



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

In: **KSC-BC-2023-10**

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

Before: **Pre-Trial Judge**

Judge Marjorie Masselot

Registrar: Dr Fidelma Donlon

Date: 27 August 2024

Language: English

Classification: **Public**

Decision on Application for Severance

Specialist Prosecutor

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 21(4)(d) and 39(9) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 9(5)(b) and 89(2)(b) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers ("Rules"), hereby renders this decision.

I. PROCEDURAL BACKGROUND

1. On 2 October 2023, the Pre-Trial Judge confirmed the indictment against Sabit Januzi and Ismet Bahtijari ("Mr Januzi", "Mr Bahtijari" and together, "Co-Accused") ("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").³

2. On 4 December 2023, the Pre-Trial Judge confirmed the indictment against Haxhi Shala ("Mr Shala") (together with the Co-Accused, "Accused") ("Case 11 Confirmation Decision").⁴ On 6 December 2023, the SPO filed the indictment against Mr Shala, as confirmed by the Pre-Trial Judge ("Case 11 Confirmed Indictment").⁵

¹ KSC-BC-2023-10, F00327, President, *Decision Assigning a Pre-Trial Judge*, 6 June 2024, 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* (reclassified as public on 21 March 2024), 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-2023-11, 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.

⁵ 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.

3. On 8 February 2024, the Pre-Trial Judge issued a decision (i) granting the SPO's request to join the case against Mr Januzi and Mr Bahtijari ("Case 10") with the case against Mr Shala ("Case 11"), and (ii) granting the SPO leave to amend the Case 10 Confirmed Indictment ("Joinder Decision").⁶
4. On 16 February 2024, pursuant to the Joinder Decision,⁷ the SPO filed an amended version of the Case 10 Confirmed Indictment ("Revised Case 10 Confirmed Indictment").⁸
5. On 17 May 2024, upon request of the SPO,⁹ the Pre-Trial Judge (i) granted the SPO leave to amend the Revised Case 10 Confirmed Indictment in relation to new factual allegations underpinning the charge of intimidation involving Mr Januzi and Mr Bahtijari, as well as the corresponding Rule 86(3)(b) Outline; and (ii) ordered the Parties to file their responses and replies, as the case may be, on the question of whether the supporting material to the new factual allegations supports a finding of well-grounded suspicion pursuant to Rule 86(4) of the Rules.¹⁰
6. On 8 July 2024, having received submissions, the Pre-Trial Judge amended the charge of intimidation against Mr Januzi and Mr Bahtijari ("Amendment Confirmation Decision").¹¹

⁶ 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 Amendment of the Indictment*, 8 February 2024, confidential; a public redacted version of the decision was issued on the same day, F00041/RED.

⁷ Joinder Decision, para. 58(d).

⁸ KSC-BC-2023-10, F00176, Specialist Prosecutor, *Submission of Amended Indictment*, 16 February 2024, public, with Annex 1, confidential, and Annex 2, public.

⁹ KSC-BC-2023-10, F00189, Specialist Prosecutor, *Request to Amend Pursuant to Rule 90(1)(b)*, 27 February 2024, public, with Annexes 1-2, confidential. *See also* Joinder Decision, paras 55, 58(e).

¹⁰ KSC-BC-2023-10, F00294, Pre-Trial Judge, *Decision on Prosecution Request to Amend the Indictment*, 17 May 2024, confidential. A public redacted version of the decision was issued on 9 July 2024, F00294/RED.

¹¹ KSC-BC-2023-10, F00377, Pre-Trial Judge, *Decision on the Confirmation of Amendments to the Indictment and Related Matters*, 8 July 2024, confidential. A public redacted version of the decision was issued on

7. On 10 July 2024, the SPO filed its amended indictment, as confirmed (“Amended Indictment”).¹²
8. On 19 July 2024, the Defence for Mr Shala (“Shala Defence”) filed a request seeking that the charges against Mr Shala be severed from those against Messrs Januzi and Bahtijari and that Mr Shala be tried separately from Messrs Januzi and Bahtijari (“Application”).¹³
9. On 24 July 2024, the Shala Defence filed a supplement to the Application (“Supplement”).¹⁴
10. On 31 July 2024, the SPO responded to the Application (“Response”).¹⁵
11. On 6 August 2024, the Shala Defence replied to the Response (“Reply”).¹⁶
12. On 7 August 2024, the Shala Defence requested that the Reply be regarded as validly made (“Request”).¹⁷
13. On 12 August 2024, the Pre-Trial Judge issued the decision on preliminary motions (“Decision on Preliminary Motions”).¹⁸

9 July 2024, F00377/RED. In the decision, the Pre-Trial Judge also varied the briefing schedule for the submission of any preliminary motions by Mr Januzi and Mr Bahtijari, *see* Amendment Confirmation Decision, paras 78, 79(g).

¹² KSC-BC-2023-10, F00379, Specialist Prosecutor, *Prosecution Submission of Confirmed Amended Indictment*, 10 July 2024, public, with Annexes 1-2, confidential, and Annexes 3-4, public.

¹³ KSC-BC-2023-10, F00403, Shala Defence, *Haxhi Shala Application to Sever*, 19 July 2024, public.

¹⁴ KSC-BC-2023-10, F00407, Shala Defence, *Supplement to Haxhi Shala Application to Sever*, 24 July 2024, public.

¹⁵ KSC-BC-2023-10, F00416, Specialist Prosecutor, *Prosecution Response to “Haxhi Shala Application to Sever”*, 31 July 2024, public.

¹⁶ KSC-BC-2023-10, F00427, Shala Defence, *Reply to F00416*, dated 5 August 2024 but notified on 6 August 2024, public.

¹⁷ KSC-BC-2023-10, F00428, Shala Defence, *Submission Regarding Reply to F00416*, 7 August 2024, public, with Annex 1, confidential.

¹⁸ KSC-BC-2023-10, F0433, Pre-Trial Judge, *Decision on Preliminary Motions and Related Requests*, 12 August 2024, confidential. A public redacted version was filed on the same day, F0433/RED.

II. SUBMISSIONS

A. APPLICATION

14. The Shala Defence submits that Mr Shala faces further, unnecessary delays in his case being transmitted to the Trial Panel whilst he awaits the outcome of preliminary motions pursuant to Rule 97 of the Rules that do not relate to him and that may take several weeks, if not months.¹⁹ The Shala Defence claims that, as a result, if Mr Shala continues to be joined with Messrs Januzi and Bahtijari, Mr Shala's right to be tried within a reasonable time in accordance with Article 31(2) of the Constitution, Article 6(1) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and Article 21(4(d) of the Law will be violated.²⁰

15. The Shala Defence argues that Mr Shala has been prejudiced by successive delays in this case to date, including as a result of the addition of a charge against Messrs Januzi and Bahtijari.²¹

16. The Shala Defence also maintains that, while it is trial-ready, it remains unclear as to when the case will be ready for trial. It argues that it is simply unconscionable to continue detaining Mr Shala for continuous delays for which he bears no responsibility and which are outside of his control.²²

17. The Shala Defence concludes that the Pre-Trial Judge ought to sever his case from that of Messrs Januzi and Bahtijari so that the case against Mr Shala can be brought to trial more quickly.²³

¹⁹ Application, paras 14-15. *See also* Application, para. 22.

²⁰ Application, para. 16.

²¹ Application, paras 15-17, 19.

²² Application, paras 19-20.

²³ Application, paras 1, 13, 21, 23.

B. SUPPLEMENT

18. The Shala Defence submits that, following the filing of preliminary motions by Messrs Januzi and Bahtijari, pursuant to Rule 97 of the Rules, and considering the decision of the Pre-Trial Judge on the calendar for the transmission of the case file to the Trial Panel, any appeal against the decision(s) disposing of said motions could easily prolong the pre-trial phase for a substantial amount of time.²⁴

C. RESPONSE

19. The SPO submits that severing the case would not expedite the proceedings against Mr Shala and would inevitably delay one of the two severed trials, thereby jeopardising the rights of Mr Shala's Co-Accused. The SPO further submits that the compelling reasons that led the Pre-Trial Judge to join the indictments remain operative and wholly militate against severance.²⁵

20. More specifically, the SPO submits that, according to the Court of Appeals, the right to be tried within a reasonable time under Article 21(4)(d) of the Law protects the Accused against undue delay – not any and all delay in the proceedings.²⁶

21. The SPO also submits that, according to the jurisprudence of the European Court of Human Rights ("ECtHR"), when determining whether the duration of criminal proceedings overall has been reasonable, relevant factors to consider include: (i) the applicant's conduct and the conduct of the relevant authorities; (ii) the complexity of the case; and (iii) what is at stake for the applicant. The SPO contends that, applying these criteria, the duration of the current proceedings has been imminently reasonable.²⁷

²⁴ Supplement, paras 5-6, 8-11 referring to KSC-BC-2023-10, F00406, Pre-Trial Judge, *Decision on Various Defence Requests* ("23 July 2024 Decision"), 23 July 2024, public.

²⁵ Response, paras 1, 2, 12.

²⁶ Response, para. 3.

²⁷ Response, paras 3, 13.

22. The SPO concludes that the Application should be rejected.²⁸

D. REPLY

23. The Shala Defence replies that Mr Shala is currently experiencing, and will continue to experience, *undue* delay, unless the cases are severed.²⁹

24. The Shala Defence submits that if he is not tried separately from his Co-Accused, Mr Shala will be required to wait for his Co-Accused's proceedings – which concern the Co-Accused's preliminary motions – to be resolved before he can stand trial.³⁰ According to the Shala Defence, said proceedings, which do not concern Mr Shala, are the sole reason preventing Mr Shala from moving to trial and, in its view, that plainly constitutes an *undue* delay.³¹ The Shala Defence contends that, contrary to the SPO's assertion, severance would not prejudice the Co-Accused, since any potential delay experienced by the Co-Accused would arise from their preliminary motions proceedings and would therefore not be *undue*.³²

25. The Shala Defence also asserts that since only two witnesses will be called by the SPO, the effect of separate trials on the overall capacity of the Specialist Chambers ("SC") will be minimal.³³ The Shala Defence also contends that, while there may be disadvantages of separate trials for persons in factually overlapping cases, the fundamental right of Mr Shala to stand trial within reasonable time remains paramount and arrangements should be made to accommodate separate trials.³⁴

²⁸ Application, paras 1, 14.

²⁹ Reply, paras 8-11, 17.

³⁰ Reply, paras 9, 16. *See* Application, paras 15-16.

³¹ Reply, para. 11.

³² Reply, paras 12-13, 16-17.

³³ Reply, para. 14.

³⁴ Reply, para. 18.

26. Lastly, the Shala Defence posits that the SPO's assertion that the compelling reasons that led to the joinder of Case 10 with Case 11 remain operative and wholly mitigate against severance is incorrect, since at the time of the Joinder Decision, there had been no prolongation of the pre-trial phase resulting from revisions of the indictment concerning only the Co-Accused.³⁵

27. The Shala Defence thus reiterates its request that the Pre-Trial Judge sever the case against Mr Shala from that of Messrs Januzi and Bahtijari so that Mr Shala's case can be brought to trial more quickly.³⁶

E. REQUEST

28. The Shala Defence maintains that for technical reasons beyond its control it unsuccessfully attempted to submit the Reply on 5 August 2024. It therefore requests that the Reply be regarded as validly made.³⁷

III. APPLICABLE LAW

29. Pursuant to Article 39(9) of the Law, upon application from or notice to the Parties, the Pre-Trial Judge (or Trial Panel if seized) may direct that there be joinder or severance in respect of charges against more than one Accused.

30. Pursuant to Article 21(4)(d) of the Law, in the determination of any charge against the Accused pursuant to the Law, the Accused shall be entitled to be tried within a reasonable time.

31. Pursuant to Rule 89(2)(b) of the Rules, at any stage of the proceedings, a Panel, after hearing the Parties, may order that persons charged jointly be tried separately,

³⁵ Reply, paras 19-20.

³⁶ Reply, para. 24.

³⁷ Request, paras 1-2.

in the interests of a fair and expeditious trial or to avoid a conflict of interests that may cause serious prejudice to an Accused.

32. Pursuant to Rule 9(5)(b) of the Rules, the Panel may, *proprio motu* or upon showing of good cause recognise as valid any act carried out after the expiration of the time limit.

IV. DISCUSSION

A. PRELIMINARY ISSUES

1. Supplement

33. The Shala Defence requests that the Pre-Trial Judge takes its Supplement into account in her ruling on the Application.³⁸ The SPO responds that Mr Shala appears to have filed its Supplement without leave, without explaining its legal basis, and outside of the deadline set for filing motions pursuant to Rule 97 of the Rules.³⁹ The Shala Defence replies that interpreting Rule 76 of the Rules so as to exclude such filings is at variance with the practice of the SC and the Response ignores that the Shala Defence explained the reasons for the filing of the Supplement and expressly requested the Pre-Trial Judge to take it into account in her decision on the Application.⁴⁰

34. The Pre-Trial Judge notes at the outset that, contrary to what the SPO asserts, the Shala Defence expressly requested the Pre-Trial Judge to consider its Supplement and provided reasons for its filing.⁴¹ The Pre-Trial Judge further considers that the Supplement was filed to incorporate the findings made in the “Decision on Various Defence Requests” (“23 July 2024 Decision”), which was issued *after* the Application,

³⁸ Supplement, paras 1, 12.

³⁹ Response, footnote 1.

⁴⁰ Reply, para. 22 referring to Supplement, para. 12.

⁴¹ See Supplement, para. 12.

and which includes new procedural deadlines that are relevant to the determination of the Application. The Pre-Trial Judge is further satisfied that, given the limited scope of the Supplement, and the fact that the SPO had the opportunity to comment on it in its Response, considering that it does not cause any prejudice to the SPO. Accordingly, the Pre-Trial Judge decides to consider the Supplement in the present decision.

2. Reply

35. The Shala Defence submits that the date and time of submission of the Reply is given as 6 August 2024 at 17:31 hours on both the filing and Legal Workflow. The Shala Defence maintains however that it attempted to file the Reply on 5 August 2024 but was unsuccessful for technical reasons beyond its control. The Shala Defence thus requests that the Reply be regarded as validly made within the time limit.⁴²

36. The Pre-Trial Judge notes that, on 5 August 2024, at 23:31, the Shala Defence informed the Court Management Unit (“CMU”) that it was experiencing connection issues, attaching the intended filing, and that, on 6 August 2024, following resolution of said technical issues, the Shala Defence submitted the Reply for filing, as requested by CMU.⁴³ As a result, the Pre-Trial Judge finds that the Shala Defence has shown good cause and, therefore, recognises the Reply as validly submitted under Rule 9(5)(b) of the Rules.

⁴² Request, para. 2.

⁴³ Annex 1 to Request.

B. MERITS

37. The Application is premised on the argument that, should the joint case against Mr Shala and the Co-Accused be maintained, Mr Shala faces (further) undue delay in violation of his right to be tried within a reasonable time as set forth under Article 6(1) of ECHR and Article 21(4)(d) of the Law.⁴⁴

38. The Pre-Trial Judge notes that, pursuant to Article 39(9) of the Law and Rule 89(2) of the Rules, she is vested with discretionary powers to order that persons charged jointly be tried separately.⁴⁵ According to the first alternative provided in Rule 89(2)(b) of the Rules, the Pre-Trial Judge may order that the Accused, charged jointly, be tried separately in the interests of a fair and expeditious trial. Thus, this decision rests on Rule 89(2)(b) of the Rules as its legal basis.

39. Under Rule 89(2)(b), first alternative, of the Rules, the Pre-Trial Judge has the duty to enquire whether trying Mr Shala separately is in the interests of a fair and expeditious trial. Mr Shala raises concerns of “undue delay”. Hence, the Pre-Trial Judge will assess whether Mr Shala’s right to be tried within a reasonable time is infringed, should the trial proceed jointly with the Co-Accused, as part and parcel of the “interests of a fair and expeditious trial” limb of Rule 89(2)(b) of the Rules.

40. As in case of joining charges against multiple accused, the Pre-Trial Judge considers that, in the exercise of her discretion to sever a case, she must strike a fair balance between the need to ensure the proper administration of justice and respecting the rights of the accused to a fair and expeditious trial.⁴⁶ The Pre-Trial Judge further underscores that, given that the present case involves three Accused,

⁴⁴ See *supra* paras 14-15, 18, 23-27.

⁴⁵ See Joinder Decision, para. 25.

⁴⁶ See Joinder Decision, para. 25 and references therein. See also ECtHR, *Wejrup v. Denmark* (“*Wejrup v. Denmark*”), no. 49126/99, Admissibility Decision, 7 March 2002, pp. 10-11.

the rights of Mr Shala must be assessed in light of the same rights of his Co-Accused.⁴⁷

1. Assessment of Reasonable Time

41. The Pre-Trial Judge notes that, as established by the jurisprudence of the ECtHR, the reasonableness of the length of proceedings is to be determined in light of the circumstances of the case, which calls for an overall assessment, having regard to: (i) the complexity of the case; (ii) the applicant's conduct and that of the relevant administrative and judicial authorities; and (iii) what is at stake for the applicant in the dispute.⁴⁸ The Pre-Trial Judge recalls that the right to be tried within a reasonable time under Article 21(4)(d) of the Law protects the Accused against undue delay, and not against a justified or necessary delay in the proceedings.⁴⁹

(a) Complexity of the case

42. The Pre-Trial Judge notes that the present case involves three Accused charged with two counts of obstructing official persons in performing official duties and

⁴⁷ The Pre-Trial Judge recalls for instance that the impact of the joinder of Case 10 with Case 11 on the rights of the Co-Accused to be tried within a reasonable time under Article 21(4)(d) of the Law was considered in order to grant the SPO's request to join said cases (*See Joinder Decision*, paras 32-33). *See similarly* ICTY, *Prosecutor v. Kunarac and Kovać*, IT-96-23-PT, Trial Chamber II, *Decision on Joinder of Trials*, 9 February 2000, para. 11; ICC, *Prosecutor v. Ruto et al.*, ICC-01/09-01/11-221, Pre-Trial Chamber II, *Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses*, 25 July 2011, para. 13; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-2259, Appeals Chamber, *Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II on 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings"*, 12 July 2010, paras 82-84.

⁴⁸ ECtHR, *Salapa v. Poland* ("*Salapa v. Poland*"), no. 35489/97, Judgment, 19 March 2003, paras 83-89; *Wejrup v. Denmark*, pp. 9-12; *Boddaert v. Belgium*, no. 12919/87, Judgment, 12 October 1992, para. 36; *Chiarello v. Germany*, no. 497/17, Judgment, 4 November 2019, para. 45; *Liblik and Others v. Estonia*, nos. 173/15, Judgment, 7 October 2019, para. 91. *See also* KSC-BC-2018-01, IA001/F00005, Court of Appeals, *Decision on Appeal Against "Decision on Application for an Order Directing the Specialist Prosecutor to Terminate the Investigation against Driton Lajçi"*, 1 October 2021, public, para. 22.

⁴⁹ KSC-BC-2020-06, IA028/F00011/RED, Court of Appeals, *Public Redacted Version of Decision on Thaçi, Selimi and Krasniqi Appeal against Oral Order on Trial Panel Questioning*, 4 July 2023, public, para. 51.

one count of intimidation during criminal proceedings, under alternative limbs of conduct, and pursuant to various modes of liability, in relation to conduct that began in April 2023. It is also recalled that those counts carry a potential sentence of up to five years and ten years of imprisonment, respectively.⁵⁰ The Pre-Trial Judge also notes that the evidence in this case includes live witnesses and documentary evidence, including the Accused's electronic communications, forensically extracted from mobile telephones.⁵¹ The Pre-Trial Judge considers in this regard that the need to assess electronic communications increases the investigation's complexity. Considering these factors, the Pre-Trial Judge is of the view that the present case is of relative complexity.

(b) The conduct of the relevant authorities

43. The Pre-Trial Judge recalls that: (i) following the Case 10 Confirmation Decision, Messrs Januzi and Bahtjari were arrested⁵² and swiftly transferred to the SC Detention Facilities, respectively on 5 and 6 October 2023;⁵³ and (ii) following the Case 11 Confirmation Decision, Mr Shala was arrested on 11 December 2023 and swiftly transferred to the SC Detention Facilities on 12 December 2023.⁵⁴ The

⁵⁰ See Amended Indictment; Case 10 Confirmation Decision, paras 26, 36-37; Case 11 Confirmation Decision, paras 26, 36-37.

⁵¹ Response, para. 10. See KSC-BC-2023-10, F00374, Specialist Prosecutor, *Prosecution Submission of Amended Exhibit List*, 5 July 2024, confidential, with Annex 1 ("Amended Exhibit List"), confidential.

⁵² KSC-BC-2023-10, F00011, Registrar, *Notification of Arrest of Ismet Bahtjari Pursuant to Rule 55(4)*, 5 October 2023, public; F00012, Registrar, *Notification of Arrest of Sabit Januzi Pursuant to Rule 55(4)*, 5 October 2023, public.

⁵³ KSC-BC-2023-10, F00014, Registrar, *Notification of the Reception of Ismet Bahtjari in the Detention Facilities of the Specialist Chambers*, 6 October 2023, public with Annex 1, strictly confidential and *ex parte*; a public redacted version of Annex 1 was filed on 13 November 2023, see F00101/A01. F00015, Registrar, *Notification of the Reception of Sabit Januzi in the Detention Facilities of the Specialist Chambers*, 6 October 2023, public, with Annex 1, strictly confidential and *ex parte*; a public redacted version of Annex 1 was filed on 13 November 2023, see F00101/A02.

⁵⁴ KSC-BC-2023-11, F00008, Registrar, *Notification of Arrest of Haxhi Shala Pursuant to Rule 55(4)*, 11 December 2023, public; 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. a public redacted version of Annex 1 was filed on 15 December 2023, see F00021/A01.

Pre-Trial Judge notes that the SPO requested the joinder of Case 10 with Case 11 on 13 December 2023, i.e. shortly after the arrest and transfer of Mr Shala, and that said request was granted on 8 February 2024.⁵⁵

44. The Pre-Trial Judge also notes that the discovery of new factual allegations and evidence related to the events pleaded in the Case 10 Confirmed Indictment, following the Case 10 Confirmation Decision, generated further investigative activities⁵⁶ and led to the amendment process.⁵⁷ As previously held, in the view of the Pre-Trial Judge, the SPO acted diligently in seeking to amend the Case 10 Confirmed Indictment.⁵⁸

45. The Pre-Trial Judge further notes that: (i) given the joinder of Case 10 with Case 11 on 8 February 2024, new time limits were set in order to harmonise deadlines between the two cases, mitigate any delays, and allow sufficient time for the defence preparation;⁵⁹ and (ii) progress continued to be made in preparation for the transfer of the case to the Trial Panel. Notably, (i) the SPO completed its pre-trial (disclosure) obligations within the time limits set by the Pre-Trial Judge;⁶⁰ (ii) the Parties submitted their points of agreement on matters of

⁵⁵ Joinder Decision, para. 58(a).

⁵⁶ See, for instance, KSC-BC-2023-10, F00103/RED, Specialist Prosecutor, *Public Redacted Version of "Prosecution request for an order and [REDACTED] strictly confidential and ex parte Annex"*, 15 November 2024, public.

⁵⁷ See Amendment Confirmation Decision, paras 5-11.

⁵⁸ See Joinder Decision, para. 44.

⁵⁹ See Joinder Decision, para. 33.

⁶⁰ See KSC-BC-2023-10, F00233, Pre-Trial Judge, *Decision Setting out the Calendar for the Remaining Procedural Steps of the Pre-Trial Phase ("Calendar Decision")*, 27 March 2024, public, paras 23, 25, 30(e), (g); F00260, Specialist Prosecutor, *Prosecution Detailed Notice of Disclosure Process*, 19 April 2024, public; F00352, Pre-Trial Judge, *Decision on Prosecution Requests for Rule 102(1)(b) Disclosures and to Amend Exhibit List*, 28 June 2024, confidential; Amended Exhibit List.

law and fact in a joint filing;⁶¹ (iii) the SPO submitted its Pre-Trial Brief;⁶² and (iv) the SPO completed its investigations ahead of the transmission of the case to the Trial Panel.⁶³ Moreover, status conferences pursuant to Rule 96(1) of the Rules were held at regular intervals in order to ensure that the Parties discharge their obligations pertaining to the pre-trial phase of the present case in an expeditious manner.⁶⁴

46. The Pre-Trial Judge further recalls that the date for the transmission of the case file to the Trial Panel was: (i) initially set to 21 June 2024 on account of various requests by the Defence teams of all Accused for additional time to resolve issues pertaining to funding and disclosure;⁶⁵ (ii) subsequently varied twice as a result of requests by the Co-Accused;⁶⁶ and (iii) further varied to allow adequate time for

⁶¹ KSC-BC-2023-10, F00296, Specialist Prosecutor, *Notification of Agreed Facts and Points of Law*, 17 May 2024, public, with Annexes 1-2, confidential.

⁶² 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; a public redacted version of Annex 1 was filed on 3 July 2024, F00367/A01.

⁶³ See Calendar Decision, paras 24, 30(f); KSC-BC-2023-10, F00249, Specialist Prosecutor, *Prosecution Submissions Regarding Completion of Investigations*, 12 April 2024, confidential; a public redacted version was filed on 3 May 2024, F00249/RED.

⁶⁴ See KSC-BC-2023-10, F00022, Pre-Trial Judge, *Order Setting the Date for the First Status Conference and for Submissions*, 9 October 2023, public; Transcript of Hearing, 12 October 2023, public, pp. 33-71; F00081, Pre-Trial Judge, *Order Setting the Date for the Second Status Conference and for Submissions*, 27 October 2023, public; Transcript of Hearing, 3 November 2023, public, pp. 72-92; F00121, Pre-Trial Judge, *Order Setting the Date for the Third Status Conference and for Submissions*, 8 December 2023, public; Transcript of Hearing, 14 December 2023, public, pp. 93-134; F00163, Pre-Trial Judge, *Order Setting the Date for Status Conference and for Submissions*, 8 February 2024, public; Transcript of Hearing, 13 February 2024, public, pp. 135-198; F00213, Pre-Trial Judge, *Order Setting the Date for Status Conference and for Submissions*, 14 March 2024, public; Transcript of Hearing, 22 March 2024, confidential; KSC-BC-2023-11, F00017, Pre-Trial Judge, *Order Setting the Date for the First Status Conference and for Submissions*, 13 December 2023, public; Transcript of Hearing, 15 December 2023, public, pp. 16-44.

⁶⁵ See Calendar Decision, paras 14-17, 21(a), (d), (e), (g), 22, 29, 30(k).

⁶⁶ See KSC-BC-2023-10, F00324, Pre-Trial Judge, *Decision on Bahtijari Request for Extension of Time*, 5 June 2024, public; F00345, Pre-Trial Judge, *Decision on Januzi Request for Extension of Time*, 20 June 2024, public.

the Co-Accused's filing of preliminary motions, following the issuance of the Amendment Confirmation Decision on 8 July 2024.⁶⁷

47. The Pre-Trial Judge recalls in particular that, on 23 July 2024, she set a calendar for the remaining pre-trial proceedings and the date for the transmission of the case file to the Trial Panel.⁶⁸ The Pre-Trial Judge also recalls that she ruled on Mr Januzi and Mr Bahtijari's respective preliminary motions on 12 August 2024.⁶⁹

48. The Pre-Trial Judge lastly observes that, contrary to what the Shala Defence posits,⁷⁰ the transmission of the case file to the Trial Panel is set to occur in the foreseeable future, following the outcome of the preliminary motions, as scheduled in the 23 July 2024 Decision.⁷¹

49. In the view of the Pre-Trial Judge, while the pre-trial proceedings have indeed been impacted by the joinder, the amendment process, and the lodging of preliminary motions of the Co-Accused, those procedural steps arise from the ordinary conduct of proceedings as foreseen by the Law and the Rules. Significantly, the Shala Defence fails to show that the proceedings, and in

⁶⁷ See Amendment Confirmation Decision, paras 78, 79(g); KSC-BC-2023-10, F00382, Pre-Trial Judge, *Decision Concerning Case Calendar*, 12 July 2024, public, paras 15, 16(a)-(d); 23 July 2024 Decision, para. 45.

⁶⁸ 23 July 2024 Decision, paras 37, 45, 50(b), (e). In this context, the Pre-Trial Judge had considered specifically, that the Shala Defence had not opposed the second request of Mr Januzi for an extension of time to file pre-trial brief(s), if any, after the final determination of any preliminary motion, *see* 23 July 2024 Decision, para. 36.

⁶⁹ *See supra* para. 13.

⁷⁰ *See supra* paras 14, 18.

⁷¹ In this context, the Pre-Trial Judge recalls that: (i) only the Januzi Defence filed a request for leave to appeal the Decision on Preliminary Motions, which was dismissed as untimely on 23 August 2024 ("23 August 2024 Decision"), *see* KSC-BC-2023-10, F00444, Pre-Trial Judge, *Decision Dismissing Application for Leave to Appeal F00433*, 23 August 2024, public; (ii) the time limit for the filing of a jurisdictional appeal against the Decision on Preliminary Motions expired on 22 August 2024; and (iii) the Januzi Defence request for reconsideration of the 23 August 2024 Decision was rejected, *see* F00451, Pre-Trial Judge, *Decision on Request for Reconsideration of F00444*, 27 August 2024, public.

particular the aforementioned procedural steps, were conducted inappropriately or without due diligence.⁷²

(c) The conduct of the Accused

50. The Pre-Trial Judge notes the Shala Defence's submissions that (i) it has consistently maintained that Mr Shala is ready for trial, (ii) any delay caused to the start of the trial is not of his making, and (iii) the amendment process and ensuing preliminary motion proceedings do not concern him.⁷³

51. The Pre-Trial Judge recalls at the outset that the date for the transmission of the case file to the Trial Panel was initially set to 21 June 2024 on account of various requests by the Defence teams, including by the Shala Defence, for additional time to resolve issues pertaining to funding and disclosure.⁷⁴

52. Moreover, the Pre-Trial Judge notes that, while only the Case 10 Confirmed Indictment (referred to as the "Revised Case 10 Confirmed Indictment" following the Joinder Decision) was concerned by the amendment process, said process was intrinsically linked to the joinder of Case 10 and Case 11, given the complete factual overlap between the two cases, and led to the confirmation of one operative indictment against the three Accused, i.e. the Amended Indictment, as opposed to two separate ones. Thus, in the view of the Pre-Trial judge, contrary to the Shala Defence's position,⁷⁵ the amendment process does concern Mr Shala, albeit indirectly.

⁷² See ECtHR, *Wejrup v. Denmark*, p. 11; ECtHR, no. 13089/87, *Dobbertin v. France*, Judgment, 25 February 1993, para. 44. See also *infra* paras 54-55.

⁷³ See *supra* paras 14-16; Application, para. 20.

⁷⁴ See *supra* para. 46. See for instance KSC-BC-2023-10, F00168, Shala Defence, *Submissions on Behalf of Haxhi Shala for Status Conference*, 12 February 2024, public, paras 2(4)(a)(i), 2(6)(b); F00224, Shala Defence, *Haxhi Shala Submissions for Status Conference on 22 March 2024*, 19 March 2024, public, paras 2(4)(a)(iii), 2(6)(b).

⁷⁵ See *supra* paras 15, 26.

53. Lastly, the Pre-Trial Judge concurs with the SPO⁷⁶ that the duration of the pre-trial proceedings as a result of the Co-Accused's filing of preliminary motions is justified and thus does not raise the question of "undue delay", since, in doing so, the Co-Accused are merely making full use of the remedies available to them in the defence of their interests as foreseen in the Law and the Rule.⁷⁷ In the view of the Pre-Trial Judge, nothing indicates that such exercise is aimed at delaying the proceedings.⁷⁸ Indeed, the Shala Defence appears to agree insofar as it repeatedly states that the Co-Accused exercise their legitimate right in lodging preliminary motions, including any future interlocutory appeal.⁷⁹

(d) What is at stake for Mr Shala

54. The Pre-Trial Judge observes that, while the Shala Defence invites her to consider the right of an accused to release pending trial when relevant authorities have failed to exercise due diligence,⁸⁰ it fails to substantiate this assertion. Notwithstanding this deficiency in the Shala Defence's submission, the Pre-Trial Judge observes that in the jurisprudence of the ECtHR, persons held in detention pending trial are entitled to "special diligence" on the part of the competent authorities. The Pre-Trial Judge observes in this context that the length of the proceedings may be deemed unreasonable where there are "protracted periods of inactivity" resulting from a lack of diligence.⁸¹

⁷⁶ Response, paras 7-8.

⁷⁷ See *supra* para. 41.

⁷⁸ See ECtHR, *Wejrup v. Denmark*, p. 9; *Salapa v. Poland*, paras 86-89, *Eckle v. Germany*, no. 8130/78, Judgment, 15 July 1982, para. 82; *Sociedade de Construções Martins & Vieira, Lda., and Others v. Portugal*, nos. 56637/10, 59856/10, 72525/10, 7646/11 and 12592/11, Judgment, 30 January 2015, para. 48.

⁷⁹ Application, para. 19; F00392, Shala Defence, *Response to Januzi Application to Extend the Time Limit for the Filing of Defence Pre-Trial Briefs*, 16 July 2024, public, para. 8.

⁸⁰ Application, para. 20.

⁸¹ See for instance ECtHR, *Abdoella v. Netherlands*, no. 12728/87, Judgment, 25 November 1992, para. 24.

55. Here, the Pre-Trial Judge finds that, while the proceedings have been impacted by the joinder and the amendment process, these do not amount to “protracted periods of inactivity” and, as highlighted above, progress has continued to be made in preparation for the transfer of the case to the Trial Panel.⁸² Thus, the Pre-Trial Judge fails to see that the pre-trial proceedings have exceeded what is reasonable due to lack of diligence, warranting a release pending trial. The Pre-Trial Judge further recalls that, pursuant to Article 41(10) of the Law and Rule 57(2) of the Rules, Mr Shala’s detention shall be reviewed every two months or as soon as a change in circumstances arises,⁸³ and therefore the Shala Defence has the opportunity to challenge the reasonableness of Mr Shala’s pre-trial detention through that avenue.

(e) Conclusion

56. Considering all these factors, the Pre-Trial Judge is satisfied that the current stage of the proceedings has been conducted at an acceptable speed and its overall length remains reasonable.

2. Administration of Justice Considerations

57. In addition to the above, the Pre-Trial Judge considers that Mr Shala’s right to be tried within a reasonable time must be balanced against the need to ensure the proper administration of justice. In this regard, the Pre-Trial Judge finds that the considerations that led to the joinder of Case 10 with Case 11 remain valid today. The Pre-Trial Judge first recalls that the Accused are charged with the same offences based on the same events.⁸⁴ The Pre-Trial Judge also notes that separate trials would duplicate the evidence.⁸⁵ Furthermore, the Pre-Trial Judge notes that

⁸² See *supra* paras 45-46.

⁸³ Rule 56(2) of the Rules.

⁸⁴ Joinder Decision, paras 26-28.

⁸⁵ See *similarly*, Joinder Decision, para. 30.

witnesses would be required to testify in two separate trials, thereby increasing their hardship and putting them at risk, due to the need for them to make multiple journeys and repeat their testimony.⁸⁶ The Pre-Trial Judge further notes that separate trials would inevitably increase judicial time and resources.⁸⁷ The Pre-Trial Judge notes in this regard that the courtroom of the SC has limited availability as it has to be shared with other Panels.⁸⁸ Thus, in the view of the Pre-Trial Judge, regardless of the estimated length of the trial, severance would affect the capacity of the SC and likely delay by months the start of one of the trials, thus jeopardising the rights of the Accused to be tried within a reasonable time pursuant to Article 21(4)(d) of the Law.⁸⁹

58. In the view of the Pre-Trial Judge, the above considerations militate against severance.

3. Overall Conclusion

59. In light of the above, the Pre-Trial Judge finds that the Shala Defence has failed to demonstrate that, under the present circumstances, severance is required in the interest of fair and expeditious trial and is further compatible with the proper administration of justice. Accordingly, the Application is rejected.

⁸⁶ See *similarly* Joinder Decision, para. 30.


⁸⁷ See Joinder Decision, para. 30. Response, para. 9.

⁸⁸ See for example KSC-BC-2020-04, F00591, Trial Panel I, *Decision on the Defence Request for an Extension of Time for the Submissions of its Lists of Witnesses and Exhibits (F00583)*, 14 July 2023, public, para. 7.

⁸⁹ See *supra* para. 41.

V. DISPOSITION

60. For the above-mentioned reasons, the Pre-Trial Judge hereby **REJECTS** the Application.



Judge Marjorie Masselot
Pre-Trial Judge

Dated this Tuesday, 27 August 2024
At The Hague, the Netherlands.