



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

File number: KSC-CC-2023-22

Before: **The Specialist Chamber of the Constitutional Court**
Judge Vidar Stensland, Presiding
Judge Roumen Nenkov
Judge Romina Incutti, Rapporteur

Registrar: Fidelma Donlon

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**Judgment on the Referral by Nasim Haradinaj to the Specialist Chamber of the
Constitutional Court**

Applicant

Nasim Haradinaj

Specialist Prosecutor

Kimberly P. West

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The Specialist Chamber of the Constitutional Court

Composed of

Vidar Stensland, Presiding Judge

Roumen Nenkov, Judge

Romina Incutti, Judge Rapporteur

Having deliberated remotely delivers the following Judgment

I. PROCEDURE

A. REFERRAL AND RELATED REQUESTS

1. On 20 November 2023, Mr Nasim Haradinaj (“Applicant”) made a referral to the Specialist Chamber of the Constitutional Court (“Chamber”) under Article 113(7) of the Constitution of the Republic of Kosovo (“Constitution”), and Article 49(3) of the Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“Law” and “Referral”, respectively).¹ The Applicant was represented by Mr Toby Cadman, Ms Almudena Bernabeu, and Mr John Cubbon.

2. In the Referral, the Applicant complained about violations of his fundamental rights under Articles 33(1), 31(2) and 40 of the Constitution, and Articles 7, 6(1) and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) in relation to criminal proceedings against him, which took place before the Specialist Chambers (“SC”).²

3. On 22 November 2023, the President of the SC, pursuant to Article 33(3) of the Law, assigned the above Panel to rule on the Referral.³

¹ KSC-CC-2023-22, F00001, Haradinaj Defence referral to the Specialist Chamber of the Constitutional Court, public, 20 November 2023, with Annex 1, public.

² Referral, paras 2, 4-15, 28-83.

³ KSC-CC-2023-22, F00002, Decision to assign judges to a Constitutional Court Panel, public, 22 November 2023. As regards the venue of the proceedings, see KSC-CC-2019-06, F00001, Invocation of change of venue for referrals made pursuant to Article 49 of the Law, public, 18 January 2019; F00002,

4. On 27 November 2023, the Chamber decided, pursuant to Article 20 of the Law and Rule 5 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court (“SCCC Rules”), that the official language of the proceedings shall be English.⁴ Among others, the Chamber also decided to invite the Specialist Prosecutor’s Office (“SPO”), should it wish to do so, to file written submissions in response to the Referral, and the Applicant, should he wish to do so, to file written submissions in reply.⁵
5. On 27 December 2023, the Applicant submitted to the Chamber a request for the admission as evidence of a whistleblower complaint, given in a confidential annex (“Applicant’s request for admission of evidence”).⁶
6. On 5 January 2024, the SPO notified the Chamber that it intended to respond to the Applicant’s request for admission of evidence jointly with the written submissions on the Referral (“SPO notification”).⁷
7. On 8 January 2024, the Applicant submitted to the Chamber a request seeking a finding that the SPO notification had no legal effect (“Applicant’s request regarding the SPO notification”).⁸ The Applicant maintained in this regard that, pursuant to Rule 1(2) of the SCCC Rules and Rule 76 of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers (“Rules”), the SPO was either entitled to file a response within ten (10) days of the Applicant’s request for admission of evidence, or

Decision on the location of proceedings before the Specialist Chamber of the Constitutional Court, public, 22 January 2019.

⁴ KSC-CC-2023-22, F00003, Decision on the working language, written submissions and public redacted version of the referral, public, 27 November 2023 (“Decision on working language and written submissions”), para. 4 and Disposition, para. 1.

⁵ Decision on working language and written submissions, para. 5 and Disposition, paras 2-3.

⁶ KSC-CC-2023-22, F00005, Confidential request for admission of whistleblower complaint, confidential, 22 December 2023, with Annex 1, confidential. While the filing is dated on the cover page 22 December 2023, it was filed on 27 December 2023. A public redacted version of the main filing was filed on 28 December 2023, F00005/RED.

⁷ KSC-CC-2023-22, F00006, Notification concerning KSC-CC-2023-22/F00005, public, 5 January 2024.

⁸ KSC-CC-2023-22, F00007, Request regarding notification concerning KSC-CC-2023-22/F00005, public, 8 January 2024.

to submit an application for extension of time sufficiently in advance to enable the Chamber to rule on it before the expiry of the time limit.⁹

8. On 11 January 2024, the Chamber issued an order whereby it allowed the SPO to respond to the Applicant's request for admission of evidence along with its written submissions on the Referral, and invited the Applicant, should he wish to do so, to reply to the SPO's response together with his reply to the SPO's written submissions on the Referral.¹⁰ The Chamber also informed the Applicant and the SPO that it would examine the Applicant request regarding the SPO notification after it has received the written submissions.¹¹

B. WRITTEN SUBMISSIONS AND ORAL HEARING

9. On 22 January 2024, the SPO filed its written submissions on the Referral.¹²

10. On 12 February 2024, the Applicant filed his written submissions in reply to the SPO.¹³

11. As regards the Applicant's alternative request to schedule an oral hearing,¹⁴ the Chamber observes, as a preliminary matter, that the SPO deferred to the Chamber's discretion as to the necessity of such a hearing.¹⁵ In this regard, the Chamber recalls that, pursuant to Rule 15(4) of the SCCC Rules, after the expiry of the time limits for the filing of the written submissions, the Chamber shall decide on the basis of the written submissions, unless a hearing is in the interests of the proper administration

⁹ Applicant request regarding the SPO notification, paras 10-11.

¹⁰ KSC-CC-2023-22, F00008, Order on time limits for submissions, public, 11 January 2024 ("Order on submissions"), para. 6 and Disposition, paras 1-2.

¹¹ Order on submissions, para. 6 and Disposition, para. 4.

¹² KSC-CC-2023-22, F00009, Prosecution response to Haradinaj Defence referral to the Specialist Chamber of the Constitutional Court, public, 22 January 2024, with Annexes 1-2, public ("SPO submissions").

¹³ KSC-CC-2023-22, F00010, Reply to Prosecution response to Haradinaj Defence Referral to the Specialist Chamber of the Constitutional Court, public, 10 February 2024 ("Applicant submissions"), with Annex 1, public. While the filing is dated on the cover page 10 February 2024, it was filed on 12 February 2024.

¹⁴ Referral, paras 3, 85.

¹⁵ SPO submissions, para 16.

of justice. Considering the specific circumstances of the present Referral, the Chamber considers that no hearing is required.

C. EXAMINATION OF THE REFERRAL

12. The Chamber turns to the examination of the Referral, based on the Referral and the aforementioned written submissions of the SPO and the Applicant. This judgment refers to the facts of the case and the submissions of the SPO and the Applicant insofar as relevant for the Chamber's assessment of the Referral.

II. THE FACTS

A. EVENTS LEADING TO THE CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

13. During a three-week period from 7 September to 25 September 2020, Mr Hysni Gucati ("Mr Gucati") and the Applicant, at the time Chairman and Deputy Chairman of the Kosovo Liberation Army War Veterans Association ("KLA WVA"), received from unknown sources, three sets of documents that contained confidential and non-public information related to the work of the Special Investigative Task Force ("SITF") and the SPO. The material in question was delivered to the Prishtinë/Priština premises of the KLA WVA on 7 September, 16 September, and 22 September 2020.¹⁶

14. After each delivery, Mr Gucati and the Applicant organised and hosted a press conference, where they discussed and made available to journalists each of the three sets of documents.¹⁷ Simultaneously, Mr Gucati and the Applicant, individually or jointly, gave a number of media interviews in relation to this material, commented on the material, and re-published articles on social media with regard to the same.¹⁸

15. During the same three-week period, a single judge panel repeatedly ordered the KLA WVA and any representative, member, or agent thereof, among others, to

¹⁶ KSC-BC-2020-07, F00611/RED, Public redacted version of the trial judgment, public, 18 May 2022, ("Trial judgment"), paras 204, 207-210, 243-244, 275, with Annexes 1-3, public.

¹⁷ Trial judgment, paras 205, 212-221, 247-251, 277-283.

¹⁸ Trial judgment, paras 206, 222-224, 234, 237, 239-241, 253-255, 259-264, 265, 268-274, 284, 286-290, 293-296, 298.

refrain from recording or copying, in whatever form, or disseminating, by whatever means of communication, the documents delivered to the premises of the KLA WVA or their content, in the absence of authorisation from the SPO or the single judge. The single judge also cautioned that a violation of these orders may constitute an offence under the 2019 Kosovo Criminal Code, Code No. 06/L-074 (“KCC”), by virtue of Article 15(2) of the Law.¹⁹

16. On 24 September 2020, the single judge issued an arrest warrant and transfer order for Mr Gucati and the Applicant.²⁰ On 25 and 26 September 2020, Mr Gucati and the Applicant were arrested in Kosovo, and transferred to the SC Detention Facilities in The Hague.²¹

17. On 11 December 2020, the pre-trial judge confirmed an indictment submitted by the SPO against Mr Gucati and the Applicant, charging them with two counts of a criminal offence against public order under Article 401(1) and (5), and 401(2)-(3) of the KCC, as well as four counts of criminal offences against the administration of justice and public administration pursuant to Articles 387, 388(1), 392(1), and 392(2)-(3) of the KCC, allegedly committed between at least 7 September 2020 and 25 September 2020, applicable by virtue of Article 15(2) of the Law.²²

¹⁹ KSC-BC-2020-07, F00005, Urgent decision authorising a seizure, public, 7 September 2020, paras 21, 25; F00007, Decision authorising a seizure, public, 17 September 2020, paras 21, 25; F00017/RED, Public redacted version of decision on Specialist Prosecutor’s request for order in relation to non-public and confidential documents, public, 25 September 2020, para. 10.

²⁰ See KSC-BC-2020-07, F00012/A03/COR/RED, Public redacted version of corrected version of arrest warrant for Nasim Haradinaj, public, 24 September 2020; F00012/A04/RED, Public redacted version of order for transfer to detention facilities of the Specialist Chambers, public, 24 September 2020.

²¹ See KSC-BC-2020-07, F00016, Notification of arrest pursuant to Rule 55(4), public, 25 September 2020; F00020, Notification of the reception of Nasim Haradinaj in the detention facilities of the Specialist Chambers, public, 26 September 2020.

²² KSC-BC-2020-07, F00074/RED, Public redacted version of the decision on the confirmation of the indictment, public, 11 December 2020, paras 3, 103, 109, 113, 117, 121, 125, 155(a)(i)-(vi). A further confirmed amended indictment was filed on 14 December 2020, see KSC-BC-2020-07, F00075/A02, Redacted indictment, public, 14 December 2020.

18. On 23 June 2021, following a decision by a Court of Appeals panel finding that the indictment lacked specificity,²³ the pre-trial judge ordered that a corrected version of the indictment be filed by the SPO.²⁴ On 5 July 2021, the SPO filed the corrected indictment.²⁵

19. On 16 July 2021, the pre-trial judge transmitted the case file to a trial panel.²⁶

B. TRIAL PROCEEDINGS

20. On 18 May 2022, the trial panel delivered its judgment, finding the Applicant and Mr Gucati, his co-defendant, guilty on five counts of the indictment, namely of (i) obstructing official persons in performing official duties by serious threat under Article 401(1) and (5) of the KCC; (ii) obstructing official persons in performing official duties by participating in the common action of a group under Article 401(2) and (5) of the KCC; (iii) intimidation during criminal proceedings under Article 387 of the KCC; (iv) violating the secrecy of proceedings through unauthorised revelation of secret information disclosed in official proceedings under Article 392(1) of the KCC; as well as (v) violating the secrecy of proceedings through unauthorised revelation of the identities and personal data of protected witnesses under Article 392(2)-(3) of the KCC.²⁷ The trial panel found the Applicant and Mr Gucati not guilty on one count of the indictment, namely retaliation under Article 388 of the KCC.²⁸

21. The Applicant and Mr Gucati were both sentenced to four and a half years of imprisonment, with credit for time served and a fine of 100 Euros each.²⁹

²³ See KSC-BC-2020-07, IA004-F00007, Decision on the Defence appeals against decision on preliminary motions, public, 23 June 2021.

²⁴ KSC-BC-2020-07, F00244, Order for the submission of a corrected indictment and for a second revised calendar for the remainder of the pre-trial proceedings, public, 23 June 2021.

²⁵ KSC-BC-2020-07, F00251/A02, Redacted indictment, public, 5 July 2021. A lesser redacted indictment was filed on 4 October 2021, F00251/A01/RED.

²⁶ KSC-BC-2020-07, F00265, Decision transmitting case file to trial panel II, public, 16 July 2021.

²⁷ Trial judgment, paras 1012, 1015.

²⁸ Trial judgment paras 1013, 1016.

²⁹ Trial judgment, paras 1014, 1017.

1. Obstructing official persons in performing official duties by serious threat

22. During the trial proceedings, the Applicant made a number of submissions as regards the interpretation of the *actus reus* of the offence of obstructing official persons in performing official duties by serious threat under Article 401(1) of the KCC,³⁰ which provides that:

Whoever, by force or serious threat, obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished by imprisonment of three (3) months to three (3) years.

23. The Applicant argued, *inter alia*, that Article 401(1) of the KCC requires the use of force or serious threat to be directed against the official person.³¹ The trial panel, however, found that a “serious threat” within the meaning of Article 401(1) of the KCC may be directed not only against “an official person”, which may include SC and SPO officials such as a judge, a prosecutor or an investigator, but also against another person or an object, as long as the serious threat is issued with the intention to obstruct the official duties or functions of the official person.³²

2. Intimidation during criminal proceedings

24. The Applicant also made submissions as regards the interpretation of the *actus reus* of the offence of intimidation during criminal proceedings under Article 387 of the KCC,³³ which provides that:

Whoever uses force or serious threat, or any other means of compulsion, a promise of a gift or any other form of benefit to induce another person to refrain

³⁰ Trial judgment, para. 142.

³¹ KSC-BC-2020-07, F00342, Defence submissions on elements of crimes and modes of liability, public, 30 September 2021 (“Haradinaj submissions on elements of crimes and modes of liability”), paras 34-35; F00440/RED, Publicly redacted Defence motion under Rule 130 ‘Dismissal of Charges’, public, 27 November 2021 (“Haradinaj Rule 130 motion”), para. 11. See also KSC-BC-2020-07, F00345, Further written submissions on the elements of the offence and modes of liability, public, 30 September 2021 (“Gucati submissions on elements of the offence and modes of liability”), paras 3-7; F00439/RED, Publicly redacted version of motion to dismiss pursuant to Rule 130, public, 13 December 2021 (the original filed on 17 November 2021) (“Gucati Rule 130 motion”), para. 28.

³² Trial judgment, para. 146.

³³ Trial judgment, para. 110.

from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings shall be punished by a fine of up to one hundred and twenty-five thousand (125,000) EUR and by imprisonment of two (2) to ten (10) years.

25. The Applicant contended, among others, that the information which was to be provided, but was not as a result of the use of force or serious threat, must relate to the obstruction of criminal proceedings.³⁴ The trial panel held that the phrase “when such information relates to obstruction of criminal proceedings” only qualifies the third alternative of the provision, namely the person failing to “state true information to the police, a prosecutor or a judge”.³⁵ Therefore, the trial panel concluded that intimidation under Article 387 of the KCC may be directed against any person making or likely to make a statement or provide information in relation to the criminal proceedings to the police, a prosecutor or a judge, and not just against those with information relating to the obstruction of criminal proceedings.³⁶

3. Violating the secrecy of proceedings through unauthorised revelation of the identities and personal data of protected witnesses

26. Likewise, the Applicant made submissions on the interpretation of the *actus reus* of the offence of violating the secrecy of proceedings through unauthorised revelation of the identities and personal data of protected witnesses under Article 392(2) of the KCC,³⁷ which provides that:

Whoever without authorization reveals information on the identity or personal data of a person under protection in the criminal proceedings or in a special program of protection shall be punished by imprisonment of up to three (3) years.

³⁴ Haradinaj submissions on elements of crimes and modes of liability, para. 26; Haradinaj Rule 130 motion, para. 11. See also Gucati submissions on elements of the offence and modes of liability, para. 34; Gucati Rule 130 motion, paras 58-59.

³⁵ Trial judgment, para. 114.

³⁶ Trial judgment, paras 113-114.

³⁷ Trial judgment, para. 90.

27. The Applicant argued, among others, that the revealed information must relate to a person under a specific measure of protection in the criminal proceedings or in a special program of protection.³⁸ The trial panel held that “a person under protection in criminal proceedings” within the meaning of Article 392(2) of the KCC may refer not only to any person who the law regards as protected, or those for whom an order or measure of protection has been adopted in criminal proceedings by a competent panel or the SPO but also, in accordance with Article 62 of the Law, to any person whose identity or personal data appears in SC or SPO documents or records the disclosure of which has not been authorised.³⁹

4. Defence of entrapment by the SPO

28. During the trial proceedings, the Applicant invoked a number of justifications for his conduct, among others, that he was subject to entrapment by the SPO to commit the charged offences.⁴⁰ The trial panel noted that, though neither the Law, the Rules, nor the KCC explicitly list entrapment as a ground excluding criminal responsibility, the Law and the Constitution demand that the SC abide by and apply internationally recognised human rights standards, including those in the Convention.⁴¹ Recalling the case law of the European Court of Human Rights (“ECtHR”) as regards entrapment,⁴² the trial panel observed that, while entrapment does not offer a formal defence to the charges, it sets out procedural requirements for courts and prosecuting authorities to adopt in order to guarantee the fairness of the criminal proceedings in a case involving

³⁸ Haradinaj submissions on elements of crimes and modes of liability, paras 14-15; Haradinaj Rule 130 motion, para. 11. See also Gucati submissions on elements of the offence and modes of liability, paras 10-11; Gucati Rule 130 motion, paras 88-89; Haradinaj Rule 130 motion, para. 11.

³⁹ Trial judgment, para. 95.

⁴⁰ KSC-BC-2020-07, F00260/RED, Public redacted submission of interim pre-trial brief on behalf of the Defence of Nasim Haradinaj, public, 12 July 2021 (“Haradinaj pre-trial brief”), paras 277(a), 278-280; F00566/RED, Publicly redacted final trial brief on behalf of Nasim Haradinaj, public, 11 March 2022 (the original filed on 3 March 2022) (“Haradinaj trial brief”), paras 392-440.

⁴¹ Trial judgment, paras 800, 835-836.

⁴² Trial judgment, paras 836-838.

an entrapment claim.⁴³ Accordingly, the trial panel decided to address the Applicant's entrapment claim.⁴⁴

29. The trial panel indicated, among others, that one of the conditions under which Article 6 of the Convention is complied with in a case of entrapment is that it falls on the prosecution to prove that there was no entrapment, provided that the accused's allegations are not wholly improbable.⁴⁵ The trial panel likewise noted that, if a plea of entrapment is made and there is *prima facie* evidence of entrapment, a court must examine the facts of the case and take the necessary steps to uncover whether there was any entrapment.⁴⁶ In assessing the Applicant's entrapment claim, the trial panel found that there was no reasonable basis to conclude that he was entrapped by an SPO official or any individual acting under the SPO's direction or control.⁴⁷ The trial panel determined that the entrapment claim was wholly improbable and unfounded.⁴⁸

5. Public interest defence

30. The Applicant also claimed that any unauthorised revelations of information found to have been made by him were justified by considerations of public interest as regards cooperation between Serbia and the SITF/SPO.⁴⁹ He maintained that the public interest justification constituted a defence against the charges.⁵⁰ The trial panel noted that, though neither the Law, the Rules, nor the KCC explicitly list public interest as a ground excluding criminal responsibility, the Law and the Constitution demand that the SC abide by and apply internationally recognised human rights standards, including those enshrined in the Convention.⁵¹ In this regard, the trial panel recalled

⁴³ Trial judgment, para. 839.

⁴⁴ Trial judgment, paras 854-890.

⁴⁵ Trial judgment, para 837.

⁴⁶ Trial judgment, para. 837.

⁴⁷ Trial judgment, para. 889.

⁴⁸ Trial judgment, para. 890.

⁴⁹ Haradinaj pre-trial brief, paras 277(d), 283-298; Haradinaj trial brief, paras 19, 131, 391, 441, 443, 477, 491, 497.

⁵⁰ Haradinaj pre-trial brief, paras 277(d), 283-298.

⁵¹ Trial judgment, paras 800, 806.

that Article 40 of the Constitution and Article 10 of the Convention guarantee the freedom of expression, and that the ECtHR has held that the exercise of freedom of expression in pursuit of a public interest warrants particular protection.⁵² Accordingly, the trial panel decided to address the Applicant's public interest claim in the context of the right to freedom of expression and as a potential justification that might affect his individual criminal responsibility.⁵³

31. The trial panel, noting the definition of public interest contained in Article 200(4) of the KCC, as well as relevant ECtHR case law, defined the notion of public interest in the context of SITF/SPO cooperation with Serbia as:

[L]imited to evidence that would suggest that some of the material allegedly disclosed by the [Applicant] contain indications of improprieties occurring in the context of cooperation between the Republic of Serbia (or its officials) and the SITF/SPO, which would have affected the independence, impartiality, or integrity of the SITF/SPO's investigation.⁵⁴

32. In assessing the Applicant's public interest claim, the trial panel found that there was no credible basis to conclude that the information he had revealed contained any indications of improprieties attributable to the SITF/SPO.⁵⁵ It further concluded that, even assuming that it was reasonable for the Applicant to believe that the information revealed contained indications of improprieties affecting SITF/SPO investigations, the Applicant's actions went beyond exposing what he considered improprieties in the SITF/SPO's cooperation with Serbia.⁵⁶ Lastly, the trial panel held that, even assuming that the Applicant's actions were, at least to some extent, driven by considerations of public interest, the interference with the Applicant's right to freedom of expression by means of criminal prosecution was lawful, pursued a number of legitimate aims, and

⁵² Trial judgment, para. 806.

⁵³ Trial judgment, para. 806.

⁵⁴ Trial judgment, para. 808.

⁵⁵ Trial judgment, paras 811-817.

⁵⁶ Trial judgment, paras 818-819.

was necessary in a democratic society.⁵⁷ The trial panel concluded that the Applicant's criminal responsibility could not be excluded by considerations of public interest.⁵⁸

C. APPEAL PROCEEDINGS

33. On 2 February 2023, following Mr Gucati's and the Applicant's appeal against the trial judgment, a Court of Appeals panel affirmed the majority of their convictions, reversing their conviction for obstructing official persons in performing official duties by participating in the common action of a group.⁵⁹ In view of its finding, the appeals panel, by majority, reduced the sentences imposed by the trial panel of four and a half years to four years and three months of imprisonment, with credit for the time served, and affirmed the additional sentence to pay a fine of 100 Euros for both Mr Gucati and the Applicant.⁶⁰

1. Obstructing official persons in performing official duties by serious threat

34. In his appeal, the Applicant challenged, among others, the trial panel's findings on the *actus reus* underpinning his conviction for obstruction of official persons in performing official duties under Article 401(1) and (5) of the KCC.⁶¹ In particular, the Applicant alleged that the use of force or serious threat must be directed at the person performing official duties.⁶² In this regard, the Applicant submitted that the text of Article 401(1) of the KCC does not contain language suggesting that its purpose is to prevent indirect obstruction of official duties as well.⁶³

⁵⁷ Trial judgment, paras 820-823.

⁵⁸ Trial judgment, para. 824.

⁵⁹ KSC-CA-2022-01, F00114, Appeal judgment, 2 February 2023, public ("Appeal judgment"), para. 442, with Annexes 1-2, public.

⁶⁰ Appeal judgment, para. 442.

⁶¹ Appeal judgment, para. 269.

⁶² KSC-CA-2022-01, F00035/COR2, Further corrected version of Defence appeal brief on behalf of Mr. Nasim Haradinaj, public, 2 September 2022 (the original filed on 19 September 2022) ("Haradinaj appeal brief"), paras 173-177, with Annex 1, public; F00065, Haradinaj re-filed reply to SPO brief in response to Defence appeal brief, public, 15 October 2022 ("Haradinaj reply appeal brief"), para. 46.

⁶³ Haradinaj appeal brief, para. 176; Haradinaj reply appeal brief, para. 46.

35. As regards the direction of the serious threat, the appeals panel, by majority, agreed with the trial panel's finding that nothing in the language of this provision requires that the serious threat be specifically directed at the official person in question.⁶⁴ The appeals panel was of the view that, to incorporate that element, the provision would have been formulated in a manner that explicitly requires that the use of force or serious threat be directed against the official person(s).⁶⁵ In this regard, it considered that the trial panel was correct to interpret Article 401(1) of the KCC in accordance with the rationale of the offence, which is to ensure that official duties are not obstructed, directly or indirectly.⁶⁶ The appeals panel, by majority, found no error in the trial panel's finding that the offence under Article 401(1) of the KCC was also established in cases where the serious threat is directed against another person, namely, in the Applicant's case, those who gave evidence to the SC or SPO, or who were likely to do so.⁶⁷

2. Intimidation during criminal proceedings

36. In one of the grounds of appeal set forth in his notice of appeal, the Applicant maintained that the trial panel erred in law in regard to Article 387 of the KCC when interpreting the scope of the phrase "when such information relates to obstruction of criminal proceedings".⁶⁸ However, in his appeal brief, the Applicant appeared to have abandoned this ground of appeal.⁶⁹ Accordingly, the appeals panel only addressed Mr Gucati's challenge as to the interpretation of Art 387 of the KCC.⁷⁰

⁶⁴ Appeal judgment, para. 282.

⁶⁵ Appeal judgment, para. 282.

⁶⁶ Appeal judgment, para. 282.

⁶⁷ Appeal judgment, para. 282.

⁶⁸ KSC-CA-2022-01, F00029, Haradinaj Defence re-filed notice of appeal of trial judgment, public, 8 July 2022, para. 25. While the filing is dated on the cover page 8 July 2022, it was filed on 10 July 2022.

⁶⁹ Appeal judgment, para. 211, footnote 460. See also Haradinaj appeal brief.

⁷⁰ KSC-CA-2022-01, F00036/RED, Public redacted version of Gucati appeal brief, public, 19 August 2022 ("Gucati appeal brief"), paras 10-20, with Annexes 1-4, public. While the filing is dated on the cover page 19 August 2022, the original was filed on 22 August 2022. See also KSC-CA-2022-01, F00067/RED, Public redacted version of re-filed Gucati brief in reply pursuant to Rule 179(3), public, 17 October 2022, paras 16-17, 21.

37. As regards the scope of the aforesaid qualifier, the appeals panel found that the words “such information” under Article 387 of the KCC refer to “true information” in the third alternative, namely the person failing to state “true information to the police, a prosecutor or a judge”, because of the placement and formulation of the qualifier.⁷¹ The appeals panel concluded that the scope of Article 387 of the KCC was not limited to the use of force or serious threat in relation to the obstruction of proceedings,⁷² and accordingly dismissed this ground of appeal.⁷³

3. Violating the secrecy of proceedings through unauthorised revelation of the identities and personal data of protected witnesses

38. Under ground 22 of his appeal, the Applicant submitted that the trial panel erred in law in finding that “a person under protection [in the] criminal proceedings” within the meaning of Article 392(2) of the KCC was any person with respect to whom there is a legal requirement, an order or a measure of protection issued or implemented in criminal proceedings, and can be a person whose identity or personal data appears in SC or SPO documents or records the disclosure of which has not been authorised.⁷⁴ In support, the Applicant referred to the arguments presented in relation to ground 4 of his appeal.⁷⁵ However, since ground 4 challenged the trial panel’s decision to allow the SPO to withhold material unlawfully disclosed by the Applicant, rather than the interpretation of Article 392(2) of the KCC, the appeals panel summarily dismissed ground 22 of the Applicant’s appeal as unsubstantiated.⁷⁶

39. Mr Gucati similarly challenged the trial panel’s findings on “protection in the criminal proceedings” for the purpose of Article 392(2) of the KCC.⁷⁷ In particular, he claimed that, rather than providing for the “sweeping protection” asserted by the trial

⁷¹ Appeal judgment, para. 221.

⁷² Appeal judgment, para. 222.

⁷³ Appeal judgment, para. 230.

⁷⁴ Haradinaj appeal brief, paras 194.

⁷⁵ Haradinaj appeal brief, para. 195. See also Haradinaj reply appeal brief, para. 57.

⁷⁶ Appeal judgment, paras 172-173.

⁷⁷ Gucati appeal brief, paras 217-224, 243.

panel, Article 62(2) of the Law specifically refers to protections being “granted”, and not to a mere mention of the name of an individual on an SPO document.⁷⁸ Noting that Mr Gucati’s arguments do not contain any reference to the trial judgment and that it was unable to identify the “sweeping protection” referred to, the appeals panel did not address this specific limb of Mr Gucati’s appeal ground in the appeal judgment.⁷⁹

4. Defence of entrapment by SPO

40. In his appeal, the Applicant maintained that the trial panel erred in failing to investigate the source of the leak from the SPO, thus reversing the burden of proof to the Applicant to support his *prima facie* claims of entrapment/incitement. He further argued that the trial panel erred in ignoring or rejecting evidence demonstrating that the source of the leak was the SPO.⁸⁰ The Applicant also claimed that, in his view, he satisfied the “not wholly improbable” standard applicable to entrapment claims.⁸¹

41. While noting that some of the Applicant’s appeal grounds on defences, including the defence of entrapment by the SPO, suffered from a number of deficiencies and procedural shortcomings that would have warranted summary dismissal, the appeals panel nonetheless decided, out of fairness to the Applicant, to address his arguments, insofar as they overlapped with the arguments put forward by Mr Gucati.⁸²

42. At the outset, the appeals panel agreed that the trial panel correctly identified the fact that, provided that the Applicant’s allegations were not wholly improbable, it fell on the SPO to prove that there was no entrapment.⁸³ The appeals panel held in this regard that the Applicant and Mr Gucati misconstrued the applicable standard when they argued that the “not wholly improbable” standard is so low that it excludes any

⁷⁸ Gucati appeal brief, para. 218.

⁷⁹ Appeal judgment, para. 185.

⁸⁰ Haradinaj appeal brief, paras 135-144.

⁸¹ See KSC-CA-2022-01, Transcript of appeal hearing, public, 1 December 2022, p. 86, line 12 to p. 89, line 25.

⁸² Appeal judgment, paras 314, 356.

⁸³ Appeal judgment, para. 363.

evidential requirement, even when the SPO's involvement in the commission of the offences is in dispute.⁸⁴ The appeals panel recalled that the ECtHR's jurisprudence on entrapment requires the involvement of law enforcement officers in the commission of the offence as a pre-existing starting point for discussion.⁸⁵ In the appeals panel's view, the ECtHR intended the issue of law enforcement involvement to fall within the scope of the "not wholly improbable" test.⁸⁶ Accordingly, the appeals panel dismissed the Applicant's claim that the trial panel's findings requiring him to bring *prima facie* evidence of the SPO's involvement in the commission of the offences amounted to an erroneous reversal of the burden of proof on entrapment.⁸⁷

5. Public interest defence

43. On appeal, the Applicant also claimed that the trial panel erred by determining that the defence of public interest was not available under Kosovo law, and by failing to consider the involvement of SITF/SPO Serbian sources in what he referred to as "the globally condemned criminal Milošević regime", as well as the stance that Serbia has taken over the years towards Kosovo.⁸⁸ The Applicant also argued that acts which are compatible with the right to freedom of expression as guaranteed by the Constitution and the Convention cannot be considered to be criminal acts.⁸⁹

44. In the same vein as the trial panel, the appeals panel found that the defence of public interest, if proven in respect to the relevant offences, would not mean that the offences were not committed, but would operate as a ground excluding individual criminal responsibility.⁹⁰ The appeals panel also held that, since the trial panel had expressly considered the notion of public interest under Article 200(2) of the KCC, in addition to Article 40 of the Constitution and Article 10 of the Convention, it did not

⁸⁴ Appeal judgment, para. 366.

⁸⁵ Appeal judgment, para. 367.

⁸⁶ Appeal judgment, para. 368.

⁸⁷ Appeal judgment, para. 369.

⁸⁸ Haradinaj appeal brief, paras 108, 113-114.

⁸⁹ Haradinaj appeal brief, para. 110.

⁹⁰ Appeal judgment, paras 321-323.

err in finding that the defence of public interest was not available under Kosovo law.⁹¹ The appeals panel further found that the trial panel properly assessed whether the alleged public interest in the Applicant's case would outweigh the interest in the non-disclosure of the confidential information.⁹²

45. Lastly, in light of the aforesaid finding, and since the Applicant's arguments as to Serbia's involvement in the work and investigations of the SITF/SPO were largely unsubstantiated, the appeals panel decided not address the Applicant's remaining arguments.⁹³ Still, the appeals panel recalled that, though the Applicant claimed that the trial panel prejudiced him in this regard, he had failed to challenge at trial the definition adopted by the trial panel on the notion of public interest in the context of SITF/SPO cooperation with Serbia.⁹⁴ Accordingly, it dismissed the Applicant's appeal as regards errors in the trial panel's findings on the public interest defence.⁹⁵

D. REQUEST FOR PROTECTION OF LEGALITY

46. On 18 September 2023, a Supreme Court panel dismissed, in their entirety, the requests for protection of legality lodged by Mr Gucati and the Applicant.⁹⁶

1. Obstructing official persons in performing official duties by serious threat

47. In his request for protection of legality, the Applicant submitted, among others, that the trial panel and the appeals panel violated the criminal law by impermissibly broadening the scope of Article 401(1) of the KCC to include a serious threat against third persons, rather than against an official person who is performing official duties.⁹⁷

⁹¹ Appeal judgment, para. 334.

⁹² Appeal judgment, para. 337.

⁹³ Appeal judgment, para. 338.

⁹⁴ Appeal judgment, para. 339.

⁹⁵ Appeal judgment, para. 340.

⁹⁶ KSC-SC-2023-01, F00021, Decision on requests for protection of legality, public, 18 September 2023 ("Decision on protection of legality").

⁹⁷ KSC-SC-2023-01, F00009, Haradinaj Defence re-filed request for protection of legality, public, 9 May 2023 ("Haradinaj protection of legality request"), paras 2(a), 14-16, 18, 20. See also KSC-SC-2023-01, F00019, Haradinaj reply to prosecution consolidated response to requests for protection of legality, public, 2 August 2023 ("Haradinaj protection of legality reply"), paras 3-5.

The Applicant further claimed that the interpretation of Article 401(1) of the KCC as determined by the trial panel and the majority of the appeals panel violated the principle of legality, and argued that no evidence was adduced at trial demonstrating that he directed serious threats at an official person when performing official duties.⁹⁸

48. In assessing the merits of the Applicant's complaint, the Supreme Court panel did not consider that the interpretation of Article 401(1) of the KCC, as determined by the trial panel and upheld by the appeals panel, was excessively broad, or that it violated the principle of legality set forth in Article 33(1) of the Constitution.⁹⁹ In particular, the Supreme Court panel held that the responsibility of judges to interpret the legislation in accordance with its object and purpose and the circumstances of the particular case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen, has been acknowledged not only by the ECtHR, but within the constitutional framework applicable to the SC as well.¹⁰⁰ Accordingly, it dismissed the Applicant's complaint.¹⁰¹

2. Intimidation during criminal proceedings

49. The Applicant also submitted that the phrase "when such information relates to obstruction of criminal proceedings" qualifies all of the alternative acts and omissions mentioned in Article 387 of the KCC, rather than only the third alternative, as held by the trial panel and upheld by the appeals panel. In the Applicant's view, the panels' interpretation was erroneous and amounted to a violation of the criminal law.¹⁰²

50. Noting that the Applicant had not raised arguments concerning the legal interpretation of Article 387 of the KCC before the appeals panel, the Supreme Court

⁹⁸ Haradinaj protection of legality request, paras 16-17, 19-20; Haradinaj protection of legality reply, paras 7-8, 10-11.

⁹⁹ Decision on protection of legality, paras 40-48.

¹⁰⁰ Decision on protection of legality, para. 45.

¹⁰¹ Decision on protection of legality, para. 50.

¹⁰² Haradinaj protection of legality request, paras 2(b), 21-30; Haradinaj protection of legality reply, paras 12-15.

panel summarily dismissed his claim as inadmissible.¹⁰³ The Supreme Court panel therefore only addressed similar arguments on the legal interpretation of Article 387 of the KCC raised by Mr Gucati in his request for protection of legality.¹⁰⁴

51. The Supreme Court panel found that a plain reading of Article 387 of the KCC demonstrates that the trial panel, as upheld by the appeals panel, correctly interpreted this provision.¹⁰⁵ In particular, it noted that, if the panels had followed the restrictive interpretation advanced by Mr Gucati, it would mean that only persons who have information that relates to the actual obstruction could be intimidated, rather than those with information about the criminal proceedings.¹⁰⁶ The Supreme Court panel was of the view that Mr Gucati's interpretation was contrary to the intent and purpose of Article 387 of the KCC, as well as the existing practice before Kosovo courts.¹⁰⁷ It accordingly found that there had been no violation of the criminal law in this respect and dismissed Mr Gucati's complaint.¹⁰⁸

3. Violating the secrecy of proceedings through unauthorised revelation of the identities and personal data of protected witnesses

52. Before the Supreme Court panel, the Applicant further contended that the trial panel's definition of "a protected person", as upheld by the appeals panel, conflated Article 62 of the Law, which grants confidentiality to the identity and personal data of individuals within the records of the SC or SPO, with protected status under Article 23 of the Law, and Article 3(1.3) of the Law on Witness Protection, Law No. 04/L-015, thus entailing a violation of the criminal law.¹⁰⁹

¹⁰³ Decision on protection of legality, para. 56.

¹⁰⁴ KSC-SC-2023-01, F00002/RED, Public redacted version of Gucati request for protection of legality pursuant to Article 48(6) to (8) of the Law and Rule 193 of the Rules, public, 3 May 2023 ("Gucati protection of legality request"), paras 24-37, 44, 47.

¹⁰⁵ Decision on protection of legality, paras 60-61.

¹⁰⁶ Decision on protection of legality, para. 60.

¹⁰⁷ Decision on protection of legality, para. 60.

¹⁰⁸ Decision on protection of legality, paras 61, 65.

¹⁰⁹ Haradinaj protection of legality request, paras 2(c), 35-41; Haradinaj protection of legality reply, paras 17-19.

53. The Supreme Court panel noted that the Applicant had not properly articulated these arguments before the court of appeals panel, even though he could have reasonably done so.¹¹⁰ The Supreme Court panel further considered that the alleged violation did not amount to any of the violations enumerated in the standard of review,¹¹¹ and summarily dismissed the Applicant's complaint in this regard as inadmissible.¹¹²

54. Likewise, since Mr Gucati's arguments as to the misapplication of Article 392(2) of the KCC were related to the evidentiary findings of the trial panel, as upheld by the appeals panel,¹¹³ and were thus factual in nature, the Supreme Court panel summarily dismissed them as inadmissible.¹¹⁴

4. Defence of entrapment by SPO

55. As regards the defence of entrapment by the SPO, the Applicant claimed that the trial panel and appeals panel violated his rights under Article 6 of the Convention by requiring him to provide *prima facie* evidence of entrapment.¹¹⁵ The Applicant also submitted that his lack of access to certain evidence available to both the trial panel and the SPO compounded this violation, and that he was further prevented from appealing this before a Court of Appeals panel.¹¹⁶ Additionally, the Applicant argued that, as a result, there had been a substantial violation of his right to a fair hearing under Article 21(2) of the Law.¹¹⁷

56. The Supreme Court panel held that the appeals panel correctly applied the case law of the ECtHR when it found that the trial panel had not reversed the burden of

¹¹⁰ Decision on protection of legality, paras 81-82.

¹¹¹ Decision on protection of legality, para. 82.

¹¹² Decision on protection of legality, para. 83.

¹¹³ Gucati protection of legality request, paras 81-95.

¹¹⁴ Decision on protection of legality, para. 80

¹¹⁵ Haradinaj protection of legality request, paras 2(e), 60-66; Haradinaj protection of legality reply, paras 24-27.

¹¹⁶ Haradinaj protection of legality request, paras 67-69; Haradinaj protection of legality reply, para. 28.

¹¹⁷ Haradinaj protection of legality request, para. 66.

proof in relation to the Applicant's claim of entrapment by the SPO.¹¹⁸ In particular, the Supreme Court panel noted that the ECtHR's case law reflects that there must be some evidence, which on its face, demonstrates that the situation in question can be characterised as entrapment, and that if a party cannot provide any such evidence, the entrapment claim is considered wholly improbable.¹¹⁹ It further held that, in the absence of any indication as to the SPO's involvement in the three deliveries of confidential documents to the KLA WVA, the Applicant's case was not an entrapment case in the sense of the ECtHR case law.¹²⁰

57. Lastly, the Supreme Court panel observed that, even in the absence of *prima facie* evidence as to SPO involvement in the commission of the offences, the trial panel nevertheless went to great lengths to afford the Applicant the opportunity to present his entrapment claims.¹²¹ Thus, the Supreme Court panel found that the Applicant failed to demonstrate that there had been a substantial violation of the procedure of the Rules or the Law, dismissing his complaint accordingly.¹²²

5. Public interest defence

58. The Applicant submitted that his right to a fair hearing within the meaning of Article 21(2) of the Law was violated as a result of the appeals panel's failure to find an error as regards the findings of the trial panel on the public interest defence.¹²³ In particular, the Applicant maintained that the trial panel's narrow definition of public interest failed to take account of additional elements undermining the independence, impartiality and integrity of the investigations, such as the stance that Serbia has taken

¹¹⁸ Decision on protection of legality, para. 91.

¹¹⁹ Decision on protection of legality, para. 92.

¹²⁰ Decision on protection of legality, para. 94.

¹²¹ Decision on protection of legality, para. 95.

¹²² Decision on protection of legality, para. 96.

¹²³ Haradinaj protection of legality request, paras 2(g), 75; Haradinaj protection of legality reply, para. 35.

over the years towards Kosovo, and the volume of contacts between the SITF/SPO and Serbian officials, some of whom served in the Milošević regime.¹²⁴

59. The Supreme Court panel noted that the Applicant neither identified the procedural rule alleged to have been substantially violated, nor set forth how the alleged procedural violation materially affected the appeal judgment.¹²⁵ Moreover, the Supreme Court panel found that the Applicant's arguments were factual in nature, as they concerned his disagreement with the assessment of the trial and appeals panels.¹²⁶ It therefore summarily dismissed the Applicant's complaint as inadmissible.¹²⁷

E. COMMUTATION OF SENTENCE

60. On 12 December 2023, the President of the SC decided to modify the Applicant's sentence to provide for his release under certain conditions set forth in the decision, which would continue to apply for the remainder of the duration of the sentence imposed by the appeals panel, namely until 24 December 2024.¹²⁸ The Applicant was released on 14 December 2023.

III. ALLEGED VIOLATIONS

61. The Applicant complained before the Chamber that he was found guilty under unjustifiably broad interpretations of Articles 401(1), 387 and 392(2) of the KCC, which were such that his actions did not constitute criminal offences under these provisions at the time that they were committed.¹²⁹ The Applicant asserted, therefore, that the criminal chambers' interpretation of the above-mentioned provisions was in breach of Article 33(1) of the Constitution and Article 7 of the Convention.¹³⁰

¹²⁴ Haradinaj protection of legality request, para. 75; Haradinaj protection of legality reply, para. 35.

¹²⁵ Decision on protection of legality, para. 124.

¹²⁶ Decision on protection of legality, para. 124.

¹²⁷ Decision on protection of legality, para. 125.

¹²⁸ KSC-SC-2023-01/CS002, F00005, Decision on modification of sentence, public, 12 December 2023, paras 21-22, 25.

¹²⁹ Referral, paras 2(a), 28, 34-40, 42-43, 47-48, 50.

¹³⁰ Referral, para. 2(a).

62. Further, the Applicant complained that he was subject to entrapment by the SPO to commit the offences he was convicted for. In particular, the Applicant claimed that the criminal chambers erred in the legal standard applied, and reversed the burden of proof with respect to the Applicant's entrapment claim.¹³¹ He further claimed that certain evidence allegedly proving the entrapment claim was not disclosed at trial.¹³² The Applicant alleged a violation of his right to a fair trial under Article 31(2) of the Constitution and Article 6(1) of the Convention as a result.¹³³

63. Lastly, the Applicant complained that the criminal chambers' failure to exclude his criminal responsibility on the basis of considerations of public interest amounted to a violation of his right to freedom of expression under Article 40 of the Constitution and Article 10 of the Convention.¹³⁴

IV. JURISDICTION

64. The Chamber observes that the Applicant filed the Referral under Article 113(7) of the Constitution and raised complaints in relation to the proceedings against him, which took place before the SC. The Referral therefore relates to the SC and the SPO, as required by Article 162(3) of the Constitution and Articles 3(1) and 49(2) of the Law. It follows that the Chamber has jurisdiction to rule on the Referral.

V. SCOPE OF REVIEW

65. The Chamber recalls, at the outset, its supervisory function as regards the work of the SC and the SPO insofar as fundamental rights and freedoms guaranteed by the Constitution are concerned.¹³⁵ Pursuant to Article 49(1) of the Law, the Chamber shall

¹³¹ Referral, paras 54-58, 62.

¹³² Referral, paras 59-65.

¹³³ Referral, paras 2(b), 66.

¹³⁴ Referral, paras 2(c), 67-83.

¹³⁵ See, similarly, KSC-CC-2019-05, F00012, Decision on the referral of Mahir Hasani concerning prosecution order of 20 December 2018, public, 20 February 2019 (*"Decision on M. Hasani referral concerning SPO order"*), para. 24.

be the final authority on the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the SC and the SPO.

66. As regards the fundamental rights and freedoms guaranteed by Chapter II of the Constitution, the Chamber notes that, by virtue of Article 22(2) of the Constitution, the guarantees set forth in the Convention apply at the constitutional level.¹³⁶ Indeed, the Kosovo Constitutional Court has reiterated that the rights and freedoms guaranteed by the international instruments enumerated in Article 22 of the Constitution “have the status of norms of constitutional rank and are an integral part of the Constitution, in the same way as all other provisions contained in the Constitution”.¹³⁷ The Chamber recalls in this regard that the Applicant’s complaints relate to Articles 33(1), 31(2) and 40 of the Constitution, and Articles 7, 6(1) and 10 of the Convention. Therefore, the Chamber finds that the Referral falls to be considered under Articles 33(1), 31(2) and 40 of the Constitution, and Articles 7, 6(1) and 10 of the Convention.¹³⁸

67. Concerning the assessment of the Referral, the Chamber notes that, pursuant to Article 53 of the Constitution, human rights and fundamental freedoms guaranteed by the Constitution “shall be interpreted consistent with the court decisions of the [ECtHR]”. Further, the Kosovo Constitutional Court has consistently recognised the application of Article 53 of the Constitution in its review of constitutional referrals.¹³⁹

¹³⁶ See, for example, KSC-CC-2022-13, F00010; KSC-CC-2022-14, F00009, Decision on the referral of Jakup Krasniqi concerning the legality of charging joint criminal enterprise and the referral of Kadri Veseli concerning decision of the appeals panel on challenges to the jurisdiction of the Specialist Chambers, public, 13 June 2022 (“*Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*”), para. 34, with further references to case law.

¹³⁷ Kosovo, Constitutional Court, *Constitutional review of judgments [A.A.U.ZH. no. 20/2019 of 30 October 2019; and A.A.U.ZH. no. 21/2019, of 5 November 2019] of the Supreme Court of the Republic of Kosovo*, KI 207/19, Judgment, 10 December 2020 (5 January 2021), para. 111.

¹³⁸ *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 35.

¹³⁹ See, for example, Kosovo, Constitutional Court, *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017*, KI 37/18, Resolution on inadmissibility, 30 May 2018 (11 June 2018), para. 37; *Constitutional review of decision Pn II no. 1/17 of the Supreme Court of Kosovo of 30 January 2017 related to the decision Pml no. 300/16 of the Supreme Court of 12 December 2016*, KI 62/17, Judgment, 29 May 2018 (11 June 2018), para. 43; *Request for constitutional review of judgment Pml no. 225/2017 of the Supreme Court of 18 December 2017*, KI 34/18, Resolution on inadmissibility, 23 May 2018 (11 June 2018), para. 41.

It has also stated that “the Constitutional Court *is bound* to interpret human rights and fundamental freedoms consistent with the court decisions of the [ECtHR]”.¹⁴⁰ In that light, and given Articles 22(2) and 53 of the Constitution, this Chamber has particular regard to the jurisprudence of the ECtHR in its review of the Applicant’s Referral.¹⁴¹

68. Lastly, the Chamber recalls that its task, under Article 113(7) of the Constitution and Article 49(1) and (3) of the Law, is to assess whether the irregularities complained of by the Applicant violated his individual rights and freedoms as guaranteed by the Constitution.¹⁴² Accordingly, the Chamber does not decide on the Applicant’s guilt or innocence.¹⁴³ Likewise, it is not the Chamber’s role to decide whether the findings of the criminal chambers were correct in terms of facts or law.¹⁴⁴ Otherwise, it would be acting as an appeal chamber, which would be to disregard the limits imposed on its jurisdiction pursuant to Articles 113 and 162(3) of the Constitution.¹⁴⁵

69. The Chamber may only question such findings where they are flagrantly and manifestly arbitrary, in a manner that gives rise in itself to a violation of fundamental rights and freedoms guaranteed by the Constitution.¹⁴⁶ For instance, but not limited

¹⁴⁰ See Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 181/15 of the Supreme Court of the Republic of Kosovo of 6 November 2015*, KI 43/16, Resolution on inadmissibility, 14 April 2016 (16 May 2016), para. 50 (emphasis added).

¹⁴¹ See, similarly, *Decision on M. Hasani referral concerning SPO order*, para. 26.

¹⁴² KSC-CC-2022-15, F00010, Decision on the referral of Hashim Thaçi concerning the right to an independent and impartial tribunal established by law and to a reasoned opinion, public, 13 June 2022 (“*Decision on H. Thaçi referral concerning jurisdictional challenge*”), para. 41; Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 19/2022 of the Supreme Court of 15 February 2022*, KI 74/22, Judgment, 7 November 2023 (5 December 2023), para. 72.

¹⁴³ *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 41; Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 224/220 of the Supreme Court of Kosovo of 17 September 2020*, KI 31/21, Resolution on inadmissibility, 5 May 2021 (21 May 2021), para. 35.

¹⁴⁴ KSC-CC-2020-08, F00020/RED, Public redacted version of decision on the referral of [REDACTED] further to a decision of the Single Judge, public, 20 April 2020 (“*Decision concerning single judge decision*”), para. 36. See also Kosovo, Constitutional Court, KI 31/21, cited above, paras 35-36.

¹⁴⁵ *Decision concerning single judge decision*, para. 36; Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 41/2017 of the Supreme Court of the Republic of Kosovo of 3 July 2017*, KI 119/17, Resolution on inadmissibility, 3 April 2019 (3 May 2019), para. 87. See also ECtHR, *Kemmache v. France (no. 3)*, no. 17621/91, 24 November 1994, para. 44.

¹⁴⁶ *Decision concerning single judge decision*, para. 36; ECtHR, *De Tommaso v. Italy [GC]*, no. 43395/09, 23 February 2017, para. 170; Kosovo, Constitutional Court, KI 37/18, cited above, para. 41.

to, this may occur in situations of manifest errors of assessment that no reasonable court could have ever made,¹⁴⁷ unreasonable conclusions regarding the facts that are so striking and palpable on the face of it that a court's findings could be seen as grossly arbitrary,¹⁴⁸ or manifestly erroneous interpretation and application of the relevant law or reasoning that has no legal foundation or is so palpably incorrect that it may be construed as grossly arbitrary or as amounting to a denial of justice.¹⁴⁹

VI. ADMISSIBILITY

70. The Chamber must first ascertain whether the various complaints raised by the Applicant are admissible.¹⁵⁰ This follows from Article 113(1) of the Constitution, pursuant to which the Chamber decides only on matters "referred to [it] in a legal manner by authorised parties".¹⁵¹ Furthermore, Rule 15(1) of the SCCC Rules provides that the Chamber shall decide on "the admissibility and/or the merits of a referral made under Article 49 of the Law". These provisions provide for the Chamber's responsibility to first determine, *ex officio*, whether the Referral is admissible or not.¹⁵²

¹⁴⁷ ECtHR, *Dulaurans v. France*, no. 34553/97, 21 March 2000, paras 33-39. See also ECtHR, *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, 5 February 2015, para. 62.

¹⁴⁸ ECtHR, *Khamidov v. Russia*, no. 72118/08, 15 November 2007, paras 170-175.

¹⁴⁹ ECtHR, *Anđelković v. Serbia*, no. 1401/08, 9 April 2013, paras 24-29; *Bochan v. Ukraine (no. 2)* [GC], cited above, paras 60-65.

¹⁵⁰ KSC-CC-2023-21, F00006, Decision on the referral of Pjetër Shala to the Constitutional Court Panel concerning the violation of Mr Shala's fundamental rights guaranteed by Articles 31, 32, and 54 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, public, 29 August 2023 ("*Decision on P. Shala referral concerning admissibility of prior statements*"), para. 19. See also *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 36.

¹⁵¹ See *Decision on P. Shala referral concerning admissibility of prior statements*, para. 19; KSC-CC-2022-19, F00004/RED, Public redacted version of the decision on the referral of Pjetër Shala concerning fundamental rights guaranteed by Articles 31 and 32 of the Kosovo Constitution and Articles 6 and 13 of the European Convention on Human Rights, public, 15 December 2022 ("*Decision on P. Shala referral concerning disqualification request*"), para. 14. See also Kosovo, Constitutional Court, *Constitutional review of decision Ae no. 287/18 of the Court of Appeals of 27 May 2019 and decision I.EK. no. 330/2019 of the Basic Court in Prishtina, Department for Commercial Matters, of 1 August 2019*, KI 195/19, Judgment, 5 May 2021 (31 May 2021), paras 68-69; *Constitutional review of decision Pml no. 313/2018 of the Supreme Court of 10 December 2018*, KI 12/19, Resolution on inadmissibility, 10 April 2019 (3 May 2019), paras 30-31.

¹⁵² *Decision on P. Shala referral concerning admissibility of prior statements*, para. 19; *Decision on P. Shala referral concerning disqualification request*, para. 14; *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 43.

71. The Chamber therefore turns to the question of admissibility in light of certain admissibility requirements provided for in the Constitution, the Law, and the SCCC Rules, which arise in the present proceedings. Considering that the Applicant raised several complaints in the Referral, the admissibility is examined for each complaint separately.

A. ALLEGED VIOLATION OF ARTICLE 33(1) OF THE CONSTITUTION AND ARTICLE 7 OF THE CONVENTION

1. Submissions

72. The Applicant argued at the outset that, by filing the request for protection of legality, which was dismissed on 18 September 2023 by the Supreme Court panel, the requirement set out in Article 113(7) of the Constitution, to exhaust all the effective remedies provided for by law, had been met.¹⁵³ The Applicant further submitted that, since referrals to the Chamber address matters of special legal importance, a failure to bring these arguments to the attention of the criminal chambers at an earlier stage should not impede their proper consideration on the merits.¹⁵⁴

73. As to the alleged violation of Article 33(1) of the Constitution and Article 7 of the Convention,¹⁵⁵ the Applicant contended that the criminal chambers' interpretation of Articles 401(1), 387, and 392(2) of the KCC substantially broadened the meaning of these provisions by finding that: (i) use of force or serious threat against third parties is sufficient to meet the *actus reus* and intent for the offence under Article 401(1) of the KCC;¹⁵⁶ (ii) the phrase "when such information relates to obstruction of criminal proceedings" only qualifies the third of the three alternative acts and omissions under Article 387 of the KCC, rather than all of them;¹⁵⁷ and (iii) a "person under protection

¹⁵³ Referral, para. 22.

¹⁵⁴ Referral, para. 26.

¹⁵⁵ Referral, para. 2(a).

¹⁵⁶ Referral, paras 34-40, 50.

¹⁵⁷ Referral, paras 42-43, 50.

in the criminal proceedings” within the meaning of Article 392(2) of the KCC could be anyone subject to measures of protection adopted by the SPO, as well as a person whose identity or personal data appears in SC or SPO documents or records the disclosure of which has not been authorised.¹⁵⁸

74. In this respect, the Applicant also argued that, for the reasons given at the outset, the Chamber should not dismiss his allegations as regards Articles 387 and 392(2) of the KCC on grounds that they had not been raised before the appeals panel, as the Supreme Court panel did.¹⁵⁹

75. The SPO submitted that, to exhaust remedies, applicants must take advantage of all effective procedural avenues available to them prior to submitting a referral to the Chamber.¹⁶⁰ The SPO argued that an applicant’s hope of benefitting from arguments made by others does not discharge his or her obligation to pursue remedies either jointly or separately from them.¹⁶¹ The SPO contended that failing to raise arguments that could have been raised before the criminal chambers amounted to a failure to exhaust remedies, and constituted grounds for declaring a referral, or part thereof, inadmissible.¹⁶² The SPO further submitted that the Applicant’s allegations in relation to Article 401(1) of the KCC were inadmissible, as he merely expressed dissatisfaction with the criminal chambers’ legal interpretation.¹⁶³

76. According to the SPO, the Applicant’s arguments in relation to Article 387 of the KCC should similarly be dismissed as inadmissible for failure to exhaust remedies.¹⁶⁴ The SPO also contended that the Applicant’s allegations in relation to Article 392(2) of the KCC were time-barred, since they were raised in a manifestly ineffective manner

¹⁵⁸ Referral, paras 47-48, 50.

¹⁵⁹ Referral, paras 44, 49.

¹⁶⁰ SPO submissions, para. 14.

¹⁶¹ SPO submissions, para. 14.

¹⁶² SPO submissions, para. 14.

¹⁶³ SPO submissions, paras 15, 19.

¹⁶⁴ SPO submissions, para. 22.

before the Supreme Court panel.¹⁶⁵ Lastly, it argued that the legal interpretations at issue were in full conformity with the Constitution and the Convention.¹⁶⁶

77. In reply, the Applicant submitted that the requirement to exhaust remedies is neither absolute nor capable of being applied automatically.¹⁶⁷ In particular, he argued that, according to the ECtHR case of *Vladimir Romanov v. Russia*,¹⁶⁸ failures in formal procedure do not amount to non-exhaustion of remedies where the domestic courts nevertheless examined the substance of an applicant's complaint.¹⁶⁹ As regards, more specifically, the admissibility of his arguments on the interpretation of Article 401(1) of the KCC, the Applicant relied on the ECtHR case of *Vasiliauskas v. Lithuania* [GC],¹⁷⁰ arguing that the Chamber's powers of review are greater when the Convention right itself, namely Article 7 in his case, requires that there was a legal basis for a conviction and sentence.¹⁷¹

78. In relation to his arguments on the interpretation of Article 387 of the KCC, the Applicant indicated that the Supreme Court panel examined the substance thereof in the context of similar arguments raised by Mr Gucati, and contended that he should therefore not be precluded from raising them before the Chamber.¹⁷² The Applicant further claimed that, since the appeals panel had examined the statutory construction of Article 392(2) of the KCC in relation to Mr Gucati, the Supreme Court panel erred in dismissing his argument as inadmissible.¹⁷³ Accordingly, the Applicant argued that he should not be disqualified from raising the same allegation before this Chamber.¹⁷⁴

¹⁶⁵ SPO submissions, paras 13, 26.

¹⁶⁶ SPO submissions, paras 18-21, 24-25, 27-29.

¹⁶⁷ Applicant submissions, para. 12.

¹⁶⁸ See Applicant submissions, para. 12, referring to ECtHR, *Vladimir Romanov v. Russia*, no. 41461/02, 24 July 2008, para. 52.

¹⁶⁹ Applicant submissions, para. 12.

¹⁷⁰ Applicant submissions, para. 16, referring to ECtHR, *Vasiliauskas v. Lithuania* [GC], no. 35343/05, 20 October 2015, para. 161.

¹⁷¹ Applicant submissions, paras 16-17.

¹⁷² Applicant submissions, para. 20.

¹⁷³ Applicant submissions, para. 27.

¹⁷⁴ Applicant submissions, para. 27.

2. Chamber's Assessment

79. At the outset, the Chamber observes that the Applicant raised three separate allegations with respect to his complaint under Article 33(1) of the Constitution and Article 7 of the Convention. In particular, the Applicant complained that, by virtue of the interpretation given to Articles 401(1), 387, and 392(2) of the KCC, respectively, the criminal chambers substantially broadened the meaning of these provisions. Given, however, that the Applicant appears to have failed to raise some of these arguments before the criminal chambers at various stages of the criminal proceedings against him, the question arises whether the Applicant has exhausted all effective remedies provided for by law in relation to his allegations regarding the interpretation of Articles 387 and 392(2) of the KCC by the criminal chambers. The Chamber observes in this respect that, pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, as well as Rule 20(1)(a) of the SCCC Rules, an individual may make a referral to the Chamber only after exhausting all the effective remedies provided for by law against the alleged violation.

80. The Chamber first recalls that the exhaustion rule is meant to afford the relevant authorities the opportunity to prevent or put right the alleged violations of the Constitution and/or Convention.¹⁷⁵ This is based on the assumption, reflected in Article 32 of the Constitution and Article 13 of the Convention, that the relevant legal

¹⁷⁵ See, for example, Kosovo, Constitutional Court, *Constitutional review of decision [KPK/no. 475/2022] on proposal of Mr Blerim Isufaj for the position of the Chief State Prosecutor of 6 April 2022 of Kosovo Prosecutorial Council and decision [KPK/no. 474/2022] on rejection of the Report of 6 April 2022 of the Review Commission of the Kosovo Prosecutorial Council*, KI 57/22 and KI 79/22, Resolution on inadmissibility, 4 July 2022 (25 July 2022), para. 70; *Request for constitutional review of decision no. 64/04 of the Civil Registration Agency of 13 June 2018*, KI 108/18, Resolution on inadmissibility, 5 September 2019 (30 September 2019), para. 153; *Constitutional review of decision PA-II-KZ-II-7/15 of the Supreme Court of Kosovo of 26 November 2015*, KI 15/16, Resolution on inadmissibility, 16 March 2016 (5 April 2016), para. 41. Similarly, see ECtHR, *Gherghina v. Romania* (dec.) [GC], no. 42219/07, 9 July 2015, paras 83-84, with further references to case law.

order will provide an effective remedy for violations of constitutional rights.¹⁷⁶ Within the SC's legal framework, this is secured, in principle, through the criminal chambers. The requirement that all legal remedies be exhausted is an important aspect of the subsidiary nature of the machinery for the protection of constitutional rights, and an indispensable part of the functioning thereof.¹⁷⁷ Therefore, those who wish to invoke the supervisory jurisdiction of the Chamber are obliged to first make normal use of remedies that are available and effective in respect of their constitutional grievances.¹⁷⁸

81. More specifically, the Chamber notes that, within the SC's legal framework, Article 47 of the Law provides that a Supreme Court panel shall, in certain specifically enumerated instances, hear appeals against a judgment of a Court of Appeals panel. In accordance with Article 48(6)-(7) of the Law, in case of a final judgment, a request for protection of legality may be lodged before a Supreme Court panel with respect to a violation of the criminal law contained within the Law, or a substantial violation of the procedures set out in the Law and the Rules.¹⁷⁹ Accordingly, a request for protection of legality is one of the remedies that would need to be considered, in principle, to determine whether all remedies have been exhausted with respect to the alleged violations, which concern the criminal proceedings against the Applicant that took place before the SC.¹⁸⁰

¹⁷⁶ Kosovo, Constitutional Court, KI 57/22 and KI 79/22, cited above, para. 70; KI 108/18, cited above, para. 153; KI 15/16, cited above, para. 41. See also ECtHR, *Gherghina v. Romania* (dec.) [GC], cited above, para. 83.

¹⁷⁷ Kosovo, Constitutional Court, KI 57/22 and KI 79/22, cited above, para. 71; KI 108/18, cited above, para. 153; KI 15/16, cited above, para. 42. See also ECtHR, *Gherghina v. Romania* (dec.) [GC], cited above, para. 83; *Demopoulos and Others v. Turkey* (dec.) [GC], no. 46113/99, 1 March 2010, para. 69.

¹⁷⁸ Kosovo, Constitutional Court, KI 108/18, cited above, para. 154. See also ECtHR, *Gherghina v. Romania* (dec.) [GC], cited above, para. 85; *Akdivar and Others v. Turkey* [GC], no. 21893/93, 16 September 1996, para. 66.

¹⁷⁹ See, similarly, *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 56; *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 66.

¹⁸⁰ See *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 56; *Decision on H. Thaçi referral concerning jurisdictional challenge*, para. 67. See also, among others, Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 242/2017 of the Supreme Court of Kosovo of 30 April 2018*, KI 01/19, Resolution on inadmissibility, 2 September 2020 (1 October 2020), paras 2, 31-41, 91-93; *Constitutional review of judgment Pml no. 247/2017 of the Supreme Court of Kosovo of 6 February 2018*, KI 95/18, Resolution

82. The Chamber recalls that the criteria on whether the obligation to exhaust all effective remedies provided for by law has been met are well established in the case law of the ECtHR, in accordance with which, based on Article 53 of the Constitution, the Chamber is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution.¹⁸¹ The same principles are also developed in the case law of the Kosovo Constitutional Court.¹⁸² The Chamber thus refers to the case law of the ECtHR and the Kosovo Constitutional Court as regards the requirement of exhaustion of remedies.¹⁸³

83. The Chamber also notes in this respect that the mere fact that an applicant has submitted his or her case to the relevant court does not in itself constitute compliance with Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.¹⁸⁴ Thus, to properly exhaust remedies, an applicant must actually have complained, expressly or in substance, about a violation of the Constitution or the Convention, in a manner which leaves no doubt that the same complaint which was submitted to the Chamber had indeed been previously raised before the relevant authorities, namely the criminal chambers in this context.¹⁸⁵

84. While the exhaustion rule must be applied with some degree of flexibility and without excessive formalism, it normally requires that the complaints brought before the Chamber should have been made to the relevant courts, at least in substance and

on inadmissibility, 27 May 2019 (19 August 2019), paras 3, 12-17, 22; *Constitutional review of judgment of the Supreme Court of the Republic of Kosovo, Pml 125/14, dated 8 July 2014*, KI 185/14, Resolution on inadmissibility, 8 July 2015 (28 September 2015), paras 2, 12-13, 21, 29.

¹⁸¹ See above, para. 67. See, similarly, Kosovo, Constitutional Court, KI 57/22 and KI 79/22, cited above, para. 69.

¹⁸² See, among others, Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 63/2018 of the Supreme Court of the Republic of Kosovo of 4 June 2018*, KI 155/18, Resolution on inadmissibility, 25 September 2019 (21 October 2019), paras 34-38; KI 119/17, cited above, paras 71-73.

¹⁸³ Kosovo, Constitutional Court, KI 119/17, cited above, para. 70.

¹⁸⁴ See, for example, ECtHR, *Novak v. Croatia* (dec.), no. 20737/15, 16 March 2021, para. 23.

¹⁸⁵ ECtHR, *Farzaliyev v. Azerbaijan*, no. 29620/07, 28 May 2020, para. 55; *Nicklinson and Lamb v. the United Kingdom* (dec.), nos 2478/15 and 1787/15, 23 June 2015, para. 90; *Merot d.o.o and Storitve Tir d.o.o v. Croatia* (dec.), nos 29426/08 and 29737/08, 10 December 2013, para. 36. See also Kosovo, Constitutional Court, KI 119/17, cited above, paras 72-73.

in compliance with the formal requirements and time-limits laid down in the Law and the Rules.¹⁸⁶ Pursuant to the case-law of the ECtHR, this means that an applicant must raise legal arguments to the same or like effect on the basis of the applicable law, in order to give the criminal chambers the opportunity to redress the alleged breach.¹⁸⁷ The Chamber notes that this requires taking into account not only the facts, but also an applicant's legal arguments.¹⁸⁸

85. In this connection, the Chamber further notes that, in line with the ECtHR case law, the exhaustion rule cannot be held against an applicant if, in spite of the latter's failure to observe the forms prescribed by law, the relevant authority has nevertheless examined the substance of his or her claim.¹⁸⁹ Moreover, the Chamber observes that, when reviewing whether the exhaustion rule has been observed, it is essential to have regard to the circumstances of the individual case.¹⁹⁰ More specifically, the Chamber must take realistic account not only of existing formal remedies in the relevant legal framework, but also of the general context in which they operate, and the personal circumstances of an applicant.¹⁹¹

86. The Chamber must therefore ascertain whether, in the circumstances of the case, an applicant did everything that could be reasonably expected of him or her to exhaust legal remedies.¹⁹² The Chamber notes that an applicant may only be exempt from this

¹⁸⁶ See, for example, ECtHR, *Nicklinson and Lamb v. the United Kingdom* (dec.), cited above, para. 90; *Kaya v. Germany* (dec.), no. 31753/02, 11 May 2006, p. 8. See also Kosovo, Constitutional Court, KI 119/17, cited above, para. 71.

¹⁸⁷ ECtHR, *Novak v. Croatia* (dec.), cited above, para. 24.

¹⁸⁸ ECtHR, *Radomilja and Others v. Croatia* [GC], nos 37685/10 and 22768/12, 20 March 2018, para. 117; *Novak v. Croatia* (dec.), cited above, para. 24.

¹⁸⁹ See, among others, ECtHR, *Savickis and Others v. Latvia* [GC], no. 49270/11, 9 June 2022, para. 140; *Ulemek v. Croatia*, no. 21613/16, 31 October 2019, para. 77; *Vladimir Romanov v. Russia*, cited above, para. 52; *Kaya v. Germany* (dec.), cited above, p. 8.

¹⁹⁰ ECtHR, *Vladimir Romanov v. Russia*, cited above, para. 50; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, 13 November 2007, para. 116; *Akdivar and Others v. Turkey* [GC], cited above, para. 69.

¹⁹¹ ECtHR, *D.H. and Others v. the Czech Republic* [GC], cited above, para. 116; *Akdivar and Others v. Turkey* [GC], cited above, para. 69. See also Kosovo, Constitutional Court, KI 108/18, para. 155.

¹⁹² ECtHR, *D.H. and Others v. the Czech Republic* [GC], cited above, para. 116; *Akdivar and Others v. Turkey* [GC], cited above, para. 69. See also Kosovo, Constitutional Court, KI 108/18, para. 159.

requirement if he or she can show that the remedy was for some reason inadequate and ineffective in the particular circumstances of the case, or if there existed special circumstances relieving him or her from this obligation.¹⁹³

87. Turning to the Applicant's allegation as regards the interpretation given by the criminal chambers to Article 387 of the KCC, the Chamber observes that, while the Applicant, assisted by a lawyer of his choice, had announced in his notice of appeal his intent to challenge the trial panel's interpretation of the scope of the phrase "when such information relates to obstruction of criminal proceedings" under Article 387 of the KCC, he ultimately abandoned this ground of appeal in his appeal brief.¹⁹⁴ The Chamber is further mindful that, as a result, and by virtue of its strict admissibility requirements,¹⁹⁵ the Supreme Court panel, observing that the Applicant could have reasonably pursued such arguments before the appeals panel, summarily dismissed as inadmissible the Applicant's request for protection of legality as regards the legal interpretation of Article 387 of the KCC.¹⁹⁶

88. While it may be true that the Supreme Court panel examined the substance of Mr Gucati's arguments on the legal interpretation of Article 387 of the KCC,¹⁹⁷ raised in due form in his request for protection of legality, the Chamber notes that this was the substance of Mr Gucati's arguments, and not that of the Applicant's which were explicitly rejected for his failure to observe formal requirements.¹⁹⁸

89. In this regard, the Chamber is mindful that, while the Applicant's arguments were similar to those raised by Mr Gucati and examined by the Supreme Court panel,

¹⁹³ See, among others, ECtHR, *Gherghina v. Romania* (dec.) [GC], cited above, para. 89; *Vučković and Others v. Serbia* [GC], no. 17153/11, 25 March 2014, para. 77. See also Kosovo, Constitutional Court, KI 108/18, paras 158, 160.

¹⁹⁴ See above, para. 36.

¹⁹⁵ Decision on protection of legality, paras 9-10.

¹⁹⁶ See above, para. 50.

¹⁹⁷ See above, paras 50-51.

¹⁹⁸ Cf. ECtHR, *Ulemek v. Croatia*, cited above, para. 77.

they were not identical.¹⁹⁹ Indeed, in some respects, the Applicant advanced different arguments in support of his position on the legal interpretation of Article 387 of the KCC,²⁰⁰ which are the same as those he raised in his Referral.²⁰¹ Therefore, the Supreme Court panel did not examine the exact substance of the claim that the Applicant brought before the Chamber.²⁰² The Chamber thus considers that the Applicant cannot claim to benefit from the examination of the substance of Mr Gucati's arguments by the Supreme Court panel.

90. Likewise, the Chamber pays close attention to the fact that the Applicant has not provided any explanation as to why he failed to properly pursue his arguments on Article 387 of the KCC before the appeals panel and, subsequently, the Supreme Court panel. The Chamber further notes that there is no indication that these legal remedies were, for some reason, inadequate and ineffective in the particular circumstances of the case. Rather, in the eyes of the Chamber, the fact that the appeals panel and the Supreme Court panel properly engaged with the substance of the arguments raised by Mr Gucati demonstrates otherwise.²⁰³

91. There is thus no basis to suggest that the decision of the Supreme Court panel would have been the same had the Applicant observed the formal requirements and provided the Supreme Court panel with the opportunity to consider his arguments.²⁰⁴ Similarly, the Applicant did not invoke, nor does the Chamber observe any special circumstances relieving the Applicant from his obligation to avail himself of the effective remedies provided for by law.²⁰⁵

¹⁹⁹ Compare Haradinaj protection of legality request, paras 2(b), 21-30 with Gucati protection of legality request, paras 24-37, 44, 47.

²⁰⁰ See, for example, Haradinaj protection of legality request, para. 27.

²⁰¹ Compare Haradinaj protection of legality request, paras 2(b), 21-30 with Referral, para. 42.

²⁰² ECtHR, *Savickis and Others v. Latvia* [GC], cited above, para. 140.

²⁰³ ECtHR, *P.C. v. Ireland*, no. 26922/19, 1 September 2022, para. 107. See also Kosovo, Constitutional Court, KI 108/18, cited above, paras 166-178.

²⁰⁴ Cf. ECtHR, *Paketova and Others v. Bulgaria*, nos 17808/19 and 36972/19, 4 October 2022, para. 128; *D.H. and Others v. the Czech Republic* [GC], cited above, para. 122.

²⁰⁵ Cf. ECtHR, *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, paras 43-55.

92. In light of the above, the Chamber is of the view that, while the Applicant sought to exhaust an otherwise effective remedy, it was through his own negligence that he failed to observe the formal requirements for lodging a request for protection of legality. Thus, in accordance with the settled criteria developed in the case law of the ECtHR and the Kosovo Constitutional Court, as set out in paragraphs 80-86 above, the Chamber finds that the Applicant's allegation as regards the legal interpretation of Article 387 of the KCC is inadmissible for failure to exhaust remedies and that, in line with Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules, it must be rejected.

93. As regards the Applicant's allegation concerning the interpretation given by the criminal chambers to Article 392(2) of the KCC, the Chamber notes that, as a result of the Applicant's failure to set out in his appeal brief all the arguments and authorities in support of his ground of appeal concerning the legal interpretation of Article 392(2) of the KCC, the appeals panel summarily dismissed his appeal in this regard as unsubstantiated.²⁰⁶ The Chamber further notes that it was primarily for this reason that the Supreme Court panel also summarily dismissed the Applicant's arguments in relation to Article 392(2) of the KCC.²⁰⁷

94. The Chamber recalls that it is not its task to deal with errors of facts or law allegedly committed by the criminal chambers, unless and insofar as they may have infringed rights and freedoms guaranteed by the Constitution. The Chamber limits itself to note that, contrary to the Applicant's claims, the appeals panel did not, in fact, engage with the substance of the same arguments that he sought to subsequently raise before the Supreme Court panel, as these were not specifically addressed by the appeals panel in the context of Mr Gucati's appeal.²⁰⁸

²⁰⁶ See above, para. 38.

²⁰⁷ See above, para. 53.

²⁰⁸ See above, para. 39.

95. Therefore, even assuming that the Applicant could claim to benefit from the examination of the substance of Mr Gucati's arguments on the legal interpretation of Article 392(2) of the KCC, this was not the case here. Moreover, the Chamber notes that, in his request for protection of legality, Mr Gucati no longer raised the arguments made on appeal, and neither did the Supreme Court panel examine, whether with respect to the Applicant or Mr Gucati, the substance of the allegation raised by the Applicant before the Chamber as regards Article 392(2) of the KCC.²⁰⁹

96. Lastly, the Chamber notes that there is no indication that the legal avenues available before the appeals and the Supreme Court panels were, for some reason, inadequate and ineffective in the particular circumstances of the case, or that there were any special circumstances relieving the Applicant from availing himself of the effective remedies provided for by law. The Chamber is thus of the view that the Applicant's own failure to comply with the formal requirements, among others, in Article 48(6)-(7) of the Law, and Rules 179(1) and 193(3) of the Rules, resulted in his arguments on the legal interpretation of Article 392(2) of the KCC being declared inadmissible by both the appeals panel and the Supreme Court panel. Therefore, the Chamber finds that the Applicant's allegation as to the allegedly broad interpretation of Article 392(2) of the KCC must similarly be declared inadmissible for failure to exhaust remedies pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.

97. As regards the allegation concerning the legal interpretation of Article 401(1) of the KCC, the Chamber notes that the Applicant has properly exhausted the remedies provided for by law.²¹⁰ Moreover, while it is not the Chamber's function to deal with errors of facts or law allegedly committed by the criminal chambers unless and insofar as they may have infringed rights and freedoms guaranteed by the Constitution, the Chamber observes that the Applicant complained, in essence, that he was found guilty

²⁰⁹ See above, para. 54.

²¹⁰ See above, paras 34-35, 47-48.

under an unjustifiably broad interpretation of Article 401(1) of the KCC, which was such that, contrary to Article 33(1) of the Constitution and Article 7 of the Convention, his actions did not constitute a criminal offence at the time they were committed.

98. The Chamber considers that, under the aforesaid provisions, it is tasked to verify whether the Applicant's conviction had a contemporaneous legal basis, and whether the result reached by the criminal chambers was compatible with the principle of legality.²¹¹ As such, and since no other grounds for inadmissibility can be established, the Chamber finds that the Applicant's complaint in this respect must be declared admissible and examined on the merits.

B. ALLEGED VIOLATION OF ARTICLE 32(1) OF THE CONSTITUTION AND ARTICLE 6(1) OF THE CONVENTION

1. Submissions

99. Referring to the ECtHR case of *Ramanauskas v. Lithuania* [GC],²¹² the Applicant argued that, insofar as entrapment claims are not wholly improbable, it falls on the prosecution to prove that there was no incitement and, in the absence of any such proof, it is the task of the judicial authorities to examine the facts of the case and to take the necessary steps to uncover the truth.²¹³ Further relying on ECtHR case law, including *Matanović v. Croatia*,²¹⁴ the Applicant claimed that the criminal chambers erred in the legal standard applied, and submitted that the applicable standard was a *prima facie* case of entrapment, and not a requirement to provide *prima facie* evidence of entrapment, as interpreted by the criminal chambers.²¹⁵

²¹¹ See ECtHR, *Jasuitis and Šimaitis v. Lithuania*, nos 28186/19 and 29092/19, 12 December 2023, paras 112-114; *Vasiliauskas v. Lithuania* [GC], cited above, paras 160-161. See also Kosovo, Constitutional Court, *Request for constitutional review of judgment Pml no. 325/2020 of the Supreme Court of 16 December 2020*, KI 11/21, Resolution on inadmissibility, 25 March 2021 (31 May 2021), paras 81-83.

²¹² Referral, para. 52, referring to ECtHR, *Ramanauskas v. Lithuania* [GC], no. 74420/01, 5 February 2008, para. 70.

²¹³ Referral, para. 52.

²¹⁴ Referral, paras 54, 57, referring to ECtHR, *Matanović v. Croatia*, no. 2742/12, 4 April 2017, para. 131.

²¹⁵ Referral, paras 54, 57.

100. The Applicant claimed that a *prima facie* case of entrapment may be established even in the absence of involvement by law enforcement, and that items of evidence which, as a whole, make entrapment not wholly improbable, should be sufficient to meet this threshold.²¹⁶ He argued that, by employing a different standard than that required by the case law of the ECtHR, the criminal chambers effectively reversed the burden of proof, and breached his right to a fair hearing.²¹⁷

101. The Applicant further claimed that, in requiring *prima facie* evidence of SPO involvement, the criminal chambers failed to consider that the entrapment could have been orchestrated by Serbia.²¹⁸ In this respect, he maintained that certain evidence allegedly proving the entrapment claim had not been disclosed at trial and, in line with the ECtHR case of *Edward and Lewis v. the United Kingdom* [GC],²¹⁹ argued that this amounted to a procedural breach of Article 6(1) of the Convention.²²⁰ Lastly, the Applicant also criticised the fact that there was no possibility of interlocutory appeal against decisions of the appeals panel in which it denied requests for evidence that was crucial to the entrapment claim.²²¹

102. The SPO argued that, insofar as the Applicant complained about the criminal chambers' interpretation of the *prima facie* threshold applicable to entrapment claims, the complaint was inadmissible, as only procedural, rather than substantive fairness, could be considered with respect to claims under Article 31(2) of the Constitution and Article 6(1) of the Convention.²²² The SPO further argued that there was no appearance of a violation and that, as a result, the complaint was inadmissible.²²³ In particular, the SPO was of the view that the Applicant's interpretation of the threshold applicable to

²¹⁶ Referral, paras 55-57.

²¹⁷ Referral, para. 58.

²¹⁸ Referral, paras 59-62.

²¹⁹ Referral, para. 64, referring to ECtHR, *Edward and Lewis v. the United Kingdom* [GC], nos 39647/98 and 40461/98, 27 October 2004, para. 46.

²²⁰ Referral, para. 64.

²²¹ Referral, para. 65.

²²² SPO submissions, para. 31.

²²³ SPO submissions, para. 31.

entrapment was so low, that it essentially excluded any evidential requirement, and misconstrued the case law of the ECtHR.²²⁴

103. Lastly, the SPO claimed that the Applicant's arguments as to the non-disclosure of evidence were unsubstantiated, and neglected the detailed lengths taken by the criminal chambers to ensure his procedural rights.²²⁵ The SPO maintained that these arguments should also be declared inadmissible, as the Applicant failed to indicate anything flagrantly and manifestly arbitrary in the criminal chambers' application of the disclosure framework.²²⁶

104. In reply, the Applicant reiterated that the wholly improbable threshold required the prosecution to prove that there was no incitement, and that, by erring in the legal standard applied, the criminal chambers reversed the burden of proof with respect to his claim of entrapment by the SPO.²²⁷

2. Chamber's Assessment

105. The Chamber notes, at the outset, that the Applicant appears to have fulfilled, in principle, most of the admissibility requirements provided for in the Constitution, the Law, and the SCCC Rules. However, pursuant to Rule 14(f) of the SCCC Rules, the Chamber may nevertheless declare inadmissible a referral, or specific parts thereof, for reasons related to the examination of the merits. More specifically, a referral, or a specific claim in the referral, may be deemed inadmissible if nothing in the referral gives rise to the appearance of a violation of a constitutional right. For the purpose of this assessment, the Chamber again refers to and applies the standards of the ECtHR, as it is obliged to do pursuant to Article 53 of the Constitution.²²⁸

²²⁴ SPO submissions, para. 33.

²²⁵ SPO submissions, para. 32.

²²⁶ SPO submissions, para. 32.

²²⁷ Applicant submissions, para. 37.

²²⁸ Kosovo, Constitutional Court, *Constitutional review of judgment Pml no. 76/2020 of the Supreme Court of 8 April 2020*, KI 110/20, Resolution on inadmissibility 3 November 2021 (22 November 2021), paras 44-48; KI 11/21, cited above, paras 42-46.

106. Turning to the Applicant's complaint under Article 32(1) of the Constitution and Article 6(1) of the Convention, the Chamber observes that, in essence, the Applicant complained that he was entrapped by the SPO to commit the offences leading to his conviction, and that the criminal chambers reversed the burden of proof by requiring him to provide *prima facie* evidence of entrapment, instead of employing the wholly improbable standard which placed the burden of proof on the SPO. The Chamber first recalls that, pursuant to the case law of the ECtHR, entrapment or

[p]olice incitement occurs where the officers involved [in a covert operation] – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject [of the investigation] as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution.²²⁹

107. The Chamber further notes that the examination of complaints of entrapment by the ECtHR has developed on the basis of two tests, namely the substantive test and the procedural test of incitement.²³⁰ In the context of the substantive test, the ECtHR will attempt, as a first step, to establish on the basis of the available material whether the offence would have been committed without the authorities' intervention, that is to say, whether the investigation was essentially passive. To that end, the ECtHR will examine, among others, the reasons underlying the covert operation, as well as the conduct of the authorities carrying it out.²³¹

108. In the context of the procedural test of incitement, the ECtHR will examine the way in which the (domestic) courts dealt with an applicant's plea of incitement and, in particular, whether they did so in a manner compatible with the principles of adversarial proceedings and equality of arms.²³² It is in this connection, specifically, that the ECtHR has held that it falls on the prosecution to prove that there was no

²²⁹ ECtHR, *Ramanauskas v. Lithuania* [GC], cited above, para. 55.

²³⁰ See, for example, ECtHR, *Matanović v. Croatia*, cited above, para. 122.

²³¹ ECtHR, *Matanović v. Croatia*, cited above, paras 123-124.

²³² ECtHR, *Matanović v. Croatia*, cited above, paras 125-130.

incitement, provided that an accused's allegations to that effect are not wholly improbable.²³³

109. However, the Chamber notes that a preliminary consideration in the ECtHR's assessment of any complaint of incitement relates to the existence of an arguable claim that an applicant was subject to incitement by the law enforcement authorities. Indeed, the ECtHR will not proceed with any further assessment under the substantive and/or the procedural tests of incitement, unless it can satisfy itself that the situation under examination falls *prima facie* within the category of entrapment cases.²³⁴

110. Turning to the facts of the case, the Chamber recalls, as a preliminary matter, that an issue of entrapment under Article 33(1) of the Constitution and Article 6(1) of the Convention may only arise in the context of a covert operation involving law enforcement officers or persons acting under their instructions. Complaints relating to incitement to commit an offence by persons not acting under the instructions or control of law enforcement authorities are examined under the general rules on the administration of evidence, not as an issue of entrapment.²³⁵

111. The Chamber observes that, while the SPO denied that it was involved in any investigation concerning the Applicant at that time, the Applicant claimed that the confidential material delivered to the premises of the KLA WVA was either intentionally disclosed by the SPO or, alternatively, might have come from Serbia.²³⁶ The Chamber further notes that nothing in the trial panel's findings suggested that law enforcement officers or persons acting under their instructions were involved in the three deliveries to the KLA WVA.²³⁷ In any event, even assuming, for the sake of argument, that the source of the leaks was the SPO or persons acting under their

²³³ ECtHR, *Bannikova v. Russia*, no. 18757/06, 4 November 2010, paras 54, 73; *Ramanauskas v. Lithuania* [GC], cited above, paras 69-70.

²³⁴ See ECtHR, *Matanović v. Croatia*, cited above, paras 131-132.

²³⁵ ECtHR, *Shannon v. United Kingdom* (dec.), no. 67537/01, 6 April 2014, pp 10-13.

²³⁶ Referral, para. 59. See also Trial judgment, para. 856.

²³⁷ Trial judgment, paras 859-862.

instructions, in the eyes of the Chamber, the situation under examination does not fall *prima facie* within the category of entrapment cases.

112. More specifically, the Chamber notes that the Applicant never claimed that the unknown persons who delivered the three sets with confidential material, or anyone else for that matter, had, either at the time of the deliveries or thereafter, attempted to pressure him into committing the illegal acts.²³⁸ Rather, the Applicant was merely the recipient of confidential documents, delivered to him by unknown persons. It was therefore up to the Applicant to react to the events in question in a lawful manner. Instead, the Applicant chose, of his own free will, to respond in a deliberately illegal manner.²³⁹

113. Accordingly, the Chamber concludes that it was the Applicant's conduct and not, assuming that this was even the case, the actions of law enforcement or persons acting under their instructions that was the determinative factor in the commission of the offences for which the Applicant was convicted.²⁴⁰ For these reasons, the Chamber finds that the Applicant's situation plainly does not fall within the category of entrapment cases and therefore does not, even *prima facie*, need to be considered as such.

114. The Chamber is of the view that the criminal chambers, in the various stages of the proceedings, conflated the *prima facie* case standard with the wholly improbable standard which the ECtHR only examines once the former has been met.²⁴¹ However, the Chamber finds that this conflation of standards was ultimately inconsequential for the Applicant's rights under Article 32(1) of the Constitution and Article 6(1) of the Convention, since it afforded him more, rather than fewer, procedural safeguards.

²³⁸ Trial judgment, paras 856-857.

²³⁹ See above, para. 14, with further references.

²⁴⁰ See, for example, ECtHR, *Volkov and Adamskiy v. Russia*, nos 7614/09 and 30863/10, 26 March 2015, paras 36-46; *Trifontsov v. Russia* (dec.), no. 12025/02, 9 October 2012, paras 32-35; *Kuzmickaja v. Lithuania* (dec.), no. 27968/03, 10 June 2008, p. 7.

²⁴¹ Trial judgment, paras. 837, 889-890; Appeal judgment, paras 363-365; Decision on protection of legality, paras 92-93.

Indeed, even in the absence of a *prima facie* entrapment case, the trial panel went to great lengths to afford the Applicant the opportunity to present his entrapment claim, and carried out a thorough assessment thereof.²⁴²

115. In the same vein, both the appeals panel and the Supreme Court panel duly considered the Applicant's arguments as to the plea of entrapment, and gave reasoned assessments for the rejection thereof.²⁴³ In these circumstances, the Chamber does not detect any appearance of a violation of the Applicant's rights under Article 32(1) of the Constitution and Article 6(1) of the Convention. Thus, this complaint must be declared inadmissible in accordance with Rule 14(f) of the SCCC Rules.

C. ALLEGED VIOLATION OF ARTICLE 40 OF THE CONSTITUTION AND ARTICLE 10 OF THE CONVENTION

1. Submissions

116. The Applicant submitted that the criminal chambers erred in their definition of public interest and, as such, failed to consider that the stance that Serbia has taken over the years towards Kosovo, as well as the volume of contacts between the SITF/SPO and Serbian officials, some of whom had served in the Milošević regime, also undermined the independence, impartiality and integrity of the investigations.²⁴⁴ In this regard, the Applicant further claimed that the criminal chambers prevented his reliance on certain witnesses able to offer an account that was relevant to his public interest defence, and erroneously restricted key parts of testimony that they did permit.²⁴⁵

117. In the Applicant's view, the conclusion that his criminal responsibility could not be excluded on the basis of considerations of public interest amounted to a violation

²⁴² See, specifically, Trial judgment, paras 841-850, 854-890.

²⁴³ Appeal judgment, paras 361-374; Decision on protection of legality, paras 91-96.

²⁴⁴ Referral, paras 67, 70, 78.

²⁴⁵ Referral, paras 71-77.

of his right to freedom of expression.²⁴⁶ Lastly, the Applicant complained that the criminal chambers failed to consider whether there were any means other than prosecution to attain the objectives set forth in Article 10(2) of the Convention.²⁴⁷

118. The SPO argued that this complaint should be dismissed as inadmissible.²⁴⁸ In particular, the SPO contended that the relief sought by the Applicant before the Supreme Court panel was manifestly ineffective, and that his complaint before the Chamber was thus out of time.²⁴⁹ In any event, the SPO contended that the Applicant's alleged public interest in revealing the confidential information at issue had been outweighed by the paramount need to safeguard the safety of (protected) witnesses of international crimes.²⁵⁰

119. In his reply, the Applicant reiterated the arguments made in the Referral as regards the necessity and proportionality of criminal prosecution to attain the aims set forth in Article 10(2) of the Convention.²⁵¹

2. Chamber's Assessment

120. At the outset, the Chamber notes that the Applicant complained, in essence, that by failing to exclude his criminal responsibility on the basis of considerations of public interest, the criminal chambers breached his right to freedom of expression under Article 40 of the Constitution and Article 10 of the Convention. The Chamber further recalls that the trial panel addressed the Applicant's public interest claim in the context of the right to freedom of expression, and assessed it as a potential justification that might affect his individual criminal responsibility.²⁵²

²⁴⁶ Referral, para. 79.

²⁴⁷ Referral, paras 81-82.

²⁴⁸ SPO submissions, para. 35.

²⁴⁹ SPO submissions, para. 35.

²⁵⁰ SPO submissions, para. 36.

²⁵¹ Applicant submissions, para. 39.

²⁵² See above, para. 28.

121. The appeals panel examined the public interest defence in the same light, finding that, if proven, it would operate as a ground excluding the Applicant's individual criminal responsibility.²⁵³ The Chamber notes in this regard that, in accordance with Article 48(6)-(7) of the Law, a violation of the criminal law may be invoked before a Supreme Court panel when, among others, circumstances exist which preclude criminal liability.²⁵⁴ It therefore follows that a request for protection of legality is one of the remedies that the Applicant had to pursue to exhaust all legal remedies with respect to the alleged violation.²⁵⁵

122. The Chamber observes, however, that the arguments adduced by the Applicant before the Supreme Court panel were significantly narrower in scope than those he raised in his Referral, and failed to address the claimed incompatibility of the Applicant's criminal conviction with Article 40 of the Constitution and/or Article 10 of the Convention.²⁵⁶ In particular, the Applicant alleged a substantial violation of his right to a fair hearing under Article 21(2) of the Law on the basis of the trial panel's failure to consider certain factual circumstances in its definition of public interest, as subsequently upheld by the appeals panel.²⁵⁷

123. The Chamber also notes that the Supreme Court panel summarily dismissed the Applicant's arguments on the public interest defence as inadmissible for a number of reasons, including because he failed to identify the procedural rule alleged to have been substantially violated and that, contrary to the requirements under Article 48(7) of the Law and Rule 193(3) of the Rules, his arguments were factual, rather than legal in nature.²⁵⁸

²⁵³ See above, para. 44.

²⁵⁴ Decision on protection of legality, para. 17.

²⁵⁵ See above, para. 81.

²⁵⁶ *Compare* Haradinaj protection of legality request, para. 75 *with* Referral, paras 67-83 and Applicant submissions, para. 39.

²⁵⁷ See above, para. 58.

²⁵⁸ See above, para. 59.

124. Recalling the principles set out in paragraphs 80-86 above as to the obligation to exhaust remedies, the Chamber is of the view that the Applicant failed to raise before the Supreme Court panel, either expressly or in substance, the same arguments that he subsequently made to the Chamber. As to the few arguments that the Applicant did raise, the Chamber notes that they were also summarily dismissed by the Supreme Court panel for failure to observe the formal requirements laid down in the Law and the Rules. Thus, the Applicant's failure to properly raise his claim before the Supreme Court panel deprived it of the opportunity to consider and potentially redress the alleged breach. Lastly, the Chamber notes that there is no indication that the remedy available before the Supreme Court panel was, for some reason, inadequate and ineffective in the particular circumstances of the case, or that there existed any special circumstances relieving the Applicant from his obligation to avail himself of the effective remedies provided for by law.

125. Accordingly, the Chamber finds that the Applicant's complaint under Article 40 of the Constitution and Article 10 of the Convention must be declared inadmissible for failure to exhaust legal remedies pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.

D. CONCLUSION

126. Based on the foregoing, the Chamber finds that the Applicant's complaint under Article 33(1) of the Constitution and Article 7 of the Convention, with respect, in particular, to the Applicant's allegations on the legal interpretation of Articles 387 and 392(2) of the KCC, must be declared inadmissible for failure to exhaust remedies in accordance with Article 113(7) of the Constitution, Article 49(3) of the Law, as well as Rule 20(1)(a) of the SCCC Rules.

127. Likewise, the Chamber finds that the Applicant's complaint under Article 40 of the Constitution and Article 10 of the Convention, must, for the same reasons of non-exhaustion, be declared inadmissible pursuant to Article 113(7) of the Constitution, Article 49(3) of the Law, and Rule 20(1)(a) of the SCCC Rules.

128. Further, as to the Applicant's entrapment complaint under Article 33(2) of the Constitution and Article 6(1) of the Convention, the Chamber finds that it does not reveal an appearance of a violation of the Applicant's constitutional rights. It follows that this part of the Applicant's Referral must be declared inadmissible pursuant to Rule 14(f) of the SCCC Rules.

129. Lastly, the Chamber finds that the Applicant's complaint under Article 33(1) of the Constitution and Article 7 of the Convention, insofar as it concerns his allegations as to the legal interpretation of Article 401(1) of the KCC, is admissible, and has to be examined on the merits.

VII. MERITS

A. ALLEGED VIOLATION OF ARTICLE 33(1) OF THE CONSTITUTION AND ARTICLE 40 OF THE CONVENTION

1. Submissions

130. The Applicant submitted that the criminal chambers' unjustifiably broad interpretation of Article 401(1) of the KCC violated the principle of legality under Article 33(1) of the Constitution and Article 7 of the Convention.²⁵⁹ In particular, the Applicant maintained that, by expanding the scope of Article 401(1) of the KCC to encompass serious threats against third persons, the offence was neither accessible nor foreseeable at the time of commission. The Applicant claimed that his actions did not, therefore, constitute a criminal offence at the material time, and argued that, by considering them as such, the criminal chambers violated the principle of legality, in particular in its formulation of *lex stricta* and the prohibition of analogy *in malam partem*.²⁶⁰

²⁵⁹ Referral, paras 2(a), 28, 36, 50.

²⁶⁰ Referral, paras 34-40.

131. The SPO claimed that the criminal chambers' interpretation of Article 401(1) of the KCC was in full conformity with the Constitution and the Convention.²⁶¹ In particular, the SPO maintained that the principle of legality still allows for judicial interpretation of the applicable law, that Article 401(1) of the KCC plainly covers any serious threat capable of obstructing an official person, and that the Applicant did not offer any authority to the contrary.²⁶² The SPO agreed with the criminal chambers' interpretation of Article 401(1) of the KCC, and argued that it was fully consistent with the essence of the provision, as well as foreseeable.²⁶³

132. The Applicant replied by contesting the arguments of the SPO as erroneous and excessively broad, as well as lacking any evidential basis.²⁶⁴

2. Chamber's Assessment

133. The Chamber first recalls that the Applicant complained that, in finding him guilty of obstructing official persons in performing official duties by serious threat under Article 401(1) of the KCC, the criminal chambers had interpreted broadly the definition of that offence, in breach of Article 33(1) of the Constitution and Article 7 of the Convention. Pursuant to Article 53 of the Constitution, in examining the merits of the Applicant's complaint, the Chamber refers to the general principles developed in the case law of the ECtHR.²⁶⁵

134. The Chamber recalls in this respect that Article 33(1) of the Constitution reads as follows:

No one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.

²⁶¹ SPO submissions, para. 18.

²⁶² SPO submissions, paras 18, 20-21.

²⁶³ SPO submissions, para. 21.

²⁶⁴ Applicant submissions, paras 18-19.

²⁶⁵ See above, para. 67. See also *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, paras 45, 75.

135. The Chamber further notes that Article 7 of the Convention similarly provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

136. Further to the above, the Chamber notes that Article 33(1) of the Constitution and Article 7 of the Convention embody, in general terms, the principle of legality, namely that only the law can define a crime and prescribe a penalty.²⁶⁶ While these provisions preclude, in particular, extending the scope of existing offences to acts which were previously not criminal offences, they also lay down the principle that the criminal law must not be extensively construed to the detriment of an accused, for instance, by analogy.²⁶⁷

137. It follows that offences must be clearly defined by law. When speaking of “law”, Article 33(1) of the Constitution and Article 7 of the Convention imply qualitative requirements, notably those of accessibility and foreseeability.²⁶⁸ As established in the case law of the ECtHR and the Kosovo Constitutional Court, these requirements are met where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts’ interpretation and after taking appropriate legal advice, what acts and/or omissions will render him criminally liable and what penalty will be imposed for the act committed and/or omission.²⁶⁹

²⁶⁶ See, among others, ECtHR, *Kafkaris v. Cyprus* [GC], no. 21906/04, 12 February 2008, para. 138; *Cantoni v. France* [GC], no. 17862/91, 15 November 1996, para. 29

²⁶⁷ ECtHR, *Kafkaris v. Cyprus* [GC], cited above, para. 138; *Cantoni v. France* [GC], cited above, para. 29; Kosovo, Constitutional Court, KI 11/21, cited above, para. 79.

²⁶⁸ ECtHR, *Korbely v. Hungary* [GC], no. 9174/02, 19 September 2008, para. 70; Kosovo, Constitutional Court, KI 11/21, cited above, para. 80.

²⁶⁹ ECtHR, *Del Río Prada v. Spain* [GC], no. 42750/09, 21 October 2013, para. 79; Kosovo, Constitutional Court, KI 11/21, cited above, para. 79.

138. The Chamber further recalls that both the ECtHR and the Kosovo Constitutional Court have consistently acknowledged in their case law that, however clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation, the role of which is to elucidate any remaining doubtful aspects.²⁷⁰ Indeed, as previously observed by the Chamber, Article 33(1) of the Constitution and Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence, and could reasonably be foreseen.²⁷¹

139. Lastly, the Chamber recalls that it is not its role to substitute itself for the criminal chambers as regards the assessment of the facts and their legal classification, provided that these are based on a reasonable assessment of the evidence.²⁷² Rather, within the legal framework of the SC, as in any system of law, it is primarily for the criminal chambers to resolve any questions as to the interpretation of the applicable law.²⁷³ Therefore, the Chamber's role is confined to determining whether the effects of the interpretation at issue are compatible with the Constitution and the Convention.²⁷⁴

140. However, the Chamber's powers of review must be greater when the right itself, namely Article 33(1) of the Constitution and Article 7 of the Convention, as raised by the Applicant, requires that there was a legal basis for a conviction and sentence.²⁷⁵ It

²⁷⁰ ECtHR, *Kafkaris v. Cyprus* [GC], cited above, para. 141; Kosovo, Constitutional Court, KI 01/19, cited above, para. 155. See also *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 77.

²⁷¹ *Decision on J. Krasniqi, K. Veseli referrals concerning criminal charges*, para. 77. See also ECtHR, *Norman v. the United Kingdom*, no. 41387/17, 6 July 2021, para. 60; *Kononov v. Latvia* [GC], no. 36376/04, 17 May 2010, para. 185; *Kafkaris v. Cyprus*, cited above, para. 141; Kosovo Constitutional Court, KI 01/19, cited above, para. 156.

²⁷² Similarly, see above, paras 68-69, 97. See also ECtHR, *Rohlena v. the Czech Republic* [GC], no. 59552/08, 27 January 2015, para. 51.

²⁷³ ECtHR, *Dallas v. the United Kingdom*, no. 38395/12, 11 February 2016, para. 71; Kosovo, Constitutional Court, KI 11/21, cited above, para. 81.

²⁷⁴ ECtHR, *Norman v. the United Kingdom*, cited above, para. 61; *Rohlena v. the Czech Republic* [GC], cited above, para. 51; Kosovo, Constitutional Court, KI 11/21, cited above, para. 81.

²⁷⁵ See above, para. 98, with further references to case law.

follows that the Chamber must examine whether there was a contemporaneous legal basis for the Applicant's conviction and, in particular, it must satisfy itself that the result reached by the criminal chambers was compatible with Article 33(1) of the Constitution and Article 7 of the Convention.²⁷⁶

141. Turning to the circumstances of the present case, the Chamber observes that the Applicant does not dispute that Article 401(1) of the 2019 KCC was in force at the time of the commission of his acts. Indeed, the Chamber notes that obstructing official persons in performing official duties by serious threat, as such, was clearly recognised as an offence under the KCC at the relevant time, the Applicant having committed the acts in question during September 2020.²⁷⁷ Therefore, the Chamber is of the view that the provision was sufficiently accessible to the Applicant.

142. The Applicant, however, argued that the criminal chambers employed an overly broad interpretation of the offence. Specifically, the Applicant questioned whether his conviction for obstructing official persons in performing official duties by serious threat against another person than the official person performing official duties had been consistent with the essence of the offence under Article 401(1) of the KCC, and could reasonably have been foreseen by the Applicant at the time of the events leading to the criminal proceedings against him.

143. As regards the compatibility of the criminal chambers' interpretation with the essence of the offence, the Chamber must determine whether the interpretation was in line with the wording of the provision of the criminal legislation in question as read in its context, and whether or not it was unreasonable.²⁷⁸ In determining whether the criminal chambers' interpretation was consistent with the essence of the offence under Article 401(1) of the KCC, the Chamber notes that the criminal chambers considered that a "serious threat" within the meaning of Article 401(1) of the KCC, the text of

²⁷⁶ ECtHR, *Yüksel Yalçinkaya v. Türkiye* [GC], no. 15669/20, 26 September 2023, para. 241; *Vasiliauskas v. Lithuania* [GC], cited above, para. 161; Kosovo, Constitutional Court, KI 11/21, cited above, para. 83.

²⁷⁷ See above, paras 13-14.

²⁷⁸ See, for example, ECtHR, *Jorgic v. Germany*, no. 74613/01, 12 July 2007, paras 104-107.

which was cited in paragraph 22 above, did not necessarily have to be directed only against “an official person”, namely SC and SPO officials such as a judge, a prosecutor or an investigator. Rather, it was found that the serious threat could also be directed against another person or an object, insofar as it was carried out with the intention to obstruct the official duties or functions of an official person.²⁷⁹

144. The Chamber observes that, in reaching the foregoing conclusion, the criminal chambers first considered the wording of Article 401(1) of the KCC. In particular, the criminal chambers found that nothing in the wording thereof suggests that the serious threat must be directed against the official person only.²⁸⁰ The criminal chambers considered that the provision would have been formulated differently, in a manner that explicitly required that the serious threat be directed against official persons.²⁸¹ Notably, the various panels considered that restricting the application of the offence to acts directed at official persons would be inconsistent with the essence of the offence, which sought to ensure that official duties are not obstructed, directly or indirectly.²⁸²

145. Since it is clear from a plain reading of Article 401(1) of the KCC that the intention of the legislator was to protect the unhindered performance of official duties by official persons, rather than to protect the official persons *per se*, the Chamber is of the view that the criminal chambers’ interpretation was in line with the wording of the provision. Moreover, the Chamber notes that the majority of the appeals panel, in upholding the interpretation of the trial panel, read the provision at issue systematically, in the context of the KCC as a whole. More specifically, the appeals panel observed that the specific type of protection provided by Article 401(1) of the KCC was not found in any other provisions of the KCC.²⁸³ In this regard, the Chamber

²⁷⁹ See above, paras 23, 35, 48, with further references.

²⁸⁰ Trial judgment, para. 146; Appeal judgment, para. 282; Decision on protection of legality, para. 40.

²⁸¹ Appeal judgment, para. 282.

²⁸² Trial judgment, para. 146; Appeal judgment, para. 282; Decision on protection of legality, para. 47.

²⁸³ Appeal judgment, para. 282.

further notes that the provision immediately succeeding it, namely Article 402 of the KCC, affords specific protection to the official persons as such.

146. Furthermore, the Chamber finds that the criminal chambers' interpretation of Article 401(1) of the KCC was likewise supported by doctrinal commentary at the relevant time of the commission of the offence. Indeed, like the criminal chambers, this Chamber also acknowledges that commentary by Ismet Salihu *et al.* on the KCC explicitly recognised at the material time of the offence that the primary subject of the protection afforded by Article 401(1) of the KCC was the official duty, that is, the unimpeded performance thereof by an official person.²⁸⁴

147. Therefore, the Chamber is of the view that the Ismet Salihu *et al.* commentary supported the same interpretation of Article 401(1) of the KCC as given by the criminal chambers, namely that a serious threat could also be directed against third persons or even an object, inasmuch as it was issued with the intention of obstructing the performance of official duties by an official person.²⁸⁵

148. Accordingly, the Chamber finds that the criminal chambers' interpretation of Article 401(1) of the KCC is consistent with the wording and scope of the provision, and does not appear to be at all unreasonable.²⁸⁶ The Chamber further notes that the Applicant had the opportunity to present his arguments on the interpretation of Article 401(1) of the KCC before three successive panels, which carefully considered them. Having regard to their amply reasoned decisions on this point, and noting that all three panels reached the same conclusion,²⁸⁷ the Chamber is of the view that they

²⁸⁴ Ismet Salihu *et al.*, Commentary on the Penal Code of Republic of Kosovo (GIZ, 2014) ("*Salihu et al.* commentary"), p. 1165. While the commentary refers to Article 409(1), the Chamber notes that this is the analogous provision of Article 401(1) of the KCC from the preceding legislation, namely the 2012 Kosovo Criminal Code, Law No. 04/L-082. See also Appeal judgment, para. 282.

²⁸⁵ Salihu *et al.* commentary, pp. 1165-1166. See, similarly, Trial judgment, para. 146; Appeal judgment, para. 282; Decision on protection of legality, para. 42.

²⁸⁶ ECtHR, *Jorgic v. Germany*, cited above, paras 104-107.

²⁸⁷ Trial judgment, para. 146; Appeals judgment, para. 282; Decision on protection of legality, paras 40- 47.

did not exceed the limits of a reasonable interpretation of the applicable provisions.²⁸⁸ It follows that the criminal chambers' interpretation was compatible with the essence of the offence set forth in Article 401(1) of the KCC, and that the Applicant's acts could reasonably be regarded as falling within its ambit.²⁸⁹

149. As regards the reasonable foreseeability of the criminal chambers' interpretation, the Chamber must assess whether the Applicant could have reasonably foreseen, at the material time, if necessary with the assistance of legal advice, that he risked being charged with and convicted of the offence under Article 401(1) of the KCC, and that he would incur the penalty which that offence carried.²⁹⁰ The Chamber notes in this regard that neither the Applicant, nor the panels, pointed towards any comparable precedents under Article 401(1) of the KCC.

150. Nevertheless, the Chamber recalls that, pursuant to ECtHR case law, no decisive importance should be attached to a lack of comparable precedents when assessing the foreseeability of judicial interpretation.²⁹¹ Indeed, situations may arise in which the criminal chambers are called to interpret a criminal law provision for the first time. As a rule, and as opposed to situations that concern a reversal of pre-existing case law,²⁹² an interpretation of the scope of the offence which was consistent with the essence of that offence must be considered as foreseeable.²⁹³ The Chamber recalls, in this regard, its findings in paragraphs 143-148 above.

²⁸⁸ ECtHR, *Berardi and Mularoni v. San Marino*, nos 24705/16 24818/16, 10 January 2019, paras 48-52; *K.A. and A.D. v. Belgium*, nos 42758/98 and 45558/99, 17 February 2005, para. 60.

²⁸⁹ See Trial judgment, paras 536-541, 547, 597-598, 600-605, 646-647, 650, 659-668, 671, 960; Appeals judgment, paras 290-291; Decision on protection of legality, paras 42-43.

²⁹⁰ See ECtHR, *Berardi and Mularoni v. San Marino*, cited above, para. 54; *Jorgic v. Germany*, cited above, paras 109-113.

²⁹¹ ECtHR, *Berardi and Mularoni v. San Marino*, cited above, para. 44; *K.A. and A.D. v. Belgium*, cited above, para. 55; *Soros v. France*, no. 50425/06, 6 October 2011, para. 58.

²⁹² Cf. ECtHR, *Dragotoniou and Militaru-Pidhorni v. Romania*, nos 77193/01 and 77196/01, 24 May 2007, paras 42-44.

²⁹³ ECtHR, *Berardi and Mularoni v. San Marino*, cited above, para. 44; *Jorgic v. Germany*, cited above, para. 109.

151. Moreover, the Chamber notes that, in the absence of jurisprudence, the doctrinal interpretation of the law may carry more weight, especially if it tallies with the judicial interpretation.²⁹⁴ The Chambers refers to its findings in paragraph 146 above as to the compatibility of the criminal chambers' conclusions with the doctrinal interpretation advanced in the Ismet Salihu *et al.* commentary. The Chamber likewise notes in this connection that the Ismet Salihu *et al.* commentary on the KCC was available and accessible to the Applicant in September 2020, at the time of commission of the acts at issue.

152. Notably, the Chamber observes that, prior to the notification of the indictment against him, the Applicant and other representatives or members of the KLA WVA were repeatedly cautioned by a single judge that their acts may constitute an offence under Article 15(2) of the Law and the various KCC provisions mentioned therein.²⁹⁵ In this regard, the Chamber further notes that the Applicant nevertheless consciously attempted and explicitly intended to obstruct SC and/or SPO officials in performing official duties.²⁹⁶

153. In view of the above, the Chamber cannot accept that the Applicant, if need be with the assistance of a lawyer, could not have reasonably foreseen that he risked being charged with, and convicted of the offence under Article 401(1) of the KCC.²⁹⁷ It follows that the criminal chambers' interpretation of the offence of obstructing official persons in performing official duties by serious threat could reasonably be regarded to be consistent with the essence of that offence, and could reasonably be foreseen by the Applicant at the material time. Therefore, the Chamber finds that the Applicant's

²⁹⁴ ECtHR, *K.A. and A.D. v. Belgium*, cited above, para. 59. See also *cf.* ECtHR, *Dragotoniú and Militaru-Pidhorni v. Romania*, cited above, para. 43.

²⁹⁵ See above, para. 15.

²⁹⁶ Trial judgment, paras 536-541, 547, 597-598, 600-605, 646-647, 650, 659-668, 671, 960; Appeals judgment, paras 290-291; Decision on protection of legality, para. 43.

²⁹⁷ See, similarly, ECtHR, *Berardi and Mularoni v. San Marino*, cited above, paras 48-57; *Jorgic v. Germany*, cited above, paras 109-116.

conviction pursuant to Article 401(1) of the KCC was not in breach of Article 33(1) of the Constitution and Article 7 of the Convention.

B. CONCLUSION

154. In light of the above, the Chamber finds that there has been no violation of Article 33(1) of the Constitution and Article 7 of the Convention.

VIII. RELATED REQUESTS

155. As regards the Applicant's request for admission of evidence, the Chamber notes that he refers to a letter which the Applicant contends would support his allegations under Article 32(1) of the Constitution and Article 6 of the Convention.²⁹⁸ Recalling that the Applicant's complaint in this regard was declared inadmissible pursuant to Rule 14(f) of the SCCC Rules,²⁹⁹ the Chamber finds that the Applicant's request for admission of evidence has been rendered moot. For the same reasons, the Chamber finds that the Applicant's request regarding the SPO notification is likewise moot.

FOR THESE REASONS,

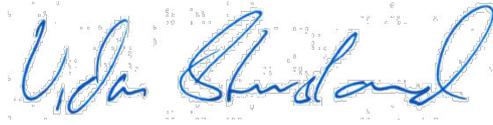
Deciding on the Referral made by Mr Nasim Haradinaj, the Specialist Chamber of the Constitutional Court, unanimously,

1. *Declares* the complaint under Article 33(1) of the Constitution and Article 7 of the Convention as regards Article 401(1) of the KCC admissible and the remainder of the Referral inadmissible;
2. *Finds* that there has been no violation of Article 33(1) of the Constitution and Article 7 of the Convention as regards Article 401(1) of the KCC; and

²⁹⁸ Applicant request for admission of evidence, para. 10.

²⁹⁹ See above, paras 115, 128.

3. *Dismisses* the Applicant's request for admission of evidence and the Applicant's request regarding the SPO notification as moot.



Judge Vidar Stensland
Presiding Judge

Done in English on Friday, 31 May 2024
At The Hague, the Netherlands