



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 December 2023

Language: English

Classification: Public

Public redacted version of 'Prosecution consolidated response to Defence
Submissions regarding F00013'

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ('SPO') hereby responds to the Defence Submissions,¹ relating to the Decision.² The Defence: (1) lacks standing to challenge the Decision and also advocates for an incorrect standard of review; (2) makes factually and legally incorrect submissions in relation to Rule 36 of the Rules;³ and (3) makes baseless and irrelevant arguments in relation to the valid legal, security, and practical reasons necessitating [REDACTED] Sabit Januzi's arrest. The Defence Submissions should be rejected accordingly.

II. SUBMISSIONS

A. THE DEFENCE LACKS STANDING AND INVOKES AN INAPPLICABLE STANDARD OF REVIEW

2. The Defence asserts without any legal authority or reference to any procedural vehicle that the Pre-Trial Judge 'can and should' consider the Defence Submissions *de novo*.⁴ The only procedural vehicle identified by the Defence is reconsideration pursuant to Rule 79(1),⁵ which is not applicable to *ex parte* proceedings. Pursuant to Rule 79(1), a Panel may reconsider its decision only 'upon request by a Party' or '*proprio motu* after hearing the Parties,' which, in either case, requires action from a 'Party' to the decision.⁶

¹ Submissions re F00013 Prosecution Request for Retention of Evidence on behalf of Sabit Januzi, KSC-BC-2023-10/F00106, 16 November 2023, Confidential ('First Defence Submission'); Addendum to Submissions re F00013 Prosecution Request for Retention of Evidence on behalf of Sabit Januzi, KSC-BC-2023-10/F00115, 28 November 2023, Confidential ('Second Defence Submission') (collectively 'Defence Submissions').

² Confidential Redacted Version of Corrected Version of Decision on Prosecution request for retention of evidence or, alternatively, request for approval of a special investigative measure, KSC-BC-2023-10/F00029/CONF/RED, 11 October 2023, Confidential ('Decision').

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ Second Defence Submission, KSC-BC-2023-10/F00115, para.22.

⁵ Second Defence Submission, KSC-BC-2023-10/F00115, para.23.

⁶ Rule 2(1) defines a Party as the 'Specialist Prosecutor or the Defence'.

As the Request⁷ and the Decision were made and rendered *ex parte*, the Defence was not a Party to the legal proceedings and therefore lacks standing to request reconsideration.

3. Other tribunals that have dealt with similar variants of this issue have come to the same conclusion. Pre-Trial Chamber II of the ICC has held that that '[t]he fact that the Defence became a party to those proceedings at a later stage, and was given access to prior decisions when the grounds for the[ir] original classification as *ex parte* no longer existed, does not retroactively confer the right to challenge them' and further that '[t]o conclude otherwise would turn the Court's criminal process into a highly unstable set of procedural steps which, instead of moving forward in a sequential manner, may be revisited or "turned back" at any point in time by the simple inclusion of a new participant.'⁸ In addition, in the context of considering whether prior *ex parte* submissions should be subject to reconsideration or *de novo* review, the Trial Chamber of the ICTY held that a challenge could not even be made until the issue was actually ripe for consideration.⁹

4. The same principles squarely apply here. There is no legal basis for the re-opening of *ex parte* investigative decisions in the manner sought, and doing so would be contrary to the procedural framework and highly prejudicial to the fair and efficient conduct of proceedings. The Defence must wait until the issue of the admissibility of the Video Recording¹⁰ is properly before the Panel.¹¹ Indeed, the Defence is not left without a

⁷ Confidential redacted version of 'Prosecution request for retention of evidence or, alternatively, request for approval of a special investigative measures,' KSC-BC-2023-10/F00013/CONF/RED, 5 October 2023, Confidential ('Request').

⁸ See ICC, *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Joint decision on applications for leave to appeal decisions issued in the situation following their reclassification, submitted by the Defence for Mr Mangenda, the Defence for Mr Kilolo and the Defence for Mr Bemba, 14 February 2014, pp.7-8.

⁹ ICTY, *Prosecutor v. Karadžić*, Case Nos. IT-95-5/18-T, Decision on The Accused's Application for Certification to Appeal Decision on Reconsideration of Protective Measures (KDZ531), 16 August 2011 ('Karadžić Decision'), para.13.

¹⁰ As defined in the Request, KSC-BC-2023-10/F00013/CONF/RED, para.3.

¹¹ See *Karadžić Decision*, Case Nos. IT-95-5/18-T, para.13.

potential remedy in this regard. Rule 138(2) allows for Defence to challenge the admissibility of evidence obtained by means of a violation of the Law or the Rules or standards of international human rights, and trial proceedings would provide the proper venue for such a challenge if the SPO seeks to admit the Video Recording. The Defence Submissions should be rejected on this basis alone.

5. However, even if the Pre-Trial Judge were to reconsider the Decision at this stage, the applicable standard of review would be clear error or the necessity to avoid injustice, pursuant to Rule 79(1). For the reasons outlined below, the Defence could not meet either standard. Certainly, the *de novo* standard is inapplicable as the Defence requests that the Pre-Trial Judge reconsider his 'own'¹² Decision.

B. THE VIDEO RECORDING WAS TIMELY AUTHORISED PURSUANT TO RULE 36

6. The Pre-Trial Judge properly authorised the Video Recording in the Decision. The Decision was timely rendered and the Defence does not make any arguments that would mandate the exclusion of the Video Recording as evidence based on timeliness.

7. The Defence incorrectly asserts that the Pre-Trial Judge failed to render a timely decision.¹³ Pursuant to Rule 9(2), time limits run from the first working day after the notification of the relevant filing. Rule 36(3) provides that the Panel seized with a request to approve SIMs may approve the request within three (3) days of the request. The Request was notified on Friday, 6 October 2023. The next working day after the notification of the Request was Monday, 9 October 2023. Thus, the issuance of the Decision on 11 October 2023 was clearly timely.

¹² Rule 79(1).

¹³ Second Defence Submission, KSC-BC-2023-10/F00115, paras 5-8.

C. THE SPECIALIST PROSECUTOR PROPERLY ORDERED THE VIDEO RECORDING PURSUANT TO
RULE 36(1)

8. The Defence asserts that only the Specialist Prosecutor or other Prosecutors in the SPO may order and/or undertake a SIM and seems to suggest that the order must be reduced to writing or otherwise formalised.¹⁴ Rule 36 allows the ‘Specialist Prosecutor’ to order special investigative measures, and Rule 2(1) defines the ‘Specialist Prosecutor’ as ‘[t]he Prosecutor appointed pursuant to Article 35(6) or (7) of the Law, or any of his or her staff members authorized by him or her to represent him or her in the exercise of his or her functions.’ In this case, the relevant SIM was ordered by a Prosecutor with the requisite authority under the Rules. Nowhere does Rule 36 mandate that the order must be reduced to writing or further formalised in order to take effect pending judicial approval. Indeed, any such requirement would be inconsistent with the spirit of Rule 36, which is specifically designed to address situations of urgency, where, *inter alia*, ‘immediate’ implementation is required.¹⁵

D. THE SPO ACTED PROPERLY IN EXECUTING THE ARREST OF THE ACCUSED

9. The Defence asserts¹⁶ that the Video Recording was not made for the limited purpose of [REDACTED], but rather to collect evidence, and was thus in breach of the authorisation granted in Decision F00006.¹⁷

¹⁴ First Defence Submission, KSC-BC-2023-10/F00106, para.28; Second Defence Submission, KSC-BC-2023-10/F00115, paras 9-16.

¹⁵ Rule 36(1).

¹⁶ Second Defence Submission, KSC-BC-2023-10/F00115, paras 17-20.

¹⁷ Confidential Redacted Version of Decision Authorising Searches and Seizures and Special Investigative Measures, KSC-BC-2023-10/F00006/CONF/RED, 25 September 2023, Confidential (‘Decision F00006’).

10. The SPO was authorised to [REDACTED].¹⁸ That authorisation extended to the time of the arrest. The Video Recording was made [REDACTED].¹⁹

11. The Defence suggests that the SPO had no legitimate reason to not arrest Januzi at the [REDACTED].²⁰ It is inappropriate, in light of all of the information provided by the SPO [REDACTED], for the Defence to suggest otherwise and further accuse the SPO of manipulating the court.²¹ The Video Recording was made [REDACTED] was entirely proper, as determined by the Pre-Trial Judge.



III. CLASSIFICATION

12. This filing is submitted confidentially pursuant to Rule 82(4). A public redacted version will be filed.

IV. CONCLUSION

13. For the foregoing reasons and the reasons set forth in the Request, the Defence Submissions should be rejected.

Word count: 1,514

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¹⁸ Decision F00006, KSC-BC-2023-10/F00006/CONF/RED, paras 62, 80(i).

¹⁹ See Request, KSC-BC-2023-10/F00013/CONF, paras 2-4.

²⁰ See Prosecution reply to Corrected Version of 'Submissions re F00032 Prosecution Request for an Order on behalf of Sabit JANUZI', KSC-BC-2023-10/F00112, 21 November 2023, Confidential, paras 7-8.

²¹ Second Defence Submission, KSC-BC-2023-10/F00115, para.20.

Friday, 8 December 2023

At The Hague, the Netherlands