

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
Filing Participant: **Specialist Counsel for Ismet Bahtijari**
Date: 19 August 2024
Language: English
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Public Redacted Version of BAHTIJARI UPDATED PRE- TRIAL BRIEF

Specialist Prosecutor's Office
Kimberly P. West

Counsel for Sabit Januzi
Jonathan Rees KC
Huw Bowden

Counsel for Ismet Bahtijari
Felicity Gerry KC
Marion Carrin

Counsel for Haxhi Shala
Toby Cadman

I. DOCUMENT

1. Mr Ismet Bahtijari hereby files this updated Pre-Trial Brief, pursuant to Rule 95(5) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers and the timeline set by the pre-trial judge.
2. In the absence of necessary material, as set out below, it remains an outline.
3. A request has been filed (on Friday 16 August 2024) for an extension of time to file an updated pre-trial brief. This request is maintained in the hope that there will be a further opportunity to file a final document.

II. PROCEDURAL HISTORY

4. On 19 June 2024 Mr Bahtijari filed a pre-trial brief¹ on time but in which he expressly reserved the right to provide an updated pre-trial brief, not least because medical evidence was outstanding. In fact, time was extended on the same day at the request of counsel for the co-accused and has since been extended due to pre-trial motions.
5. This updated pre-trial brief replaces that document.

III. FAIR TRIAL ISSUES

6. Mr Bahtijari will likely raise fair trial issues relating to medical evidence, defence investigations, treatment on arrest and transfer, interviews and arraignment, absence of an opportunity to cross examine witnesses, prosecution reliance on their own notes rather than witness testimony and non-disclosure.
7. Medical
 - a. In October 2023 Mr Bahtijari was arrested. He was apparently assessed as fit to travel but no disclosure of that assessment nor any medical report has been made to the defence. It is simply mentioned in a report filed by the Registrar on 9 October 2023.² The defence have received some confidential medical notes from the medical officer. The assessment made on arrest was not included, which suggests it was not given to the medical officer and that the medical officer has not communicated with the person who made that assessment.

¹ See BAHTIJARI PRE TRIAL BRIEF, KSC-BC-2023-10/F00343, 19 June 2024.

² Report on the Arrest and Transfer of Ismet Bahtijari to the Detention Facilities, KSC-BC-2023-10/F00021, 9 October 2023, para. 30.

- b. On 9 October 2023 Mr Bahtijari appeared before the court and entered a not guilty plea. [REDACTED].³
- c. On 4 January 2024 Counsel Dr Felicity Gerry KC was appointed to defend Mr Bahtijari in the expectation that funding for the defence would be covered for his defence by the Kosovan Ministry of Justice as it had been for previous defendants. This funding was not forthcoming despite the obvious need for medical reports.
- d. On 13 February 2024 at the status conference, Counsel for Mr Bahtijari raised the need to obtain confidential medical reports and that funding was needed to do so. Various requests have been made for suitable funding to both the MOJ and the court for confidential reports.
- e. On 18 March 2024 in submissions for the forthcoming status conference, counsel for Mr Bahtijari set out the need for medical evidence (including detailed information on the relevant Kosovan context)⁴ and made an application for funding for confidential reports in the absence of MOJ funding.⁵
- f. On 22 March 2024 at the status conference requests for duty funding, emergency funding and funding for a unique situation were all refused, despite counsel's pleas that medical reports were needed.
- g. Legal aid was granted on 10 May 2024. It is subject to a 20% reduction and a 1000 Euro reduction in the expectation that there will be a 1000 Euro contribution from the MOJ. No payments have been received from the MOJ at all. Funding for defence investigations does not cover the necessary medical reports.
- h. The only route to obtaining reports is therefore an ex parte request to the panel which has been made, although the court ordered involvement of the SPO and the Registry which has reduced confidentiality. A decision from the pre-trial judge on these issues is awaited. It is likely this matter will be transferred for trial without the necessary medical evidence.
- i. Obviously, Mr Bahtijari cannot be tried fairly if [REDACTED].

8. Defence investigations

- a. Defence investigations are allocated limited funds that are unlikely to cover the collection of evidence from (currently 23 witnesses), let alone

³ Ibid, para. 39, 48.

⁴ See BAHTIJARI FILING FOR STATUS CONFERENCE, KSC-BC-2023-10/F00219, 18 March 2024.

⁵ Ibid.

medical reports and military records. This may be an issue for complexity level but are mentioned here in anticipation of difficulties.

- b. The pre-trial brief made it plain that there is a dispute as to [REDACTED]. The defence have asked the prosecution to take photographs showing [REDACTED]. It is not possible for the defence to obtain these photographs given the restrictions on [REDACTED].

9. Treatment on arrest and transfer, interviews and arraignment.

- a. In addition to the medical issues above the timing and manner of the conduct of arrest, transfer and interviews, including the absence of a lawyer, until arrival, all give rise to concerns about a fair trial but cannot be fully addressed without the medical reports and disclosure.

10. Opportunity to cross examine witnesses and reliance on notes

- a. It is perhaps trite, but worth mentioning, that Mr Bahtijari has a right to challenge witnesses against him.
- b. The defence will seek to exclude all material, save for direct evidence, and to oppose any reliance on paperwork as part of bar table motions. In addition, the defence on behalf of Mr Bahtijari will assert that the failure to call witnesses or make them available for cross examination is a violation of his fair trial rights. For example, the SPO are not proposing to call any witness to deal with the following:
 - i. Arrest, transfer, interview and arraignment.
 - ii. Notes they rely on made by [REDACTED] that are inconsistent with other evidence (see for example disclosure 2).
 - iii. Examination of telephones to include [REDACTED].

11. Non- disclosure

- a. On 26 July 2024, the prosecution indicated in inter partes correspondence there was no further disclosure arising from the first pre-trial brief
 - i. Aside from Mr Bahtijari's interview, as long ago as at least disclosure 12 (20/12/2023), the prosecution has sought to rely on a military hierarchy. However, there has been no disclosure of military records nor evidence to place Mr Bahtijari in that hierarchy. The prosecution apparently seeks to use Mr Bahtijari's interviews to prove he was in such a hierarchy, despite the problematic conduct of those interviews which had to be abruptly stopped. It is likely that the prosecution is in possession of military

- records so can disclose [REDACTED]No such disclosure has been forthcoming despite the service of the first pre-trial brief.
- ii. The history of genocidal attacks is well known and documented. The damage, slaughter and destruction and risks Mr Bahtijari and his family faced, along with the history of reconstruction is likely to be known (and should be known) to the prosecution and may well be in records from the ICTY. No such disclosure has been forthcoming despite the service of the first pre-trial brief.
 - iii. There has been no disclosure of why Mr Bahtijari might be [REDACTED] alleges (note the prosecution pre-trial brief is inaccurate on this point when referring to discomfort). The prosecution must be in possession of material that could answer this question given that they are prosecuting people for atrocity crimes in this court. No such disclosure has been forthcoming despite the service of the first pre-trial brief.
 - iv. There has been no disclosure of what examinations of [REDACTED]
 - v. There has been no disclosure of medical assessments made on Mr Bahtijari at the request of prosecutors nor those involved in his arrest, transfer, interview and arraignment.
- b. At present disclosure has not been made of the recordings of Mr Bahtijari's interviews so they can be checked by the defence interpreter, nor any details of reasons why medical assessments were made at the time of arrest, transfer or interview and the content thereof. Nor have the prosecution confirmed that the arrest involved not only reading Mr Bahtijari his rights, but also making sure they were fully understood by him. A request for this to be by way of an agreed fact was declined.
12. This is just an outline of fair trial issues that may be dealt with in full before the trial chamber on transfer. It gives the opportunity for relevant parties to respond before transfer to ensure Mr Bahtijari receives a fair trial.

IV. DEFENCES

13. In general terms, the nature of Mr Bahtijari's defence is that he is not guilty of all charges. He denies criminal responsibility for committing or attempting to commit each of the crimes charged through all alleged modes of liability.

14. He accepts [REDACTED] . Accordingly, he does not raise alibi but he does raise the following in relation to the elements of offending:
- a. He did not make, nor attempt to make, any threat, or engage in any other means of compulsion, nor offer a promise of a gift or any other form of benefit to [REDACTED], whether as an individual or jointly with others on any mode of liability, as alleged, or at all.
 - b. He did not participate in or attempt to obstruct an official person, that is, a judge, a prosecutor, an official of a court, prosecution officer or a person authorised by the court and prosecution office, in performing official duties whether as an individual or jointly with others, on any mode of liability as alleged, or at all.
 - c. He was not and did not believe he was being consulted, directed or instructed.
 - d. He did not hold the relevant state of mind for any of the alleged offences either specifically and/or because of his poor health at the time. He had no knowledge or awareness of any interference with any witness or process of the Court and no intention to engage in any unlawful activity.
 - e. He denies any intent to undermine or obstruct an official person in performing official duties and he denies any co-perpetration with other individuals, nor was he involved in any coordination with others as alleged or at all.
 - f. Accordingly, he denies any knowledge or intent for each mode of liability and crime as alleged or at all, whether by full offence or attempt, negligence, individually, jointly or in co-perpetration, again, as alleged or at all.
15. In addition, he raises the following positive defences:
- a. [REDACTED] may amount to diminished or lack of mental capacity for which medical evidence will be necessary.
 - b. [REDACTED]
 - c. If the court, contrary to the above, concludes that he was being consulted or directed or instructed then the court will need to consider whether he was, or may have been, acting under a mistake.
 - d. Whilst he does not allege he was acting under necessity / duress, [REDACTED] has stated that Mr Bahtijari [REDACTED] which appears to leave those defences open for the court's consideration.
16. Further, subject to obtaining medial evidence, Mr Bahtijari may argue that his arrest and transfer were unlawful and his interviews with investigators are not admissible and that his health affects his fitness to be tried.

17. Insofar as the facts are in dispute, Mr Bahtijari makes the following assertions:

- a. He accepts that [REDACTED].

- b. Mr Bahtijari had no knowledge that [REDACTED]
Mr Bahtijari accepts chatting with [REDACTED] in a café that day and hearing what appeared to be gossip, which he was not even sure was true. He did not believe or understand that he was being consulted, instructed or directed to intimidate or influence [REDACTED].

- c. Mr Bahtijari was intoxicated, [REDACTED].

- d. Mr Bahtijari accepts he then contacted [REDACTED] via social media [REDACTED]. He went because he was concerned [REDACTED] and for no other reason. It never occurred to him that visiting [REDACTED] would have any effect on [REDACTED], nor the court or its officers.

- e. Mr Bahtijari accepts he sat with [REDACTED] in his house and they chatted. He denies expressing any inducement to [REDACTED]
in official proceedings before the KSC.

- f. Mr Bahtijari told [REDACTED] he had heard gossip that [REDACTED].
[REDACTED] then immediately flew into a rage. Mr Bahtijari is unable to recall exactly what was said by [REDACTED] but he does recall that [REDACTED] was ranting about threatening or attacking others, as [REDACTED] himself states.

- g. Mr Bahtijari will explore the complex evidence [REDACTED].

18. In particular, Mr Bahtijari disputes the following alleged comments:

- a. He did not threaten or intimidate [REDACTED] nor did he pass on any threats or intimidation, nor did he make any statement about [REDACTED] not testifying.

- b. Mr Bahtijari did not say that he had not come for a good purpose nor did he add an Albanian phrase generally meaning that his purpose was a bad one, as he was acting as the ‘mouthpiece’ or ‘advocate’ of ‘the devil.’

- c. Mr Bahtijari did not say he had been sent by anyone to deliver any message and, in particular, did not say that ‘they’ know that [REDACTED] was a [REDACTED].
 - d. Mr Bahtijari did not say to [REDACTED] had approached him and told him to go and tell [REDACTED].
 - e. Mr Bahtijari did not instruct [REDACTED] as alleged or at all.
19. Mr Bahtijari denies his actions created any fears or concerns for [REDACTED], nor did he create any disincentive for [REDACTED]. His visit did not threaten the court or the prosecutor’s ability to effectively investigate and prosecute crimes, including by obtaining and securing relevant witness evidence; and his actions did not divert any resources and time to address actual and potential consequences to [REDACTED] in connection with official proceedings at the Kosovo Specialist Chambers.
20. Mr Bahtijari had a lift from a friend and afterwards phoned that same person to collect him because Mr Bahtijari does not drive. [REDACTED] is not accurate in his description of the parking arrangements nor the number of persons present on 5 April 2023.
21. Mr Bahtijari does not recall any other communications and had nothing to do with the alleged “second approach” and had no knowledge about it until after his arrest and transfer to The Hague.
22. Mr Bahtijari accepts that he knows [REDACTED]. He did not meet or ever communicate with Mr [REDACTED] until he was in detention in the Hague. Prior to his arrest he had seen but never spoken to Mr Selimi.
23. Mr Bahtijari was not a member of 121 Brigade of the Kosovo Liberation Army. During the conflict with which this Court is concerned, he and his family fled from their village to seek safety twice. On the first occasion there was damage and livestock were slaughtered. On the second occasion, the village was raised. It has since been rebuilt with European funding. He never had a military role but, after being displaced, he carried out some work as a mechanic with his late brother, in exchange for food.
24. At no stage in April 2023 did Mr Bahtijari understand or believe that he was being asked to take part in any unlawful activity. Insofar as the prosecution allege that the alleged “first approach” was unclear, this is because there was no first approach,

only a visit to a relative which has been misconstrued, mixed up with later events or fabricated.

25. Mr Bahtijari has been [REDACTED]

V. CONCLUSION

26. Accordingly, in the light of all the above, Mr Bahtijari disputes all the charges he faces and the whole of the way the prosecution put their case against him on each of the charges he faces.

27. Mr Bahtijari also reserves the right to further update his pre-trial brief once medical evidence is obtained and defence investigations are completed.

28. If an extension is granted a further document will be prepared to assist.

VI. CLASSIFICATION

29. This document is filed as confidential at this stage but can be reclassified as public.

Word Count: 3109



Dr Felicity Gerry KC

Counsel for Mr Bahtijari

19 August 2024
At Dar es Salaam