

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: 2 September 2024
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Further Publicly redacted version BAHTIJARI FURTHER UPDATED PRE-TRIAL BRIEF

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I. DOCUMENT

1. Mr Ismet Bahtijari hereby files this further 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.

II. PROCEDURAL HISTORY

2. 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, which are now at an end.
3. On 19 August 2024 Mr Bahtijari filed an updated pre-trial brief² on time but in which he expressly reserved the right to provide a further updated pre-trial brief, not least because medical evidence was outstanding.
4. On 16 August 2024 Mr Bahtijari also filed a request for an extension of time to file any further updated pre-trial brief to 30 August or at such time as the pre-trial briefs of others.³

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

² KSC-BC-2023-10, F00439, *BAHTIJARI UPDATED PRE-TRIAL BRIEF*, 19 August 2024.

³ KSC-BC-2023-10, F00436, *BAHTIJARI request to extend time to file an updated pre-trial brief*, 16 August 2024.

5. On 27 August 2024 the pre-trial judge issued an order refusing the application for an extension of time and set the time limit for filing at 2 September 2024.⁴
6. This further updated pre-trial brief replaces the previous documents. In the absence of necessary material, as set out below, it remains an outline.

III. PROSECUTION PRE-TRIAL BRIEF

7. It is worth noting at this stage, one inference on all the evidence is that [REDACTED].
8. It is difficult to answer the Prosecution ('SPO') pre-trial brief ('PTB'),⁵ because it is inaccurate and the SPO are seeking to rely on hearsay notes from witnesses (one unidentified and one [REDACTED]) who are not being called. What follows are some examples:

Meeting [REDACTED].

9. The SPO assert in their PTB that Mr Bahtijari met [REDACTED] before visiting [REDACTED].⁶ Footnote 18 of the SPO PTB suggests the evidence relied upon in making this assertion are two SPO 'Official Notes' of contact with [REDACTED].⁷ These are not formal interviews with [REDACTED], but rather the recollection and post contact summaries (of either informal in person visits, or video calls)

⁴ KSC-BC-2023-10, F00453COR, Pre-Trial Judge, *Corrected Version of Decision Concerning Timeframes for Filing of Defence Pre-Trial Briefs*, 27 August 2024.

⁵ KSC-BC-2023-10, F00177/A01, *ANNEX 1 to Submission of Prosecution Pre-Trial Brief, witness and exhibit lists, and Rule 109(c) chart*, 16 February 2024 para 13 ('F00177/A01').

⁶ *Ibid*, at 13.

⁷ KSC-BC-2023-10-112769-112772 RED, *Redacted version of SPO Official Note of contact with [REDACTED]*, 6 April 2023, para. 5-6; KSC-BC-2023-10-113354-113355 RED, *Redacted version of SPO Official Note of contact with [REDACTED]*, 21 May 2023, para. 8.

with [REDACTED] by an SPO Prosecutor,⁸ and an unidentified Witness Security Officer.⁹ In the case of the Official Note ERN: 113354-113355, the date of the note is 3 days after the actual meeting with [REDACTED] took place. Neither the SPO Prosecutor nor the unidentified Witness Security Officer are on the list of witnesses the SPO are going to call.

10. In the Official Note ERN: 112769-112772, the SPO records that during a Microsoft Teams video call with [REDACTED] on 6 April 2023, [REDACTED] suggested that Mr Bahtijari told him during his visit on 5 April 2023 that [REDACTED] had recently approached Mr Bahtijari whilst he was drinking at [REDACTED]. However, [REDACTED] noted he did not know exactly when the alleged meeting took place.¹⁰

11. In the second Official Note on which the SPO seek to rely to substantiate this claim, the unidentified Witness Security Officer who visited [REDACTED] in Kosovo over a month later on 18 May 2023, records that [REDACTED] mentioned he believed a meeting took place involving [REDACTED] prior to the alleged approaches.¹¹

12. It's worth noting that this evidence does not reference Mr Bahtijari specifically, but instead outlines that [REDACTED] said '**one of the people** who intimidated him' had earlier met with [REDACTED] in a coffee shop.¹²

13. The SPO also assert in their PTB that [REDACTED] is a former commander of Mr Bahtijari in the [REDACTED] the Kosovo Liberation Army ('KLA').¹³ This

⁸ KSC-BC-2023-10, 112769-112772 RED, *Redacted version of SPO Official note of contact with [REDACTED]*, 6 April 2023.

⁹ KSC-BC-2023-10, 113354-113355 RED, *Redacted version of SPO Official note of meeting with [REDACTED]*, 21 May 2023.

¹⁰ 112769-112772 RED, para 5-6.

¹¹ 113354-113355 RED, para 8.

¹² Ibid.

¹³ F00177/A01 para 7.

assertion also implies that Mr Bahtijari was an active member of [REDACTED]. Footnote 2 of the SPO PTB suggests the evidence relied on in making this assertion (as it relates to Mr Bahtijari) is solely the transcript of the SPO's interview with Mr Bahtijari conducted on 5 October 2023.¹⁴ This evidence was collected 6 months after April, just after his arrest and without a lawyer. As yet the SPO have not provided the recording of that interview although they have recently indicated they will do so after a request by the defence. Disclosure obligations are not meant to be by request.

14. On 8 July 2024 the SPO served disclosures [REDACTED]. [REDACTED].
15. The SPO allege that Mr Bahtijari, [REDACTED] and [REDACTED] have all kept in contact since the war.¹⁵ It can reasonably be inferred by the wording used that the SPO allege Mr Bahtijari has kept in contact with both [REDACTED] and [REDACTED]. Footnote 3 of the SPO PTB notes the evidence relied on to substantiate this assertion as it relates to Mr Bahtijari, is again his interview with the SPO on 5 October 2023 and the interview given by [REDACTED] on 4 October 2023.¹⁶ However, close examination of the pages referred to by Footnote 3 highlights that Mr Bahtijari's interview (ERN: 116065) in fact suggests Mr Bahtijari has had little to no contact with [REDACTED] during or after the war.
16. The SPO allege that Mr Bahtijari told [REDACTED] during the 'First Approach' that he had been sent to visit [REDACTED] by [REDACTED].¹⁷ Footnote 16 of the SPO PTB suggests the only evidence relied on to support this assertion is again an Official Note summarising [REDACTED]'s initial phone call to the SPO on 5 April

¹⁴ KSC-BC-2023-10, 116065-TR-ET Part 1 RED, *Redacted version of SPO Transcript of interview with Ismet BAHTIJARI ([REDACTED])*, 5 October 2023, pp. 7-9.

¹⁵ F00177/A01, para 7.

¹⁶ See KSC-BC-2023-10, 116065-TR-ET Part 1 RED, *Redacted version of SPO Transcript of interview with Ismet BAHTIJARI (W04897)*, 5 October 2023, pp. 7-9; KSC-BC-2023-10, 116063-TR-ET, *Interview of Witness [REDACTED] Part 1*, dated 4 October 2023, pp. 9-13; KSC-BC-2023-10/116063-TR-ET, *Interview of Witness [REDACTED] Part 4*, dated 4 October 2023, p. 4.

¹⁷ F00177/A01 para 13.

2023. The note was made by an unnamed SPO Witness Security Officer who took the phone call.¹⁸ The note records [REDACTED] as telling the SPO that Mr Bahtijari had told him [REDACTED] had **called him** prior to the visit and asked for a meeting.¹⁹ [REDACTED]'s disclosed phone records do not record any contact or phone calls to Mr Bahtijari's phone number on or before 5 April 2023, and there is no further evidence disclosed that suggests [REDACTED] directly contacted Mr Bahtijari and asked or organised to meet in a café prior to 5 April 2023 as [REDACTED] suggests in 112768-112768.²⁰ In addition, whilst not cited by the SPO in relation to this issue, examination of their 'official note' of contact with [REDACTED] just one day later on 6 April 2023 (ERN: 112769-112772), reveals on that occasion [REDACTED] provided different information recalling an approach and not a phone call.²¹ Finally, [REDACTED] outlines in both his SPO interview and in audio that was captured during the 12 April 2023 visit to [REDACTED]'s home, that it was in fact he ([REDACTED]) that met Mr Bahtijari, not [REDACTED].²²

The alleged first approach

17. The SPO allege that prior to the First Approach, Mr Bahtijari spoke to [REDACTED] who had answered [REDACTED]'s phone and when [REDACTED] suggested [REDACTED], Mr Bahtijari responded that [REDACTED] should not.²³ Footnote 11 of the PTB suggests the evidence relied upon is the SPO's interview

¹⁸ See, KSC-BC-2023-10, 112768-112768 RED, Redacted version of SPO Official note of contact with [REDACTED], 5 April 2023, para 2.

¹⁹ Ibid.

²⁰ See relevant phone records associated with [REDACTED] - KSC-BC-2023-10-SPOE00331860-SPOE00332231; KSC-BC-2023-10-SPOE00333744-00333746; KSC-BC-2023-10-SPOE00335420-SPOE00335425 RED; KSC-BC-2023-10-SPOE00341414-SPOE00341417 RED.

²¹ 112769-112772 RED, para 5

²² KSC-BC-2023-10, 116063-TR-ET Part 1, *Interview of [REDACTED]*, 4 October 2023, p. 22, line 13-19; KSC-BC-2023-10, 116623-01-TR-AT-ET Revised, *Transcript of audio recording dated 12 April 2023*, p. 4, line 4-5.

²³ F00177/A01, para 9.

with [REDACTED] on 20 April 2023.²⁴

18. In the 20 April interview, [REDACTED] suggests [REDACTED] *told him* when speaking to Mr Bahtijari on the phone he used words to the effect of “don’t call him, don’t call him because he is a coward and he won’t wait for me there”.²⁵
19. None of this evidence comes from [REDACTED]. All of it is after the events of 12 April 2023. The SPO assert it as direct fact rather than second hand hearsay.
20. The SPO assert Mr Bahtijari stated upon entering [REDACTED]’s home that he had not come for a good purpose and added an ‘Albanian phrase’ to preface his conversation with [REDACTED].²⁶
21. Footnote 15 of the SPO PTB suggests the evidence relied upon are again an SPO Official note and [REDACTED]’s formal SPO interview of 20 April 2023.²⁷
22. However, the wording used by the SPO in their PTB is not an accurate reflection of any one particular statement made by [REDACTED] and instead is an amalgam or paraphrasing of two different statements given by [REDACTED] in relation to this issue.
23. In the evidence referenced as the SPO ‘official note’ (112769-112772) the SPO recollect [REDACTED] as telling them Mr Bahtijari said ‘I haven’t come here for good’ and that he added an Albanian phrase meaning ‘I have something to do for the evil’.²⁸
24. Alternatively, when pressed in his formal interview to confirm this evidence, [REDACTED] recalled Mr Bahtijari as instead saying ‘I have not come here for

²⁴ See, KSC-BC-2023-10, 112906-TR-AT Part 1 Revised 1-ET RED, *Interview of [REDACTED]*, 20 April 2023, pp. 24-25.

²⁵ Ibid, p. 25, line 4-7.

²⁶ F00177/A01, para 12.

²⁷ See, KSC-BC-2023-10, 112769-112772 RED, para. 5; KSC-BC-2023-10-112906-TR-AT Part 1 Revised 1-ET RED, p. 22.

²⁸ 112769-112772 RED, para. 5.

celebrations, I am devil's mouthpiece, devil's advocate'.²⁹

25. The Defence also notes [REDACTED] does not make any reference to the use of an 'Albanian phrase' in his formal SPO interview.

26. The SPO's PTB is therefore inconsistent because their description of the meaning of the 'Albanian phrase' Mr Bahtijari allegedly used is actually a combination of two different pieces of information provided by [REDACTED]. Noting only one of which was collected under formal interview conditions.

27. The SPO further allege that during the First Approach, Mr Bahtijari told [REDACTED] he had been sent by [REDACTED] specifically to deliver the message that 'they' know that [REDACTED] was a harmful witness against [REDACTED] and he should therefore withdraw his testimony.³⁰ Footnote 17 of the SPO PTB again suggests the evidence relied on to support this assertion is [REDACTED]'s SPO interview of 20 April 2023 and the 'official note' of contact with [REDACTED] on 6 April 2023.³¹

28. In the earlier 6 April communication with [REDACTED], the SPO record [REDACTED] as telling them that Mr Bahtijari referred to [REDACTED] as '[REDACTED]'s weakness' and that [REDACTED] should withdraw his testimony.³² Alternatively, later when formally interviewed, [REDACTED] appears confused about reference to the terminology '[REDACTED]'s weakness', and instead suggests **Mr Bahtijari told him they have heard you are a witness against [REDACTED].**³³

²⁹ 112906-TR-AT Part 1 Revised 1-ET, p. 22, line 24-25.

³⁰ F00177/A01, para 12.

³¹ See, KSC-BC-2023-10-112906-TR-AT Part 1 Revised 1-ET RED, pp. 22-24; KSC-BC-2023-10-112769-112772 RED, para. 5.

³² 112769-112772, para. 5.

³³ 112906-TR-AT Part 1 Revised 1-ET RED, p. 23, line 1-4.

29. Whilst [REDACTED]'s evidence slightly differs across the statements / notes related to this issue, the key factors for consideration here are:

- a. That the assertion that Mr Bahtijari suggested he was being sent to deliver any kind of specific message to [REDACTED], or was instructed by [REDACTED] to deliver a specific message relating to the withdrawing of testimony is not clearly substantiated by evidence in the disclosures.
- b. Relaying that they had heard he is a witness is not a threat or an offer of a benefit nor the passing of a message.

Mr Bahitjari was in fear

30. During the 'First Approach' the SPO allege that Mr Bahtijari appeared nervous and uncomfortable to [REDACTED].³⁴ Footnote 21 of the SPO PTB suggests that again an SPO official note has been relied on to substantiate this assertion as well as [REDACTED]'s SPO interview.³⁵ Whilst the words used by the SPO in their 'official note' are indeed that Mr Bahtijari allegedly appeared 'nervous and uncomfortable' during his interaction with [REDACTED], the SPO have failed to highlight that in [REDACTED]'s interview (which they cite, but do not accurately reference in the PTB) he in fact describes Mr Bahtijari as appearing to be 'frightened' and to be in fear.³⁶

31. [REDACTED] in fact uses the terminology that he believed Mr Bahtijari was 'afraid of them, but he was also afraid of me' and that Mr Bahtijari appeared to have 'lost his mind...because of fear'.³⁷

³⁴ F00177/A01, para 14.

³⁵ See, KSC-BC-2023-10-112906-TR-AT Part 1 Revised 1-ET RED, pp.13, 22; KSC-BC-2023-10-112769-112772 RED, para.7

³⁶ 112906-TR-AT Part 1 Revised 1-ET RED, p. 22, line 16.

³⁷ Ibid, p. 13, line 8-13.

Leaving [REDACTED]'s home

32. The SPO assert in their PTB that after the alleged 'First Approach', Mr Bahtijari left [REDACTED]'s home and entered a vehicle waiting nearby that had multiple other people in it.³⁸ Footnotes 30-31 of the PTB suggest the evidence relied upon by the SPO in making this assertion is again their Official note (112769-112772) made after a video call with [REDACTED] on 6 April 2024.³⁹ The SPO suggest in this note that [REDACTED] recalled seeing Mr Bahtijari leave his house and walk towards a dark coloured golf waiting 200 meters away. [REDACTED] who was standing at the window at the time suggests she saw two men standing near the car who also got in with Mr Bahtijari, and a fourth person was in the driver's seat. In his first pre-trial brief, Mr Bahtijari asserts he received a lift from a friend to get to [REDACTED]'s home as he does not drive. Mr Bahtijari called the same person to collect him from [REDACTED]'s house and [REDACTED] is not accurate in his description of the parking and pick up arrangements, nor the number of persons present on 5 April 2023.⁴⁰ Mr Bahtijari also made this fact clear in his interview with the SPO on 5 October 2023, in which he responded when asked if he drove to [REDACTED]'s home that he did not and that a friend gave him a lift. He further confirmed that no one else was in the car.⁴¹ The recording of 12 April 2023 between [REDACTED] and [REDACTED] supports what Mr Bahtijari said in his interview.⁴²

33. Ultimately the SPO PTB is concerning over the issue of Mr Bahtijari having any meeting or interaction with [REDACTED] prior to 5 April 2023 and [REDACTED] has provided evidence that suggests it was in fact he who suggested Mr Bahtijari

³⁸ F00177/A01, para 17.

³⁹ 112769-112772, at para. 11.

⁴⁰ F00439, at 20.

⁴¹ 116065-TR-ET Part 1 RED, at p. 16, line 2-15.

⁴² KSC-BC-2023-10/116623-01-TR-AT-ET Revised, *Transcript of audio recording dated 12 April 2023*, p. 4, line 17-18.

visit [REDACTED] to clarify what appeared to be ‘rumours’ he had heard.⁴³ The SPO PTB is selective and misleading as to why Mr Bahtijari went there, his fear and what was said and done.

IV. JURISDICTION

34. This court was set up to deal with alleged war crimes. It remains Mr Bahtijari’s position (previously raised in review of detention submissions) that his case can be dealt with in Kosovo far more swiftly and where he could be treated by Kosovan speaking medical professionals.

V. ABUSE OF PROCESS / LACK OF PUBLIC INTEREST TO PROSECUTE

35. Mr Bahtijari is married with children, all of whom are now adults. He was born in [REDACTED] and has lived in [REDACTED] most of his life, where he is related to many people and is well known in his community. He was a hard-working family man who, by the time of these allegations, had obvious health issues [REDACTED] which was well known and must have been obvious to those who arrested and interviewed him, especially as they had him medically assessed before travel.

36. Before the war he sought asylum in Germany for fear of genocide. He waited months for help but it never came and, in the end, he was returned home. Given the tensions in the region, it is not clear why he and his family were not assisted. Shortly after being returned, the war began. It was clear that he and his family were at grave risk. He and his family sought to remain in their rural community but were fearful of attack. His village was attacked twice. On the first occasion they left

⁴³ 116063-TR-ET Part 1, p. 22, line 3-5.

without livestock and hid in the mountains. When they returned home, the village had been attacked and all the animals had been slaughtered. On the second occasion they left with machinery and livestock, walking for a day to another location. His wife and children stayed with family members and he sought work with his late brother as a mechanic in exchange for food. He was not a brigade member (as alleged by the SPO) but a rural worker with the skills in vehicle maintenance which come with rural life. When he and his family (including his then young children) returned the second time, their village had been devastated. They rebuilt themselves with European grants. The Pre-Trial Judge has previously noted Mr Bahtijari's rootedness in his community.⁴⁴

37. It is likely much if this information is available to the SPO but no disclosure has been given. If it is not available to the SPO then it is likely the investigations into Mr Bahtijari's situation have been inadequate. He is plainly a victim of those events and it is an appalling sadness that he is now before this court. It is obvious that by seeking asylum he had no intention to engage in a military role. A proper investigation would also reveal he could have no intention of threatening or offering benefits to [REDACTED].

38. Mr Bahitijari has been a heavy drinker. At the time of the alleged offences, he was rarely working and he would spend his days in a café in his village drinking more than 5 litres of beer a day. In approximately 2022 his regular café [REDACTED] changed the size of glasses in which they served beer so he moved to café [REDACTED] which sold traditional larger tankard size of beer. At the time of the alleged offences, [REDACTED]. This is where [REDACTED] found him. Mr Bahtijari did not drive in April 2023. If he was able to obtain work it was by being

⁴⁴ *Fourth Detention Decision*, page 8 and 9, para 25.

collected in a van and taken to engage in manual labour. He often got into debt with his village shop and would pay them back when he had work.

39. Mr Bahtijari was arrested in Kosovo at 6.33 am on 5 October 2023.⁴⁵ Following the arrest, he was transferred to the Host State and detained at the Detention Facilities of the Specialist Chambers by 6 October 2023.⁴⁶ He was assessed as fit to travel.⁴⁷ However, he appeared before the KSC on 9 October 2023 having been taken from the medical wing/ hospital so it can be inferred that he was not fit to travel after all.⁴⁸

40. Issues with Mr Bahtijari's health were raised on his behalf in submissions on a detention review on 4 March 2024.⁴⁹ Counsel noted that Mr Bahtijari has significant health conditions which were not considered or addressed in previous decisions regarding the necessity of Mr Bahtijari ongoing detention.⁵⁰ The SPO responded to these submissions on 14 March 2024 and submitted there had been 'no developments that diminish the factors supporting the need for and reasonableness of detention'.⁵¹ This, despite not obtaining or disclosing the medical assessment they obtained regarding his fitness to travel.

41. Mr Bahtijari has multiple health issues that require expert assessment. At the status conference on 22 March 2024, the then pre-trial judge indicated that the health

⁴⁵ KSC-BC-2023-10, F00011, *Notification of Arrest of Ismet Bahtijari Pursuant to Rule 55(4)*, 5 October 2023 ('Notification of Arrest') para 4.

⁴⁶ KSC-BC-2023-10, F00014, *Notification of the Reception of Ismet Bahtijari in the Detention Facilities of the Specialist Chambers*, 6 October 2023.

⁴⁷ KSC-BC-2023-10, F00021, *Report on the Arrest and Transfer of Ismet Bahtijari to the Detention Facilities with strictly confidential and ex parte Annexes 1-3*, 9 October 2023, para 30 ('Report on Arrest and Transfer').

⁴⁸ Ibid.

⁴⁹ KSC-BC-2023-10, F00195, *Bahtijari Review of Detention Submission*, 4 March 2024.

⁵⁰ Ibid, page 7, para 39.

⁵¹ Ibid, page 2, para 7.

issues were not a unique investigative opportunity. However, plainly there is a need to explore the health issues. In the absence of expert evidence, it is not known if Mr Bahtijari has a dependence that affects his cognitive function that can be connected to PTSD but it is a legitimate line of enquiry because some limited research on PTSD in Kosovo has found the following:⁵²

- PTSD symptoms were reported 8 years after the war.
- some of those with PTSD did not seek medical help for their symptoms.
- A large percentage of the general population of Kosovo are reported to have mood disorders and anxiety in the years after 1999.
- There has been a dearth of specialist institutions working with veterans' PTSD in Kosovo and there was a high level of stigma around the disorder and therefore room for 'self-medication'.
- Although Kosovo became independent in 2008, economic stagnation, widespread poverty, high unemployment rates, and poor quality of life

⁵² Mimoza Shahini and Merita Shala, 'Post Traumatic Stress Disorder in Kosovo Veterans' (2016) January–March, *SAGE Open*, 1; Teuta Danuza et al, 'Post Traumatic Stress Disorder and Social Support in the Veterans of the War in Kosovo' (2014) 8(1) *Kairos Journal of Philosophy and Science* 75; Shira Maguen et al, 'PTSD Subclusters and Functional Impairment in Kosovo Peacekeepers' (2009) 174(8) *Military Medicine* 779; E Ralevski et al, 'PTSD and comorbid AUD: a review of pharmacological and alternative treatment options' (2014) (5) *Substance Abuse Rehabilitation* 25 <https://doi.org/10.2147/SAR.S37399>; Naim Fanaj and Erika Melonashi, 'Understanding and Describing PTSD in Kosovo: A Systematic Evidence-Based Review' (2017) October–December, *Sage Open* 1. See also "Between Illness and Prejudice" <<https://kosovotwopointzero.com/en/between-illness-and-prejudice/>> and Nona Mohammadi Imir, 'Transitional Justice and Mental Health: The Kosovo Case' (Masters Thesis, University of Luxembourg, 2020) <https://repository.gchumanrights.org/bitstreams/6526eeb6-86a5-4f42-8dc3-f1a167d3de4d/download>

continue to burden the country (United Nations Development Program [UNDP], 2010). Research studies suggest that PTSD prevalence rates in less economically developed and non-Western countries tend to be higher as compared with other countries.”

- Approaches to mental health treatment in Kosovo that take the particular socio-cultural and psychosocial contexts in account seem to be lacking.
- 90% of KLA veteran suicides are as a result of war trauma.
- Even though 20 years have passed veterans may only now be seeking help for psychological trauma.
- PTSD and mental health issues are still stigmatised in Kosovar culture.

42. On 1 May 2024 an application was made ex parte for relevant medical reports. This necessarily remains strictly confidential. No decision has yet been issued on that request.⁵³

43. Further, in submissions on pre- trial detention, the SPO have relied in the past on a so-called ‘pervasive climate of fear and intimidation in Kosovo against witnesses or potential witnesses’.⁵⁴ These statements refer to previous decisions, which refer to the same statements in other previous decisions, or rely on statements in the *Gucati* judgment which articulate the existence of such a climate in the past.⁵⁵ Expert evidence from [REDACTED] on these issues given in those cases must be in the possession of the SPO and yet it has not been disclosed, despite [REDACTED] describing Mr Bahtijari as ‘in fear’ at the time of the visit on 5 April 2023. Whilst some background material has been disclosed in relation to the bad

⁵³ KSC-BC-2023-10, F00273, ‘BAHTIJARI FILING FOR MEDICAL REPORTS ex parte’, 1 May 2024.

⁵⁴ *Decision on Arrest and Transfer*, para 21; KSC-BC-2023-10, F00373, SPO submission pertaining to periodic detention review of Ismet Bahtijari, page 5, para 13.

⁵⁵ For example, KSC-BC-2020-07, F00611/RED, *The Prosecutor v. Hysni Gucati and Nasim Haradinaj*, Public Redacted Version of the Trial Judgment, 18 May 2022 para 553.

character of [REDACTED] (which could of itself create fear, especially his connection with guns), the climate in Kosovo more broadly is highly relevant to a visit out of concern for [REDACTED] and/ or the circumstances for Mr Bahtijari at the time of these allegations and yet the [REDACTED]report has apparently been withheld.

44. These issues are clearly relevant to Mr Bahtijari's fitness to cope with a trial and his potential defences as well as the overall public interest as to whether he should be tried at this court at all and whether the current process, as it affects him, is an abuse of process sufficient to stay the indictment. It is at least hoped that the SPO will provide disclosure from all the other cases at this court and all records from the ICTY to ensure that disclosure is properly given in order to assess whether an abuse of process submission can be made to the trial chamber.

VI. FAIR TRIAL ISSUES

45. 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, SPO reliance on their own notes rather than witness testimony and non-disclosure to name those so far identified.

46. Medical

- a. In October 2023 Mr Bahtijari was arrested. He [REDACTED] and his rights were read but not explained. 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 2023.⁵⁶ The defence have received some

⁵⁶ Report on the Arrest and Transfer of Ismet Bahtijari to the Detention Facilities, KSC-BC-2023-10/F00021, 9 October 2023, para. 30.

confidential detention medical notes from the medical officer. These remain confidential. 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.

- b. When Mr Bahtijari was interviewed [REDACTED]. His rights were read but not explained and were not fulfilled. He was without a lawyer.
- c. On 9 October 2023 Mr Bahtijari appeared before the court and entered a not guilty plea. He was transferred from the medical wing (where he had been since his arrival in The Hague on 6 October) in order to do so.⁵⁷ Duty counsel at the time has reported he was required to visit Mr Bahtijari in full PPE. The health issues were not brought to the attention of the court.
- d. 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.
- e. On 13 February 2024 at the status conference, Counsel for Mr Bahtijari raised the need to obtain confidential medical reports as part of the defence investigations 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.
- f. 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)⁵⁸ and made an

⁵⁷ Ibid, para. 39, 48.

⁵⁸ See BAHTIJARI FILING FOR STATUS CONFERENCE, KSC-BC-2023-10/F00219, 18 March 2024.

application for funding for confidential reports in the absence of MOJ funding.⁵⁹

- g. 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.
- h. Legal Aid was granted on 10 May 2024. It is subject to a 20% reduction (paid on submission of end of stage reports) 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.
- i. 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.
- j. Obviously, Mr Bahtijari cannot be tried fairly if he is unwell and was unwell at the time of the alleged offending and the level and nature of his health issues are not explained through expert opinion.

47. Defence investigations

- a. Defence investigations are allocated limited funds that are unlikely to cover the collection of evidence from (currently 23 witnesses), let alone medical reports and military records. This may be an issue for complexity level but are mentioned here in anticipation of difficulties.
- b. The previous pre-trial briefs made it plain that there is a dispute as to how many people were with Mr Bahtijari on 5 April 2023. The defence have asked the SPO to take photographs showing the view from the house of [REDACTED] but they have refused. It is not possible for the

⁵⁹ Ibid.

defence to obtain these photographs given the restrictions on approaches to Witnesses.

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

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.

49. Interviews

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 / unreliable and that his health affects his fitness to be tried.

50. It is important that there is special attention paid to the notification of the crime to the accused. There are numerous authorities regarding the admissibility and reliability of an interview and the rights at interview for accused, especially those with medical issues and without a lawyer, also provided for in the Kosovo Criminal Procedure Code ('KCPC'). But one example from the European Court of Human Rights (ECtHR) is *Plonka v Poland*⁶⁰ where it was held that the applicant had a particular vulnerability due to her alcoholism. As such, a declaration form signed by the applicant acknowledging her right to remain silent and right to a lawyer could not be considered reliable. The ECtHR found a violation of Article 6(1) and Article 6(3)(c) as the position of the applicant should be considered during

⁶⁰ 31 March 2009, ECtHR, App no 20310/02.

questioning and when providing information about procedural rights. In *Plonka v Poland* it was also held unanimously that there had not been a clear and unequivocal waiver of her right to a lawyer.⁶¹ The subsequent reliance upon admissions made in the interview to convict her was therefore unfair, even though she was represented at trial.

51. Opportunity to cross examine witnesses and reliance on notes

It is perhaps trite, but worth mentioning, that Mr Bahtijari has a right to challenge witnesses against him. The following points are made:

- a. 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 unidentified security officers and prosecutors that are inconsistent with other evidence (see for example disclosure 2).
 - iii. [REDACTED].

52. Non- disclosure

On 26 July 2024, the SPO indicated in inter partes correspondence there was no further disclosure arising from the first pre-trial brief

- a. Aside from Mr Bahtijari's interview, as long ago as at least disclosure 12 (20/12/2023), the SPO has sought to rely on a military hierarchy. However, there has been no disclosure of military records nor evidence

⁶¹ 31 March 2009, ECtHR, App no 20310/02.

to place Mr Bahtijari in that hierarchy. The SPO 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 SPO is in possession of military records so can disclose that Mr Bahtijari is NOT recorded as a member of 121 Brigade. No such disclosure has been forthcoming despite the service of two pre-trial briefs.

- b. 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 SPO and may well be in records from the ICTY. No such disclosure has been forthcoming despite the service of two pre-trial briefs.
- c. There has been no disclosure of why Mr Bahtijari might be in fear as [REDACTED] alleges (note the SPO pre-trial brief is inaccurate on this point when referring to discomfort). The SPO 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 two pre-trial briefs.
- d. There has been no disclosure of what examinations [REDACTED].
- e. 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.
- f. 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 SPO 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.

53. 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.

VII. DEFENCES

54. 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.

55. He accepts visiting [REDACTED] on 5 April 2023. 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, SPO officer or a person authorised by the court and SPO 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.

56. Under the KSC legal framework, specific grounds for excluding criminal responsibility (hereby referred to as “defences”) are provided for in Rule 95(5) of the Rules.⁶² These defences include diminished or lack of mental capacity, intoxication, necessity, duress and mistake of fact or law.

57. Given neither Rule 95(5) itself nor any other provision within the KSC legal framework indicates what body of law (domestic or international) applies to the Rule 95(5) defences, it has been accepted by the Court that in the first instance, where a defence provided for under Rule 95(5) is advanced by an Accused and this defence is also expressly provided for in the Kosovo Criminal Code (‘KCC’), the provisions of the KCC will be considered by the Trial Panel when addressing the relevant defences.⁶³

58. In this instance, the defences that will be raised by Mr Bahtijari including, diminished or lack of mental capacity, intoxication and mistake of fact or law are

⁶² In *The Prosecutor v. Hysni Gucati and Nasim Haradinaj* KSC-BC-2020-07, 797 the Trial Panel noted that the wording of Rule 95(5) suggests that “defence” and “ground for excluding criminal responsibility” have the same meaning (ie they exonerate the criminality of the conduct) and the various grounds included in Rule 95(5) can therefore also be referred to as “Defences”.

⁶³ *The Prosecutor v. Hysni Gucati and Nasim Haradinaj* KSC-BC-2020-07/F00611/RED/287, para. 798-799.

correspondingly provided for in Articles 18, 19, 25 and 26 of the KCC.

59. It should be noted that in advancing the Article 18 KCC defence of diminished mental capacity, the notion of “mental incompetence” which isn’t explicitly provided for in Rule 95(5), but is provided for in the Article 18 defence will also be relied upon.

60. Given the lack of guidance within the KSC legal framework for applying the Rule 95(5) defences, to provide further contextual understanding to the arguments that will be advanced by Mr Bahtijari, reliance is also likely upon broader interpretations of the defences of diminished or lack of mental capacity, intoxication and mistake of fact or law, as per their dissemination in authoritative academic literature and application in other international Courts, Tribunals and domestic jurisdictions.

61. In this context, Mr Bahtijari raises the following positive defences:

- a. He suffers from health issues that [REDACTED].
- b. At the time he was [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 was frightened and in fear which appears to leave those defences open for the court’s consideration.

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

- a. He accepts that [REDACTED] is [REDACTED]. They usually saw each other at [REDACTED].

- b. Mr Bahtijari had no knowledge that [REDACTED] was a witness until 5 April 2023. 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 [REDACTED].
- d. Mr Bahtijari accepts he then contacted [REDACTED] and communicated with [REDACTED] and then went to visit. He went because he was concerned [REDACTED] and for no other reason. It never occurred to him that [REDACTED] would have any effect on [REDACTED], nor the court or its officers.
- e. Although the SPO do not reference Mr Bahtijari's interview in relation to this issue, it should be noted that when asked about the same phone call, Mr Bahtijari clearly states that when asked by [REDACTED] if [REDACTED] [REDACTED], Mr Bahtijari responded in the affirmative saying [REDACTED] because I want to come and visit".⁶⁴ Mr Bahtijari therefore disputes what [REDACTED] (and the SPO) say about the conversation with Witness [REDACTED]. Mr Bahtijari had no reason to believe [REDACTED] would not want to meet with him and did not attempt to prevent [REDACTED] telling [REDACTED] that Mr Bahtijari intended to visit [REDACTED].

⁶⁴ 116065-TR-ET Part 1 RED, p. 16, line 16-20.

- f. Mr Bahtijari accepts he sat with [REDACTED] in his house and they chatted. He denies expressing any inducement to [REDACTED] to withdraw evidence or refrain from providing evidence in official proceedings before the KSC.
- g. Mr Bahtijari told [REDACTED] he had heard gossip that [REDACTED] was a witness. [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.
- h. Mr Bahtijari will explore [REDACTED].

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

- a. The comments as alleged by [REDACTED]
- b. 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.
- c. 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.'
- d. 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 harmful witness against [REDACTED] and [REDACTED] should withdraw his testimony.
- e. Mr Bahtijari did not say to [REDACTED] that his co-accused [REDACTED] had approached him and told him to go and tell

[REDACTED] that 'they' had heard that [REDACTED] is a witness with harmful evidence against [REDACTED] and that he should withdraw.

- f. Mr Bahtjari did not instruct [REDACTED] to withdraw his testimony as alleged or at all.

64. Mr Bahtjari denies his actions created any fears or concerns for [REDACTED], nor did he create any disincentive for [REDACTED] to provide information about any crimes under this Court's jurisdiction. 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] and his family in connection with official proceedings at the Kosovo Specialist Chambers.

65. Mr Bahtjari had a lift from a friend and afterwards phoned that same person to collect him because Mr Bahtjari does not drive. [REDACTED] is not accurate in his description of the parking arrangements nor the number of persons present on 5 April 2023.

66. Mr Bahtjari 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.

67. [REDACTED].

68. [REDACTED].

69. Recordings in those disclosures from 12 April 2023 reveal [REDACTED] telling [REDACTED] that it was he who visited Mr Bahtjari on 5 April 2023. Accordingly, the SPO case that Mr Bahtjari was in some kind of 3-way joint activity is now unsupported.

70. Mr Bahtijari accepts that he knows [REDACTED] as a person from his village. He did not meet or ever communicate with [REDACTED] until he was in detention in the Hague. Prior to his arrest he had seen but never spoken to [REDACTED].
71. Mr Bahtijari was not a member of [REDACTED] Kosovo Liberation Army. As set out above, 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.
72. 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 SPO allege that the alleged “first approach” was unclear, this is because there was no first approach, only a visit to a relative out of concern which has been misconstrued, mixed up with later events, or fabricated.
73. It bears repeating that Mr Bahtijari has [REDACTED]. He also has a range of other health issues which affect his physical and mental state. These issues were present both at the time of the alleged charges and when he was arrested and interviewed and then transferred to the Hague. It is notable that on arrival in the Hague he transferred to clinical care and Duty Counsel was required to visit in full personal protective equipment. Mr Bahtijari was taken from hospital / the hospital wing to court to enter his not guilty plea.

VIII. CONCLUSION

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

75. Mr Bahtijari also reserves the right to develop his case once medical evidence is obtained and defence investigations are completed.

76. CLASSIFICATION

77. This document is filed as confidential at this stage but a publicly redacted version will be prepared.

Word Count: 7661

A handwritten signature in black ink, appearing to read 'Felicity Gerry', with a long horizontal flourish extending to the right.

Dr Felicity Gerry KC

Counsel for Mr Bahtijari

2 September 2024

At Dar es Salaam