



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

In: KSC-SC-2023-01
Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj

Before: A Panel of the Supreme Court Chamber
Judge Ekaterina Trendafilova, Presiding
Judge Christine van den Wyngaert
Judge Daniel Fransen

Registrar: Dr Fidelma Donlon

Filing Participant: Acting Specialist Prosecutor

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Prosecution consolidated response to requests for protection of legality

with one public annex

Specialist Prosecutor's Office

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I. Introduction

1. The Appeal Panel confirmed the convictions of Gucati and Haradinaj. These men now stand guilty of four counts of attempted obstruction of official persons in performing official duties, intimidation during criminal proceedings, and violating the secrecy of proceedings under the KCC.¹ Their seriously threatening conduct resulted in the revelation of the names and/or details of hundreds of (potential) witnesses. They were sentenced to four years and three months imprisonment and a fine of EUR 100 for these grave offences.

2. The Gucati Request² and Haradinaj Request³ (combined: 'Requests') raise several inadmissible arguments against these convictions. Protection of legality requests are carefully circumscribed in the Law⁴ and Rules,⁵ and Defence arguments falling outside these parameters warrant summary dismissal. To the extent the Defence raise admissible challenges, their arguments fail to show any violation requiring protection of legality in the Confirmation Decision,⁶ Trial Judgment,⁷ or Appeal Judgment⁸ in this case.

¹ Law No.06/L-074 on Criminal Code of the Republic of Kosovo, 14 January 2019 ('KCC'). The offences under Articles 387, 388, 392 and 401 of the KCC are analogous to the corresponding offences under Articles 395, 396, 400 and 409 of the 2012 KCC.

² 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, KSC-SC-2023-01/F00002/RED, 3 May 2023 (with one annex; public redacted version filed on 4 May 2023) ('Gucati Request').

³ Haradinaj Defence Re-filed Request for Protection of Legality, KSC-SC-2023-01/F00009, 9 May 2023 (list of authorities provided at KSC-SC-2023-01/F00001/A01) ('Haradinaj Request').

⁴ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). Unless otherwise indicated, all subsequent references to 'Article' or 'Articles' are to the Law.

⁵ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). Unless otherwise indicated, all subsequent references to 'Rule' or 'Rules' are to the Rules.

⁶ Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020 (redacted version notified 22 December 2022) ('Confirmation Decision').

⁷ Public Redacted Version of the Trial Judgment, KSC-BC-2020-07/F00611/RED, 18 May 2022 (with three annexes) ('Trial Judgment').

⁸ Appeal Judgment, KSC-CA-2022-01/F00114, 2 February 2023 ('Appeal Judgment').

II. Procedural History

3. On 11 December 2020, the Pre-Trial Judge issued the Confirmation Decision in this case. Amongst other determinations, the Pre-Trial Judge found that: (i) Gucati and Haradinaj's conduct against (potential) witnesses amounted to (attempted) obstruction of official persons under Article 401(1) of the KCC;⁹ (ii) intimidation under Article 387 of the KCC was not limited to intimidation in obstruction cases;¹⁰ (iii) information need not have been formally disclosed to the perpetrator within the context of official proceedings under KSC 392(1);¹¹ and (iv) the (potential) witnesses affected were protected persons within the meaning of KCC 392(2).¹²

4. On 18 May 2022, the Trial Panel reached all these same conclusions in its Trial Judgment.¹³ The Trial Panel further rejected Defence arguments on entrapment and public interest before convicting and sentencing the Accused.¹⁴

5. On 2 February 2023, The Appeals Panel upheld the Trial Panel's determinations on all points specified above, with Judge Ambos dissenting only on the interpretation of obstructing official persons.¹⁵ The Appeals Panel ultimately decided upon a sentence of four years and three months imprisonment for each Accused.

6. On 3 and 9 May 2023, the Requests were filed. The Requests seek relief which, depending on the ground, has been previously rejected by as many as six KSC judges.

⁹ Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 68- 69, 119.

¹⁰ Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 58-59, 115.

¹¹ Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 35-36, 100-01.

¹² Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 45, 105-06.

¹³ Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 146 (point (i)), 114 (point (ii)), 74 (point (iii)), 98 (point (iv)).

¹⁴ Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 824, 890.

¹⁵ Appeal Judgment, KSC-CA-2022-01/F00114, paras 293 (point (i)), 230 (point (ii)), 136 (point (iii)), 173 (point (iv)), 374 (entrapment), 340 (public interest).

III. Standard of Review

7. Requests for protection of legality are an extra-ordinary legal remedy under Article 48 of the Law. They must be distinguished from a third instance appeal, which can only be filed in limited circumstances that do not presently apply.¹⁶

8. A request for protection of legality is confined to raising violations of criminal law, substantial violations of procedural rule(s), and violations of the applicable rights protected by the Constitution or the ECHR.¹⁷

9. Such requests cannot be filed on the basis of an erroneous or incomplete determination of the facts of the case.¹⁸ Care must be taken to dismiss disguised attempts to relitigate the facts (including by challenging the application, as opposed to the interpretation, of the law to the facts),¹⁹ noting that it is a ‘widely spread unfortunate tendency among many Defence Counsels to try to use the Request for Protection of Legality as a second Appeal, which it is not supposed to be’.²⁰

10. Parties requesting protection of legality must present sufficiently reasoned arguments – merely expressing disagreement with the first and second instance

¹⁶ Article 47. *See also Veseli Legality Decision*, KSC-BC-2020-06/PL001/F00008, para.21 ([t]he protection of legality is not meant to create another general avenue of appeal’); *Case of S.S.*, PmL-Kzz 42/2017, para.23 ([t]he request for protection of legality, as one of the extraordinary legal remedies, is the exceptional legal remedy aiming to correct possibly wrong application of the material and procedural law. Strict requirements of the admissibility are designed to ensure that this legal remedy would not be used as a general third instance against all decisions in the criminal proceedings’).

¹⁷ Article 48(7)-(8); Rule 193(1).

¹⁸ Rule 193(3).

¹⁹ *Case of A.B.*, PKL-KZZ-137/2011, 13 April 2012, p.7.

²⁰ *Case of N.M. et al.*, Pml.Kzz 8/2015, para.4.2. *See also Case of ZK*, PML 125/2014, 8 July 2014, Section III, para.f (protection of legality cannot be used as an indirect method of further appeal; any such request filed with this purpose ‘is a misuse of this remedy’).

judgements or repeating prior submissions is insufficient.²¹ Alleging errors of law requires identifying the alleged error, presenting arguments in support of the claim, and explaining how the error invalidates the decision.²² A 'substantial' violation of procedures connotes a high threshold and should be assessed on a case-by-case basis.²³ Where no violation has been demonstrated or where a request is deficient, the Supreme Court is entitled to dismiss it and need not repeat or rehearse findings of lower courts.²⁴

IV. Submissions

11. As a preliminary matter, the Haradinaj Defence requests an oral hearing on its request.²⁵ The SPO is available for any such hearing and defers to the Supreme Court Panel's discretion as to whether one is necessary.

A. IMPARTIALITY OF JUDGES

*Haradinaj Ground 6*²⁶

12. The core of the Haradinaj Defence's argument is that, because the Appeals Chamber sat on interlocutory appeals, they could no longer qualify as impartial judges for hearing an appeal on the merits of the case.²⁷

13. This matter cannot be further litigated and is outside the jurisdiction of the Supreme Court Panel.²⁸ The Haradinaj Defence never raised this issue with the Appeals Panel or

²¹ Veseli Legality Decision, KSC-BC-2020-06/PL001/F00008, para.25; *Case of N.V. et al.*, Pml.Kzz 178/2016, para.68.

²² Appeal Judgment, KSC-CA-2022-01/F00114, para.22; *Fatuma et al.* AJ, para. 14; *Al Jadeed and Al Khayat* AJ, para. 12; *Šešelj* AJ, para.13; *to be read with* Veseli Legality Decision, KSC-BC-2020-06/PL001/F00008, para.22.

²³ Veseli Legality Decision, KSC-BC-2020-06/PL001/F00008, paras 23-24.

²⁴ *See, for example, Case of ZK*, PML 125/2014, 8 July 2014, Section III, para.h.

²⁵ Haradinaj Request, KSC-SC-2023-01/F00009, paras 76-79.

²⁶ Haradinaj Request, KSC-SC-2023-01/F00009, paras 70-74.

²⁷ Haradinaj Request, KSC-SC-2023-01/F00009, paras 72-74.

²⁸ *See similarly* Appeal Judgment, KSC-CA-2022-01/F00114, paras 42-43.

challenged its composition through the proper procedures specified in Rule 20(3)-(6). Had they followed these procedures, any decision on the disqualification of judges would not be subject to review.²⁹

14. The Appeals Judgment is not itself a determination on the assignment of the Appeals Panel, as this decision was taken by the President.³⁰ The Haradinaj Defence arguments are nothing less than an attempt to challenge an administrative issue for the first time following final appeal. For these reasons, this ground should be summarily dismissed.

15. Even if considered on its merits, the Law regulates when judges can and cannot sit on a case.³¹ There is no statutory provision preventing Appeals Panel judges from sitting on both interlocutory and final appeals in the same case. Given the limited number of available judges and the concurrent necessity to assign judges to other divisions,³² it is structurally infeasible to operate otherwise. It is routine for Appeals Chamber judges to sit on interlocutory and final appeals on the same case at the ICTY, ICC, and other international tribunals.³³

16. The personal impartiality of a judge must be presumed until there is proof to the contrary; such presumption cannot be easily rebutted.³⁴ The Haradinaj Defence has the burden of rebutting this presumption on the basis of adequate and reliable evidence. The Haradinaj Defence presents no such evidence, instead advancing an unsubstantiated

²⁹ Rule 20(5).

³⁰ Decision Assigning a Court of Appeals Panel, KSC-CA-2022-01/F00002, 24 May 2022.

³¹ Article 39.

³² Article 25.

³³ See generally Article 12(3) of the ICTY Statute; Article 39 of the ICC Statute.

³⁴ *Kyprianou*, para.119; *Nyiramasuhuko et al.* AJ, para.95.

claim that the ongoing involvement of Appeals Panel judges, combined with their interlocutory appellate rulings, somehow impinges on actual or perceived impartiality.

17. The Haradinaj Defence does not explain, let alone establish, how the allegations in this ground materially affected the Appeal Judgment. Further, the Haradinaj Defence does not cite any precise legal authority that would validate such audacious contentions, and fails to establish any violation of procedure, substantial or otherwise.

B. W04730 INTERVIEW

*Gucati Ground 5*³⁵

18. The Gucati Defence's argument that the Appeals Panel did not grant a sufficient remedy for a disclosure violation is predicated on a defective assumption.³⁶ The simple reason no remedy was provided is that no violation was found.

19. W04730's first SPO interview ('First Interview') was noticed under Rule 102(3) and made available to the Trial Panel.³⁷ The Trial Panel granted the SPO's request for non-disclosure of this interview.³⁸

20. When the Trial Panel was deliberating its judgment, the SPO had a further phone contact with W04730 ('Second Interview'). The transcript of the Second Interview was only finalised during the appeals proceedings.³⁹ The SPO did not consider it necessary to

³⁵ Gucati Request, KSC-SC-2023-01/F00002/RED, paras 96-170.

³⁶ Gucati Request, KSC-SC-2023-01/F00002/RED, paras 96, 133.

³⁷ Annex 1 to Prosecution addendum to its Consolidated Rule 102(3) Notice, KSC-BC-2020-07/F00307/A01, 9 September 2021, Confidential (Items 186-90).

³⁸ Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, KSC-BC-2020-07/F00413, 3 November 2021, Confidential (with annex) ('Rule 102(3) Decision'), paras 60-61.

³⁹ See Public Redacted Version of Notification on W04730 telephone contact, KSC-CA-2022-01/F00028/RED, 7 July 2022 (redacted version notified 12 January 2023) ('W04730 Notification'), paras 6-7. The Gucati Defence misapprehends the difference between simultaneously interpreting a conversation in English and

disclose or notice this interview, but in an abundance of caution made the Second Interview available to the Appeals Panel *ex parte* and explained its position.⁴⁰

21. About two months after this notification, the Appeals Panel decided that the Second Interview fell under Rule 103 of the Rules.⁴¹ The Appeals Panel further held that this determination made the First Interview disclosable for context.⁴² The SPO duly disclosed both interviews within the deadline set by the Appeals Panel.⁴³

22. The Defence then sought relief for alleged disclosure violations in different forms. The Appeals Panel rejected all relief sought,⁴⁴ finding in particular that the SPO had not breached its Rule 103 disclosure obligations in the manner it proceeded.⁴⁵ The Appeals Panel did not require ‘bad faith’ in order to find a Rule 103 violation, but rather considered that ‘the SPO acted as soon as possible after the information was in its actual knowledge’.⁴⁶

23. Further, for all its claims, the Gucati Request does not substantiate what prejudice it actually suffered from its ‘violation’. The Gucati Defence never sought to introduce either the First Interview or Second Interview as additional evidence on appeal, even after

the preparing, revising, and editing subsequently required to make a disclosable English transcript of that conversation. Gucati Request, KSC-SC-2023-01/F00002, para.138.

⁴⁰ W04730 Notification, KSC-CA-2022-01/F00028/RED.

⁴¹ Public Redacted Version of Decision on Prosecution Notifications, KSC-CA-2022-01/F00044/RED, 15 September 2022 (redacted version notified 31 January 2023) (‘Notifications Decision’), paras 27-29.

⁴² Notifications Decision, KSC-CA-2022-01/F00044/RED, para.29.

⁴³ Disclosure Package 1 (KSC-CA-2022-01); Public Redacted Version of Decision on Specialist Prosecutor’s Office Request for Protective Measures, KSC-CA-2022-01/F00049/RED, 23 September 2022 (redacted version notified 31 January 2023).

⁴⁴ Public Redacted Version of Decision on Defence Motions for Alternate Relief Relating to Rule 103 Disclosure Violations, KSC-CA-2022-01/F00083/RED, 7 November 2022 (redacted version notified 31 January 2023) (‘Rule 103 Decision’).

⁴⁵ Rule 103 Decision, KSC-CA-2022-01/F00083/RED, paras 24-26.

⁴⁶ Rule 103 Decision, KSC-CA-2022-01/F00083/RED, para.26. *Contra* Gucati Request, KSC-SC-2023-01/F00002/RED, para.145.

it knew that its planned investigative steps were unavailable.⁴⁷ Of the two persons mentioned in paragraph 149 of the Gucati Request, the Gucati Defence neglects to mention that: (i) the first could not be interviewed because they were subject to protective measures in another case⁴⁸ and (ii) the second declined to be interviewed by the defence.⁴⁹ These same issues would have equally foreclosed the contemplated interviews had they been pursued during the course of the trial, and the inferences the Gucati Defence seeks to draw from W04730's interviews are entirely baseless.⁵⁰

24. The Gucati Defence arguments establish no violation of procedure and should be rejected.

C. OBSTRUCTION (KCC 401)

Gucati Ground 1⁵¹ and Haradinaj Ground 1⁵²

25. The only issue before the Supreme Court Panel on these grounds is whether or not serious threats directed against third persons could – as a matter of law – obstruct an official person within the meaning of KCC 401(1). Gucati's and Haradinaj's serious threats against (potential) witnesses and these threats' proximity to the KSC/SPO's

⁴⁷ Public Redacted Version of Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing, KSC-CA-2022-01/F00094/RED, 28 November 2022 (redacted version notified 31 January 2023) para.19. ('KSC-CA-2022-01/F00094/RED').

⁴⁸ KSC-CA-2022-01/F00094/RED, para.20.

⁴⁹ Public redacted version of Prosecution Consolidated Response to Defence Disclosure Requests, KSC-CA-2022-01/F00091/RED, 11 November 2022 (redacted version notified on 12 January 2023), para.13.

⁵⁰ Rule 103 Decision, KSC-CA-2022-01/F00083/RED, para.21. *See also* Public Redacted Version of Prosecution Consolidated Response to Defence Rule 103 Requests and Related Reconsideration Requests, KSC-CA-2022-01/F00076/RED, 27 October 2022 (redacted version notified 12 January 2023), paras 15-18. *Contra* Gucati Request, KSC-SC-2023-01/F00002, paras 109-17.

⁵¹ Gucati Request, KSC-SC-2023-01/F00002/RED, paras 14-22.

⁵² Haradinaj Request, KSC-SC-2023-01/F00009, paras 13-20.

official duties are questions of fact that fall outside the purview of a request for legality protection.

26. Article 401(1) of the KCC 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.

27. As drafted, KCC 401(1) covers any serious threat capable of obstructing an official person. The Pre-Trial Judge, Trial Panel, and Appeals Panel Majority rightly interpreted that KCC 401(1) does not necessitate that the threat to obstruct an official be directly targeted at that official.⁵³ The provision would be worded differently if this were a requirement (along the lines of ‘by force or serious threat *against an official person*, obstructs or attempts to obstruct *that official person*’).⁵⁴ The KCC commentary from Salihu et al., upon which the Defence relies, also unambiguously acknowledges that the threats in this offence can indeed target other individuals, or even inanimate objects.⁵⁵

⁵³ Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.119; Trial Judgment, KSC-BC-2020-07/F00611/RED, para.639; Appeal Judgment, KSC-CA-2022-01/F00114, para.282.

⁵⁴ A more specific formulation of this kind in the KCC can be found in the contextual elements for crimes against humanity, where KCC 143(1) requires that the widespread or systematic attack be ‘directed against any civilian population’. See also Appeal Judgment, KSC-CA-2022-01/F00114, para.282.

⁵⁵ Salihu et al. Commentary, pp.1165-66 (‘commenting that [t]he use of force could be applied both against the official person and other people, most frequently people related to the official person. However, this criminal offence may occur also when the force applied against another person has prevented the official person to perform his official duties, i.e. he has been compelled to interrupt the performance of his official duties (for instance, the use of force against a passer-by). The perpetration of violence could also be directed against objects, on the condition that these objects are used for the performance of a particular official action’); The Gucati Defence relies on this commentary in other parts of the Gucati Request, and the Haradinaj Defence relied on this specific part of the commentary in its rejected appellate submissions. See Appeal Judgment, KSC-CA-2022-01/F00114, para.283, n.644.

28. The Defence overlooks basic principles of causality, refusing to see how threatening potential witnesses could in fact and foreseeably hinder the KSC/SPO's work. As notably put by Defence expert witness Robert Reid during trial:

A leak of any information is detrimental to a prosecution's case. The leak of witness information is doubly detrimental in that it not only impacts the potential of your case but it impacts on the psychology of the particular witness. And if it's found out to be -- if the witness community find out about it, it also impacts upon other witnesses.

So, you know, if ten other witnesses find out about it, there's a huge impact on your case. You don't just have one witness who you've got to be concerned about now. If it's leaked and it becomes public knowledge, then you've got ten to, say, 15 to 20 witnesses who it impacts upon.⁵⁶

29. The interpretation by the Pre-Trial Judge, Trial Panel, and Appeals Panel Majority aligns with the purpose of Article 401(1) of the KCC, which aims to protect officials from obstruction in their duties, whether direct or indirect.⁵⁷ The *M.I. et al.* case advanced by the Gucati Defence is consistent with this purpose,⁵⁸ and in any event caution is required when relying on this case for the interpretation of the current KCC 401(1).⁵⁹

30. Other KCC provisions cannot capture the full scope of criminality when viewed through the restrictive lens of the Defence and Dissenting Opinion's interpretation of KCC 401(1). KCC 386 and 387 capture serious threats against private witnesses, but only

⁵⁶ Reid, T.3360-61.

⁵⁷ Appeal Judgment, KSC-CA-2022-01/F00114, para.282; *Salihu et al.* Commentary, p.1165 ('the primary subject of [this] protection is the [official] duty, that is, unhindered performance of official duties by the official person, with the protection of the official person himself a corollary of such protection').

⁵⁸ Protecting official persons against violent or threatening duties is important precisely because otherwise they would be hindered in the official performance of their duties. *Compare* Appeal Judgment, KSC-CA-2022-01/F00114, para.282 *with M.I. et al.*, part 6.3.

⁵⁹ *M.I. et al.* was applying the language from the PCCK whereby the equivalent to KCC 401(1) then required there to be a serious threat of force (Article 316(1) of the PCCK). However, the words 'of force' are removed in the version of KCC 401(1) applicable at the time of the offences in this case.

KCC 401(1) can capture the extra condemnation warranted when these threats against witnesses are made to obstruct the work of official persons.

31. A provision's plain meaning and purpose are still relevant within the principle of strict construction.⁶⁰ While the *lex stricta* principle demands strict construction and prohibits analogy, the Defence's interpretation adds limitations to the provision that are not there. KCC 401(1) governs, *inter alia*, attempts to obstruct an official by 'serious threat', with no further qualifiers dictating which serious threats can apply. Requiring the statutory language to explicitly cover every possible serious threat is simply unreasonable and incompatible with basic principles of statutory interpretation.⁶¹

32. Strict construction must still allow for permissible interpretation, and neither the Defence nor the Dissenting Opinion offer any Kosovo authorities interpreting KCC 401(1) in the constricted manner suggested. Upholding the principle of legality still allows for judicial interpretation of the applicable law⁶² as long as the judicial development is consistent with the 'essence of the offence' (i.e. the existing law) and could have been reasonably foreseen.⁶³ The Pre-Trial Judge, Trial Panel and Appeals Panel Majority's interpretation was fully consistent with the essence of KCC 401(1), and was unquestionably foreseeable. This foreseeability is demonstrated by the established facts:

⁶⁰ See Appeal Judgment, KSC-CA-2022-01/F00114, paras 131, 135 (unanimously turning to such considerations in conjunction with KCC 2(3), which sets out the principle of strict construction in the KCC). See also *Hadžihasanović et al.* Decision (Partial Dissenting Opinion of Judge Shahabuddeen), IT-01-47-AR72, 16 July 2003, para.12.

⁶¹ Relatedly, Haradinaj Defence arguments that the legislative drafters had to expressly legislate for 'indirect intent' ignore KCC 21 and wrongly conflate *mens rea* considerations into a ground about the *actus reus* of the offence. Haradinaj Request, KSC-SC-2023-01/F00009, para.16.

⁶² *Del Río Prada*, 42750/09, paras 92–93; *Aleksovski* AJ, IT-95-14/1-A, para. 127 ('[*nullum crimen sine lege*] does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime').

⁶³ *Vasiliasukas*, 35343/05, paras 155, 157; *Del Río Prada*, 42750/09, para.93; *Kafkaris*, 21906/04, para.141; *S.W.*, 20166/92, para.36.

Gucati and Haradinaj knew their actions were both unlawful⁶⁴ and could obstruct the SPO – indeed, it was their express intention to do so.⁶⁵

33. The Pre-Trial Judge, Trial Panel, and Appeals Panel Majority are not analogising; their interpretation aligns precisely with the statutory language of KCC 401(1). Concluding otherwise would disallow any interpretation of flexible statutory language that the law intended to permit. For example, Article 13(1)(j) of the Law prohibits ‘other inhumane acts’ as a crime against humanity. Provisions drafted in this manner comport with the principle of legality,⁶⁶ and the ICC – which has robust protection for the principle of legality – has essentially the same crime in Article 7(1)(k) of the ICC Statute. However, if *lex stricta* is interpreted in the manner proposed by the Defence and Dissenting Opinion, then any application of provisions written in this way would be prohibited analogy. This indeed seems to be the dissenting judge’s view on Article 7(1)(k) of the ICC Statute.⁶⁷

⁶⁴ Paragraph 77 below.

⁶⁵ Guçati, T.2430-32; P00007ET, p.6 (Haradinaj: ‘we put this out because we want to show to the judge that the job you have done is zero’); P00002ET, p.4; P00028ET; P00007ET, pp.11-12 (emphasis added: ‘ANCHOR: In this case, should all indictments filed by the Specialist Chambers be dismissed? MR. GASHI: Now the Specialist Chambers need ... the Specialist Chambers need to think again. Now it is in the hands of the pre-trial judge and I believe that after this scandal of the Specialist Chambers, not of the KLA OVL, individuals or Albanians ... ANCHOR: This is known. MR. GASHI: They have to think once again whether to confirm those indictments or not. [...] MR. Haradinaj: Because, since the court has degenerated one cannot expect it to resort to degenerated means to file an indictment. *Our lawyer said it well. I believe it should think twice now.*’); P00035ET, p.3 (‘[w]e will publish everything we receive that exposes this indictment and these indictments they want to file.’); P00015ET, p.2 (Haradinaj, moments before his arrest on 25 September 2020: ‘[k]eep this in mind, we will be against this court as long as we live, as long as we can breathe. Full stop. We will work against this court. Full stop. It is their job to keep their secrets safe. It is not my fault that they have involved those illiterate people, that they have involved naïve people, and that they have lied to these naïve people of ours that they will protect their secrets. They should have protected their archives.’); P00018ET, pp.1-2; P00004ET, p.3; P00034ET, p.2; P00008ET, pp.26, 30-31; P00025ET, pp.1-2, 9-10; P00029ET, p.2; P00030ET, pp.17-18.

⁶⁶ *Cantoni*, 17862/91, paras 31–32.

⁶⁷ See Ambos Treatise, p.91 (‘[d]espite the explicit recognition of the principle of legality, the ICC Statute does not fully comply with it. For example, Article 7(1)(k) refers to “other inhumane acts of a similar character” and thus amounts to punishment by analogy, contrary to the *lex stricta* rule, because the

34. This is also not a case of ambiguity that should favour the accused. There is no ambiguity to resolve: KCC 401(1) is clearly not limited in the way the Defence proposes. Not every Defence-proposed interpretation of a provision creates ambiguity or violates the principle of strict construction, as unanimous Appeals Panel findings in other areas of the Appeals Judgment demonstrate.⁶⁸

35. While the Defence heavily relies on the Dissenting Opinion in the Requests, even that opinion is not as unequivocal as presented. The Dissenting Opinion noted that persons ‘related or close’ to an official person arguably fell within the scope of Article 401(1) of the KCC.⁶⁹ This hypothetical is distinguished from the ‘private persons unrelated to SPO officials’ in the present case.⁷⁰ The Dissenting Opinion did not definitively resolve this question, but the mere contemplation of the possibility implies an openness to the notion that conduct against third parties could fall within the purview of a (strictly interpreted) KCC 401(1).⁷¹ Whether or not the (potential) witnesses in this case are sufficiently proximate to the official persons is a factual matter beyond the scope of a request for protection of legality.⁷²

“similarity” of the other inhumane acts must be examined by drawing an analogy to the other acts covered by Article 7’).

⁶⁸ See Appeal Judgment, KSC-CA-2022-01/F00114, para.135 (in the context of rejecting the Gucati Defence’s interpretation of ‘information disclosed in any official proceeding’ raised as Ground 3 of the Gucati Request; citations removed: ‘[t]he Panel further finds that, contrary to Gucati’s assertion, nothing in the wording of Article 392(1) of the KCC justifies the application of Article 2(3) of the KCC, according to which, in case of ambiguity, the definition of a criminal offence shall be interpreted in favour of the Accused (*lex mitior* rule). Having found that the interpretation of Article 392(1) of the KCC bears no ambiguity, recourse to Article 2(3) of the KCC is not warranted’).

⁶⁹ Dissenting Opinion, para.12.

⁷⁰ Dissenting Opinion, para.12.

⁷¹ *Contra* Haradinaj Request, KSC-SC-2023-01/F00009, para.18.

⁷² See paragraph 25 above.

36. The interpretation shared by the Pre-Trial Judge, Trial Panel, and Appeals Panel Majority aligns entirely with the principle of legality. The Defence's arguments should be rejected.

D. INTIMIDATION (KCC 387)

Gucati Ground 2⁷³ and Haradinaj Ground 2⁷⁴

37. The Defence's arguments on these grounds amount to a mere repetition of legal submissions which have failed previously.

38. The inducement required by KCC 387 is for a person: (i) to refrain from making a statement; (ii) to make a false statement; or (iii) to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings. The Pre-Trial Judge did not require a pre-existing act of obstruction for KCC 387 to apply, and the Trial Panel and Appeals Panel correctly concluded that the phrase 'when such information relates to obstruction of criminal proceedings' qualifies only the third of these alternatives.⁷⁵ This interpretation best aligns with the statutory construction of the provision, as explained in detail by the Appeals Panel:

The Appeals Panel will first discuss the scope of the qualifier 'when such information relates to obstruction of criminal proceedings' in Article 387 of the KCC, as raised by Gucati. The Appeals Panel considers that the words 'such information' in the qualifier of Article 387 of the KCC refer to the '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 the formulation of the qualifier. The Panel notes, first, that the qualifier refers to 'such information' and thus to the 'true

⁷³ Gucati Request, KSC-SC-2023-01/F00002/RED, paras 23-64.

⁷⁴ Haradinaj Request, KSC-SC-2023-01/F00009, paras 21-30.

⁷⁵ Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 58-61; Trial Judgment, KSC-BC-2020-07/F00611/RED, para.114; Appeal Judgment, KSC-CA-2022-01/F00114, para. 211.

information' mentioned in the third alternative, and second, that the qualifier is directly placed after the third alternative.⁷⁶

39. If 'such information relates to obstruction of criminal proceedings' was construed as a general element across all three alternatives, as argued in the Requests, this would lead to an absurd interpretation where only witnesses privy to information about obstruction could be intimidated.⁷⁷ The inevitable implication of this interpretation would be that crimes under KCC 387 could only be charged if the intimidated person had information about obstruction as per KCC 386. This is not how Kosovo courts interpret KCC 387, as they make findings of guilt under this provision in the absence of pre-existing acts of obstruction.⁷⁸ The Defence cannot produce a single authority in support of its statutory interpretation.

40. The Gucati Defence's comparison to a distinctly narrower provision in the PCCK concerning intimidation within the framework of organised crime offers no insight into KCC 387's legislative intent,⁷⁹ as noted by the Appeals Panel.⁸⁰

41. There is also nothing 'confusing' about how to contextually read KCC 386 with KCC 387 in the Confirmation Decision, Trial Judgment, and Appeal Judgment's interpretations.⁸¹ KCC 386 governs obstruction generally across all 'official proceedings', whereas KCC 387 specifically addresses intimidation of those with information in 'criminal proceedings' as requiring special legal protection. It is fully justifiable that the legislative drafters would differentiate the unique harm caused in the latter context as a

⁷⁶ Appeal Judgment, KSC-CA-2022-01/F00114, para.221 (citations removed).

⁷⁷ *Contra* Gucati Request, KSC-SC-2023-01/F00002/RED, para.33.

⁷⁸ *KS and RB; LT* (KSC-CA-2022-01/F00047/A02).

⁷⁹ *Contra* Gucati Request, KSC-SC-2023-01/F00002/RED, paras 29-31.

⁸⁰ Appeal Judgment, KSC-CA-2022-01/F00114, para.222 (referencing Article 310 of the PCCK).

⁸¹ *Contra* Haradinaj Request, KSC-SC-2023-01/F00009, para.28.

separate offence — particularly in Kosovo — which logically explains why KCC 387 allows for stiffer penalties than KCC 386.

42. Relatedly, it was not necessary to determine the truth or falsity of the information in question because KCC 387 criminalises the act of inducing someone to ‘refrain from making a statement’. Indeed, this was the alternative on which the Trial Panel reached its finding of direct intent that was upheld on appeal.⁸² The Gucati Defence’s suggestion that the Appeals Panel somehow fabricated this conclusion in the Trial Judgment is entirely without merit.⁸³ Borrowing from the Trial Panel’s interpretation of KCC 388(1) is also entirely inapposite,⁸⁴ as KCC 388’s statutory language contains an element of truthful information in its *mens rea* requirements which is non-existent in KCC 387.⁸⁵ This is another instance of the Defence demanding that the Trial Panel make findings beyond what was necessary to secure a conviction.

43. Gucati Defence arguments that eventual intent is unavailable for this crime are also plainly at odds with KCC 21, but the Supreme Court Panel need not resolve this issue if no violation is found on direct intent.⁸⁶

44. No violation of the criminal law is established, and Defence submissions under these grounds should again be rejected.

⁸² Appeal Judgment, KSC-CA-2022-01/F00114, para.264; Trial Judgment, KSC-BC-2020-07/F00611/RED, para.604.

⁸³ *Contra* Gucati Request, KSC-SC-2023-01/F00002/RED, paras 40-41. Relatedly, arguments that the Trial Panel referenced ‘evidence’ or ‘information’ rather than ‘statements’ is nothing more than an attempt at legal obfuscation to evade clear Trial Panel findings. *See* Appeal Judgment, KSC-CA-2022-01/F00114, para.223.

⁸⁴ *Contra* Gucati Request, KSC-SC-2023-01/F00002/RED, para.57.

⁸⁵ Appeal Judgment, KSC-CA-2022-01/F00114, para.264.

⁸⁶ Trial Judgment, KSC-BC-2020-07/F00611/RED, para.124; *Contra* Gucati Request, KSC-SC-2023-01/F00002/RED, paras 61-64.

E. SECRECY OF PROCEEDINGS (KCC 392)

1. *Gucati Ground* ³⁸⁷

45. The plain language of KCC 392(1) does not require that the information be disclosed to the perpetrator in the official proceeding. If such a requirement existed, '[w]hoever, without authorization, reveals information disclosed in any official proceeding' in KCC 392(1) would have instead read something like '[w]hoever, without authorization, reveals information disclosed *to him or her* in any official proceeding'. As detailed by the Appeals Panel:

The Panel does not consider that Article 392(1) of the KCC should be read in such a restrictive way. The Panel rather observes that Article 392(1) of the KCC refers to '[w]hoever without authorization reveals [...] information [...]' and, based on the plain or ordinary meaning of the word 'whoever', applies to any person, regardless of whether that person is part of the official Specialist Chambers' proceedings. Accordingly, the Panel dismisses *Gucati's* interpretation and agrees with the Trial Panel's finding that Article 392(1) of the KCC does not specifically require that the information must have been disclosed directly to the perpetrator of the offence and that a different interpretation would be inconsistent with the plain meaning of the text of the provision, as well as with the purpose of this provision, that is the protection of the secrecy of the proceedings.⁸⁸

46. There is no 'loophole' in the provision.⁸⁹ The *Gucati Defence* employs an overly restrictive interpretation of 'disclosure', inconsistent with the word's literal meaning.⁹⁰

47. The *Gucati Defence's* suggested interpretation would allow for easy circumvention of the protected interest, for example when a third person - outside of any proceeding - reveals protected information obtained through an accused who received it through formal disclosure. The *Gucati Defence's* other proffered legal bases under this ground do

⁸⁷ *Gucati Request*, KSC-SC-2023-01/F00002/RED, paras 65-80.

⁸⁸ See Appeal Judgment, KSC-CA-2022-01/F00114, paras 131, 133-34 (from para.131, with citations removed).

⁸⁹ *Contra* *Gucati Request*, KSC-SC-2023-01/F00002/RED, para.72. See also Appeal Judgment, KSC-CA-2022-01/F00114, para.135.

⁹⁰ See Appeal Judgment, KSC-CA-2022-01/F00114, paras 133-34. *Contra* *Gucati Request*, KSC-SC-2023-01/F00002/RED, paras 77-78.

not protect the secrecy of the proceedings to a comparable degree.⁹¹ KCC 393 (governing contempt of court) requires the existence of a formal ruling, decision, or judgment of a court which will often not exist for investigation materials generated by the prosecution. KCC 199(1), KCC 200 and Article 236 of the Kosovo Criminal Procedure Code are not even incorporated by reference into the KSC statutory framework.

48. The Appeals Panel and Trial Panel interpret KCC 392(1) correctly,⁹² and no violation of the criminal law is established.

2. *Haradinaj Ground 3*⁹³

49. Haradinaj Defence submissions under this ground amount to the Trial and Appeals Panels making an incomplete factual assessment on who is a 'protected person' per KCC 392(2). These are repetitive, unsuccessful appellate arguments labelled by the Haradinaj Defence on appeal as errors *of fact*.⁹⁴ This ground should be dismissed accordingly.

50. Even if considered further, the Haradinaj Defence's interpretation of a protected person deviates from the statutory language. KCC 392(2) does not mandate that the assessment of protected persons be carried out only in the manner proposed by the Haradinaj Defence.⁹⁵

51. That persons named in confidential documents not authorised for disclosure are 'under protection in the criminal proceedings' follows from the plain meaning of KCC

⁹¹ Gucati Request, KSC-SC-2023-01/F00002/RED, para.71.

⁹² Appeal Judgment, KSC-CA-2022-01/F00114, para.131; Trial Judgment, KSC-BC-2020-07/F00611/RED, para.75.

⁹³ Haradinaj Request, KSC-SC-2023-01/F00009, paras 31-41.

⁹⁴ Further Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, KSC-CA-2022-01/F00035/COR2, 19 August 2022 (corrected version notified 2 September 2022) ('Haradinaj Appeal'), paras 196-208.

⁹⁵ See Appeal Judgment, KSC-CA-2022-01/F00114, para.186.

392(2).⁹⁶ Reliance on Article 62 in determining the protected status of the persons concerned follows logically from the SPO's role as a classifying authority, as made clear by the Pre-Trial Judge, Trial Panel, and Appeals Panel.⁹⁷ Article 23(1) incorporates the protective measures offered under Articles 5-13 of the Witness Protection Law into the KSC framework, but its definition of a protected person is not so incorporated. In any event, the definition of 'protected person' in this law is consonant with the definition adopted in this case, as noted by the Trial Panel itself.⁹⁸

52. The Haradinaj Defence fails to establish any violation of the criminal law from the manner it was interpreted in the Confirmation Decision, Trial Judgment, and Appeal Judgment.

3. *Gucati Ground 4*⁹⁹

53. Defence arguments under this ground principally concern an alleged erroneous or incomplete determination of the facts when making findings on protected persons under

⁹⁶ Appeal Judgment, KSC-CA-2022-01/F00114, para.183; Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 95, 97. *Contra* Haradinaj Request, KSC-SC-2023-01/F00009, para.39.

⁹⁷ Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.44(c); Trial Judgment, KSC-BC-2020-07/F00611/RED, para.95; Appeal Judgment, KSC-CA-2022-01/F00114, para.181. *Contra* Haradinaj Request, KSC-SC-2023-01/F00009, para.35.

⁹⁸ Trial Judgment, KSC-BC-2020-07/F00611/RED, para.511, *upheld in* Appeal Judgment, KSC-CA-2022-01/F00114, para.170.

⁹⁹ *Gucati* Request, KSC-SC-2023-01/F00002/RED, paras 81-95.

KCC 392(2).¹⁰⁰ Such arguments should be summarily dismissed as falling outside the scope of a legality challenge.

54. If evaluated on its merits, the Gucati Defence merely reiterates previously unsuccessful appeal arguments.¹⁰¹ The Appeals Panel and Trial Panel made clear findings as to why the (potential) witnesses were under protection in KSC/SPO proceedings.¹⁰² These findings follow naturally from Zdenka Pumper's evidence, whose definition of a witness was limited to those with information on matters related to crimes or other important circumstances relevant to KSC proceedings.¹⁰³ The Defence merely disagrees with the Trial Panel and Appeals Panel factual determinations on these points.

55. The Appeals Panel's reference to the evidence on the 35 statements relied upon by the Gucati Defence is also based on Zdenka Pumper. The 'witness' statements Ms Pumper identified therefore fall within the scope of KSC proceedings because of how she defined that term.¹⁰⁴

56. The Gucati Defence misinterprets this Appeals Panel consideration as the sole determinant for protected persons in KSC/SPO proceedings.¹⁰⁵ The Appeals Panel gave no indication this evidence on Batch 1 was the *only* fact available to determine the link between the protected persons and KSC/SPO proceedings. Indeed, other evidence was

¹⁰⁰ See especially Gucati Request, KSC-SC-2023-01/F00002/RED, para.86 ('[t]he Trial-Judgment did not identify what crime any individual had information about, or what perpetrator, or what other circumstances relevant to SC proceedings that person might have had information about, and why those circumstances were important to SC proceedings. TP heard no such evidence'); Haradinaj Request, KSC-SC-2023-01/F00009, para.37 (on whether there has been a sufficient assessment on the relevance of the protected persons' evidence).

¹⁰¹ Summarised in Appeal Judgment, KSC-CA-2022-01/F00114, para.162.

¹⁰² Appeal Judgment, KSC-CA-2022-01/F00114, paras 166-73; Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 89, 94-99, 509-27.

¹⁰³ Appeal Judgment, KSC-CA-2022-01/F00114, para.168.

¹⁰⁴ Contra Gucati Request, KSC-SC-2023-01/F00002/RED, para.90.

¹⁰⁵ Appeal Judgment, KSC-CA-2022-01/F00114, para.171.

considered in the same Trial Judgment section analysed by the Appeals Panel, such as detailed charts Zdenka Pumper prepared on Batches 1, 2, and 4 which reveal hundreds of (potential) witnesses within her definition of the term.¹⁰⁶ This same Trial Judgment section also relies on Pumper's evidence on Batch 3, and her evidence that there were 150 (potential) witnesses within this document alone.¹⁰⁷ Batch 3 also cites these names within an internal document, the admitted content of which is incontrovertibly associated with crimes falling under the jurisdiction of the KSC.¹⁰⁸

57. The Gucati Defence fails to establish any violation and its arguments should be dismissed under this ground accordingly.

F. ENTRAPMENT

Haradinaj Ground 5¹⁰⁹ and Gucati Ground 6¹¹⁰

58. Defence arguments under this ground which go towards the sufficiency of the evidence for its ill-conceived entrapment defence should be summarily dismissed as going towards an erroneous determination of the facts presented at trial and on appeal.

59. Haradinaj Defence arguments that they were denied access to information required to make this defence neglects the detailed lengths the Trial Panel went to ensure their procedural rights.¹¹¹ Every piece of information that could potentially show any SPO

¹⁰⁶ Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 337 (P90), 341 (P91), 348 (P90). Even the same paragraph mentioning the 35 witness statements cites to Zdenka Pumper's Batch 1 evidence that the confidential annexes of the SITF Requests listed 'hundreds of names of witnesses and potential witnesses'. Trial Judgment, KSC-BC-2020-07/F00611/RED, para.345.

¹⁰⁷ Trial Judgment, KSC-BC-2020-07/F00611/RED, para.355.

¹⁰⁸ P00106-P00119, *relied upon in* Trial Judgment, KSC-BC-2020-07/F00611/RED, para.354.

¹⁰⁹ Haradinaj Request, KSC-SC-2023-01/F00009, paras 60-69.

¹¹⁰ Gucati Request, KSC-SC-2023-01/F00002/RED, paras 171-82.

¹¹¹ Appeal Judgment, KSC-CA-2022-01/F00114, paras 80-82. *Contra* Haradinaj Request, KSC-SC-2023-01/F00009, paras 67-69.

involvement in delivering the Batches was disclosed to the Accused.¹¹² The materials ultimately tendered by the Defence at trial included: (i) a report that, *inter alia*, ‘uncovered no evidence that members of the SPO staff deliberately leaked [Batch 3]’;¹¹³ and (ii) various items relating to Defence claims of surveillance¹¹⁴ for which no connection to the SPO was revealed. The Defence did not even make the effort to introduce other disclosed materials on these matters, only to attempt to rely on this unadmitted evidence on appeal.¹¹⁵ The Haradinaj Defence continues to argue as if information supporting their claims was withheld from them, whereas in truth no such information exists.

60. To the extent that the Defence argues that evidence falling below a *prima facie* standard should suffice to substantiate entrapment,¹¹⁶ no violation is established. *Prima facie* is Latin for ‘on its face’. A failure by the Defence to establish this standard necessarily implies that it is ‘wholly improbable’. If the Defence cannot uphold a claim on its face it will be unable to prevail on any scrutiny of that claim. This is fully consistent with the ECtHR jurisprudence on this point.¹¹⁷ The Defence’s interpretation of the applicable

¹¹² See especially Public Redacted Version of Decision on the Prosecution Challenges to Disclosure of Items in the Updated Rule 102(3) Notice, KSC-BC-2020-07/F00413/RED, 3 November 2021 (redacted version notified 16 December 2021).

¹¹³ 1D00033, p.3. This item is Rule 191 on the Rule 102(3) notice, and the Trial Panel ordering its disclosure – even though it constituted internal work product – was specifically noted by the Appeals Panel. Appeal Judgment, KSC-CA-2022-01/F00114, para.81, n.199.

¹¹⁴ 1D00031; 1D00032; 1D00034.

¹¹⁵ See Appeal Judgment, KSC-CA-2022-01/F00114, para.372.

¹¹⁶ Gucati Request, KSC-SC-2023-01/F00002/RED, paras 171-82.

¹¹⁷ Appeal Judgment, KSC-CA-2022-01/F00114, paras 363-65; *Contra* Gucati Request, KSC-SC-2023-01/F00002/RED, para.176; Haradinaj Request, KSC-SC-2023-01/F00009, para.64. As concerns *Matanović*, the reference to ‘*prima facie*’ in that case appears in connection with the beginning of a paragraph which explains that ‘a preliminary consideration in its assessment of a complaint of incitement relates to the existence of an *arguable complaint* that an applicant was subjected to incitement by the State authorities’. *Matanović*, para.131 (emphasis added). In the cases cited by *Matanović* which were found not to be *prima facie* arguable complaints, it was the established facts which were deemed insufficient. *Trifontsov*, paras 32-33; *Lyubchenko*, paras 33-34.

threshold is so low as to exclude any evidential requirement, which - as correctly found by the Appeals Panel - misconstrues the ECtHR jurisprudence.¹¹⁸

61. There is simply no evidence that Gucati and Haradinaj were influenced by the SPO, or anyone else, in the actions they took.¹¹⁹ Gucati's testimony at trial was particularly revealing in this regard:

Q. And nobody forced you into calling the press conferences and sharing the documents with the media; is this correct?

A. Only God can force me to do something. I'm the chairman of that organisation, and not a single person can force me to hold a press conference on certain issue. Only God can order me to do that, if you believe in God.¹²⁰

62. The Trial Panel considered, at length, the numerous Defence arguments concerning entrapment and ultimately found that the claim was wholly improbable. The Appeals Panel upheld these findings, and the Defence fails to establish any violation of law or procedure.

G. PUBLIC INTEREST

*Haradinaj Ground 7*¹²¹

63. The Haradinaj Defence asserts that the Appeals Panel's disagreement with its stance on the availability of a public interest defence constitutes a significant violation of the procedures delineated in the Law.¹²² The Trial Panel did not categorically exclude the

¹¹⁸ Appeal Judgment, KSC-CA-2022-01/F00114, paras 363-66.

¹¹⁹ The Gucati Defence selectively quotes the Trial Judgment in paragraph 179 of the Request. The Trial Panel did note that 'the hypothesis of a deliberate leak by an SPO staff cannot be totally excluded', but concluded this same paragraph by finding that '[i]n any event, the Panel does not accept that the hypothetical possibility of a deliberate leak by an SPO staff member provides a reasonable basis for an inference that the SPO entrapped the Accused'. Trial Judgment, KSC-BC-2020-07/F00611/RED, para.877.

¹²⁰ Gucati, T.2216.

¹²¹ Haradinaj Request, KSC-SC-2023-01/F00009, para.75.

¹²² Haradinaj Request, KSC-SC-2023-01/F00009, para.75.

applicability of public interest, but weighed the rights in question and rejected the Haradinaj Defence arguments in a reasoned decision now upheld on appeal. How these considerations were weighed pertains to matters of fact which go beyond the scope of requesting protection of legality.

64. Even if considered further, the Defence's alleged public interest is clearly outweighed by the paramount need to safeguard (potential) witnesses of international crimes from serious threats by protecting their confidential information. The Trial Panel and Appeals Panel both clearly specified why the Haradinaj Defence's public interest claims failed,¹²³ including consideration of the SPO's cooperation with the Serbian authorities.¹²⁴ Freedom of expression, as outlined in the ECHR, may be subject to necessary restrictions or penalties in a democratic society, as dictated by law.¹²⁵ Any misuse of the right to freedom of expression also does not warrant protection under the ECHR.¹²⁶

65. The Haradinaj Defence fails to articulate any procedural violation, and these arguments should be rejected.

H. SENTENCING

1. *Gucati Ground* 7¹²⁷

66. The error identified by the Appeals Panel and relied upon in the *Gucati* Request was factual, as the number of protected persons found to have suffered serious

¹²³ Appeal Judgment, KSC-CA-2022-01/F00114, paras 334-40; Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 811-16.

¹²⁴ Appeal Judgment, KSC-CA-2022-01/F00114, paras 338-40; Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 806-08.

¹²⁵ Article 10(2) of the ECHR.

¹²⁶ Articles 17 and 35(3) of the ECHR.

¹²⁷ *Gucati* Request, KSC-SC-2023-01/F00002/RED, paras 183-203.

consequences was reduced on appeal due to the sufficiency of the evidence. Indeed, the Gucati Defence originally argued this error on appeal as one of fact.¹²⁸ The Gucati Defence's arguments that this error should have changed the sentence are likewise arguments on how factual findings were considered. This ground should be dismissed for arguing determinations of the facts which are beyond the scope of a request for protection of legality.

67. If evaluated on its merits, the Appeals Panel is legally empowered to decide the suitable corrective action, if any, after identifying an error in the Trial Judgment.¹²⁹ The error found by the Appeals Panel only concerned the scope of a proven sentencing enhancement found under KCC 392(3). The Appeals Panel explained clearly why it found that the error it identified should not change the sentence imposed.¹³⁰

68. The Gucati Defence points to nothing which shows that the Appeals Panel abused the exercise of its discretion, and ignores how appellate standards of review account for the possibility of identifying errors on appeal which do not materially affect the trial judgment.¹³¹

2. *Haradinaj Ground 4*¹³²

69. The Haradinaj Defence alleges a violation of Article 44(5) under this ground, focusing solely on how factual findings were weighed in determining the sentences for

¹²⁸ Public Redacted Version of Gucati Appeal Brief Pursuant to Rule 179(1) of the Rules of Procedure and Evidence before the Kosovo Specialist Chambers ("Rules"), KSC-CA-2022-01/F00036/RED, 22 August 2022, paras 249-73.

¹²⁹ Article 46(3) ('[t]he Court of Appeals Panel may affirm, reverse or revise judgements by the Trial Panel and take any other appropriate action').

¹³⁰ Appeal Judgment, KSC-CA-2022-01/F00114, para.206.

¹³¹ In this regard, *see generally Lubanga* AJ, ICC-01/04-01/06-3121-RED, paras 20, 56; *Brđanin* AJ, IT-99-36-A, paras 7-9, 13.

¹³² Haradinaj Request, KSC-SC-2023-01/F00009, paras 42-59.

the Accused.¹³³ The Haradinaj Defence previously made these same arguments on appeal, labelling them as alleged errors of fact.¹³⁴ There is no requirement in law or procedure obliging a Panel to consider whether the same sentence has been given for a more or less serious contempt charge in another case.¹³⁵ Such arguments go towards matters which fall beyond the scope of a request for protection of legality and should be summarily dismissed.

70. In any event, the Trial and Appeals Panels considered sentences in other contempt cases in making its determinations.¹³⁶ It was perfectly reasonable for the Trial and Appeals Panels to impose a higher sentence than those imposed in other cases. Indeed, '[d]ifferences between cases are often more significant than similarities and different mitigating and aggravating circumstances might dictate different results'.¹³⁷ Even where similar cases do exist, such cases do not provide a legally binding tariff of sentences, in particular in view of the fact that each case contains a multitude of variables.¹³⁸

71. To focus on the *Margetić* case emphasised by the Haradinaj Defence as an example,¹³⁹ the Accused in that case published the confidential witness list from the *Blaškić* case before the ICTY which included just under 50 protected witnesses.¹⁴⁰ However, Margetić: (i) removed the hyperlink to the witness list in response to a cease and desist order;¹⁴¹ (ii) expressed that he would not repeat the conduct after removing the

¹³³ See especially Haradinaj Request, KSC-SC-2023-01/F00009, paras 47-59.

¹³⁴ Haradinaj Appeal, KSC-CA-2022-01/F00035/COR2, paras 209-32.

¹³⁵ See *Bulatović* Appeal Decision, IT-02-54-A-R77.4, para.62.

¹³⁶ Appeal Judgment, KSC-CA-2022-01/F00114, para.437; Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 957, 979, 1004, n.2012.

¹³⁷ *Dragomir Milošević* AJ, IT-98-29/I-A, para.326; 2010 *Šešelj Contempt* AJ, IT-03-67-R77.2-A, para.41.

¹³⁸ *Dragomir Milošević* AJ, IT-98-29/I-A, para.326; 2010 *Šešelj Contempt* AJ, IT-03-67-R77.2-A, para.41.

¹³⁹ Haradinaj Request, KSC-SC-2023-01/F00009, para.44.

¹⁴⁰ See *Margetić* TJ, IT-95-14-R77.6, para.42.

¹⁴¹ *Margetić* TJ, IT-95-14-R77.6, paras 5-6.

witness list from the internet;¹⁴² and (iii) professed doubts about the confidentiality of the information in circumstances which the Trial Chamber - despite nevertheless being convinced the Accused had the requisite criminal intent - acknowledged were 'unfortunate'.¹⁴³

72. The facts of the present case show an order of magnitude difference in culpability.

73. *Nature and scale of the criminal conduct.* Gucati and Haradinaj revealed the identity and/or personal data of hundreds of (potential) witnesses,¹⁴⁴ and ignored two judicial orders making clear they could not repeat their conduct.¹⁴⁵ They displayed and distributed the Batches at press conferences for all to see while publicly and repeatedly pointing out the presence of (potential) witness names and information.¹⁴⁶ They described them as liars, spies, traitors, collaborators, criminals, and bloodsuckers.¹⁴⁷ The unmistakable message Gucati and Haradinaj sent to the (potential) witnesses in the Batches is that they could not be protected and were now known:

I hope that you, the media, but also those who been so much engaged in making analyses, will have now what to deal with. I think this Court should pay its price. To say that these are confidential and top secret only for the documents to be leaked -- no matter who has received them -- I think this shows that it is more than scandalous and it is shameful even to mention its name. It no longer exists. What is worse, they misled the witnesses by telling them that they would protect them. [moves the papers on the table] *These notes, these names, these surnames, they must now know that they are known names and that no one is unknown, because the exact place, the exact summon, the statement when he has given it, the next statement when he has given it are all shown here.*¹⁴⁸

¹⁴² *Margetić* TJ, IT-95-14-R77.6, paras 57 ('I give you my word and promise that I will never again disclose or in any way use confidential ICTY information'), 88.

¹⁴³ *Margetić* TJ, IT-95-14-R77.6, para.47.

¹⁴⁴ Trial Judgment, KSC-BC-2020-07/F00611/RED, para.559, *upheld in* Appeal Judgment, KSC-CA-2022-01/F00114, para.241.

¹⁴⁵ P00052; P00053.

¹⁴⁶ Trial Judgment, KSC-BC-2020-07/F00611/RED, para.561.

¹⁴⁷ Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 570-74.

¹⁴⁸ P00001ET, p.3 (Nasim Haradinaj, with emphasis added). *See also* Haradinaj, T.2819 ('I stand by it, word for word').

74. The Accused were attacking the KSC as a judicial institution, and their efforts extended to every case before this court. The scale of the criminal conduct cannot be compared to other cases considering a fraction of affected persons in a single case.

75. *Climate of intimidation.* The Accused committed these offences in Kosovo, a country with a long history of witness intimidation. That there is a climate of witness intimidation in Kosovo is clear in both the findings in the Trial Judgment and Appeal Judgment.¹⁴⁹ Even Defence witness Robert Reid noted that being a Kosovo witness is perceived as being a ‘traitor to the cause’,¹⁵⁰ and affirmed his statement from a prior video-recorded interview where he said:

Witness intimidation in the trials for Kosovo, I’ve really never seen anything like it before. I was a policeman for 20 years and I’ve worked here [at the ICTY] for [what at the time of the interview was] 23 years, and I have never seen the intimidation like it. It was really quite frightening. And I’m not linking that to any individuals or any organisation. But just the fear that was engendered in the society, I’ve not seen any -- even in organised crime, I’ve never seen anything like it.¹⁵¹

76. To target protected witnesses in Kosovo specifically aggravated the risks they faced and contributes to the gravity of the offences.

77. *Lack of remorse.* The Accused have always been completely unrepentant about their conduct, insisting that penal sanctions would not stop them from committing the offences for which they were convicted again. Gucati said he would continue to publish materials as he received them and would be willing to go to jail for five years if necessary.¹⁵² When a person attending the press conference noted that publication of the documents is

¹⁴⁹ Appeal Judgment, KSC-CA-2022-01/F00114, para.424; Trial Judgment, KSC-BC-2020-07/F00611/RED, para.993.

¹⁵⁰ Reid, T.3306-07.

¹⁵¹ P00165, min.06:55-07:29; P00165ET, p.5; Reid, T.3305-10 (from 3306: ‘[a]nd I don’t take a word back of what I just said’).

¹⁵² P00028ET, p.12.

prohibited by law and carries a sentence of up to 10 years' imprisonment, Haradinaj went so far as to respond: '[y]ou think you will scare me with ten years! Even if you sentence me to 300 years, I will still disclose them. I am speaking on my behalf and on the behalf of the whole presidium [...] We are ready to face 300 years [...] We are ready to die'.¹⁵³

78. This must – and has – weighed heavily in the sentences given, as a substantial period of incarceration is the only guaranteed way to stop Gucati and Haradinaj from committing further offences.

79. No cited authority from the Haradinaj Defence approximates the criminal conduct proven in this case. The Haradinaj Defence fails to substantiate any violation of Article 44(5) of the Law.

V. Classification

80. The present response is submitted confidentially in accordance with Rule 82(4). The SPO has no objection to reclassifying this response as public.

VI. Relief Sought

81. For the foregoing reasons, the SPO requests the Supreme Court Panel to reject the relief sought in the Requests.

¹⁵³ P00035ET, p.13; P00035, min.00:24:44-00:25:16.

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Monday, 3 July 2023

At The Hague, the Netherlands