

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

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Counsel for Haxhi Shala

**Date:** 27 February 2024

**Language:** English

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**Reply to Prosecution Response to 'Defence Preliminary Motions on Behalf of Haxhi Shala'**

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## I. INTRODUCTION

1. The Defence for Mr. Haxhi Shala (“Accused”) hereby submits a Reply to the Prosecution Response to ‘Defence Preliminary Motions on Behalf of Haxhi Shala’, which the Specialist Prosecutor’s Office (“SPO”) filed on 22 February 2024<sup>1</sup> (“Response”).

## II. PROCEDURAL BACKGROUND

2. On 4 December 2023, the Pre-Trial Judge confirmed the indictment against the Accused.<sup>2</sup>
3. On 12 December 2023, the SPO submitted a public redacted version of the indictment of the Accused, as confirmed by the Pre-Trial Judge<sup>3</sup> (“Indictment”).
4. On 8 February 2024 in the Decision on Request for Joinder and Amendment of the Indictment (“Joinder Decision”)<sup>4</sup>, the Pre-Trial Judge granted the

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<sup>1</sup> KSC-BC-2023-10/F00182.

<sup>2</sup> KSC-BC-2023-11, F00005, Pre-Trial Judge, Decision on the Confirmation of the Indictment, 4 December 2023, confidential. A public redacted version was filed on 30 January 2024, F00005/RED.

<sup>3</sup> KSC-BC-2023-11/F00013/A01, Annex 1 to Submission of Confirmed Indictment, 12 December 2023, F00013/A01.

<sup>4</sup> KSC-BC-2023-10/F00041.

joinder of Special Prosecutor v. Sabit Januzi and Ismet Bahtijari (“Case 10”) and Special Prosecutor v. Haxhi Shala (“Case 11”) but determined that separate indictments should remain operative.<sup>5</sup>

5. On 9 February 2024 the Defence filed Preliminary Motions on Behalf of Haxhi Shala<sup>6</sup> (“Preliminary Motions”) in which it requested either an order requiring the SPO to submit an amended Indictment addressing certain defects, or the dismissal of the Indictment.<sup>7</sup>
6. In the Response the SPO requested that the Preliminary Motions be dismissed.<sup>8</sup>

### III. SUBMISSIONS

7. All three charges in the Indictment rest on Witness 1’s status as “a person who has provided or is likely to provide information to the Special Investigative Task Force (‘SITF’), SPO, and/or to any KSC Panel about any crimes or offences falling under KSC jurisdiction.”<sup>9</sup> The SPO submits in the Reply that the legally

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<sup>5</sup> Joinder Decision, paras. 55, 58a.

<sup>6</sup> KSC-BC-2023/10/F00166.

<sup>7</sup> Preliminary Motions, paras. 1, 27.

<sup>8</sup> Response, para. 8.

<sup>9</sup> Indictment, paras. 3, 18 (Counts 1 and 2), 21 (Count 3).

required specificity related to such a person—identifiability either as an individual or, at least, as a member of a clearly identifiable category—is clearly met.<sup>10</sup> However, the information held by such a person also requires specificity. It is inherently intangible, being information, so to speak, in a person’s mind. It requires greater specificity in order to meet the legal requirements set forth in paragraphs 13 and 14 of the Preliminary Motions.

8. In paragraph 21 of the Indictment<sup>11</sup> the SPO alleges that the Accused acted in order to induce Witness 1 to take one of three actions. Of these one is the highly specific one of “[making] a false statement or to otherwise [failing] to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings” (“third limb”); and the other two are on their face broadly characterised as “[refraining] from making a statement” and “[making] a false statement” (“first and second limbs”). If the SPO adopts its interpretation of Article 387 of the Kosovo Criminal Code (“KCC”) in SPO v. Hysni Gucati and Nasim Haradinaj,<sup>12</sup> the information contained in the statements referred to in the first and second limbs is unspecified. The Defence submitted in the Preliminary Motions that

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<sup>10</sup> Response, para. 3.

<sup>11</sup> See also Indictment para. 27.c.

<sup>12</sup> E.g. KSC-CC-2023-22/F00009, Prosecution Response to Haradinaj Defence Referral to the Specialist Chamber of the Constitutional Court, 22 January 2024, paras. 23-24.

the degree of precision in the description of the information at issue in these two limbs would be sharply at variance with that in third and that such a divergence would introduce uncertainty.<sup>13</sup>

9. The SPO state in the Response that the Defence is not “merely be taking issue with and/or seeking guidance on the language of KCC Article 387 itself, rather than with the Indictment”.<sup>14</sup> The Defence is in the first instance assuming that the SPO is consistent in its interpretation of Article 387 and drawing out the lack of clarity to which it gives rise. By such a submission the Defence is not taking issue with and/or seeking guidance in regard to Article 387. However, if the SPO were to take the position that the phrase “when such information relates to obstruction of criminal proceedings” qualifies all three limbs, the allegation against the Accused would be very different. This possibility which is derived from the formulation of Article 387 causes further doubt as to the meaning of the Indictment. It demonstrates that, contrary to the suggestion of the SPO, a determination of the sufficiency of pleadings in an indictment cannot always be divorced from interpretation of the criminal law provisions to which it refers.

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<sup>13</sup> Indictment, paras. 22, 23.

<sup>14</sup> Response, para. 5.

10. The SPO submits that while all material facts have been pleaded with sufficient detail in the Indictment, the Accused has also already received and will continue to receive further evidentiary details supporting the material facts in disclosures and filings other than the Indictment.<sup>15</sup> The Defence points out that the receipt of these further evidentiary details have no bearing on, and cannot remedy, any defects that there might be in the Indictment. The Pre-Trial Judge stated in *Specialist Prosecutor v. Hashim Thaçi et al.*:

“As a matter of principle, the indictment shall be a stand-alone document. The factual allegations underpinning the charges, involving the questions of who did what, when, where and against whom, shall be encompassed and sufficiently described in the indictment. Notably, the accused should not be required to consult other documents in order to understand and piece together the factual allegations underpinning the charges.”<sup>16</sup>

11. The Defence notes that the SPO filed the Response outside the time-period laid down in the Rules. The Preliminary Motion was filed on 9 February 2024. Pursuant to Rule 76 of the Rules, any response to a motion shall be filed within

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<sup>15</sup> Response, para. 7.

<sup>16</sup> KSC-BC-2020-06/F00010 *Specialist Prosecutor v. Hashim Thaçi et al.*, Order to the Specialist Prosecutor Pursuant to Rule 86(4) of the Rules, 2 July 2020, para. 11.

ten days of the motion, unless otherwise provided in the Rules. The SPO filed the Response on 22 February 2023 and did not seek an extension of time.

#### IV. CONCLUSION

12. For the foregoing reasons, the Defence respectfully requests that the Pre-Trial Judge reject the Response and grant what was sought in the Preliminary Motions.

**Word Count: [1,039 words]**



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**Toby Cadman**

**Specialist Counsel**

**27 February 2024**

**At London, United Kingdom**