the indictment more than one time. In consequence, the Pre-Trial Judge finds that, even though he had dismissed the allegation of “a promise of a gift or any other form of benefit” in a previous decision,⁵⁰ such finding does not preclude him from considering it again.

26. As a result, the Request under Article 39(8) of the Law and Rule 90(1)(b) of the Rules is properly placed before the Pre-Trial Judge.

⁴⁸ Joinder Decision, paras 55, 58(e).

⁴⁹ See *supra* para. 15.

⁵⁰ Case 10 Confirmation Decision, para. 90.

27. As a second preliminary matter, the Pre-Trial Judge observes that the Proposed Amendments only bear on Mr Januzi and Mr Bahtijari, since the factual allegations on their basis are already part of the Case 11 Confirmed Indictment against Mr Shala.⁵¹ In this context, the Pre-Trial Judge recalls his finding that the Revised Case 10 Confirmed Indictment and the Case 11 Confirmed Indictment remain operative in the present case.⁵² In light of the above, the Pre-Trial Judge considers it appropriate to undertake the present analysis solely against the Revised Case 10 Confirmed Indictment.

B. PROPOSED AMENDMENTS

28. Having concluded that the proper avenue to amend the charges is Article 39(8) of the Law and Rule 90(1)(b) of the Rules, the question arises whether the amendment constitutes a new charge or the substitution of a more serious charge, triggering the applicability of Rule 86(3) and (4) of the Rules *mutatis mutandis*. Notably, the Pre-Trial Judge recalls that a new charge introduces a new basis for conviction not previously reflected in the confirmed indictment that is factually or legally distinct from any already alleged.⁵³ The introduction of a factual allegation not previously alleged in the indictment may amount to a new charge, but only where it exposes an Accused to an additional basis for conviction.⁵⁴

⁵¹ Compare Revised Case 10 Confirmed Indictment, paras 3-23 with Case 11 Confirmed Indictment, paras 2-23.

⁵² See *supra* para. 6.

⁵³ KSC-BC-2020-06, F00635/RED, Pre-Trial Judge, *Public Redacted Version of Decision Concerning Submission of Corrected Indictment and Request to Amend Pursuant to Rule 90(1)(b)* (“*Thaçi et al. Decision on Amendment to Indictment*”), 23 December 2021, public, para. 22 and further references; KSC-BC-2020-06, IA018/F00007, Court of Appeals, *Decision on Defence Appeals Against Decision Concerning Request to Amend the Indictment Pursuant to Rule 90(1)(b) of the Rules*, 22 March 2022, public, para. 24; Joinder Decision, para. 38.

⁵⁴ *Thaçi et al. Decision on Amendment to Indictment*, para. 22 and further references; Joinder Decision, para. 38.

29. In this respect, the Pre-Trial Judge further recalls that, in the Joinder Decision, he, *inter alia*, rejected the Second Amendment on account of the necessity to review it under Rules 86(3)-(4) and 86(9) of the Rules.⁵⁵ In support of its Request, the SPO resubmits the same Joint Indictment and Joint Rule 86(3)(b) Outline as those previously submitted in support of the Request for Joinder.⁵⁶

30. With regard to the Minor Amendments, the Pre-Trial Judge observes that they constitute only minor and necessary adjustments to incorporate all three Accused in one indictment.⁵⁷ As such, the Pre-Trial Judge finds that the Minor Amendments (i) do not amount to a new charge or a more serious charge; and, thus, (ii) do not trigger the applicability of Rule 86(3) and (4) of the Rules. Nevertheless, before granting leave, the Pre-Trial Judge will consider their potential prejudicial impact to the Accused.⁵⁸

31. With regard to the Main Amendments, the Pre-Trial Judge considers that they provide an alternative factual basis for the charge of intimidation (“promise of a gift or any other form of benefit”) from the one pled in the Case 10 Confirmed Indictment (“serious threat”), thus exposing Mr Januzi and Mr Bahtijari to an additional risk of conviction. Consequently, the Pre-Trial Judge finds that the Main Amendments amount to a new charge within the meaning of Rule 90(2) of the Rules, and accordingly trigger the application of Rule 86(3) and (4) of the Rules.⁵⁹ This means that they must be assessed against the requisite evidentiary threshold of “well-grounded suspicion” as per Rule 86(4) of the Rules, in light of the evidence submitted, as per Rule 86(3) of the Rules.

32. Moreover, the Pre-Trial Judge finds that the Main Amendments trigger the application of Rule 86(9) of the Rules, since the Pre-Trial Judge had not confirmed

⁵⁵ Joinder Decision, paras 53-55.

⁵⁶ Cf. Annexes 1-2 to the Request and Annexes 1-2 to the Joint Indictment Submissions.

⁵⁷ See *supra* para. 10.

⁵⁸ See *infra* paras 35-43.

⁵⁹ Similarly, Joinder Decision, para. 53.

the alternative factual basis for the charge of intimidation, namely “promise of a gift or any other form of benefit” at the time of the Case 10 Confirmation Decision, arguing that the SPO had, at the time, neither properly pled nor provided evidence in support thereof.⁶⁰ In this respect, the Pre-Trial Judge finds that the charge must be supported by new evidentiary material, within the meaning of Rule 86(9) of the Rules.

33. The Parties disagree on the issue of whether the evidentiary material in support of the Main Amendments is actually “new” according to Rule 86(9).⁶¹ The Pre-Trial Judge agrees with the SPO that, in interpreting Rule 86(9) of the Rules, recourse to Rule 181(3) of the Rules is neither necessary nor appropriate. Rule 86(9) of the Rules is self-sufficient and, importantly, Rule 181(3) of the Rules is only applicable to appellate proceedings. In this context, the Pre-Trial Judge pays heed to the SPO’s submission that it was not aware of the existence of the Recording until 19 October 2023, after the issuance of the Case 10 Confirmation Decision.⁶² For this reason, this evidence had not been part of the supporting material when confirming the initial Case 10 indictment. In light of the foregoing, the Pre-Trial Judge is satisfied that the Recording constitutes “new evidentiary material” within the meaning of Rule 86(9) of the Rules and determines to proceed to analyse the Main Amendments.

34. The Pre-Trial Judge further notes that the present proceedings have passed the *ex parte* confirmation stage and have entered a phase in which the Defence participates, *inter alia*, by making submissions or applying for relief, except where otherwise provided by the Rules.⁶³ In addition, the Pre-Trial Judge notes that there is existing international practice that allows the Defence to challenge the proposed

⁶⁰ Case 10 Confirmation Decision, paras 90, 149. *Similarly*, Joinder Decision, para. 54.

⁶¹ *See supra* paras 16, 19.

⁶² *See supra* para. 13.

⁶³ Rule 75 of the Rules. *See also* *Thaçi et al.* Decision on Amendment to Indictment, para. 44.

amendments to an indictment on issues other than the matter of prejudice.⁶⁴ With a view to ensuring that Mr Januzi and Mr Bahtijari are heard, the Pre-Trial Judge will make his determinations on the Main Amendments after having heard from Mr Januzi and Mr Bahtijari. Bearing in mind that Mr Shala already had the opportunity present preliminary motions against the Case 11 Confirmed Indictment, which already includes the factual allegations on the basis of the Proposed Amendments, Mr Shala's right to be heard has already been ensured.⁶⁵ As a result, the Pre-Trial Judge will enter his findings on the Main Amendments once he has heard from Mr Januzi and Mr Bahtijari on whether a well-grounded suspicion in relation thereto has been established pursuant to Rule 86(4) of the Rules, if they so wish.

C. PREJUDICE TO THE ACCUSED

35. The Pre-Trial Judge recalls that, pursuant to Rule 90(2) of the Rules, regardless of whether an amendment amounts to a new charge, consideration must be given to the potential prejudicial impact of a proposed amendment. Factors to be considered in this regard, include but are not limited to: (i) whether the amended indictment improves the clarity and precision of the case to be met; (ii) the diligence of the prosecution in making the amendment in a timely manner

⁶⁴ See also *Thaçi et al.* Decision on Amendment to Indictment, para. 44. STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/PTJ, *Redacted Version of the Decision Relating to the Prosecution Request of 21 June 2013 for Leave to Amend the Indictment of 6 February 2013, Dated 31 July 2013, 2 August 2013*, paras 9-11, 16; ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-PT, *Decision on Motion to Amend the Indictment*, 11 May 2006, para. 20; ICTR, *Prosecutor v. Ngirabatware*, ICTR-99-54-T, *Decision on Prosecution Motion for Leave to Amend the Indictment*, 29 January 2009, paras 11-14, 24-40; SCSL, *Prosecutor v. Sesay et al.*, SCSL-04-15-T, *Decision on Prosecution Application for Leave to Amend the Indictment*, 31 July 2006, paras 30, 38. Acknowledging that the confirmation process is conducted *inter partes* under the Rome Statute, see also, ICC, *Prosecutor v. Kenyatta*, ICC-01/09-02/11-700-Corr, Pre-Trial Chamber II, *Corrigendum to "Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'"*, 21 March 2013, para. 22.

⁶⁵ See *supra* para. 27.

that avoids creating an unfair tactical advantage; and (iii) any delay or prejudice to the defence from the amendment.⁶⁶

36. With respect to improving the accuracy of the case to be met, the Pre-Trial Judge is satisfied that the Proposed Amendments improve the precision, clarity, consistency and detail of the charges contained in the Joint Indictment.

37. Regarding the Minor Amendments, the Pre-Trial Judge considers that they (i) ensure consistency between the texts of the Revised Case 10 Confirmed Indictment and of the Case 11 Confirmed Indictment; and (ii) contribute to the clarity, accuracy and detail of the allegations made by the SPO, in light of its inclusion of all three Accused in one indictment.

38. Regarding the Main Amendments, they concern the charge of “intimidation during criminal proceedings”, wherein the SPO seeks to further indict Mr Bahtijari and Mr Januzi for using and attempting to use “a promise of a gift or any other form of benefit” in order to intimidate Witness 1.⁶⁷ In support, the SPO seeks to include the following factual allegations which, in the view of the Pre-Trial Judge, provide further details regarding the 12 April 2023 Approach: (i) Mr Januzi told Witness 1 that Mr Shala had asked Mr Januzi to convey the message that, if Witness 1 withdrew his testimony, then Mr Shala and unnamed others would provide him with “help”; and (ii) Witness 1 responded that, if Mr Shala and/or the others brought him 200,000 euros, they would have a deal.⁶⁸ The Pre-Trial Judge

⁶⁶ Joinder Decision, para. 39. See also *Thaçi et al.* Decision on Amendment to Indictment, para. 32. See similarly e.g., ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, *Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment*, 14 February 2005, para. 35; *Prosecutor v. Bizimungu et al.*, ICTR-99-50-AR50, *Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment*, 12 February 2004, para. 16; *Prosecutor v. Karemera et al.*, ICTR-98-44-AR73, *Decision on Prosecutor’s Interlocutory Appeal Against Trial Chambers III Decision of 8 October 2003 Denying Leave to file an Amended Indictment*, 19 December 2003, paras 13-31. See also ICC, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18-517, *Decision on the “Prosecution’s Request to Amend Charges Pursuant to Article 61(9) and for Correction of the Decision on the Confirmation of Charges, and Notice of Intention to Add Additional Charges”*, 14 May 2020, paras 28-29.

⁶⁷ Annex 1 to the Request, para. 23.

⁶⁸ Annex 1 to the Request, paras 16, 24(ii).

finds that these proposed additions to the Revised Case 10 Confirmed Indictment more accurately describe the nature of the 12 April 2023 Approach and the persistence and scope of the overall alleged interference.

39. With respect to the diligence of the SPO in making the Proposed Amendments in a timely manner, the Pre-Trial Judge notes that (i) the Recording was disclosed to Mr Januzi and Mr Bahtijari on the same week that Mr Shala was arrested;⁶⁹ and (ii) the Request for Joinder, the Joint Indictment, the Joint Rule 86(3)(b) Outline and the Request were filed in line with the timelines established by the Pre-Trial Judge. It is further noted that the SPO has filed the Proposed Amendments while the pre-trial phase is ongoing.⁷⁰ For those reasons, the Pre-Trial Judge does not find there to have been a lack of diligence on the part of the SPO.

40. With respect to whether there is any delay or prejudice to the defence, the Pre-Trial Judge recalls that any benefit brought about by the Proposed Amendments must be weighed against any prejudice to the rights of Mr Januzi and Mr Bahtijari, in particular the right to be tried within a reasonable time.

41. Regarding the Minor Amendments, the Pre-Trial Judge considers that, given that they are limited to the adjustments necessary to incorporate all three Accused in one indictment, they would not, in and of themselves, entail additional procedural steps impacting the time it takes to proceed to trial or the Accused's time to prepare their defence. As such, the Pre-Trial Judge finds that the Minor Amendments do not cause an undue delay or prejudice to the defence.

42. Regarding the Main Amendments, on the other hand, they include a "new charge" within the meaning of Rule 90(2) of the Rules and therefore entail review of the supporting material by the Pre-Trial Judge, a further appearance, as well as potential additional litigation through the filing of preliminary motions relating

⁶⁹ Mr Shala was arrested on 11 December 2023, and the Recording was disclosed to Mr Januzi and Mr Bahtijari on 15 December 2023.

⁷⁰ *Similarly, Thaçi et al.* Decision on Amendment to Indictment, para. 34.

to the Main Amendments.⁷¹ These additional procedural steps do require additional time, but can be carried out in parallel with the remaining stages of the pre-trial phase and therefore will likely have a more limited impact on the time it takes to proceed to trial. This is particularly the case as defence investigations are ongoing.⁷² In this regard, the Pre-Trial Judge notes that investigations by the defence teams do not need to be fully completed before trial.⁷³ In addition, in light of the stage of proceedings, and the very limited addition to the charges, the potential introduction of new allegations would not deprive the Accused of adequate time to prepare their defence. Furthermore, should it be required, schedules may be adjusted to facilitate adequate defence preparations.⁷⁴

43. The Pre-Trial Judge accordingly finds that, in this instance, the Proposed Amendments are not unfair or inconsistent with the rights of the Accused.

D. CONCLUSION

44. In light of the above, and considering the SPO's aim of bringing all three Accused under the same indictment in the present case and the finding that the Proposed Amendments are not unfair or inconsistent with the rights of the Accused,⁷⁵ the Pre-Trial Judge decides to grant the SPO leave to amend the Revised Case 10 Confirmed Indictment, as well as the Rule 86(3)(b) Outline.

45. Accordingly, the Pre-Trial Judge finds it appropriate that the defence of Mr Januzi and the defence of Mr Bahtijari are given until **Monday, 27 May 2024** to provide submissions, if they so wish, in response to the SPO's request on whether a well-grounded suspicion in relation to the Main Amendments has been

⁷¹ Rules 86(3) and (4) and 90(2), (3), and (4) of the Rules.

⁷² *Similarly, Thaçi et al.* Decision on Amendment to Indictment, para. 35.

⁷³ KSC-BC-2020-06, F00438/CONF/RED, Pre-Trial Judge, *Confidential Redacted Version of Eighth Decision on Specialist Prosecutor's Request for Protective Measures*, 24 August 2021, confidential, para. 65.

⁷⁴ *Similarly, Thaçi et al.* Decision on Amendment to Indictment, para. 36.

⁷⁵ *See supra* para. 43.

established pursuant to Rule 86(4) of the Rules. The SPO may reply, if it so wishes, by **Friday, 31 May 2024**.

V. DISPOSITION

46. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- (a) **GRANTS** the Request;
- (b) **GRANTS** the SPO leave to amend the Revised Case 10 Confirmed Indictment, as well as the Rule 86(3)(b) Outline;
- (c) **REQUESTS** the defence of Mr Januzi and the defence of Mr Bahtijari, if they so wish, to provide submissions in response to the Request, on whether a well-grounded suspicion in relation to the Proposed Amendments has been established pursuant to Rule 86(4) of the Rules, by **Monday, 27 May 2024**; and
- (d) **REQUESTS** the SPO, if it so wishes, to reply to the defence submissions by **Friday, 31 May 2024**.

[signed]

Judge Nicolas Guillou

Pre-Trial Judge

Dated this Friday, 17 May 2024

At The Hague, the Netherlands.