



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor's Office

Date: 26 January 2024

Language: English

Classification: Confidential

Prosecution consolidated reply to Defence responses to Prosecution request for
joinder

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The accused in KSC-BC-2023-10 ('Case 10') and KSC-BC-2023-11 ('Case 11') participated in the same alleged crimes, the crimes and charges in the Indictments confirmed in Cases 10 and 11 are based on the same facts, and the crimes and charges form and are part of a series of alleged crimes of the same character and conduct. Joinder is thus entirely appropriate pursuant to Article 39(9) of the Law¹ and Rule 89(1) of the Rules.² To find otherwise would mean that the SPO would be tendering the same evidence to prove the same facts to meet the same elements of identical charges in two separate trials, when they may instead be adjudicated in a single trial before a single panel. The Responses³ largely ignore the important interests that would be served by joinder, overstate any alleged prejudice that would result, and raise issues that would not, in any case, prevent joinder.

II. SUBMISSIONS

A. THE JOINT INDICTMENT IS PROPERLY SUPPORTED

2. As ordered by the Pre-Trial Judge,⁴ on 12 January 2023, the Specialist Prosecutor's Office ('SPO') filed a proposed joint indictment and detailed outline supporting the

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules').

³ Haxhi Shala Response to Prosecution Request for Joinder, KSC-BC-2023-11/F00032, 19 January 2024, Confidential ('Shala Response'); Response to Prosecution Request for Joinder F00132 and Submission of Joint Indictment with confidential Annexes 1 and 2 F00146, KSC-BC-2023-10/F00148, 23 January 2024, Confidential ('Januzi Response'); OBJECTION TO JOINDER MOTION, KSC-BC-2023-10/F00152, 23 January 2024, Confidential ('Bahtijari Response') (collectively 'Responses'). The SPO notes that the Bahtijari Response was filed late with no request for extension and only an explanation that the filing had previously been rejected 'on formalities,' and, as such, should not be considered by the Pre-Trial Judge.

⁴ Transcript (Status Conference), Case 10, 14 December 2023, p.132, lines 20-23, p.133, lines 2-10; Transcript (Status Conference), Case 11, 15 December 2023, p.38, lines 9-23.

charges contained therein pursuant to Rule 86(3). All supporting materials, as cited in the Rule 86(3)(b) outline, had already been disclosed to the Pre-Trial Judge⁵ and the Defence in both Cases 10 and 11.⁶ In an effort to make this process as transparent as possible, on 15 January 2024, all Defence Counsel were sent a courtesy email containing a list of previously disclosed supporting materials along with the dates and disclosure package numbers corresponding to the materials' disclosure.

3. While, for the reasons explained in the Submissions,⁷ Rules 86(3) and 86(4) are not implicated, as explained above the SPO has in any event fully complied with the requirements of those provisions.

4. Further, to the extent Rule 86(9) is applicable to the Pre-Trial Judge's analysis of joinder in relation to Case 10,⁸ the relevant evidence is 'new,' as it was obtained after 2 October 2023, when the Case 10 Indictment was confirmed.⁹ It has been disclosed to all Defence teams, and is cited in the (courtesy) Rule 86(3)(b) outline provided with the joint indictment.

5. In the same vein, the pending litigation referenced in the Responses involves

⁵ KSC-BC-2023-11, Disclosure 1.

⁶ *Contra* Januzi Response, KSC-BC-2023-10/F00146, para.12; Bahtijari Response, KSC-BC-2023-10/F00152, paras 10-13.

⁷ Submission of joint indictment, KSC-BC-2023-10/F00146 and KSC-BC-2023-11/F00031 ('Submissions'), para.1. The Defence make submissions, in particular, in relation to the charge of Intimidation in criminal proceedings. However, the legal characterisation of that charge has not changed, there is simply an additional factual basis for it.

⁸ *See* Januzi Response, KSC-BC-2023-10/F00146, paras 10-16; Bahtijari Response, KSC-BC-2023-10/F00152, paras 11-13.

⁹ Confidential Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2023-10/F00008/CONF/RED, 2 October 2023, Confidential; *see* Confidential redacted version of 'Prosecution request for an order and related non-disclosure with strictly confidential and *ex parte* Annex,' KSC-BC-2023-10/F00103/CONF/RED, 15 November 2023, Confidential, paras 8-17; 118215-118217 RED.

evidence not dispositive of the charges confirmed in Cases 10 and 11.¹⁰ Moreover, evidentiary litigation is not presumed to be complete (or in most cases even initiated) at the point of submission of an indictment.

6. Therefore, none of the arguments in the Responses invoking the Rules is an impediment to joinder.

B. JOINDER IS CONSISTENT WITH THE FAIR TRIAL RIGHTS OF THE ACCUSED

7. The SPO has already provided reasons why joinder would, in fact, protect the fair trial rights of the Accused, as recognised by the European Court of Human Rights.¹¹

8. Regarding Shala's submissions related to the extremely limited differences between Cases 10 and 11 during the current pre-trial phase,¹² the SPO notes that upcoming deadlines, including those related to disclosure, have already been harmonised between the two cases. Similarly, all relevant filings will continue to be made available to all parties.¹³

9. Regarding the related assertion of the right to trial within a reasonable time for Januzi and Bahtijari,¹⁴ Defence Counsel for these Accused have previously indicated that they could not envisage the transfer of this case to the Trial Panel before May 2024 or trial before July 2024.¹⁵

¹⁰ See Januzi Response, KSC-BC-2023-10/F00146, paras 17, 19; Bahtijari Response, KSC-BC-2023-10/F00152, para.14; Shala Response, KSC-BC-2023-11/F00032, para.22.

¹¹ See Prosecution request for joinder, KSC-BC-2023-10/F00132, KSC-BC-2023-11/F00016, 13 December 2023, para.6.

¹² See Shala Response, KSC-BC-2023-11/F00032, para.14.

¹³ See e.g. Decision Setting the Date for the Initial Appearance of Haxhi Shala and Related Matters, KSC-BC-2023-11/F00014, 12 December 2023, para.21 *contra* Shala Response, KSC-BC-2023-11/F00032, paras 17-19.

¹⁴ See Shala Response, KSC-BC-2023-11/F00032, para.15.

¹⁵ Transcript (Status Conference), 14 December 2023, pp.121-124.

10. Though Shala references small differences between the cases and the possibility of a conflict of interest with the other Accused, he gives no clear indication of how this might manifest or how it would impact his rights.¹⁶ Indeed, there is no expectation that co-Accused would necessarily have a complete alignment of interests (and the contrary is frequently the case). Rather, Shala's reference to important evidence of his role coming from Januzi and Bahtijari militates in favour of joinder.

11. Similarly, Shala seeks to minimise the importance of recognised factors favouring joinder, such as the potential hardship occasioned to witnesses from having to testify multiple times, apparently based solely on the projected length of this case.¹⁷ Such factors still compel joinder in this case, especially as none of Shala's arguments demonstrate the potential for anything close to 'significant prejudice.'¹⁸

III. CLASSIFICATION

12. This filing is submitted confidentially pursuant to Rule 82(4).

IV. CONCLUSION

13. For the foregoing reasons, the Pre-Trial Judge should reject the Responses and grant joinder.

¹⁶ See Shala Response, KSC-BC-2023-11/F00032, para.16.

¹⁷ See Shala Response, KSC-BC-2023-11/F00032, para.21.

¹⁸ See Shala Response, KSC-BC-2023-11/F00032, para.23.

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At The Hague, the Netherlands