

In: KSC-BC-2023-10
Specialist Prosecutor v. Sabit Januzi and Ismet Bahtijari
KSC-BC-2023-11
Specialist Prosecutor v. Haxhi Shala

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Haxhi Shala

Date: 19 January 2024

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Public Redacted Version of Haxhi Shala Response to Prosecution Request for Joinder

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I. INTRODUCTION

1. The Defence for Mr. Haxhi Shala (“Defence”) hereby responds to the Prosecution Request for Joinder filed on 13 December 2023,¹ which seeks the joinder of the Indictments confirmed in Specialist Prosecutor v. Sabit Januzi and Ismet Bahtijari (“Case 10”) and Specialist Prosecutor v. Haxhi Shala (“Case 11”).

II. PROCEDURAL BACKGROUND

2. On 6 December 2023, the Specialist Prosecutor’s Office (“SPO”) submitted the indictment of Mr. Shala, as confirmed by the Pre-Trial Judge.²
3. On 11 December 2023 he was arrested in Kosovo and on 12 December 2023 he was transferred to the Specialist Chambers Detention Facilities in The Hague, the Netherlands.³

¹ KSC-BC-2023-10/F00132, KSC-BC-2023-11/F00016, 13 December 2023.

² KSC-BC-2023-11/F00007, Submission of Confirmed Indictment, 6 December 2023, strictly confidential and ex parte, with confidential Annex 1. A public redacted version was filed on 12 December 2023, F00013/A01.

³ KSC-BC-2023-11/F00014, Decision Setting the Date for the Initial Appearance of Haxhi Shala and Related Matters, 12 December 2023, paras. 4-5.

4. At the Status Conference held on 15 December 2023 he entered pleas of not guilty to each charge on the indictment.⁴
5. On 4 October 2023, the SPO submitted a revised indictment of Mr. Januzi and Mr. Bahtijari, as confirmed by the Pre-Trial Judge.⁵ They were arrested in Kosovo on 5 October 2023 and transferred to the Specialist Chambers Detention Facilities the next day.⁶ At their initial appearances on 9 October 2023 both enter pleas of not guilty to each charge on the indictment.⁷
6. On 12 January 2024, pursuant to Oral Orders of the Pre-Trial Judge,⁸ the Specialist Prosecutor's Office ("SPO") submitted a Joint Indictment in both Cases.⁹
7. The Accused objects to the joinder of Case 10 and Case 11 for the reasons set out herein.

⁴ KSC-BC-2023-11, Status Conference, Transcript, 15 December 2023 ("Shala First Status Conference Transcript"), p. 42.

⁵ KSC-BC-2023-10/F00010, Submission of Confirmed Indictment, 4 October 2023, strictly confidential and ex parte, with strictly confidential Annex 1; F00016, Submission of Public Redacted Version of Confirmed Indictment, 6 October 2023, with public Annex 1.

⁶ KSC-BC-2023-10/F00017, Decision Setting the Date for the Initial Appearances of Sabit Januzi and Ismet Bahtijari and Related Matters, 6 October 2023, paras. 4-6.

⁷ KSC-BC-2023-10, Initial Appearance of Ismet Bahtijari, Transcript, 9 October 2023, pp. 11-12; Initial Appearance of Sabit Januzi, Transcript, 9 October 2023, p. 27.

⁸ KSC-BC-2023-10, Status Conference, Transcript, 14 December 2023, pp. 132-133; Shala First Status Conference Transcript, p.38.

⁹ KSC-BC-2023-10/F00146, KSC-BC-2023-11/F00031, Annex 1 to Submission of joint Indictment (confidential).

III. APPLICABLE LAW

8. Article 39(9) of the Law on Specialist Chambers and Specialist Prosecutor's Office¹⁰ ("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.

9. Rule 89(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers¹¹ ("Rules") provides:

Two or more alleged crimes and charges may be joined in one indictment, where:

- (a) the same Accused participated in the alleged crimes;
- (b) the crimes and charges are based on the same facts; or
- (c) the crimes and charges form or are part of a series of alleged crimes of the same or a similar character or conduct.

¹⁰ Law no.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015.

¹¹ KSC-BD0-3/Rev3/2020, 2 June 2020.

IV. SUBMISSIONS

10. The SPO submits that each of the three conditions set forth in Rule 89(1) of the Rules are met in the instant case.¹² It should nevertheless be noted that joinder is not a necessary consequence of the fulfilment of any of these conditions. It follows from the use of word “may” in Rule 89(1) of the Rules that the Pre-Trial Judge has discretion in deciding whether to direct joinder where one or more of the conditions are present. It is noteworthy that an international tribunal has expressly found that a Trial Chamber’s decision pursuant to a similar provision to join two or more persons accused of the same or different crimes under one indictment is discretionary.¹³
11. The SPO submits that the joinder of the indictments would serve certain specified important purposes¹⁴ and cites examples of decisions of international tribunals in support.¹⁵ However, the purposes that the SPO lists do not give prominence to the protection of the fundamental and non-derogable fair trial rights of the Accused.

¹² KSC-BC-2023-10/F00132, KSC-BC-2023-11/F00016, paras. 2-5.

¹³ Prosecutor v. Zdravko Tolimir et al., IT-04-80-AR73.1, Decision on Radivoje Miletić’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006, para. 5.

¹⁴ KSC-BC-2023-10/F00132, KSC-BC-2023-11/F00016, para. 6.

¹⁵ KSC-BC-2023-10/F00132, KSC-BC-2023-11/F00016, fn. 7.

12. Two of the authorities that the SPO cites contain a more complete statement of what should be taken into consideration in deciding a motion for joinder. The International Criminal Tribunals for Rwanda and the former Yugoslavia found that it was appropriate to consider and weigh (i) the protection of the fair trial rights of the accused, (ii) avoidance of any conflict of interest that might cause serious prejudice to an accused and (iii) protection of the interests of justice and that factors that may be looked to in the interests of justice included (a) avoiding the duplication of evidence, (b) promoting judicial economy, (c) minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence and (d) ensuring consistency of verdicts.¹⁶
13. The differences between Cases 10 and 11 are such that fair trial rights and avoidance of conflicts of interest in points (i) and (ii) above weigh heavily against joinder.
14. In the SPO's submission, because proceedings in Cases 10 and 11 are at the pre-trial stage, there will be no prejudice to the rights of the Accused.¹⁷

¹⁶ Prosecutor v. Pauline Nyiramasuhuko et al., ICTR-98-42-A, Judgment, 14 December 2015 ("Butare Appeal Judgment"), para. 71; Prosecutor v. Ante Gotovina, Prosecutor v. Ivan Čermak and Mladen Markač, IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006 ("Gotovina et al. Interlocutory Appeals Decision"), para. 17.

¹⁷ KSC-BC-2023-10/F00132, KSC-BC-2023-11/F00016, para. 7.

However, it remains the case that Mr. Januzi and Mr. Bahtijari were arrested and transferred to the Specialist Chambers Detention Facilities more than two (2) months before Mr. Shala¹⁸ and there has been litigation on issues of disclosure that are at a more advanced stage than that of Mr. Shala. They will therefore be in a position to be further advanced in their preparations for trial. For example, in Case 10 the Pre-Trial Judge ordered the SPO to complete the disclosure of material falling under Rule 102(1)(a) of the Rules by 8 November 2023;¹⁹ whereas in Case 11 he ordered that the SPO complete the same disclosure by 22 December 2023 for material not requiring redactions and by 11 January 2024 for material requiring redactions.²⁰ Notably, the SPO has disclosed four disclosure packs: (a) Disclosure Packs Nos 2 and 3 were released on 21 December 2023, consisting of 42 items; (b) Disclosure Pack 4 was released on 10 January 2024, consisting of 20 items; and Disclosure Pack 5 was released on 19 January 2024, consisting of 119 items. Further, a hard-drive was delivered to the Defence on 18 January 2024, consisting of the data download of three mobile telephones. There is therefore a considerable

¹⁸ See paragraphs 2-5 above.

¹⁹ KSC-BC-2023-10/F00076, Public Redacted Version of the Framework Decision on Disclosure of Evidence and Related Matters, para. 122(b).

²⁰ KSC-BC-2023-11/F00023, Framework Decision on Disclosure of Evidence and Related Matters, 19 December 2023, paras. 111(b)-111(c).

amount of work that will be required to review the material and Specialist Counsel was appointed by the Registrar on 3 January 2024.

15. If there were to be joinder, the right of detainees to trial within a reasonable time under Article 41(5) of the Law would conflict with Mr. Shala's right to a fair trial and could shorten the length of pre-trial proceedings in Mr. Shala's case in breach of his fair trial rights under Article 21(4)(c) of the Law and Article 6(3)(b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Any additional time that he might require for preparation would prolong the pre-trial detention of Mr. Januzi and Mr. Bahtijari and may be curtailed for that reason.
16. Notwithstanding the commonalities between the allegations in Cases 10 and 11, there is one crucial difference. Two occasions on which Mr. Januzi and Mr. Bahtijari are alleged to have met Witness 1 in order to induce Witness 1 to withdraw evidence or refrain from providing evidence in official proceedings before the Kosovo Specialist Chambers were critical to all three Counts in the Indictment,²¹ but it is not alleged that Mr. Shala had any such meeting. In addition, the SPO alleges that at each of those meetings Mr. Januzi and Mr. Bahtijari made statements incriminating Mr. Shala who the SPO does

²¹ KSC-BC-2023-11/F00146, KSC-BC-2023-10/F00031, paras. 7, 9-11, 15-17.

not allege was present.²² Therefore, without making any assumptions about the defences of Mr. Januzi or Mr. Bahtijari, there is a risk that their joinder in the indictment may give rise to a conflict of interest between the Accused which would be prejudicial to Mr. Shala. It is submitted that an assessment of the evidence relating to the alleged meetings with Witness 1 can be more effectively made if Mr. Shala is tried on his own and not together with the other Accused who may present a divergent case from both Mr. Shala and the SPO.

17. Certain filings and other items relevant to the indictment in Case 10 are confidential and therefore inaccessible to the Shala Defence. This reduces its ability to determine whether Cases 10 and 11 meet any of the criteria in Rule 89(1) of the Rules and, if they do, whether the discretion to direct joinder should be exercised.
18. The allegation that Mr. Januzi and Mr. Bahtijari used a promise of a gift or any other form of benefit to dissuade Witness 1 from testifying provides an example. In the Decision on the Confirmation of the Indictment of 12 October 2023 in Case 10, the Pre-Trial Judge noted that “the SPO does not plead, nor does it present any supporting material to establish that Mr. Januzi and Mr.

²² KSC-BC-2023-11/F00146, KSC-BC-2023-10/F00031, paras. 7, 9-10, 15-17.

Bahtijari, jointly with or on behalf of Co-Perpetrator 1, used a promise of a gift or any other form of benefit to dissuade Witness 1 from testifying in SC Proceedings.”²³ He therefore ordered that the SPO delete such references in the Indictment that the SPO had filed on 11 September 2023.²⁴ The Shala Defence has no access to this earlier Indictment even in redacted form or to the supporting material.

19. However, the SPO made allegations regarding the use of a promise of a gift or another form of benefit to dissuade Witness 1 from testifying in the Indictment filed in Case 11²⁵ and in the proposed Joint Indictment.²⁶ Indeed in the proposed Joint Indictment [REDACTED],²⁷ which in his Decision of 2 October 2023, the Pre-Trial Judge noted that the SPO was not pleading and did not present any supporting material to establish. The Shala Defence is unable to determine whether there is a difference here between the two cases which should be taken into account in the decision on joinder because it is unable to access the Indictment filed on 11 September 2023 or the supporting material in Case 10.

²³ KSC-BC-2023-10/F00008, Corrected Version of Public Redacted Version of the Decision on the Confirmation of the Indictment, 12 October 2023, para. 90.

²⁴ KSC-BC-2023-10/F00008, paras. 149, 155(b).

²⁵ KSC-BC-2023-11/ F00013/A01, Public redacted Indictment, 12 December 2023, paras. 14, 21 and 22(ii).

²⁶ KSC-BC-2023-10/F00146, KSC-BC-2023-11/F00031, paras. 16, 23 and 24(ii).

²⁷ KSC-BC-2023-10/F00146, KSC-BC-2023-11/F00031, para. 23.

20. The SPO sets out in its application for joinder that *“[the] proposed joint indictment does not add new counts or modes of liability, but rather provides certain limited additional factual allegations in respect of Januzi and Bahtijari, and such clarifications and alignments of language necessary to the joiner.”*²⁸ However, as set out above it is clear that is not accurate and, in particular, runs contrary to the Single Judge’s 12 October 2023 ruling that the SPO delete such references in the indictment²⁹, as set out above. It would appear that the SPO is seeking to add an entirely new legal and factual basis for the counts in respect of Messrs. Januzi and Bahtijari that would amount to new charges.³⁰ It is respectfully submitted that this should not form the basis for joinder.
21. The examples of factors to be looked at in the interests of justice³¹ were given in the context of very lengthy prosecution cases concerning serious violations of international humanitarian law. Case 11 on the other hand is on a much smaller scale. The SPO indicated on 15 December 2023 that it intended to call only two witnesses.³² Therefore little weight should be given to the avoidance of duplication of evidence, promotion of judicial economy or minimising

²⁸ KSC-BC-2023-10/F00146, KSC-BC-2023-11/F00031, para. 1.

²⁹ KSC-BC-2023-10/F00008, paras. 149, 155(b).

³⁰ Prosecutor v Halilović, IT-01-48-PT, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, Trial Chamber, 17 December 2004 at para.30

³¹ Butare Appeal Judgment, para. 71; Gotovina et al. Interlocutory Appeals Decision, para. 17.

³² Shala First Status Conference Transcript, p. 20.

hardship to witnesses that may result from joinder. Ensuring consistency of verdicts should also count for little in light of the differences between the allegations about the Accused in the two Cases.

22. Finally, in relation to two items tendered by the Prosecution in the form of video and audio recordings, namely ERN-116158-01 dated 4 October 2023 and ERN-116623-01 dated 2 April 2023, respectively, there is to be ongoing litigation in Case 11 concerning these items.
23. In short, joinder should not be ordered in view of the potentially significant prejudice to Mr. Shala and the relatively minor gains in efficiency that would result.

V. CONCLUSION

24. For the foregoing reasons the Defence requests that the Pre-Trial Judge dismiss the Joinder Request.

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At London, United Kingdom