

**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:** 10 January 2025

**Language:** English

**Classification:** Public

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**Public Redacted Version of BAHTIJARI Submissions on detention review and request for release on humanitarian grounds**

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## I. INTRODUCTION

1. The Defence for Ismet BAHTIJARI ('the Defence') hereby makes submissions for a review of detention pursuant to Rule 57 of the *Rules of Procedure and Evidence* ('Rules'), Article 41 of the *Law on the Specialist Chambers and the Specialist Prosecutor's Office* ('Law') and the Panel's order in their most recent decision on detention.<sup>1</sup>
2. All prosecution submissions in F00636 are opposed.
3. The Defence's position is that the criteria for continued detention, pursuant to Article 41(6) of the *Law*, are no longer met.
4. Concurrently and in addition to these routine submissions, there are urgent humanitarian reasons why Mr Bahtijari should be released, pursuant to Rule 56(1), (2) and (5) of the *Rules*.

## II. PROCEDURAL BACKGROUND

4. Mr Bahtijari was arrested in Kosovo on 5 October 2023.
5. Mr Bahtijari has been in detention for 457 days at the date of this filing.
6. To date, seven decisions on review of detention for Mr Bahtijari have been filed.<sup>2</sup>
7. He was transferred to the Kosovo Specialist Chambers Detention Facility ('DMU') in The Hague on 6 October 2023.<sup>3</sup> He was assessed as fit to travel but

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<sup>1</sup> KSC-BC-2023-10, F00611, *Decision on the Seventh Review of Detention of Ismet Bahtijari*, 26 November 2024, confidential ('F00611').

<sup>2</sup> KSC-BC-2023-10, F00116, *Decision on Ismet Bahtijari's Request for Interim Release*, 29 October 2024, confidential; KSC-BC-2023-10, F00156, *Decision on Review of Detention of Ismet Bahtijari*, 29 January 2024, confidential; KSC-BC-2023-10, F00238, *Decision on Review of Detention of Ismet Bahtijari*, 28 March 2024, confidential; KSC-BC-2023-10, F00306, *Decision on Review of Detention of Ismet Bahtijari*, 28 May 2024, public; KSC-BC-2023-10, F00408, *Decision on Review of Detention of Ismet Bahtijari*, 26 June 2024, public; KSC-BC-2023-10, F00481, *Decision on Sixth Review of Detention of Ismet Bahtijari*, 26 September 2024, confidential ('F00481'); F00611.

<sup>3</sup> *Ibid*, paras 29-38.

- was plainly [REDACTED].<sup>4</sup> Upon examination in The Hague he was [REDACTED].<sup>5</sup>
8. During his detention, Counsel for Mr Bahtijari has raised concerns about his health on several occasions, including [REDACTED].<sup>6</sup> [REDACTED].<sup>7</sup>
  9. In detention he has been treated for multiple conditions – the deterioration of his health between October 2023 and October 2024 is documented.<sup>8</sup>
  10. On 1 May 2024 the Defence requested that the court order four distinct medical assessments of Mr Bahtijari [REDACTED].<sup>9</sup>
  11. The case was transmitted to Trial Panel I on 4 September 2024.<sup>10</sup>
  12. On 7 October 2024 the Panel [REDACTED].<sup>11</sup>
  13. Legal Aid funding is not sufficient to pay for four separate medical examinations. The Defence used funding allocation for a single report at reduced costs by Prof Kennedy,<sup>12</sup> which was conducted with translation

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<sup>4</sup> *Arrest and Transfer Report*, para 30; Annex 3 to *Arrest and Transfer Report*, pp 7, 9; KSC-BC-2023-10, ERN 123123-123127 RED2, *Redacted version of notes taken during the arrest of Ismet Bahtijari*, 5 October 2023, p 3.

<sup>5</sup> *Arrest and Transfer Report*, para 39.

<sup>6</sup> For example KSC-BC-2023-10, F00480, *Bahtijari Response to F00477*, 25 September 2024, paras 14, 15. See also KSC-BC-2023-10, F00273, *Bahtijari Filing for Medical Reports*, 1 May 2024, strictly confidential and ex parte.

<sup>7</sup> KSC-BC-2023-10, F00620/A01, Annex 1 of *Bahtijari Submissions on Sentencing with three confidential annexures*, 6 December 2024, confidential, p 16, para 19.2 ('*Kennedy Report*').

<sup>8</sup> *Kennedy Report*, pp 27–40.

<sup>9</sup> KSC-BC-2023-10, F00273, *Bahtijari Filing for Medical Reports*, 1 May 2024, strictly confidential and ex parte; See also, KSC-BC-2023-10, F00273, Pre-Trial Judge, *Order for Submissions*, 16 May 2024, confidential and ex parte; KSC-BC-2023-10, F00305, *Bahtijari filing for reclassification of F00273*, 28 March 2024, strictly confidential and ex parte; KSC-BC-2023-10, F00337, *Registrar's Submissions Pursuant to F00293*, 14 June 2024, strictly confidential and ex parte; KSC-BC-2023-10, F00358, Pre-Trial Judge, *Second Order for Submissions*, 2 July 2024, confidential and ex parte; KSC-BC-2023-10, F00375, *Bahtijari Filing in Relation to F00358*, 8 July 2024, confidential and ex parte; KSC-BC-2023-10, F00477, Trial Panel I, *Order for Further Submissions in Relation to F00273*, 19 September 2024, confidential and ex parte; KSC-BC-2023-10, F00480, *Bahtijari Response to F00477*, 25 September 2024, strictly confidential and ex parte; KSC-BC-2023-10, F00483, *Registrar's Submissions Related to F00480 Further to Order F00477*, 30 September 2024, strictly confidential and ex parte; KSC-BC-2023-10, F00498, *Bahtijari reply to responses to F00477*, 3 October 2024; KSC-BC-2023-10, F00503, *Bahtijari update on medical notes and contacts*, 4 October 2024, strictly confidential and ex parte.

<sup>10</sup> KSC-BC-2023-10, F00468, *Decision Transmitting the Case File to Trial Panel I*, 4 September 2024, public.

<sup>11</sup> KSC-BC-2023-10, F00508, *Decision on the Bahtijari Defence request [REDACTED]*, 7 October 2024, confidential and ex parte.

<sup>12</sup> *Kosovo Specialist Chambers Legal Aid Regulations*, KSC-BD-25-Rev1, 22 February 2024, regs 13, 14

assistance and under time-pressure.<sup>13</sup> Nevertheless, it confirmed that Mr Bahtijari suffers from serious health concerns, both acute and chronic, and that further assessment is required urgently.

14. A request for [REDACTED] recommended has been made but it has not yet occurred.
15. The trial was scheduled to commence on 14 November 2024,<sup>14</sup> with earliest testimony of witnesses on 9 December 2024.<sup>15</sup>
16. On 13 November 2024, Mr Bahtijari signed the first plea agreement.<sup>16</sup>
17. On 15 November 2024, the Defence requested 10 December 2024 for sentencing to take place expeditiously.<sup>17</sup>
18. On 29 November 2024 the Panel ordered parties to file amended plea agreements to resolve matters raised and requested that the Defence file their written submissions on sentencing, including any evidence as annexes, by 6 December 2024.<sup>18</sup>
19. On 3 December 2024, Mr Bahtijari signed an amended plea agreement. On 6 December it was filed by the SPO.<sup>19</sup>
20. On 6 December 2024 the Defence filed submissions on sentencing with three confidential annexes.<sup>20</sup> These included Prof Kennedy's report, statements from Mr Bahtijari's family and community demonstrating his good character, their experience of war, and the effect of his arrest on his family.

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<sup>13</sup> *Kennedy Report*, p 17, para 21.1.

<sup>14</sup> KSC-BC-2023-10, F00559, *Decision on the date for the commencement of the trial*, 24 October 2024, public.

<sup>15</sup> *Ibid*, para 17.

<sup>16</sup> KSC-BC-2023-10, F00596/COR, *Annex 3 to Corrected version of URGENT Prosecution notification of plea agreements*, 14 November 2024, confidential ('F00596/COR').

<sup>17</sup> KSC-BC-2023-10, F00604, *Bahtijari application for short timetable for sentencing*, 15 November 2024, confidential.

<sup>18</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>19</sup> KSC-BC-2023-10, F00619, *Urgent Submission of revised Indictment with confidential Annex 1*, 6 December 2024, confidential ('F00619').

<sup>20</sup> KSC-BC-2023-10, F00620, *Bahtijari Submissions on Sentencing with three confidential annexures*, 6 December 2024, confidential ('F00620').

21. On 9 December 2024 the SPO filed a request to the Panel that they either reconsider their decision on plea proceedings, or grant leave for an appeal on the decision on grounds that the Panel erred in finding that the plea should specify a sentence (rather than a statutorily available sentencing range) ('SPO Request').<sup>21</sup>
22. The Defence responded to the SPO Request, requesting that the Panel reject the request on the basis that it would unnecessarily delay the plea proceedings.<sup>22</sup>
23. On 13 December 2024 the Panel filed a decision finding the amended Bahtijari plea agreement still failed to comply with Rule 94(2)<sup>23</sup> and stated they could not issue any final decision on plea agreements until the resolution of the SPO Request, but that Mr Shala and Mr Januzi would appear in respect of their agreements at hearings on 18 and 19 December 2024.<sup>24</sup>
24. On 16 December 2024 the SPO and the Defence filed an urgent joint submission with a further amended plea agreement, addressing Rule 94(2) compliance, and requesting Mr Bahtijari be heard with the co-accused on 18 December 2024 ('Joint Request').<sup>25</sup>
25. On 17 December 2024 the SPO filed a revised indictment.<sup>26</sup>
26. On 18 December 2024 the Panel determined that Mr Bahtijari's amended plea agreement as annexed to the Joint Request fulfilled the requirements of Rule 94(2) of the *Rules*.<sup>27</sup>

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<sup>21</sup> KSC-BC-2023-10, F00621, *Prosecution request for reconsideration and/or leave to appeal of Decision F00612*, 9 December 2024, confidential.

<sup>22</sup> *Ibid.*

<sup>23</sup> F00619; KSC-BC-2023-10, F00626, *Decision Setting the Agenda for Hearings on Plea Proceedings, Requesting Submissions and on Related Matters*, 13 December 2024, confidential, paras 11, 12, 23, 24(e) ('F00626').

<sup>24</sup> F00626, para 13.

<sup>25</sup> KSC-BC-2023-10, F00628, *Urgent Joint Submission of Plea Agreement with confidential Annex 1*, 16 December 2024, confidential ('F00628').

<sup>26</sup> KSC-BC-2023-10, F00619, *Urgent Submission of revised Indictment with confidential Annex 1*, 17 December 2024, confidential.

<sup>27</sup> KSC-BC-2023-10, *Plea Agreement Hearing of 19 December 2024*, Transcript, pp 569 (lines 18, 19, 24, 25), 570 (lines 1, 11–18), 578 (lines 18–19), ('19 Dec Hearing')

27. On 19 December 2024 Mr Bahtijari attended court in person, where the Panel heard his revised plea and Defence submissions. During this hearing Mr Bahtijari's distress and poor health was evident –Presiding Judge Veldt-Foglia paused the proceedings several times in recognition of this and invited him to sit rather than stand when it was clear he was struggling during the hearing.<sup>28</sup> The Panel declined to accede to the defence request for immediate release and declined to definitively accept the plea agreements until the victim participation process has been dealt with.<sup>29</sup>
28. On 6 January 2025, the prosecution filed F00636.

### III. APPLICABLE LAW

1. Mr Bahtijari is protected by domestic and international law. The *Constitution of the Republic of Kosovo* ('the *Constitution*') provides both a right to liberty and a right family life.<sup>30</sup> The *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights*<sup>31</sup> provide for the right to personal liberty and to be free from arbitrary detention;<sup>32</sup> the right to a fair trial;<sup>33</sup> and the right to family life.<sup>34</sup>
2. It is implied by the *Law* that the Court should prioritise human rights over a strict detention regime, as the superiority of international human rights mechanisms and customary international law is explicit in its foundational principles.<sup>35</sup>

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<sup>28</sup> Ibid, p 561 (lines 12–13).

<sup>29</sup> Ibid, pp 603 (lines 18–25), 604 ( line 1).

<sup>30</sup> *Constitution of the Republic of Kosovo* (adopted 9 April 2008) with amendments I-XXIV, August 2015, Art 29; Art 36(1).

<sup>31</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ('ECHR'); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 ('ICCPR').

<sup>32</sup> ICCPR art 9(1) and 3; ECHR art 5(1) and (3).

<sup>33</sup> ICCPR art 14(3) and ECHR Art 6(3).

<sup>34</sup> ICCPR arts 17 and 23; ECHR art 8.

<sup>35</sup> The *Law* art 4; See also Caroline L Davidson, 'No Shortcuts on Human Rights: Bail and the International Criminal Trial' (2010) 6(1) *American University Law Review* 1, 10.

3. The submissions on detention are made pursuant to Rule 57 of the *Rules* and Article 41 of the *Law*, recalling the criteria for detention at Article 41(6).
4. Rule 56 of the *Rules* provides a mechanism for a party to request temporary release on humanitarian grounds.<sup>36</sup> This rule also protects Mr Bahtijari's right to not be detained for an unreasonable period prior to the opening of the case.<sup>37</sup>
5. This court has previously held that humanitarian or compassionate release is at the discretion of the Panel, who should consider all relevant circumstances and factors and provide a reasoned opinion.<sup>38</sup> Release is assessed on a case-by-case basis having regard to its particular circumstances, which may include: 'the stage of the proceedings, the nature of the criminal offence, the Accused's character, the gravity of the relative's illness, the degree of kinship, the possibility of escorted leave and other circumstances.'<sup>39</sup>
6. The Defence recognises that humanitarian release is often used for time-limited purposes such as after the death of a family member,<sup>40</sup> but it is also a flexible mechanism, and it is open to the Panel to order conditional release that meets the needs of the circumstances.
7. For clarity these submissions are split into two parts having regard to the criteria for detention and reasons for humanitarian release. However, it is intended that they be considered by the Panel holistically. Special circumstances do not have

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<sup>36</sup> The *Rules*, r 56(3).

<sup>37</sup> *Ibid*, r 56(2).

<sup>38</sup> KSC-BC-2023-10, F00517, Trial Panel I, *Decision on the Shala Urgent Request for Temporary Release on Compelling Humanitarian Grounds*, 9 October 2024, public, para 14 ('*Shala Request Decision*'); KSC-BC-2020-07, F00604, Trial Panel II, *Public Redacted Version of the Decision on Gucati Defence Request for Temporary Release on Compassionate Grounds*, 9 May 2022, public, para 11; ICTY, *Prosecutor v. Popović et al.*, IT-05-88-AR65.4, IT-05-88-AR65.5 and IT-05-88-AR65.6, Appeals Chamber, *Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's Motions for Provisional Release During the Break in the Proceedings*, 15 May 2008, para 6; See also ICTY, *Prosecutor v Prlić et al*, IT-04-74-AR65.19, *Decision on Prosecution's Appeal of the Trial Chamber's Decision to Provisionally Release Accused Praljak*, 17 December 2009, para 7 ('*Praljak Decision*')

<sup>39</sup> KSC-BC-2020-07, F00604, Trial Panel II, *Public Redacted Version of the Decision on Gucati Defence Request for Temporary Release on Compassionate Grounds*, 9 May 2022, public, para 11.

<sup>40</sup> For example, *Shala Request Decision*.

to be individually sufficient but may justify provisional or temporary release in their totality.<sup>41</sup>

#### IV. SUBMISSIONS

##### 1. Article 41(6) criteria no longer met

1. For continued detention to be justified the criteria in Article 41(6) of the *Law* must be established by the SPO by reference to sufficient and relevant articulable evidence.<sup>42</sup> Under the current circumstances, it is submitted that the criteria are no longer met.
2. Though the Defence bears no burden to prove the absence of grounds for detention, to assist the Panel, the reasons are addressed as follows:<sup>43</sup>

##### (a) Art 41(6)(a): Grounded Suspicion of the Commission of a Crime

3. The significance of grounded suspicion as a criterion for detention wanes as the case progresses and time passes, and more weight is placed on other factors.<sup>44</sup>
4. Mr Bahtijari has pleaded guilty to the offences. There is no longer an on-going investigation or pending trial that would be supported by further detention (subject to the Panel's decision on the plea agreements and revised indictment).
5. Therefore 'grounded suspicion' retains little relevance as criteria for detention and the key criteria for consideration are those that go to his conduct should he be released, and evidence thereof.<sup>45</sup>
6. Plainly he has accepted guilt and placed himself at the mercy of the court.
7. Accepting that sentencing has not yet taken place, the Panel is nonetheless requested to keep in mind the need for Mr Bahtijari not to be the subject of a

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<sup>41</sup> *Praljak Decision*, para 26.

<sup>42</sup> *Khodorkovskiy v. Russia*, no. 5829/04 (ECtHR, 31 May 2011), para 182; *Ilijkov v. Bulgaria*, no. 33977/96 (ECtHR, 26 July 2001), para 84, 85; *Rokhlina v. Russia*, no. 54071/00 (ECtHR, 7 April 2005), para 69.

<sup>43</sup> *Rokhlina v. Russia*, no. 54071/00 (ECtHR, 7 April 2005), para 69.

<sup>44</sup> *Bykov v. Russia*, no. 4378/02, (ECtHR, 10 March 2009), para 67.

<sup>45</sup> The abstract assertion that investigations are continuing is *not* considered a ground for continued detention, notwithstanding, see *Piruzyan v. Armenia*, no. 33376/07 (ECtHR, 26 June 2012) para 98.



disproportionate sentence. It remains the defence case, as set out at the hearing on 19 December 2024, that his culpability is low, his mitigation is extensive and he should be immediately released. That request has effectively been ongoing since 10 December 2024.

8. It is accepted that Mr Bahtijari's health condition is [REDACTED] and the fact Mr Bahtijari needs treatment does not mean this cannot be delivered in Kosovo.
9. The victim participation process need not delay his release. He can attend any hearings online from Kosovo.

**(b) Art 41(6)(b)(i): Flight Risk**

10. Mr Bahtijari is not a flight risk. This has been confirmed by the Panel who noted his rootedness in his community, stable family relationships, and economic and social links with his community.<sup>46</sup> This has not changed.
11. The Panel further noted that such risk, if existent, could be adequately mitigated by the imposition of certain conditions.<sup>47</sup> This remains correct.

**(c) Art 41(6)(b)(ii): risk of evidence destruction or obstruction of criminal proceedings**

12. There is no longer an ongoing investigation for which evidence may be destroyed, hidden, changed or forged.
13. Witness 1 is not in any danger of being obstructed, as previously asserted by the SPO and the Panel, as testimony was given as planned.<sup>48</sup>

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<sup>46</sup> KSC-BC-2023-10, F00481, Trial Panel 1, *Decision on Sixth Review of Ismet Bahtijari*, 26 September 2024, confidential, para 33 ('F00481'); F00611, paras 20–21.

<sup>47</sup> F00481, para 33.

<sup>48</sup> F00611, para 221; *Ibid* para 35, 36.

14. In any case, it is now known that Mr Bahtijari's limited involvement in such acts was under direction, when in fear (not amounting to duress) and isolated in nature – not as part of a persistent or conspiratorial plan as previously suggested in detention decisions.<sup>49</sup> Moreover, the risk of further 'collusion' is held to be 'significantly less relevant' once investigations are complete.<sup>50</sup>
15. Furthermore, there is no spectre of 'additional obstructive conduct', nor was there ever, as the 'offer of a gift' element is simply part of the charges to which Mr Bahtijari has pleaded guilty.<sup>51</sup>
16. On the contrary, Mr Bahtijari has demonstrated compliance by cooperating with the SPO and the Court and has shown perfectly satisfactory behaviour in detention. Mr Bahtijari has made a timely plea, signed prior to the commencement of trial, which is in the interest of the efficient administration of justice.
17. His demeanour during the hearing of 19 December 2024 clearly showed his remorse and genuine distress – the stress of the current proceedings alone is patently abundant deterrence against any further offences, obstructive or otherwise.
18. There is no evidence that Mr Bahtijari would obstruct this proceeding.<sup>52</sup>

**(d) Art 41(6)(b)(iii): the seriousness of the crime, circumstances of the offending and risk of repeating or completing the offence**

19. The seriousness of Mr Bahtijari's offences lie at the lowest end of the scale for crimes of this type. Offences of this type often involve systematic attempts or

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<sup>49</sup> F00611, para 22 citing F00481, para 35; *Gal v Hungary*, no. 62631/11, (ECtHR, 11 March 2014), para 45 ('Gal').

<sup>50</sup> *Gal*, para 44; *Szeloch v. Poland*, no. 33079/96 (ECtHR, 22 February 2001) para 98.

<sup>51</sup> F00481, para 36.

<sup>52</sup> This element must be substantiated with evidence of actual risk, see *Trzaska v. Poland*, no. 25792/94 (ECtHR, 11 July 2000), para 65.

- commission of witness obstruction either involving multiple witnesses, repeated acts over time, threats and violence or some combination thereof.<sup>53</sup>
20. In contrast: Mr Bahtijari's offending involved a single witness who is [REDACTED], who was *not* threatened, and, but for limited contact with the co-accused, the acts took place on one day in April 2023.
21. Mr Bahtijari's offending did not have permanent or serious consequences for public order or the administration of justice: the witness visited by Mr Bahtijari on 5 April 2023 later testified as intended. This was not a crime of violence or cruelty.
22. There is evidence that at the time of the offending he was [REDACTED],<sup>54</sup> and that [REDACTED].<sup>55</sup>
23. Mr Bahtijari's lesser liability and the fact that he acted under direction are agreed.<sup>56</sup>
24. Other than acting under direction there is no evidence Mr Bahtijari has shown any interest in the Court, its officers or proceedings. His motivation was entirely extrinsic, not derived from an internal impulse to obstruct the court.
25. The offending was inextricably linked to specific circumstances: that Witness 1 is [REDACTED]; Mr Bahtijari's health at the time; and the direction of the co-accused.
26. Mr Bahtijari has no prior criminal record.
27. Mr Bahtijari has taken responsibility for his actions and suffered harsh consequences already. His main goal is to return to his quiet life with his family.

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<sup>53</sup> *Prosecutor v. Jean-Pierre Bemba et 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 ('*Bemba*'); *Independent Counsel v. Hassan Papa Bangura et al*, Trial Chamber II, SCSL-11-02-0066, Judgment in Contempt Proceedings, 25 September 2012 paras. 70-101); *Independent Counsel v. Hassan Papa Bangura et al*, Trial Chamber II, SCSL-11-02-0071, Sentencing Judgment in Contempt Proceedings, 16 October 2012, paras. 92, 160, 678 ('*Bangura Sentencing*'); *Prosecutor v. Yelena Rašić*, Written Reasons for Oral Sentencing Judgment, IT-98-32/I-R77.2, 6 March 2012, paras. 18, 31 ('*Rašić*').

<sup>54</sup> *Kennedy Report*, p 43, para 10.

<sup>55</sup> KSC-BC-2023-10, ERN 112906-TR-AT Part 1 Revised 1-ET RED, *Redacted version of SPO Transcript of interview with Witness 1*, 20 April 2023, p 22, line 8-13.

<sup>56</sup> See F00628; F00620.

28. He is a man rooted within his community and beloved of his family. This support provides for continued compliance with court processes and his effective rehabilitation.
29. His good character is shown in witness statements collected from family and community members who reiterate that he is a person of integrity: a 'good man'<sup>57</sup>, who 'has always helped other people'<sup>58</sup> and shared 'even if he didn't have enough for himself'<sup>59</sup>
30. After the war he helped to rebuild all the homes in his village. [REDACTED] stated, 'His heart is such that that is the sort of thing he does and he did it for free.'<sup>60</sup>
31. It is obvious he is not at risk of re-offending if released – there is no plausible evidence for this considering 'the circumstances of the case and in particular the past history and the personality of the person concerned'.<sup>61</sup>

## **2. Existence of compelling humanitarian grounds for release**

### **(a) Survivor of genocidal attacks**

32. During the Kosovo War Mr Bahtijari looked after his family and community. The War has left permanent scars on the country and its citizens. Evidence gathered by NGOs, the ICTY and KFOR in the wake of the conflict shows that state-sponsored ethnic cleansing was inflicted upon Kosovar Albanians.<sup>62</sup>
33. Mr Bahtijari's village, [REDACTED]<sup>63</sup> is situated in the [REDACTED] region, which was one of the hardest hit. Civilians were subject to systemic destruction of their homes and property, massacres, torture, and arbitrary detention.<sup>64</sup> According to an emergency damage assessment conducted in mid-1999 by the

<sup>57</sup> Annex 2 to F00620, *Statement of [REDACTED]*, 28 November 2024.

<sup>58</sup> Annex 2 to F00620, *Statement of [REDACTED]*, 29 November 2024.

<sup>59</sup> Annex 3 to F00620, *Statement of [REDACTED]*, 1 December 2024.

<sup>60</sup> Annex 2 to F00620, *Statement of [REDACTED]*, 29 November 2024 ('*Statement of [REDACTED]*').

<sup>61</sup> *Gal* para 42.

<sup>62</sup> US State Department, 'Ethnic Cleansing in Kosovo: An Accounting' (Second Report, December 1999).

<sup>63</sup> Also known as [REDACTED].

<sup>64</sup> Human Rights Watch, 'Under Orders: War Crimes in Kosovo' (Report, 2001).

European Commission, 100% of houses in the village were damaged, with 82% of houses in the two most severe categories of damage.<sup>65</sup>

34. Mr Bahtijari and his family had to flee their village more than once. One time they dodged bullets as they fled. He put his wife and children on a tractor and then returned to the besieged village to untie the cows, collect food and take water to the soldiers who remained to fight.<sup>66</sup> It then took him several days to find his family among the displaced.<sup>67</sup>

35. They had to survive for months, in makeshift tents with little access to food.<sup>68</sup> Mr Bahtijari's youngest child was only three months old at the time.

36. When they returned home, Mr Bahtijari found their family dog slaughtered.<sup>69</sup> He also personally checked their property for land mines:<sup>70</sup>

'[REDACTED] 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....'<sup>71</sup>

37. They lived in an animal shed while they rebuilt their burnt-down home.<sup>72</sup>

38. Prof Kennedy assessed that due to these experiences Mr Bahtijari [REDACTED].<sup>73</sup> [REDACTED].<sup>74</sup>

### **(b) Acute health conditions and necessity of appropriate medical treatment**

39. Since his arrest and transfer to The Hague, Mr Bahtijari has required medical treatment for a range of serious and debilitating health conditions. Despite

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<sup>65</sup> European Commission, 'Emergency Assessment of Damaged Housing and Local/Village Infrastructure in Kosovo' (Report, July 1999).

<sup>66</sup> *Kennedy Report*, p 10-11; *Statement of [REDACTED]*.

<sup>67</sup> *Statement of [REDACTED]*.

<sup>68</sup> *Kennedy Report*, p. 9-12.

<sup>69</sup> *Statement of [REDACTED]*.

<sup>70</sup> [REDACTED]; Annex 2 to F00620, *Statement of [REDACTED]*, 29 November 2024 ('*Statement of [REDACTED]*').

<sup>71</sup> *Statement of [REDACTED]*.

<sup>72</sup> Annex 2 to F00620, *Statement of [REDACTED]*, 28 November 2024 ('*Statement of [REDACTED]*').

<sup>73</sup> *Kennedy Report*, p. 11, paras 13.15, 13.31; p. 42, para. 7(c). See also [REDACTED].

<sup>74</sup> See for example [REDACTED]. See also [REDACTED].

being deemed 'fit to travel' after his arrest,<sup>75</sup> upon arrival in The Hague, Mr Bahtijari was [REDACTED].<sup>76</sup>

40. Whilst in detention, Mr Bahtijari was diagnosed [REDACTED].<sup>77</sup> [REDACTED].<sup>78</sup>

41. His worsening condition has revealed further serious health issues including [REDACTED].<sup>79</sup>

42. Mr Bahtijari's history of [REDACTED].<sup>80</sup>

43. Prof Kennedy's report outlines that Mr Bahtijari likely [REDACTED],<sup>81</sup> [REDACTED],<sup>82</sup> [REDACTED]<sup>83</sup> and [REDACTED].<sup>84</sup>

44. Prof Kennedy commented, with caution, that Mr Bahtijari may [REDACTED].<sup>85</sup> He described Mr Bahtijari's diagnoses as [REDACTED],<sup>86</sup> including risk [REDACTED].<sup>87</sup>

45. Recently Mr Bahtijari has experienced [REDACTED].<sup>88</sup> Due to [REDACTED].<sup>89</sup>

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<sup>75</sup> *Arrest and Transfer Report*, para 30.

<sup>76</sup> *Ibid*, para 39.

<sup>77</sup> *Kennedy Report*, paras 34.12, 35.8, 37.17.

<sup>78</sup> *Ibid*, paras 37.21, 66, 67.

<sup>79</sup> *Kennedy Report*, para 75.

<sup>80</sup> F00620/COR, paras 45-50.

<sup>81</sup> *Kennedy Report*, pp 11, 12, 42.

<sup>82</sup> *Ibid*, p 8, 42.

<sup>83</sup> *Ibid* p 8, 42, 43.

<sup>84</sup> *Ibid* p 9.

<sup>85</sup> *Ibid*, p 17, para 21.6, p 44, para 14.

<sup>86</sup> *Ibid*, p. 42, para 7-8.

<sup>87</sup> *Ibid*, p 16, para 19.2, p 27 para 32.27.

<sup>88</sup> *Ibid*, p 40.

<sup>89</sup> *Ibid*, pp 30, 31.

46. The need for ‘appropriate treatment’ (as opposed to *available* treatment) is a legitimate factor for release.<sup>90</sup>
47. Prof Kennedy states that for Mr Bahtijari to obtain *appropriate* treatment he should be [REDACTED] who speaks and tests in Albanian. As such, more suitable medical treatment would be available in Kosovo, where he can be supported by his family, speak the same language and receive physically, psychologically and culturally appropriate treatment.
48. Furthermore, the detrimental effect of detention on the health of detainees in facilities like the DMU was documented by the former ICTY Registrar. Factors include stress caused by long-term or prolonged detention; the geographic distance from relatives and social support networks; and lack of familiarity with the surroundings, which inevitably impact on the physical and psychological health of the detainee.<sup>91</sup>
49. The Registrar noted that the risk of a life-threatening incident in such facilities is relatively high due to the advanced age, adverse personal circumstances, and existence of serious medical conditions of the detainees.<sup>92</sup> All three of these factors are present in Mr Bahtijari.
50. Mr Bahtijari’s age and health conditions put him at significant risk of unexpected, rapid and/or life-threatening deterioration. He has already been required to undergo preventative treatments whilst in detention.<sup>93</sup>
51. It is imperative that Mr Bahtijari be allowed to return to Kosovo as soon as practicable to seek appropriate medical treatment and family support to avoid further deterioration and catastrophic consequences thereof.

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<sup>90</sup> *Pralja Decision*, 17 December 2009, para 14.

<sup>91</sup> ICTY, *Prosecutor v Prlić et al*, IT-04-74-T, *Decision on the Accused Prlić’s Motion for Provisional Release*, 17 July 2008, p 10 quoting Speech by Mr Hans Holthuis, Registrar, ICTY Diplomatic Seminar, The Hague, 10 June 2008.

<sup>92</sup> *Ibid*, p 11.

<sup>93</sup> *Kennedy Report*, paras 49.1; 51.4; 57; 61; 67.7, 67.8, 88.1.

**(c) The effects of Mr Bahtijari's detention on his family and their health conditions**

52. Mr Bahtijari's ongoing detention separates him from the support of his family and shortens any remaining time he has with them.

53. Mr Bahtijari has a strong relationship with his [REDACTED]. His arrest and detention have been a psychological and financial burden on his family. His [REDACTED] due to the stress of his arrest, detention and the on-going uncertainty as to the finalisation of the proceedings.

54. [REDACTED] stated:

'[Mr Bahtijari's arrest] made our [REDACTED] [...] every single day she has problems.'<sup>94</sup>

55. The circumstances of Mr Bahtijari's arrest were extremely distressing to his family. He was arrested at 6:20am and his family were not informed until that evening when SPO Officers delivered a letter to them. Community members told [REDACTED] that 'some people put him in a car and took him away'.<sup>95</sup>

56. [REDACTED] said, 'I will never forget that fearful time because I was afraid of what could have happened.'<sup>96</sup> Her reaction is understandable given that this is a family who were displaced and traumatised by war, and who experienced the horror of enforced disappearance of civilians in their region.

57. In [REDACTED] and trauma suffered by their family:

'[REDACTED] The arrest has caused so much distress [REDACTED] have all suffered'<sup>97</sup>

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<sup>94</sup> Statement of [REDACTED].

<sup>95</sup> Statement of [REDACTED].

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.



58. Mr Bahtijari's [REDACTED].<sup>98</sup>

59. The Defence submits that the effects of Mr Bahtijari's on-going detention on the health and well-being of his family constitute compassionate grounds for release.

### 3. Conditions of Release

60. Mr Bahtijari is a citizen of Kosovo and a respected member of his community. There is no reason why he should not be released to the family home and be supported by his loving family while he awaits decisions regarding the plea agreement, sentencing, and victim participation (if any), on the condition that he appear in person or via Video link.

61. In the interests of mitigating any perceived or actual risk the Panel may order various conditions on Mr Bahtijari's release. Article 41(12) of the *Law* provides a non-exhaustive list of such conditions which can be arranged by the Registrar in cooperation with EULEX or other Kosovo authorities.<sup>99</sup>

## V. RELIEF SOUGHT

62. In summary: Mr Bahtijari has 'life shortening' health conditions. [REDACTED]. Further detention would exacerbate his health problems, which require appropriate, on-going medical care. His family have suffered enough. He has served more time than he should have for these offences – any further time is unreasonable. He is currently in procedural uncertainty, creating nascent arbitrariness, which could be ameliorated by conditional release.

63. There is no public interest in the continued detention of a sick man, who is the survivor of genocide and has now been separated from his home and family for

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<sup>98</sup> Annex 2 to F00620, *Additional Statement of [REDACTED]*, 1 December 2024.

<sup>99</sup> *The Rules*, r 53.

well over a year, whose offending is plainly on the lowest end of the severity scale, and which was committed under direction and [REDACTED].

64. As the criteria for continued detention under Article 41(6) of the *Law* are no longer met and there are circumstances which can be considered humanitarian grounds for release, the Defence requests that the Panel orders his release to Kosovo with conditions acceptable to the Court.

## VI. CLASSIFICATION

65. These submissions are filed confidentially. A public redacted version will be filed shortly.

**Word count: 5463**

A handwritten signature in black ink, reading "Felicity Gerry", with a long horizontal flourish underneath.

**Dr Felicity Gerry KC**

**Counsel for Mr Bahtijari**

10 January 2025

At London, UK.