



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

**In:** KSC-BC-2020-06  
**Before:** Pre-Trial Judge  
Judge Nicolas Guillou  
  
**Registrar:** Dr Fidelma Donlon  
**Filing Participant:** Specialist Prosecutor  
**Date:** 25 May 2021  
**Language:** English  
**Classification:** Public

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**Prosecution request for leave to sur-reply**

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**Specialist Prosecutor's Office**

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Venkateswari Alagenda

1. The Veseli Defence appears to now place very heavy reliance on a decision of the Serbian Constitutional Court<sup>1</sup> in respect of its preliminary motions challenging joint criminal enterprise and the application of customary international law. The SCC Case was not mentioned at all in the Defence's initial preliminary motions submissions, instead having been addressed for the first time in the Veseli Defence Replies<sup>2</sup> and further emphasised by Counsel at the status conference on 19 May 2021.<sup>3</sup> Despite not having raised it previously, Defence Counsel now, erroneously, submits that the SCC Case addresses the 'very same' question as that before the Kosovo Specialist Chambers ('KSC') and that, if applied, it would be decisive.<sup>4</sup>

2. The Veseli Defence submissions on the SCC Case are not related to any new issue arising from the SPO's responses, and consequently exceed the scope of permitted replies.<sup>5</sup> However, to the extent the Pre-Trial Judge intends to consider those further submissions, the SPO seeks leave for the following short sur-reply.

3. The SCC Case does not advance the matter in any respect and, contrary to Defence submissions,<sup>6</sup> does not address the question before this court. The SCC Case is confined to a narrow consideration of the laws currently applicable in Serbia. Those laws are materially different from the framework applicable before the KSC. In particular, the offences under consideration by the Serbian Constitutional Court

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<sup>1</sup> Decision of the Serbian Constitutional Court, No.Už-11470/2017, 2020 citation taken from KSC-BC-2020-06/F00310/A02 ('SCC Case').

<sup>2</sup> Veseli Defence Reply to the Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise, KSC-BC-2020-06/F00310, 17 May 2021; Veseli Defence Reply to Prosecution Response to the Preliminary Motion of Kadri Veseli to Challenge the Jurisdiction of the KSC (Customary International Law), KSC-BC-2020-06/F00311, 17 May 2021 (together 'Veseli Defence Replies').

<sup>3</sup> Transcript of Hearing on 19 May 2021, pp.425, 435-437.

<sup>4</sup> Transcript of Hearing on 19 May 2021, pp.425, 435. Defence Counsel further misrepresented the substantive scope of the matters addressed in the SCC Case (Transcript of Hearing on 19 May 2021, p.425, lns 12-17).

<sup>5</sup> Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020, Rule 76.

<sup>6</sup> *Contra*. KSC-BC-2020-06/F00310, paras 3, 5(c), (d), 17; KSC-BC-2020-06/F00311, para.3(c),(d), 10; Veseli Defence submissions, Transcript of Hearing on 19 May 2021, pp.425 (describing it as the 'very same question').

(Articles 371 and 384 of the Criminal Code of Serbia) were introduced and defined in Serbian domestic legislation in 2006, and consequently must be considered in the context of the principle of non-retroactivity.<sup>7</sup> By contrast, as outlined in detail in the SPO's response,<sup>8</sup> pursuant to the Law,<sup>9</sup> the KSC applies customary international law and applies it only as it existed at the time the offences were committed.<sup>10</sup>

4. It follows from this distinction that Defence submissions regarding 'parity' are inapposite.<sup>11</sup> Serbia and Kosovo are distinct jurisdictions with their own, separate legal regimes and, in this instance, it is the legislation passed by the Kosovo Assembly which is governing.

5. The Veseli Defence challenges to jurisdiction should be dismissed accordingly.

**Word count: 690**



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**Jack Smith**  
**Specialist Prosecutor**

Tuesday, 25 May 2021  
At The Hague, the Netherlands.

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<sup>7</sup> It is noted, however, that the European Court of Human Rights ('ECtHR') case relied upon by the Serbian Constitutional Court does not directly support the proposition for which it appears to be cited. In *Korbely v Hungary*, no.9174/03, 19 September 2008, it was found that the provisions of the Geneva Conventions were applicable in Hungary at the relevant time, and the international law elements of the relevant crime were applied. The issue arising in the case was simply whether, on the facts, the accused's conduct had come within the international law definition of crimes against humanity.

<sup>8</sup> Prosecution response to preliminary motion concerning applicability of customary international law, KSC-BC-2020-06/F00262, paras 17-25. *See also* paras 26-35 addressing the inapplicability of the *lex mitior* principle.

<sup>9</sup> Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

<sup>10</sup> The further submissions in the Veseli Defence Replies regarding direct applicability of customary international law similarly do not arise from the SPO responses and are misplaced in light of the jurisdiction granted by the Law.

<sup>11</sup> *Contra*. KSC-BC-2020-06/F00310, paras 4, 5((e), 17; KSC-BC-2020-06/F00311, paras 3(e), 10; Veseli Defence submissions, Transcript of Hearing on 19 May 2021, pp.425, 435.