

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

**Before:** **Pre Trial Judge**  
Judge Nicolas Guillou

**Registrar:** Dr Fidelma Donlon

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

**Date:** 23 January 2024

**Language:** English

**Classification:** Public

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**OBJECTION TO JOINDER MOTION**

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**Specialist Prosecutor's Office**

Kimberley P. West

**Counsel for Sabit Januzi**

Jonathan Rees KC

Huw Bowden

**Counsel for Ismet Bahtijari**

Felicity Gerry KC

**Counsel for Haxhi Shala**

Toby Cadman

## I. APPLICATION

1. On 13 December 2023, the Specialist Prosecutors Office (SPO) filed a motion for joinder to join the indictment in KSC-BC-2023-10 (BAHTIJARI and JANUZI) (Case 10) with the indictment in Case KSC-BC-2023-11(H. SHALA) (Case 11).

## II. BACKGROUND

2. On 4 October 2023, the SPO filed the Case 10 Indictment which remains strictly confidential (see publicly redacted version dated 6 October 2023). The indictment was later confirmed by the Pre-Trial Judge, charging Mr Bahtijari and Mr Januzi with offences within the meaning of Article 15(2).
3. On 5 October 2023, Mr Ismet Bahtijari was arrested. On 6 October 2023, he was transferred to the Detention Facilities of the Kosovo Specialist Chambers (the KSC), in The Hague.
4. On 8 January 2024, Dr Felicity Gerry KC was appointed as Mr Bahtijari's Counsel. Please note - at the time of this filing, she has only gained access to the workflow system on 19 January 2024. In order not to cause delay no application is made for further time to respond but apologies are made that this filing was rejected on formalities on Friday and Monday.
5. Rule 76 of the *Rules of Procedure and Evidence before the Kosovo Specialist Chambers (the Rules)* provides that any response to a motion shall be filed within 10 days of the motion and any reply to a response shall be filed within 5 days of the response. However, this period would have occurred during the Chambers' holiday recess. Therefore, oral orders were made to extend the date to the following:
  - a. SPO proposed joint indictment to be filed on or before 12 January 2024 at 16:00;
  - b. Defence to respond to the SPO joinder request on or before 19 January 2024 at 16:00; and
  - c. SPO to reply no later than on or before 26 January 2024.
6. SPO proposed joint indictment was filed together with an outline on 12 January 2024.

## III. APPLICABLE LAW

7. Article 39(9) of the Law on Specialist Chambers and Specialist Prosecutor's Office<sup>10</sup> ("Law") provides that, upon application from the parties, the Pre-Trial Judge *may* direct that there be joinder in respect of charges against more than one accused. This is plainly a discretion.
8. Joinder is governed by Rule 89 of the *Rules*. Two or more alleged crimes and charges may be joined in one indictment on the condition that at least one of the 3 factors under Rule 89(1) are satisfied, being:
  1. The same Accused participated in the alleged crimes;
  2. The crime and charges are based on the same facts; or
  3. The crimes and charges form or are part of a series of alleged crimes of the same or a similar character or conduct.
9. While only one factor is required to justify a joinder, according to the public redacted version of the draft joint indictment, the SPO is alleging that joinder is permissible due to the satisfaction of all three of the above. It is notable that the factual bases for the roles played and events which occurred as between cases 10 and 11 appear to vary but, since cross service has not occurred the variance is difficult to evaluate. In this respect, submissions made by Counsel for Haxmi Shala are adopted.
10. The motion for joinder must comply with Rule 86 of the *Rules* with respect to filing an indictment, an outline and evidentiary material. Rule 86(3) is mandatory and reads, in part as follows:

"The indictment shall be filed together with supporting material, which shall<sup>1</sup> include: (a) evidentiary material supporting the material facts; and a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s).

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<sup>1</sup> Emphasis added

11. It appears from the outline that the SPO is seeking to join charges from Case 11 that were not confirmed in relation to Case 10.<sup>2</sup> Rule 86(9) of the *Rules* states that the non-confirmation of any charge in an indictment shall not preclude the SPO from subsequently filing an amended indictment or from including the same charge in an indictment supported by new evidentiary material.<sup>3</sup>

#### IV. SUBMISSIONS

12. The motion for joinder is opposed.

13. Aside from the need for counsel for Mr Bahtijari to have a proper opportunity to consider all the evidence, there are fundamental procedural deficiencies as follows:

- a. No new evidentiary material has been filed to support a Rule 86(9) application in relation to non-confirmed charges. This in turn means that the Rule 89 requirements cannot be fulfilled.
- b. No evidentiary material has been filed to support a Rule 86(3) application: The SPO outline refers to disclosed materials but not evidentiary material which means it is non-compliant with Rule 86(3)(a). Since the outline should be “a detailed outline demonstrating the relevance of each item of evidentiary material to each allegation, with particular reference to the conduct of the suspect with respect to the alleged crime(s),” the SPO motion is also non-compliant with Rule 86(3)(b). This in turn means that the Rule 89 requirements cannot be fulfilled.

14. In addition, it is understood from submissions by Counsel for Januzi on this motion that the SPO motion on joinder relies on evidence which is confidential and about which there is outstanding litigation in case KSC-BC-2023-10. The issue of joinder cannot properly be determined without resolution of that litigation on which Mr Bahtijari adopts the same arguments as Januzi.

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<sup>2</sup> KSC-BC-2023-10/F00008/CONF/RED, *Confidential Redacted Version of the Decision on the Confirmation of the Indictment*, Pre-Trial Judge, 2 October 2023, Confidential at paragraph 90, 149, and 155(b)

<sup>3</sup> Emphasis added.

15. Accordingly, the SPO motion for joinder should be refused

**Word Count: 940**

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 towards the right.

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**Dr Felicity Gerry KC**

**Counsel for Mr Bahtijari**

23 January 2024

At New South Wales, Australia