



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In: **KSC-BC-2023-10 and KSC-BC-2023-11**
The Specialist Prosecutor v. Sabit Januzi and Ismet Bahtijari
The Specialist Prosecutor v. Haxhi Shala

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

Registrar: Dr Fidelma Donlon

Date: 8 February 2024

Language: English

Classification: **Public**

**Public Redacted Version of Decision on Request for Joinder and
Amendment of the Indictment**

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THE PRE-TRIAL JUDGE,¹ pursuant to Article 39(8) and (9) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 86(3)-(4), 86(9), 89(1) and 90(1)-(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" and "Confirmation Decision").²

2. On 4 October 2023, the Specialist Prosecutor's Office ("SPO") submitted the indictment against Mr Januzi and Mr Bahtijari, as confirmed by the Pre-Trial Judge ("Case 10 Confirmed Indictment").³

3. 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

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* ("Confirmation Decision"), 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* ("Submission"), 4 October 2023, strictly confidential and *ex parte*, with Annex 1, strictly confidential. A public redacted version of the Submission and Confirmed Indictment 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* ("First Amendment"), 10 November 2023, public, with Annex 1 ("Amended Indictment"), strictly confidential, and Annex 2, public.

4. On 4 December 2023, the Pre-Trial Judge confirmed the indictment against Haxhi Shala (“Mr Shala” and “Case 11 Confirmed Indictment”).⁵
5. On 13 December 2023, the SPO filed a request to join the cases against Mr Januzi and Mr Bahtijari (“Case 10”) with the case against Mr Shala (“Case 11” and “Request for Joinder”).⁶
6. On 14 December 2023 and 15 December 2023, after hearing the Parties, the Pre-Trial Judge ordered the SPO to file a proposed joint indictment and Rule 86(3) outline, including any supporting materials, related to Case 10 and Case 11, by 12 January 2024.⁷
7. On 12 January 2024, the SPO filed a proposed joint indictment (“Joint Indictment”) and Rule 86(3) outline in Case 10 and Case 11 in support of the Request for Joinder.⁸ In the Joint Indictment, the SPO includes the amendment requested in the First Amendment, and further amendments with respect to Case 10 (“Second Amendment”).⁹

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

⁶ 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.

⁷ 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.

⁸ 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 “Submission of Joint Indictment”).

⁹ Joint Indictment, paras 16-17.

8. On 19 January 2024, the Defence for Mr Januzi, Mr Bahtijari, and Mr Shala each responded to the Request for Joinder, objecting to the joinder.¹⁰ The SPO replied on 26 January 2024.¹¹

II. SUBMISSIONS

A. REQUEST FOR JOINDER

9. The SPO submits that joinder of the confirmed indictments in Case 10 and Case 11 is warranted, because: (i) the same Accused participated in the crimes alleged in both indictments; (ii) the crimes and charges against the Accused are based on the same facts; and (iii) the crimes and charges form part of a series of alleged crimes of the same character and conduct.¹² In particular, the SPO submits that the Case 10 Confirmed Indictment identifies Mr Shala as a co-perpetrator, while both Mr Januzi and Mr Bahtijari are identified as co-perpetrators in Case 11.¹³ Furthermore, the SPO asserts that the respective indictments for Case 10 and Case 11 charge all three Accused with the same criminal offences, based on the same underlying facts, namely allegations that they “coordinated and made approaches to a protected witness on 5 April 2023 and 12 April 2023”¹⁴ in order to dissuade said witness from testifying in Specialist Chambers (“SC”) proceedings.

¹⁰ KSC-BC-2023-10, F00148, Specialist Counsel, *Response to Prosecution Request for Joinder F00132 and Submission of Joint Indictment* (“Januzi Response”), 19 January 2024, confidential; a public redacted version was submitted on 24 January 2024, F00148/RED; F00152, Specialist Counsel, *Objection to Joinder Motion* (“Bahtijari Response”), 22 January 2024, public; KSC-BC-2023-11, F00032, Specialist Counsel, *Haxhi Shala Response to Prosecution Request for Joinder* (“Shala Response”), 19 January 2024, confidential.

¹¹ KSC-BC-2023-10, F00153, Specialist Prosecutor, *Prosecution Consolidated Reply to Defence Responses to Prosecution Request for Joinder*, 26 January 2024, confidential; KSC-BC-2023-11, F00035, Specialist Prosecutor, *Prosecution Consolidated Reply to Defence Responses to Prosecution Request for Joinder*, 26 January 2024, confidential (collectively, “SPO Reply”).

¹² Request for Joinder, paras 1, 3-5.

¹³ Request for Joinder, para. 3.

¹⁴ Request for Joinder, paras 4-5.

10. In view of the above, the SPO asserts that it anticipates tendering the same evidence at trial in both cases, such that judicial economy demands the consolidation of the indictments.¹⁵ Furthermore, the SPO asserts that, in light of the fact that the proceedings in both cases are at the pre-trial stage, joinder will not prejudice the rights of the Accused but would rather serve their interests by avoiding the risk of conflicting rulings or evidence.¹⁶ Additionally, the SPO submits that joinder of the indictments is consistent with the practice of other criminal tribunals, and would serve other important purposes, including: (i) promoting judicial economy; (ii) avoiding duplication; (iii) minimising hardship to witnesses; (iv) ensuring consistency in verdicts; (v) avoiding conflicts of interests; and (vi) the interests of justice.¹⁷

11. Lastly, the SPO requests that the Pre-Trial Judge consider adopting the decisions issued in Case 10 into the joint case *mutatis mutandis*, to ensure the continued smooth conduct of proceedings.¹⁸ In this regard, the SPO asserts that no prejudice would result, given the limited number of decisions and the fact that the Accused have or will have the opportunity to make submissions in relation to those decisions.¹⁹

12. The Defence for Mr Januzi and Mr Bahtijari respond that joinder of the two cases is improper, as the SPO seeks to join charges from Case 11 that were not confirmed in Case 10 and does not provide new evidentiary material in support of those charges in the joint indictment, as required under Rule 86(9) of the Rules.²⁰ In particular, the Defence for Mr Januzi asserts that the joint indictment introduces the “use of a promise of a gift or any other form of benefit” as an alternative legal and/or factual basis for conviction under Counts 1 to 3.²¹ Consequently, the Defence for

¹⁵ Request for Joinder, paras 1, 6, 7.

¹⁶ Request for Joinder, paras 1, 7.

¹⁷ Request for Joinder, para. 6.

¹⁸ Request for Joinder, para. 8.

¹⁹ Request for Joinder, para. 8.

²⁰ Januzi Response, paras 10-11, 13; Bahtijari Response, paras 10, 12.

²¹ Januzi Response, para. 8.

Mr Januzi asserts that the SPO is precluded from re-introducing the dismissed charges and joinder should be denied.²²

13. The Defence for Mr Januzi and Mr Bahtijari further submit that the SPO Request relies on confidential evidence that is the subject of present litigation, and accordingly the issue of joinder cannot be properly determined until resolution of that litigation.²³

14. The Defence for Mr Shala responds that the protection of fair trial rights and the avoidance of conflicts of interest that might prejudice the Accused weigh against joinder.²⁴ Specifically, the Defence for Mr Shala argues that, while both at the pre-trial stage, Case 10 is at a more advanced stage than Case 11 with respect to disclosures and trial preparation.²⁵ Consequently, the Defence for Mr Shala asserts that joinder would conflict with Mr Shala's right to a fair trial and could also prolong the pre-trial detention of Mr Januzi and Mr Bahtijari, in violation of their right to be tried within a reasonable time.²⁶ The Defence for Mr Shala further argues that joinder would prejudice Mr Shala in the presentation of his defence, considering that: (i) Mr Shala is not alleged to have been present at the meetings forming the basis of the charges against Mr Januzi and Mr Bahtijari; and (ii) Mr Januzi and Mr Bahtijari made statements incriminating Mr Shala and as a result, may present a divergent case from Mr Shala.²⁷

15. Lastly, the Defence for Mr Shala submits that little weight should be given to considerations of avoiding the duplication of evidence, promoting judicial economy

²² Januzi Response, para. 16.

²³ Januzi Response, para. 17; Bahtijari Response, para. 14.

²⁴ Shala Response, para. 13.

²⁵ Shala Response, para. 14.

²⁶ Shala Response, para. 15.

²⁷ Shala Response, para. 16.

and minimizing hardship to witnesses, in light of the fact that the SPO only intends to call two witnesses, and any gains in efficiency would therefore be minor.²⁸

16. The SPO replies that joinder is consistent with the rights of the Accused, considering that the disclosure deadlines in both cases have been harmonised, and the transfer of Case 10 is not anticipated before May 2024.²⁹ With respect to any conflict of interest resulting in prejudice to Mr Shala, the SPO asserts that there is no expectation that the interests of co-accused would necessarily align, and that Mr Shala fails to demonstrate how any potential conflict of interest would manifest in serious prejudice.³⁰

B. AMENDMENT OF THE INDICTMENT

17. With respect to the First Amendment, the SPO asserts that it does not expand the scope of confirmed charges or add new or more serious charges and is necessary to accurately describe evidentiary details relevant to material facts underpinning the charges.³¹ In particular, the SPO submits that the First Amendment corrects the details concerning Witness 1's statements to Mr Januzi during the approach of 12 April 2023, in light of revisions made to the transcript of Witness 1's interview.³² The SPO further argues that these amendments are not prejudicial or inconsistent with the rights of the Accused, as they are timely and provide greater accuracy to the evidence relied on in the Case 10 Confirmed Indictment, ultimately facilitating the fair and expeditious conduct of the proceedings.³³ The Defence did not make any submissions with respect to the First Amendment.

²⁸ Shala Response, para. 21.

²⁹ SPO Reply, paras 8-9.

³⁰ SPO Reply, paras 10-11.

³¹ First Amendment, para. 3.

³² First Amendment, paras 1, 3.

³³ First Amendment, para. 2.

18. With respect to the Second Amendment, the SPO submits that the Joint Indictment does not add new counts or modes of liability, and as such Rule 86(3)-(4) of the Rules does not apply. Rather, the SPO asserts that the Joint Indictment provides additional factual allegations, namely evidence of an offer of assistance, in support of the alternative limb of “promise of gift or other form of benefit” with respect to the charge of intimidation against Mr Januzi and Mr Bahtijari.³⁴ The SPO further asserts that, to the extent Rule 86(9) of the Rules is applicable to a determination on joinder, the evidence is “new”, as it was obtained after confirmation of the indictment in Case 10, and has since been disclosed to the Accused in both cases.³⁵ Lastly, the SPO submits that the Joint Indictment complies with Rule 86(3)(a)-(b) of the Rules, and was submitted with a detailed outline and evidentiary material supporting the charges.³⁶

19. The Defence for Mr Januzi and Mr Bahtijari assert that the SPO seeks to add charges that were dismissed at the confirmation stage through the filing of a joint indictment, without providing new evidentiary material in support, as required under Rule 86(9) of the Rules.³⁷

III. APPLICABLE LAW

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

21. Pursuant to Rule 89(1) of the Rules, two or more alleged crimes and charges may be joined in one indictment, where: (a) the same Accused participated in the

³⁴ Submission of Joint Indictment, para. 1.

³⁵ SPO Reply, para. 4.

³⁶ SPO Reply, paras 2-3.

³⁷ Januzi Response, para. 8, 10-11, 13; Bahtijari Response, paras 11, 13.

alleged crimes; (b) the crimes and charges are based on the same facts; or (c) the crimes and charges form or are part of a series of alleged crimes of the same or a similar character or conduct.

22. Pursuant to Article 39(8) of the Law and Rule 90(1)(b) of the Rules, after confirmation of the indictment but before the trial has begun, the Specialist Prosecutor may, with the permission of the Pre-Trial Judge having heard the Parties, amend the indictment. 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, Rules 86(3) and (4) of the Rules shall apply *mutatis mutandis*.

23. 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. REQUEST FOR JOINDER

24. At the outset, the Pre-Trial Judge finds that the joinder must be decided on the basis of the confirmed indictments rendered in Case 10 and Case 11. Rule 89(1) of the Rules does not require the submission of a joined indictment. As a result, the Pre-Trial Judge is not tasked to “confirm” a joined indictment when joining the cases. The Rule 86(4) confirmation process in both cases has been concluded. Any amendments to the indictment follow the regime under Rule 90 of the Rules. Accordingly, the Pre-Trial Judge will separately consider the Request for Joinder and the requests to amend the indictment in Case 10.

25. The Pre-Trial Judge observes that the requirements of Rule 89(1) of the Rules are in the alternative, and that the existence of one suffices to permit joinder. The Pre-Trial Judge further recalls that, pursuant to Article 39(9) of the Law, the decision to join charges against multiple Accused is discretionary. In the exercise of his discretion, the Pre-Trial Judge must strike a fair balance between the need to ensure the proper administration of justice,³⁸ such as: (i) avoiding the duplication of evidence; (ii) minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence; (iii) promoting judicial economy; and (iv) ensuring consistency in rulings and verdicts;³⁹ and respecting the rights of the Accused, in accordance with Article 21 of the Law.

1. Basis for Joinder

26. The Pre-Trial Judge first observes that the Case 10 Confirmed Indictment and Case 11 Confirmed Indictment charge all three Accused with the same offences (two counts of obstructing official persons in performing official duties and one count of intimidation during criminal proceedings) on the basis of the same events, as foreseen in Rule 89(1)(a) of the Rules. In particular, both indictments allege that Mr Shala, Mr Januzi and Mr Bahtijari, jointly coordinated and acted as a group between

³⁸ See ECtHR, *Boddaert v. Belgium*, no. 12919/87, Judgment (“*Boddaert Judgment*”), 12 October 1992, para. 39.

³⁹ Similarly, ICTY, *Prosecutor v. Tolimir et al.*, IT-04-80-AR73.1, *Decision on Radivoje Miletic’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused*, 27 January 2006, para. 8; *Prosecutor v. Gotovina and Prosecutor v. Cermak & Markac*, IT-01-45-AR73.1, IT-03-73-AR73.1 & IT-03-73-AR73.2, *Decision on Interlocutory Appeals Against the Trial Chamber’s Decision to Amend the Indictment and for Joinder* (“*Gotovina et al. Appeal Decision*”), 25 October 2006, para. 17; ICTR, *Prosecutor v. Nyramasuhuko et al.*, ICTR-98-42-A, *Judgement*, 14 December 2015, para 71. See also ICC, *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/11-810, *Decision on Prosecution Requests to Join the Cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and Related Matters* (“*Gbagbo & Blé Goudé Joinder Decision*”), 11 March 2015, para. 63; *Prosecutor v. Alfred Yekatom*, ICC-01/14-01/18-87, *Decision on the Joinder of the Cases Against Alfred Yekatom and Patrice-Edouard Ngaïssona and Other Related Matters*, 20 February 2019, para. 13; *Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-01/07-257, *Decision on Joinder of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui*, 10 March 2008, p. 8.

5 April 2023 and 12 April 2023 in approaching a protected witness for the purpose of dissuading him from participating in SC proceedings. Additionally, each indictment identifies the other Accused as co-perpetrators and alleges that they shared a common plan or purpose and acted in a coordinated manner in order to implement it.

27. The Pre-Trial Judge further observes that the charges confirmed in Case 10 and Case 11 arise from the same factual allegations, within the meaning of Rule 89(1)(b) of the Rules, namely that:

- a. Between 5 April 2023 and 12 April 2023, the three Accused communicated with each other by phone both before and after two separate approaches to Witness 1;⁴⁰
- b. On 5 April 2023, Mr Bahtijari approached Witness 1, in order to induce him to withdraw his testimony, and confirmed that [REDACTED] if he testified;⁴¹
- c. On 12 April 2023, Mr Januzi approached Witness 1, indicating that he was following up on Mr Bahtijari's visit with respect to his testimony, and asked what Witness 1 planned to do and how the matter could be addressed;⁴²
- d. During both approaches, Mr Bahtijari and Mr Januzi indicated to Witness 1 that they were acting at the direction of Mr Shala.⁴³

28. Lastly, the Pre-Trial Judge observes that the charges in Case 10 and Case 11 also form part of a series of alleged crimes of the same or similar character or conduct within the meaning of Rule 89(1)(c) of the Rules. In particular, as noted above, all three Accused are charged with the same offences based on the same events. While their

⁴⁰ Case 10 Confirmed Indictment, paras 7, 12-14, 16, 22(iii); Case 11 Confirmed Indictment, paras 6, 11-13, 16, 22(iii).

⁴¹ Case 10 Confirmed Indictment, paras 8-9, 22(i); Case 11 Confirmed Indictment, paras 7-8, 22(i).

⁴² Case 10 Confirmed Indictment, paras 14, 22(ii); Case 11 Confirmed Indictment, paras 13, 22(ii).

⁴³ Case 10 Confirmed Indictment, paras 8, 14; Case 11 Confirmed Indictment, paras 7, 13.

alleged individual participation or contribution to the common plan or purpose may differ,⁴⁴ the nature of the charges against each Accused are of the same or similar character (offences against public order and the administration of justice) and involve the same or similar conduct (approaching a protected witness for the purpose of dissuading him from participating in SC proceedings).

2. Balancing of Interests

29. Having found that joinder may be proper pursuant to Rule 89(1)(a) of the Rules, the Pre-Trial Judge must, within the exercise of his discretion, further consider and weigh administration of justice factors against the fair trial rights of the Accused.

30. In the view of the Pre-Trial Judge, having considered the allegations and supporting materials⁴⁵ in each case and the SPO's submission that it anticipates presenting the same evidence against each Accused, a joint trial would: (i) promote efficiency in the proceedings by avoiding the duplication of evidence and ensuring consistency in rulings and verdicts; and (ii) promote judicial economy by conserving judicial time and resources and avoiding the duplication of efforts and unnecessary expense. Furthermore, a joint trial would minimise hardship to witnesses and ensure better protection of their physical safety and mental wellbeing by eliminating the need for them to make multiple journeys and repeat their testimony. In this regard, the Pre-Trial Judge notes that the number of witnesses is not the only factor to consider in evaluating the potential hardship to witnesses and that an anticipated small number of witnesses does not lessen the hardship caused to each individual witness through

⁴⁴ For example, the fact that Mr Shala was not present during the meetings between Witness 1 and Mr Januzi and Mr Bahtijari, as argued by the Shala Defence. *See* Shala Response, para. 16.

⁴⁵ The Pre-Trial Judge notes that the confirmed indictments and respective Rule 86(3) outlines in each case refer to the same supporting materials and evidence, including, *inter alia*, [REDACTED], [REDACTED], and [REDACTED]. *See* KSC-BC-2023-10, F00002/A02, *Annex 2 to Submission of Indictment for Confirmation and Related Requests*, 11 September 2023, confidential; KSC-2023-11, F00002/A02, *Annex 2 to Submission of Indictment for Confirmation and Related Requests*, 11 November 2023, confidential.

repeated testimony. The Pre-Trial Judge emphasises that these considerations apply equally to Defence witnesses, who may also suffer hardship from having to testify in multiple trials.

31. In deciding whether to join the indictments against two or more Accused, the Pre-Trial Judge must also ensure that the fair trial rights of the Accused are respected and have due regard to the existence of any conflict of interests that may give rise to serious prejudice. In this regard, the Pre-Trial Judge emphasises that an Accused tried jointly retains all of the same protections afforded under Article 21 of the Law, as if he were tried individually.

32. With respect to the length of the proceedings and any impact of a delay on Mr Januzi and Mr Bahtijari, the Pre-Trial Judge first stresses 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 any delay in the proceedings.⁴⁶ Furthermore, the Pre-Trial recalls that the European Court of Human Rights has recognised that joinder may best serve the proper administration of justice, even if it risks some delay in the proceedings.⁴⁷

33. In this regard, the Pre-Trial Judge observes that, while Case 10 precedes Case 11 by approximately two months, both cases are in the same stage of the proceedings. In particular, the Pre-Trial Judge notes that the SPO essentially completed its disclosures pursuant to Rule 102(1)(a) and Rule 102(1)(b) of the Rules in Case 10 and Case 11 on 19 December 2023 and 19 January 2024, respectively, and provided notice of Rule 102(3) material in both cases on 26 January 2024. Furthermore,

⁴⁶ See for example, ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Judgment, ICTR-98-42-A, 14 December 2015, para. 108; ICTY, *Prosecutor v. Halilović*, IT-01-48-A, *Decision on Defence Motion for Prompt Scheduling of Appeal Hearing*, 27 October 2006, para. 17.

⁴⁷ ECtHR, *Coëme and Others v. Belgium*, nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment, 22 June 2000, paras 139-140; *Boddaert* Judgment, paras 37-39; *Neumeister v. Austria*, no. 1936/63, Judgment, 27 June 1968, para. 21. See similarly, ICTY, *Gotovina et al.* Appeal Decision, para. 44.

the submission of the SPO's Pre-Trial Brief was set in Case 10 for 2 February 2024, and its submission in Case 11 is anticipated to occur soon.⁴⁸ The Pre-Trial Judge also notes that no date has yet been set in either case for the Defence Pre-Trial Brief, or the subsequent transfer of the cases. Consequently, while joinder of the two cases may cause *some* delay in order to harmonise deadlines and allow sufficient time for defence preparation, the Pre-Trial Judge considers that any such delay is minimal and would not unduly lengthen the proceedings. Furthermore, the Pre-Trial Judge considers that the assessment of any delay in the proceedings is premature at this stage, in light of the absence of an estimation from the Defence for Mr Januzi and Mr Bahtijari of the time needed for trial preparation.

34. With respect to any alleged prejudice to Mr Shala's fair trial right to adequate time for the preparation of his defence, the Pre-Trial Judge recalls, as noted above, that no date has yet been set in either case for the submission of the Defence Pre-Trial Brief, or the subsequent transfer of the cases. Furthermore, considering that defence investigations need not be fully completed before the commencement of the trial,⁴⁹ the Pre-Trial Judge finds that an assessment of the Accused's ultimate readiness for trial is premature at this stage.

35. With respect to any purported conflict of interests, the Pre-Trial Judge stresses that a joint trial involving multiple Accused does not require a joint defence and the Accused may choose to adopt adverse defence strategies. However, "the mere possibility of mutually antagonistic defences does not in itself constitute a conflict of interests capable of causing serious prejudice".⁵⁰ The Defence has not advanced any

⁴⁸ See KSC-BC-2023-10, Oral Order on the Submissions of the SPO's Pre-Trial Brief, Transcript of Hearing, 3 November 2023, p. 82, lines 10-15; KSC-2023-11, Transcript of Hearing, 15 December 2023, p. 24 (where the SPO indicated that it contemplated submitting its Pre-Trial Brief on 2 February 2024).

⁴⁹ 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. 36.

⁵⁰ ICTY, *Gotovina et al.* Appeal Decision, para. 37; ICC, *Gbagbo & Blé Goudé* Joinder Decision, para. 60.

concrete arguments to support a finding that the possibility of conflicting defence theories will give rise to serious prejudice.

36. In light of the above, the Pre-Trial Judge finds that: (i) joinder of the indictments in Case 10 and Case 11 meets the requirements of Rule 89(1) of the Rules; and (ii) having balanced administration of justice considerations against the rights of the Accused, joinder would serve the proper administration of justice and would not be prejudicial or inconsistent with the rights of the Accused. Accordingly, the Pre-Trial Judge decides to grant the Request for Joinder.

B. AMENDMENT OF INDICTMENT

37. At the outset, the Pre-Trial Judge notes that there are two separate proposed amendments to the Case 10 Confirmed Indictment: (i) the First Amendment, a request for leave to amend the Case 10 Confirmed Indictment; and (ii) the Second Amendment, consisting of revisions made in the Joint Indictment, and for which the SPO did not seek leave. While the proper procedure would have been for the SPO to first seek leave to further amend the Case 10 Confirmed Indictment pursuant to Article 39(8) of the Law and Rule 90(1)(b) of the Rules, the Pre-Trial Judge will nevertheless, in the interest of expediency, consider the Second Amendment and determine whether leave should be granted.

1. Applicable Standard

38. The Pre-Trial Judge recalls that, in order to determine the applicability of Rule 86(3) and (4) of the Rules, it must be determined whether the proposed amendments constitute new charges or substitute more serious charges. 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.⁵¹ 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.⁵²

39. Having said that, 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 that avoids creating an unfair tactical advantage; and (iii) any delay or prejudice to the defence from the amendment.⁵³ Lastly, the Pre-Trial Judge emphasises that when a proposed amendment does not amount to a new or more serious charge, he does not undertake an analysis of the supporting material underlying the proposed amendment.⁵⁴

⁵¹ *Thaçi et al.* Decision on Amendment to Indictment, para. 22 and further references. See also 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.

⁵² *Thaçi et al.* Decision on Amendment to Indictment, para. 22 and further references.

⁵³ *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.

⁵⁴ *Thaçi et al.* Decision on Amendment to Indictment, para. 23.

2. First Amendment⁵⁵

40. The SPO asserts that the First Amendment does not expand the scope of confirmed charges or add new or more serious charges and is necessary to accurately describe evidentiary details relevant to material facts underpinning the charges.⁵⁶ In particular, the SPO submits that the First Amendment corrects the details concerning Witness 1's statements to Mr Januzi during the approach of 12 April 2023, in light of revisions made to the transcript of Witness 1's interview.⁵⁷ The SPO further argues that these amendments are not prejudicial or inconsistent with the rights of the Accused, as they are timely and provide greater accuracy to the evidence relied on in the Case 10 Confirmed Indictment, ultimately facilitating the fair and expeditious conduct of the proceedings.⁵⁸ The Defence did not make any submissions with respect to the First Amendment.

41. The Pre-Trial Judge notes that the SPO seeks to amend the statement allegedly made by Witness 1 during the second approach on 12 April 2023, by replacing the statement "Witness 1 told JANUZI that he did not want to deal with this matter anymore and to put a stop to it"⁵⁹ with "Witness 1 did not confirm or deny being a witness".⁶⁰

42. The Pre-Trial Judge considers that, while the amended statement is factually distinct from the one alleged in the Case 10 Confirmed Indictment, it does not amount to a new charge. Rather, the First Amendment adds further precision to material facts

⁵⁵ The Pre-Trial Judge clarifies that he does not entertain the amendment to Mr Bahtijari's last name. The correct spelling of the Accused's name has been notified in F00080 and has been used across all filings and decisions since that time. *See also* KSC-BC-2023-10, Transcript of Hearing, 3 November 2023, public, p. 74, lines 12-17.

⁵⁶ First Amendment, para. 3.

⁵⁷ First Amendment, paras 1, 3.

⁵⁸ First Amendment, para. 2.

⁵⁹ Case 10 Confirmed indictment, para. 15.

⁶⁰ Amended Indictment, para. 15; Joint Indictment, para. 17.

already pleaded in the Case 10 Confirmed Indictment, namely that Mr Januzi approached Witness 1 on 12 April 2023 for the purpose of dissuading him from participating in SC proceedings. Accordingly, the Pre-Trial Judge finds that the First Amendment does not amount to a new, independent basis for conviction.

43. Before granting leave, the Pre-Trial Judge must nevertheless consider the potential prejudicial impact of the First Amendment. In this context, the Pre-Trial Judge considers that the First Amendment was provided to improve the accuracy of the evidence relied upon in the Case 10 Confirmed Indictment, in light of revisions made to the transcript of Witness 1's statement. Accordingly, the Pre-Trial Judge finds that the First Amendment improves the clarity and precision of the case.

44. With respect to the diligence of the SPO in seeking to amend the Case 10 Confirmed Indictment, the Pre-Trial Judge notes that submission of the First Amendment occurred approximately one month after the rendering of the Confirmation Decision. Accordingly, the Pre-Trial Judge does not find a lack of diligence on the part of the SPO.

45. Lastly, in weighing any benefit of the First Amendment against any prejudice to the rights of the Accused, in particular the right to be tried within a reasonable time, the Pre-Trial Judge considers that: (i) the First Amendment arises from revisions to a witness transcript that was relied upon in the indictment supporting materials, and which was made available to the Accused in original form in the context of the SPO's Rule 102(1)(a) disclosure,⁶¹ (ii) in light of its nature, the First Amendment would not entail additional procedural steps that may impact the time it takes to proceed to trial; and (iii) in view of the stage of the proceedings, the First Amendment would not deprive the Accused of adequate time to prepare their defence.

⁶¹ See Disclosure Package No 2, 2 November 2023, and in particular 112906-TR-AT Part 1 Revised 1-ET-RED and 112906-TR-ET Part 1-RED.

46. In light of the foregoing, the Pre-Trial Judge finds that, in the present instance, the First Amendment is not unfair or inconsistent with the rights of the Accused, and therefore grants leave to amend the Case 10 Confirmed Indictment accordingly.

3. Second Amendment

47. As stated above, the Pre-Trial Judge must first determine whether the proposed amendments constitute new charges or substitute more serious charges.

(a) Submissions

48. The SPO submits that the Joint Indictment does not add new counts or modes of liability, and as such Rule 86(3)-(4) of the Rules does not apply. Rather, the SPO asserts that the Joint Indictment provides additional factual allegations, namely evidence of an offer of assistance, in support of the alternative limb of “promise of gift or other form of benefit” with respect to the charge of intimidation against Mr Januzi and Mr Bahtijari.⁶²

49. The Defence for Mr Januzi and Mr Bahtijari assert that the SPO seeks to add charges that were dismissed at the confirmation stage through the filing of a joint indictment, without providing new evidentiary material in support, as required under Rule 86(9) of the Rules.⁶³

50. In reply, the SPO asserts that, to the extent Rule 86(9) of the Rules is applicable to a determination on joinder, the evidence is “new”, as it was obtained after confirmation of the indictment in Case 10, and has since been disclosed to the Accused in both cases.⁶⁴

⁶² Submission of Joint Indictment, para. 1.

⁶³ Januzi Response, para. 8, 10-11, 13; Bahtijari Response, paras 11, 13.

⁶⁴ SPO Reply, para. 4.

(b) Nature of the Amendment

51. The Pre-Trial Judge notes that the SPO seeks to amend the Case 10 Confirmed Indictment by including the following factual allegations:

“Specifically, JANUZI told Witness 1 that SHALA had asked JANUZI to convey the message that if Witness 1 withdrew his testimony, then SHALA and unnamed others would provide him with ‘help.’ Witness 1 responded that if SHALA and/or the others brought him 200,000 euros, they would have a deal”.⁶⁵

52. The Pre-Trial Judge considers that these new factual allegations are provided to supplement the statements made by Mr Januzi and Witness 1 during the second approach of 12 April 2023, which is an event pleaded in the Case 10 Confirmed Indictment.⁶⁶ The Pre-Trial Judge further observes that the Joint Indictment neither amends the alleged charges and modes of liability nor adds new counts.

53. In the view of the Pre-Trial Judge, the Second Amendment does not change the legal characterisation of the charges by alleging a different crime or mode of liability. However, the Pre-Trial Judge finds that, by providing an alternative factual basis for the charge of intimidation (promise of a gift or any other form of benefit) from the one pleaded in the Case 10 Confirmed Indictment (serious threat), the Second Amendment exposes the Accused to an additional risk of conviction. Consequently, the Second Amendment amounts to a new charge within the meaning of Rule 90(2) of the Rules and accordingly triggers the application of Rule 86(3) and (4) of the Rules.

54. Furthermore, the Pre-Trial Judge recalls that, in the Confirmation Decision, he explicitly dismissed the factual allegation of “a promise of a gift or any other form of benefit”, because the SPO at the time had neither properly pleaded nor provided evidence

⁶⁵ See Joint Indictment, para. 16.

⁶⁶ See Joint Indictment, para. 23.

supporting it.⁶⁷ Consequently, the proposed amendment also triggers the application of Rule 86(9) of the Rules.⁶⁸

4. Conclusion

55. In light of the above, the Pre-Trial Judge decides to: (i) grant the SPO leave to amend the Case 10 Confirmed Indictment in relation to the First Amendment; (ii) reject the Second Amendment; and (iii) invite the SPO to file a proper request to amend the Case 10 Confirmed Indictment with respect to the Second Amendment, in accordance with the provisions of Rule 86 of the Rules. Consequently, the Pre-Trial Judge considers the Joint Indictment non-operative, and that the joint case will proceed at this stage on the basis of the Case 10 Confirmed Indictment and Case 11 Confirmed Indictment.

C. JOINT CASE RECORD

56. Having found that the cases are to be joined, the Pre-Trial Judge finds it appropriate to briefly address the practical consequences of the decision. Moving forward, the Pre-Trial Judge decides that:

- (i) the joint case will proceed under the case record number KSC-BC-2023-10, which will be renamed to include the name of all three Accused;
- (ii) the Case 11 record will be discontinued, but will remain part of the joint case record;

⁶⁷ See Confirmation Decision, para. 90.

⁶⁸ In this regard, the Pre-Trial Judge notes that the SPO has provided new evidentiary material in support of the previously dismissed factual allegation. See Disclosure Package No. 6, 15 December 2023, and in particular 116623-01-TR-AT-ET. See also SPO Reply, para. 4.

- (iii) all new records will be submitted (filings, transcripts, evidence, correspondence) in the Case 10 record;
- (iv) the Defence for Mr Shala will be granted access to the Case 10 records, to the extent possible; and
- (v) The Defence for Mr Januzi and Mr Bahtijari will be granted access to Case 11 records, to the extent possible.⁶⁹

57. The Pre-Trial Judge will issue a decision in due course providing the Parties with further guidance and instruction with respect to access rights and any other related matters.

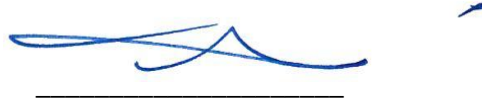
V. DISPOSITION

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

- a. **GRANTS** the Request for Joinder;
- b. **GRANTS** the SPO leave to amend the Case 10 Confirmed Indictment in relation to the First Amendment;
- c. **REJECTS** the Second Amendment;
- d. **ORDERS** the SPO to file an amended indictment in Case 10, incorporating the First Amendment;
- e. **INVITES** the SPO to file a proper request to amend the Case 10 Confirmed Indictment with respect to the Second Amendment, in accordance with the provisions of Rule 86 of the Rules;

⁶⁹ This may exclude access to *ex parte* filings.

- f. **DIRECTS** the Registry to rename the record of the case to *The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala* while retaining the case record number KSC-2023-10; and
- g. **DIRECTS** the Registry to discontinue the Case 11 case record.



Judge Nicolas Guillou

Pre-Trial Judge

Dated this Thursday, 8 February 2024

At The Hague, the Netherlands.