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 Prosecution Sur-Reply

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1. The Defence for Mr Veseli hereby responds to the SPO's sur-reply of 1 June 2021.[1]

2. The judgment of the Serbian Constitutional Court ("SCC")[2] considered exactly the same matters that are currently being litigated before the KSC. Contrary to the SPO's submissions,[3] the Serbian Parliament had also purported to 'unlock a jurisdictional avenue' in order to give direct effect to crimes under customary international law ("CIL") concurrently to those in the Serbian Criminal Code. The position under the Serbian and Kosovo legislation are substantively identical in this regard. Surprisingly, the SPO appears to be unaware of this elementary and decisive point. The legal position under both States' current domestic law is substantively the same, and both are subject to a constitutional prohibition on retrospective application of the criminal law. The criminal law applicable to Serbia and Kosovo in 1998 and 1999 was identical and was governed by the constitutional rules (a) that only a domestic statute could create a crime, and (b) that international criminal law had no direct application in domestic law. The Serbian Constitutional Court rightly held that Parliament could not retrospectively "unlock a jurisdictional avenue" by incorporating international criminal law into domestic law in a manner that would give it retrospective effect. The position facing the KSC is self-evidently indistinguishable.

3. Article 2 of the Serbian 'Law on Organisation and Competence of Government Authorities in War Crimes Proceedings' ("Serbian War Crimes Law") mirrors almost exactly Article 12 of the KSC Law, adding by reference, all violations of international criminal law specified in the ICTY Statute:

[1] F00333, Prosecution sur-reply, 1 June 2021.
[2] Constitutional Court of Serbia, case no. Uz-11470/2017, Judgment, published in the Official Gazette of RS, no. 127/2020 ("Judgment no Uz-11470/2017").
[3] Prosecution Sur-Reply, para. 4.

> **Article 2**
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> This law shall apply to the detection, prosecution and trying of:
>
> 1) criminal offences referred to in Articles 370 through 384 and Art. 385 and 386 of the Criminal Code;
>
> 2) serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 specified in the Statute of the International Criminal Tribunal for the Former Yugoslavia;
>
> 3) the criminal offence of aiding and abetting an offender after the commission of a criminal offence referred to Article 333 of the Criminal Code, if committed in connection with criminal offences referred in sub –paragraphs 1) and 2) of this Article.[4] (emphasis added)

4. According to the SCC, the criminality imputed to the Serbian accused in that case could be characterised by two concurrent categories of proscribed behaviour set out in the Serbian War Crimes Law: a) criminal offences derived from international criminal law as listed in the ICTY Statute, and b) international crimes listed in the Criminal Code of Serbia.[5] Despite the domestic legislation criminalising command responsibility and crimes against humanity, and notwithstanding the acknowledged existence of these rules under CIL at the time of the conflict, the SCC found that the principle of legality (i.e. non-retrospectivity) operated as a complete jurisdictional bar that prevented the retrospective application of these rules of international criminal law to conduct which occurred before their proscription by way of Serbian domestic legislation. They could not, therefore, be applied to the 1998/1999 conflict on the territory of Kosovo:

> "The classification of these ... set[s] of criminal offenses in respect of which special rules of concentration of actual jurisdiction apply in combination with *sui generis* application of the universal principle of validity of Serbian criminal legislation, is not disputable in itself, but from the point of view of the principle

[4] Annex 1, Law on Organisation and Competence of Government Authorities in War Crimes Proceedings, (*Official Gazette of the Republic of Serbia No 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009*), (official translation by the Serbian Ministry of Justice, available at https://www.mpravde.gov.rs/en/tekst/1701/criminal-matter.php)

[5] Judgment no Uz-11470/2017, page 14 (Defence translation).

> of legality, i.e. its *lex praevia* element, crimes committed before the entry into force of the CC of Serbia in 2005 […] is not constitutionally possible here, because in this particular case [it is] not a more lenient criminal law (*sic*). [6]

5. Moreover, and contrary to the SPO's submissions,[7] the question before the SCC was not whether the accused could be prosecuted exclusively on the basis of Articles 371 and 384 of the Serbian CC, but whether "it was *even possible* to conduct an investigation […] against D.Ž on the basis of command responsibility"[8] for violations of rules of IHL and Article 142 FRY CC and Article 30 (commission by omission).[9] The SCC found that neither of the "avenues" in Article 2 of the Serbian War Crimes Law could trump the principle of legality.[10] This necessarily means that the SCC also found that Article 30 FRY CC did not satisfy the "duality test" and could not, therefore, afford a lawful jurisdictional basis to prosecute cases involving command responsibility in connection with events occurring during the conflict in Kosovo in 1998/1999.[11]

6. When the SPO speaks of "unlocking a jurisdictional avenue", this is just another way of claiming the right to apply international criminal law retrospectively, in flat contradiction to the applicable constitutional provisions in operation at the time of the conflict. There is no such thing as "unlocking" a jurisdictional avenue. It is not possible, in any domestic legal system that prohibits the retrospective application of the criminal law, to "unlock a jurisdictional avenue" with retrospective effect. Using the expression "unlocking" a jurisdictional avenue is a deliberate mischaracterisation.

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[6] Ibid, p. 14. The Defence also notes that the discussion regarding *Korbely v. Hungary* is irrelevant considering that, contrary to the SPO's submissions, the SCC decided the case on the basis of Article 34(1) of the Serbian Constitution, whereas any ECtHR reference was only secondary, and in support of its main argument).
[7] Prosecution Sur-Reply, para. 3.
[8] Judgment no Uz-11470/2017, p. 13 (para. 6).
[9] Ibid, pp. 3-4; 13-14.
[10] Ibid, p. 15 As stated elsewhere, the principle of legality is a constitutional guarantee set out in Article 34(1) of the Serbian Constitution.
[11] See also, *Prosecutor v. Kolanisac*, F00223, paras 122-123.

It is just another way of asserting that it is possible to apply criminal law retrospectively in violation of non-derogable constitutional guarantees. The constitutional requirement that criminal offences be introduced by domestic statute cannot be circumvented without violating non-derogable constitutional guarantees prohibiting the retrospective application of criminal offences, and modes of criminal liability that were not applicable in domestic law at the time of the events concerned. The SPO seems to have lost track of the fact that the KSC is not an international criminal tribunal but instead strictly and expressly limited to act under (and in compliance with) Kosovo domestic law, including the Kosovo Constitution. There is simply no legitimate or credible way of circumventing this problem.

7. Despite being allowed (by consent) an exceptional opportunity to file a sur-reply, the SPO has been unable to put forward a convincing argument. Nor has it identified any basis for distinguishing the present case from the rule laid down by the Serbian Constitutional Court.

8. Nor has the SPO even attempted to engage in the discrimination issues. It is obvious, even to non-lawyers, that it would be grossly unfair for accused members of the KLA to be tried in a domestic court for crimes or modes of liability that are prohibited in relation to the opposite party in the conflict, despite the fact that both parties were subject to the same law at the time. Whether this is approached as an illustration of the application of the prohibition on retrospective application of the criminal law or as an issue of equal treatment before the law, the result is the same. The purpose of the rule against retrospective criminal offences is that the person concerned should be adequately notified of the applicable domestic law at the time they commit the act that is alleged to constitute an offence. In this instance, both parties to the conflict were subject to the same domestic law rule that prevented international law from criminalising their conduct as a matter of domestic law. As a domestic court bound by domestic law, the KSC is required to give effect to the

constitutional prohibition on discrimination in just the same way as the CCS was bound by it.

9. The SPO's only response to the discrimination issue is that Serbia and Kosovo are different legal systems. It seems to be implied, therefore, that the position of persons accused before the courts of Serbia and Kosovo are not in a comparable position for the purposes of the discrimination analysis. But this completely overlooks the fact that the issue is whether the exercise of jurisdiction on the basis of international criminal law would constitute discrimination (i.e. unjustified difference in treatment) *in the delivery of* an identical prohibition on the retrospective application of the criminal law. Serbia and Kosovo are not two unconnected legal systems as regards the trial of offences allegedly committed during the 1998/9 conflict. Persons accused in the domestic courts of the two States are obviously in an analogous situation (i.e. they are in situations that are *relevantly similar* as regards the application of the prohibition on the retrospective application of the criminal law). These two legal systems have come about as the result of the dissolution of a single federated sovereign State. The international law rules governing the secession of States, or the establishment of new States following the disintegration of a larger State, make it quite clear that there is a continuity of rights and obligations by automatic succession to certain treaties. This reflects the fact that the two new States share a common route. Where the prohibition on the retrospective application of the domestic criminal law is at stake, it obviously and necessarily requires the Court to consider the law that was applicable to the accused in the territory at issue when the acts concerned occurred, and to ask whether the offence with which they are currently charged would have been an offence in that territory at that time. In this critical respect, the Serbian and Albanian accused who face trial now in the domestic courts of Serbia and Kosovo are in an identical position because the law that applied to them at the time of the acts alleged was identical.

10. It is a telling fact that the SPO fails altogether to even put forward any suggested substantive justification for the difference in treatment between Serbs and Albanians, despite being specifically put on notice by the Defence that there was no objection to it filing an (otherwise unjustified) sur-reply as long as it was used to provide a substantive justification for treating Serbs and Albanians in such a radically different way. By side-stepping the question altogether, the SPO effectively acknowledges that it cannot even identify a legitimate aim for the difference in treatment, let alone justify the extent of the difference in treatment on proportionality grounds.

11. The plain and obvious fact is that if the KSC (a domestic court), assumes jurisdiction for crimes under international law that were not domestic law crimes (that is, crimes against humanity and arbitrary detention); or if it assumes jurisdiction to try the accused on an indictment alleging criminal responsibility through joint criminal enterprise or command responsibility (modes of liability that did not exist at the time of incidents under the relevant federal domestic law); this will result in gross discrimination between two separate ethnic parties to the same conflict, whose alleged offences were committed in the same place at the same time, and were subject to the same applicable law. This would be a clear violation of Article 3, Article 24 of the Constitution and Article 14 ECHR. It would also be a grave challenge to the validity of the KSC as an institution if it is marred from the outset by an assumption of jurisdiction that involved unlawful discrimination on the grounds of nationality, ethnicity or political affiliation.

12. To conclude, the Pre-Trial Judge is respectfully requested to grant all the preliminary motions filed by the Defence.

Word Count: 2001 words

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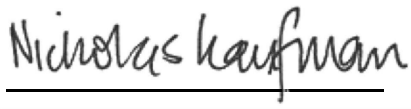

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