

In: KSC-BC-2020-06
The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi
and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Defence Counsel for Jakup Krasniqi

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Krasniqi Defence Reply

**to Prosecution Response to Preliminary Motions Concerning Council of Europe
Report, Investigation Deadline, and Temporal Mandate**

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I. INTRODUCTION

1. The Specialist Prosecutor's Office ("SPO") fails to establish that the charges in the Indictment *relate to* the Council of Europe Report ("CoE Report").¹ Interpreting Article 6(1) of the Law² harmoniously with Articles 103(7) and 162 of the Constitution,³ the jurisdiction of the Kosovo Specialist Chambers ("KSC") is limited by the parameters of the CoE Report. The majority of the charges in the Indictment⁴ concern a different geographic location and temporal period to the CoE Report and the KSC therefore does not have jurisdiction over them.

II. PROCEDURAL HISTORY

2. On 15 March 2021, the Defence filed their Preliminary Motion on Jurisdiction.⁵

3. On 23 April 2021, pursuant to an extension ordered by the Pre-Trial Judge,⁶ the SPO filed their Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate.⁷

III. SUBMISSIONS

A. THE MEANING OF "RELATE TO" IN ARTICLE 6(1) OF THE LAW

¹ Council of Europe, Parliamentary Assembly, 'Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo', Doc. 12462, 7 January 2011.

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law").

³ Constitution of the Republic of Kosovo ("Constitution").

⁴ The exception is the crimes alleged at Kukës and Cahan, which do relate to the CoE Report.

⁵ KSC-BC-2020-06, F00220, Krasniqi Defence, *Krasniqi Defence Preliminary Motion on Jurisdiction* ("Defence Preliminary Motion on Jurisdiction"), 15 March 2021, public, with Annex 1, public.

⁶ KSC-BC-2020-06, Revised Transcript of Hearing, 24 March 2021, public, p. 391, lines 15-16.

⁷ KSC-BC-2020-06, F00259, Specialist Prosecutor, *Prosecution Response to Preliminary Motions Concerning Council of Europe Report, Investigation Deadline, and Temporal Mandate* ("SPO Response"), 23 April 2021, public.

4. Although the SPO recognises that the jurisdiction of the KSC only extends to crimes that “relate to the CoE Report”,⁸ the Response prefers not to offer the SPO’s interpretation of what “relate to the CoE Report” means in defining the subject matter jurisdiction of the KSC.⁹ In the place of a positive explanation, the SPO instead submits (without explanation or support) that “a perfect overlap with the incidents in the CoE Report is not required”.¹⁰ That begs the question if a perfect overlap is not required, what does Article 6(1) require in terms of a nexus to the CoE Report in order to confer jurisdiction upon the KSC? The SPO’s position appears to be that any link to the CoE Report, however tenuous, is sufficient to give jurisdiction to the KSC. The Defence disagree.

5. Article 6(1) of the Law could simply have provided that “the Specialist Chambers shall have jurisdiction over crimes set out in Articles 12 – 16”. The deliberate decision to include the further clause “which relate to the CoE Report” must carry some meaning. The only reason to include that clause is to narrow the jurisdiction of the KSC so that it only has jurisdiction over those crimes relating to the CoE Report.

6. This strict limitation on jurisdiction is consistent with the harmonious interpretation of the Law and the Constitution. The Defence agree in general that an interpretation of the Law and the Constitution which “validates outweighs one that invalidates”.¹¹ But the SPO only considers the validity of Article 6(1) of the Law in the light of Article 162 of the Constitution.¹² In so doing, the SPO fails to address the Defence submission which was founded on Article 103(7) of the Constitution.¹³ Article 103(7) is important because it provides that a Specialised Court – like the KSC

⁸ Article 6(1) of the Law.

⁹ SPO Response, para. 13.

¹⁰ *Ibid.*

¹¹ *Ibid.*, fn. 18.

¹² *Ibid.*, paras 7, 8, 10.

¹³ Defence Preliminary Motion on Jurisdiction, paras 63, 65(a). *See also* paras 66, 67.

– may only be established “when necessary”. The only necessity to create the KSC came from the international obligation to investigate the allegations in the CoE Report.¹⁴ Accordingly, interpreting Article 6(1) of the Law harmoniously¹⁵ with Article 103(7), and preferring an interpretation of Article 6(1) in which the KSC would not be unconstitutional, the words “relate to the CoE Report” mean that the KSC has jurisdiction over those crimes alleged in the CoE Report which Kosovo had an international obligation to investigate. The corollary of this is that the KSC does not have jurisdiction over alleged crimes tangentially related to the CoE Report because there was no necessity to establish a Specialised Court in relation to those crimes.¹⁶

B. MOST OF THE CHARGES IN THE INDICTMENT DO NOT RELATE TO THE COE REPORT

7. Aside from the allegations about Cahan and Kukës, the remainder of the charges in the Indictment are outside the geographic and temporal scope of the CoE Report. The SPO Response fails to demonstrate that they relate to the CoE Report.

8. The SPO fails to demonstrate that the charges in the Indictment *relate to* the geographic scope of the CoE Report.¹⁷ The SPO concedes, rightly, that the CoE Report “certainly focuses on crimes committed in Albania”.¹⁸ That is fatal to the SPO’s position because (aside from Kukës and Cahan) all the detention centres pleaded in

¹⁴ Kosovo, Constitutional Court, *Assessment of an Amendment to the Constitution of the Republic of Kosovo proposed by the Government of the Republic of Kosovo and referred by the President of the Assembly of the Republic of Kosovo on 9 March 2015 by Letter No. 05-433/DO-318* (“Kosovo Constitutional Court Judgment”), KO 26/15, Judgment, 15 April 2015, para. 51.

¹⁵ See SPO Response, fn. 18.

¹⁶ The absence of necessity in relation to these matters is reflected in the Draft Resolution of the CoE Report itself, which emphasises co-operation with the existing ICTY and EULEX institutions: CoE Report, Draft Resolution, para. 19.

¹⁷ *Contra* SPO Response, para. 19.

¹⁸ SPO Response, para. 19.

the Indictment are in Kosovo. Unlike the CoE Report, this is not an Indictment which focuses on crimes committed in Albania.

9. The SPO cites four paragraphs of the CoE Report to support its submission that the CoE Report also “references crimes in various parts of Kosovo”.¹⁹ That the SPO could only find 4 paragraphs referring to crimes in Kosovo out of a report totalling 176 paragraphs in itself highlights that the CoE Report does not relate to crimes committed in Kosovo. Nor does the content of those paragraphs assist the SPO:

- a) paragraph 4 offers an overview of the “confusion throughout the region” without defining where crimes occurred;
- b) paragraph 23 is the first paragraph in a section entitled “introductory commentary on sources” and simply lists sources of information not details about crimes;
- c) paragraph 72 refers to crimes “in various parts of Kosovo and, of particular interest to our work, in the context of KLA-led operations on the territory of Albania”; and
- d) paragraph 175 relates to the “task” the CoE was instructed to perform and not the findings of the Report.

10. Not one of those four paragraphs clearly identifies or describes particular crimes committed in Kosovo. Instead, even these paragraphs relied on by the SPO say expressly that the particular interest of the CoE Report is in KLA operations on the territory of Albania.

¹⁹ SPO Response, para. 19 and fn. 46.

11. That is confirmed by the remainder of the CoE Report. The content of the Report should be analysed as a whole, considering the substance of the report not merely its title.²⁰ The substance is clearly directed to detention centres crimes in Albania. Multiple references to crimes committed in Albania contrast with the insubstantial nature of the four passing references cited by the SPO to crimes committed in Kosovo.²¹ No detention centre in Kosovo is named in the Report (compared to six in Albania).²² No detail is given in the CoE Report of any detention centre crime committed in Kosovo. It is not clear from the CoE Report that the Rapporteur visited mass grave sites in Kosovo;²³ the footnote relied on by the SPO²⁴ purely describes an example of difficulties recounted by local construction companies during excavations, it does not say the Rapporteur actually visited the excavations. Read as a whole and in context, the CoE Report does not relate to crimes committed in Kosovo.

12. The SPO also fails to establish that the temporal scope of the charges relates to the CoE Report. The only fair reading of the CoE Report is that it relates to crimes which occurred after April 1999. The SPO is correct that paragraph 4 of the CoE Report refers to crimes that occurred “for the most part from the Summer of 1999 onwards”²⁵ but in context that is a reference to crimes beginning in April 1999 not as far back as March 1998. The SPO entirely overlooks the Defence submission²⁶ that the CoE Report clearly addressed three categories of cases: the “first subset of captives” were “[i]n the period between April and June 1999”;²⁷ the “[s]econd subset of captives” were “in the weeks and months directly after 12 June 1999”;²⁸ and the “[t]hird subset of captives”

²⁰ *Contra* SPO Response, para. 19.

²¹ CoE Report, paras 36, 74, 80, 89, 93, 96, 98, 102, 105, 109, 115 – 130, 141 – 167.

²² *Ibid.*, para. 93.

²³ *Contra* SPO Response, para. 19.

²⁴ CoE Report, para. 14, fn. 11.

²⁵ SPO Response, para. 20.

²⁶ Defence Preliminary Motion on Jurisdiction, para. 58.

²⁷ CoE Report, 3.3.1., para. 102.

²⁸ *Ibid.*, 3.3.2.1., para. 137.

were also in the “post-conflict period”.²⁹ Those are the only categories of cases analysed in the CoE Report and they all relate to crimes committed after April 1999. The CoE Report states that the crimes occurred “for the most part from the Summer of 1999 onwards” because the first subset of crimes that it considered began in April 1999 (and the other two subsets of crimes occurred from the Summer of 1999 onwards).

13. Paragraph 56 of the CoE Report does not establish that the CoE Report addressed crimes committed in 1998. It is part of a background section addressing organised crime in Kosovo. The specific reference to 1998 is to general “illicit criminal enterprises in which Kosovar Albanians were involved in the Republic of Albania”;³⁰ it is not a reference to the specific crimes discussed in the CoE Report (or to the crimes charged in the Indictment). Importantly, no detention centre crime is specifically identified in the CoE Report prior to April 1999.

14. The majority of the charges in the Indictment, which begin in March 1998³¹ and which relate mostly to detention centre crimes in Kosovo, do not relate to the CoE Report, which only addressed crimes in Albania from April 1999 onwards. As a result, the KSC only has jurisdiction over the charged crimes in Kukës and Cahan.

C. OTHER PROVISIONS OF THE LAW DO NOT ASSIST THE SPO

15. The SPO’s construction of Article 6(1) is not advanced by its references to other provisions of the Law. Fundamentally, none of these other provisions can affect the assessment of the KSC’s subject matter jurisdiction in Article 6(1). The Kosovo

²⁹ CoE Report, 3.3.2.2., para. 156. *See also* para. 129.

³⁰ *Contra* SPO Response, para. 20.

³¹ KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public, paras 60–69, 71, 73-74, 97-105, 107-111, 137-153 are clearly prior to the temporal scope of the CoE Report.

legislature was only empowered by the Constitution to create a Specialised Court where it was necessary to do so to investigate the allegations in the CoE Report.³² Any provisions in the Law broader than this mandate are simply *ultra vires*.³³

16. In any event, the detail does not support the SPO. First, whilst the territorial jurisdiction of the KSC (defined in Article 8 of the Law) includes crimes committed in Kosovo that does not expand the jurisdiction of the KSC from the CoE Report's focus on crimes committed in Albania.³⁴ The allegations in the CoE Report included that victims were transported from Kosovo to Albania so that jurisdiction over crimes in Kosovo would have been required in order fully to investigate those cases.³⁵

17. Second, that the Law provides for jurisdiction over international crimes does not mean that the KSC's jurisdiction exceeds the CoE Report's focus on crimes committed in Albania after April 1999. Those organised crimes may have been qualified as international crimes, as the SPO argues elsewhere in its Response.³⁶

18. Third, that the Law provides for evidence collected by the ICTY to be admissible is not inconsistent with the Defence position.³⁷ Evidence collected by the ICTY, which has been disclosed in these proceedings, includes evidence on the existence of an armed conflict and evidence about military command structures which are plainly relevant to cases within the jurisdiction of the KSC.

19. Fourth, the *non-bis-in-idem* provisions as between the ICTY and the KSC are part and parcel of the comprehensive protections offered to the fair trial rights of the

³² See Article 103(7) of the Constitution and para. 6 *supra*.

³³ Kosovo Constitutional Court Judgment, para. 51.

³⁴ *Contra* SPO Response, para. 9.

³⁵ CoE Report, paras 129, 137, 144.

³⁶ SPO Response, para. 16.

³⁷ *Contra* SPO Response, para. 11.

Accused in the Law, and operate specifically to exclude certain overlaps with ICTY investigations rather than evidencing a broader jurisdiction.³⁸

IV. CONCLUSION

20. The asymmetry between the CoE Report and the Indictment is striking and profound. The CoE Report relates to crimes committed after April 1999 in detention centres in Albania. The Indictment charges crimes allegedly committed after March 1998 in the vast majority of cases in Kosovo. This is not simply a situation in which there is not a “perfect overlap” between the CoE Report and the Indictment.³⁹ The overlap is limited to the charges relating to Cahan and Kukës, which represent a small fraction of the Indictment Charges. The remainder of the Indictment presents a different case of detentions in different locations often in a different time period. None of the charges relating to crimes in Kosovo are identifiable from the CoE Report, nor was the focus of the CoE Report on crimes committed in Kosovo or during the armed conflict

21. Article 6(1) only confers jurisdiction over crimes which “relate to” the CoE Report. Crimes relate to the CoE Report if they are crimes which Kosovo had an international obligation to investigate as a result of the CoE Report. Aside from the alleged crimes in Kukës and Cahan, the Indictment charges are too far removed from the temporal and geographic scope of the CoE Report to “relate to” it. The KSC should find that it has no jurisdiction over all charges prior to April 1999 and all charges based on detention centres in Kosovo.

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³⁸ *Contra* SPO Response, para. 11.

³⁹ *Contra* SPO Response, para. 13.



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