



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: 1 June 2021
Language: English
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Prosecution sur-reply

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1. Pursuant to the Decision,¹ the Specialist Prosecutor's Office ('SPO') hereby submits its sur-reply to the Veseli Defence submissions regarding the SCC Case.²
2. Contrary to Defence submissions,³ the SCC Case does not address the issue before this court or otherwise advance the matter in any respect. Serbia and Kosovo are distinct jurisdictions with their own, separate legal regimes. The Serbian Constitutional Court's pronouncements on the scope of application of crimes set out in the current Criminal Code of Serbia have no bearing on the jurisdiction of courts within the Kosovo judicial system.
3. In particular, in the SCC Case, the Serbian Constitutional Court considered whether the offences set out in Articles 371 and 384 of the Criminal Code of Serbia, which were introduced and defined in Serbian domestic legislation in 2006, could be applied to crimes committed prior to 2006. Considering the principle of non-retroactivity,⁴ it held that they could not be.
4. However, that finding has no relevance to the issue before this court because, as outlined in detail in the SPO's response,⁵ the KSC applies customary international law and applies it only as it existed at the relevant time period (i.e. the time when the alleged offences occurred). It does so pursuant to the Law,⁶ as adopted by the Kosovo

¹ Decision on SPO Request to Sur-Reply, KSC-BC-2020-06/F00326, 28 May 2021 ('Decision').

² Serbian Constitutional Court, Judgment Uz-11470/2017 ('SCC Case').

³ Transcript of Hearing on 19 May 2021, pp.425, 435. Defence Counsel also misrepresented the substantive scope of the matters addressed in the SCC Case (Transcript of Hearing on 19 May 2021, p.425, lns 12-17).

⁴ It is noted 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 the SCC Case. 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 in that case. The issue arising was simply whether, on the facts, the accused's conduct had come within the international law definition of crimes against humanity.

⁵ 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.

⁶ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law').

Assembly, which constitutes domestic legislation granting the KSC such jurisdiction.⁷ In contrast to the case before the Serbian Constitutional Court, the Law does not create new crimes or change old ones. Rather, it unlocks a jurisdictional avenue in Kosovo to apply customary international law as it existed between 1998-2000.

5. It follows from this distinction that Defence submissions regarding ‘parity’ and ‘discrimination’ are simply misplaced.⁸ The non-retroactivity principle is not being ‘deployed to the advantage’ of any particular protagonist.⁹ Rather, as noted above, Kosovo and Serbia are distinct jurisdictions with differing legal regimes, each with the right to independently define the crimes to be prosecuted within their separate jurisdictions. The fact that one jurisdiction can or cannot prosecute certain crimes has no bearing upon the ability of any other jurisdiction to do so.

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

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At The Hague, the Netherlands.

⁷ Consequently, the submissions of the Veseli Defence regarding direct applicability of customary international law are equally misplaced.

⁸ *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. *See also* Veseli Defence Response, KSC-BC-2020-06/F00323, paras 5-8.

⁹ *Contra*. Veseli Defence Response, KSC-BC-2020-06/F00323, para.5.