



KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEÇA KOSOVA

File number: KSC-SC-2023-01

Before: **A Panel of the Supreme Court Chamber**

Judge Ekaterina Trendafilova, Presiding
Judge Christine van den Wyngaert
Judge Daniel Fransen

Registrar: Fidelma Donlon

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Decision on Requests for Protection of Legality

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THE PANEL OF THE SUPREME COURT CHAMBER of the Kosovo Specialist Chambers (“Supreme Court Panel” or “Panel”) noting Articles 3, 48(6), (7), and 64 of the Law on Specialist Chambers and Specialist Prosecutor’s Office (“Law”) and Rule 193 of the Rules of Procedure and Evidence (“Rules”)¹ is seised of the “Haradinaj Defence Request for Protection of Legality”² (“Haradinaj Request”) and the “Gucati Request for Protection of Legality pursuant to Article 48(6) to (8) of the Law and Rule 193 of the Rules”³ (“Gucati Request”), (collectively “Requests”).

I. PROCEDURAL BACKGROUND

1. On 18 May 2022, Trial Panel II (“Trial Panel”) issued the “Trial Judgment” in the case against Messrs Hysni Gucati and Nasim Haradinaj.⁴ The Trial Panel found both accused guilty of obstructing official persons in performing official duties, intimidation during criminal proceedings and violating the secrecy of proceedings, and sentenced them to four and a half years of imprisonment, with credit for the time served, and a fine of 100 Euros each.⁵

2. On 2 February 2023, a Court of Appeals Panel issued the “Appeal Judgment” in the case against Messrs Gucati and Haradinaj.⁶ The Court of Appeals Panel affirmed the majority of Messrs Gucati’s and Haradinaj’s convictions and reversed their

¹ Rules of Procedure and Evidence before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, (adopted on 17 March 2017, revised on 29 May 2017, amended on 29 and 30 April 2020).

² F00001, Haradinaj Defence Request for Protection of Legality, 2 May 2023, with Annex. Following an order by the Panel, Mr Haradinaj refiled his Request to ensure compliance with the Practice Direction on Files and Filings on 9 May 2023. See F00009, Haradinaj Defence Re-filed Request for Protection of Legality, 9 May 2023. All references in this decision are to Mr Haradinaj’s re-filed request.

³ F00002, Gucati Request for Protection of Legality pursuant to Article 48(6) to (8) of the Law and Rule 193 of the Rules, 3 May 2023 (confidential), with Annex. Mr Gucati filed a public redacted version of his request on 4 May 2023. See F00002/RED.

⁴ KSC-BC-2020-07, F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022.

⁵ Trial Judgment, paras 1012-1017. The Trial Panel applied, by virtue of Articles 6(2), 15(2), 16(3) and 64 of the Law, Articles 17, 28, 31, 32, 33, 35, 387, 388, 392 and 401 of the Kosovo Criminal Code. The offences under Articles 387, 388, 392 and 401 of the Kosovo Criminal Code are analogous to the corresponding offences under Articles 395, 396, 400 and 409 of the 2012 Kosovo Criminal Code. Criminal Code of the Republic of Kosovo No. 06/L-074, Official Gazette No. 2/14 January 2019 (“Kosovo Criminal Code”); Criminal Code of the Republic of Kosovo No. 04/L-082, Official Gazette No. 19/13 July 2012.

⁶ KSC-CA-2022-01, F00114, Appeal Judgment, 2 February 2023.

convictions for obstruction of official persons in performing official duties by participating in the common action of a group.⁷ 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.⁸ The Appeals Panel affirmed Messrs Gucati's and Haradinaj's additional sentence to pay a fine of 100 Euros each.⁹

3. On 2 and 3 May 2023, Messrs Haradinaj and Gucati filed their Requests.

4. On 4 May 2023, the President assigned the Supreme Court Panel.¹⁰ On the same day, the Panel ordered that the Specialist Prosecutor's Office ("SPO") file its response to the Requests, if any, within 60 days of notification of the decision.¹¹ The Panel also ordered that Messrs Gucati and Haradinaj file their replies, if any, within 30 days of notification of the SPO's response.¹²

5. On 3 July 2023, the SPO filed the "Prosecution Consolidated Response to Requests for Protection of Legality with One Public Annex" ("Response").¹³

6. On 30 July 2023 and on 3 August 2023, Messrs Gucati and Haradinaj filed their replies to the Response ("Gucati Reply" and "Haradinaj Reply", respectively).¹⁴ In addition, on 30 July 2023, Mr Gucati filed a request for an oral hearing,¹⁵ and on

⁷ Appeal Judgment, para. 442.

⁸ Appeal Judgment, para. 442.

⁹ Appeal Judgment, para. 442.

¹⁰ F00003, Decision Assigning a Supreme Court Panel, 4 May 2023.

¹¹ F00004, Order on the Time-Limits for Submissions, 4 May 2023, para. 7.a) ("Order on Time-Limits").

¹² Order on Time-Limits, para. 7.b).

¹³ F00014, Prosecution Consolidated Response to Requests for Protection of Legality with One Public Annex, 3 July 2023 (confidential).

¹⁴ F00017, Gucati Reply to the Prosecution Consolidated Response to Requests for Protection of Legality with one Public Annex, 30 July 2023 (confidential); F00019, Haradinaj Reply to Prosecution Consolidated Response to Requests for Protection of Legality, 2 August 2023.

¹⁵ F00018, Gucati Request for an Oral Hearing before the Supreme Court on a Request for Protection of Legality, 30 July 2023 ("Gucati Request for Oral Hearing").

4 August 2023 filed an Addendum thereto.¹⁶

II. ADMISSIBILITY

7. The Panel notes at the outset that the Requests are not third instance appeals as set forth in Article 47 of the Law, nor do they raise matters under Article 48(1) to (5) of the Law. The Requests instead are an extraordinary legal remedy in the form of requests for protection of legality pursuant to Article 48(6) and (7) of the Law.

8. The Panel notes that the Appeal Judgment is final and that Messrs Gucati and Haradinaj filed their respective Requests within the three-month time limit prescribed in Article 48(6) of the Law, following the issuance of said Judgment. The Requests have thus been properly filed and are accordingly admissible in this respect. The Panel will therefore proceed with an assessment of the grounds in the Requests.

III. STANDARD OF REVIEW

9. The Panel recalls that protection of legality, as provided for in Article 48(6) and (7) of the Law and Rules 193 and 194 of the Rules, is an extraordinary remedy. It is not meant to create another general avenue of appeal.¹⁷ Rather, and similar to the Kosovo Criminal Procedure Code,¹⁸ the protection of legality is limited to the specific instances defined in the Law and the Rules. As the Kosovo Supreme Court stated with respect to protection of legality provided in the Kosovo Criminal Procedure Code:

[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.¹⁹

¹⁶ F00020, Addendum Submission to Gucati Request for an Oral Hearing before the Supreme Court on a Request for Protection of Legality, 4 August 2023 (“Gucati Addendum”).

¹⁷ KSC-BC-2020-06, PL001/F00008, Decision on Kadri Veseli’s Request for Protection of Legality, 15 August 2022 (“Veseli Decision”), para. 21.

¹⁸ Kosovo Criminal Procedure Code No 08/L-032, Official Gazette No. 24/17 August 2022.

¹⁹ Kosovo, Supreme Court, S.S., PmL-Kzz 42/2017, Judgment, 10 May 2017, para. 23.

10. Therefore, strict admissibility requirements apply to requests for protection of legality. In assessing the admissibility of the Requests, the Panel shall determine whether a violation of the criminal law contained within the Law or a substantial violation of the procedures set out in the Law and in the Rules has been identified in the Requests. Arguments that reasonably could have been raised before the first and second instance panels, cannot be raised *de novo* before the Supreme Court Panel.²⁰ Furthermore, a request for protection of legality alleging erroneous or incomplete determinations of the facts, is beyond the competence of this Panel and thus inadmissible.²¹ Mere disagreement with the factual assessment of the first and second instance courts or verbatim repetitions of submissions of the previous appeal without engaging substantively with the impugned decision or final judgment identifying the specific alleged error or violation are equally insufficient to meet the admissibility threshold.²²

11. Should a ground not comply with any of the admissibility criteria above, the Panel shall dismiss them without addressing the merits of that ground.

12. The Panel notes that Messrs Gucati and Haradinaj raise allegations of substantial violations of the procedures set out in the Law and the Rules, as well as violations of the criminal law with respect to the Appeal Judgment.²³

²⁰ Notably, this standard has been developed in the jurisprudence of the Court of Appeals Panel. The Supreme Court Panel does not see a reason not to endorse the same standard when addressing a request for protection of legality. Logically, the standard applicable before the Supreme Court Panel, if not equal to the one applied by the Court of Appeals Panel, should be at least equal or narrower. Cf. International Residual Mechanism for Criminal Tribunals (“IRMCT”), *Prosecutor v. Orić*, MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge’s Decision of 10 December 2015, 17 February 2016, para. 14 and citations therein.

²¹ Rule 193(3) of the Rules. See also Veseli Decision, para. 25.

²² Veseli Decision, para. 25; Kosovo, Supreme Court, *N.V. et al.*, Plm.Kzz 178/2016, Judgment, 19 December 2016, para. 68. See also IRMCT, *Prosecutor v. Mladić*, MICT-13-56-A, Judgment, 8 June 2021, para. 20; International Criminal Court, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2666-Red, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’, 30 March 2021, paras 95, 219.

²³ See the Requests.

13. The Panel recalls that the Supreme Court Chamber has previously set forth the standard of review applicable to requests for protection of legality based on substantial violations of the procedures pursuant to Article 48(7)(b) of the Law in the context of detention.²⁴ The Panel considers that this standard is equally applicable to requests for protection of legality related to substantial violations of the procedures regarding final judgments.

14. With respect to substantial violations of the procedures, the Panel recalls that Article 48(7)(b) of the Law sets forth a high threshold.²⁵ A “substantial violation” of the procedures occurs when it “materially affects the judicial finding”.²⁶ Whether an alleged violation constitutes “[...] “a substantial violation of the procedures set out in [the] Law and [...] the Rules [...]” should be assessed on a *case-by-case* basis in view of the circumstances underlying each particular request.²⁷ The Supreme Court Panel recalls that it may find a “substantial violation of the procedures” if the Court of Appeals Panel, for example: (i) omitted to apply a provision of the Law or the Rules; (ii) incorrectly applied the Law and/or the Rules; or (iii) violated the rights of the Defence in a manner which has influenced the rendering of a lawful and fair decision.²⁸

15. The Panel has not yet elaborated on the standard of review with respect to violation(s) of the criminal law as set out in Article 48(7)(a) of the Law. Given that the Requests include allegations of violations of the criminal law, the Panel will set forth the standard of review therefor below.

16. In so doing, the Panel will be guided by the Kosovo Criminal Procedure Code,

²⁴ Veseli Decision, paras 23-26.

²⁵ Veseli Decision, para. 23.

²⁶ Veseli Decision, para. 23.

²⁷ See also Kosovo, Supreme Court, *NV*, Pml.Kzz 91/2015, Judgment, 14 May 2015, paras 4, 10-12; *AM*, Pml.Kzz 84/2015, Judgment, 12 May 2015, pp 2-4; *M.I.*, Pml.Kzz 26/2015, Judgment, 18 March 2015, pp 3-7.

²⁸ Veseli Decision, para. 24.

as appropriate, the case law of the Kosovo Supreme Court, as well as the jurisprudence of international criminal courts and tribunals, where relevant.²⁹

17. The Panel notes that Article 48(7)(a) of the Law does not require that a violation of the criminal law be “substantial”. The Panel observes that Article 385(1) of the Kosovo Criminal Procedure Code provides an exhaustive list of violations of the criminal law. Such a violation exists where: (i) the offence for which the accused is prosecuted is not a criminal offence; (ii) circumstances exist which preclude criminal liability and, in particular, if criminal prosecution is prohibited by the period of statutory limitation or precluded due to an amnesty or pardon, or prior adjudication by a final judgment; (iii) circumstances exist which preclude criminal prosecution; (iv) an inapplicable law was applied to the criminal offence; (v) in rendering a decision on punishment, alternative punishment or judicial admonition, or in ordering a measure of mandatory rehabilitation treatment or the confiscation, the court exceeded its authority under a law; or (vi) provisions were violated in respect of crediting the period of detention, house arrest, any period of deprivation of liberty and an earlier served sentence related to the criminal offence subject to the criminal proceedings.³⁰ The Panel considers that violations of the criminal law are confined to these enumerated violations.

18. The Panel notes that the Requests are also premised on Article 48(8) of the Law, which stipulates that an extraordinary legal remedy may also be filed on the basis of rights available under the Law and which are protected under the European Convention on Human Rights (“ECHR”). The Panel considers that any alleged

²⁹ The Panel recalls the Supreme Court’s earlier finding in the Veseli Decision concerning the jurisprudence of the international courts and tribunals and their relevance when the Supreme Court addresses a request for protection of legality. The Supreme Court Panel stated that: “[it] recognises that the international criminal courts and tribunals do not provide for the protection of legality. However, the Panel considers that it may rely on their jurisprudence insofar as they include relevant concepts from which the Panel may draw in setting forth its standard of review.” See Veseli Decision, para. 22, fn. 25.

³⁰ Article 385(1)(1.1-1.6) of the Kosovo Criminal Procedure Code.

violation of the rights available under the Law, which are also protected under the ECHR, must meet the same standard of review as set out above.³¹

19. The Panel further recalls that a party requesting protection of legality must clearly identify the alleged legal violation, substantiate it, and, in case of a procedural violation, demonstrate how it materially affected the impugned judgment.³²

20. Lastly, the Panel recalls Rule 194(1) of the Rules, which stipulates that where the Supreme Court Panel grants a request for protection of legality, depending on the nature of the violation, it may either:

- (a) modify the impugned decision or judgment;
- (b) annul in whole or in part the impugned decision or judgment and return the case for a new decision or retrial to the competent Panel; or
- (c) confine itself only to establishing the existence of a violation of law.

21. Having set the standard of review, the Supreme Court Panel shall address the grounds underlying the Requests.

IV. DISCUSSION

A. PRELIMINARY MATTERS

22. The Panel notes Messrs Haradinaj's and Gucati's requests for an oral hearing, submitting that such a hearing would be in the interest of justice, given the novelty and complexity of the matters raised in their Requests.³³ The Panel further notes Mr Gucati's Addendum, wherein he submits that a public oral hearing is important, including for the proceedings that will take place against Mr Driton Goxhaj in relation to offences against the administration of justice.³⁴ Mr Gucati therefore requests that Mr Goxhaj be invited to intervene as part of the Requests pending before the Panel.³⁵

³¹ See Veseli Decision, para. 33.

³² Veseli Decision, para. 23.

³³ Haradinaj Request, paras 76-79; Gucati Request for Oral Hearing, para. 7.

³⁴ Gucati Addendum, paras 12-13.

³⁵ Gucati Addendum, para. 13.

23. The SPO deferred to the Supreme Court Panel's discretion as to the necessity of an oral hearing.³⁶

24. The Panel notes that the Rules do not require that a hearing in relation to requests for protection of legality take place.³⁷ What matters is that Parties are adequately heard, be it through written or oral submissions. Therefore, and contrary to Mr Gucati's suggestion regarding the mandatory nature of oral hearings,³⁸ panels may dispose of matters on the basis of written submissions alone and hearings are therefore discretionary.³⁹ The decision to convene a hearing on appeals before the Supreme Court or with respect to extraordinary legal remedies will depend on whether the panel considers that Parties' written submissions require clarification or the panel has identified questions it wishes to have answered in relation to arguments made in the filings.

25. The Panel is not persuaded by Messrs Haradinaj's and Gucati's submissions that the issues raised in the Requests are so complex or novel that they require an oral hearing. The Panel is of the view that the Parties had adequate time to develop their arguments and that the written submissions are sufficiently comprehensible to allow the Panel to come to an informed decision. Finally, there is sufficient jurisprudence on the matters raised in the Requests from the Supreme Court of Kosovo, as well as other courts and tribunals, as referenced to in the present decision, which served as guidance to the Panel in adjudicating the Requests.

26. The Panel also notes that the Requests are available to the public and that therefore the public nature of the proceedings is fully ensured.

³⁶ SPO Response, para. 11.

³⁷ See Rules 75(3), 193-194 of the Rules.

³⁸ Gucati Request for Oral Hearing, para. 9.

³⁹ Cf. Rules 72(3), 75(3), 180 of the Rules. Notably, Article 407(2) of the Kosovo Criminal Procedure Code provides that there shall be no hearings before the Supreme Court Chamber with respect to appeals. See also European Court of Human Rights ("ECtHR"), *Miller v. Sweden*, no. 55853/00, Judgment, 8 February 2005, para. 30.

27. The Panel further recalls that requests for protection of legality are, as set forth above, extraordinary legal remedies, which are filed by individuals in the circumstances set forth in Article 48 of the Law. Mr Gucati has no standing to request that another accused be invited to intervene as part of his Request. It is not for Mr Gucati to seek to protect the perceived interests of another accused as part of Mr Gucati's own Request.

28. Accordingly, the Panel considers that Messrs Haradinaj's and Gucati's requests for an oral hearing are without merit, and are, accordingly, rejected. The Panel further rejects Mr Gucati's request that another accused intervenes in the proceedings before this Panel.

29. Finally, the Panel notes that Mr Gucati has classified his Reply as confidential. The Panel recalls the principles of publicity and will therefore order Mr Gucati to file a public (redacted) version of his Reply within a week of the filing of this decision.

B. ALLEGED VIOLATION OF ARTICLE 401 OF THE KOSOVO CRIMINAL CODE (MR GUCATI AND MR HARADINAJ GROUNDS 1)

1. Submissions

30. Messrs Gucati and Haradinaj submit that the Trial Panel and the Court of Appeals Panel violated the criminal law by impermissibly broadening the scope of Article 401 of the Kosovo Criminal Code to include threats against third persons, rather than against an official person who is performing official duties.⁴⁰ Mr Gucati contends that threats directed at "private" witnesses are instead covered by Articles 386(1), (4) and (5) and 387 of the Kosovo Criminal Code.⁴¹ Mr Gucati further alleges that the serious threat must be "immediate" and thus take place against the

⁴⁰ Gucati Request, paras 14-19; Haradinaj Request, paras 14-16, 18, 20; Gucati Reply, paras 18, 20; Haradinaj Reply, paras 3-5.

⁴¹ Gucati Request, para. 21; Gucati Reply, para. 19.

official during the exercise of their functions.⁴²

31. Messrs Gucati and Haradinaj assert that the interpretation by the Trial Panel and the Court of Appeals Panel, by majority, of Article 401 of the Kosovo Criminal Code violates the principle of legality⁴³ and argue that no evidence was adduced at trial demonstrating that they directed serious threats at an official person when performing official duties.⁴⁴

32. The SPO responds that the Pre-Trial Judge, Trial Panel and the Court of Appeals Panel, by majority, correctly found that Article 401 of the Kosovo Criminal Code covers any serious threat capable of obstructing an official person.⁴⁵ The SPO contends that if Article 401(1) of the Kosovo Criminal Code had intended to restrict the serious threats to be directed only against the official person, it would have specified this.⁴⁶ The SPO asserts that even the commentary on the Kosovo Criminal Code from Salihu et al., upon which Mr Gucati relies, also unambiguously recognises that the serious threats can be directed at other individuals or even inanimate objects, as long as these threats are capable of obstructing the official person.⁴⁷ The SPO submits that other provisions in the Kosovo Criminal Code cannot capture the full scope of criminality envisioned by Article 401(1) of the Kosovo Criminal Code.⁴⁸

33. Finally, the SPO asserts that interpreting Article 401(1) of the Kosovo Criminal Code to allow for serious threats to be directed at third persons if those threats are intended to obstruct an official in the performance of duties is consistent with the *lex stricta* principle.⁴⁹ According to the SPO, the principle of legality “still allows for

⁴² Gucati Request, para. 18. See also Gucati Request, para. 19.

⁴³ Gucati Request, para. 20; Haradinaj Request, paras 16-17; Gucati Reply, para. 21; Haradinaj Reply, paras 7-8. See also Haradinaj Request, para. 19; Haradinaj Reply, paras 10-11.

⁴⁴ Gucati Request, para. 22; Haradinaj Request, paras 19-20.

⁴⁵ Response, paras 25-27.

⁴⁶ Response, para. 27.

⁴⁷ Response, paras 27-29.

⁴⁸ Response, para. 30.

⁴⁹ Response, paras 31-32.

judicial interpretation of the applicable law as long as the judicial development is consistent with the ‘essence of the offence’ [...] and could have been reasonably foreseen”.⁵⁰ The SPO contends that the underlying panels’ interpretation aligns with the statutory language of Article 401(1) of the Kosovo Criminal Code and that their interpretation was reasonably foreseeable to Messrs Gucati and Haradinaj.⁵¹

34. Mr Haradinaj replies that it is irrelevant whether it was his express intention to obstruct the SPO or commit an offence. Rather, according to Mr Haradinaj, the principle of legality requires that the particular interpretation given to Article 401(1) of the Kosovo Criminal Code was reasonably foreseeable to him.⁵² According to Mr Haradinaj, the interpretation given by the underlying Panels was not reasonably foreseeable to him, because it is “a variance with the ordinary and logical understanding of the provision”.⁵³

2. The Panel’s assessment

a. Admissibility of Mr Gucati and Mr Haradinaj Grounds 1

35. The Panel notes that Messrs Gucati and Haradinaj claim a violation of the criminal law in the form of Article 401 of the Kosovo Criminal Code. The Panel recalls in this regard that Article 401 of the Kosovo Criminal Code is explicitly referenced in Article 15(2) of the Law and that Messrs Gucati and Haradinaj essentially contend that the interpretation of the Court of Appeals Panel goes beyond the statutory limits of the offence in violation of the principle of legality. It is thus argued that the offence for which the accused were found guilty is not a criminal offence. Accordingly, the Panel finds Grounds 1 admissible and will consider the merits thereof.

⁵⁰ Response, para. 32. See also Response, para. 33.

⁵¹ Response, paras 32-33. See also Response, paras 34-36.

⁵² Haradinaj Reply, para. 9.

⁵³ Haradinaj Reply, para. 7.

b. Merits of Mr Gucati and Mr Haradinaj Grounds 1

36. The Panel recalls that the Trial Panel convicted Messrs Gucati and Haradinaj on the basis of Article 401(1) of the Kosovo Criminal Code for having attempted to obstruct an official person in performing official duties through serious threat.⁵⁴

37. The Panel considers that the principal question is whether the Trial Panel, as affirmed by the majority of the Court of Appeals Panel, violated the criminal law by finding that serious threats within the meaning of Article 401(1) of the Kosovo Criminal Code may encompass threats against third persons, as long as these serious threats are capable of obstructing officials in the performance of their duties.

38. Article 401(1) of the Kosovo Criminal Code provides:

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.

39. The Panel recalls, as confirmed by the majority of the Court of Appeals Panel, that the Trial Panel was satisfied that the Accused fulfilled one of the *actus reus* and *mens rea* elements of the offence of obstructing official persons in performing official duties by serious threat under Article 401(1) of the Kosovo Criminal Code amounting to an attempted form thereof.⁵⁵ The Panel observes that the Trial Panel considered that nothing in Article 401(1) of the Kosovo Criminal Code restricts the type or category of action that might qualify as a serious threat.⁵⁶ The Trial Panel found that a serious threat may therefore include actions that “inflict serious harm on the health, well-being, safety, security or privacy of a person”,⁵⁷ as long as the serious threat is carried out with the intention to obstruct an official person performing his/her functions.⁵⁸

⁵⁴ Trial Judgment, paras 656-657, 1012(a), 1015(a).

⁵⁵ Trial Judgment, paras 658, 672; Appeal Judgment, paras 272, 291, 293.

⁵⁶ Trial Judgment, para. 144.

⁵⁷ Trial Judgment, para. 144.

⁵⁸ Trial Judgment, paras 146, 153-155.

The Court of Appeals Panel, by majority, thereafter carefully assessed Messrs Gucati's and Haradinaj's appeal in relation hereto and concluded that the Trial Panel's findings were reasonable.⁵⁹

40. The Panel is not persuaded by Messrs Gucati's and Haradinaj's arguments that the Trial Panel and the Court of Appeals Panel violated the criminal law with their interpretation of Article 401(1) of the Kosovo Criminal Code. The Panel notes that there is nothing in Article 401(1) of the Kosovo Criminal Code that restricts the type of situation that may constitute a "serious threat". As correctly pointed out by the majority of the Court of Appeals Panel, Article 401(1) of the Kosovo Criminal Code would have been formulated differently, had it intended the serious threat to be directed only *against* the official performing duties.⁶⁰

41. The fact that another crime may be fulfilled through the same conduct, does not justify a narrower interpretation of a criminal provision, as suggested by Mr Gucati,⁶¹ especially where the criminalisation of the conduct serves different protective interests. Article 401 of the Kosovo Criminal Code protects the interest and trust of the general public in the lawful exercise of official duties and at the same time serves to protect the officials called upon to exercise such powers. Articles 386 and 387 of the Kosovo Criminal Code, by contrast, protects the truthful ascertainment of facts and the integrity of judicial proceedings.⁶² It would be flawed to request a different interpretation of a criminal norm simply because a conduct may result in two different crimes. Rather, such tensions are commonly addressed through other legal principles, more specifically the general principles on the concurrence of crimes.⁶³

⁵⁹ Appeal Judgment, paras 282-285, 290-291.

⁶⁰ Appeal Judgment, para. 282.

⁶¹ Gucati Request, para. 21.

⁶² See also Appeal Judgment, para. 229.

⁶³ See Kosovo, Court of Appeal, *K.P. et al.*, [PAKR 1122/2012](#), Judgment, 25 April 2013, para. 29; International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 468; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgment,

42. Moreover, the Panel observes that commentary by Ismet Salihu et al. on the Kosovo Criminal Code (“Salihu et al. Commentary”), upon which Mr Gucati relies,⁶⁴ explicitly recognises that threats may be directed at third persons or even an object, as long as the threat is issued with the intention of obstructing the official duties.⁶⁵

43. The Panel observes in this respect that the Trial Panel assessed a wide range of evidence, which demonstrated that through their acts and statements, Messrs Gucati and Haradinaj attempted to obstruct Specialist Chambers and/or SPO officials in the performance of their official duties.⁶⁶ Moreover, the Trial Panel, as affirmed by the Court of Appeals Panel, made explicit findings that Messrs Gucati and Haradinaj, through their acts and statements, *intended* to obstruct the Specialist Chambers and/or SPO officials in performing their official duties.⁶⁷

44. The Panel does not consider this interpretation excessively broad nor does it find that it violates the principle of legality set forth in Article 33(1) of the Constitution. Article 33(1) of the Constitution requires the legislature – in addition to the prohibition of retroactivity – to define the contours of criminal liability such that the scope and elements of the crime or offence are sufficiently identifiable. This obligation serves a dual purpose, namely: (i) foreseeability when it comes to the prohibited conduct and that such conduct may be punishable; and (ii) ensuring that the legislature decides which conduct is punishable, rather than delegating this task to the judiciary.

45. This dual purpose does not preclude a judge from interpreting the scope and elements of the offence as defined by the legislature. Indeed, the responsibility of judges to interpret the legislation in accordance with its object and purpose and the circumstances of the particular case, has been acknowledged by the Specialist

21 May 1999, para. 627; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kupreškić et al.*, Judgment, IT-95-16-T, 14 January 2000, paras 683-684.

⁶⁴ See Gucati Request, paras 15-16.

⁶⁵ Ismet Salihu et al., *Commentary on the Penal Code of Republic of Kosovo* (GIZ, 2014), pp 1165-1166.

⁶⁶ See, e.g., Trial Judgment, paras 536-541, 547, 597-605, 650. See also Trial Judgment, paras 646-647.

⁶⁷ See Trial Judgment, paras 659-669, 671, 960. See also Appeal Judgment, paras 290-291.

Chamber of the Constitutional Court and the ECtHR.⁶⁸ With respect to the requirement of foreseeability, the ECtHR has held that it is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account.⁶⁹

46. Having closely considered the wording of Article 401(1) of the Kosovo Criminal Code and the interpretation thereof by the Trial Panel and the majority of the Court of Appeals Panel, the Panel does not find that the principle of legality as enshrined in Article 33(1) of the Constitution has been violated.

47. As correctly articulated by the Trial Panel and the majority of the Court of Appeals Panel,⁷⁰ the purpose of Article 401(1) of the Kosovo Criminal Court is to protect the exercise of official duties and to ensure that official persons are not obstructed in performing such duties. The legislature requires this obstruction to be undertaken by force or by serious threat.

48. Moreover, and in line with the purpose of the criminal provision, the wording

⁶⁸ E.g. ECtHR, *Kafkaris v. Cyprus*, no. 21906/04 (GC), Judgment, 12 February 2008 ("*Kafkaris Judgment*"), para. 141 ("[H]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain. 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.'" (*references omitted*). See also 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, 13 June 2022, para. 77; KSC-CC-2022-16, F00004, Decision on the Referral of Pjetër Shala to the Constitutional Court Panel Concerning Fundamental Rights Guaranteed by Article 33 of the Kosovo Constitution and Article 7 of the European Convention on Human Rights, 6 July 2022, para. 68.

⁶⁹ *Kafkaris Judgment*, para. 140.

⁷⁰ Trial Judgment, para. 146; Appeal Judgment, para. 282.

of Article 401(1) of the Kosovo Criminal Code concisely articulates that the intended target of the obstruction has to be the official person performing official duties. It is clear that the official person and his or her ability to perform official duties may equally be targeted through indirect ways in order to achieve the ultimate purpose, namely preventing the performance of official duties. Therefore, any force or serious threat may be directed against another (not the official) person or against an object, as long as the target of the obstruction *is* the official person and his official duties. This interpretation has been correctly advanced by both the Trial and Appeals Panels (by majority).⁷¹ The scope and nature of the criminal offence defined in Article 401 of the Kosovo Criminal Code was therefore sufficiently foreseeable to Messrs Gucati and Haradinaj.

49. Finally, the Panel considers Mr Gucati's argument that the serious threat to the officials did not occur during the exercise of their duties without merit. The Panel finds that a plain understanding of the word "during" means that the serious threat takes place throughout the course or duration of a certain period of time.⁷² As explained by the majority of the Court of Appeals Panel,⁷³ Article 401(1) of the Kosovo Criminal Code does not require that the serious threat take place simultaneously with the exercise by officials of their duties.⁷⁴ The Salihu et al. Commentary also reflects this understanding, noting that the word "concurrent" should "be taken in a broader sense".⁷⁵ Whether or not the serious threats in fact took place during the exercise of official duties by the Specialist Chambers or the SPO is a factual assessment, which

⁷¹ Trial Judgment, para. 146; Appeal Judgment, para. 282.

⁷² Cf. Merriam Webster on the meaning of "during", *Merriam-Webster.com dictionary* <<https://www.merriam-webster.com/dictionary/during#:~:text=1,point%20in%20the%20course%20of>> accessed 13 September 2023.

⁷³ Appeal Judgment, para. 284.

⁷⁴ Appeal Judgment, paras 283-284.

⁷⁵ Salihu et al. Commentary, p. 1166 (stating that concurrent "means that the penal offence occurs not only when the violence and threat are carried out upon the initiation of the official duty, but also when the violence or threat are carried out before the initiation of the official work").

the Panel will not address, as this is not within its competence.⁷⁶

50. In view of the above, the Supreme Court Panel does not consider that there has been a violation of the criminal law contained within the Law and hereby dismisses Messrs Gucati's and Haradinaj's Grounds 1.

C. ALLEGED VIOLATION OF ARTICLE 387 OF THE KOSOVO CRIMINAL CODE (MR GUCATI AND MR HARADINAJ GROUNDS 2)

1. Submissions

51. Messrs Gucati and Haradinaj contend that the Trial Panel and the Court of Appeals Panel violated the criminal law by misapplying Article 387 of the Kosovo Criminal Code.⁷⁷ According to Messrs Gucati and Haradinaj, Article 387 of the Kosovo Criminal Code criminalises the use of a serious threat to induce a person from refraining to make a statement/false statement/otherwise fail to state true information to the police, a prosecutor or a judge.⁷⁸ Messrs Gucati and Haradinaj submit that the Trial Panel and the Court of Appeals Panel instead erroneously interpreted Article 387 of the Kosovo Criminal Code for such (false) statement to be made to "any person".⁷⁹

52. In addition, Mr Gucati contends that the relevant (false) statement "must relate to the obstruction of criminal proceedings" and not, as he asserts the Trial Panel did, ignore this element.⁸⁰ According to Mr Gucati, the Trial Panel did not find that serious threats were used to induce someone from refraining to make a statement, but instead referred to persons who "gave 'evidence' or 'provided information'".⁸¹ Finally, Mr Gucati argues that Article 387 of the Kosovo Criminal Code requires that the person act with "direct intent"⁸² and that the Trial Panel did not find that he acted

⁷⁶ Supra para. 10.

⁷⁷ Gucati Request, para. 23; Haradinaj Request, para. 30; Haradinaj Reply, paras 12-13, 15.

⁷⁸ Gucati Request, para. 25; Haradinaj Request, para. 24.

⁷⁹ Gucati Request, paras 24-26; Haradinaj Request, paras 22-25.

⁸⁰ Gucati Request, paras 27-37, 44, 47; Gucati Reply, paras 24-26.

⁸¹ Gucati Request, paras 39-43, 45-46; Gucati Reply, para. 29. See also Haradinaj Request, paras 24-28.

⁸² Gucati Request, para. 50.

“with awareness of, and desire for, inducing a person specifically to refrain from making a ‘statement’”,⁸³ especially “to refrain from giving *true* information/evidence to the SC/SPO”.⁸⁴ Accordingly, Mr Gucati contends that an acquittal should instead be entered for this count.⁸⁵

53. The SPO responds that Messrs Gucati and Haradinaj simply repeat arguments that failed before previous panels.⁸⁶ The SPO submits that the interpretation given by the underlying panels align with the statutory construction of Article 387 of the Kosovo Criminal Code.⁸⁷ The SPO contends that if Messrs Gucati’s and Haradinaj’s interpretation were to be followed, this would “lead to an absurd interpretation where only witnesses privy to information about obstruction could be intimidated.”⁸⁸ Finally, the SPO asserts that it was not necessary for the Trial Panel to make findings on the veracity of the information in question, because Article 387 of the Kosovo Criminal Code criminalises the act of inducing someone to “refrain from making a statement”.⁸⁹ The SPO submits that this is the alternative on which the Trial Panel reached its findings of direct intent, which was upheld on appeal.⁹⁰

54. Mr Gucati replies that he did not repeat arguments previously raised before the Court of Appeals Panel, but in fact engaged with the Court of Appeals Panel’s reasoning in his Request.⁹¹ Moreover, Mr Gucati contends that he should not be barred from raising arguments regarding violations of criminal law simply because he raised them previously before the underlying Panels.⁹²

55. Mr Gucati contends that the SPO does not provide any statutory basis for its

⁸³ Gucati Request, para. 51. See also Gucati Request, paras 52-55.

⁸⁴ Gucati Request, para. 56. See also Gucati Request, paras 57-60; Gucati Reply, paras 30-32.

⁸⁵ Gucati Request, para. 60.

⁸⁶ Response, para. 37.

⁸⁷ Response, para. 38.

⁸⁸ Response, para. 39. See also Response, paras 40-41.

⁸⁹ Response, para. 42.

⁹⁰ Response, para. 42. See also Response, para. 43.

⁹¹ Gucati Reply, para. 22.

⁹² Gucati Reply, para. 23.

interpretation of Article 387 of the Kosovo Criminal Code and that the first instance decisions on which it relies are neither binding nor persuasive.⁹³

2. The Panel's assessment

a. Admissibility of Mr Gucati and Mr Haradinaj Grounds 2

56. The Panel notes at the outset that Mr Haradinaj did not raise arguments concerning the legal interpretation of Article 387 of the Kosovo Criminal Code before the Court of Appeals Panel.⁹⁴ As set forth above,⁹⁵ Mr Haradinaj could reasonably have pursued these arguments before the Court of Appeals Panel, as Mr Gucati did. Accordingly, Mr Haradinaj is precluded from making these submissions at this stage and his Ground 2 is therefore summarily dismissed.

57. Turning to Mr Gucati's submissions, the Panel notes that Mr Gucati claims a violation of the criminal law in the form of Article 387 of the Kosovo Criminal Code. The Panel observes that while the majority of Mr Gucati's arguments related to Article 387 of the Kosovo Criminal Code are near verbatim repetitions of his submissions before the Court of Appeals Panel,⁹⁶ he does on occasion reference findings by the Court of Appeals Panel.⁹⁷ Accordingly, the Panel will not dismiss Mr Gucati's Ground 2 on the basis of his near verbatim repetition of arguments previously raised.

58. The Panel also observes that Article 387 of the Kosovo Criminal Code is

⁹³ Gucati Reply, para. 28.

⁹⁴ See KSC-CA-2022-01, F00035/COR2, Further Corrected Version of Defence Appeal Brief on Behalf of Mr. Nasim Haradinaj, 2 September 2022, with Annex ("Haradinaj Appeal Brief"), paras 178-187. The Panel notes that while Mr Haradinaj raised this matter in his Notice of Appeal, he thereafter abandoned it in his Appeal brief. See Appeal Judgment, para. 211, fn. 460.

⁹⁵ See *supra*, para. 10.

⁹⁶ Compare Gucati Request, paras 24-30, 33-39, 44-47, 50-58, 60 with KSC-CA-2022-01, F00036/RED, 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"), 22 August 2022, with Annexes 1-4 ("Gucati Appeal Brief"), paras 10-23, 52, 56-58, 112, 115-119.

⁹⁷ See Gucati Request, paras 31, 40, 42, 44, 46, 59.

explicitly referenced in Article 15(2) of the Law. Accordingly, Mr Gucati's Ground 2 is admissible and will be considered on the merits.

b. Merits of Mr Gucati Ground 2

59. The offence of intimidation during criminal proceedings as set forth in Article 387(1) of the Kosovo Criminal Code is defined as follows:

[w]hoever 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 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.

60. The Court of Appeals Panel found that the words "such information" in the qualifier of Article 387 of the Kosovo Criminal Code 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 formulation of the qualifier".⁹⁸ The Panel finds that a plain reading of Article 387(1) of the Kosovo Criminal Code demonstrates that the Trial Panel, as thereafter upheld by the Court of Appeals Panel, correctly interpreted this Article. Indeed, if the Panels were to have followed Mr Gucati's restrictive interpretation, it would mean that only persons who have information that relate to the actual obstruction could be intimidated, rather than those with information about the *criminal proceedings*. This is not the intent and purpose of Article 387(1) of the Kosovo Criminal Code and has indeed not been the practice before Kosovo Courts.⁹⁹

61. The Panel notes that the Court of Appeals Panel thoroughly considered Mr Gucati's arguments in this respect and rejected them.¹⁰⁰ Having carefully

⁹⁸ Appeal Judgment, para. 221.

⁹⁹ Kosovo, Basic Court of Giljan, *L.T.*, Judgment, P 873/2020, 12 February 2021; Basic Court of Ferizaj, *K.S. and R.B.*, Judgment, PKR 36/19, 10 June 2020.

¹⁰⁰ Appeal Judgment, para. 222.

considered the Court of Appeals Panel's findings, as well as the Trial Panel's underlying determination with respect to Article 387(1) of the Kosovo Criminal Code, the Panel is not persuaded by Mr Gucati's arguments that there has been a violation of the criminal law in this respect.

62. Moreover, the Panel is not convinced by Mr Gucati's arguments that any other interpretation would create an overlap with Article 386(1) to (3) of the Kosovo Criminal Code. Article 387 of the Kosovo Criminal Code has two distinct qualifying elements: force and serious threat, rendering this offence *lex specialis* to the crime defined in Article 386(1) to (3) Kosovo Criminal Code. The use of force or serious threat is a common qualifier for *lex specialis* offences or for offences carrying a higher sentence in the Kosovo Criminal Code.¹⁰¹ The Panel notes that the Trial Panel, as affirmed by the Court of Appeals Panel, convicted Mr Gucati of having intimidating witnesses by seriously threatening them.¹⁰² The Panel finds no error in the underlying Panels' interpretation of Article 387 of the Kosovo Criminal Code in this respect.

63. The Panel further notes that the Court of Appeals Panel carefully examined Mr Gucati's submissions regarding the reference to "evidence" or "information" by the Trial Panel, rather than "statement" as provided for in Article 387(1) of the Kosovo Criminal Code.¹⁰³ Aside from mischaracterising the Court of Appeals Panel's findings,¹⁰⁴ Mr Gucati does not indicate how the Trial Panel's reference to "evidence" or "information" rather than "statement" would have materially changed the outcome of the Trial Panel's findings in this respect. Moreover, and as elaborated on by the Court of Appeals Panel, the Trial Panel made clear findings on the *actus reus* of Article 387 of the Kosovo Criminal Code, the factual considerations of which are

¹⁰¹ Cf. e.g. Articles 164(4), 168(4), 170(6.5), 171(3), 207(2), 209(3), 220(3), 227(3.1), 229(2.1), 230(2.1), 311(5.3), 314(2), 396(3), 397(3), 398(3), 410(2), 412(2).

¹⁰² Trial Judgment, paras 585-586, 606; Appeal Judgment, paras 210, 442.

¹⁰³ Appeal Judgment, para. 223.

¹⁰⁴ Compare Gucati Request, para. 42, with Appeal Judgment, para. 223.

beyond the jurisdiction of this Panel.¹⁰⁵

64. Similarly, the Panel is not convinced by Mr Gucati's arguments that the Trial Panel failed to make findings on the serious threat that was used to induce people from not making a statement. The Panel observes that the Court of Appeals Panel carefully considered Mr Gucati's arguments in this regard and found that the Trial Panel did in fact make such findings.¹⁰⁶ The Panel notes that the same is true with respect to the Trial Panel's findings on the *mens rea* for Article 387 of the Kosovo Criminal Code¹⁰⁷ and the consideration by the Court of Appeals Panel of Mr Gucati's submissions in this respect.¹⁰⁸

65. In view of the above, the Panel finds that there has been no violation of the criminal law. Accordingly, the Supreme Court Panel hereby dismisses Mr Gucati's Ground 2.

D. ALLEGED VIOLATION OF ARTICLE 392(1) OF THE KOSOVO CRIMINAL CODE
(MR GUCATI GROUND 3)

1. Submissions

66. Mr Gucati submits that the Trial Panel and the Court of Appeals Panel violated the criminal law in its misapplication of Article 392(1) of the Kosovo Criminal Code by finding that disclosure was not restricted to the alleged perpetrator in an official proceeding.¹⁰⁹ According to Mr Gucati, Article 392(1) of the Kosovo Criminal Code instead is meant to criminalise those who participate in proceedings from "'violating' the secrecy of proceedings to which they are privy".¹¹⁰ Mr Gucati asserts that his reading is consistent with Article 392(2) of the Kosovo Criminal Code, which provides

¹⁰⁵ Appeal Judgment, para. 223.

¹⁰⁶ Appeal Judgment, para. 226.

¹⁰⁷ See Trial Judgment, paras 121-122, 588-605.

¹⁰⁸ Appeal Judgment, paras 261-263, 265.

¹⁰⁹ Gucati Request, paras 65-68.

¹¹⁰ Gucati Request, para. 73. See also Gucati Request, para. 74.

that the revealed information must relate to “a person under the protection in *the* criminal proceedings, that is, the criminal proceedings in which the information was disclosed to the perpetrator”.¹¹¹ Mr Gucati contends that the *actus reus* was not satisfied and his conviction on this count should thus be overturned.¹¹²

67. The SPO responds that the plain language of Article 392(1) of the Kosovo Criminal Code does not require that the information be disclosed to the perpetrator in the official proceeding.¹¹³ The SPO submits that Mr Gucati’s “overly restrictive interpretation of ‘disclosure’”¹¹⁴ would allow for easy circumvention of the protected interest.¹¹⁵ The SPO asserts that such a restrictive interpretation does not cover the situation, for example, when a third person outside any proceeding reveals protected information obtained through an accused who received it through formal disclosure.¹¹⁶

68. Mr Gucati replies that his interpretation of Article 392(1) of the Kosovo Criminal Code does not allow for circumvention of the protected interest.¹¹⁷ Mr Gucati contends that it is not for the Specialist Chambers to remedy a perceived loophole in its legal framework by “excessively interpreting” Article 392(1) of the Kosovo Criminal Code.¹¹⁸

2. The Panel’s Assessment

a. Admissibility of Mr Gucati Ground 3

69. The Panel notes that Mr Gucati claims a violation of the criminal law in the form

¹¹¹ Gucati Request, para. 75. See also Gucati Request, paras 76-79.

¹¹² Gucati Request, para. 80.

¹¹³ Response, para. 45.

¹¹⁴ Response, para. 46.

¹¹⁵ Response, para. 47.

¹¹⁶ Response, para. 47.

¹¹⁷ Gucati Reply, para. 33. See also Gucati Reply, paras 34-35.

¹¹⁸ Gucati Reply, para. 37. See also Gucati Reply, para. 36.

of Article 392 of the Kosovo Criminal Code,¹¹⁹ specifically its excessively broad interpretation. The Panel recalls in this regard that Article 392 of the Kosovo Criminal Code is explicitly referenced in Article 15(2) of the Law. Accordingly, the Panel finds Mr Gucati's Ground 3 admissible and will consider the merits thereof.

b. Merits of Mr Gucati Ground 3

70. Article 392(1) of the Kosovo Criminal Code provides that

[w]hoever, without authorization, reveals information disclosed in any official proceeding which must not be revealed according to law or has been declared to be secret by a decision of the court or a competent authority shall be punished by a fine or by imprisonment of up to one (1) year.

71. The Court of Appeals Panel determined that there is nothing in the wording of Article 392(1) of the Kosovo Criminal Code to support Mr Gucati's contention that the revelation can only be done by someone who is privy to the disclosed information.¹²⁰ The Panel notes that Article 392(1) of the Kosovo Criminal Code refers to "whoever" reveals information without authorization. A plain reading of "whoever" means, as the Court of Appeals Panel found and as was held by the Trial Panel,¹²¹ that it applies to *anyone* who reveals disclosed information without authorization. If Article 392(1) of the Kosovo Criminal Code would have meant to restrict its application only to a perpetrator in the official proceeding, this Article would have specified that the information must have been disclosed to that person. Accordingly, the Panel does not consider that there has been a violation of the criminal law.

72. The Panel notes that Mr Gucati does not challenge the fact that investigations by the Specialist Prosecutor are included within the scope of "official proceedings" within the meaning of Article 392(1) of the Kosovo Criminal Code.¹²² Rather, Mr Gucati contends that the further dissemination of the confidential information by

¹¹⁹ Gucati Request, para. 65.

¹²⁰ Appeal Judgment, para. 131.

¹²¹ Trial Judgment, para. 75; Appeal Judgment, para. 131.

¹²² See Gucati Request, paras 78-79. See also Appeal Judgment, para. 129.

him cannot be qualified as “disclosure” within the meaning of Article 392(1) of the Kosovo Criminal Code.¹²³ The Panel observes that the Court of Appeals Panel carefully considered Mr Gucati’s arguments and found that there is no basis for his narrow interpretation of “disclosure”.¹²⁴ The Court of Appeals Panel explained that “disclosure” is to be understood as the disclosure of information that was previously confidential, including through the subsequent dissemination thereof by Mr Gucati.¹²⁵ Moreover, the Panel observes that Mr Gucati does not provide any legal support for his interpretation of “disclosure”.¹²⁶

73. In addition, the Panel observes that Article 392(1) of the Kosovo Criminal Code requires, as correctly articulated by the Trial and Court of Appeals Panel, the unauthorised *revelation* of such disclosed information irrespective of whether such information was directly disclosed to the perpetrator.¹²⁷ The Panel has thus not identified a violation in the Trial Panel’s and Court of Appeals Panel’s findings in this respect.

74. Based on the above, Mr Gucati has failed to substantiate his allegation and therefore did not persuade the Panel that the Trial Panel and the Court of Appeals Panel violated the criminal law and the Panel therefore dismisses his Ground 3.

E. ALLEGED VIOLATION OF ARTICLE 392(2) OF THE KOSOVO CRIMINAL CODE
(MR GUCATI GROUND 4 AND MR HARADINAJ GROUND 3)

1. Submissions

75. Messrs Gucati and Haradinaj submit that the Trial Panel and the Court of Appeals Panel violated the criminal law through its misapplication of Article 392(2)

¹²³ Gucati Request, paras 78-79.

¹²⁴ Appeal Judgment, paras 133-135.

¹²⁵ Appeal Judgment, paras 133-134.

¹²⁶ See Gucati Request, paras 78-79.

¹²⁷ Appeal Judgment, paras 114-115.

of the Kosovo Criminal Code.¹²⁸ Specifically, Mr Gucati contends that the panels erroneously found that the *actus reus* of the offence was established “in the absence of proof that the persons whose data was revealed were persons under the protection in SC/SPO proceedings”.¹²⁹ According to Mr Gucati, the Trial Panel adopted a definition provided by an SPO Officer, which included “witness” and potential witness” as part of the categories of persons protected under the proceedings of the Specialist Chambers and/or SPO.¹³⁰ Mr Gucati contends, however, that the Trial Panel did not identify what crime the individuals had information about, nor how this information related to proceedings before the Specialist Chambers.¹³¹

76. Mr Haradinaj contends that the Trial Panel’s definition of a “protected person” erroneously conflates Article 62 of the Law, which grants confidentiality to the identity and personal data of individuals within the records of the KSC or the 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”.¹³² According to Mr Haradinaj, it should first have been determined whether the evidence the individual can provide is relevant before protective measures are granted.¹³³ Mr Haradinaj submits that Article 62 of the Law provides that information contained within the SPO’s records is confidential, but that does not confer protected status to an individual within the meaning of Article 392(2) of the Kosovo Criminal Code.¹³⁴

77. The SPO responds that Mr Gucati’s arguments “principally concern incomplete determination of the facts when making findings on protected persons under Article 392(2) of the Kosovo Criminal Code”,¹³⁵ reiterate previously raised

¹²⁸ Gucati Request, para. 81; Haradinaj Request, paras 34-35, 41.

¹²⁹ Gucati Request, para. 81. See also Gucati Request, paras 82-83, 95; Gucati Reply, para. 41.

¹³⁰ Gucati Request, para. 84. See also Gucati Request, para. 85; Gucati Reply, para. 40.

¹³¹ Gucati Request, paras 86-94.

¹³² Haradinaj Request, para. 35. See also Haradinaj Request, para. 36; Haradinaj Reply, paras 17-18.

¹³³ Haradinaj Request, para. 37.

¹³⁴ Haradinaj Request, paras 39-40. See also Haradinaj Reply, para. 19.

¹³⁵ Response, para. 53.

unsuccessful arguments and should be dismissed on this basis alone.¹³⁶ According to the SPO, the Trial and Appeals Panels made clear findings as to why the (potential) witnesses were under protection in proceedings before the Specialist Chambers, which followed “naturally from Zdenka Pumper’s evidence”.¹³⁷

78. The SPO further responds that Mr Haradinaj’s arguments are “repetitive, unsuccessful appellate arguments labelled by [him] on appeal as errors of fact” and should thus be dismissed on this basis alone.¹³⁸ The SPO submits that even when considered on the merits, Mr Haradinaj’s arguments fail, as it follows from the plain meaning of Article 392(2) of the Kosovo Criminal Code that persons named in confidential documents not authorised for disclosure are “under the protection in the criminal proceedings”.¹³⁹

79. Mr Gucati replies that his arguments are not related to erroneous or incomplete determination of facts, but is with respect to evidence that “was not sufficient on a proper interpretation of the law to support the ultimate conclusion that such persons were protected” for the purpose of Article 392(2) of the Kosovo Criminal Code.¹⁴⁰ Mr Gucati further contends that he does not merely reiterate arguments previously raised, but that he in fact engages with specific matters arising out of the Appeal Judgment.¹⁴¹

2. The Panel’s Assessment

a. Admissibility of Mr Gucati Ground 4 and Mr Haradinaj Ground 3

80. The Panel observes that Mr Gucati’s arguments in his Ground 4 relate to the Trial Panel’s evidentiary findings and which were addressed by the Court of Appeals

¹³⁶ Response, paras 53-54. See also Response, para. 57.

¹³⁷ Response, para. 54. See also Response, paras 55-56.

¹³⁸ Response, para. 49. See also Response, para. 52.

¹³⁹ Response, para. 51. See also Response, para. 50.

¹⁴⁰ Gucati Reply, para. 38.

¹⁴¹ Gucati Reply, para. 39.

Panel. For example, Mr Gucati refers to the absence of evidence,¹⁴² the Court of Appeals Panel having conducted its own review to satisfy itself that “the trial record contains sufficient evidence”,¹⁴³ that this was “insufficient to establish that such persons fell within the protection of Article 392(2) of the Kosovo Criminal Code,¹⁴⁴ and what this information does or does not “establish”.¹⁴⁵ The Panel notes that these arguments are factual in nature and go to evidentiary findings made by the Trial Panel and thereafter upheld by the Court of Appeals Panel. The Panel recalls that it will not consider arguments of a factual nature.¹⁴⁶ Mr Gucati’s Ground 4 is therefore summarily dismissed.

81. Turning to Mr Haradinaj, the Panel observes that he qualifies his arguments under this Ground as amounting to a violation of the criminal law.¹⁴⁷ The Panel notes that Mr Haradinaj appears to have made different arguments in relation to this ground before the Court of Appeals Panels, which were either qualified as factual in nature¹⁴⁸ or were developed on grounds different from the ones presented in his Ground 3.¹⁴⁹ Notably, Mr Haradinaj submitted before the Court of Appeals Panel that he “does not necessarily disagree with [the] summary in terms of the outlined circumstances”¹⁵⁰ given by the Trial Panel with respect to its definition of who is covered by a “protected person” within the meaning of Article 392(2) of the Kosovo Criminal Code.

82. In addition, the Panel observes that Mr Haradinaj does not refer to any jurisprudence or otherwise to support his arguments under this Ground¹⁵¹ and, as

¹⁴² Gucati Request, paras 86, 93-94.

¹⁴³ Gucati Request, para. 88.

¹⁴⁴ Gucati Request, para. 89.

¹⁴⁵ Gucati Request, para. 90.

¹⁴⁶ See *supra*, para. 10.

¹⁴⁷ See Haradinaj Request, para. 41.

¹⁴⁸ See Haradinaj Appeal Brief, paras 196-208.

¹⁴⁹ See Haradinaj Appeal Brief, paras 194-195, *referring to* Haradinaj Appeal Brief, paras 55-67.

¹⁵⁰ Haradinaj Appeal Brief, para. 202, *referring to* Trial Judgment, para. 95.

¹⁵¹ See Haradinaj Request, paras 31-41.

stated above, has not made these specific arguments before the Court of Appeals Panel, when he could reasonably have done so.¹⁵² Lastly, the Panel observes that the alleged violation does not amount to any of the violations of a criminal law as enumerated in the standard of review.¹⁵³

83. Accordingly, the Panel hereby summarily dismissed Mr Haradinaj's Ground 3.

F. ALLEGED VIOLATION BY THE COURT OF APPEALS PANEL IN RELATION TO THE ARGUMENT OF ENTRAPMENT (MR GUCATI GROUND 6 AND MR HARADINAJ GROUND 5)

1. Submissions

84. Messrs Gucati and Haradinaj contend that the Trial Panel and the Court of Appeals Panel violated their rights under Article 6 of the ECHR by requiring them to provide *prima facie* evidence of the defence of entrapment.¹⁵⁴ Mr Haradinaj submits that the failure to disclose certain evidence that could have assisted him with his entrapment-defence compounded this violation and he was further prevented from appealing this before the Court of Appeals Panel.¹⁵⁵ Mr Haradinaj adds that his right to a fair hearing in accordance with Article 21(2) of the Law was violated as well.¹⁵⁶ According to Messrs Gucati and Haradinaj, the Trial Panel erred by reversing the burden of proof when it found that his defence of entrapment was "wholly improbable".¹⁵⁷

85. According to Mr Gucati, the Court of Appeals Panel "agreed" that the jurisprudence of the ECtHR cited by the Trial Panel did not support the requirement

¹⁵² See *supra*, para. 10.

¹⁵³ See *supra*, para. 17.

¹⁵⁴ Gucati Request, para. 171; Haradinaj Request, paras 60-61; Gucati Reply, paras 42-45; Haradinaj Reply, paras 24-27.

¹⁵⁵ Haradinaj Request, para. 67. See also Haradinaj Request, paras 68-69.

¹⁵⁶ Haradinaj Request, para. 66.

¹⁵⁷ Gucati Request, para. 175; Haradinaj Request, para. 66. See also Gucati Request, paras 172-174, 178-181.

that he provide *prima facie* evidence of entrapment and both Messrs Gucati and Haradinaj submit that the case law relied upon by the Court of Appeals Panel does not support this requirement either.¹⁵⁸ Mr Gucati therefore contends that all his convictions should be overturned.¹⁵⁹

86. The SPO responds that the arguments presented by Messrs Gucati and Haradinaj under this ground go towards the sufficiency of evidence and should thus be summarily dismissed on this basis alone.¹⁶⁰ The SPO submits that Mr Haradinaj's argument that he was denied access to information required for his defence "neglects the lengths the Trial Panel went to ensure their procedural rights".¹⁶¹ The SPO further contends that a failure to establish the *prima facie* standard "necessarily implies that it is 'wholly improbable'", which is consistent with ECtHR jurisprudence.¹⁶² According to the SPO, there is simply no evidence that Messrs Gucati and Haradinaj were influenced by the SPO or anyone else in the actions they took, which Mr Gucati seemed to have acknowledged during the trial proceedings.¹⁶³

87. Mr Gucati replies that "the fact that the SPO conducted an investigation into the allegation of entrapment strongly indicates that the allegation was not wholly improbable".¹⁶⁴ Mr Gucati further contends that there is no requirement that he was "forced" to act for purposes of entrapment and that neither coercion nor compulsion are "part of the test".¹⁶⁵ According to Mr Gucati, all that is required for purposes of entrapment is to show that there was influence exerted on the person with the aim of inciting that person to commit an offence that he/she would otherwise not have

¹⁵⁸ Gucati Request, para. 176; Haradinaj Request, paras 63-65. See also Gucati Request, paras 177-178, citing ECtHR, *Bannikova v. Russia*, no. 18757/06, Judgment, 4 November 2010 ("*Bannikova* Judgment").

¹⁵⁹ Gucati Request, para. 182.

¹⁶⁰ Response, para. 58. See also Response, para. 62.

¹⁶¹ Response, para. 59.

¹⁶² Response, para. 60.

¹⁶³ Response, para. 61.

¹⁶⁴ Gucati Reply, para. 47. See also Gucati Reply, para. 46.

¹⁶⁵ Gucati Reply, para. 49.

committed.¹⁶⁶

2. The Panel's assessment

a. Admissibility of Mr Gucati Ground 6 and Mr Haradinaj Ground 5

88. The Panel recalls that a party requesting protecting of legality must allege a substantial violation of the procedures set out in this Law and the Rules in accordance with Article 48(7)(b) of the Law. In other words, a party cannot, in the context of a request for protection of legality, refer only to a violation of the ECHR or the Constitution, unless such rights afforded therein are directly contained within the Law and/or the Rules.¹⁶⁷

89. Mr Gucati asserts that there has been a "substantial violation" of his rights under Article 6 of the ECHR.¹⁶⁸ After setting forth his submissions related to the violation pursuant to Article 6 of the ECHR, Mr Gucati contends that the evidence that forms the subject of his entrapment defence should have been excluded pursuant to Rule 138(2) of the Rules.¹⁶⁹ The Panel considers that Mr Gucati,¹⁷⁰ in referencing Article 6 and Rule 138(2) of the Rules, is alleging a substantial violation of the procedures. Accordingly, the Panel will consider the merits of Mr Gucati's Ground 6.

90. Mr Haradinaj, while focusing mostly on Article 6 of the ECHR, submits that there has been a violation of Article 21(2) of the Law, specifically the right to a fair hearing.¹⁷¹ Accordingly, the Panel will consider Mr Haradinaj's Ground 5 on the merits.

¹⁶⁶ Gucati Reply, para. 49. See also Gucati Reply, para. 50.

¹⁶⁷ See Veseli Decision, para. 33.

¹⁶⁸ Gucati Request, para. 171.

¹⁶⁹ Gucati Request, para. 181.

¹⁷⁰ Gucati Request, paras 171-181.

¹⁷¹ See Haradinaj Request, para. 66.

b. Merits of Mr Gucati Ground 6 and Mr Haradinaj Ground 5

91. The Panel observes that the Court of Appeals Panel considered in detail the contention that the Trial Panel reversed the burden by requiring Messrs Gucati and Haradinaj to provide *prima facie* evidence of entrapment, instead of using the wholly improbable” standard.¹⁷² Having carefully considered the relevant case law, the Panel finds that the Court of Appeals Panel correctly applied the ECtHR jurisprudence when it found that the Trial Panel had not reversed the burden of proof in this respect.¹⁷³

92. As set forth by the Court of Appeals Panel, the ECtHR has required an examination of the situation to determine whether the case falls “*prima facie* within the category of ‘entrapment cases’”.¹⁷⁴ Contrary to Mr Gucati’s contention, the ECtHR’s reference to a *prima facie* examination demonstrates that there must be some evidence, which on its face, demonstrates that the situation in question can be characterised as entrapment. It follows from the usage of the *prima facie* standard that if a party cannot provide any evidence that on its face would suggest that the situation falls within the category of entrapment cases, it is thus considered “wholly improbable”.

93. Mr Gucati’s reliance on the *Bannikova* Judgment to suggest otherwise, misrepresents the facts of that case¹⁷⁵ given that the government there did not in fact contest the existence of a covert operation through a third person.¹⁷⁶ Instead, it argued that the investigation had been lawfully carried out and that the applicant had sufficient avenues available to raise her incitement argument in court.¹⁷⁷ In other words, there had been *prima facie* evidence that the situation fell within the category

¹⁷² See Appeal Judgment, paras 361-369.

¹⁷³ Appeal Judgment, para. 364, citing ECtHR, *Matanović v. Croatia*, no. 2742/12, Judgment, 4 April 2017 (“*Matanović* judgment”).

¹⁷⁴ *Matanović* Judgment, paras 131-132. See also ECtHR, *Yevgeniy Yevgenyevich Trifonotsov against Russia*, First Section Decision, no. 12025/02, 9 October 2012, para. 32; *Aleksandr Vasilyevich Lyubchenko against Ukraine*, no. 34640/05, Fifth Section Decision, 31 May 2016, para. 33.

¹⁷⁵ Gucati Request, para. 177, citing *Bannikova* Judgment.

¹⁷⁶ See *Bannikova* Judgment, para. 30.

¹⁷⁷ *Bannikova* Judgment, paras 29, 31-32.

of entrapment cases and it fell to the ECtHR to determine whether the police had, in fact, incited the applicant to commit a crime, or whether the government's actions were permissible in this context.¹⁷⁸ It is precisely in this context that the ECtHR placed the burden of proof on the authorities to prove that the applicant's allegations of entrapment were "wholly improbable".¹⁷⁹

94. Indeed, and as correctly articulated by the Court of Appeals Panel, the ECtHR jurisprudence on entrapment, including the *Bannikova* Judgment, involves cases where there was no dispute as to the involvement of the law enforcement officers or those acting under their instruction.¹⁸⁰ These cases stand in contrast with the present case, where the SPO has denied any involvement in inciting Messrs Gucati and Haradinaj or even in passively investigating them for offences of any kind.¹⁸¹ Moreover, and as clearly articulated by the Court of Appeals Panel,¹⁸² the mere fact that the SPO was unable to prevent the dissemination of the confidential material does not show that the SPO orchestrated these deliveries and therefore does not render this an entrapment case in the sense of the ECtHR jurisprudence.

95. Finally, the Panel notes that the Trial Panel, as affirmed by the Court of Appeals Panel, did not find any evidence that the SPO directly or indirectly disclosed the documents to Messrs Gucati and Haradinaj, nor did it find evidence that Messrs Gucati and Haradinaj were pressured or prompted by official authorities to commit the offences or that anyone connected to the SPO joined them in the

¹⁷⁸ *Bannikova* Judgment, paras 35-36, 66-79.

¹⁷⁹ *Bannikova* Judgment, paras 47-48.

¹⁸⁰ Appeal Judgment, para. 367, citing ECtHR, *Akbay and Others v. Germany*, no. 40495/15 and 2 others, Judgment, 15 October 2020, para. 112 ("[p]olice incitement occurs where the officers involved [...] do not confine themselves to the investigating criminal activity in a passive manner, but exert influence on the subject 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"); *Ramanauskas v. Lithuania*, no. 74420/01, Judgment, 5 February 2008 ("*Ramanauskas* Judgment"), para. 55.

¹⁸¹ Cf. *Ramanauskas* Judgment, para. 55; ECtHR, *Teixeira de Castro v. Portugal*, no. 44/1997/828/1034, Judgment, 9 June 1998, para. 38.

¹⁸² See Appeal Judgment, para. 373.

commission of the offences.¹⁸³ To the contrary, the Trial Panel found that Messrs Gucati and Haradinaj never claimed that anyone exerted undue influence on them or that they were persuaded to commit the offences by law enforcement officers.¹⁸⁴ The Trial Panel found that Mr Gucati acted on his own account and that Mr Haradinaj acted under the authority of Mr Gucati.¹⁸⁵ Lastly, they claimed to be acting in the “public interest”. The Panel observes that the Trial Panel, notwithstanding the absence of any *prima facie* evidence of the involvement of the SPO or an agent acting on their behalf, nevertheless went to great lengths to afford Messrs Gucati and Haradinaj the opportunity to present their entrapment arguments.¹⁸⁶

96. To that end, the Panel finds that there has been no violation of the procedure of the Rules or the Law.¹⁸⁷ Accordingly, the Panel finds that Messrs Gucati and Haradinaj failed to demonstrate that there has been a substantial violation of the procedures by the Trial Panel and the Court of Appeals Panel. Mr Gucati’s Ground 6 and Mr Haradinaj’s Ground 5 are therefore dismissed.

G. ALLEGED VIOLATION REGARDING DISCLOSURE (MR GUCATI GROUND 5)

1. Submissions

97. Mr Gucati submits that in “substantial violation” of Article 21(6) of the Law, Rules 102(3) and 103 of the Rules, and Article 6 of the ECHR, the SPO failed to comply with its disclosure obligations, the Trial Panel did not ensure that the SPO complied therewith and the Court of Appeals Panel erred in refusing to remedy the disclosure

¹⁸³ See, e.g., Trial Judgment, paras 859, 862, 864, 868, 871-873, 877-878, 889; Appeal Judgment, paras 371, 373.

¹⁸⁴ See, e.g., Trial Judgment, paras 856-857.

¹⁸⁵ See Trial Judgment, paras 706-707.

¹⁸⁶ See Trial Judgment, paras 841-850, 854-890.

¹⁸⁷ See Appeal Judgment, para. 369.

violations.¹⁸⁸

98. According to Mr Gucati, the SPO failed to disclose evidence relevant to his entrapment case, which was accepted by the Trial Panel.¹⁸⁹ Mr Gucati submits that he only became aware of the SPO's disclosure violations after the issuance of the trial judgment and the filing of his notice of appeal, but was nonetheless not permitted by the Court of Appeals Panel to amend his notice of appeal.¹⁹⁰ Mr Gucati asserts that the Court of Appeals Panel erred by accepting the SPO's explanations as to their late disclosure of evidence relevant to Mr Gucati's entrapment case and erred by concluding that Mr Gucati would not have been able to identify a specific finding of the Trial Panel he would have challenged through his notice of appeal.¹⁹¹ Mr Gucati contends that where exculpatory evidence is withheld, the accused's right to a fair trial and the equality of arms is violated.¹⁹²

99. Mr Gucati submits that the Court of Appeals Panel treated his request to interview certain witnesses as a request to conduct further investigations on appeal.¹⁹³ Mr Gucati asserts that in denying his request, the Court of Appeals Panel failed to take into account that he could not have conducted these interviews at the (pre-)trial stage, as he only became aware of the existence of potentially relevant information after the issuance of the trial judgment.¹⁹⁴ Mr Gucati therefore contends that all his convictions should be overturned and an acquittal entered, or, alternatively, that a re-trial be ordered.¹⁹⁵

100. The SPO responds that Mr Gucati's arguments are based on a wrong

¹⁸⁸ Gucati Request, para. 96. See also Gucati Request, paras 97-102, 162-163, 166-168; Gucati Reply, para. 13.

¹⁸⁹ Gucati Request, paras 104, 106-128.

¹⁹⁰ Gucati Request, paras 129-130. See also Gucati Request, para. 165.

¹⁹¹ Gucati Request, paras 130-146. See also Gucati Reply, paras 16-17.

¹⁹² Gucati Request, paras 103, 105, 164.

¹⁹³ Gucati Request, para. 148.

¹⁹⁴ Gucati Request, paras 149-160.

¹⁹⁵ Gucati Request, paras 169-170.

assumption.¹⁹⁶ According to the SPO, the Court of Appeals Panel declined to provide a remedy for disclosure violations, because no such violation was found.¹⁹⁷ According to the SPO, Mr Gucati did not substantiate what prejudice he suffered from the alleged disclosure violation¹⁹⁸ and he therefore failed to establish a violation of the procedural law.¹⁹⁹

2. The Panel's assessment

a. Admissibility of Mr Gucati Ground 5

101. The Panel observes that Mr Gucati does not specify whether the alleged "substantial violation" is one of procedure or of the criminal law.²⁰⁰ However, Mr Gucati does identify the Rules which he contends have been violated, including Rules 102 and 103 of the Rules. Given that Mr Gucati's arguments concern alleged disclosure obligations, the Panel understands his submissions to be a substantial violation of the procedures. Accordingly, the Panel finds Mr Gucati's Ground 5 admissible and will consider it on the merits.

b. Merits of Mr Gucati Ground 5

102. The Panel recalls at the outset that a request for protection of legality is an extraordinary remedy and is not a third instance appeal. To that end, a party cannot simply submit its disagreement with the first and second instance judgment.²⁰¹

103. The Panel observes that Mr Gucati's arguments are centred on the presumption that there has been a disclosure violation by the SPO that first the Trial Panel and thereafter the Court of Appeals Panel failed to remedy. Having carefully considered Mr Gucati's submissions, as well as the Court of Appeals Panel's various decisions

¹⁹⁶ Response, para. 18.

¹⁹⁷ Response, para. 18. See also Response, paras 19-22.

¹⁹⁸ Response, para. 23.

¹⁹⁹ Response, para. 24.

²⁰⁰ See Gucati Request, para. 96.

²⁰¹ See supra paras 9-10.

and orders on this matter, the Panel has not identified any substantial violation in the manner in which the Court of Appeals Panel proceeded with Mr Gucati's submissions regarding the disclosure by the SPO of the two interviews.

104. The Panel notes in this respect that the Court of Appeals Panel on a variety of occasions thoroughly considered Mr Gucati's submissions in relation to alleged disclosure violations by the SPO, including the timing of the notification given by the SPO in relation to the two interviews by Witness W04730, and concluded that no such violation had occurred.²⁰² The Panel further recalls that the Court of Appeals Panel ordered the SPO to disclose to Messrs Gucati and Haradinaj the two interviews, which the SPO complied with.²⁰³ In addition, the Court of Appeals Panel considered in detail the manner in which to remedy, if at all, the disclosure of the two interviews after the rendering of the trial judgment and the possible prejudice this may have caused Mr Gucati.²⁰⁴ The Panel has not identified any error on the part of the Court of Appeals Panel in this respect.

105. In view of the above, the Panel finds that Mr Gucati failed to substantiate that a substantial violation of the procedures occurred and hereby dismisses his Ground 5.

²⁰² KSC-CA-2022-01, F00082, Decision on Defence Applications for Reconsideration of "Decision on Defence Requests to Amend the Notices of Appeal Pursuant to Rule 176(3) of the Rules", 3 November 2022 (confidential) ("3 November 2022 Decision"), paras 16-17; KSC-CA-2022-01, F00083, Decision on Defence Motions for Alternate Relief Relating to Rule 103 Disclosure Violations, 7 November 2022 (confidential) ("7 November 2022 Decision"), paras 21-26. A public redacted version of this decision was filed on 31 January 2023. See KSC-CA-2022-01/F00083/RED.

²⁰³ See KSC-CA-2022-01, F00044/CONF/RED, Confidential Redacted Version of Decision on Prosecution Notifications, 26 September 2022 (confidential). A public redacted version of this decision was filed on 31 January 2023. See KSC-CA-2022-01/F00044/RED. See also 3 November 2022 Decision, para. 5.

²⁰⁴ See 7 November 2022 Decision, paras 27-28. See also KSC-CA-2022-01, F00064, Decision on Defence Requests to Amend the Notice of Appeal pursuant to Rule 176(3) of the Rules, 13 October 2022 (confidential), paras 15-17 (a public redacted version of this decision was filed on the same day. See KSC-CA-2022-01/F00064/RED); 3 November 2022 Decision, paras 18-19; KSC-CA-2022-01, F00094, Decision on Defence Requests to Interview Witnesses, to Order an Updated Rule 102(3) Notice and to Adjourn the Appeal Hearing, 28 November 2022 (confidential). A public redacted version of this decision was filed on 31 January 2023. See F00094/RED).

H. ALLEGED VIOLATION IN RELATION TO SENTENCING (MR GUCATI GROUND 7 AND MR HARADINAJ GROUND 4)

1. Submissions

106. Mr Gucati contends that the Trial Panel violated Articles 44(5) and 46 of the Law by sentencing him on the “wrong factual basis, namely that more than two persons suffered serious consequences”.²⁰⁵ According to Mr Gucati, the Court of Appeals Panel agreed that the Trial Panel erred in finding that serious consequences were made out for more than two persons, but erroneously did not adjust Mr Gucati’s sentence accordingly.²⁰⁶

107. Mr Haradinaj contends that the Trial Panel violated Article 44(5) of the Law by sentencing him to a term that is “grossly disproportionate and unjustifiable” given the counts for which he was convicted.²⁰⁷ According to Mr Haradinaj, the Court of Appeals Panel did not provide sufficient reasoning as to the Trial Panel’s departure from the international jurisprudence and instead focussed on the specific facts of the instant case.²⁰⁸ In addition, Mr Haradinaj submits that the Trial Panel erred by failing to disaggregate the individual sentences imposed in respect of each count, resulting in a single sentence that is “so unfair or unreasonable as to constitute an abuse of discretion”.²⁰⁹

108. The SPO responds that Messrs Gucati and Haradinaj raise arguments that are factual in nature and that they raised these arguments previously before the Court of Appeals Panel as factual errors.²¹⁰ The SPO submits that even if considered on the merits, Mr Gucati’s Ground 7 and Mr Haradinaj’s Ground 4 fail, as the Court of

²⁰⁵ Gucati Request, para. 183. See also Gucati Request, paras 184-199; Gucati Reply, para. 52.

²⁰⁶ Gucati Request, paras 200-203.

²⁰⁷ Haradinaj Request, para. 42.

²⁰⁸ Haradinaj Request, paras 43-46.

²⁰⁹ Haradinaj Request, para. 51. See also Haradinaj Request, paras 47-50, 52, 59; Haradinaj Reply, para. 23.

²¹⁰ Response, paras 66, 69.

Appeals Panel has the discretion to adjustment the sentence as it sees fit,²¹¹ provided sufficient reasoning for its decision in this respect²¹² and considered other contempt cases at different tribunals.²¹³ The SPO therefore asserts that both Grounds should be dismissed.²¹⁴

109. Mr Gucati replies that while the error related to the number of protected persons to have suffered serious consequences was factual, the error made by the Court of Appeals Panel in not having acknowledged this and having adjusted the sentencing accordingly was procedural.²¹⁵

110. Mr Haradinaj replies that his argument that the Trial Panel erred in determining the gravity of the crime amounts to a violation of the criminal law as set forth in Article 44(5) of the Law.²¹⁶

2. The Panel's assessment

a. Admissibility of Mr Gucati Ground 7 and Mr Haradinaj Ground 4

111. The Panel recalls that it will not undertake an assessment of factual determinations made by other panels.²¹⁷ The Panel considers, and Mr Gucati acknowledges,²¹⁸ that the assessments made by the Trial Panel and the Court of Appeals Panel of factors to be taken into consideration when determining Mr Gucati's sentence are factual in nature. Accordingly, Mr Gucati's arguments are inadmissible and his Ground 7 is hereby dismissed in its entirety.

112. Turning to Mr Haradinaj's arguments, the Panel notes that Mr Haradinaj simply disagrees with the assessment made by the Trial Panel and the Court of

²¹¹ Response, para. 67.

²¹² Response, para. 67.

²¹³ Response, paras 70-77.

²¹⁴ Response, paras 66, 69, 79.

²¹⁵ Gucati Reply, paras 51, 53-56.

²¹⁶ Haradinaj Reply, para. 21.

²¹⁷ See supra, para. 10.

²¹⁸ See Gucati Request, para. 183.

Appeals Panel regarding the determination of his sentence. As the Panel noted earlier, mere disagreements with the factual assessments of other panels is not sufficient to meet the admissibility test.²¹⁹

113. Furthermore, Mr Haradinaj generally alleges a violation of Article 44(5) of the Law by imposing a sentence, which he argues is “grossly disproportionate and unjustifiable”, without addressing the specific sentencing ranges of the individual offences he has been sentenced for.²²⁰ The Panel recalls that Mr Haradinaj has been found guilty of the commission of several offences and that a single sentence of four years and three months was imposed reflecting the totality of his criminal conduct and the multiple offences committed by him.²²¹ The Panel notes that one of the offences Mr Haradinaj was found guilty of provides for a sentencing range of two to ten years of imprisonment in accordance with Article 387 of the Kosovo Criminal Code.

114. Accordingly, the four years and three months falls within this statutory sentencing range. The Trial Panel considered single sentences for each offence, which are all within the statutory sentencing ranges. Given that the single sentence is within the sentencing range of one of the offences he has been sentenced for, the Panel therefore considers that Mr Haradinaj has not pointed to a specific violation of the sentencing ranges that he was convicted for.

115. In any event, Mr Haradinaj’s arguments in relation to the Trial Panel’s alleged error with respect to the imposition of a single sentence are raised for the first time before this Panel. As set forth above,²²² arguments that could reasonably have been raised before other panels, cannot be raised *de novo* before the Supreme Court Panel. Accordingly, Mr Haradinaj’s arguments are inadmissible and his Ground 4 is hereby

²¹⁹ See supra, para. 10.

²²⁰ Haradinaj Request, para. 42.

²²¹ Appeal Judgment, paras 439-440, 442.

²²² See supra, para. 10.

dismissed.

I. ALLEGED VIOLATION OF ARTICLE 21(2) OF THE LAW IN RELATION TO THE COMPOSITION OF THE COURT OF APPEALS PANEL (MR HARADINAJ GROUND 6)

1. Submissions

116. Mr Haradinaj submits that his right to a fair trial in accordance with Article 21(2) of the Law was violated given that the same composition of Judges was assigned to the Court of Appeals Panel to adjudicate his appeal of the trial judgment as was assigned to decide on interlocutory appeals, during which they already took “positions on key issues that were addressed in the appeal judgment”.²²³ Mr Haradinaj asserts that the right to a fair trial “implies” that the proceedings will be conducted by an independent and impartial tribunal established by law, as set forth in Articles 27 and 31 of the Law, Article 6(1) of the ECHR and Article 31(2) of the Kosovo Constitution.²²⁴ Mr Haradinaj contends that the Court Appeals Panel’s adjudication of interlocutory matters raises “doubts” as to their impartiality when they are thereafter called upon to decide on his appeal of the trial judgment.²²⁵

117. The SPO responds that Mr Haradinaj did not challenge the composition of the Court of Appeals Panel when they were assigned and he therefore cannot do so now.²²⁶ The SPO further contends that there is nothing in the KSC’s regulatory framework that prevents Judges from adjudicating interlocutory appeals and the appeal against a trial judgment in the same case and that this is common practice at other tribunals and courts.²²⁷ Finally, the SPO asserts that Mr Haradinaj did not present any evidence to rebut the presumption of impartiality of the Judges nor did he explain how the allegations in the ground materially impact the Appeal

²²³ See Haradinaj Request, para. 73. See also Haradinaj Request, para. 72; Haradinaj Reply, para. 29.

²²⁴ Haradinaj Request, para. 70.

²²⁵ Haradinaj Request, para. 74. See also Haradinaj Request, paras 70-71.

²²⁶ Response, para. 13. See also Response, para. 14.

²²⁷ Response, para. 15.

Judgment.²²⁸

118. Mr Haradinaj contends that even if he did not request the disqualification of the Judges of the Court of Appeals Panel when they were assigned, this does not negate the fact that there has been a substantial violation of the procedure.²²⁹

2. The Panel's assessment

a. Admissibility of Mr Haradinaj Ground 6

119. The Panel notes that Mr Haradinaj did not file any submission requesting the recusal or disqualification of the Court of Appeals Panel when it was assigned to decide on his appeal against the trial judgment.²³⁰ The Panel further notes that Rule 20 of the Rules sets forth the procedure applicable to requests for the disqualification of Judges. Rule 20 of the Rules thus provides the opportunity to remove all reasonable doubt as to the impartiality of judges and the panels concerned. In line with the jurisprudence of the ECtHR, such procedures envision that, in addition to ensuring the absence of actual bias, any appearance of partiality may be removed at an early stage.²³¹

120. An accused or convicted person who fails to challenge the impartiality of judges in accordance with existing Rules during the trial or appeals procedure is therefore precluded from raising these challenges where a judgment has become final.²³² Mr Haradinaj may therefore not raise this issue before the Supreme Court, given that he failed to challenge the impartiality of the Judges of the Court of Appeals Panel when they were assigned in accordance with Rule 20 of the Rules.

121. As set forth above,²³³ grounds that could reasonably have been raised before

²²⁸ Response, paras 16-17.

²²⁹ Haradinaj Reply, para. 30.

²³⁰ See generally Haradinaj Appeal Brief.

²³¹ ECtHR, *Mežnarić v. Croatia*, no. 71615/01, Judgment, 15 July 2005, para. 27.

²³² See ECtHR, *Zahirović v. Croatia*, no. 58590/11, Judgment, 25 April 2013, paras 35-36.

²³³ See *supra*, para. 10.

either the trial or the court of appeals panels should not be raised *de novo* before the Supreme Court Panel. Accordingly, the Panel finds Mr Haradinaj's Ground 6 inadmissible and hereby summarily dismisses it.

J. ALLEGED VIOLATION BY THE TRIAL PANEL IN ITS DEFINITION OF PUBLIC INTEREST
(MR HARADINAJ GROUND 7)

1. Submissions

122. Mr Haradinaj submits that his right to a fair hearing in accordance with Article 21(2) of the Law was violated on the basis that the Trial Panel and the Court of Appeals Panel rejected his arguments in relation to his public interest defence.²³⁴

123. The SPO responds that Mr Haradinaj's disagreement with how the Trial Panel weighed the rights in question is one of fact and should be dismissed.²³⁵ The SPO submits that even if considered on the merits, the need to safeguard (potential) witnesses of international crimes from serious threats by protecting their confidential information outweighs the public interest.²³⁶

2. The Panel's assessment

a. Admissibility of Mr Haradinaj Ground 7

124. The Panel notes that Mr Haradinaj does not identify what procedural rule was substantially violated, other than generally referring to Article 21(2) of the Law, nor does he set forth how the alleged procedural violation materially affected the Appeal Judgment. More importantly, the arguments advanced by Mr Haradinaj as part of Ground 7 are factual in nature and concern his disagreement with the assessment made by the Trial and the Court of Appeals Panel.

125. The Panel recalls that it will not undertake an assessment of factual

²³⁴ Haradinaj Request, para. 75. See also Haradinaj Reply, para. 35.

²³⁵ Response, para. 63.

²³⁶ Response, para. 64.

determinations made by other panels²³⁷ and that Mr Haradinaj's arguments were considered by the Trial Panel and the Court of Appeals Panel in this respect.²³⁸ The Panel therefore finds Mr Haradinaj's Ground 7 inadmissible and hereby summarily dismisses it.

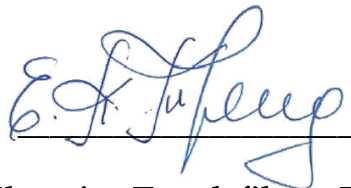
V. DISPOSITION

126. For these reasons, the Supreme Court Panel hereby:

REJECTS Messrs Gucati's and Haradinaj's requests for an oral hearing;

REJECTS Messrs Gucati's and Haradinaj's Requests in their entirety;
and

ORDERS Mr Gucati to file a public version of his Reply within five days from notification of this decision.



Judge Ekaterina Trendafilova, Presiding

Dated this Monday, 18 September 2023

At The Hague, the Netherlands

²³⁷ See supra, para. 10.

²³⁸ See Trial Judgment, paras 814-817; Appeal Judgment, paras 332, 334, 337-339.