



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

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

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Date: 29 January 2024

Language: English

Classification: Public

Public redacted version of
Decision Authorising Searches and Seizures

Specialist Prosecutor
Kimberly P. West

Counsel for Sabit Januzi
Jonathan Elystan Rees

Registry
Fidelma Donlon
Head of Detention Facilities

Counsel for Ismet Bahtijari
Felicity Gerry

Counsel for Haxhi Shala
Toby Cadman

I.	PROCEDURAL BACKGROUND	2
II.	SUBMISSIONS.....	4
III.	APPLICABLE LAW	6
IV.	DISCUSSION	8
A.	Preliminary Matter	8
B.	Searches and Seizures	12
1.	Requirements for Search and Seizure	12
(a)	Property or Reasonable Expectation of Privacy.....	13
(b)	Grounded Suspicion	13
(c)	Necessity.....	15
(d)	Unavoidability	16
(e)	Proportionality	17
(f)	Conclusion.....	17
2.	Time, Duration, and Scope of the Searches and Seizures.....	17
3.	Reporting on the Search and Seizure	18
4.	Retention, Storage, and Protection of Seized Material.....	19
C.	Execution and Service of the Annexed Order	20
D.	Disclosure of the Annexed Orders	20
V.	DISPOSITION.....	21

THE PRE-TRIAL JUDGE,¹ pursuant to Articles 39(3) of Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rules 2, 31-35, 37, 39, 42(1), 48(2), and 49(1) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chamber ("Rules"), hereby renders the following decision.

I. PROCEDURAL BACKGROUND

1. On 11 September 2023, the Specialist Prosecutor's Office ("SPO") filed before the Pre-Trial Judge the indictment against Sabit Januzi ("Mr Januzi") and Ismet Bahtijari ("Mr Bahtijari"), together with a request for their arrest and transfer ("Arrest Warrants") to the Specialist Chambers ("SC") Detention Facilities ("Detention Facilities") and a request for search and seizure and related requests.²

2. On 25 September 2023, the Pre-Trial Judge issued a decision authorizing, *inter alia*, the searches of the persons of Mr Januzi and Mr Bahtijari, their mobile telephones and any bags, parcels, or other containers in their possession carried on their persons at the time of their arrest ("Possessions"), and the seizure of any and all mobile telephones (to include any and all SIM cards) and any further evidence that is believed to have been used in, connected with or may be relevant to the charged crimes and any recent efforts to interfere with the administration of justice which they carried on their persons or in their Possessions ("25 September 2023 Decision"; "Authorised Searches and Seizures").³

¹ KSC-BC-2023-10, F00001, President, *Decision Assigning a Pre-Trial Judge*, 11 September 2023, public.

² KSC-BC-2023-10, F00002, Specialist Prosecutor, *Submission of Indictment for Confirmation and Related Requests*, 11 September 2023, strictly confidential and *ex parte*, para. 32(ii), with Annexes 1 and 3, strictly confidential and *ex parte*, and Annex 2, confidential. A confidential redacted version and a public redacted version of the main filing were filed on 12 October 2023, F00002/CONF/RED and F00002/RED.

³ KSC-BC-2023-10, F00006, Pre-Trial Judge, *Decision Authorising Searches and Seizures and Special Investigative Measure*, 25 September 2023, strictly confidential and *ex parte*, para. 80(b), with Annexes 1-2, strictly confidential. A corrected version of Annexes 1-2 was filed on 26 September 2023, F00006/A01/COR and F00006/A02/COR. A confidential redacted version of the main decision was filed on 8 November 2023, F00006/CONF/RED.

3. On 2 October 2023, the Pre-Trial Judge confirmed the indictment against Mr Januzi and Mr Bahtijari ("Accused"),⁴ issued the Arrest Warrants for the Accused and ordered their transfer to the Detention Facilities.⁵
4. On 5 October 2023, the Accused were arrested in Kosovo.⁶ On the next day, the Accused were transferred to the Detention Facilities.⁷
5. On 12 October 2023, the SPO filed the "Prosecution Request for an Order" ("Request").⁸
6. On 26 October 2023, the Pre-Trial Judge issued an order (i) requesting, *inter alia*, the SPO and the Registry to file additional submissions on the Request and (ii) inviting

⁴ KSC-BC-2023-10, F00008, Pre-Trial Judge, *Decision on the Confirmation of the Indictment* ("Confirmation Decision"), 2 October 2023, strictly confidential and *ex parte*. A confidential redacted version and a public redacted version of the decision were filed on 12 October 2023, F00008/CONF/RED and F00008/RED. A corrected version of the public redacted version of the decision was filed on 12 October 2023, F00008/RED/COR.

⁵ KSC-BC-2023-10, F00009, Pre-Trial Judge, *Decision on Request for Arrest Warrants and Transfer Orders*, 2 October 2023, confidential, with Annexes 1-4, confidential. A public redacted version of the decision was filed on 12 October 2023, F00009/RED.

⁶ KSC-BC-2023-10, F00011, Registrar, *Notification of Arrest of Ismet Bahtjari Pursuant to Rule 55(4)*, 5 October 2023, public; F00012, Registrar, *Notification of Arrest of Sabit Januzi Pursuant to Rule 55(4)*, 5 October 2023, public.

⁷ KSC-BC-2023-10, F00014, Registrar, *Notification of the Reception of Ismet Bahtjari in the Detention Facilities of the Specialist Chambers*, 6 October 2023, public, with Annex 1, strictly confidential and *ex parte*; F00015, Registrar, *Notification of the Reception of Sabit Januzi in the Detention Facilities of the Specialist Chambers*, 6 October 2023, public, with Annex 1, strictly confidential and *ex parte*. See also, F00020, Registrar, *Report on the Arrest and Transfer of Sabit Januzi to the Detention Facilities*, 9 October 2023, strictly confidential and *ex parte* ("Januzi Arrest Report"), with Annexes 1-3 strictly confidential and *ex parte*. A corrected version of F00020 was filed on 9 October 2023, F00020/COR. A public redacted version of the main filing and confidential redacted and *ex parte* versions of the three Annexes were filed on 8 November 2023, F00020/COR/RED, F00020/COR/RED/A01/CONF/RED, F00020/COR/RED/A02/CONF/RED, F00020/COR/RED/A03/CONF/RED; F00021, Registrar, *Report on the Arrest and Transfer of Ismet Bahtjari to the Detention Facilities* ("Bahtijari Arrest Report"), 9 October 2023, confidential, with Annexes 1-3, strictly confidential and *ex parte*. A public redacted version of the main filing and confidential redacted and *ex parte* versions of the three Annexes were filed on 8 November 2023, F00021/RED, F00021/RED/A01/CONF/RED, F00021/RED/A02/CONF/RED, F00021/RED/A03/CONF/RED.

⁸ KSC-BC-2023-10, F00032, Specialist Prosecutor, *Prosecution Request for an Order*, 12 October 2023, strictly confidential and *ex parte*. A confidential redacted version of the Request was filed on 6 November 2023, F00032/CONF/RED.

the Defence for the Accused to respond to the additional submissions made by the SPO and the Registry ("Order for Further Submissions").⁹

7. On 8 November 2023, the SPO¹⁰ and the Registry¹¹ filed additional submissions pursuant to the Further Submissions Order ("SPO Further Submissions" and "Registry Further Submissions", respectively).

8. On 15 November, the Defence for Mr Januzi ("Defence") responded ("Response").¹² The Defence for Mr Bahtijari did not respond.

9. On 21 November 2023, the SPO replied to the Defence Response ("Reply").¹³

II. SUBMISSIONS

10. The SPO submits that, at the time of the arrest of the Accused, it did not execute the Authorised Searches and Seizures for reasons of ensuring the safe and efficient execution of the arrest.¹⁴ The SPO avers that, rather, SPO security personnel conducted a routine security search of the Accused's persons and recovered, *inter alia*, [REDACTED] ("Subject Phones").¹⁵

11. The SPO contends that the Subject Phones were: (i) secured and transferred to the Registry personnel in Kosovo in accordance with arrest procedure and to

⁹ KSC-BC-2023-10, F00079, Pre-Trial Judge, *Order for Further Submissions in Relation to Filing F00032*, 26 October 2023, confidential, paras 20(c)-(e).

¹⁰ KSC-BC-2023-10, F00095, Specialist Prosecutor, *Prosecution Further Submissions Pursuant to Order F00079*, 8 November 2023, strictly confidential and *ex parte*. A corrected version and a confidential redacted version of the corrected version were filed on 9 November 2023, F00095/COR and F00095/COR/CONF/RED.

¹¹ KSC-BC-2023-10, F00096, Registrar, *Registrar's Submissions Pursuant to Order for Further Submissions (F00079)*, 8 November 2023, confidential, with Annexes 1-4, confidential and *ex parte* (redacted).

¹² KSC-BC-2023-10, F00104, Defence for Mr Januzi, *Submissions re F00032 Prosecution Request for an Order on behalf of Sabit Januzi*, 15 November 2023, confidential. A corrected version was filed on 17 November 2023, F00104/COR.

¹³ KSC-BC-2023-10, F00112, Specialist Prosecutor, *Prosecution Reply to Corrected Version of "Submissions re F00032 Prosecution Request for an Order on Behalf of Sabit Januzi"*, 21 November 2023, confidential.

¹⁴ Request, para. 6; SPO Further Submissions, paras 4-15.

¹⁵ Request, para. 7; SPO Further Submissions, paras 21-22, 28.

safeguard the personal property of each Accused;¹⁶ and (ii) on 6 October 2023, when the Accused were transferred to the Detention Facilities, the Subject Phones were delivered by the Registry personnel in Kosovo directly to the Chief Detention Officer of the Detention Management Unit (“DMU”) of the SC Registry.¹⁷

12. The SPO maintains that (i) because it did not execute the Authorised Searches and Seizures in Kosovo, and (ii) the Subject Phones remain to date in the DMU’s custody,¹⁸ it was necessary for the SPO to file the new request seeking authorisation to search and seize the Subject Phones from the DMU.¹⁹

13. Accordingly, the SPO requests from the Pre-Trial Judge: (i) an order authorizing the SPO to search and seize the Subject Phones, and (ii) an order to the Registrar to provide the SPO with access to the personal property of the Accused currently stored at the DMU for the purpose of executing the search and seizure order.²⁰ The SPO submits that all requirements set forth by Rules 31 and 37 of the Rules have already been met in the 25 September 2023 Decision, and incorporates by reference the facts and the legal observations underpinning said decision, along with some additional submissions.²¹

14. The Registrar responds to the specific questions raised by the Pre-Trial Judge in the Order for Further Submissions by detailing (i) the events of the transfers of each of the Accused and their personal belongings from the SPO to the Registry’s personnel in Kosovo, and subsequently from the latter to the DMU at the Detention Facilities on 6 October 2023; and (ii) the relevant provisions in the SC Rules on Detention (KSC-BD-08-Rev1) (“Detention Rules”), observed throughout those procedures.²²

¹⁶ Request, para. 8; SPO Further Submissions, paras 23, 35, 36.

¹⁷ Request, para 9.

¹⁸ Request, paras 6, 9, 19.

¹⁹ SPO Further Submissions, para. 30.

²⁰ Request, paras 1, 10, 28.

²¹ Request, paras 2, 10-18.

²² Registry Further Submissions, paras 16-35.

15. The Defence opposes the Request. It contends that the SPO did not comply with the conditions set forth by the Pre-Trial Judge in the 25 September 2023 Decision and cannot retrospectively seek judicial approval of its prior refusal to accept said conditions.²³ It also challenges (i) the timing of the execution of the arrest warrants of Mr Januzi by the SPO and the reasons provided by the SPO for not executing the Authorised Searches and Seizures; and (ii) the procedures and the facts described by the SPO with regard to the recovery and transfer of the Subject Phones to the Registry.²⁴ The Defence submits that the Request should be refused because the SPO previously sought authorisation for precisely the course of action that it has taken and the Pre-Trial Judge had rejected it in the 25 September 2023 Decision.²⁵

16. In the Reply, the SPO renews its request and addresses three distinct issues raised by the Defence in the Response.²⁶

III. APPLICABLE LAW

17. Pursuant to Article 35(2) of the Law, the SPO has the authority to conduct criminal investigations within the subject matter jurisdiction of the SC. Pursuant to Article 35(2)(b) of the Law, such authority includes the collection and examination of information and evidence.

18. Pursuant to Article 35(3) of the Law, the police within the SPO has the authority and responsibility to exercise powers given to Kosovo Police under Kosovo law.

19. Pursuant to Rules 31(1) and 37(1)-(3) of the Rules, a Panel may authorise the search of the property of a person, or such other locations, premises or objects in respect of which that person has a reasonable expectation of privacy, or a person, and the seizure of items found during the search, if there is, *inter alia*, a grounded suspicion

²³ Response, paras 29, 32, 34-38.

²⁴ Response, paras 16-24, 30-33.

²⁵ Response, paras 27, 28, 37.

²⁶ Reply, para. 1.

that (i) the person concerned has committed, is committing or is about to commit a crime within the jurisdiction of the SC, and the search will result in his or her arrest or in the discovery and seizure of evidence necessary for the investigation; and/or (ii) the evidence of a crime within the SC's jurisdiction is on the property, location, premises or object to be searched; and/or (iii) the search will result in the discovery of evidence of a crime within the jurisdiction of the SC and seizure thereof accordingly, provided that the measure is necessary for the investigation, unavoidable, and proportionate to the legitimate aim of the investigation.

20. According to Rule 37(4) of the Rules, any decision authorising search and seizure shall include: (a) the time, duration and scope of its execution, including an indication of the person or property, location, premises or object in relation to which the measure is authorised, and (b) the procedure for reporting on its implementation and the seized material in accordance with Rule 31(2) of the Rules.

21. Pursuant to Rule 39(1) and (2) of the Rules, the search and seizure must be executed in the presence of the person concerned, unless he or she cannot be found or refuses to attend the search, and if the delay in execution would jeopardise the investigation or the safety or property of a witness, victim or other person at risk. The SPO must also: (a) provide the person concerned with a certified copy of the decision authorising the search and seizure; (b) inform the person of his or her rights; (c) ensure the presence of counsel, unless the person waives this right or counsel's presence cannot reasonably be awaited; and (d) ensure the presence of an independent observer to the search and seizure.

22. Pursuant to Rules 32(1) and 39(5) of the Rules, material seized as a result of any measure pursuant to Rule 34 to Rule 41 of the Rules, shall be appropriately retained, stored and protected. The Panel authorising such measure shall indicate the procedure and precautions for the storage, protection and transfer, the duration of retention of the seized material, and instructions and a timeline for the return or destruction of the material.

23. Pursuant to Article 34(12) of the Law and Rule 23(7) of the Rules, the Registrar shall be responsible for managing and administering the detention function and facilities for the SC in line with international standards and the Law.

IV. DISCUSSION

A. PRELIMINARY MATTER

24. Before addressing the merits of the Request, the Pre-Trial Judge must determine whether the SPO, at the time of the Accused's arrest, executed the Authorised Searches and Seizures, and, if not, whether the SPO may search and seize the Accused's mobile telephones in the DMU, on the basis of a new authorisation.

25. The SPO submits that it did not execute the Authorised Searches and Seizures for safety, operational and practical reasons, and its decision to do so was lawful because it is grounded on Kosovo Law and rests within its operational discretion.²⁷ It further avers that (i) under Kosovo Law, as incorporated in the legal framework of the SC, the Kosovo Police, and therefore the SPO, can carry out a security search of the person of an arrestee while executing an arrest;²⁸ (ii) [REDACTED];²⁹ (iii) the Accused and their belongings were promptly transferred to the Registry [REDACTED] in accordance with the provisions and the routine procedure for arrest and reception of detainees and their belongings into SC custody,³⁰ and (iv) [REDACTED].³¹ According to the SPO,

²⁷ Request, para. 6; SPO Further Submissions, paras 4–15.

²⁸ See SPO Further Submissions, paras 21–22, 25–26. The SPO submits that: (i) Article 10 of the Law on Police (Law No. 04/L-076) 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; (ii) Article 11 of the Law on Police provides, *inter alia*, that during the performance of police duties, a Police Officer has the power to impose reasonable control on people and property within his/her jurisdiction; (iii) Articles 76 and 106(5) of the 2022 Kosovo Criminal Procedure Code (Code No. 08/L-032) provide that the police may conduct a search when making an arrest, if there is a danger that the person is carrying a weapon or dangerous object that can be used for attack or self-injury.

²⁹ See SPO Further Submissions, paras 27–28, 34.

³⁰ Request, para. 8; SPO Further Submissions, paras 32. The SPO also recalls similar security searches and transfer procedures undertaken in the context of other SPO's arrests, SPO Further Submissions, paras 28–31.

³¹ Request, para. 8; SPO Further Submissions, paras 23–27, 32–37.

because it elected not to execute the Authorised Searches and Seizures in Kosovo, it was necessary for the SPO to file the new request seeking authorisation to search and seize the Subject Phones from the DMU.³²

26. The Registry submits that, the Detention Rules, as well as any practice directions and instructions adopted or issued thereunder, apply to a detainee *mutatis mutandis* during transfer and on whichever premise of the SC.³³ In this context, it avers that upon transfer from the SPO [REDACTED], the Registry personnel in Kosovo (i) exercised the necessary responsibilities with respect to the transfer of custody of Accused and their belongings, and (ii) retained those belongings throughout the transfer operation until they were transferred to the DMU on 6 October 2023.³⁴ Further in this respect, the Registry provides a detailed summary of the chain of custody from the transfer of each of the Accused and their belongings until the transfer to the DMU and the relevant measures applied pursuant to the Detention Rules.³⁵

27. The Defence recalls the conditions under which the Pre-Trial Judge had granted the Authorised Searches and Seizures in the 25 September 2023 Decision and argues that the Pre-Trial Judge *required* the investigative measures to be executed in Kosovo and in accordance with the conditions granted thereof.³⁶ It suggests that the SPO did not provide any reason which could amount to concrete or compelling circumstances for not executing the arrests of Mr Januzi at the EULEX Compound during his interview with the SPO on 4 October 2023.³⁷ It highlights that no counsel(s) for Mr Januzi and/or an independent observer were present during the searches at the time of the Accused's

³² SPO Further Submissions, para. 30.

³³ The Pre-Trial Judge notes the Registry submission that (i) [REDACTED]; and (ii) Pursuant to Detention Rule 2, the "Premises" of the SC is defined as: "Any of the buildings, parts of buildings, areas, installations, or facilities made available to and maintained, occupied, or used by the [SC] or the [SPO] in connection with their functions and purposes, See Registry Further Submissions, footnotes 14 and 16.

³⁴ Registry Further Submissions, paras 17-20.

³⁵ Registry Further Submissions, paras 21 – 35.

³⁶ Response, para. 6, 34.

³⁷ Response, paras 30, 35.

arrest, as well as during the subsequent transfers [REDACTED] at the DMU.³⁸ [REDACTED].³⁹ According to the Defence, as a matter of fact, the SPO has executed a search of the Mr Januzi's person and seizure of his mobile telephone on arrest on 5 October 2023 [REDACTED], but (i) it made no attempt to comply with the conditions that the Pre-Trial Judge placed upon that search and seizure and (ii) it makes no attempt to suggest that that search and seizure was in anyway compliant with the Authorised Searches and Seizures.⁴⁰

28. The SPO replies that the Defence's challenge to the SPO's exercise of discretion in choosing the time and place of the Accused's arrest and not executing the Authorised Searches and Seizures is overbroad and without substance.⁴¹ It maintains that the Defence (i) conflates the security search incident to arrest with a search and seizure executed pursuant to Rules 37 and 39 of the Rules, as the one previously requested by the SPO and authorised by the Pre-Trial Judge in the 25 September 2023 Decision;⁴² and (ii) mischaracterizes the SPO's level of control over Mr Januzi's mobile telephone [REDACTED].⁴³ The SPO repeats that (i) Mr Januzi's mobile telephone was not searched and seized pursuant to Rule 37 of the Rules and the 25 September 2023 Decision; (ii) Mr Januzi's phone was secured because it happened to be on his person during the security search at the time of his arrest, and thus (iii) the presence of counsel or an independent observer was neither required during the procedures of recovery nor the transfer to the Registry.⁴⁴

29. At the outset, the Pre-Trial Judge clarifies that he ordered the SPO to execute the Authorised Search and Seizure in Kosovo by fully complying with the SC legal framework when the SPO proceeds on the basis of Rule 37 of the Rules.⁴⁵ However, in

³⁸ Response, paras 18, 19, 23, 32.

³⁹ Response, para. 21.

⁴⁰ Response, para. 29.

⁴¹ Reply, paras 5-9.

⁴² Reply, paras 2-4, 11.

⁴³ Reply, paras 10-12.

⁴⁴ Reply, paras 2-4, 11-12.

⁴⁵ 25 September 2023 Decision, paras 40-42.

determining when, how, and whether to execute complex operational activities, such as arrests and/or search and seizures, the SPO can take into account often rapidly changing dynamics on the ground, the risks to the execution of judicially-authorised enforcement actions and to the safety of its personnel, those in its custody and the public. In this regard, the Pre-Trial Judge accepts that the SPO can act within a certain degree of operational discretion.

30. With this in mind, the Pre-Trial Judge notes the SPO's assertion that on the day of the Accused's arrests it did not conduct the searches and seizures on the basis of Rule 37 of the Rules. Moreover, the Pre-Trial Judge attaches weight to the SPO's detailed explanations as to the security, operational and practical considerations, as described in its submissions, that led the SPO to refrain from proceeding under Rule 37 of the Rules. At the same time, the Pre-Trial Judge accepts the SPO's clarifications, as rehearsed above, that its security search activities [REDACTED], including the recovery of the Subject Phones, were carried out under Kosovo law at the occasion of, and as a necessary and proper part of the procedure of the arrests. In this regard, the Pre-Trial Judge observes that search operations only involved the persons of the Accused.

31. Further to the above, the Pre-Trial Judge also notes that [REDACTED]. [REDACTED].⁴⁶

32. Additionally, the Pre-Trial Judge notes, based on the submissions of the SPO and the Registry, that, upon arrival [REDACTED], the Accused and their belongings were transferred to the Registry in accordance with the SC legal framework and the Registry routine procedure for arrest and reception of detainees and their belongings into SC custody. [REDACTED].⁴⁷

⁴⁶ KSC-BC-2023-10, Specialist Prosecutor, F00049/CONF/RED, *Confidential redacted version of 'Prosecution report pursuant to Decisions F00342 and F00348'*, 8 June 2023, confidential, paras 7, 18, with Annexes 1-4, confidential and *ex parte*; See also, A02/CONF/RED, p. 4-5; A04/CONF/RED, p. 4-6A.

⁴⁷ SPO Further Submissions, para. 23, with further reference to Detention Rules 8-9; Registry Further Submissions, paras 17-18, 21-22, 29, with further references to *Januzi Arrest Report*, para. 18 and

33. In the light of the above, the Pre-Trial Judge is persuaded that (i) under the security and operational circumstances, as described in its submissions, the SPO was not obliged to execute the Authorised Searches and Seizures; and (ii) the search activities performed [REDACTED] were not the Authorised Searches and Seizures, pursuant to Rule 37 of the Rules, but rather they were security searches incident to arrest as foreseen in Kosovo law. Hence, the procedural requirements and safeguards set forth in the Rules, such as the presence of counsel and independent observer, were not applicable at the time.

34. The Pre-Trial Judge is satisfied that the SPO's application for the search and seizure of the Subject Phones, currently in the possession of the DMU, is a new request under Rule 37 of the Rules, which will be addressed below.

B. SEARCHES AND SEIZURES

1. Requirements for Search and Seizure

35. Pursuant to Rules 31 and 37 of the Rules, the search and seizure of Mr Januzi's and Mr Bahtijari's respective mobile telephone(s) may be authorised if:

- (a) the mobile telephone(s) to be searched and seized are either Mr's Januzi's and Mr Bahtijari's properties, or there is a reasonable expectation of privacy in relation thereto;⁴⁸
- (b) there is a grounded suspicion that: (i) Mr Januzi and Mr Bahtijari have committed, are committing or are about to commit a crime within the jurisdiction of the SC and the searches will result in the discovery and seizure of evidence necessary for the investigation;⁴⁹ and/or (ii) the searches are necessary to collect and preserve evidence of a crime within

Bahtijari Arrest report, para. 19. The Pre-Trial Judge notes also that the Accused accounted for their belongings, including the Subject Phones, and that the Defence does not argue the converse in this respect.

⁴⁸ Rule 37(2) of the Rules.

⁴⁹ Rule 37(2)(a) of the Rules.

the SC's jurisdiction and there is a grounded suspicion that such evidence on the mobile telephones sought to be searched;⁵⁰

- (c) the searches and seizures are necessary for the investigation;⁵¹
- (d) the investigative measures are unavoidable, i.e. in the specific circumstances the evidence cannot be obtained by other, less intrusive but equally effective means, and the searches and seizures appear to be the only effective means for the purposes of the investigation;⁵²
- (e) the resulting interference with Mr Januzi's and Mr Bahtijari's rights to personal integrity, privacy or property is proportionate to the legitimate aim of the investigation and does not negate the essence of the guaranteed rights.⁵³

(a) Property or Reasonable Expectation of Privacy

36. As held in the 25 September 2023 Decision,⁵⁴ Mr Januzi and Mr Bahtijari have a reasonable expectation of privacy in relation to the Subject Phones found on their persons at the time of their arrests, which are now in the custody of the DMU.

37. In light of the above, the protections set out in the Law and Rules shall apply.

(b) Grounded Suspicion

38. With regard to the requirement of a grounded suspicion, the Pre-Trial Judge recalls that in the 25 September 2023 Decision he found, *inter alia*, that there is a grounded suspicion that (i) Mr Januzi and Mr Bahtijari, potentially acting in

⁵⁰ Rule 37(2)(c) of the Rules.

⁵¹ Rule 31(1)(b) of the Rules.

⁵² Rule 37(1) of the Rules. *See also* KSC-CC-PR-2017-03, F00006, Constitutional Court Chamber, *Judgment on the Referral of Revised Rules of Procedure and Evidence Adopted by Plenary on 29 May 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article 19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office*, 28 June 2017 ("Constitutional Court Chamber 28 June 2017 Judgment"), public, paras 62-67.

⁵³ Rule 31(1)(c) of the Rules.

⁵⁴ 25 September 2023 Decision, para. 22.

co-perpetration with, and/or under instruction or direction of other persons, including Haxhi Shala ("Mr Shala"), have committed, are committing, or are about to commit offences within the meaning of Article 15(2) of the Law, and (ii) the Subject Phones contain evidence relevant to the SPO investigation, pursuant to Rule 37(2)(a) and (c) of the Rules.⁵⁵

39. The Pre-Trial Judge also recalls that he has found a well-grounded suspicion that Mr Januzi and Mr Bahtijari, are responsible for offences of intimidation during criminal proceedings and of obstructing official persons in performing official duties within the meaning of Articles 387 and 401 of the 2019 Criminal Code of Kosovo (Law No. 06/L-074) and Articles 15(2) and 16(3) of the Law, together with, *inter alia*, Mr Shala, under various modes of criminal liability.⁵⁶ In addition, the Pre-Trial recalls that he found that, the fact that, immediately after leaving an SPO interview related to the alleged offences in the Confirmed Indictment, Mr. Januzi directly proceeded to a meeting with Mr Shala, is consistent with the pattern of exchanges and concerted efforts with Mr Shala and Mr Bahtijari, as found in the Confirmation Decision.⁵⁷

40. The Pre-Trial Judge observes that the facts and the legal reasoning underpinning the Request are the same as those underlying and found in the 25 September 2023 Decision and the Confirmation Decision. For the same reasons set forth in said decisions, the Pre-Trial Judge is satisfied that there continues to

⁵⁵ 25 September 2023 Decision, paras 24-26, with reference to KSC-BC-2023-10, Single Judge, F00041/CONF/RED, *Decision Authorising Search and Seizure and Related Matters*, 28 April 2023, confidential ("28 April 2023 Decision"), paras 27-29, with Annex 1, confidential; F00043, *Decision Authorising Search and Seizure and Related Matters*, 3 May 2023, strictly confidential and *ex parte* ("3 May Decision"), paras 27-29, with Annex 1, confidential.

⁵⁶ Confirmation Decision, paras 95, 111, 123, 126, 131, 135, 139, 144.

⁵⁷ KSC-BC-2023-10, Pre-Trial Judge, F00029, *Decision on Prosecution Request for Retention of Evidence or, Alternatively, Request for Approval of a Special Investigative Measure* ("Retention of Evidence Decision"), 11 October 2023, strictly confidential and *ex parte*, para. 32, with further references to the Confirmation Decision, paras 110, 116, 129. A corrected version of the decision was issued on 12 October 2023, F00029/COR. A confidential redacted version of the corrected version of the decision was issued on 21 November 2023, F00029/CONF/RED.

be a grounded suspicion involving the Accused, in accordance with Rule 37(2) of the Rules.

(c) Necessity

41. The SPO submits that the searches and seizures of the Subject Phones are necessary to collect and preserve evidence of crimes within the jurisdiction of the SC.⁵⁸

42. The Pre-Trial Judge recalls that in the 25 September 2023 Decision he found that the searches and seizures of, *inter alia*, Mr Januzi's and Mr Bahtijari's respective mobile telephones are necessary for the SPO investigation, notably to: (i) investigate into Mr Januzi's and Mr Bahtijari's potential involvement in offences under Article 15(2) of the Law; (ii) contribute to identifying further persons of interest, relevant exchanges and/or additional investigative leads concerning the specific occurrence of alleged witness interference, as well as other ongoing investigations by the SPO into obstruction of justice offences; and, in that regard, (iii) contribute to ensuring the safety of protected witnesses and the integrity of [REDACTED].⁵⁹

43. The Pre-Trial Judge is persuaded that the Subject Phones will, in addition, contribute to confirm the role of Mr Shala, an alleged co-perpetrator of the Accused.⁶⁰ Furthermore, mindful of a pattern of exchanges between Mr Januzi, Mr Bahtijari and others trying to dissuade Witness 1 from testifying in SC Proceedings, as found in the Confirmation Decision,⁶¹ the Pre-Trial Judge is satisfied that the searches and seizures of the Subject Phones will: (i) assist to determine the continuous nature of the exchanges and contacts between the Accused and Mr Shala, and possibly others, including evidence of meetings before and after the 4 October 2023 meeting between Mr Januzi and Mr Shala; as well as (ii) contribute to ensuring the safety of protected

⁵⁸ Request, paras 2, 16.

⁵⁹ 25 September 2023 Decision, para. 29, with further references to 28 April 2023 Decision, para. 29; 3 May 2023 Decision, para. 27.

⁶⁰ Request, para. 16. *See similarly*, Retention of Evidence Decision, para. 33.

⁶¹ Confirmation Decision, paras 72-88.

witnesses and the integrity of [REDACTED].⁶²Against this backdrop, the Pre-Trial Judge also considers that the searches and seizures of the Subject Phones could also lead the SPO to identifying exculpatory evidence that, if found, will have to be disclosed to the Accused pursuant to Rule 103 of the Rules, and which could be usefully presented at trial.

44. In the light of the above, the Pre-Trial Judge finds that the searches and seizures of the Subject Phones are necessary for the SPO investigation in accordance with Rule 31(1)(b) of the Rules.

(d) Unavoidability

45. The SPO submits that the searches and seizures of the Subject Phones are the only means for the purposes of furthering the investigation and securing evidence that may not be otherwise obtained.⁶³

46. The Pre-Trial Judge is persuaded that there are no other less intrusive but equally effective means to collect the sought evidence and the searches and seizures of Subject Phones appear to be the only effective means for the purpose of furthering the investigation. The Pre-Trial Judge is of the view that the only way to obtain an overview of the Accused's alleged criminal conduct and of their contacts and interactions with others, including Mr Shala, is through the searches and seizures of the Subject Phones and their analysis, including that of their content, such as messages, call logs and location data.⁶⁴

47. In the light of the foregoing, the Pre-Trial Judge is satisfied that there are no other less intrusive but equally effective means to provide the SPO with the information and evidence it needs to assess the alleged responsibility of Mr Januzi, Mr Bahtijari and Mr Shala for offences within the meaning Article 15(2) of the Law.

⁶² Similarly, 25 September 2023 Decision, para. 29; 28 April 2023 Decision, para. 29; 3 May 2023 Decision, para. 27.

⁶³ Request, paras 2, 17.

⁶⁴ Similarly, 28 April 2023 Decision, para. 31; 3 May 2023 Decision, para. 29.

(e) Proportionality

48. The SPO submits that the searches and seizures of the Subject Phones are proportionate to the legitimate aim of the investigation and do not negate the essence of the Accused' rights to privacy and property for the same reasons articulated in the 25 September 2023 Decision.⁶⁵

49. The Pre-Trial Judge recalls his considerations and findings, as set out in the 25 September 2023 Decision,⁶⁶ and takes note of the SPO's assurances to comply with the safeguards outlined in Rule 39 of the Rules.⁶⁷

50. For the same reasons set forth in the 25 September 2023 Decision, the Pre-Trial Judge finds that, insofar as the SPO abides by the conditions set forth in the Rules and the present decision, including the requirements regarding the time, duration and scope, as well as the retention of the seized material, the searches and seizures of the Subject Phones meet the proportionality test.

(f) Conclusion

51. For the reasons above, as long as the execution of the searches and seizures of the Subject Phones meets the requirements set forth in the Rules and the present decision, the Pre-Trial Judge authorises, under Rule 37 of the Rules, their search and the seizure.

2. Time, Duration, and Scope of the Searches and Seizures

52. As regards the timing of the execution of the requested searches and seizures of the Subject Phones, the SPO submits that, given the proceedings in the present case and the ongoing investigation into, *inter alia*, Mr Shala's involvement in the charged offences, the SPO anticipates executing the requested searches and seizures of the Subject Phones as soon as possible.⁶⁸ The SPO also submits that it will comply with the

⁶⁵ Request, paras 2, 18, with further references to 25 September 2023 Decision, paras 34-37.

⁶⁶ 25 September 2023 Decision, paras 35-37.

⁶⁷ Request, para. 23.

⁶⁸ Request, para. 25.

safeguards outlined in Rule 39 of the Rules in a manner consistent with the Pre-Trial Judge's findings regarding its purpose and the scope of feasible application, including, in particular, in the context of expert examinations.⁶⁹

53. As regards the duration and the place of the searches and seizures of the Subject Phones, the Pre-Trial Judge is mindful, on the one hand, that the search and seizure will have to be executed at first in the Detention Facilities and that this will necessarily involve arrangements in coordination with the Registry/DMU, including for the presence of an independent observer, the Accused and their respective counsel(s) at the time of the execution.⁷⁰ The search of the content of the Subject Phones may also take place elsewhere, with the assistance of technical experts. On the other hand, the Pre-Trial Judge is cognizant of the reasonable expectation of privacy of Mr Januzi and Mr Bahtijari, and the resultant need for judicial oversight over the execution of the searches and seizures of the Subject Phones. Therefore, the Single Judge finds that a one (1)-month timeframe, ending on **29 February 2024**, is appropriate for the execution of the searches and seizures of the Subject Phones.

54. As regards the scope of the searches and seizures of the Subject Phones, the Pre-Trial Judge authorises the SPO to extend its searches and seizures to evidence, as defined in the 25 September 2023 Decision.⁷¹

55. Lastly, the Pre-Trial Judge recalls that the searches and seizures of the Subject Phones must take place in the presence of Mr Januzi and Mr Bahtijari and their counsel(s), unless they waive their right(s) or their counsel's presence cannot be reasonably awaited, as well as in the presence of an independent observer.

3. Reporting on the Search and Seizure

56. Taking into consideration the time needed to prepare a report following the execution of the searches and seizures of the Subject Phones, the SPO is ordered to

⁶⁹ Request, para. 23.

⁷⁰ See 25 September 2023 Decision, paras 40-41.

⁷¹ See 25 September 2023 Decision, para. 44

submit a report within fourteen (14) days of the completion of said searches and seizures or within fourteen (14) days of the elapse of the one (1)-month timeframe provided for the execution, whichever is earlier. The report shall indicate the date, time and circumstances of the searches and seizures, the duration and scope of the searches, and the fulfilment of the requirements under Rule 39 of the Rules.

4. Retention, Storage, and Protection of Seized Material

57. The SPO requests that retention of any evidence seized be authorised for (i) the time necessary to review the evidence, and (ii) if the evidence is deemed relevant, for such further period as necessary for investigations and proceedings.⁷²

58. The Pre-Trial Judge considers it necessary for the SPO to store, protect, and transfer the seized evidence, in accordance with the standard chain of custody procedures. In so doing, the SPO must take appropriate measures to protect the seized items against loss, accidental or unauthorised access, alteration, dissemination or destruction. With respect to the Subject Phones, the Pre-Trial Judge notes that the data extracted from such device(s) also fall within the purview of Rules 32 and 39(5) of the Rules. Thus, it must be equally ensured that the extracted data is appropriately stored, protected and transferred. The SPO shall inform the Pre-Trial Judge on the appropriate procedure and precautions for the storage and protection of the Subject Phones, and extracted data in a report.

59. The Pre-Trial Judge finds that a three (3)-month timeframe from the execution of the searches and seizures of the Subject Phones is sufficient for the extraction and review of the seized material. At the end of this period, the Subject Phones shall be returned to Mr Januzi and Mr Bahtijari, unless their further retention is necessary for the ongoing investigation or future proceedings.

60. Furthermore, if the SPO decides that the data extracted from the Subject Phones is necessary for the ongoing investigation or future proceedings, it may retain it in

⁷² Request, para. 21.

accordance with Rule 33(1)(b) of the Rules until such time that it is no longer relevant for the purpose for which it was obtained. At that point, the seized data will have to be returned or destroyed pursuant to Rule 33(2)-(3) of the Rules. Conversely, if the extracted data falls outside the scope of the investigation for which it was obtained, it will have to be returned or destroyed immediately in accordance with Rule 33(1)(a)(i) and (2)-(3) of the Rules, unless it is relevant for the investigation of another crime within the SC's jurisdiction.

C. EXECUTION AND SERVICE OF THE ANNEXED ORDER

61. The SPO requests to be designated as the competent authority for the service and execution of the orders regarding the searches and seizures of the Subject Phones pursuant to Rule 49(1) of the Rules.⁷³

62. The Pre-Trial Judge notes that the SPO may be considered a "competent authority" under Rule 49(1) of the Rules to serve and execute orders of the SC within the SC.⁷⁴ Accordingly, the Single Judge authorises the SPO to serve and execute the order annexed to the present decision.

63. For her part, the Registrar is ordered, in her capacity as an administrator of the Detention Facilities pursuant to Article 34(1) of the Law, to make any necessary arrangement for the SPO to access and to search the personal property of the Accused for the limited purpose of searching and seizing the Subject Phones, which are in the possession of the DMU.

D. DISCLOSURE OF THE ANNEXED ORDERS

64. The SPO is authorised to disclose, as appropriate and necessary, including to Mr Januzi and Mr Bahtijari, the annexed orders for the purposes of their execution.⁷⁵

⁷³ Request, para. 24, 28(c).

⁷⁴ Notifying the present decision and annexed order to the Specialist Prosecutor, the transmission is deemed fulfilled, in accordance with Rule 49(1) of the Rules.

⁷⁵ Request, para. 28(c).

V. DISPOSITION

65. For the above-mentioned reasons, the Pre-Trial Judge hereby:

- (a) **GRANTS** the searches and seizures of the Subject Phones and issues the annexed orders;
- (b) **AUTHORISES** the searches and the seizures of the Subject Phones and extracted data:
 - i. the searches and seizures are to be executed until **29 February 2024** at the latest;
 - ii. the scope of the searches and seizures concerns evidence pertaining the alleged responsibility of Mr Januzi's and Mr Bahtijari's for offences under Article 15(2) of the Law, and the role of Mr Shala therein, as detailed in the present decision;
 - iii. to permit Mr Januzi, Mr Bahtijari, and their counsel(s), unless they waive their right(s) or their counsel's presence cannot be reasonably awaited, and an independent observer to be present during the execution of the authorised searches and seizures of the Subject Phones; and
 - iv. that the SPO representative(s) present record the time, duration, scope, and all other relevant details of the execution of this decision, as well as to prepare an inventory with a detailed description of and information regarding each mobile telephone seized;

- (c) **ORDERS** the Registrar to make any necessary arrangement for the SPO to access and to search the personal property of the Accused from the DMU for the limited purpose of searching and seizing the Subject Phones;
- (d) **AUTHORISES** the SPO to serve and execute the attached orders in accordance with Rule 39 of the Rules;
- (e) **ORDERS** the SPO to report on the execution of the searches and seizures within fourteen (14) days of the completion of the searches, or within fourteen (14) days, at the latest, of the elapse of the one (1)-month timeframe provided for their execution, whichever is earlier;
- (f) **ORDERS** the SPO to store, protect, and retain any seized item of evidence in accordance with the Rules and the present decision; and
- (g) **AUTHORISES** the SPO to disclose, as appropriate and necessary, including to Mr Januzi and Mr Bahtijari, the annexed orders for the purpose of their execution.

[signed]

Judge Nicolas Guillou
Pre-Trial Judge

Dated this Monday, 29 January 2024

At The Hague, the Netherlands.