

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge

Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Kadri Veseli

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Veseli Defence Response to SPO Request KSC-BC-2020-06/F00322

Specialist Prosecutor's Office

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Venkateswari Alagenda

1. On a procedural note, filing F00322 of the Office of the Specialist Prosecutor ("SPO") is highly inappropriate. Not only does the SPO purport to seek "leave" for a "sur-reply" but it also includes the substance of its argument in the body of the request *and* assumes that such leave will be granted. Such a ploy renders pointless any discretion which the Pre-Trial Judge might be inclined to exercise. The Defence objects to such tactics and hopes that they will not be repeated in the future.

2. Furthermore, the statutory framework of the Kosovo Specialist Chambers ("KSC") does not recognise the concept of a "sur-reply". The SPO, of course, is fully aware that there must be a rule of finality to litigation and the ploy exposed in paragraph 1 above is evidence of the SPO hedging its bets. Essentially, the SPO has furtively introduced its substantive argument in the knowledge and, perhaps, fear that the Pre-Trial Judge might refuse such an irregular request on purely procedural grounds.

3. The Defence has not exceeded the scope of a reply and has not introduced an unexpectedly new issue. The prohibition on the retrospective application of crimes under customary international law to the events of the 1988/1999 Balkan conflict (to which the SFRY Constitution and Criminal Code applied) has always been at the heart of the Defence's submissions on jurisdiction.

4. Despite the aforementioned, the Defence does not object to the SPO clarifying its understanding of the judgment of the Serbian Constitutional Court ("SCC").¹ This crucial judgment cannot be ignored for reasons which will be clarified below. As officers of the Court, therefore, Counsel for the Defence welcome the opportunity for comprehensive consideration of such an important judgment which not only confirms the Defence's jurisdictional arguments but also reinforces them.

¹ Constitutional Court of Serbia, Judgment no. Uz-11470/2017, 10 January 2020 published in the official gazette of RS no. 127/2020.

5. It will be recalled that the KSC's jurisdiction is defined by reference to alleged crimes committed exclusively by the KLA and, as such, the KSC was established to deal with only one of the protagonists to the 1998/1999 conflict in the Balkans. It is, therefore, an inescapable fact that the KSC's jurisdiction if not mono-ethnic is based on political affiliation. When the non-retroactivity principle is deployed to the advantage of one of the protagonists to the conflict but not to the other, the discriminatory violation of interests protected, *inter alia*, by Article 14 ECHR cannot be ignored.

6. For this reason, the Defence expected that the SPO "sur-reply" would have addressed the aforementioned issue of discrimination. The SPO ought to have explained why it is justifiable for the SCC judgment to permit Serbian alleged war criminals to benefit from the non-retroactivity principle in their own domestic constitutional system for crimes committed at the same time and in the same place as Albanians who are to be tried under Kosovo's domestic constitutional system via the KSC. Both systems of law contain the same guarantees, yet if the rationale for the SCC judgment is rejected by the Pre-Trial Judge, then those ethnic Albanian suspects will be denied the very protection enjoyed by their Serbian counterparts.

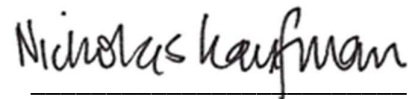
7. To conclude, the Defence does not oppose the receipt of the SPO's current filing F00322 which abjectly fails to address the key issue at stake which was lucidly argued by the Defence, in the SPO's presence, at the 5th Status Conference.

8. Moreover, and in the interests of justice, the Defence will not object to the SPO being given yet one more opportunity (with the right of Defence reply) to address how the differing application of the principle of non-retroactivity for two separate peoples bound by the same constitutional history can be deemed "necessary in a democratic society" and proportional while not leading to such blatant discrimination as outlined by the Defence - whether ethnic or political.

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