



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:** 12 August 2024

**Language:** English

**Classification:** Public

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**Public Redacted Version of Decision on Preliminary Motions and Related  
Requests**

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**THE PRE-TRIAL JUDGE**,<sup>1</sup> pursuant to Articles 39(1) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 97(1) 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").<sup>2</sup> 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").<sup>3</sup>

2. 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"), in particular to correct evidentiary details relevant to material facts, consistent with revisions to a transcript relied upon in the supporting material of the Case 10 Confirmed Indictment ("First Amendment").<sup>4</sup>

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<sup>1</sup> KSC-BC-2023-10, F00327, President, *Decision Assigning a Pre-Trial Judge*, 6 June 2024, public.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

3. On 16 February 2024, pursuant to the Joinder Decision,<sup>5</sup> the SPO filed an amended version of the Case 10 Confirmed Indictment, incorporating the First Amendment (“Revised Case 10 Confirmed Indictment”).<sup>6</sup>

4. On 17 May 2024, upon request of the SPO,<sup>7</sup> the Pre-Trial Judge issued the “Decision on Prosecution Request to Amend the Indictment” in which (i) the SPO was granted leave to amend the Revised Case 10 Confirmed Indictment in relation to new factual allegations underpinning the charge of intimidation (“Second Amendment”) involving Mr Januzi and Mr Bahtijari, as well as the corresponding Rule 86(3)(b) Outline (“Amendment Decision”); and (ii) the Parties were ordered to file their responses and replies, as the case may be, on the question of whether the supporting material to the Second Amendment supports a finding of well-grounded suspicion pursuant to Rule 86(4) of the Rules.<sup>8</sup>

5. On 8 July 2024, the Pre-Trial Judge issued the “Decision on the Confirmation of Amendments to the Indictment and Related Matters”, amending the charge of intimidation against Mr Januzi and Mr Bahtijari (“Amendment Confirmation Decision”).<sup>9</sup> The Pre-Trial Judge also varied the briefing schedule for the submission of any preliminary motions by the Defence for Mr Januzi (“Januzi Defence”) and the Defence for Mr Bahtijari (“Bahtijari Defence”) (collectively, the “Defence”).<sup>10</sup>

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<sup>5</sup> Joinder Decision, para. 58(d).

<sup>6</sup> KSC-BC-2023-10, F00176, Specialist Prosecutor, *Submission of Amended Indictment*, 16 February 2024, public, with Annex 1, confidential, and Annex 2, public.

<sup>7</sup> 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. *See also* Joinder Decision, paras 55, 58(e).

<sup>8</sup> 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.

<sup>9</sup> 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 9 July 2024, F00377/RED.

<sup>10</sup> Amendment Confirmation Decision, paras 78, 79(g).

6. On 10 July 2024, the SPO filed its amended indictment, as confirmed (“Amended Indictment”).<sup>11</sup>
7. On 19 July 2024, the Bahtijari Defence filed its preliminary motions (“Bahtijari Preliminary Motions”).<sup>12</sup> On the same day, the Januzi Defence filed its preliminary motions (“Januzi Preliminary Motions”)<sup>13</sup> (collectively, “Preliminary Motions”).
8. On 26 July 2024, the SPO filed its responses to the Preliminary Motions (“SPO Response to Bahtijari Preliminary Motions” and “SPO Response to Januzi Preliminary Motions”).<sup>14</sup>
9. On 30 July 2024, the Bahtijari Defence filed its reply (“Bahtijari Reply”).<sup>15</sup>
10. On 2 August 2024, the Januzi Defence filed its reply (“Januzi Reply”).<sup>16</sup>

## II. SUBMISSIONS

### A. JANUZI PRELIMINARY MOTIONS

11. The Januzi Defence submits that the Pre-Trial Judge did not have jurisdiction to grant leave to the SPO to add the new charge to the indictment as the requirement of Article 39(2) of the Law and Rule 86(9) of the Rules were not satisfied.<sup>17</sup> In particular, the Januzi Defence argues, at the outset, that the decision

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<sup>11</sup> 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.

<sup>12</sup> KSC-BC-2023-10, F00399, Bahtijari Defence, *Bahtijari Filing on Motion Regarding Indictment*, 19 July 2024, confidential.

<sup>13</sup> KSC-BC-2023-10, F00402, Januzi Defence, *Januzi Preliminary Motion*, 19 July 2024, public.

<sup>14</sup> KSC-BC-2023-10, F00409, Specialist Prosecutor, *Prosecution Response to “Bahtijari Filing on Motion Regarding Indictment”*, 26 July 2024, confidential; F00410, Specialist Prosecutor, *Prosecution Response to “Januzi Preliminary Motion”*, 26 July 2024, confidential.

<sup>15</sup> KSC-BC-2023-10, F00415, Bahtijari Defence, *Bahtijari Reply on Motion Regarding Indictment*, 30 July 2024, confidential.

<sup>16</sup> KSC-BC-2023-10, F00419, Januzi Defence, *Januzi Reply Re Preliminary Motion*, 2 August 2024, confidential.

<sup>17</sup> Januzi Preliminary Motions, para. 39.

to grant leave to amend the indictment by adding a new charge is coterminous with confirmation of the new charge, such that further confirmation is not required after leave to amend has been granted.<sup>18</sup> This is so because, in the view of the Januzi Defence, the amendment procedure is not divided in two stages, leave and confirmation, but only one; yet, the Pre-Trial Judge approached the Amendment Confirmation Decision as if the charge was confirmed *after* leave to amend had already been granted.<sup>19</sup> Furthermore, the Januzi Defence contends that the combined reading of Article 39(2) of the Law and Rule 86(9) of the Rules establish two separate and cumulative requirements, according to which the evidence in support of an application to add a previously dismissed charge must be both “additional” and “new”, which was not the case with respect to the evidentiary material relied upon for the Amended Indictment.<sup>20</sup>

12. The Januzi Defence further submits that the inclusion of the new charge amounts to a defect in the Amended Indictment, to the extent that the Pre-Trial Judge wrongly adopted an expansive definition of the term “promise” in Article 387 of the 2019 Kosovo Criminal Code, Code No. 06/L-074 (“KCC”), contrary to Article 2(3) of the KCC.<sup>21</sup>

13. Additionally, the Januzi Defence submits that the Amended Indictment is defective on the basis that the joinder of the two charges alleging offences contrary to Article 387 of the KCC in a single count (Count 3) is invalid and that each charge in the Amended Indictment should be articulated specifically and separately.<sup>22</sup>

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<sup>18</sup> Januzi Preliminary Motions, para. 17.

<sup>19</sup> Januzi Preliminary Motions, paras 16-17.

<sup>20</sup> Januzi Preliminary Motions, paras 26-27, 30-38.

<sup>21</sup> Januzi Preliminary Motions, paras 40-49.

<sup>22</sup> Januzi Preliminary Motions, paras 50-60.

14. For the foregoing reasons, the Januzi Defence requests that the Pre-Trial Judge set aside the Amended Indictment and order that the Revised Case 10 Confirmed Indictment be the operative indictment in this case.<sup>23</sup>

#### B. BAHTIJARI PRELIMINARY MOTIONS

15. Similar to the Januzi Defence, the Bahtijari Defence challenges the definition of “promise” under Article 387 of the KCC.<sup>24</sup> It further submits that the Amended Indictment is defective as it pleads two alleged agreements in one single count, thus failing to provide Mr Bahtijari with a specific statement of the facts and crimes with which he is charged.<sup>25</sup> Moreover, the Bahtijari Defence alleges that the Amended Indictment is not supported by either additional or new evidence, and shows no properly specified case against the Accused.<sup>26</sup>

16. Lastly, the Bahtijari Defence submits that the Pre-Trial Judge should consider the overall fairness of the SPO approach in this case, where no disclosure has been made of any expert examination of the relevant phones seized, nor has the Defence been given access to those phones for the purposes of its investigations.<sup>27</sup>

17. The Bahtijari Defence requests the Pre-Trial Judge to dismiss the Amended Indictment and to review the Amended Indictment and supporting material.<sup>28</sup>

#### C. SPO RESPONSES

18. The SPO responds that the Amended Indictment properly pleads material facts based upon new, additional evidentiary material that both supports the approved amendment to Count 3 and provides ample and sufficient notice to the

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<sup>23</sup> Januzi Preliminary Motions, para. 61.

<sup>24</sup> Bahtijari Preliminary Motions, para. 2.

<sup>25</sup> Bahtijari Preliminary Motions, para. 4.

<sup>26</sup> Bahtijari Preliminary Motions, paras 6-10.

<sup>27</sup> Bahtijari Preliminary Motions, para. 11.

<sup>28</sup> Bahtijari Preliminary Motions, para. 1.

Accused of the nature of the charges against them, thereby enabling them to understand the charge and prepare their respective defence.<sup>29</sup>

19. At first, the SPO submits that the Januzi Defence's assertion that the confirmation process cannot occur in two steps is without legal support. In its view, the Januzi Defence also cannot and does not claim any prejudice.<sup>30</sup>

20. The SPO further maintains that the Defence's arguments seeking to impose overly restrictive definitions of "promise" under Article 387 of the KCC which are more favorable to them are misplaced and premature, as challenges concerning the legal elements of a crime do not constitute either jurisdictional challenges or challenges to the form of the indictment, but are rather matters to be addressed at trial.<sup>31</sup> In any event, the SPO submits that the Januzi Defence improperly focuses on only the most restrictive alternative definitions of the term "promise" and ignores that the object and purpose of Article 387 of the KCC militates against reading the terms "promise", "gift", and "benefit" in a restrictive way.<sup>32</sup>

21. The SPO also submits that, in seeking to have the one sentence crime as defined in Article 387 of the KCC pled in separate counts of the Amended Indictment, the Defence improperly seeks a level of technical formality that is both not required and contrary to the purpose of an indictment.<sup>33</sup> According to the SPO, the purpose of an indictment is to provide the Accused with sufficient information to understand clearly and fully the nature and cause of the charges against him or

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<sup>29</sup> SPO Response to Januzi Preliminary Motions, para. 1; SPO Response to Bahtijari Preliminary Motions, para. 1.

<sup>30</sup> SPO Response to Januzi Preliminary Motions, para. 5.

<sup>31</sup> SPO Response to Januzi Preliminary Motions, para. 9; SPO Response to Bahtijari Preliminary Motions, para. 3.

<sup>32</sup> SPO Response to Januzi Preliminary Motions, paras 10-11; SPO Response to Bahtijari Preliminary Motions, para. 3. In this context, the SPO also avers that, lacking any ambiguity in the reading of Article 387 of the KCC, Article 2(3) of the KCC is not applicable, *see* SPO Response to Januzi Preliminary Motions, para. 12.

<sup>33</sup> SPO Response to Januzi Preliminary Motions, para. 13; SPO Response to Bahtijari Preliminary Motions, para. 5.

her with a view to preparing an adequate defence.<sup>34</sup> The SPO posits further that, alternative pleading, even when it sets out more than one factual basis for conviction, is permitted and is, in fact, a well-established practice at international criminal courts and tribunals, including the Specialist Chambers (“SC”).<sup>35</sup> Accordingly, the SPO maintains that Count 3 is properly pled.<sup>36</sup>

22. Lastly, the SPO maintains that the Preliminary Motions reiterate arguments previously rejected by the Pre-Trial Judge and do not otherwise articulate or establish a basis for relief, as they contain submissions which in fact largely fall outside the ambit of Rule 97(1) of the Rules.<sup>37</sup> In particular, the SPO argues that the Bahtijari Defence advances an interpretation of Rule 86(9) of the Rules that has been repeatedly rejected by the Pre-Trial Judge and recalls that the invitation to review the indictment as a whole along with the supporting material occurred at the confirmation stage.<sup>38</sup> Similarly, it argues that the issue of due diligence on the part of the SPO has already been addressed by the Pre-Trial Judge.<sup>39</sup>

23. The SPO requests the Pre-Trial Judge to dismiss the Preliminary Motions. It also requests that the Januzi Preliminary Motions be reclassified as confidential as they inappropriately reveal confidential information.<sup>40</sup>

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<sup>34</sup> SPO Response to Januzi Preliminary Motions, para. 13; SPO Response to Bahtijari Preliminary Motions, para. 5.

<sup>35</sup> SPO Response to Januzi Preliminary Motions, para. 13; SPO Response to Bahtijari Preliminary Motions, para. 6.

<sup>36</sup> SPO Response to Januzi Preliminary Motions, para. 13; SPO Response to Bahtijari Preliminary Motions, para. 7.

<sup>37</sup> SPO Response to Januzi Preliminary Motions, para. 1; SPO Response to Bahtijari Preliminary Motions, para. 1.

<sup>38</sup> SPO Response to Bahtijari Preliminary Motions, paras 8-9.

<sup>39</sup> SPO Response to Januzi Preliminary Motions, para. 8; SPO Response to Bahtijari Preliminary Motions, para. 8.

<sup>40</sup> SPO Response to Januzi Preliminary Motions, para. 14.

## D. BAHTIJARI REPLY

24. The Bahtijari Defence reiterates its interpretation of the term “promise” under Article 387 of the KCC and of the term “new” under Rule 86(9) of the Rules, as set out in the Bahtijari Defence Preliminary Motions.<sup>41</sup> According to the Bahtijari Defence, Article 387 of the KCC specifically uses the word “promise” separately from “force or serious threat, or any other means of compulsion” so that, plainly, the word “promise” ought to be read *sui generis* as something binding like an assurance, a pledge or a commitment.<sup>42</sup> In addition, the Bahtijari Defence argues that, read together, Rules 86(9) and 181 of the Rules require the evidence to be “new” in the sense that it was (a) not available to the prosecution at the time of submitting the indictment or (b) could not have been available from reasonable diligence.<sup>43</sup>

25. The Bahtijari Defence also submits that the SPO has not specified its case in a way that makes the Amended Indictment sustainable.<sup>44</sup>

26. Lastly, the Bahtijari Defence complains about the SPO’s lack of diligence in discovering the evidence on which the Amended Indictment is based, and of the impossibility to access the phones of the witnesses in the case and to cross-examine relevant witnesses.<sup>45</sup> The Bahtijari Defence submits that it is open to the Pre-Trial Judge to order the SPO to file a revised pre-trial brief, to revisit its witness list, and to order further enquiries on the relevant phones in relation to the relevant evidence they contain.<sup>46</sup>

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<sup>41</sup> Bahtijari Reply, para. 5.

<sup>42</sup> Bahtijari Preliminary Motions, para. 2.

<sup>43</sup> Bahtijari Preliminary Motions, para. 7.

<sup>44</sup> Bahtijari Reply, para. 6.

<sup>45</sup> Bahtijari Reply, paras 10-15.

<sup>46</sup> Bahtijari Reply, para. 16.

## E. JANUZI REPLY

27. The Januzi Defence essentially repeats earlier submissions that there were no findings of well-grounded suspicion by the Pre-Trial Judge pursuant to Rule 86(4) of the Rules in the Amendment Decision, nor was there any ruling pursuant to Article 39(2) of the Law.<sup>47</sup> It argues that that there exists only one procedural stage consisting of leave to amend an indictment, which was granted by the Pre-Trial Judge without any consideration of the application of Article 39(2) of the Law and Rule 86(9) of the Rules.<sup>48</sup>

28. The Januzi Defence further asserts that the former and current Pre-Trial Judge have not addressed anywhere the issue as to whether the SPO could have discovered earlier the relevant evidence on which the Amended Indictment is based, with the exercise of due diligence.<sup>49</sup>

29. The Januzi Defence also reiterates its disagreement with the definition and scope of the term “promise” under Article 387 of the KCC, submits that it is a question of law rather than of evidence, and asserts that a promise must involve an unequivocal assurance or undertaking.<sup>50</sup>

30. With regard to the application of Article 2(3) of the KCC, the Januzi Defence argues that it is the SPO which attempts to find an ambiguity in Article 387 of the KCC to advance a more favourable interpretation to its own case, notably by asserting that the provision cannot be construed restrictively but at the same time that it encompasses the concept of “offer”, which is wider than “promise”.<sup>51</sup>

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<sup>47</sup> Januzi Reply, paras 3, 5.

<sup>48</sup> Januzi Reply, paras 8-9.

<sup>49</sup> Januzi Reply, para. 14.

<sup>50</sup> Januzi Reply, paras 15, 17-20.

<sup>51</sup> Januzi Reply, paras 21-22.

31. Lastly, the Januzi Defence reiterates its position that the statement of crimes required by Rule 86(3) of the Rules should articulate each crime charged specifically and separately in the form of a count.<sup>52</sup>

### III. APPLICABLE LAW

32. Pursuant to Article 39(1) of the Law, the Pre-Trial Judge shall have the power to rule on any preliminary motions, including challenges to the indictment and jurisdiction.

33. Pursuant to Rule 97(1) of the Rules, the Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which: (a) challenge the jurisdiction of the SC; (b) allege defects in the form of the indictment; and (c) seek the severance of indictments pursuant to Rule 89(2) of the Rules.

### IV. DISCUSSION

#### A. CHALLENGES FRAMED BY THE DEFENCE UNDER RULE 97(1)(A) OF THE RULES

34. The Pre-Trial Judge recalls that for an issue to fall within the jurisdictional limb of Rule 97(1) of the Rules, it must relate to one of the grounds of jurisdiction stipulated under Articles 6-9 of the Law, notably subject-matter, temporal, territorial or personal jurisdiction.<sup>53</sup>

35. The Januzi Defence frames its arguments relating to the Pre-Trial Judge's alleged misapplication of Article 39(2) of the Law and Rule 86(9) of the Rules, i.e.

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<sup>52</sup> Januzi Reply, para. 23.

<sup>53</sup> See similarly, KSC-BC-2020-06, F00450, Pre-Trial Judge, *Decision on Motions Challenging the Legality of the SC and SPO and Alleging Violations of Certain Constitutional Rights of the Accused* ("Case 06 Constitutional Challenges Decision"), 31 August 2021, public, para. 54.

the procedure through which the amendments were approved, as a jurisdictional challenge under Rule 97(1)(a) of the Rules, whereas it does not relate to any of the jurisdictional grounds set out in Articles 6-9 of the Law. The same can be said about the question raised by the Defence as to whether the evidence which the SPO (and by extension the Pre-Trial Judge) relied upon is “new” and/or “additional”. This matter does not pertain to any of the jurisdictional grounds set out in Articles 6-9 of the Law. Lastly, to the extent the Bahtijari Defence challenges the interpretation of the term “promise”, within the context of Article 387 of the KCC, under Rule 97(1)(a) of the Rules, the Pre-Trial Judge considers that this is equally not raised properly as a jurisdictional challenge under Rule 97(1)(a) of the Rules. In fact, the Bahtijari Defence does not claim that Article 387 of the KCC does not fall within the SC subject-matter jurisdiction, but disputes the construction of one of its elements.

36. While the Pre-Trial Judge will not address the above-mentioned challenges within the purview of Rule 97(1)(a) of the Rules, she will nonetheless address these challenges pursuant to her powers under Article 39(1) of the Law, which stipulates that the Pre-Trial Judge can rule on *any* preliminary motions, including challenges to the indictment and jurisdiction.<sup>54</sup>

37. With respect to the merits of the arguments raised by the Defence, the Pre-Trial Judge notes that the legal framework of the SC does not suggest that the decision to grant leave to amend an indictment by adding a new charge shall be “coterminous” with the confirmation of the new charge, as suggested by the Januzi Defence. Similarly, there is no rule prohibiting that these two decisions be separate. In this light, the Pre-Trial Judge recalls that the two-step procedure (leave to amend and confirmation) was adopted to ensure that, in ongoing adversarial proceedings, the Accused are properly heard, if they so wish, on

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<sup>54</sup> See *similarly*, Case 06 Constitutional Challenges Decision, paras 54-55.

whether or not the amendments sought by the SPO should be confirmed against the well-grounded suspicion threshold.<sup>55</sup> Such procedure caused no prejudice to the Accused and to the Defence more generally, and in fact no prejudice is alleged. For this reason, the Januzi Defence argument is dismissed.

38. Relatedly, with regard to the Januzi Defence's and Bahtijari Defence's assertion that the requirements of Article 39(2) of the Law and Rule 86(9) of the Rules concerning new/additional evidence were not satisfied, the Pre-Trial Judge refers to the findings in the Amendment Decision and, in respect of the well-grounded suspicion threshold, to the findings in the Amendment Confirmation Decision.<sup>56</sup> The Pre-Trial Judge further recalls that the same arguments were raised and rejected in the context of the leave to appeal lodged by the Januzi Defence against the Amendment Decision, where the Pre-Trial Judge stated that the Januzi Defence misrepresented the Amendment Decision when arguing that the Pre-Trial Judge did not consider the availability, to the SPO, of the relevant evidence for the purposes of the amendments.<sup>57</sup> In particular, the Pre-Trial Judge recalls that recourse to Rule 181(3) of the Rules to interpret the above standard, as suggested by the Defence, is neither necessary nor appropriate, including because that provision is only applicable to appellate proceedings, and so is the due diligence standard that appears only in Rule 181(3) of the Rules.<sup>58</sup> For this reason, the Defence arguments are dismissed.

39. With respect to the alleged double requirement of "additional" and "new" evidence that the combined reading of Article 39(2) of the Law and Rule 86(9) of the Rules would create, the Pre-Trial Judge considers that this difference in the meaning of the two terms is based on a conflated reading of these provisions. In

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<sup>55</sup> Amendment Decision, para. 34.

<sup>56</sup> See Amendment Decision, para. 33; Amendment Confirmation Decision, paras 57, 70.

<sup>57</sup> KSC-BC-2023-10, F00347, Pre-Trial Judge, *Decision on Request for Leave to Appeal F00294* ("Leave to Appeal Decision"), 24 June 2024, public, para. 25.

<sup>58</sup> Amendment Decision, para. 33. See Leave to Appeal Decision, para. 25.

the Pre-Trial Judge's assessment, the Januzi Defence in particular overlooks that the Rules are designed to give specificity to the more general provisions of the Law, rather than establishing additional requirements thereto. In this light, the double requirements purportedly established by Article 39(2) of the Law and Rule 86(9) of the Rules, as alleged by the Januzi Defence, are unpersuasive and must be dismissed. The Pre-Trial Judge is equally unpersuaded by the attempts of the Januzi Defence to relitigate the matter of whether or not the evidentiary material on which the Amended Indictment is based is "new". The arguments raised by the Defence in this respect,<sup>59</sup> and previously presented by the Januzi Defence<sup>60</sup> do not change the previous findings according to which the Pre-Trial Judge was satisfied that the evidentiary material fulfilled the requirements of Rule 86(9) of the Rules and could accordingly be relied upon.<sup>61</sup> Rather, the Defence is now seeking to challenge the admissibility of such material, which is also a matter for trial.

40. In light of the foregoing, the Pre-Trial Judge dismisses the Defence's arguments as not falling within the purview of the Rule 97(1)(a) of the Rules and further rejects the merits of these challenges.

#### B. CHALLENGES FRAMED BY THE DEFENCE UNDER RULE 97(1)(B) OF THE RULES

41. The Pre-Trial Judge recalls that an indictment is defective when it fails to plead the facts underpinning the charges or it does so in an insufficient or unclear manner, creating ambiguity as regards the pleaded charges, including the modes of liability, and thus impairing the Defence's ability to prepare.<sup>62</sup>

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<sup>59</sup> Januzi Preliminary Motions, para. 38; Bahtijari Preliminary Motions, para. 7.

<sup>60</sup> KSC-BC-2023-10, F00199, Januzi Defence, *Response to the Request to Amend Pursuant to Rule 90(1)(b)*, 7 March 2024, confidential, paras 23-28, 30, 32(b).

<sup>61</sup> Amendment Decision, para. 33.

<sup>62</sup> KSC-BC-2020-06, F00413/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Defence Motions Alleging Defects in the Form of the Indictment* ("Case 06 Indictment Defects Decision"), 22 July 2021, public, para. 40, and references therein.

42. The Januzi Defence and the Bahtijari Defence challenge the definition of the term “promise” within the context of Article 387 of the KCC.<sup>63</sup> In this respect, the Pre-Trial Judge recalls that she defined “promise” as a declaration or assurance made to another person, stating a commitment to give, do, or refrain from doing a specified thing or act, or guaranteeing that a specified thing will or will not happen.<sup>64</sup> In so doing, the Pre-Trial Judge was guided by the ordinary meaning of the terms used and the object and purpose of the relevant law, in accordance with general principles of interpretation.<sup>65</sup>

43. However, the Pre-Trial Judge considers that instead of challenging the form of the indictment, in substance, this amounts to a challenge to the constitutive elements of the said offence, which is a matter to be litigated at trial and addressed by a trial panel.<sup>66</sup> Therefore, as the interpretation of the constitutive elements of Article 387 of the KCC does not pertain to defects of the indictment, this Defence challenge is dismissed under Rule 97(1)(b) of the Rules.

44. The Januzi Defence and the Bahtijari Defence further submit that the Amended Indictment is defective as it pleads two charges under Article 387 of the KCC in one single count (Count 3).<sup>67</sup> The Pre-Trial Judge considers that nothing in the legal framework of the SC stipulates that each factual accusation should be pled as a separate sentence. The yardstick against which it must be assessed whether an

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<sup>63</sup> Januzi Preliminary Motions, paras 40-49; Bahtijari Preliminary Motions, paras 2-3.

<sup>64</sup> Amendment Confirmation Decision, para. 34.

<sup>65</sup> See Amendment Confirmation Decision, para. 33; KSC-CA-2022-01, F00114, Court of Appeals, *Appeal Judgment*, 2 February 2023, public, para. 279; KSC-BC-2020-06, IA029/F00005, Court of Appeals, *Public Redacted Version of Decision on Veseli and Krasniqi Appeal Against Second Decision on Specialist Prosecutor’s Bar Table Motion (“Case 06 Appeals Decision”)*, 23 August 2023, public, paras 26-27; IA009/F00030, Court of Appeals, *Decision on Appeals Against “Decision on Motions Challenging the Jurisdiction of the Specialist Chambers”*, 23 December 2021, public, para. 139. See also KSC-CC-PR-2017-01, F00004, Constitutional Court, *Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office*, 26 April 2017, public, para. 13.

<sup>66</sup> See also Case 06 Indictment Defects Decision, para. 30, and further references therein.

<sup>67</sup> Januzi Preliminary Motions, paras 50-60; Bahtijari Preliminary Motions, paras 4-5.

indictment is defective in pleading the charges is whether the Accused are properly informed of the charges against them, pursuant to Article 21(4)(a) of the Law. The assertion by the Januzi Defence that Rule 89(1) of the Rules provides the power to join two or more charges in one indictment but not in one single count disregards the prerogative of the Specialist Prosecutor, pursuant to Article 38(4) of the Law, to frame the charges,<sup>68</sup> rests upon a speculative interpretation of the provision and overlooks the determinative requirement of Article 21(4)(a) of the Law, which in the Pre-Trial Judge's view is fulfilled in the present case, on the basis that the Amended Indictment pleads two specific and separate factual allegations ("serious threat, or any other means of compulsion", on the one hand, and "promise of a gift or any other form of benefit", on the other hand) in one single count. Needless to say that the practice of international courts and tribunals in cases involving offences against the administration of justice accepts that several factual accusations are presented in one count.<sup>69</sup> Accordingly, the Pre-Trial Judge also dismisses these Defence arguments under Rule 97(1)(b) of the Rules.

### C. OTHER REQUESTS

45. The Pre-Trial Judge notes that in its reply, the Bahtijari Defence complains about the lack of access to expert examinations of the relevant phones and the impossibility to cross-examine witnesses with relevant evidence thereon, and suggests the Pre-Trial Judge to order the SPO to file a revised pre-trial brief, revisit its witness list and undertake further phone enquiries.<sup>70</sup>

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<sup>68</sup> See for example, KSC-BC-2020-05, F00003, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules*, 28 February 2020, public, para. 10; KSC-BC-2020-06, F00010, Pre-Trial Judge, *Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules*, 2 July 2020, public, para. 10.

<sup>69</sup> See for example, ICC, ICC-01/05-01/13-749, Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 11 November 2014, public, para. 53 and pp. 47-55. See also KSC-BC-2020-04, F00089/RED, Pre-Trial Judge, *Public Redacted Version of Decision on Motion Challenging the Form of the Indictment*, 18 October 2021, public, para. 61; Case 06 Indictment Defects Decision, paras 65, 82, and further references therein.

<sup>70</sup> Bahtijari Preliminary Motions, para. 11; Bahtijari Reply, para. 16.

46. At the outset, the Pre-Trial Judge reminds the Bahtijari Defence to refrain in the future from raising new issues in a reply,<sup>71</sup> in accordance with Rule 76 of the Rules, but rather to make a separate filing, in order to allow also the SPO (and other participants, as the case may be) to respond to the arguments.

47. Turning to the merits of the Bahtijari Defence arguments, the Pre-Trial Judge considers that disclosure of the relevant material in the case has duly taken place in accordance with the relevant provisions. In addition, the issues raised by the Bahtijari Defence pertain mainly to the admissibility and probative value of such evidence and, more generally, to the witnesses to be called at trial, which are all matters for the trial panel to determine. These arguments are therefore dismissed.

#### D. RECLASSIFICATION

48. The SPO requests the Pre-Trial Judge to order [REDACTED].<sup>72</sup>

49. The Pre-Trial Judge, having reviewed [REDACTED], agrees with the SPO [REDACTED].

50. The Pre-Trial Judge considers it appropriate to order [REDACTED]. [REDACTED].

51. In addition, considering that their content does not reveal confidential information, the Pre-Trial Judge finds it appropriate to order the Registry to reclassify, as public, filings F00399 and F00409, currently classified as confidential.

52. With respect to the remaining filings that form part of the present litigation, the Pre-Trial Judge considers it appropriate to order the Parties to file public

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<sup>71</sup> See *similarly*, in the context of responses pursuant to Rule 76 of the Rules, KSC-BC-2020-06, F02421, Trial Panel II, *Public Redacted Version of Decision on Prosecution Motion for the Admission of the Evidence of Witnesses W00996, W02257, W02303, W04352, W04367, W04420, W04569, W04645, W04677, and W04732 Pursuant to Rule 153*, public, para. 23, and references therein.

<sup>72</sup> SPO Response to Januzi Preliminary Motions, para. [REDACTED].

redacted versions thereof<sup>73</sup> and/or to indicate whether they can be reclassified as public, by Friday, 23 August 2024.

#### V.DISPOSITION

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

- a) **REJECTS** the Preliminary Motions;
- b) **ORDERS** the Registry to reclassify as public filings F00399 and F00409, currently classified as confidential;
- c) **ORDERS** [REDACTED];
- d) **ORDERS** [REDACTED];
- e) **ORDERS** the SPO to file a public redacted version of its filing F00410, by **Friday, 23 August 2024**;
- f) **ORDERS** the Januzi Defence to file a public redacted version of its filing F00419 or to indicate whether this filing may be reclassified as public by **Friday, 23 August 2024**; and
- g) **ORDERS** the Bahtijari Defence to file a public redacted version of its filing F00415, by **Friday, 23 August 2024**.



**Judge Marjorie Masselot**  
**Pre-Trial Judge**

Dated this Monday, 12 August 2024  
At The Hague, the Netherlands.

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<sup>73</sup> [REDACTED].