



SPECIALIST PROSECUTOR'S OFFICE  
ZYRA E PROKURORIT TË SPECIALIZUAR  
SPECIJALIZOVANO TUŽILAŠTVO

**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 Prosecutor's Office

**Date:** 8 November 2023

**Language:** English

**Classification:** Public

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**Public redacted version of 'Corrected version of "Prosecution further submissions pursuant to Order F00079"'**

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## I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby provides the following submissions in response to Order F00079.<sup>1</sup>

## II. SUBMISSIONS

2. The SPO responds to each of the Pre-Trial Judge's questions in turn, beginning with paragraph 15 and subparts of Order F00079:<sup>2</sup>

*(a) Regarding the non-execution of the Authorised Searches and Seizures at the time of the arrest of the Accused in Kosovo:*

*i. What were the specific circumstances and/or security concerns, if any, impeding the execution the Authorised Searches and Seizures in Kosovo, at the time of the arrest?*

3. In determining when and how – or in some instances whether at that time – to execute complex operational activities the SPO must consider a wide range of factors. [REDACTED].

4. In this case, several related factors led the SPO to elect not to execute the Authorised Search and Seizures<sup>3</sup> at the time of the Accused's arrest. [REDACTED].

5. [REDACTED]:

- [REDACTED]
- [REDACTED]
- [REDACTED]

6. [REDACTED]:

[REDACTED].

7. [REDACTED].

8. [REDACTED].

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<sup>1</sup> Order for Further Submissions in Relation to Filing F00032, KSC-BC-2023-10/F00079, 26 October 2023, Strictly Confidential and *Ex Parte* ('Order F00079').

<sup>2</sup> Order F00079, KSC-BC-2023-10/F00079, para.15.

<sup>3</sup> As defined in Order F00079, KSC-BC-2023-10/F00079, para.6.

9. The SPO acknowledges the right of all individuals to express their disagreement and dissatisfaction with the SPO and its operations. However, the SPO must consider all relevant facts when planning its operations to ensure the safety and security of everyone involved. [REDACTED].

10. [REDACTED].

11. [REDACTED].

12. [REDACTED].

13. The SPO respectfully submits that its decision to forgo execution of the Authorised Searches and Seizures was entirely lawful and rests within its operational discretion. Such discretion is essential to protect both the efficiency of investigations and the safety of the SPO's staff, suspects, witnesses, and the public. [REDACTED].

*ii. How would have the implementation of the Authorised Searches and Seizures jeopardized the safe and efficient execution of the arrest warrant?*

14. For the reasons detailed above, the SPO assessed that execution of the Authorised Searches and Seizures in Kosovo posed a risk to the safe and efficient execution of the arrest warrants.

*iii. Considering that the Accused stayed under SPO/SC's custody [REDACTED], why did the SPO not execute and/or complete the Authorised Searches and Seizures at [REDACTED]?*

15. The SPO did not execute the Authorised Searches and Seizures at [REDACTED] following the Accused's arrest and transfer to the [REDACTED] for legal, security and practical reasons.

16. Specifically, given the obligations upon the Registry once a transfer order has been issued, it was not apparent that the SPO would have had authority - without judicial approval - to access the detainees for investigative purposes, once they were in the custody of the Registrar and awaiting transfer.

17. [REDACTED]<sup>4</sup> [REDACTED].

18. Again, the SPO recognises [REDACTED]. However, the SPO must consider all risks to the execution of its judicially-authorised enforcement actions and the safety of its personnel, those in its custody, and the public, [REDACTED].

19. Based on the above considerations, the SPO exercised its discretion not to execute the Authorised Searches and Seizures [REDACTED].

*(b) Regarding the recovery of the Subject Phones:*

*i. What was the legal basis for the “routine security search of the person” of each Accused referred to in paragraph 7 of the Request? Did the SPO act upon the Authorised Searches and Seizures for the search of the Subject Phones?*

20. For the reasons articulated above, the SPO elected not to act upon the Authorised Searches and Seizures for the search of the Subject Phones.

21. The SPO’s legal basis for conducting the ‘routine security search of the person’ of each Accused is grounded in Kosovo law, as incorporated in the legal framework of this court.

22. Pursuant to Article 35(3) of the Law, the SPO has the authority and obligation to exercise the police powers of the Kosovo Police under Kosovo law. Article 10 of the Law on Police provides the general duties and powers of the police, including the duty to prevent the risk to citizens and maintain the public order and safety.<sup>5</sup> Article 11 of the Law on Police provides, *inter alia*, that during the performance of police duties, a Police Officer has power to impose reasonable control on people and property within his/her jurisdiction.<sup>6</sup> Further, Articles 76 and 106(5) of the Kosovo Criminal Procedure Code (2022)<sup>7</sup> provide that police may conduct a search when making an arrest, if there

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<sup>4</sup> [REDACTED].

<sup>5</sup> Law on Police, Law No. 04/L-076.

<sup>6</sup> Law on Police, Law No. 04/L-076.

<sup>7</sup> Criminal Procedure Code, Code No. 08/L-032.

is a danger that the person is carrying a weapon or dangerous object that can be used for attack or self-injury.

23. Further, the KSC Detention Rules are relevant, insofar as they set out the routine procedure for reception of persons into KSC custody. Upon arrival at the detention facilities, persons are searched, including to identify any prohibited items.<sup>8</sup> Such prohibited items include mobile telephones and other communications devices.<sup>9</sup> As custody commences with arrest and for the same reasons such provisional searches are conducted when persons are received into the detention facilities, provisional security searches, including to identify phones and communications devices, of persons detained by the SPO or KSC are necessary.

24. Security searches are also consistent with European Court of Human Rights ('ECtHR') case law. For example, the ECtHR found in *Murray v. the United Kingdom* that there was no reason for not concluding that certain measures applied during an arrest were 'in accordance with the law.' In that case, the ECtHR upheld the finding of the House of Lords that a short period of restraint endured by the other members of the arrestee's family when they were asked to assemble in one room to be a necessary and proper part of the procedure of an arrest.<sup>10</sup>

25. A search incident to arrest is a necessary and proper part of the procedure of an arrest. Indeed, the SPO underscores that the Accused were arrested pursuant to a lawful arrest warrant issued by this court, and that a routine security search of an arrestee is not only impliedly authorised by a lawful arrest warrant, but is indispensable to its safe execution to ensure that, *inter alia*, any weapon or dangerous object is removed the person. Such searches incident to the execution of a lawful arrest warrant must be conducted in order to safely and properly execute the arrests and safeguard the personal property of arrestees. In this respect, the items taken during

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<sup>8</sup> Rules of Detention, KSC-BC-08/Rev1/20202, Detention Rule 10(4).

<sup>9</sup> Rules of Detention, KSC-BC-08/Rev1/20202, Detention Rule 25.

<sup>10</sup> See ECtHR, *Murray v. The United Kingdom* [GC], no. 14310/88, 28 October 1994, para.88.

the security search, including the Subject Phones, were secured insofar as they could be used to communicate with third parties, obstruct the execution of the arrest, and pose risks to the safety and security of persons involved.

26. Further underlining the necessity and proportionality of security searches, the SPO notes that a security search is limited to the person of an arrestee. Furthermore, any separated items are clearly identified and inventoried and placed in safe custody at the Detention Facilities, pursuant to Detention Rule 10(6) of the KSC Rules of Detention. The searches were also proportional to the legitimate aim pursued, considering the limited scope of such a search, and that the recovered items were inventoried and transferred to the custody of the Registry at the time of the Accused's transfer. Such searches ensure the safety of all involved, prevent disorder and protect the rights of others.

27. Importantly, the Subject Phones were only secured and transferred (together with the other personal possessions of the Accused on their person) because they happened to be on the person of each Accused at the time of the arrest and security search.

28. The SPO has conducted a security search incident to every arrest the SPO has made, and has duly reported doing so to this court and in public filings.<sup>11</sup> [REDACTED].

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<sup>11</sup> See Report on the Arrest and Transfer of the Accused to the Detention Facilities, KSC-BC-2020-05/F00018/RED, 29 September 2020 ('Mustafa Arrest Report'), para.5; Corrected Report on the Arrest and Transfer of Nasim Haradinaj to the Detention Facilities, KSC-BC-2020-07/F00026/COR/RED, 29 September 2020, para.9 ('At 17:30, an SPO officer repeated the information provided upon arrest, and two other SPO officers conducted a security search incident to arrest of Mr Haradinaj's person and removed personal property, which they inventoried and placed into one sealed evidence bag under log number G128852'); Report on the Arrest and Transfer of Hysni Gucati to the Detention Facilities, KSC-BC-2020-07/F00031/RED, 30 September 2020, para.4 ('At 11:20, the SPO officers conducted a security search incident to arrest of Mr Gucati's person and removed personal property, which they placed in one bag, sealed, and logged under number P03119593.');

Report on the Arrest and Transfer of Jakup Krasniqi to the Detention Facilities, KSC-BC 2020-06/F00064/RED, 8 November 2020, para.8 ('At 6:53, the SPO officers conducted a security search incident to arrest of Mr Krasniqi's person and removed personal property from his pockets, which they placed in an evidence bag. [REDACTED]'); Report on

29. [REDACTED].<sup>12</sup>

30. [REDACTED]. The only difference here is that, in this case, the SPO has now requested a new search and seizure prior to searching and seizing the Subject Phones following their transfer to The Hague. The SPO has done so in light of the Single Judge's Decision F00006 requiring that the searches authorised by Decision F00006 must take place in Kosovo.<sup>13</sup> Because the SPO elected – for the reasons detailed above – not to execute any search and seizure of the Subject Phones in Kosovo, it was necessary for the SPO to file the new request seeking authorisation to search and seize the Subject Phones from the Detention Centre.

31. For all these reasons, the security search incident to each Accused's arrest was in accordance with the law.

*ii. Who conducted the abovementioned search and was the Registry personnel in Kosovo present and/or involved in the operation?*

32. [REDACTED].

*iii. What measures/guarantees were in place during the abovementioned procedure to ensure the rights of the Accused under the legal framework of the SC, such as those set forth by the Rules?*

33. During the arrest and transfer of the Accused, the SPO acted at all times pursuant to its standard operating procedures which have been followed during prior arrests reported to the court. The security searches were conducted respectfully, were documented and were witnessed by additional personnel, in addition an interpreter

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the Arrest and Transfer of Hashim Thaçi to the Detention Facilities; 8 November 2020, KSC-BC 2020-06/F00065/RED, 8 November 2020, para.7 ('At approximately 12:12 on 5 November 2020, Mr Thaçi entered the Compound. After a short wait, a security search was conducted at 13:01.5 No items were taken.');

Report on the Arrest and Transfer of Kadri Veseli to the Detention Facilities, KSC-BC-2020-06/F00070/RED, 10 November 2020, para.7; Report on the Arrest and Transfer of Rexhep Selimi to the Detention Facilities, KSC-BC-2020-06/F00071/RED, 10 November 2020, para.5 ('Certain items, including an iPhone, wallet, and watch, were placed in evidence bags').

<sup>12</sup> [REDACTED].

<sup>13</sup> Decision Authorising Searches and Seizures and Special Investigative Measures, KSC-BC-2023-10/F00006, 25 September 2023, Strictly Confidential and *Ex Parte* ('Decision F00006'), paras 40-44.

was present to ensure the Accused understood the process. With regard to the personal property recovered from each Accused during the security search at the time of arrest, the details of each security search were documented in the SPO's arrest forms previously provided to the Pre-Trial Judge, including the time of the search and detailed inventory of all items recovered. As noted, all items were then duly transferred to the custody of the Registry [REDACTED].

*(c) Regarding the chain of custody and handover of the Subject Phones:*

- i. Who had the Subject Phones in custody between the time of the "routine security searches" and the transfer of custody to the SC Registry personnel in Kosovo [REDACTED]? Was this documented?*
- ii. What measures were in place to ensure the safety, security and integrity of the Subject Phones between their recovery and their handover to the SC Registry personnel in Kosovo?*

34. The SPO recovered the Subject Phones from the Accused during the security search. [REDACTED].<sup>14</sup> [REDACTED].

35. The transfer of custody of all items removed by the SPO from the Accused at the time their arrest from the SPO to the Registry personnel is reflected in forms signed by the MSC, which have previously been filed with the Pre-Trial Judge.<sup>15</sup>

- iii. Which legal provisions did the SPO apply when transferring custody of the Subject Phones to the SC Registry personnel in Kosovo "in accordance with arrest procedure", as reported in paragraph 8 of the Request?*

36. As submitted above, the search incident to an arrest is a necessary and proper part of the procedure of an arrest. The SPO submits that this applies also to transferring the custody of any items separated from the person to the authority in

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<sup>14</sup> [REDACTED].

<sup>15</sup> See Report on the Arrest and Transfer of Ismet Bahtijari to the Detention Facilities, KSC-BC-2023-10/F00021, 9 October 2023, ('BAHTIJARI Arrest Report'), paras 10, 19; Annex 3 to BAHTIJARI Arrest Report, KSC-BC-2023-10/F00021/A03, pages 3-8; see also Corrected Version of the Report on the Arrest and Transfer of Sabit Januzi to the Detention Facilities, SC-BC-2023-10/F00020/COR, 9 October 2023 ('JANUZI Arrest Report') paras 10, 17-18; Annex 3 to JANUZI Arrest Report, pages 3-8.



charge of and responsible for the subsequent detention. The SPO notes in this regard that Detention Rule 10(5) of the KSC Rules of Detention provides that the Chief Detention Officer shall record in an inventory all monies, valuables, clothing and other items belonging to the Detainee [...]. Conversely, absent an executed search and seizure order or some other exigent law enforcement need, the SPO is not aware of any legal basis it would have for retaining an Accused's personal property at the time of the Accused's transfer of custody to the Registry.

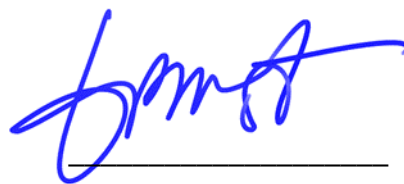
*(d) Noting that, shortly after their arrival [REDACTED], the Accused were "security searched" again, did the SPO receive further items in the possession of the Accused from the SC Registry personnel?*

37. After the transfer of the Accused to the KSC, all SPO involvement in the arrest ended. The SPO transferred all items that had been on the Accused's persons at the time of their arrest,<sup>16</sup> and did not request or receive any further items of the Accused.

### III. CLASSIFICATION

38. This filing is strictly confidential and *ex parte* as it references filings and information of the same classification.

**Word count: 4,694**



**Kimberly P. West**

**Specialist Prosecutor**

Wednesday, 8 November 2023

At The Hague, the Netherlands.

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<sup>16</sup> The SPO does not retain items identified during a security search conducted by it unless a lawfully authorised seizure of such items is conducted, and does not ever receive items from the Registry identified in any search conducted by it (again without lawful authority for such transfer).

### Explanatory Note

The following corrections have been made to the original filing:

- A typographical error of a named individual was corrected throughout the filing.
- A typographical error in paragraph 28 was corrected.