

**In:** KSC-BC-2023-10

**The Prosecutor v. Sabit Januzi and Ismet Bahtijari**

**Before:** Pre-Trial Judge

Judge Nicolas Guillou

**Registrar:** Fidelma Donlon

**Filing Participant:** Specialist Counsel for Sabit Januzi

**Date:** 15 December 2023

**Language:** English

**Classification:** Confidential

---

**Reply to Prosecution Consolidated Response to Defence Submissions regarding  
F00013**

---

**Specialist Prosecutor**

Kimberly P. West

**Counsel for Sabit Januzi**

Jonathan Elystan Rees KC  
Huw Bowden

**Counsel for Ismet Bahtijari**

Hendrik Sytema

## I. INTRODUCTION

1. On 8 December 2023, the Accused received notification of the SPO Response<sup>1</sup> to Defence Submissions<sup>2</sup>, relating to the Decision<sup>3</sup> and the Request<sup>4</sup>.
2. Pursuant to Rule 76 of the Rules, the Accused replies as follows.

## II. SUBMISSIONS

### A. STANDING AND STANDARD OF REVIEW

3. The Accused has standing.
4. Since the confirmation of the Indictment on 2 October 2023<sup>5</sup>, Mr Januzi has had the status of an Accused<sup>6</sup> and has been a 'party' to proceedings since at least that date.
5. Rule 79(1) provides that a request for reconsideration is available to 'a Party'.

---

<sup>1</sup> KSC-BC-2023-10/F00120, *Prosecution Consolidated Response to Defence Submissions regarding F00013*, Prosecution, 8 December 2023, Confidential

<sup>2</sup> KSC-BC-2023-10/F00106, *Submissions re F00013 Prosecution Request for Retention of Evidence on Behalf of Sabit Januzi*, Januzi, 16 November 2023, Confidential ('First Defence Submission'); KSC-BC-2023-10/F00115, *Addendum to Submissions re F00013 Prosecution Request for Retention of Evidence on Behalf of Sabit Januzi*, Januzi, 28 November 2023, Confidential ('Second Defence Submission') (collectively 'Defence Submissions')

<sup>3</sup> KSC-BC-2023-10/F00029/CONF/RED, *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*, Pre-Trial Judge, 11 October 2023, Confidential

<sup>4</sup> KSC-BC-2023-10/F00013/CONF/RED, *Confidential Redacted Version of 'Prosecution Request for Retention of Evidence or, alternatively, Request for Approval of a Special Investigative Measure*, Prosecution, 5 October 2023, Confidential

<sup>5</sup> KSC-BC-2023-10/F0008/RED/COR, *Corrected Version of Public Redacted Version of the Decision on the Confirmation of the Indictment*, Pre-Trial Judge, 2 October 2023, Public

<sup>6</sup> Rule 86(6)(a) of the Rules

6. A 'Party' is defined in Rule 2(1) as 'the Specialist Prosecutor or the Defence'.
7. The 'Defence' is defined in Rule 2(1) as 'the suspect/Accused and/or Specialist Counsel'.
8. Rule 2(1) of the Rules defines 'Defence' as 'the suspect/Accused and/or Specialist Counsel'.
9. There is nothing in Rule 79(1) which renders reconsideration inapplicable to *ex parte* proceedings. 'Ex parte' simply means that the application was made by one party to the proceeding (Prosecution) in the absence of the other party to the proceeding (Defence)<sup>7</sup>. 'Ex parte' does not mean that there was only a single party to the proceeding.
10. The *Bemba et al* decision<sup>8</sup> is irrelevant.
11. In contrast to the present case (where the Accused had the status of an Accused at the time that the Request was made and had made his Initial Appearance under Rule 92 before the Decision was issued), the impugned decisions in the *Bemba et al* decision 'were all issued... at a time when the identification of possible suspects and the opening of the present case were yet to come'<sup>9</sup>.
12. Likewise, the *Karadžić* decision<sup>10</sup> is irrelevant. The Trial Chamber therein simply

---

<sup>7</sup> Osborn's Concise Law Dictionary 12<sup>th</sup> Ed; Jowitt's Dictionary of English Law 5<sup>th</sup> Ed

<sup>8</sup> 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*, Pre-Trial Chamber II, 14 February 2014

<sup>9</sup> 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*, Pre-Trial Chamber II, 14 February 2014 at page 6/10

<sup>10</sup> IT-95-5/18-T, *Decision on the The Accused's Application for Certification to Appeal Decision on*

refused to grant certification to appeal a decision on reconsideration on the basis that, in the circumstances of that case, the accused had (i) failed to show that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (ii) explained how the proceedings may be materially advanced by an immediate resolution by the Appeals Chamber of the questions whether decisions taken on the basis of *ex parte* submissions should be subject to the test for reconsideration or should guarantee *de novo* consideration by the Chamber.

13. The *Karadžić* decision says (i) nothing about whether decisions taken on the basis of *ex parte* submissions should be subject to the test for reconsideration or should guarantee *de novo* consideration, nor (ii) when decisions taken on the basis of *ex parte* submissions should be subject to reconsideration/*de novo* consideration at first instance.
14. Moreover, there is no suggestion in the *Karadžić* decision that the accused was excluded from seeking reconsideration/*de novo* consideration of a decision taken on the basis of *ex parte* submissions whether at first instance, or on appeal, simply because he had been previously excluded from participating therein.
15. Further, there is no justification, in the present case, for the Accused to have been excluded from participating in the decision relating to the Request. The Request was made on 5 October 2023, retrospectively seeking approval of an investigative measure already undertaken and retention of material already obtained. The Accused was in custody by 6 October 2023 and then transferred to the Hague on the same day. As notice of the Request could not affect the nature and content of the material already obtained by the Prosecution, there was no justification for depriving the Accused of the opportunity to make representations about the

Request prior to any decision.

16. Accordingly, the Accused maintains that the Decision should be considered *de novo*, as it was reached without hearing submissions on behalf of the Accused, or alternatively reconsidered under Rule 79(1).

**B. TIMING OF AUTHORISATION PURSUANT TO RULE 36**

17. The Response asserts, without providing any evidence of the same, that ‘the Request was notified on Friday, 6 October 2023’.
18. The filing itself is stamped by the CMU as ‘05/10/2023 17:12:00’ consistent with it having been urgently submitted, processed and distributed on the same working day<sup>11</sup>.
19. Accordingly, the Decision fell outside the three-day period provided for by Rule 36(1) within which approval can be given.
20. Rule 36(1) itself provides that where approval is not so rendered then the collected material may not be used for investigation or prosecution.

**C. WHETHER THE SPECIALIST PROSECUTOR ORDERED THE [REDACTED]**

21. The Prosecution asserts, without providing any evidence of the same, that ‘the relevant SIM was ordered by a Prosecutor with the requisite authority under the Rules’.

---

<sup>11</sup> See KSC-BD-15, Articles 16 and 17  
KSC-BC-2023-10

22. [REDACTED]  
[REDACTED]

23. In the Request itself, the Prosecution simply stated that, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>12</sup>.

24. Moreover, the Pre-Trial Judge in the Decision itself does not identify any order by a Prosecutor with the requisite authority under the Rules which he was asked to approve.

25. The Prosecution only assert that 'the relevant SIM was ordered by a Prosecutor with the requisite authority under the Rules' only after the absence of such an order was raised in the Defence Submissions.

26. The Prosecution does not (or cannot) identify when the alleged order was given.

27. The Prosecution does not (or cannot) set out the terms of any such alleged order.

28. The Prosecution does not (or cannot) identify the Prosecutor who is said to have given the alleged order.

29. The Prosecution does not (or cannot) provide any record of any such order (whether created at the time of the alleged order, or in the minutes, hours, days or weeks even after the alleged order was given).

30. The Accused maintains that the attempts by the SPO to retrospectively seek

---

<sup>12</sup> The Request at paragraphs 2 and 3  
KSC-BC-2023-10

judicial approval for the disregard of the terms of the 25 September 2023 order by their investigator(s), including their belated and baseless assertion in the Response that 'the relevant SIM was ordered by a Prosecutor with the requisite authority under the Rules', should be refused outright as a clear attempt by the SPO to manipulate the court.

D. THE DEFENCE SUBMISSION THAT THE [REDACTED] WAS NOT MADE FOR THE LIMITED PURPOSE OF PLANNING AND CARRYING OUT THE ARREST WARRANT

31. Although the Defence did not know it at the time, the Defence submission that the [REDACTED] was not made for the limited purpose of planning and carrying out the arrest warrant was on all fours with the earlier finding of the Pre-Trial Judge in the Decision that:

- (i) The [REDACTED] was not made when the SPO was attempting to locate the Accused;
- (ii) That the [REDACTED] was primarily intended to serve the collection of evidence for the SPO's ongoing investigation in the charges confirmed on Mr Januzi; and that accordingly,
- (iii) The [REDACTED] fell outside the scope of the special investigative measures authorised on 25 September 2023<sup>13</sup>.

32. Contrary to paragraph 11 of the Response, the SPO has never 'enumerated in detail the specific legal, security and practical reasons necessitating the simultaneous arrests of Januzi and his co-Accused on 5 October'. In relation to

---

<sup>13</sup> The Decision at paragraphs 19 and 20  
KSC-BC-2023-10

the references at footnote 21 to the Response, paragraph 15 of F00095/COR/CONF refers to the SPOs displeasure that, once the Accused had been arrested and transferred to the custody of the Registrar, they would require judicial approval to 'access the detainees for investigative purposes'. No other details are provided.

33. Their vague and unsupported claims as to the need to conduct simultaneous arrests of the Accused and his co-perpetrators and security concerns such as granting access to external persons including attorneys to the EULEX compound and potential gathering of people at the gates of the EULEX compound ignores:

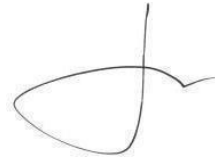
- (i) the fact that the Accused was *not* simultaneously arrested with his co-perpetrators - Mr SHALA not being arrested until 11 December 2023; and
- (ii) the fact that the Accused was present within the EULEX compound on 5 October 2023, with access having been granted to external persons i.e. his attorney, and with no gathering of people at the gates of the EULEX compound – before he was released.

34. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

35. The Accused maintains that the attempts by the SPO to retrospectively seek judicial approval for the disregard of the terms of the 25 September 2023 order by their investigator(s) should be refused outright as a clear attempt by the SPO to manipulate the court.

Word count: 1767 words





JONATHAN ELYSTAN REES KC

Specialist Counsel for Mr Januzi

HUW BOWDEN

Specialist Co-Counsel for Mr Januzi

15 December 2023

Cardiff, UK