



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

**In:** KSC-CC-2023-22

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

**Registrar:** Dr Fidelma Donlon

**Filing Participant:** Specialist Prosecutor

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**Prosecution Response to Haradinaj Defence Referral to the Specialist Chamber of  
the Constitutional Court  
with public annexes 1 and 2**

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**Specialist Prosecutor's Office**

Kimberly P. West

**Applicant**

Nasim Haradinaj

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## I. INTRODUCTION

1. After three levels of proceedings, Nasim Haradinaj currently has confirmed convictions for attempted obstruction of official persons in performing official duties, intimidation during criminal proceedings, and violating the secrecy of proceedings under the Criminal Code.<sup>1</sup> His seriously threatening conduct resulted in the revelation of the names and/or details of hundreds of (potential) witnesses.

2. The Haradinaj Referral<sup>2</sup> raises only inadmissible arguments against these convictions. Merely repeating or incorporating arguments made before other courts cannot give rise to the appearance of an incompatibility with the Kosovo Constitution ('Constitution') or a violation of a constitutional right. Constitutional court referrals are carefully circumscribed in the Law and SCCC Rules, and arguments falling outside these parameters warrant summary dismissal. To the extent the SCCC were to find any admissible challenge, Haradinaj's arguments fail to show any constitutional violation. Haradinaj's Additional Evidence Request<sup>3</sup> should likewise be deemed inadmissible, and in any event changes nothing about the merits of the Referral.

3. The Specialist Chamber of the Constitutional Court Panel ('SCCC Panel') should dismiss all relief sought accordingly.

## II. PROCEDURAL HISTORY

4. On 11 December 2020, the Pre-Trial Judge issued the Confirmation Decision<sup>4</sup> in this case. Amongst other determinations, the Pre-Trial Judge found that: (i) Haradinaj's conduct against (potential) witnesses amounted to (attempted)

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<sup>1</sup> The offences under Articles 387, 388, 392 and 401 of the Criminal Code are analogous to the corresponding offences under Articles 395, 396, 400 and 409 of the 2012 Criminal Code.

<sup>2</sup> Referral, KSC-CC-2023-22/F00001 (with annex; notified 21 November 2023 and reclassified as public on 11 December 2023).

<sup>3</sup> Additional Evidence Request, KSC-CC-2023-22/F00005/RED .

<sup>4</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED .

obstruction of official persons under Article 401(1) of the Criminal Code;<sup>5</sup> (ii) intimidation under Article 387 of the Criminal Code was not limited to intimidation in obstruction cases;<sup>6</sup> and (iii) the (potential) witnesses affected were protected persons within the meaning of Article 392(2) of the Criminal Code.<sup>7</sup>

5. On 18 May 2022, the Trial Panel reached all these same conclusions in its Trial Judgment.<sup>8</sup> The Trial Panel further rejected Haradinaj's arguments on entrapment and public interest before convicting and sentencing him.<sup>9</sup>

6. On 2 February 2023, the Appeals Panel upheld the Trial Panel's determinations on all points specified above in the Appeal Judgment,<sup>10</sup> with Judge Ambos dissenting only on the interpretation of obstructing official persons. In the course of the proceedings leading up to the Appeal Judgment, and in conformity with its obligations, the SPO disclosed information concerning baseless allegations against the former Specialist Prosecutor<sup>11</sup> that Haradinaj did not attempt to admit as additional evidence on appeal.

7. On 18 September 2023, the Supreme Court rejected – or, in some cases, summarily dismissed – Haradinaj's challenges on these same points in the Legality Decision.<sup>12</sup>

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<sup>5</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 68- 69, 119.

<sup>6</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 58-59, 115.

<sup>7</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 45, 105-06.

<sup>8</sup> Trial Judgment, KSC-BC-2020-07/F00611/RED (with three annexes), paras 146 (point (i)), 114 (point (ii)), 98 (point (iii)).

<sup>9</sup> Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 824, 890.

<sup>10</sup> Appeal Judgment, KSC-CA-2022-01/F00114, paras 293 (point (i)), 230 (point (ii)), 173 (point (iii)), 374 (entrapment), 340 (public interest).

<sup>11</sup> See Disclosure Package 1, KSC-CA-2022-01.

<sup>12</sup> Legality Decision, KSC-SC-2023-01/F00021, paras 50 (point (i)), 56 (point (ii)), 83 (point (iii)), 96 (entrapment), 125 (public interest).

8. On 20 November 2023, the Referral was filed. The Referral seeks constitutional relief for alleged violations which, depending on the ground, have been previously rejected by as many as 10 KSC judges.

9. On 22 December 2023, the Additional Evidence Request was filed. In this request, Haradinaj seeks to admit a 'whistleblowing complaint' ('Tendered Item')<sup>13</sup> developing the same allegations against the former Specialist Prosecutor which had already been disclosed by the SPO over one year ago during the appellate proceedings.

### III. REFERRAL ADMISSIBILITY REQUIREMENTS

10. The SCCC Panel must first consider the admissibility of referrals brought before examining their merits.<sup>14</sup> The SCCC can consider referrals alleging violations of the individual rights and freedoms guaranteed by the Constitution or European Convention on Human Rights ('ECHR'), noting that the ECHR is directly incorporated into the Constitution.<sup>15</sup> The SCCC cannot be considered as a fourth instance of appeal, and is unable to re-open proceedings or substitute decisions of earlier courts with its own findings.<sup>16</sup>

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<sup>13</sup> Tendered Item, KSC-CC-2023-22/F00005/A01.

<sup>14</sup> Veseli/Krasniqi SCCC Decision, KSC-CC-2022-13/F00010, para.36.

<sup>15</sup> Article 49(3); Article 22(2) of the Constitution. *See also* Shala 2023 SCCC Decision, KSC-CC-2023-21/F00006 para.18.

<sup>16</sup> KCC, KI 55/09, para.22 ('[t]he Court's task with regard to alleged violations of constitutional rights is to examine whether the proceedings, taken as a whole, were fair and complied with the specific safeguards stipulated by the Constitution. The Constitutional Court is, therefore, not a fourth instance of appeal, and has no jurisdiction to reopen court proceedings or to substitute decisions of regular courts with its own findings'); KCC, KI 96/18 *et al.*, para.51; KCC, KI 72/18, para.40.

11. Applicants seeking relief before the SCCC must file their referrals within two months of the 'final ruling' challenged.<sup>17</sup> Depending on the nature of the final ruling in question, parts of a referral could be time-barred while other parts are not.<sup>18</sup>

12. The only 'final ruling' rendered within two months of the Referral is the Legality Decision. Any admissible challenge can therefore arise only from this decision – challenges against any earlier ruling would be out of time. In this respect, challenges for protection of legality are statutorily confined to raising violations of criminal law, substantial violations of procedural rule(s), and violations of the applicable rights protected by the Constitution or the ECHR.<sup>19</sup> Such requests cannot be filed on the basis of an erroneous or incomplete determination of the facts of the case.<sup>20</sup> The final ruling for purposes of all factual determinations in this case was the Appeals Judgment, not the Legality Decision.

13. Applicants are required to exhaust remedies before filing SCCC referrals,<sup>21</sup> but exhaustion of remedies is only limited to those normal and effective remedies which are in accordance with procedural requirements.<sup>22</sup> Seeking manifestly ineffective relief cannot be considered when evaluating exhaustion of remedies, as otherwise such efforts could be used to circumvent the two month time limit for filing SCCC referrals.<sup>23</sup>

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<sup>17</sup> SCCC Rules 14(d) and 20.

<sup>18</sup> Shala 2022 SCCC Decision, KSC-CC-2022-19/F00004/RED, para.25 (in a referral otherwise dismissed as inadmissible for being filed prematurely, complaint on freedom of expression dismissed as out of time).

<sup>19</sup> Article 48(7)-(8); Rule 193(1) of the Rules.

<sup>20</sup> Rule 193(3) of the Rules.

<sup>21</sup> Article 49(3).

<sup>22</sup> *Ben Salah Adraqui and Dhaima*, 45023/98 ('[t]he Court reiterates that under Article 35 of the Convention, it may only deal with applications after all domestic remedies have been exhausted. It notes that the Convention institutions have consistently taken the view that that condition is not satisfied if a remedy has been declared inadmissible for failure to comply with a formal requirement').

<sup>23</sup> See SCCC Rule 20(1)(b); *Lopes de Sousa Fernandes*, 56080/13, para.132 ('[Article 35(1) of the ECHR] allows only remedies which are normal and effective to be taken into account as an applicant cannot extend the strict time-limit imposed under the Convention by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer

14. Conversely, exhaustion of remedies also requires applicants to take advantage of all effective procedural avenues available to them prior to submitting their referral.<sup>24</sup> An applicant's hope of benefitting from arguments made by others does not discharge their obligation to pursue remedies either jointly or separately from them.<sup>25</sup> Contrary to Haradinaj's submissions, failing to raise arguments that could have been raised before other KSC panels is a failure to exhaust remedies and constitutes grounds for declaring a referral or part thereof inadmissible.<sup>26</sup>

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effective redress for the complaint in issue under the Convention'); *Prystavska*, 21287/02 (citations removed: '[a]s to the rule on exhaustion, it recalls that Article 35 § 1 of the Convention requires that the only remedies to be exhausted are those that are available and sufficient to afford redress in respect of the breaches alleged. The purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court [...] The rule in Article 35 § 1 is based on the assumption that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights [...]. However, an applicant is not obliged to have recourse to remedies which are inadequate or ineffective [...]. It follows that the pursuit of such remedies will have consequences for the identification of the "final decision" and, correspondingly, for the calculation of the starting point for the running of the six-months' rule [then in force for ECtHR applications]'); *Rezgui*, 49859/99 (attempting a statutorily unavailable remedy found not to have stopped the time limit to file ECtHR application, which was then declared inadmissible for being out of time).

<sup>24</sup> See KCC, KI 08/11, para.47 ('[t]he principle of subsidiarity requires that the Applicants exhaust all procedural possibilities in the regular proceedings, either administrative or judicial, in order to prevent the violation of the constitution or, if any, to remedy such violation of a fundamental right. Thus, Applicants are liable to have their case declared inadmissible by the Constitutional Court, when failing to avail themselves of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a waiver of the right to object the violation and complain.');

*Vuckovic and others* 17153/11 *et al.*, para.72 (citations removed: 'Article 35 § 1 also requires that the complaints intended to be made subsequently in Strasbourg should have been made to the appropriate domestic body, at least in substance [...] and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used [...]. Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies').

<sup>25</sup> *Saghinadze and others*, 18768/05, para.83 (in the course of rejecting complaint for failing to exhaust remedies).

<sup>26</sup> *Contra* Referral, KSC-CC-2023-22/F00001, paras 23-27. Haradinaj argues in particular that the authorities relied upon by the Supreme Court Panel when summarily dismissing his arguments do not apply before the SCCC (para.26), but – as seen from the authorities cited in this paragraph of the present filing – the same principle applies in the constitutional context.

15. The SCCC is not generally mandated to assess facts or interpret the law, as these are responsibilities of other courts.<sup>27</sup> The SCCC cannot interfere with these determinations unless it can be substantiated that the other courts' determinations were so flagrantly and manifestly arbitrary as to give rise to a constitutional violation.<sup>28</sup> Not doing so renders that part of the referral inadmissible for failing to show the appearance of any constitutional incompatibility or violation.<sup>29</sup> In other words, being dissatisfied with the factual or legal conclusions in the challenged decision cannot justify a SCCC referral.<sup>30</sup>

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<sup>27</sup> April 2020 SCCC Decision, KSC-CC-2020-08/F00020/RED (public redacted version notified 12 June 2020), paras 35-36 (citations and paragraph numbers removed, emphasis added: '[i]n that regard, the Chamber reiterates that, pursuant to Article 49(1) and (3) of the Law, the task of this Chamber is to assess whether the irregularities complained of by the Applicant violated its individual rights and freedoms guaranteed by the Constitution. It is not the Chamber's function to deal with errors of fact or law allegedly made in the course of criminal proceedings unless and in so far as such errors may have infringed the fundamental rights and freedoms protected by the Constitution. *It follows that it is not the Chamber's role to decide on whether the findings of the Single Judge were correct in terms of facts or law. Otherwise, the Chamber would be acting as an appeal chamber, which would be to disregard the limits imposed on its jurisdiction pursuant to Articles 113 and 162(3) of the Constitution. The Chamber may exceptionally question the findings in question where they are flagrantly and manifestly arbitrary, in a manner that gives rise in itself to a violation of the fundamental rights and freedoms guaranteed by the Constitution*'); Veseli/Krasniqi SCCC Decision, KSC-CC-2022-13/F00010, para.59; Lajci 2020 SCCC Decision, KSC-CC-2019-07/F00013, para.18; KCC, KI 146/20, para.37 ('[t]he Court has repeatedly stated that, as a general rule, the allegations concerning the manner of administration of facts, erroneous interpretation and application of the provisions of substantive or procedural law, allegedly committed by the regular courts, relate to the scope of legality and as such, are not within the jurisdiction of the Constitutional Court, and therefore, in principle, they cannot be reviewed by the Court').

<sup>28</sup> April 2020 SCCC Decision, KSC-CC-2020-08/F00020/RED, paras 35-36; Thaçi SCCC Decision, KSC-CC-2022-15/F00010, para.113 (dismissing complaint concerning legal interpretation as inadmissible on grounds that interpretation adopted was not flagrantly or manifestly arbitrary); KCC, KI 144/20, para.41; KCC, KI 37/18, paras 41, 43, 52-61 (rejecting a constitutional challenge based on the principle of legality because no arbitrariness substantiated); KCC, KI 96/18 *et al.*, paras 56-57 (detailed examination of the arguments and interpretations advanced by the applicants, such that the applicants had an opportunity to present these points at all stages of the procedure, sufficient to show impugned decision was fair and not arbitrary).

<sup>29</sup> SCCC Rule 14(f). *See also* Thaçi SCCC Decision, KSC-CC-2022-15/F00010, para.114 (dismissing an unsubstantiated allegation as inadmissible pursuant to SCCC Rule 14(f)). In this regard, *see* Referral, KSC-CC-2023-22/F00001, para.27.

<sup>30</sup> *See* KCC, KI 72/18, para.45 ('[...] dissatisfaction of the Applicant with the outcome of the proceedings before the regular courts cannot of itself raise an arguable claim for the violation of the right to fair and impartial trial'); KCC, KI 119/17, para.88.



#### IV. SUBMISSIONS

16. As a preliminary matter, Haradinaj requests an oral hearing on the Referral as ‘alternative’ relief.<sup>31</sup> The SPO is available for any such hearing and defers to the SCCC Panel’s discretion as to whether one is necessary.

##### **A. Articles 401(1), 387, and 392(2) of the Criminal Code (Articles 33(1) of the Constitution and 7(1) of the ECHR)**

17. Haradinaj’s arguments under this ground of the Referral are ostensibly premised on the principle of legality, but are all inadmissible repetitions of previous arguments rejected in the Legality Decision and earlier rulings.<sup>32</sup>

18. Even if this ground of the Referral is considered on its merits, the legal interpretations at issue are in full conformity with the Constitution and ECHR. Upholding the principle of legality still allows for judicial interpretation of the applicable law<sup>33</sup> as long as the judicial development is consistent with the ‘essence of the offence’ (i.e. the existing law) and could have been reasonably foreseen.<sup>34</sup>

##### *1. Article 401(1) of the Criminal Code*

19. The Legality Decision gave full and considered reasons for its legal interpretation of Article 401(1) of the Criminal Code, including why its interpretation was compatible with the principle of legality.<sup>35</sup> Haradinaj does not dispute that judicial interpretation can be compatible with the principle of legality,<sup>36</sup> and fails to

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<sup>31</sup> Referral, KSC-CC-2023-22/F00001, paras 3, 85.

<sup>32</sup> Referral, KSC-CC-2023-22/F00001, paras 28-50.

<sup>33</sup> *Del Río Prada*, 42750/09, paras 92–93; *Aleksovski AJ*, IT-95-14/1-A, para. 127 ([*nullum crimen sine lege*] does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime’).

<sup>34</sup> *Vasiliauskas*, 35343/05, paras 155, 157; *Del Río Prada*, 42750/09, para.93; *Kafkaris*, 21906/04, para.141; *S.W.*, 20166/92, para.36. *See also* Veseli/Krasniqi SCCC Decision, KSC-CC-2022-13/F00010, paras 47, 77-78.

<sup>35</sup> Legality Decision, KSC-SC-2023-01/F00021, paras 35-50 (Article 401(1) of the Criminal Code).

<sup>36</sup> *See* Referral, KSC-CC-2023-22/F00001, para.31.

substantiate anything flagrantly and manifestly arbitrary in the Supreme Court Panel's assessment.<sup>37</sup> Haradinaj is merely dissatisfied with the legal interpretation adopted, and this part of the Referral should be dismissed as inadmissible accordingly.

20. Even if further considered, Article 401(1) of the Criminal Code plainly covers any serious threat capable of obstructing an official person. The Supreme Court Panel rightly interpreted that Article 401(1) of the Criminal Code includes both direct and indirect efforts targeted at that official.<sup>38</sup> There is nothing 'circular' in considering how this interpretation conforms with the purpose of the provision, which is to protect the exercise of official duties and prevent obstruction.<sup>39</sup> The Criminal Code commentary from the *Salihu et al.* treatise also unambiguously acknowledges that the threats at issue can indeed be directed at other individuals or inanimate objects,<sup>40</sup> and Haradinaj's efforts to distinguish this passage distort its plain meaning.<sup>41</sup>

21. Strict construction and the *lex stricta* principle still allow for permissible interpretation, and Haradinaj offers no Kosovo authorities interpreting Article 401(1) of the Criminal Code in the constricted manner suggested.<sup>42</sup> The Supreme Court Panel's interpretation was fully consistent with the essence of Article 401(1) of the

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<sup>37</sup> *Contra* Referral, KSC-CC-2023-22/F00001, paras 32-40.

<sup>38</sup> Legality Decision, KSC-SC-2023-01/F00021, para.48; *contra* Referral, KSC-CC-2023-22/F00001, para.35. See also Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.119; Trial Judgment, KSC-BC-2020-07/F00611/RED, para.639; Appeal Judgment, KSC-CA-2022-01/F00114, para.282.

<sup>39</sup> *Contra* Referral, KSC-CC-2023-22/F00001, paras 38-39.

<sup>40</sup> Legality Decision, KSC-SC-2023-01/F00021, para.42, in reference to *Salihu et al.* Commentary, KSC-BC-2020-07/F00341/A01, pp.1165-66 ('commenting that [t]he use of force could be applied both against the official person and other people, most frequently people related to the official person. However, this criminal offence may occur also when the force applied against another person has prevented the official person to perform his official duties, i.e. he has been compelled to interrupt the performance of his official duties (for instance, the use of force against a passer-by). The perpetration of violence could also be directed against objects, on the condition that these objects are used for the performance of a particular official action').

<sup>41</sup> As explained in Appeal Judgment, KSC-CA-2022-01/F00114, para.282, n.644.

<sup>42</sup> *Contra* Referral, KSC-CC-2023-22/F00001, paras 36-37 (citing only to the dissenting judge in the Appeals Judgment, who cites to no such authorities).

Criminal Code, and was unquestionably foreseeable.<sup>43</sup> This foreseeability is even demonstrated by the established facts: Haradinaj knew his actions were both unlawful<sup>44</sup> and could obstruct the SPO – indeed, it was his express intention to do so.<sup>45</sup>

## 2. *Article 387 of the Criminal Code*

22. For Haradinaj's arguments under Articles 387 of the Criminal Code specifically,<sup>46</sup> the Legality Decision summarily dismissed his arguments because he had not raised them previously before the Appeals Panel.<sup>47</sup> Only Gucati's arguments on these points were considered on the merits.<sup>48</sup> By not himself exploring all effective procedural avenues on this point, Haradinaj has failed to exhaust remedies and this part of the Referral is inadmissible.<sup>49</sup>

23. Further, and just as in the context of Article 401(1) of the Criminal Code, when rejecting Gucati's arguments the Legality Decision gave clear and detailed

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<sup>43</sup> Legality Decision, KSC-SC-2023-01/F00021, paras 44-48.

<sup>44</sup> When a person attending the press conference noted that publication of the documents was prohibited by law and carried a sentence of up to 10 years' imprisonment, Haradinaj went so far as to respond: '[y]ou think you will scare me with ten years! Even if you sentence me to 300 years, I will still disclose them. I am speaking on my behalf and on the behalf of the whole presidium [...] We are ready to face 300 years [...] We are ready to die'. P00035ET, p.13; P00035, min.00:24:44-00:25:16.

<sup>45</sup> P00007ET, p.6 (Haradinaj: 'we put this out because we want to show to the judge that the job you have done is zero'); P00002ET, p.4; P00028ET; P00007ET, pp.11-12 (emphasis added: 'ANCHOR: In this case, should all indictments filed by the Specialist Chambers be dismissed? MR. GASHI: Now the Specialist Chambers need ... the Specialist Chambers need to think again. Now it is in the hands of the pre-trial judge and I believe that after this scandal of the Specialist Chambers, not of the KLA OVL, individuals or Albanians ... ANCHOR: This is known. MR. GASHI: *They have to think once again whether to confirm those indictments or not.* [...] MR. Haradinaj: Because, since the court has degenerated one cannot expect it to resort to degenerated means to file an indictment. *Our lawyer said it well. I believe it should think twice now.*'); P00035ET, p.3 ('[w]e will publish everything we receive that exposes this indictment and these indictments they want to file,'); P00015ET, p.2 (Haradinaj, moments before his arrest on 25 September 2020: '[k]eep this in mind, we will be against this court as long as we live, as long as we can breathe. Full stop. We will work against this court. Full stop. It is their job to keep their secrets safe. It is not my fault that they have involved those illiterate people, that they have involved naïve people, and that they have lied to these naïve people of ours that they will protect their secrets. They should have protected their archives').

<sup>46</sup> Referral, KSC-CC-2023-22/F00001, paras 41-44.

<sup>47</sup> Legality Decision, KSC-SC-2023-01/F00021, para.56.

<sup>48</sup> Legality Decision, KSC-SC-2023-01/F00021, paras 57-65.

<sup>49</sup> Paragraph 14 above; *contra* Referral, KSC-CC-2023-22/F00001, para.44.

considerations underpinning its legal interpretation of Article 387 of the Criminal Code.<sup>50</sup> Haradinaj again fails to substantiate anything flagrantly and manifestly arbitrary in the Supreme Court Panel's assessments, and is merely dissatisfied with the outcome of the Legality Decision. This is an independent basis for declaring this part of the Referral inadmissible.

24. Even if assessed on the merits, the inducement required by Article 387 of the Criminal Code is for a person: (i) to refrain from making a statement; (ii) to make a false statement; or (iii) to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings. The Pre-Trial Judge did not require a pre-existing act of obstruction for Article 387 of the Criminal Code to apply, and the Trial Panel, Appeals Panel, and Supreme Court Panel all correctly concluded that the phrase 'when such information relates to obstruction of criminal proceedings' qualifies only the third of these alternatives.<sup>51</sup> This interpretation best aligns with the statutory construction of the provision, as explained in the Legality Decision.<sup>52</sup>

25. If 'such information relates to obstruction of criminal proceedings' was construed as a general element across all three alternatives, as argued in the Referral,<sup>53</sup> this would lead to an absurd interpretation where only witnesses privy to information about obstruction could be intimidated. The inevitable implication of this interpretation would be that crimes under Article 387 of the Criminal Code could only be charged if the intimidated person had information about obstruction as per Article 386 of the Criminal Code. This is not how Kosovo courts interpret Article 387, as they make findings of guilt under this provision in the

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<sup>50</sup> Legality Decision, KSC-SC-2023-01/F00021, paras 59-65.

<sup>51</sup> Legality Decision, KSC-SC-2023-01/F00021, para.60. *See also* Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 58-61; Trial Judgment, KSC-BC-2020-07/F00611/RED, para.114; Appeal Judgment, KSC-CA-2022-01/F00114, para.211.

<sup>52</sup> Legality Decision, KSC-SC-2023-01/F00021, para.60.

<sup>53</sup> Referral, KSC-CC-2023-22/F00001, para.42.

absence of pre-existing acts of obstruction.<sup>54</sup> That these cases do not address any potential conflict when applying this provision outside the obstruction context simply illustrates that no such conflict is apparent.<sup>55</sup> For all its opportunities to make legal submissions throughout this case – the Referral included – Haradinaj still cannot produce a single authority in support of its statutory interpretation of Article 387 of the Criminal Code.

### 3. *Article 392(2) of the Criminal Code*

26. The Legality Decision summarily dismissed Haradinaj’s arguments under Article 392(2) of the Criminal Code because they were factual in character, beyond the scope of what he had argued on appeal, and unsubstantiated.<sup>56</sup> Accordingly, Haradinaj’s arguments under this part of the Referral<sup>57</sup> are time-barred for raising matters in a manifestly ineffective manner before the Supreme Court Panel. This part of the Referral is therefore inadmissible.

27. Were the SCCC to consider these arguments further, Haradinaj’s interpretation of a protected person deviates from the statutory language for the reasons comprehensively explained in the Appeals Judgment and earlier rulings. Article 392(2) of the Criminal Code does not mandate that the assessment of protected persons be carried out only in the manner proposed by Haradinaj.<sup>58</sup>

28. That persons named in confidential documents not authorised for disclosure are ‘under protection in the criminal proceedings’ follows from the plain meaning of Article 392(2) of the Criminal Code.<sup>59</sup> Reliance on Article 62 in determining the

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<sup>54</sup> *KS and RB; LT* (KSC-CA-2022-01/F00047/A02).

<sup>55</sup> *Contra Referral*, KSC-CC-2023-22/F00001, para.43.

<sup>56</sup> Legality Decision, KSC-SC-2023-01/F00021, paras 81-82.

<sup>57</sup> Referral, KSC-CC-2023-22/F00001, paras 45-49.

<sup>58</sup> See Appeal Judgment, KSC-CA-2022-01/F00114, para.186; *contra Referral*, KSC-CC-2023-22/F00001, para.48.

<sup>59</sup> Appeal Judgment, KSC-CA-2022-01/F00114, para.183; Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 95, 97. *Contra Referral*, KSC-CC-2023-22/F00001, para.48.

protected status of the persons concerned follows logically from the SPO's role as a classifying authority, as made clear by the Pre-Trial Judge, Trial Panel, and Appeals Panel.<sup>60</sup> Article 23(1) incorporates the protective measures offered under Articles 5-13 of the Witness Protection Law into the KSC framework, but its definition of a protected person is not so incorporated.<sup>61</sup> In any event, the definition of 'protected person' in this law is consonant with the definition adopted in this case, as noted by the Trial Panel itself.<sup>62</sup>

29. There is nothing flagrantly and manifestly arbitrary about the legal interpretation of Article 392(2) in this case, which is both plainly foreseeable and consistent with the essence of the offence.

## **B. Entrapment (Articles 31(2) of the Constitution and 6(1) of the ECHR)**

### *1. Admissibility*

30. Haradinaj's arguments under this part of the Referral<sup>63</sup> revolve around two overarching points: (i) the Supreme Court erroneously applied the *prima facie* threshold in the entrapment context; and (ii) the Defence did not have access to the information it needed to meet the threshold. Neither argument is admissible before the SCCC.

31. The first point is one of substantive legal interpretation that generally falls outside the ambit of SCCC consideration, as only *procedural* fairness is considered when assessing claims brought under Article 31 of the Constitution and Article 6 of the ECHR.<sup>64</sup> Haradinaj does not substantiate that a flagrantly and manifestly arbitrary

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<sup>60</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.44(c); Trial Judgment, KSC-BC-2020-07/F00611/RED, para.95; Appeal Judgment, KSC-CA-2022-01/F00114, para.181.

<sup>61</sup> *Contra* Referral, KSC-CC-2023-22/F00001, para.48.

<sup>62</sup> Trial Judgment, KSC-BC-2020-07/F00611/RED, para.511, *upheld in* Appeal Judgment, KSC-CA-2022-01/F00114, para.170.

<sup>63</sup> Referral, KSC-CC-2023-22/F00001, paras 51-66.

<sup>64</sup> KCC, KI 146/20, para.45 (citations removed: '[t]he Court also notes the fact that when assessing the "fourth instance" claims relating to alleged violations of Article 31 of the Constitution in conjunction

interpretation was adopted as to the requirement to present *prima facie* evidence of entrapment – all that is raised is a disagreement in interpretation.<sup>65</sup> No constitutional violation is apparent and these arguments should be summarily dismissed.

32. The second point is a summary and baseless disclosure challenge to decisions taken prior to the Legality Decision.<sup>66</sup> To the extent Haradinaj even properly challenged this point in the litigation underlying the Legality Decision,<sup>67</sup> the Supreme Court Panel fully considered the steps taken by the Appeals Panel to ensure that the Defence had access to all information required to present its entrapment arguments.<sup>68</sup> Haradinaj's arguments that he was denied access to information required to present his defence are unsubstantiated and neglect the detailed lengths taken to ensure his procedural rights.<sup>69</sup> Haradinaj points to nothing suggesting a flagrantly and manifestly arbitrary application of the disclosure framework, and these arguments should likewise be dismissed as inadmissible.

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with Article 6 of the ECHR, it has also consistently emphasized that the "fairness" required by the above articles is not "substantive", but rather "procedural" fairness. This concept in practical terms, in principle, mainly implies (i) the possibility of conduction of proceedings based on the principle of a[dv]erserial proceedings; (ii) the opportunity for the parties to present arguments and evidence which they consider relevant to the respective case at various stages of these proceedings; (iii) the opportunity to effectively challenge arguments and evidence presented by the opposing party; and (iv) the right that their arguments, which, viewed objectively, are relevant for the resolution of the case, be duly heard and examined by the courts; and that, consequently, the proceedings, viewed in entirety, would result to be fair [...] Moreover, the assessment of the fairness of a procedure in its entirety is one of the main premises of case law of the Court and that of ECtHR').

<sup>65</sup> See Referral, KSC-CC-2023-22/F00001, paras 54-58.

<sup>66</sup> See Referral, KSC-CC-2023-22/F00001, paras 59-60, 63.

<sup>67</sup> As done in the Referral, Haradinaj makes brief reference to a lack of access to materials in the context of his entrapment ground which was considered on its merits in the Legality Decision. But the only full ground concerning alleged (non)disclosure of materials was brought by Gucati alone. See Legality Decision, KSC-SC-2023-01/F00021, paras 84, 97-105.

<sup>68</sup> Legality Decision, KSC-SC-2023-01/F00021, paras 102-05. See also Appeal Judgment, KSC-CA-2022-01/F00114, paras 80-82.

<sup>69</sup> *Contra* Referral, KSC-CC-2023-22/F00001, paras 63-64. As to Haradinaj's submission that 'the Appeals Panel failed to give attention to the evidential value of what the Appellant was not permitted to access', the Appeals Panel had access to the unredacted versions of all documents disclosed and was therefore in full position to assess the fairness of the appeals proceedings. To the extent Haradinaj's arguments extend to contemplated interviews, the evidential value of unrealised investigative steps is purely speculative.

## 2. Merits

33. To the extent that Haradinaj argues that evidence falling below a *prima facie* standard should suffice to substantiate entrapment,<sup>70</sup> no violation is established. A failure to establish this standard necessarily implies that it is ‘wholly improbable’. If a claim cannot be upheld on its face it will be unable to prevail under any scrutiny. This is fully consistent with the ECtHR jurisprudence on this point.<sup>71</sup> Haradinaj’s interpretation of the applicable threshold is so low as to essentially exclude any evidential requirement,<sup>72</sup> which misconstrues the ECtHR jurisprudence.<sup>73</sup>

34. The materials ultimately tendered by the Defence at trial included: (i) a report that, *inter alia*, ‘uncovered no evidence that members of the SPO staff deliberately leaked [Batch 3]’;<sup>74</sup> and (ii) various items relating to Defence claims of surveillance<sup>75</sup> for which no connection to the SPO was revealed. Haradinaj did not even make the effort to tender other disclosed materials he now claims to be relevant, even when he could have done so.<sup>76</sup> Haradinaj persists in arguing as if information supporting his claims was withheld from him, whereas in truth no such information exists. There is

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<sup>70</sup> See Referral, KSC-CC-2023-22/F00001, para.57.

<sup>71</sup> Appeal Judgment, KSC-CA-2022-01/F00114, paras 363-65. As concerns the ECtHR *Matanović* case relied upon (Referral, KSC-CC-2023-22/F00001, para.57), the reference to ‘*prima facie*’ in that case appears in connection with the beginning of a paragraph which explains that ‘a preliminary consideration in its assessment of a complaint of incitement relates to the existence of an *arguable complaint* that an applicant was subjected to incitement by the State authorities’. *Matanović*, 2742/12, para.131 (emphasis added). In the cases cited by *Matanović* which were found not to be *prima facie* arguable complaints, it was the established facts which were deemed insufficient. *Trifontsov*, 12025/02, paras 32-33; *Lyubchenko*, 34640/05, paras 33-34.

<sup>72</sup> See Referral, KSC-CC-2023-22/F00001, para.57 (‘there should be items of evidence which together make entrapment not wholly improbable, even if there is no evidence which on its face proves that any one of its elements has been instantiated’).

<sup>73</sup> Appeal Judgment, KSC-CA-2022-01/F00114, paras 363-66.

<sup>74</sup> 1D00033, p.3. This item is Rule 191 on the Rule 102(3) notice, and the Trial Panel ordering its disclosure – even though it constituted internal work product – was specifically noted by the Appeals Panel. Appeal Judgment, KSC-CA-2022-01/F00114, para.81, n.199.

<sup>75</sup> 1D00031; 1D00032; 1D00034.

<sup>76</sup> E.g. at paragraph 40 below.



simply no evidence that Haradinaj was influenced by the SPO, or anyone else, in the actions he took.<sup>77</sup>

### C. Public Interest (Article 10 of the ECHR)

35. Haradinaj's submissions on freedom of expression in the Referral<sup>78</sup> amount to an argument that his alleged public interest was mis-weighed. As correctly found by the Supreme Court Panel, this is a factual argument beyond the scope of the challenge to the protection of legality.<sup>79</sup> Such an argument is both out of time – because the relief sought before the decision presently challenged was manifestly ineffective - and goes squarely to the exercise of discretion of other KSC Panels without any showing of flagrant and manifest arbitrariness.<sup>80</sup> This part of the Referral should be declared inadmissible accordingly.

36. Even if considered further, Haradinaj's alleged public interest is clearly outweighed by the paramount need to safeguard (potential) witnesses of international crimes from serious threats by protecting their confidential information.<sup>81</sup> The Trial Panel and Appeals Panel both clearly specified why Haradinaj's public interest claims failed,<sup>82</sup> including considerations of necessity and proportionality. Freedom of expression, as outlined in the ECHR, may be subject to necessary restrictions or penalties in a democratic society, as dictated by law.<sup>83</sup> Any misuse of the right to freedom of expression also does not warrant protection under the ECHR.<sup>84</sup>

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<sup>77</sup> See Legality Decision, KSC-SC-2023-01/F00021, para.95.

<sup>78</sup> Referral, KSC-CC-2023-22/F00001, paras 67-83.

<sup>79</sup> Legality Decision, KSC-SC-2023-01/F00021, paras 124-25.

<sup>80</sup> Paragraphs 13, 15 above.

<sup>81</sup> *Contra* Referral, KSC-CC-2023-22/F00001, paras 80-82.

<sup>82</sup> Appeal Judgment, KSC-CA-2022-01/F00114, paras 321-40; Trial Judgment, KSC-BC-2020-07/F00611/RED, paras 806-16.

<sup>83</sup> Article 10(2) of the ECHR.

<sup>84</sup> Articles 17 and 35(3) of the ECHR.

#### D. Additional Evidence Request

37. As indicated above, Haradinaj raises no admissible argument in the Referral concerning entrapment. Any additional evidence on this point is therefore superfluous, rendering the Additional Evidence Request moot.

38. Should the Tendered Item's admissibility be considered, the item is inadmissible for myriad reasons and, in any event, has no impact on the resolution of the Referral.

39. First, Haradinaj entirely fails to substantiate how the Tendered Item is relevant to the Referral.<sup>85</sup> Haradinaj argues that the Tendered Item 'provides evidence of the circumstances in which three sets of documents were delivered to the Kosovo Liberation Army War Veterans' Association in September 2020',<sup>86</sup> without specifying what those circumstances are or why they are significant. Most of the allegations in the Tendered Item have no conceivable relationship to the facts underlying Haradinaj's convictions, and Haradinaj advances them without explaining any connection they have to this case.<sup>87</sup>

40. Second, Haradinaj makes no effort to explain how the Tendered Item adds to the disclosed information he chose not to use in earlier proceedings. Exhibit E of the Tendered Item is a transcript of a conversation disclosed to the Defence prior to the Appeals Judgment,<sup>88</sup> which Haradinaj declined to even tender as additional evidence on appeal.<sup>89</sup> Exhibit C is a statement of the same individual as Exhibit E and presents essentially the same allegations against the former Specialist Prosecutor. Just as with

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<sup>85</sup> See generally KCC, Case No. KI 74/22, para.69 (summarising ECtHR jurisprudence: '[i]t is not sufficient for a defendant to complain that he has not been allowed to question certain witnesses; he must, in addition, support his request by explaining why it is important for the witnesses concerned to be heard, and their evidence must be necessary for the establishment of the truth and the rights of the defence').

<sup>86</sup> Additional Evidence Request, KSC-CC-2023-22/F00005/RED, para.10.

<sup>87</sup> Additional Evidence Request, KSC-CC-2023-22/F00005/RED, para.8.

<sup>88</sup> 105694-TR-ET Part 1.

<sup>89</sup> See Rule 181 of the Rules.

the exhaustion of remedies requirement for the Referral itself, Haradinaj should not be entitled to admit information before the SCCC he did not seek to admit previously.

41. Third, and relatedly, evidence that would have been inadmissible at trial or on appeal should not be admitted in the context of a SCCC referral. Statements like those admitted in the Tendered Item could only be admitted at trial through procedures in Rules 153-155, none of which are even remotely complied with in this instance. Such an item could only have been admitted as additional evidence on appeal if it could have been a 'decisive factor in reaching a decision at trial' – Haradinaj fails to substantiate how this information is decisive or even meaningfully new from what was available to him in appellate proceedings. As a matter of principle, it is not the role of the SCCC to determine whether particular types of evidence may be admissible.<sup>90</sup> Haradinaj's relief sought is in clear tension with this principle, and recourse to SCCC Rule 23 in the present circumstances is inappropriate.

42. Fourth, the Referral is filed in the context of a challenge against a Legality Decision, where the facts of the case were beyond the scope of the Supreme Court Panel's permissible review. Haradinaj cannot explain how the Tendered Item – or indeed any evidence – could be admitted at this point which affects the constitutionality of a decision on the protection of legality.

43. Fifth, the overall account of the people making claims against the former Specialist Prosecutor is transparently unreliable and inconsistent with the factual record. All allegations against the former Specialist Prosecutor in the Tendered Item are ascribed by others to one person, who allegedly purports to be a CIA agent who - amongst other operations - participated in both the arrest of Slobodan Milošević and the operation when Osama Bin Laden was killed.<sup>91</sup> The witnesses interviewed in the Tendered Item all believe this person to be a fraud and a liar. The limited portions of

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<sup>90</sup> Shala 2023 SCCC Decision, KSC-CC-2023-21/F00006, paras 23-24; KCC, KI 74/22, para.87.

<sup>91</sup> Tendered Item, KSC-CC-2023-22/F00005/A01, p.18. All cited pages are to the annex, and not those of the Tendered Item itself.

the Tendered Item concerning the batches at issue in this case are so far-fetched they are incoherent.<sup>92</sup>

44. This lack of reliability is apparent on even a *prima facie* assessment. But there is also ample information beyond such an assessment indicating that the Tendered Item was prepared with a political agenda through witnesses of dubious credibility.<sup>93</sup>

45. The Tendered Item is nothing more than a baseless attempt to discredit the former Specialist Prosecutor in the United States and the work of the SPO. Nothing in the Tendered Item mentions Nasim Haradinaj, the criminal conduct for which he was actually convicted, or anything approaching entrapment. This information has no impact on the Referral, and it should not be admitted.

## V. RELIEF REQUESTED

46. For the foregoing reasons, the SPO requests that the Referral and Additional Evidence Request be dismissed.

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<sup>92</sup> For example, whether or not someone was willing to pay money to have their name removed from a 'leaked' document would purportedly inform the prosecution that the person in question was 'guilty', and would somehow constitute evidence to support their arrest. *See* Tendered Item, KSC-CC-2023-22/F00005/A01, p.30.

<sup>93</sup> In this regard, *see generally* Mother Jones, David Corn and Dan Friedman, [The Far-Right Pushes a New Conspiracy Theory to Discredit Jack Smith](#), 23 December 2023. In early October 2023, shortly after the date of Milaim Zeka's statement of 26 September 2023, the witness stated on Albanian television that he had recently travelled to the United States at the invitation of Republicans from the United States Congress. Top Channel, [The Square Circle](#), 1 October 2023 (English translation at Annex 2). This may explain the random and bizarre claim in the Tendered Item that the former Specialist Prosecutor would want more information on 'evidence of corruption by Hillary Clinton'. Tendered Item, KSC-CC-2023-22/F00005/A01, p.33.

**Word Count:** 6402



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**Kimberly P. West**

**Specialist Prosecutor**

Monday, 22 January 2024

At The Hague, the Netherlands.