

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

**Before:** **Trial Panel I**  
Judge Mappie Veldt-Foglia, Presiding Judge  
Judge Roland Dekkers  
Judge Gilbert Bitti  
Judge Vladimir Mikula, Reserve Judge

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** **Specialist Counsel for Ismet Bahtijari**

**Date:** 6 December 2024

**Language:** English

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**Public Redacted Version of**  
**BAHTIJARI Submissions on Sentencing with three confidential annexures**

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## I. INTRODUCTION

1. Pursuant to Article 44 of the *Law on Specialist Chambers and Specialist Prosecutor's Office* ('the *Law*'), Rule 163 of the *Rules of Procedure and Evidence* ('the *Rules*'), Article 71 of the *Criminal Code of the Republic of Kosovo* ('*KCC*'),<sup>1</sup> and the Orders as set out in the Decision of 19 November 2024,<sup>2</sup> the Defence for Ismet Bahtijari ('the Defence') hereby presents to Trial Panel I ('the Panel') its submissions on the sentencing of Mr Bahtijari, with supporting information as contained in three Annexes:

- a. **Annex 1:** Professor Henry Kennedy, *Confidential Psychiatric Report on Ismet Bahtijari* (22 November 2024)
- b. **Annex 2:** Compilation of Witness Statements from Family Members of Ismet Bahtijari:
  - i. [REDACTED]
  - ii. [REDACTED]
  - iii. [REDACTED]
  - iv. [REDACTED]
  - v. [REDACTED]
  - vi. [REDACTED]
  - vii. [REDACTED] (additional statement)
- c. **Annex 3:** Compilation of Witness Statements from Community Members known to Ismet Bahtijari:
  - i. [REDACTED]
  - ii. [REDACTED]
  - iii. [REDACTED]
  - iv. [REDACTED]
  - v. [REDACTED]
  - vi. [REDACTED]
  - vii. [REDACTED]

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<sup>1</sup> *Criminal Code of the Republic of Kosovo 2019* (Code No. 06/L-074) ('*KCC*'), art. 71, applied pursuant to the *Law*, Article 44(4).

<sup>2</sup> KSC-BC-2023-10, F00612, *Decision on Matters Related to Plea Proceedings*, 29 November 2024, confidential ('F00612').

## II. PROCEDURAL HISTORY

2. On 5 October 2023, Mr Bahtijari was arrested in Kosovo and transferred to KSC Detention Unit on 6 October 2023.<sup>3</sup>
3. The trial was scheduled to commence on 14 November 2024,<sup>4</sup> and earliest testimony of witnesses on 9 December 2024.<sup>5</sup>
4. On 13 November 2024, Mr Bahtijari signed the *Plea Agreement*.<sup>6</sup> In the corresponding plea agreements with the co-accused, the Prosecution recommended 3-years imprisonment for Mr Shala, and 30 months or less for Mr Januzi.
5. On 29 November 2024 the Panel filed Orders on matters related to the plea proceedings, including that parties should file amended plea agreements to resolve matters raised by the Panel, and requesting that the Defence file their written submissions on sentencing, including any evidence as annexes, by 6 December 2024.<sup>7</sup>
6. On 3 December 2024, Mr Bahtijari signed an amended plea agreement (currently in possession of the SPO), admitting guilt and accepting criminal responsibility for Counts 2 and 3 on the indictment, which will be filed pursuant to Orders in F00612 by 6 December 2024 (hereafter, '*Revised Plea Agreement*').
7. On each plea agreement other charges against Mr Bahtijari are withdrawn.<sup>8</sup>

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<sup>3</sup> KSC-BC-2023-10, F00021, *Report on the Arrest and Transfer of Ismet Bahtijari to the Detention Facilities*, 9 October 2023, confidential; Public redacted version (F00021/RED) filed on the same day.

<sup>4</sup> KSC-BC-2023-10, F00559, *Decision on the date for the commencement of the trial*, 24 October 2024, public.

<sup>5</sup> *Ibid*, para 17.

<sup>6</sup> KSC-BC-2023-10, F00596/COR, *Annex 3 to Corrected version of 'URGENT Prosecution notification of plea agreements*, 14 November 2024, confidential.

<sup>7</sup> KSC-BC-2023-10, F00612, *Decision on Matters Related to Plea Proceedings with one confidential and ex parte annex*, 29 November 2024, confidential.

<sup>8</sup> KSC-BC-2023-10, F00596/COR, *Annex 3 to Corrected version of 'URGENT Prosecution notification of plea agreements*, 14 November 2024, confidential.

### III. APPLICABLE LAW

8. Mr Bahtijari is convicted by his plea pursuant to Rule 94 of the *Rules*, in agreeing to admit guilt to offences under Articles 401(2) and 401(5), Article 387 of the *KCC* and Articles 15(2) and 16(2) of the *Law*.
9. The *Law* provides that the Specialist Chambers will 'adjudicate and function in accordance with' the Kosovo Constitution, other provisions of Kosovo law as expressly incorporated and applied by the *Law*.

#### A. Statutory Range and Recommended Sentence

10. Pursuant to Article 44(4) of the *Law*, the punishment imposed on Mr Bahtijari 'shall be in line with the punishment for those crimes set out in the [*KCC*]'.<sup>9</sup> As such, the applicable penalty ranges are derived from art 401(5) (Count 2) and art 387 (Count 3) of the *KCC*: imprisonment of 1–5 years and imprisonment of 2–10 years, and a fine of up to 125,000 EUR, respectively. The *Law* relevantly provides that a sentence shall be determined for each charge and a single sentence reflecting the totality of the conduct shall be imposed.<sup>10</sup>
11. In the Plea Agreement the range is 0-10 years but will full range of mitigation. In the *Revised Plea Agreement* pursuant to the Panel's order in F00612<sup>11</sup>, the Prosecution recommends a sentence of 'not more than two years',<sup>12</sup> and that Mr Bahtijari be given credit for time served.<sup>13</sup>
12. In F00416 the Panel states that they cannot impose 'a sentence different than the

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<sup>9</sup> The *Law* refers to a superseded version of *KCC* (Law No. 04/L-082) of 2012. By virtue of Article 64 of the *Law*, references to the 2012 *KCC* should be interpreted as meaning the successor legislation, i.e. the 2019 *KCC*.

<sup>10</sup> The *Law*, art 163(4).

<sup>11</sup> KSC-BC-2023-10, F00612, *Decision on Matters Related to Plea Proceedings with one confidential and ex parte annex*, 29 November 2024, confidential, para 17.

<sup>12</sup> *Revised Plea Agreement*, para 16.

<sup>13</sup> *Ibid*, noting that the deduction of time served is provided for under the *Rules*, r 163(6).

one agreed to by the Parties or one falling outside the agreed sentencing range'. However, the range in the Plea Agreement gives the Panel full scope, hence the matters set out below.

13. On this basis, having regard to all available legal frameworks, the maximum sentence that may be imposed by the Panel with regard to Mr Bahtijari is two years and the applicability of the KCC to both the *Plea Agreement* the *Revised Plea Agreement* means that submissions by the Defence may mitigate **and thus reduce the sentence** below two years, in effect making the range 0-2 years or, put another way, the statutory range of 0-10 years can be mitigated to below 2 years.

#### **B. Law on Reducing or Mitigating Sentence**

14. Rule 163(2) of the *Rules* provides that a 'plea agreement pursuant to Rule 94 shall result in a reduced sentence.'<sup>14</sup>
15. As of 6 December, Mr Bahtijari has been in custody in relation to this case for 429 days. If not released, the pre-trial detention would be 441 days by the hearing scheduled on 18 December 2024. Under the Rules, and at the Prosecution's recommendation, this time in custody should be credited against any further sentence of imprisonment.<sup>15</sup> Additionally under the KCC one day of detention can be deducted for a fine of 20 EUR.<sup>16</sup>
16. For the remaining custodial sentence, if any, the President can decide the state where the convicted person will serve their sentence.<sup>17</sup>
17. Regarding any monetary penalty, Mr Bahtijari's material situation must be

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<sup>14</sup> See also: KCC, art 71(1)(1.3).

<sup>15</sup> *Revised Plea Agreement*, para 16; *The Rules*, r 163(6).

<sup>16</sup> KCC, art 79(4).

<sup>17</sup> *The Rules*, Rule 166; *KSC Law*, art 50(1); KSC-BD-45, *Practice Direction on the Designation of State of Enforcement*, 19 May 2022, art 6(1)-(2).

considered, including his income, assets, and obligations. The imposition of a fine above one's means is prohibited.<sup>18</sup>

18. The applicable legal framework provides non-exhaustive factors that may be considered by the Panel,<sup>19</sup> including mitigating circumstances as stated under Rule 163(a) of the *Rules* and Article 44(5) of the *Law*, as well as factors pursuant to Article 69(3) of the *KCC*.
19. The available legal frameworks afford the Panel considerable discretion in determining a sentence, including to sentence below the statutory minimum, where it is justified by evidence of mitigating circumstances.<sup>20</sup> It is the Panel's obligation to ensure that the sentence is proportionate to both the 'gravity of the offense and the conduct and circumstances of the offender'.<sup>21</sup>

#### IV. SUBMISSIONS

20. The following submissions are written following the Panel's order in F00612 requesting submissions that address mitigating and aggravating circumstances pursuant to Article 44(5) of the *Law* and Rule 163(1) of the *Rules*.
21. Rule 163(1) state that determination of sentencing is in accordance with Article 44(4) of the *Rules*, which expressly incorporates the *KCC* for offences under Art 15(2) of the *Law*. Therefore, these submissions additionally consider factors in determining punishment at Article 69(3) and rules on mitigation of punishment at Article 70(2) of the *KCC*, as well as the companion *Sentencing Guidelines*.<sup>22</sup>

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<sup>18</sup> *KCC*, art 69(5).

<sup>19</sup> The *Rules*, r 163(1); The *Law*, art 44(5); *KCC*, art 69(3).

<sup>20</sup> *KCC*, art 71.

<sup>21</sup> *KCC*, art 69(2); The *Law*, art 44(5).

<sup>22</sup> New guidelines were published by the Supreme Court on November 22 2024, however as those Guidelines are not yet published in English these submissions rely on both the 2024 Guidelines (in Albanian) and the 2018 (in English) for clarity and accuracy ('Sentencing Guidelines'); See: Supreme

22. In this case there are no aggravating circumstances, Mr Bahtijari does not have any prior criminal convictions, there was no abuse of power or official capacity, and the crime did not involve particularly vulnerable victims or cruelty.<sup>23</sup>
23. In fact, the overwhelming amount of mitigating and favourable factors warrant a sentence of time served and Mr Bahtijari's immediate release.

#### A. Gravity<sup>24</sup>

24. Gravity of the crime is one of the principal considerations in determining an appropriate sentence.<sup>25</sup> It is measured both *in abstracto*, by analysing the nature of the crime as demonstrated by the constituent elements,<sup>26</sup> and *in concreto*, taking into account the particular circumstances of the case, and by considering both qualitative and quantitative aspects.<sup>27</sup> In broader sense, gravity assessment also encompasses the gravity of the convicted person's culpable conduct, in particular conduct constituting the elements of the relevant mode of liability.<sup>28</sup>
25. Under the *KCC*, factors such as the intensity of danger or injury to the protected value,<sup>29</sup> circumstances of the commission,<sup>30</sup> and consequence of the offence<sup>31</sup> also go towards of the gravity assessment.
26. **Protected value**: The crimes under Counts 2 and 3 are classified as offences

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Court of Republic of Kosovo, *Sentencing Guidelines*, 1<sup>st</sup> Edition, 2018 ('2018 Sentencing Guidelines'); Gjykata Supreme e Republikës së Kosovës, *Udhëzues i përgjithshëm për matjen e dënimit*, Botimi II, 2024 ('2024 Sentencing Guidelines').

<sup>23</sup> The *Rules*, rule 163(1)(b).

<sup>24</sup> The *Law*, art 44(5).

<sup>25</sup> *The Prosecutor v. Dominic Ongwen*, Sentence, ICC-02/04-01/15-1819-Red, 6 May 2021, para 52 ('*Ongwen Sentence*').

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *KCC*, art 69(3)3.1; *See also*, *Ongwen Sentence*, para 52.

<sup>29</sup> *KCC*, art 69(3)3.3.

<sup>30</sup> *KCC*, art 69(3)3.4; *See also*, *Prosecutor v Nzabonimpa*, Judgment, MICT-18-116-T, 25 June 2021 para 398 ('*Nzabonimpa Judgement*').

<sup>31</sup> The *Law*, art 44(5).

against public order and against the administration of justice, respectively.<sup>32</sup> In assessing the danger or injury to the protected value, the Panel may consider the seriousness and permanence of the consequence.<sup>33</sup> The offences in the present case did not have permanent or serious consequences for public order or the administration of justice: Mr Bahtijari's actions implicated a singular witness who later testified as intended. The course of justice was not diverted. Mr Bahtijari was no threat to safety and the functions of the Court were not interfered with.

27. **Circumstances of commission:** Mr Bahtijari neither threatened nor harmed Witness 1, the basis of the Plea Agreement makes it clear that this was an offer of a benefit or gift.<sup>34</sup> Apart from the 5 April visit, Mr Bahtijari had no other interaction with Witness in the context of the offences. Accepting the timing given to the whole of the group conduct, Mr Bahtijari's remaining misconduct is limited to a few phone contacts with Witness 1 and Mr Januzi, which occurred within the span of one week.<sup>35</sup>

#### **B. Individual Circumstances of the Convicted Person<sup>36</sup>**

28. The Panel shall take into account the individual circumstances of the convicted person in imposing punishment.<sup>37</sup> Mr Bahtijari's relevant individual circumstances include his good character, his family circumstances, a history of trauma and hardship, and his health and medical history.

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<sup>32</sup> KSC-BC-2023-10, F00379, *Prosecution submission of confirmed indictment with confidential Annexes 1 and 2 and public Annexes 3 and 4*, 10 July 2024, public, para. 33.

<sup>33</sup> *2024 Sentencing Guidelines*, p. 25, para. 2.3; *2019 Sentencing Guidelines*, p. 40, para. 3.5.2.3.

<sup>34</sup> *Nzabonimpa Judgment*, para. 398 ('the fact that witnesses were not threatened or harmed is a consideration and places the gravity of the offence in its proper context.').

<sup>35</sup> KSC-BC-2023-10, ERN SPOE00339014-00339017, Interactions between Ismet Bahtiajri and Sabit Januzi extracted with Cellebrite from Ismet Bahtijari's seized phone (Samsung A02s); KSC-BC-2023-10, ERN SPOE00339024-00339027, Interactions between Ismet Bahtijari and Witness 1 extracted with Cellebrite from Ismet Bahtijari's seized phone (Samsung A02s).

<sup>36</sup> The *Law*, art 44(5); KCC, art. 69(3)3.7.

<sup>37</sup> The *Law*, art 44(5).



Good Character<sup>38</sup>

29. Mr Bahtijari was and remains a person of integrity, who has always helped and cared for other people.<sup>39</sup> He has a reputation as a respected family man in his community. The tenor of his past conduct is evidenced in various witness statements:

He has always been a good man to everybody. One example of this was that I remember in Kosovo, there was an unemployment crisis, and he helped others by finding jobs for them in the company he worked.<sup>40</sup>

He has always helped other people. I think almost every house in this village he will have done 2 or 3 days worth of work/help for to help with things even if it meant he had to leave his own paid work for them.<sup>41</sup>

You can also see it in his children by how respectful they are. He is a village man, a family man, he minds his own business...<sup>42</sup>

Even if he didn't have enough for himself he would share. If he had food he would share. He had a heart of gold and would always want to help people [...] He just looked after his kids when we were in the mountains and helped with burying the people that died...<sup>43</sup>

Family Circumstances

30. Mr Bahtijari's ties with his family and community are strong, being a father of [REDACTED] and a grandfather and a well-known and respectable figure of [REDACTED] Kosovo. It is an extremely close family unit which was heavily affected by his arrest. This is illustrated in the statements provided by his family and friends:

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<sup>38</sup> KCC, art 69(3)3.5.

<sup>39</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024; Annex 2, Statement of [REDACTED], [REDACTED] 2024; Annex 3, Statement of [REDACTED], [REDACTED] 2024; Annex 2, Statement of [REDACTED], [REDACTED] 2024; Annex 3, Statement of [REDACTED], [REDACTED] 2024; Annex 3, Statement of [REDACTED], [REDACTED] 2024.

<sup>40</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>41</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>42</sup> Annex 3, Statement of [REDACTED], [REDACTED] 2024.

<sup>43</sup> Annex 3, Statement of [REDACTED], [REDACTED] 2024.

I am so connected to my father. There is nothing I wouldn't do for him. We are all so close to each other as a family.<sup>44</sup>

Now I am in effect the head of the household, I have taken responsibility for everything for looking after the family. I feel a lot of stress. We didn't know where he was arrested or where he was taken.<sup>45</sup>

31. Indeed, [REDACTED] it is clear he is needed at home:

[REDACTED].<sup>46</sup>

[REDACTED].<sup>47</sup>

[REDACTED].<sup>48</sup>

### Trauma and Hardship

32. It is widely recognised that the Kosovo war period left a deep mark on the country. Most of the Kosovan population, including 90% of the Kosovar Albanians, was displaced from their homes as a result.<sup>49</sup>

33. During conflict, individuals may fall victim of or bear witness to various atrocities like displacement, casualties, and severe material destruction. The range of traumatising experiences can leave a long-lasting impact on the social psyche and structure.<sup>50</sup>

34. Mr Bahtijari's village was attacked twice during the war. He and his family escaped into the mountains, including with a very young baby who now [REDACTED].<sup>51</sup> Mr Bahtijari recalled that:

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<sup>44</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>45</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>46</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>47</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>48</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>49</sup> Human Rights Watch, *Under Orders: War Crimes in Kosovo* (Report, HRW 2001), Part 1, p. 4.

<sup>50</sup> Sara Kijewski and Markus Freitag, 'Civil war and the Formation of Social Trust in Kosovo: Posttraumatic Growth or War-related Distress?' (2018) 62(4) *Journal of conflict resolution* 717, 718.

<sup>51</sup> Annex 2, Statement of [REDACTED], 29 November 2024; Annex 2, Statement of [REDACTED] 29 November 2024; Annex 2, Statement of [REDACTED], 28 November 2024, para. 5; Kennedy Report, p. 9-12.

The whole village had to flee... we stayed away two or three months. We had to leave because fighting was already going on. We had to find shelter for our children.<sup>52</sup>

A few months later, the family returned to a burnt home, possibly littered with landmines, and the family dog slaughtered:

I remember moving out of the house three times. We came back home and everything was burnt. The only place not burnt was this place where we used to keep the cows. We had to sleep in there until our father could make a place in our burnt house for us to sleep<sup>53</sup>

[REDACTED]: 'When we came back, [Ismet Bahtijari] stopped us outside the gates and wouldn't let us in until he had checked the ground for mines. They had killed our dog and left it in our bedroom.'<sup>54</sup>

[REDACTED]: 'I remember the grass had grown a lot, he told us to wait there [outside the gates] and he went himself to check if there were any landmines. My grandmother was shouting at him not to go and to stay with the children... He went in and shut the gates and shut us out and checked with his own hands to make sure it was safe... This was an example of the type of person he was.'<sup>55</sup>

35. Indeed, Professor Kennedy concluded that upon assessment Mr Bahtijari meets the diagnostic criteria for [REDACTED], primarily related to his experiences during the war.<sup>56</sup> This has likely perpetuated [REDACTED], leading to substantial functional impairment.<sup>57</sup>

#### Current Medical Condition

36. Mr Bahtijari is living with [REDACTED]<sup>58</sup> conditions. This must be considered

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<sup>52</sup> Kennedy Report, p. 9-12.

<sup>53</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>54</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>55</sup> Annex 2, Statement of [REDACTED], [REDACTED] 2024.

<sup>56</sup> Annex 1, Report of Professor Harry Kennedy, 22 November 2024 ('Kennedy Report'), p. 11, paras. 13.15, 13.31 ; p. 42, para. 7(c). In Kosovo, various studies conducted after 1999 indicated large portions of the population were suffering from mental health conditions which could be connected to either direct or indirect involvement in the events during the war period. See, e.g., Mimoza Shahini & Merita Shala, 'Post Traumatic Stress Disorder in Kosovo Veterans' (2016) January–March, *SAGE Open*, 1.

<sup>57</sup> Studies involving personnel exposed to war environments found a [REDACTED] and PTSD: (September 2024).

<sup>58</sup> Kennedy Report, p. 42, paras. 7-8.

when determining what is appropriate as a punishment.

37. During the initial medical check before his interview with the SPO on 5 October 2023, the examining physician learnt of Mr Bahtijari's [REDACTED],<sup>59</sup> and promptly warned him of the risks of [REDACTED].<sup>60</sup>
38. The next day, upon his arrival in The Hague, Mr Bahtijari was '[REDACTED]'.<sup>61</sup> He was held there until his initial appearance on 9 October 2023,<sup>62</sup> necessitating [REDACTED] by his Duty Counsel.<sup>63</sup>
39. Mr Bahtijari's condition [REDACTED]. On 26 February 2024, Mr Bahtijari's counsel, albeit a layperson, communicated that [REDACTED] to the Detention Facilities.<sup>64</sup>
40. After examining Mr Bahtijari in late October 2024, Professor Kennedy concluded that he is currently at risk of [REDACTED] and may have already suffered [REDACTED].<sup>65</sup>
41. The medical concerns are serious and ongoing.
42. Professor Kennedy's report demonstrates the [REDACTED] circumstances to be considered when determining the sentence to be imposed to him.
43. His time in custody will have been hard as it involved [REDACTED] and remains burdensome given [REDACTED].

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<sup>59</sup> KSC-BC-2023-10, ERN 123123-123127 RED2, *Redacted version of notes taken during the arrest of Ismet Bahtijari*, 5 October 2023, p. 3 ('08:21 – [REDACTED] for last 20 years. [REDACTED]').

<sup>60</sup> 123123-123127 RED2, *Redacted version of notes taken during the arrest of Ismet Bahtijari*, 5 October 2023, p. 3 ('08:37 – Info on possible risk while [REDACTED]').

<sup>61</sup> [REDACTED]

<sup>62</sup> [REDACTED]

<sup>63</sup> KSC-BC-2023-10, F00480, *Bahtijari Response to F00477*, 25 September 2024, strictly confidential and *ex parte*, para. 10(b).

<sup>64</sup> KSC-BC-2023-10, F00480, *Bahtijari Response to F00477*, 25 September 2024, strictly confidential and *ex parte*, para. 15.

<sup>65</sup> Kennedy Report, p. 16, para. 19.2; p. 28, para. 32.27.

44. Mr Bahtijari's vulnerability is unmistakable. The fact that his conditions are [REDACTED] means any additional custodial penalty would significantly impact his available time and would be a harsher punishment than if Mr Bahtijari was in good health.

Health and Medical History

45. Mr Bahtijari has a long history of [REDACTED]. [REDACTED]. While [REDACTED],<sup>66</sup> [REDACTED] can be considered a factor that goes to mitigation.<sup>67</sup>

46. Professor Kennedy visited Mr Bahtijari on 24 and 25 October 2024 and has provided the report at Annex 1, dated 30 November 2024. Mr Bahtijari's history of [REDACTED].<sup>68</sup> [REDACTED].<sup>69</sup> [REDACTED].<sup>70</sup> [REDACTED].<sup>71</sup> [REDACTED].

47. [REDACTED].<sup>72</sup> [REDACTED].<sup>73</sup> [REDACTED].<sup>74</sup> [REDACTED].<sup>75</sup>

48. Following his assessment of Mr Bahtijari on 24 and 25 October 2024, Professor Kennedy concluded that Mr Bahtijari: (i) meets the diagnostic criteria for [REDACTED];<sup>76</sup> and (ii) [REDACTED].<sup>77</sup>

49. [REDACTED].<sup>78</sup>

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<sup>66</sup> [REDACTED].

<sup>67</sup> [REDACTED]; See also [REDACTED].

<sup>68</sup> Kennedy Report, [REDACTED].

<sup>69</sup> *Ibid*, [REDACTED].

<sup>70</sup> *Ibid*, [REDACTED].

<sup>71</sup> *Ibid*, [REDACTED].

<sup>72</sup> [REDACTED].

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

<sup>74</sup> [REDACTED].

<sup>75</sup> [REDACTED].

<sup>76</sup> Kennedy Report, [REDACTED].

<sup>77</sup> *Ibid*, [REDACTED].

<sup>78</sup> *Ibid*, [REDACTED].

50. Based on his assessment of Mr Bahtijari's symptoms and [REDACTED], Professor Kennedy is of the opinion that Mr Bahtijari was [REDACTED].<sup>79</sup> In particular, Professor Kennedy notes that with respect to 5 April 2023:

[REDACTED].<sup>80</sup>

51. Articles 18(2) and 70(3)3.1 of the *KCC* provide that the Panel can consider diminished mental capacity as a mitigating factor in deciding the duration and the type of sanction it imposes. This is reiterated by the *Sentencing Guidelines* which list diminished mental capacity as a mitigating circumstance for determining punishment and notes that when fulfilled the Court can consider a reduction in sentence.<sup>81</sup>

52. Article 18(2) of the *KCC* has been applied by Kosovan courts in several cases to mitigate or alter the conditions of a sentence when a relevant mental health condition is present at the time of an offence.<sup>82</sup>

53. Mr Bahtijari's functional mental state at the time of his offending is relevant to a consideration of mitigation per Article 18(2) and suggests that he did not commit the offence with a high degree of will.<sup>83</sup> Further, [REDACTED].<sup>84</sup> It is also against this backdrop that Mr Bahtijari was more likely to succumb to direction.

54. Though culpable, Mr Bahtijari's culpability is reduced by his impaired mental capacity, which warrants a mitigation of his punishment.<sup>85</sup>

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<sup>79</sup> Kennedy Report, [REDACTED].

<sup>80</sup> *Ibid*, [REDACTED].

<sup>81</sup> *2024 Sentencing Guidelines*, p 219; *2019 Sentencing Guidelines*, p 56, para 3.1 and p 101–104.

<sup>82</sup> [REDACTED].

<sup>83</sup> *Ibid*. [REDACTED].

<sup>84</sup> Kennedy Report, p. 43, paras. 10-11.

<sup>85</sup> *See* Case No. 2022:108403, Basic Court of Mitrovicë, Judgement (11 May 2023), Judge Mentor Hajraj presiding, p. 29.

### C. Degree of Criminal Liability and Mitigation of Responsibility<sup>86</sup>

55. In addition to the reduction in mitigation by way of impaired mental capacity, it has been accepted that Mr Bahtijari engaged in the offending act under direction by Mr Shala and has lesser liability than the co-accused.<sup>87</sup> The facts surrounding the offending and the plea agreement show that Mr Bahtijari played a lesser role in the offense.<sup>88</sup>
56. Placed in context, the gravity of this case and the role of Mr Bahtijari are both minor. Comparable cases of greater seriousness and with aggravating circumstances show that sentences between 11 months and two years are the norm.<sup>89</sup> As the circumstances of this case show that Mr Bahtijari's offending was far less serious and his liability mitigated by the fact that he acted under direction, it follows that the punishment should be less than comparable cases of greater seriousness and liability.
57. For example, in *Nzabonimpa et al.* defendants who bore lesser culpability to crimes of much graver significance – who had each spent more than 11 months in pre-trial detention – were sentenced to time served.<sup>90</sup>

### D. Motive<sup>91</sup>

58. Other than being directed on this one occasion, there is no evidence that Mr

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<sup>86</sup> Rule 163(1)(a)(i); KCC, Article 69(3)(3.1).

<sup>87</sup> *Revised Plea Agreement*, p 11 (Annex 1, Agreed Factual Basis).

<sup>88</sup> *Ibid*; KCC, art 70(3)(3.4).

<sup>89</sup> *The Prosecutor v. Jean-Pierre Bemba and al.*, Trial Chamber VII, ICC-01/05-01/13-1989-Red, Judgment pursuant to Article 74 of the Statute, 19 October 2016, pp. 455-457; *Independent Counsel v. Hassan Papa Bangura and al.*, Trial Chamber II, SCSL-11-02-0066, Judgment in Contempt Proceedings, 25 September 2012 paras. 70-101; *Independent Counsel v. Hassan Papa Bangura and al.*, Trial Chamber II, SCSL-11-02-0071, Sentencing Judgment in Contempt Proceedings, 16 October 2012, paras. 92, 160, 678; *Prosecutor v. Yelena Rašić, Written Reasons for Oral Sentencing Judgment*, IT-98-32/I-R77.2, 6 March 2012, paras. 18, 31.

<sup>90</sup> *Nzabonimpa Judgment*, paras. 400,

<sup>91</sup> KCC, art 69(3)3.2.



Bahtijari has taken any interest in this court nor its officers.

59. Mr Bahtijari also acted with a level of trepidation: Witness 1 observed that Mr Bahtijari appeared [REDACTED] it is relevant to consider Mr Bahtijari's state of mind when considering motive and in comprehending his actions as a whole.<sup>92</sup>

**E. Conduct after the act<sup>93</sup>**

60. Mr Bahtijari cooperated with the Prosecution and their investigators during and after his arrest. He has not wasted court time: he did not at any stage seek to suggest he had an alibi and signed the first plea agreement prior to the commencement of trial.<sup>94</sup> Consequently, hearing dates are vacated and scheduled witnesses no longer need to travel, saving court resources. Credit should be given, not only to the very admission of guilt, but also to its timely intervention prior to the beginning of the trial and the testimony of witnesses, which demonstrates Mr Bahtijari's commitment to cooperate.
61. Moreover, Mr Bahtijari has displayed perfectly satisfactory behaviour while in detention.

**F. Purposes of Punishment**

62. Considering the purposes of punishment, a just punishment for Mr Bahtijari is a lenient one.
63. The investigation, prosecution, and conviction suffice to achieve general deterrence. The guilty plea suggests that Mr Bahtijari understand the wrongful nature of his conducts and is unlikely to re-offend, removing the need for specific

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<sup>92</sup> See, *2024 Sentencing Guidelines*, page 25, para 2.2; *Sentencing Guidelines 2018* page 39-40, para 3.5.2.2 which states that criminal acts perpetrated out of concern rather than self-interest or malice are generally considered to deserve a lesser punishment.

<sup>93</sup> *The Rules*, Rule 163(1)(a)(ii).

<sup>94</sup> KSC-BC-2023-10, F00596/A03, *Annex 3 to URGENT Prosecution notification of plea agreements*, 13 November 2024, confidential.



deterrence through sentencing. Given the role played by [REDACTED] in the offending, the risk of recidivism is further lowered by [REDACTED].

64. Mr Bahtijari poses no danger to society. There is no need to incarcerate him to protect the community. On the contrary, Mr Bahtijari's family and community are an integral part to his moral framework. Among them, rather than in a prison, is the supportive network that would be essential to Mr Bahtijari's effective rehabilitation.
65. For someone who has never been on the wrong side of law, spending 13 months in detention in a foreign country where he does not speak the language and is physically apart from his supportive network is already a severe punishment. Given his financial situation, any fine should be deemed as fully covered by the time served.
66. Any further retribution, custodial or monetary, would be disproportionately strident.

## V. CONCLUSION

67. Mr Bahtijari's limited role in the commission of the offences, his personal circumstances and background, and health conditions, particularly in respect to his [REDACTED], should be considered holistically. The overwhelming mitigating factors benefiting Mr Bahtijari warrant the determination of a lenient sentence inferior to those imposed to the Co-Accused in this case.
68. Additionally, Mr Bahtijari has been assessed as indigent. He has been out of work for over a year, has significant health issues that will affect his ability to work and has [REDACTED] who will need his support. As such, any financial penalty would not be appropriate.

69. Ultimately, Mr Bahtijari is eligible for a sentence that allows for his immediate release and return home with no further punishment or cost.

## VI. RELIEF SOUGHT

70. A sentence of time served as at 18 December 2024 and his immediate release.

## VII. CLASSIFICATION

71. This document is filed as confidential at this stage. A publicly redacted version will be filed forthwith.

Word count: 5823

A handwritten signature in black ink, appearing to read 'Felicity Gerry', with a long, sweeping underline that extends to the left and then curves back under the signature.

**Dr Felicity Gerry KC**

**Counsel for Mr Bahtijari**

6 December 2024

At London, UK