REPUBLIKA E KOSOVËS - REPUBLIKA KOSOVO - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
USTAVNI SUD
CONSTITUTIONAL COURT

Prishtina, 15 July 2024
Ref. no.:AGJ 2476/24

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JUDGMENT

in

joint cases nos. KO114/23, KO192/23, KO227/23 and KO229/23

Applicant

The Supreme Court of the Republic of Kosovo

Constitutional review of paragraph 2 of article 4, paragraph 4 of article 432, and paragraph 2 of article 438 of the Criminal Procedure Code of the Republic of Kosovo No.08/L-032

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Gresa Caka-Nimani, President
Bajram Ljatifi, Deputy President
Selvete Gërxhaliu-Krasniqi, Judge
Safet Hoxha, Judge
Radomir Laban, Judge
Remzije Istrefi-Peci, Judge
Nexhmi Rexhepi, Judge,
Enver Peci, Judge, and
Jeton Bytyqi, Judge

Applicant

1. The referrals were submitted by the Supreme Court of the Republic of Kosovo (hereinafter: the referring Court) and were signed by its President, Fejzullah Rexhepi.

Challenged law

2. The referring court raises doubts about the constitutionality of paragraph 2 of article 4 (Ne Bis In Idem), paragraph 4 of article 432 (Grounds for Filing a Request for Protection of Legality) and paragraph 2 of article 438 (Judgment on Request for Protection of Legality) of the Criminal Procedure Code of the Republic of Kosovo No. 08/L-032 (hereinafter: CPCRK).

3. The CPCRK was adopted by the Assembly of the Republic of Kosovo on 14 July 2022 and entered into force on 17 February 2023.

Subject matter

4. The subject matter of the referral is the constitutional review of paragraph 2 of article 4 (Ne Bis In Idem), paragraph 4 of article 432 (Grounds for Filing a Request for Protection of Legality) and paragraph 2 of article 438 (Judgment on Request for Protection of Legality), of the Criminal Procedure Code of the Republic of Kosovo No. 08/L-032, which are claimed to be contrary to articles 29 [Right to Liberty and Security], 34 [Right not to be Tried Twice for the Same Criminal Act] and 53 [Interpretation of Human Rights Provisions] of the Constitution of the Republic of Kosovo (hereinafter; the Constitution).

Legal basis

5. The referral is based on paragraph 8 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, articles 51 (Accuracy of referral), 52 (Procedure before a court) and 53 (Decision) of the Law no. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and rule 75 (Referral Pursuant to Paragraph 8 of Article 113 of the Constitution and Articles 51, 52 and 53 of the Law) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2018 (hereinafter: the Rules of Procedure No. 01/2018).

6. On 7 July 2023, the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No. 01/2023, were published in the Official Gazette of the Republic of Kosovo and entered into force fifteen (15) days after their publication. Consequently, during the examination of the Referral, the Constitutional Court refers to the provisions of the aforementioned Rules of Procedure. In this regard, in accordance with rule 78 (Transitional Provisions) of the Rules of Procedure No. 01/2023, exceptionally, certain provisions of the Rules of Procedure No. 01/2018, will continue to be applied in cases registered in the Court before its abrogation, only if and to the extent that they are more favourable for the parties.

Proceedings before the Court

7. On 2 June 2023, the referring Court submitted referral KO114/23 to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 8 June 2023, the President of the Court by Decisions [No. GJR. KO114/23] and [No. KSH. KO114/23] appointed Judge Radomir Laban as Judge Rapporteur and the Review Panel, composed of judges: Gresa Caka-Nimani (Presiding), Bajram Ljatifi and Safet Hoxha (members).

9. On 19 June 2023, the Court notified about the registration of the referral (i) the referring Court;, (ii) the President of the Republic of Kosovo;, (iii) the Prime Minister of the Republic of Kosovo;, (iv) the Ombudsperson; (v) the President and Secretary General of the Assembly of the Republic of Kosovo; and (vi) the Office of the Chief State Prosecutor, who were given the opportunity to submit comments within 15 (fifteen) days from the day of receipt of the letter.

10. On the same date, the Court notified the lawyer of the interested party T.Rr. in case KO114/23, who was given the opportunity to submit comments within 15 (fifteen) days from the day of receipt of the letter.

11. On 5 July 2023, the Ombudsperson requested the Court to grant him an additional deadline for submitting comments related to the constitutional review of the contested provisions of the CPCRK.

12. On 11 July 2023, the lawyer of the interested party in case KO114/23 T.Rr. submitted comments to the Court.

13. On 18 July 2023, the Court notified the Ombudsperson about the approval of the request to grant him an additional deadline for submission of comments.

14. On 21 July 2023, the Court requested the referring Court to submit the decision of the Panel of the referring Court to suspend the case and refer the latter to the Court.

15. On 31 July 2023, the Ombudsperson submitted comments regarding the relevant provisions of the CPCRK.

16. On 3 August 2023, the referring Court submitted the decision of the Panel of the referring Court to suspend the case and refer the same to the Court.

17. On 1 September 2023, the Court considered the report of the Judge Rapporteur and unanimously decided to submit questions to the member states of the Venice Commission Forum , as well as to postpone the consideration of the case to the next session after completion with additional data.

18. On 18 September 2023, the referring Court submitted a new referral requesting the constitutional review of paragraph 2 of Article 438 of the CPCRK. The referral was registered with number KO192/23.

19. On 19 September 2023, the President of the Court by the Order on the joinder of referrals [Order KO114/23 and KO192/23] ordered the joinder of referral KO192/23 with referral KO114/23 because the subject of review is the same issue.

20. On 21 September 2023, the Court notified about the registration and joinder of referrals (i) the referring Court;, (ii) the President of the Republic of Kosovo; , (iii) the Prime Minister of the Republic of Kosovo;, (iv) the Ombudsperson; (v) the President of the Assembly of the Republic of Kosovo; and (vi) the Office of the Chief State Prosecutor, who were given the opportunity to submit comments within 15 (fifteen) days from the day of receipt of the letter.

21. On 21 September 2023, the Court addressed the member states of the Venice Commission Forum with the following questions:

> *"1) Does the applicable law in your country include an extraordinary remedy, namely a request for protection of legality in cases pertaining to detention?*
>
> *2) If the relevant decision against the decision of the lower instance court on the termination of detention finds that the request for protection of legality is grounded:*
>
> *a) does it find that only the law has been violated, without interfering with the final decision, therefore, it is only a decision of a declarative nature; or*

b) is of an executive nature, so it allows the relevant Court to also modify the decision of the lower instance court on termination of detention to the detriment of the defendant."

22. From 21 September to 23 October 2023, the Court received responses from the Constitutional Courts and courts with constitutional jurisdiction of member states of the Venice Commission Forum such as Albania, Sweden, Liechtenstein, Slovakia, Austria, Czech Republic, Kazakhstan, Croatia, Turkey , Germany, North Macedonia and Bosnia and Herzegovina.

23. On 17 and 18 October 2023, the referring Court submitted two new referrals requesting the constitutional review of paragraph 2 of article 4, paragraph 4 of article 432 and paragraph 2 of article 438 of the CPCRK. The referrals were registered with numbers KO227/23 and KO229/23.

24. On 20 October 2023, the President of the Court by the Order for the joinder of referrals [Order. KO227/23 and KO229/23] ordered the joinder of referrals KO227/23 and KO229/23 with the joint referrals KO114/23 and KO192/23.

25. On 30 October 2023, the Court notified about the registration and joinder of referrals (i) the referring Court, (ii) the President of the Republic of Kosovo, (iii) the Prime Minister of the Republic of Kosovo; (iv), the Ombudspersons; (v) the President of the Assembly of the Republic of Kosovo; and (vi) the Office of the Chief State Prosecutor, who were given the opportunity to submit comments within 7 (seven) days from the day of receipt of the letter.

26. On 1 November 2023, the Court considered the report of the Judge Rapporteur, and in full composition unanimously decided to postpone the consideration of the case to one of the next sessions after completion with additional data and clarifications.

27. On 23 November 2023, the Court in full composition unanimously supported the recommendation of the Judge Rapporteur that the referral is admissible for review and also unanimously decided to postpone the review of the case to one of the next sessions after completion with additional data and clarifications.

28. On 11 March 2024, Judge Jeton Bytyqi took an oath before the President of the Republic of Kosovo, in which case his mandate at the Court began.

29. On 20 March 2024, the Court in full composition unanimously decided to postpone the review of the case to one of the next sessions after the completion with additional data and clarifications.

30. On 15 May 2024, the Court decided: (i) unanimously, that the wording "*or terminating*" of paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the CPCRK is not contrary to Article 29 [Right to Liberty and Security] of the Constitution and Article 5 (Right to liberty and security) of the European Convention on Human Rights; (ii) unanimously, that paragraph 2 of article 4 (Ne Bis In Idem) of the CPCRK is not contrary to article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with paragraph 2 of article 4 of Protocol no. 7 (Right not to be tried or punished twice) of the European Convention on Human Rights; (iii) by five (5) votes in favor and four (4) against, that the wording "*unless if the final decision is manifestly inappropriate or based on serious error*" of paragraph 2 of article 438 (Judgment on Request for Protection of Legality) of the CPCRK, is not contrary to Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with paragraph 2 of Article 4 of Protocol no. 7 (Right not to be tried or punished twice) of the European Convention on Human Rights.

31. On the same day, the Judge Rapporteur, based on paragraph (6) of rule 53 (Voting) of the Rules of Procedure, requested the President of the Court to assign another judge, from the majority, to prepare the Judgment.

32. On the same day, based on the aforementioned rule, and taking into account that the other members of the review panel were not among the majority, the President of the Court appointed judge Jeton Bytyqi, to prepare the Judgment according to the finding of the Court.

33. On 19 June 2024, Judge Jeton Bytyqi presented the Judgment before the Court.

34. In accordance with rules 56 (Dissenting Opinions) and 57 (Concurring Opinions) of the Rules of Procedure of the Court, Judge Radomir Laban has prepared a dissenting and concurring opinion, which will be published together with this Judgment.

Summary of facts

35. In the text below, the Court will reflect the brief summary of the procedural background of the joint referrals KO114/23, KO192/23, KO227/23 and KO229/23, at the time of their submission to the Court.

(i) KO114/23 – related to the detention procedure

36. On 28 February 2023, the Basic Court in Prishtina by the Decision [PKR. No. 549/22] terminated the detention of F.G .

37. The Special Prosecutor of the Republic of Kosovo (hereinafter: SPRK) filed an appeal against the above-mentioned decision, alleging a violation of the criminal law and erroneous and incomplete determination of the factual situation.

38. On 1 March 2023, the Court of Appeals by Decision [PN.I.S. no. 38/2023] rejected the appeal of the SPRK as ungrounded and upheld the Decision of the Basic Court [PKR. no. 549/22] of 28 February 2023.

39. The Office of the Chief State Prosecutor submitted a request for protection of legality to the Supreme Court proposing that the request for protection of legality be approved as grounded and the case be remanded for retrial.

40. The defense of F.G. responded against the request for protection of legality with a proposal that the Supreme Court reject the latter as ungrounded, while the decisions of the Basic Court and the Court of Appeals on termination of the detention of F.G. be upheld.

41. On 2 June 2023, the Supreme Court, in accordance with Article 113 (8) of the Constitution and Articles 51, 52 and 53 of the Law, submitted a request to the Constitutional Court regarding the constitutional review of paragraph 2 of Article 4, paragraph 4 of Article 432, and paragraph 2 of Article 438 of the CPCRK.

(ii) KO192/23 - related to the procedure of objecting the evidence and dismissing the indictment

42. On 5 December 2022, the Basic Court in Mitrovica -branch in Vushtrri by Decision [P. no. 14/2022] approved the objection of the evidence and the request for the dismissal of the indictment of the defense of the defendant B.M., in which case the indictment of the Basic Prosecution in Mitrovica [PP.II. no. 2216/2021] of 21 January 2022 was dismissed and the criminal proceedings against the defendant B.M. was terminated.

43. On 10 January 2023, the Court of Appeals by Decision [PN. no. 1353/2022] rejected as unfounded the appeal of the Prosecutor of the Basic Prosecution of Mitrovica filed against the Decision of the Basic Court in Mitrovica-Branch in Vushtrri, of 5 December 2022.

44. On 21 June 2023, the Chief State Prosecutor filed a request for protection of legality against the abovementioned decisions with the Supreme Court proposing the annulment of the contested decisions and that the case be remanded to the first instance court for retrial.

45. On 18 September 2023, the Supreme Court in accordance with Article 113 (8) of the Constitution and Articles 51, 52 and 53 of the Law submitted a referral to the Constitutional Court regarding the constitutional review of paragraph 2 of Article 438 of the CPCRK.

(iii) KO227/23 – related to the detention procedure

46. On 19 August 2023, the Basic Court in Prishtina - Special Department by Decision [PPPS. no. 35/2023] imposed the measure of detention on the defendants I.L., H.G., and R.M., for a length of one (1) month, on the grounds of grounded suspicion of the commission of the criminal offense of providing assistance in the commission of the criminal offense of abusing official position or authority, provided for in Article 414 and in conjunction with Article 33 of Criminal Code No. 06/L-074 of the Republic of Kosovo (hereinafter: CCRK).

47. On 31 August 2023, the Court of Appeals by Decision [PN. l.S. no. 165/2023] approved the appeals of the defense of the defendants I.L., H.G., and R.M., and modified the decision of the first instance court, so that the detention of defendants I.L., H.G. and R.M. was terminated , and immediately released them to be defended in liberty.

48. The State Prosecutor filed a request for protection of legality with the Supreme Court against the decision of the Court of Appeals, alleging essential violation of the criminal procedure, with the proposal that the request be approved as grounded, and the case be remanded to the second instance court.

49. On 18 October 2023, the Supreme Court in accordance with Article 113 (8) of the Constitution and Articles 51, 52 and 53 of the Law submitted a referral to the Constitutional Court regarding the constitutional review of paragraph 2 of Article 4, paragraph 4 of Article 432 and paragraph 2 of article 438 of the CPCRK.

(iv) KO229/23 - regarding the final decision ending the criminal process

50. On 31 August 2022, the Basic Court in Prishtina-Department for Serious Crimes by Judgment [PKR. no. 15/2020], found the defendants A.B., O.B., and S.B. guilty of committing the criminal offense "*Organized crime", provided for by Article 274 paragraph 3 of the Criminal Code in conjunction with the criminal offense "Extortion", provided for by Article 267 paragraph 2 of the Criminal Code in conjunction with Article 23 of the Criminal Code […]*". The Court notes that the naming of the aforementioned criminal offenses correspond to the numbers of articles of the Provisional Criminal Code of Kosovo.

51. On 20 January 2023, the Court of Appeals by Judgment [APS. no. 40/2022], upheld the Judgment of the first instance court and rejected as ungrounded the appeal of the Special Prosecutor and the appeals of the defense of the defendants A.B., O,B., and S.B.

52. The State Prosecutor filed a request for protection of legality with the Supreme Court against the decisions of the lower instance courts, claiming violations of the criminal procedural provisions and that due to "*serious errors*" the case should be remanded for retrial. The State Prosecutor requested (i) that the defendants be found guilty of the criminal offense of organized crime and that the legal action of transferring the property in the name of persons close to the defendants be annulled; (ii) to hold that the decisions of the Basic

Court and the Court of Appeals contain violations of the provisions of the criminal procedure in favor of the defendants; or (iii) to hold that the decisions of the Basic Court and the Court of Appeals contain violations of the provisions of the criminal procedure and that due to "*serious errors*", the case should be remanded for retrial.

53. On 18 October 2023, the Supreme Court in accordance with Article 113 (8) of the Constitution and Articles 51, 52 and 53 of the Law submitted a referral to the Constitutional Court regarding the constitutional review of paragraph 2 of Article 4 and paragraph 2 of Article 438 of CPCRK.

Allegations of the referring Court

54. In the following, the Court will reflect the brief summary of the allegations of the referring Court regarding the joint cases KO114/23, KO192/23, KO227/23 and KO229/23.

(i) KO114/23 – related to the detention procedure

55. The essence of the referral of the referring Court consists of doubts regarding the constitutionality of paragraph 2 of Article 4; paragraph 4 of article 432; and paragraph 2 of article 438 of the CPCRK. The referring Court claims that the relevant provisions of the CPCRK are not in compliance with articles 29 [Right to Liberty and Security], 34 [Right not to be Tried Twice for the Same Criminal Act] and 53 [Interpretation of Human Rights Provisions] of the Constitution.

56. The referring Court claims that: "*According to the criminal procedure code of 2013 (but also the criminal procedure code that was in force until 2012) the request for protection of legality as an extraordinary legal remedy could only be filed against the decisions of final form by which the detention was imposed and extended, and now with the new code also against the final decisions by which the detention was terminated*."

57. The referring Court also emphasizes that: "*Also according to the previous criminal procedure code within the legal provision the principle "ne bis in idem" respectively article 4 par.2 of the CPC, with the exception of cases where this code provides otherwise, the final court decision could be modified by extraordinary legal remedies only in favor of the convicted person. In addition, with the old codes, when the request for protection of legality was filed to the detriment of the defendant, the judgment had only a declarative nature, only the violation was established without affecting the final decision*."

58. Regarding the contested provisions of the CPCRK, the referring Court states that *"[...] according to the provisions of the new code of criminal procedure that entered into force this year, the judgment taken regarding the request for protection of legality can be effective and declarative. Effective is in favour of the defendant (modifying in favour or annulment), while declarative when the violation of the law is established in favour of the defendant without affecting the final decision. However, with the provision of the new code of criminal procedure, respectively par. 2 of article 4 of the CPC, it is foreseen that the final court decision can be modified by extraordinary legal remedies. Whereas, according to the provision of Article 438 par. 2 of the Code - when the Supreme Court of Kosovo deems that the request for protection of legality to the detriment of the defendant is founded, it only finds the violation of the law without affecting the final decision, unless the decision of the final form is manifestly inappropriate or based on serious error."* Regarding the above, the referring Court claims that: *"[...] despite the fact that with the new code it is foreseen that the request filed to the detriment of the defendant has a declarative character, at the same time the possibility of modifying the form of the final decision is foreseen to the detriment of the defendant, without determining the legal effect of the modification (how can the final acquittal judgment be changed, in case it is changed from acquittal to conviction, does the defendant have the right to appeal and which court should*

decide regarding the appeal, and when a decision is manifestly inappropriate or based on a serious error, and the same applies to the final decision by which the detention was terminated)."

59. Therefore, the referring Court alleges that: "*In the present case, the Prosecutor filed a request against the final decision by which the defendant's detention was terminated, and considering that the detention is a measure of the security of the defendant's presence in the criminal procedure, whereas according to the provisions of the criminal procedure code, the right to liberty and security must be interpreted in favor of remaining at liberty and this measure (as a more serious measure) must be reduced to the shortest possible time, the question that is posed is whether the final decision can be changed with the request for protection of legality as an extraordinary legal remedy to his detriment and are the provisions of article 4 par. 2, article 432 par. 4 and 438 par. 2 of the Criminal Procedure Code in compliance with articles 29 and 34 and 53 of the Constitution of Kosovo.*"

60. The referring Court emphasizes that: "*For the reasons presented above, we consider that the decision on merits of the Supreme Court of Kosovo in the present case is directly related to the legal norms mentioned above, therefore this Court cannot decide on the request for protection of legality until the Constitutional Court renders decision regarding this referral, while in the Supreme Court until the decision is taken by your Court, the procedure for decision-making will be suspended.*"

(ii) KO192/23 - related to the procedure of objecting the evidence and dismissing the indictment

61. The referring Court emphasizes that the judges of the criminal branch of the Supreme Court of Kosovo, after the session, have assessed that in this case it is necessary to initiate the constitutional review proceedings before the Constitutional Court, since they are not certain "*whether the legal provisions from article 438, paragraph 2 of the CPC (referring to the request for protection of legality submitted to the detriment of the defendant), is in compliance with the provisions of the Constitution of the Republic of Kosovo and with the court decisions of the European Court of Human Rights , while such an interpretation is important to decide in this criminal case*".

62. The referring Court emphasizes that in the legal provisions of the previous Criminal Procedure Code (Code no. 04/L-123, of 13 December 2012), same in other countries of the region, there was an acceptable legal solution according to which "*The Supreme Court of Kosovo will certify with a judgment that there has been a violation of the law without affecting the final decision if it approves the request for the protection of legality that was filed to the detriment of the defendant" (Article 438 paragraph 2).*

63. The referring Court emphasizes that now with the new legal provision from article 438, paragraph 2 of the CPCRK it is foreseen that: "*If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error*".

64. The referring Court considers that the Constitutional Court should clarify three (3) important things, as follows:

i. first, what is meant by the term used by the legislation "*manifestly inappropriate or based on serious error"*, as this may cause ambiguity in interpretation;
ii. secondly, how should the court act after finding that it is a "*manifestly inappropriate or based on serious error"*, since this is not clarified by this legal provision; and

iii. thirdly, is this a way of deciding to the detriment of the defendant, according to the request for protection of legality of the Chief State Prosecutor, with an extraordinary legal remedy, in accordance with the constitutional principles and provisions, as well as with the decisions of the European Court of Human Rights.

(iii) KO227/23 – related to the detention procedure

65. The referring Court emphasizes that the provision of the CPCRK, namely paragraph 2 of article 4 of the CPCRK, establishes that the final court decision can be modified by extraordinary legal remedies.

66. The referring Court emphasizes that "*with the new code it is foreseen that the request filed to the detriment of the defendant has a declarative nature, at the same time the possibility of modifying the form of the final decision is foreseen to the detriment of the defendant, without determining the legal effect of the modification (how can the final acquittal judgment be changed, in case it is changed from acquittal to conviction, does the defendant have the right to appeal and which court should decide regarding the appeal, and when a decision is manifestly inappropriate or based on a serious error, and the same applies to the final decision by which the detention was terminated).*"

67. The referring Court states that "*in the present case, the Prosecutor filed a request against the final decision by which the defendant's detention was terminated, and considering that the detention is a measure of the security of the defendant's presence in the criminal procedure, whereas according to the provisions of the criminal procedure code, the right to liberty and security must be interpreted in favor of remaining at liberty and this measure (as a more serious measure) must be reduced to the shortest possible time, the question that is posed is whether the final decision can be changed with the request for protection of legality as an extraordinary legal remedy to his detriment and are the provisions of article 4 par. 2, article 432 par. 4 and 438 par. 2 of the Criminal Procedure Code in compliance with articles 29, 34 and 53 of the Constitution of the Republic of Kosovo*".

(iv) KO229/23 - related to the final decision ending the criminal process

68. The referring Court emphasizes that: "*in the present case, in addition to the defendants' defense, the state prosecutor also filed a request for protection of legality against the final decision, taking into account that in the request he proposed that on the grounds of "serious errors" the case should be remanded for retrial, the question that is posed is whether the final decision can be changed with the request for protection of legality as an extraordinary legal remedy to the detriment of defendants and are the provisions of article 4 par. 2, article 432 par. 4 and 438 par. 2 of the CPC in compliance with articles 30, 31, 34 and 53 of the Constitution of the Republic of Kosovo".*

Comments submitted by the Ombudsperson

69. In relation to paragraph 2 of article 438 of the CPCRK, the Ombudsperson*: "[...] considers that in the present case, as long as a norm does not clarify when "the final decision is manifestly inappropriate" and when "the final decision is based on serious error", then the determination of inappropriateness and serious error falls to the discretion of the judges, which results in their arbitrary decision.*"

70. In this regard, the Ombudsperson adds: *"[...] it is unacceptable for procedural actions to be based on a norm that does not clearly define when a final decision is inappropriate, or when it is based on serious error. Procedural norms must be clear and foreseeable , so that the parties to the proceedings can develop and foresee their procedural actions in terms of the exercise of judicial protection of rights.*"

71. The Ombudsperson emphasizes that paragraph 2 of Article 438 of the CPCRK does not contain the necessary elements of the rule of law, such as legal certainty and the prohibition of arbitrariness established by the Venice Commission.

72. In what follows, the Ombudsperson referring to the Venice Commission considers that: "*the necessary elements of the rule of law, such as: legality, legal certainty, prohibition of arbitrariness, respect for human rights and non-discrimination and equality before the law , should not only be formal, but also substantial in the fulfillment and functioning of the rule of law*."

73. The Ombudsperson specifies that: "*The current content of Article 438, paragraph 2, of the Code no. 08/L-032 of the Criminal Procedure in Kosovo is unclear and does not contain the elements of the rule of law and is not in harmony with the elements of the rule of law established by the Venice Commission*."

74. Based on the above elaboration, the Ombudsperson considers it very important for the Court to assess whether paragraph 2 of Article 438 of the Criminal Procedure Code violates legal certainty, the position of the defendant in criminal proceedings, and whether it is in accordance with elements of the rule of law.

The comments submitted by T.Rr in the capacity of the lawyer of the interested party F.G.

75. T.Rr., as the lawyer of the interested party F.G., specifies that as far as the issue of detention is concerned, this issue is not related to the principle *Ne Bis In Idem* since *"it is not appropriate for the present case, because Article 4 of the CPCRK refers to cases where the person has been convicted or released by a final court decision or the indictment has been rejected by a final court decision."* Moreover, according to him, in the case of F.G. we are dealing with a case where the latter, "*is unable to stand trial due to mental illness which is of permanent character*." However, it raises doubts about the constitutionality of the request for protection of legality against the final decision on the termination of detention, as a legal remedy before the Supreme Court, and the compatibility of this provision with the decisions of the European Court of Human Rights (hereinafter: the ECtHR). In addition, he also emphasizes regarding paragraph 2 of article 438 of the CPCRK that "*[...] The words used in this provision ... unless if the final decision is manifestly inappropriate or based on serious error are completely vague, incomprehensible and abstract, and creates legal uncertainty."* He further adds that with regard to detention that *"[...] the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the" ECHR* citing in this regard the cases of the ECtHR, including case*, Baranowski v. Poland*.

Contribution of Member States of the Venice Commission Forum

Albania

76. The Albanian criminal procedural code does not provide for the extraordinary legal remedy, namely the request for protection of legality. Such a provision had become an integral part of the legal system in 1996 but it was later declared unconstitutional by decision no. 55 of 21 November 1997. Decision no. 55 of 21 November 1997 of the Constitutional Court of the Republic of Albania, in the relevant part defines: "*At the proposal of the Albanian Committee of Helsinki, the Constitutional Court on its own initiative, as for the other issues raised in its request, submitted to the constitutional control also laws no. 8180 and no. 8181, dated 23.12.1996, which refer to, the first one "On an amendment to the Code of Criminal Procedure" and the other "On an amendment to the Code of Civil Procedure. In both of these laws it is provided for the creation of a new institute, which gives the right to*

the General Prosecutor to exercise recourse in the interest of the law for the annulment of the final decisions of the first instance court , the court of appeal as well as the decisions of the Criminal Panel and the Civil Panel of the Court of Cassation. The Constitutional Court, examining the essence and content of these normative acts and comparing and analyzing them in the spirit of the constitutional laws, considers that the provision of the Prosecutor General with this new remedy of response as well as his right to use it within one year from the day that the decisions of these courts became final, is not in compliance with the constitutional functions and duties of the prosecution body. Based on Article 13 of Law No. 7561, of 29.04.1992 "On some amendments and supplementations to Law No. 7491, of 29.04.1991 "On the main constitutional provisions", the Prosecutor's Office is the only authority that exercises criminal prosecution in the investigation and in court and that in its court activity it protects the general interests of society, the legal order, as well as the rights and freedoms of citizens with the function of control over the legality of final court decisions. Its activity and scope of competences is more limited and focuses mainly on the investigation, while in the adjudication of criminal and civil cases, the competencies of the prosecutor are exercised only during the continuation or as soon as the court process has ended, but always within the deadlines set in the provisions of the Criminal Procedure Code and the Civil Procedure Code. Moreover, in the adjudication of criminal and civil cases, the principle of equality of the parties sanctioned by Article 25 of Law No. 7692, of 31.03.1993 on "Fundamental Human Rights and Freedoms" is discussed.

Sweden

77. The Swedish Supreme Court answered that in the Swedish legal system there is no extraordinary legal remedy, the request for protection of legality. The Swedish Supreme Court explains that detention cases are, in practice, always contested through regular legal remedies. If new circumstances arise later, for example, during the preliminary investigation phase, the issue of detention can be reassessed. This may lead to the release of the detainee, or—if the suspect is a fugitive—a request by the prosecutor for the suspect's detention. The court, in such a situation, would not be conditioned by the preliminary decisions related to the issue of detention. Therefore, in practice, it is not appropriate to say that detention is final as referred to in the question posed. Finally, it is worth noting that courts as well as prosecutors are conditioned by the principle of proportionality so that detention is as short as possible.

Liechtenstein

78. The Criminal Procedure Code of Liechtenstein provides for the regular legal remedy for the State Prosecutor in the Supreme Court against the decisions of the Court of Appeals regarding the termination of the defendant's detention. Article 240, paragraph 1, point 2 of the CPC states as follows: "*Against the decisions of the Court of Appeals, an appeal can be submitted to the Supreme Court in the following cases: 2. by the prosecutor against the decisions rejecting the request to initiate the investigation , order for arrest, imposition or extension of detention or termination is pronounced*". Such an appeal can also be filed by the defendant, specifically if his appeal against the imposition or extension of detention is rejected (Article 240 paragraph 1 point 1a of the CPC). However, an extraordinary legal remedy similar to the request for protection of legality does not exist in Liechtenstein. Since the state prosecutor has available the regular legal remedy, the Supreme Court can modify the decision of the Court of Appeals.

Slovakia

79. In the legal-legal system of the Slovak Republic, the final decision on detention can only be contested through a point in law appeal filed by the Minister of Justice of the Slovak Republic. Appeals on questions of law in criminal proceedings are reviewed by the Supreme Court of the Slovak Republic. When deciding on appeals on questions of law, the Supreme

Court can cancel the contested decisions and return them to the lower courts, which are bound by the decisions of the Supreme Court. If requested by the Minister of Justice, the Supreme Court can also annul the detention decisions issued in favor of the defendants. The constitutionality of the aforementioned legal framework has never been challenged in the Constitutional Court of the Slovak Republic.

Austria

80. According to the criminal procedure code of Austria, the General Prosecutor, acting on his own initiative or at the request of the Federal Minister of Justice, can submit an appeal for the protection of legality to the Supreme Court. Such an appeal may be filed against any judgment, decision or other measure of the criminal court. The complaint can be submitted at any time, that is, even when it is final and regardless of the fact whether the parties to the criminal proceedings have used a legal remedy. In principle, such a complaint can also be filed against court decisions regarding detention. If the complaint is grounded, the Supreme Court will find that there has been a violation of the law. In principle, this decision is declarative and does not affect the rights of the accused. However, if the court's decision imposes a sentence, the Supreme Court based on its discretion may acquit the accused, reduce the sentence or order the repetition of procedure. In any case, the decision of the court can never be modified to the detriment of the accused.

Czech Republic

81. The legal system of the Czech Republic does not provide for an extraordinary legal remedy such as the request for protection of legality.

Kazakhstan

82. The category of complaints for protection of legality have not been reviewed by the Constitutional Court of the Republic of Kazakhstan.

Croatia

83. In the Croatian legal system, there is an extraordinary remedy, a request for the protection of legality. The State Prosecutor can submit a request against the final decision of the court, including the decision on detention rendered in the procedure that contains violation of fundamental human rights and freedoms guaranteed by the constitution as well as by domestic and international law. When the court finds that the request for protection of legality is grounded, it renders a judgment in which case it finds, depending on the nature of the legal violation, or remands the final decision to a retrial or quashes it in whole or in part. If the request for protection of legality is submitted to the detriment of the defendant and the court finds that the request for protection of legality is grounded, it only finds that there has been a violation of the law, but without affecting the final decision. The court sometimes renders declaratory decisions even in cases where the request is filed in favor of the defendant or in case of a violation of the law to the detriment of the defendant, respectively, or if the court considers that it is not necessary, due to the minor importance of the violation committed, remand or quash the decision so that the violation is corrected in the repeated procedure.

Turkey

84. In the Turkish criminal justice system, the State Prosecutor does not have the possibility of submitting an extraordinary appeal to the Court of Cassation to protect the legality of the final decisions of the lower instance courts regarding the termination of the detention of the accused person. The State Prosecutor has only the opportunity to request the detention of the defendant, or to give his opinion on the extension or termination of detention, or even

to submit an objection to the order for detention to the competent judge during all stages of the conduct of the criminal proceedings according to the manner provided by the criminal procedural law.

Germany

85. The applicable law in Germany does not contain an extraordinary legal remedy corresponding to the request for protection of legality in cases related to detention. If the court decides to revoke or suspend an arrest warrant that imposes detention, the public prosecutor can file an appeal against the court order. The court deciding on the appeal may reinstate the arrest warrant unless the reason for the termination of detention is the release of the accused. In doing so, the court may also base the arrest warrant on different grounds or strong suspicion that the accused has committed another criminal offense. In any case, the complaint constitutes a common legal remedy. While German procedural law recognizes some extraordinary remedies such as the restoration of the *status quo ante* after failure to respect deadlines, and some of them serve to protect legality, they are limited to procedural decisions of the main issue and that they do not enable the public prosecutor to contest the decisions of the courts regarding the termination of detention.

North Macedonia

86. The request for protection of legality is an extraordinary legal remedy that can be filed by the public prosecutor in the Republic of North Macedonia against final decisions in case they are contrary to the constitution, the law or the international agreement ratified in accordance with the constitution. The request for protection of legality can be submitted to the Supreme Court of the Republic of North Macedonia, which decides in a court session. If the request for protection of legality is submitted against the accused and the court finds that it is grounded, the latter will only find that the law has been violated but will not interfere with the final decision.

Bosnia and Herzegovina

87. There are four criminal procedure laws in Bosnia and Herzegovina. One at the state level, two at the ethnic level and one at the Brčko District level. Only one of them provides for the request for protection of legality as a special extraordinary legal remedy - the criminal procedure code of Republika Srpska. Article 350 of this code provides for the submission of a request for protection of legality against the final decision. This law does not provide for exceptions similar to the provision of paragraph 4 of article 432 of the Criminal Procedure Code of the Republic of Kosovo.

Relevant Constitutional and Legal Provisions

Constitution of the Republic of Kosovo

Article 29
[Right to Liberty and Security]

"1. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:

(1) pursuant to a sentence of imprisonment for committing a criminal act;

(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission

of another criminal act, and only for a limited time before trial as provided by law;

(3) for the purpose of educational supervision of a minor or for the purpose of bringing the minor before a competent institution in accordance with a lawful order;

(4) for the purpose of medical supervision of a person who because of disease represents a danger to society;

(5) for illegal entry into the Republic of Kosovo or pursuant to a lawful order of expulsion or extradition.

2. Everyone who is deprived of liberty shall be promptly informed, in a language he/she understands, of the reasons of deprivation. The written notice on the reasons of deprivation shall be provided as soon as possible. Everyone who is deprived of liberty without a court order shall be brought within forty-eight (48) hours before a judge who decides on her/his detention or release not later than forty-eight (48) hours from the moment the detained person is brought before the court. Everyone who is arrested shall be entitled to trial within a reasonable time and to release pending trial, unless the judge concludes that the person is a danger to the community or presents a substantial risk of fleeing before trial.

3. Everyone who is deprived of liberty shall be promptly informed of his/her right not to make any statements, right to defense counsel of her/his choosing, and the right to promptly communicate with a person of his/her choosing.

4. Everyone who is deprived of liberty by arrest or detention enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention. The case shall be speedily decided by a court and release shall be ordered if the arrest or detention is determined to be unlawful.

5. Everyone who has been detained or arrested in contradiction with the provisions of this article has a right to compensation in a manner provided by law.

6. An individual who is sentenced has the right to challenge the conditions of detention in a manner provided by law.

Article 34
[Right not to be Tried Twice for the Same Criminal Act]

"No one shall be tried more than once for the same criminal act."

Article 103
[Organization and Jurisdiction of Courts]

"1. Organization, functioning and jurisdiction of the Supreme Court and other courts shall be regulated by law.
2. The Supreme Court of Kosovo is the highest judicial authority.
[…]"

Article 109
[State Prosecutor]

"1. The State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law.

2. The State Prosecutor is an impartial institution and acts in accordance with the Constitution and the law.

3. The organization, competencies and duties of the State Prosecutor shall be defined by law.

4. The State Prosecutor shall reflect the multiethnic composition of the Republic of Kosovo and shall respect the principles of gender equality.

5. The mandate for prosecutors shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.

6. Prosecutors may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties.

7. The Chief State Prosecutor shall be appointed and dismissed by the President of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council. The mandate of the Chief State Prosecutor is seven (7) years, without the possibility of reappointment."

Article 53
[Interpretation of Human Rights Provisions]

"Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights."

European Convention on Human Rights

Article 5
(Right to liberty and security)

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

b. the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Article 4
(Right not to be tried or punished twice)

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this article shall be made under Article 15 of the Convention.

Code No. 08/L-032 Criminal Procedure Code of the Republic of Kosovo

Article 3
Presumption of Innocence of Defendant and In Dubio Pro Reo

"1. Any person suspected or charged with a criminal offense shall be deemed innocent until his guilt has been established by a final judgment of the court.

2. Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favor of the defendant and his rights under the present Code and the Constitution of the Republic of Kosovo."

Article 4
Ne Bis In Idem

"1. No one may be prosecuted and convicted of a criminal offense for which he has been acquitted or for which he has been convicted by a final court decision, respectively if the criminal proceedings against him have been terminated by a final decision of a court or the indictment has been rejected by a final court decision.

2. A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code.

3. Articles 1 and 2 of the Criminal Code shall be applied mutatis mutandis. "

Article 171
Authorized Measures to Ensure Presence of Defendant

"1. The measures to ensure the presence of defendant which may be used to ensure the presence of the defendant, to prevent re-offending and to ensure successful conduct of the criminal proceedings are:

1.1. summons;
1.2. order for arrest;
1.3. promise of the defendant not to leave his place of current residence;
1.4. prohibition on approaching a specific place or person;
1.5. attendance at a police station;
1.6. bail;
1.7. house detention;
1.8. detention on remand.

2. In deciding which measure to apply, the court shall be obliged to take account of the conditions specified for the individual measures and to ensure that it does not apply a more severe measure if a less severe measure would suffice.

3. These measures shall be terminated when the reasons that necessitated them cease to exist or shall be replaced by more lenient measures if the conditions are met for this.

4. The decisions regarding these measures shall be made by or pretrial judge before the indictment has been filed and by the single judge or the presiding trial judge after the indictment has been filed, unless provided otherwise by this Code.

5. The term "lesser measures to ensure the presence of defendant" or "lesser measures" as used in this Code shall mean a summons; a promise of the defendant not to leave his place of current residence; a prohibition on approaching a specific place or person; attendance at a police station; bail or house detention.

6. The court may simultaneously impose one or more measures from paragraph 1. of this Article.

Sub - Charter V - Extra-ordinary legal remedies
Article 419
Extra-ordinary legal remedies

"1. Criminal proceedings terminated by a final ruling or a final judgment may be reopened upon the request of authorized persons only in instances and under conditions provided for by the present Code. The request for the reopening of the criminal proceedings is filed with the Basic Court that rendered the decision.

2. A party may request the extraordinary mitigation of punishment at any time during the period being served in imprisonment. The party files the request with the Basic Court

where the first instance judgement was issued, which transmits all case files to the Supreme Court.

3. A party may request protection of legality within three (3) months from the day of filing the final judgment or final ruling against which protection of legality is sought. The party files the request with the Basic Court where the first instance decision was issued which transmits all case files to the Supreme Court.

4. Articles 375, 376, 377, 378 and 379 of the present Code applies to all requests made under this Article."

Reopening of criminal proceedings
Article 422
Reopening of Criminal Proceedings Dismissed by a Final Ruling

"1. Criminal proceedings which were dismissed in a final form before the main trial can be reopened if the state prosecutor withdrew the indictment and it is proven that this withdrawal was a result of the criminal offense committed by the state prosecutor. While proving this criminal offense, provisions of Article 423, paragraph 3 of the present Code apply.

2. If the indictment was dismissed based on insufficient evidence to support a well-grounded suspicion that the defendant has committed the criminal offense as described in the indictment and if new facts and evidence are discovered and obtained, a new indictment can be filed if the review panel determines that new evidence and facts justify this."

Article 423
Reopening Criminal Proceedings Terminated by Final Judgment

"1. Criminal proceedings terminated by a final judgment may only be reopened if:

1.1. it is proven that the judgment rests on a forged document or a false statement of a witness, expert witness or interpreter;

1.2. it is proven that the judgment ensued from a criminal offense committed by a judge or a person who undertook investigative actions;

1.3. new facts are discovered or new evidence is produced which, alone or in connection with previous evidence, appears likely to justify the acquittal of the convicted person or his conviction under a less severe criminal provision;

1.4. a person was tried more than once for the same offense or several persons were convicted of the same offense which could have been committed only by a single person or only by some of them; or

1.5. in the case of conviction for a continuous criminal offense, or some other criminal offenses which under the law include several acts of the same kind or different kinds, new facts are discovered or new evidence is produced which indicates that the convicted person did not commit an act included in the criminal offense, of which he was convicted and the existence of these facts would have critically influenced the determination of punishment;

2. Criminal proceedings terminated by a final judgment may be reopened only in favour of the defendant, except that if it is proven that the circumstances under paragraph 1 sub-paragraphs 1.1 and 1.2 of the present Article have been a result of a criminal offense

committed by the defendant or a person acting on his behalf against a witness, expert witness, interpreter, state prosecutor, judge or those close to such persons, criminal proceedings terminated by a final judgment may be reopened against the defendant. The reopening of criminal proceedings to the detriment of the defendant is only permissible within five (5) years of the time the final judgment was rendered.

3. In cases under paragraph 1 sub-paragraphs 1.1 and 1.2 or paragraph 2 of the present Article, it must be proven by a final judgment that the persons concerned have been found guilty of criminal offenses in question. If proceedings against these persons cannot be conducted because they are dead or because other circumstances exist which preclude criminal prosecution, the facts under paragraph 1 sub-paragraphs 1.1. and 1.2. or paragraph 2 of the present Article may be proven by using other evidence."

Article 424
Persons Authorized to Request Reopening of Criminal Proceedings

"1. The reopening of criminal proceedings may be requested by the parties and defense counsel. After the death of the convicted person, the reopening may be requested by the state prosecutor or by the spouse, the extramarital spouse, a blood relation person in a direct line to the first degree, an adoptive parent, an adopted child, a brother, a sister or a foster parent of the convicted person.

2. The reopening of criminal proceedings may be requested even after the convicted person has served his sentence and irrespective of the period of statutory limitation, an amnesty or a pardon.

3. The court which is competent to decide on the reopening of criminal proceedings, upon learning of the existence of grounds to reopen criminal proceedings, notifies thereof the convicted person or another person authorized to file the request."

Article 425
Content of the Request for Reopening Criminal Proceedings and the Court Deciding Thereupon

"1. A request for reopening criminal proceedings is decided by the review panel of the Basic Court which adjudicated the previous proceedings.

2. The request shall specify the legal ground on which the reopening is requested and the evidence supporting the facts on which the request rests. If the request does not contain this information, the court asks the requesting party to supplement the request within a specified time.

3. A judge who participated in rendering the judgment in previous proceedings may not take part in the deliberations of the panel on the request for reopening."

Article 426
Basis and Procedure for Dismissing the Request to Reopen Criminal Proceedings

"1. The court dismisses the request by a ruling on the basis of the request itself and the files of previous proceedings if it finds that:

1.1. the request has been filed by an unauthorized person;

1.2. there are no legal grounds for reopening of proceedings;

1.3. the facts and evidence on which the request rests were presented in an earlier request for reopening of proceedings which was rejected by a final ruling;

1.4. the facts and evidence obviously do not provide grounds to grant the reopening of proceedings; or

1.5. the person who requests the reopening of proceedings did not abide by the provisions under Article 425 paragraph 2 of the present Code.

2. If the request is not dismissed, the court serves a copy of the request on the state prosecutor or the other party who are entitled to reply within eight (8) days. After the court has received the reply to the request, or after the time limit for the reply has expired, the presiding judge of the review panel orders that the facts and evidence indicated in the request and the reply thereto be produced and examined."

Article 427
Decisions of the Panel on the Request for Reopening Proceedings

"1. On the basis of the results of the examination of the facts and evidence indicated in the request and the reply, the court either grants the request and allows the reopening of criminal proceedings or rejects the request.

2. If the court finds that the grounds on which it has allowed the reopening of proceedings also benefit a co-accused who has not requested the reopening of proceedings, it proceeds ex officio as if such request had also been filed by that person.

3. In the ruling by which the reopening of criminal proceedings is allowed the court orders that a new main trial be scheduled immediately or that the case be returned to the stage of investigation or that an investigation be opened if none was conducted before.

4. The court orders that the execution of the judgment is postponed or interrupted if, having regard to the evidence filed, the court considers that:

4.1.the convicted person may be given a sentence in the retrial as a result of which, allowing for the part of the sentence already served, he would have to be released;

4.2. he may be acquitted of the charge; or

4.3. the charge against him may be rejected.

5. When a ruling granting the reopening of criminal proceedings becomes final, the enforcement of punishment is stayed. However, if grounds provided for in Article 184 paragraph 1 of the present Code exist, the court orders detention on remand.

Article 428
Rules on New Reopening Proceedings

"1. New proceedings, held on the basis of a ruling which grants the reopening of criminal proceedings, is conducted in accordance with the provisions applying to the original proceedings. In the new proceedings, the court is not bound by the rulings rendered in the original proceedings.

2. If new proceedings are terminated prior to the opening of the main trial, the earlier judgment is annulled by a ruling on termination.

3. In rendering a new judgment, the court either annuls the earlier judgment or a part thereof or affirms the earlier judgment. In the punishment imposed by the new judgment, the court gives credit for a sentence already served and if reopening was granted only for some of the acts of which the accused was convicted or acquitted, the court imposes a new aggregate punishment in accordance with the provisions of criminal law.

4. In new proceedings, the prohibition under Article 395 of the present Code is binding on the court.

Article 432
Grounds for Filing a Request for Protection of Legality

"1. A request for protection of legality against a final judicial decision or against judicial proceedings which preceded the rendering of that decision may, after the proceedings have been completed in a final form, be filed in the following instances:

1.1. on the ground of a violation of the criminal law;

1.2. on the ground of a substantial violation of the provisions of criminal procedure provided for in Article 384 paragraph 1 of the present Code; or

1.3. on the ground of another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision.

2. A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.

3. Notwithstanding the provisions under paragraph 1 of the present Article, the Chief State Prosecutor may file a request for protection of legality on the grounds of any violation of law

4. Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during proceeding which have not been completed in a final form only against final decisions ordering, extending, or terminating detention on remand."

Article 438
Judgment on Request for Protection of Legality

"1. If the Supreme Court of Kosovo determines that a request for protection of legality is wellfounded it renders a judgment by which, depending on the nature of the violation, it shall:

1.1. modify the final decision;

1.2. annul in whole or in part the decision of both the Basic Court and the higher court or the decision of the higher court only, and return the case for a new decision on the merits or retrial to the Basic Court or the higher court; or

1.3. confine itself only to establishing the existence of a violation of law.

2. If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error.

3. If the Court of Appeals was not entitled under the present Code to annul a violation of law committed in a decision at first instance or in judicial proceedings which preceded it and the Supreme Court of Kosovo finds that the request filed in favour of the accused is well-founded and that the annulment of the committed violation requires that the decision at first instance be annulled or altered, the Supreme Court of Kosovo annuls or alters the decision of the Court of Appeals as well, even though the law has not thereby been violated."

Article 440
[Protection of Rights Under the Constitution of the Republic of Kosovo, European Convention on Human Rights and European Court of Human Rights]

"The extraordinary legal remedies under the present Chapter may be filed on the basis of rights available under this Code which are protected under the Constitution of the Republic of Kosovo or the European Convention on Human Rights and its Protocols, as well as any decision of the European Court of Human Rights."

Criminal No. 04/L-123 Procedure Code repealed by Code no. 08/L-032 Criminal Procedure Code

Article 432
Grounds for filing a request for protection of legality

"1. A request for protection of legality against a final judicial decision or against judicial proceedings which preceded the rendering of that decision may, after the proceedings have been completed in a final form, be filed in the following instances: on the ground of a violation of the criminal law;

1.1. on the ground of a violation of the criminal law;

1.2. on the ground of a substantial violation of the provisions of criminal procedure provided for in Article 384, paragraph 1, of the present Code; or

1.3. on the ground of another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision.

2. A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.

3. Notwithstanding the provisions under paragraph 1 . of the present Article, the Chief State Prosecutor may file a request for protection of legality on the grounds of any violation of law

4. Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during criminal proceedings which have not been completed in a final form only against final decisions ordering or extending detention on remand."

Article 441
Constitution of the Republic of Kosovo, European Convention on Human Rights and European Court of Human Rights

"A request for an extraordinary legal remedy under the present Chapter may be filed on the basis of rights available under this Code which are protected under the Constitution

of the Republic of Kosovo or the European Convention on Human Rights and its Protocols, as well as any decision of the European Court of Human Rights."

UNMIK Regulation No. 2003/26 on The Provisional Criminal Procedure Code of Kosovo repealed by Criminal no. 04/L-123 Procedure Code

Article 451
No title

"(1) A request for protection of legality against a final judicial decision or against judicial proceedings which preceded the rendering of that decision may, after the proceedings have been completed in a final form, be filed in the following instances:

1) on the ground of a violation of the criminal law;

2) on the ground of a substantial violation of the provisions of criminal procedure provided for in Article 403 paragraph 1 of the present Code; or

3) on the ground of another violation of the provisions of criminal procedure if such violation affected the lawfulness of a judicial decision.

(2) A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon.

(3) Notwithstanding the provisions under paragraph 1 of the present Article, the Public Prosecutor for Kosovo may file a request for protection of legality on the grounds of any violation of law.

(4) Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during criminal proceedings which have not been completed in a final form only against final decisions ordering or extending detention on remand."

Article 460
No title

"A request for an extraordinary legal remedy under the present Chapter may be filed on the basis of a decision of the European Court of Human Rights in accordance with procedures to be provided for by law."

Admissibility of the Referral

88. The Court first examines whether the referrals have fulfilled the admissibility requirements established in the Constitution, and further specified in the Law, and the Rules of Procedure.

89. In this respect, the Court refers to paragraphs 1 and 8 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.

(...)

8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring

court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.

90. The Court refers to Articles 51, 52 and 53 of the Law, which stipulate:

Article 51
(Accuracy of referral)

"1. A referral pursuant to Article 113, Paragraph 8 of the Constitution shall be filed by a court only if the contested law is to be directly applied by the court with regard to the pending case and if the lawfulness of the contested law is a precondition for the decision regarding the case pending with the court.

2. A referral shall specify which provisions of the law are considered incompatible with the Constitution."

Article 52
(Procedure before a court)

"After the submission of a referral pursuant to Article 113, Paragraph 8 of the Constitution, the procedure before the referring court shall be suspended until a decision of the Constitutional Court is rendered."

Article 53
(Decision)

"The Constitutional Court shall decide only about the compliance of the legal provision with the Constitution and shall not decide on other factual or legal matters related to the dispute before the referring court."

91. The Court also takes into account rule 75 of the Rules of Procedure, which specifies:

Rule 75 (Referral Pursuant to Paragraph 8 of Article 113 of the Constitution and Articles 51, 52 and 53 of the Law)

"(1) A referral filed under this Rule must fulfil the criteria established in paragraph (8) of Article 113 of the Constitution and Articles 51 (Accuracy of the Referral), 52 (Procedure before a court) and 53 (Decision) of the Law.

(2) A referral filed pursuant to this Rule shall have a suspensive effect.

(3) Any court of the Republic of Kosovo may submit a referral under this Rule provided that:

(a) The challenged law is to be directly applied by a court concerning the matter that is a part of the pending case; and

(b) The legality of the challenged law is a precondition for rendering the court's decision.

(4) The referral filed under this Rule must specify which provisions of the contested law are considered incompatible with the Constitution. The case under consideration by the referring court shall be attached to the referral.

(5) The referring court may file the referral ex officio or upon the request of one of the parties to the proceedings.

(6) After the filing of the referral, the Court shall notify the referring court in accordance with paragraph (8) of Article 113 of the Constitution and articles 51 (Accuracy of referral) and 52 (Procedure before a court) of the Law of the suspensive effect of the referral, respectively to suspend the procedure related to the case concerned until the Court has rendered a decision."

92. In the light of the above normative framework, it results that any referral submitted under Article 113, paragraph 8 of the Constitution, in order to be admissible, must meet the following criteria:

a) The referral must be filed by a "*court*";
b) The (referring) Court must not be certain of the compliance of the contested law with the Constitution;
c) The referring Court must specify what provisions of the contested law are considered incompatible with the Constitution;
d) The contested law must be applied directly by the referring court in the case before it; and
e) The legality of the contested law is a prerequisite for deciding in the case under consideration.

93. The Court recalls its case law, which confirms the abovementioned criteria, regarding the admissibility of referrals filed under Article 113.8 of the Constitution (see, *mutatis mutandis,* cases of the Constitutional Court, KO157/18, applicant *the Supreme Court of Kosovo,* Judgment of 28 March 2019, paragraph 45; KO126/16, applicant: *Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters*, of 27 March 2017, paragraph 62; KO142/16, applicant, *Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters*, Judgment of 9 May 2017, paragraph 58).

94. Consequently, the Court first finds that the referring Court is an authorized party to submit such a referral. In this regard, the Court recalls that the referrals were submitted by the Supreme Court and were signed by its President within the scope of authorizations relating to his function. The referrals clearly state that they are submitted by the Supreme Court which has to decide on the requests for protection of legality, submitted by the authorized parties. Therefore, the Court considers that the present referrals were submitted by a "*court*" within the meaning of Article 113.8 of the Constitution (see cases of the Constitutional Court, KO157/18, applicant, *the Supreme Court of Kosovo*, cited above, paragraph 48; KO126/16, applicant, *Specialized Panel of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency of Kosovo Related Matters*, cited above, paragraphs 55-60).

95. The Court also notes that the referring Court has raised doubts regarding the constitutionality of the relevant provisions of the CPCRK. Moreover, the referring Court has specifically specified paragraph 2 of article 4, paragraph 4 of article 432, and paragraph 2 of article 438 of the CPCRK, as provisions which it considers may be in conflict with the Constitution.

96. In what follows, the Court also assesses whether the contested provisions of the CPCRK should be directly applied by the referring Court in the cases pending before it and whether the constitutionality of the contested provisions of the CPCRK is a prerequisite for the decision-making by the referring Court.

97. The Court considers that "*the direct application*" of the concrete norm means that the outcome of the decision by the referring Court depends on the direct implementation or non-implementation of the specific norm. Namely, as a result of the direct implementation or non-implementation of the specific norm, the regular courts could render decisions with different results (see, case of the Constitutional Court, KO157/18, cited above, paragraph 52).

98. Therefore, in order to have a direct connection, there must be a necessary relation between the decision of the Constitutional Court (resolution of the issue of the constitutionality of the law by this Court) and resolution of the main issue by the referring Court, in the sense that the adjudication by the referring Court cannot be completed independently from the adjudication in the Constitutional Court (see, *mutatis mutandis,* cases of the Constitutional Court, KO157/18, cited above, paragraph 53; and KO142/16, cited above, paragraph 62).

99. In the light of the facts of the case and the above considerations, the Court considers that the referrals raise serious doubts regarding the constitutionality of paragraph 2 of article 4 (Ne Bis In Idem), paragraph 4 of article 432 (Grounds for Filing a Request for Protection of Legality) and paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the CPCRK. Also, the referring Court has argued that the contested articles of the CPCRK should be applied directly in the cases before it.

100. Therefore, with regard to the fulfillment of the admissibility criteria, the Court finds that the referring Court: (i) is an authorized party; (ii) raises reasonable doubts about the contested Law; and (iii) has proved that that law should be applied directly by the referring Court in the case under consideration before it. Also, the referring Court reasoned that the constitutional review of the contested provisions of the CPCRK is a prerequisite for rendering decisions in the cases under review before it and has clarified what provisions of the CPCRK are considered incompatible with concrete provisions of the Constitution.

101. Therefore, the Court finds that the referrals are admissible for review on merits.

Merits of the referral

Introduction

102. The Court notes that the joint referrals KO114/23 and KO227/23 are related to the detention procedure within the meaning of Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the European Convention on Human Rights (hereinafter: ECHR), in which case the issue raised before the Supreme Court concerns whether (i) the request for protection of legality can also be filed against final decisions on the termination of detention, as stipulated by paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the CPCRK; and (ii) if, in the event that the Supreme Court finds that the final decision is "*manifestly inappropriate or based on serious error*", by the request for protection of legality, it can also decide to the detriment of the defendant, as it was enabled by paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the CPCRK.

103. On the other hand, the joint referrals KO192/23 and KO229/23, are related to objection of the evidence and dismissal of the indictment, namely the final decision in the criminal procedure, regarding which, the referring Court mainly raise issues related to the *ne bis in idem* principle, as guaranteed by Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 4 (Right not to be tried or punished twice) of Protocol No. 7 of the ECHR, and that if (i) the request for protection of legality can be filed even against final decisions regarding the defendant, as defined by paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the CPCRK, namely if the Supreme Court, in case it finds that the final decision is "*manifestly*

inappropriate or based on serious error", through the request for protection of legality, it can also decide to the detriment of the defendant, as it was enabled by paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the CPCRK.

104. Therefore, the Court recalls that the referring Court, during the examination of specific cases, raised doubts about the incompatibility of paragraph 2 of Article 4 (Ne Bis In Idem), paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) and paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the CPCRK, with Articles 29 [Right to Liberty and Security], 34 [Right not to be Tried Twice for the Same Criminal Act] and 53 [Interpretation of the Human Rights Provisions] of the Constitution.

105. In this context, the Court assesses that the subject of the constitutional review in this referral is (i) paragraph 2 of Article 4 (Ne Bis In Idem) of the CPCRK which stipulates that: "*A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code*"; (ii) paragraph 4 of article 432 (Grounds for Filing a Request for Protection of Legality) of the CPCRK which determines that: "*Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during proceeding which have not been completed in a final form only against final decisions ordering, extending, or terminating detention on remand*"; and (iii) paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the CPCRK which stipulates that: "*If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error*", namely if the latter are contrary to the human rights guaranteed by articles 29 [Right to Liberty and Security] and 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with article 5 (Right to liberty and security) and article 4 (2) (Right not to be tried or punished twice) of Protocol no. 7 of the ECHR.

106. The Court also clarifies that in accordance with Article 53 (Decision) of the Law, the latter decides only on the compatibility of the legal provision with the Constitution and does not decide on other factual or legal issues related to the cases under consideration before the referring Court. In other words, the Court assesses only if the legal provision contested by the referring court is in compliance with the constitutional norm, and consequently it is up to the referring Court to apply the finding of the Constitutional Court in the circumstances of the case before it.

107. In what follows, the Court, in assessing the constitutionality of the relevant provisions of the CPCRK, will examine the claims of the referring court regarding (i) the issue of detention, namely whether the request for protection of legality can also be filed in cases when the detention was terminated by a final decision; and (ii) if the request for protection of legality filed to the detriment of the defendant, may have an effect on the final decision against the defendant, including in detention cases.

108. For this purpose, the Court will first elaborate (i) the allegations of the referring Court and the arguments of the parties submitted to the Court; (ii) the general principles established through the case law of the Court itself and of the European Court of Human Rights (hereinafter: ECtHR); to continue with (iii) their application throughout its assessment in the present case.

I. Assessing the constitutionality of paragraph 4 of Article 432 of the CPCRK in conjunction with the detention procedure (joint cases KO114/23 and KO227/23)

109. As a preliminary matter regarding the constitutional review of the provisions of the CPCRK in the context of detention, the Court assesses that Article 4 (Ne Bis In Idem) of the CPCRK

in conjunction with Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution present rights and guarantees that are not related to the circumstances applicable in cases KO114/23 and KO227/23, namely the issue related to detention procedures. This is, among other things, because it is clear that the request for protection of legality filed by the state prosecutor against the decision to terminate detention does not refer to the investigation, accusation or trial against the defendant, but only to final decisions that deal with the imposition, extension and termination of detention.

110. Also, in the context of whether the request for protection of legality can be filed to the detriment of the defendant, and as such can have an effect on the final decision against the defendant in detention cases, established in paragraph 2 of Article 438 of the CPCRK, the Court assesses that this case has an effect not only in relation to detention but also the decisions related to the indictment and the decision to terminate the criminal proceedings. Having said that, this issue will be addressed through the constitutional review of paragraph 2 of article 438 of the CPCRK, in terms of the effects of the request for protection of legality, filed to the detriment of the defendant.

111. In this regard, the Court will continue with the constitutional review of the provisions of the CPCRK in the context of detention as related to the joint cases KO114/23 and KO227/23, namely the assessment of whether paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the CPCRK is compatible with the right to liberty and security, as guaranteed by Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the ECHR. For this purpose and in the following, the Court will present, (i) the allegations of the referring Court and the arguments of the interested parties; (ii) the general principles established by the Court and the ECtHR regarding the right to liberty and security, as far as they are relevant in the circumstances of the present case; to continue with (iii) the constitutional review of paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the CPCRK.

(i) Allegations of the referring Court and arguments of the parties

112. The Court recalls that paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of the CPCRK stipulates: "*Notwithstanding the provisions under paragraph 1 of the present Article, a request for protection of legality may be filed during proceeding which have not been completed in a final form only against final decisions ordering, extending, or terminating detention on remand*." The Court, in the following, recalls that the previous criminal procedure laws of the CPCRK in relation to cases of detention have allowed the use of extraordinary remedies, but only in relation to the decisions by which the detention was imposed or extended, but not against the decisions by which the detention was terminated. In this regard, the Court refers to paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of Code no. 04/L-123 (repealed by CPCRK) and paragraph 4 of Article 451 (No title) of the Provisional Code of Criminal Procedure of Kosovo UNMIK/RREG/2003/26, (repealed by Code no. 04/L-123 of Criminal Procedure) which provided that the request for protection of legality can be filed against final decisions regarding the imposition or extension of detention.

113. In the context of the above, the Court notes that the referring Court bases its doubts about the unconstitutionality of paragraph 4 of Article 432 of the CPCRK on the fact that by the latter, the possibility of submitting a request for protection of legality has been provided also regarding the termination of detention, "*bearing in mind that detention is a measure to ensure the presence of the defendant in the criminal procedure, while according to the provisions of the criminal procedure code, the right to liberty and security must be interpreted in favor of remaining at liberty and this measure (as a more severe measure) should be reduced in the shortest possible time.*" In the following, T.Rr, in the capacity of

the defense of the party in case KO114/23, also raises the issue of the constitutionality of this provision in the sense of the judicial practice of the ECtHR.

(ii) General principles established by the Court and the ECtHR regarding the right to liberty and security

114. Initially, the Court reiterates that based on the contested provisions of the CPCRK, the legal remedy before the Supreme Court is allowed, namely that of the request for protection of legality, against the decisions on the termination of detention, in contrast to the previous codes related to the criminal procedure and in which, the request for protection of legality was allowed only against decisions on the imposition and extension of detention.

115. In this regard, the Court first emphasizes that, in order to be in accordance with the Constitution and the ECHR, the arrest or deprivation of liberty must be based on one of the grounds for deprivation of liberty provided for in Article 29, paragraph 1, of the Constitution in conjunction with Article 5 of the ECHR.

116. In this regard, the Court first recalls Article 29, paragraph 1, item 2, of the Constitution, which establishes:

> *1. Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court as follows:*
>
> *[...]*
> *(2) for reasonable suspicion of having committed a criminal act, only when deprivation of liberty is reasonably considered necessary to prevent commission of another criminal act, and only for a limited time before trial as provided by law;*
>
> *[...]."*

117. Secondly, the Court also refers to Article 5. 1 (c) of the ECHR which stipulates that:

> *1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
> *[...]*
> *c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*

118. The Court also refers to paragraph 4 of Article 29 of the Constitution, which stipulates that: *"Everyone who is deprived of liberty by arrest or detention enjoys the right to use legal remedies to challenge the lawfulness of the arrest or detention. The case shall be speedily decided by a court and release shall be ordered if the arrest or detention is determined to be unlawful."*

119. Furthermore, the Court notes that paragraph 4 of Article 5 of the ECHR stipulates that: "*Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."*

120. Based on the above, the Court notes, that based on Article 29 paragraph 1, item 2 of the Constitution and item c of paragraph 1 of Article 5 of the ECHR, the deprivation of liberty may be conducted in the case of a grounded suspicion of committing the criminal offence,

and when such a thing is considered necessary to prevent the commission of another offense or escaping after its commission (see, cases of the Court, KI10/18, Applicant *Fahri Deqan*i, judgment, of 8 October 2019, paragraph 65 and KI85/22, applicant: *Jadran Kostić*, judgment of 26 April 2023, paragraph 68). Therefore, the Court notes that in order to comply with the Constitution and the ECHR, the imposition of detention must be based on one of the grounds for deprivation of liberty set forth in Article 29 of the Constitution in conjunction with Article 5, paragraph 1 (c) of the Convention (see, case of the Court, KI85/22, cited above, paragraph 69).

121. Based on the case law of the ECtHR, the purpose of Article 5 of the ECHR is to prevent arbitrary or unjustified deprivation of liberty (see the case of the ECtHR, *McKay v. The United Kingdom*, no. 543/03, Judgment of 3 October 2006, paragraph 30).

122. The ECtHR, in its case law, which the Court itself referred to, has identified three (3) basic criteria to be examined to assess whether deprivation of liberty is lawful and non-arbitrary (see ECtHR case, *Merabishvili v. Georgia* no. 72508/13, Judgment of 28 November 2017, paragraph 183, see also cases of the Court, KI10/18, cited above, paragraph 67 and KI85/22, applicant *Jadran Kostić,* cited above, paragraph 70).

a. First, there must exist a "*reasonable suspicion*" that the person deprived of liberty has committed the criminal offense (see ECtHR case, *Merabishvili v. Georgia*, no. 72508/13, Judgment of 28 November 2017, paragraph 184);
b. secondly, the purpose of deprivation of liberty "*is that it should in principle be in the function of the conduct of criminal proceedings"* (see, case of the Court KI63/17, applicant *Lutfi Dervishi*, Resolution on Inadmissibility of 16 November 2017, paragraph 57; KI10/18, applicant *Fahri Deqani*, cited above, paragraph 68; and KI85/22, applicant *Jadran Kostić*, cited above, paragraph 70; see also the case of the ECtHR, *Ostendorf v. Germany*, no. 15598/08, Judgment of 7 March 2013, paragraph 68), and moreover, it must be proportionate in the sense that it should be necessary "*to ensure the appearance of the person affected by the relevant competent authorities"* (see, case of the Court KI63/17, Applicant *Lutfi Dervishi*, cited above, paragraph 57, see also the abovementioned ECtHR case *Merabishvili v. Georgia*, paragraph 185); and
c. third, the deprivation of liberty or the detention on remand must have been done following the procedure prescribed by law (see abovementioned case of the Court, KI10/18, Applicant *Fahri Deqani,* cited above, paragraph 68 and case of the ECtHR *Merabishvili v. Georgia*, cited above, paragraph 186).

123. Moreover, the ECtHR in its case law, which the Court also referred to, has emphasized that Article 5, paragraph 4 of the ECHR stipulates that every person arrested or detained has the right to request the court to examine the procedural and substantive requirements that are essential for the "*legality*" of the deprivation of his liberty, within the meaning of Article 5, paragraph 1 of the ECHR (see, cases of the ECtHR, *Idalov v. Russia*, no. 5826/03, Judgment, of 22 May 2022, paragraph 161; *Reinprecht v. Austria*, application no. 67175/01, Judgment, of 15 November 2005, paragraph 31; and case of the Court KI85/22, applicant *Jadran Kostić*, cited above, paragraph 77).

124. The notion of "*lawfulness*" under Article 5 paragraph 4 of the ECHR has the same meaning as in Article 5 paragraph 1, so that the arrested or detained person is entitled to a review of the "*lawfulness*" of his detention in the light not only of the requirements of domestic law, but also of the ECHR, the general principles embodied therein and the aim of the restrictions permitted by Article 5 paragraph 1 of ECHR (see the case of ECtHR, *Suso Musa v. Malta*, no. 42337/12, Judgment of 23 July 2013, paragraph 50; and case of the Court KI85/22, applicant *Jadran Kostić*, cited above, paragraph 78).

125. In order that the principle of *"lawfulness"* is respected, detention must be in accordance with the "*established legal procedure*" (see, the case of the ECtHR, *Del Rio Prada v. Spain* no. 42750/09, Judgment of 21 October 2013, paragraph 125). Consequently, in order to fulfill the respective requirements of the Constitution in relation to those of the ECHR, the review by the court must be in compliance with both the substantive and procedural rules of the domestic legislation and be developed in accordance with the purpose of Article 5 of the ECHR, namely the protection of the individual from arbitrariness (see in this context case of ECtHR *Koendjbiharie v. the Netherlands*, no. 11487/85, Judgment of 25 October 1990, paragraph 27; and case of the Court KI85/22, applicant *Jadran Kostić*, cited above, paragraph 79).

126. However, the Court notes that the requirement of procedural fairness under paragraph 4 of Article 5 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that the procedure related to paragraph 4 of Article 5 be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (see, cases of the ECtHR *A. and others v. the United Kingdom*, no. 3455/05, Judgment of 19 February 2009, paragraph 203; and *Idalov v. Russia*, no. 5826/03, Judgment of 22 May 2012, paragraph 161).

127. According to the ECtHR, for every person whose detention falls within the scope of the implementation of Article 5 (1) (c) of the ECHR, a hearing is definitely required (see, ECtHR case *Nikolova v. Bulgaria*, no 31195/96, Judgment of 25 March 1999, paragraph 58). The possibility for a prisoner "*to be heard either in person or, where necessary, through some form of representation*" features in certain instances among the fundamental guarantees of procedure applied in matters of deprivation of liberty (see, case of the ECtHR, *Kampanis v. Greece*, no. 17977/91, Judgment of 13 July 1995, paragraph 47). However, paragraph 4 of Article 5 of the ECHR does not require that a detained person be heard every time he lodges an appeal against a decision extending his detention but that it should be possible to exercise the right to be heard at reasonable intervals (see, case of the ECtHR, *Çatal v. Turkey*, no.26808/08, Judgment of 17 April 2012, paragraph 33).

128. Also, according to the ECtHR, the procedure must respect the principle of "*adversariality*" and in all cases ensure "*equality of arms*" between the parties (see, ECtHR case *Reinprecht v. Austria*, no. 67175/01, Judgment of 15 November 2005, paragraph 31). The principles of adversariality and equality of arms must be equally respected in proceedings before an appellate court. However, the ECtHR underlines that the principles of adversarial procedure and equality of arms were not violated in the cases before it, either because neither of the parties had participated in the proceedings on appeal or because the presence of the detained person's lawyer was sufficient to satisfy these requirements (see ECtHR case, *Çatal v. Turkey*, cited above, paragraph 34 and cases cited therein).

129. Also, according to the ECtHR, the right to liberty and security also includes the right to a speedy decision regarding the legality of detention as well as an order to terminate the latter if it turns out that the detention was illegal (see, in this sense the ECtHR case, *Idalov v. Russia*, cited above, paragraph 154). However, according to the ECtHR, the standard of "*speed*" is less strict, when we are dealing with appeal procedures and when the initial decision on detention was given by the court in a procedure offering appropriate guarantees of due process, and that in these circumstances, the ECtHR is prepared to tolerate longer periods of review in the proceedings before the second instance court (see ECtHR case *Shcherbina v. Russia*, no. 41970/11, judgment of 26 June 2014, paragraph 65)

(iii) Application of these principles in the present case

130. The Court notes that based on the above-mentioned principles, and insofar as they are relevant to assess the constitutionality of paragraph 4 of article 432 of the CPCRK in relation to the request for protection of legality regarding the termination of detention, it should be taken into account that Article 29 of the Constitution and Article 5 of the ECHR establish, among others, (i) the grounds on which a person can be deprived of his liberty based on the law and court decisions; (ii) the rights enjoyed by a person who is deprived of liberty, including the right to be informed about the reasons for the deprivation of liberty and the right to be brought before a judge within a certain period; and (iii) the right to use legal remedies to challenge the legality of his/her arrest or detention. Also, based on the aforementioned principles, (iv) the legal remedy in question must be effective; and that during the procedure must be guaranteed (v) the principle of equality of arms and adversariality; (vi) the right to have the case decided within the shortest possible period; and (vii) prohibition of arbitrariness in decision-making. Beyond these principles, article 29 of the Constitution and Article 5 of the ECHR place emphasis on the principle of "*legality*", namely that detention must be in compliance with the "*established legal procedure*", obliging the regulation of procedural issues at the law level.

131. In this regard, the Court notes that the aforementioned provisions of Article 29 of the Constitution and Article 5 of the ECHR, including the case law of the ECtHR, except for the requirement that is foreseen as a remedy of appeal to challenge the legality of the deprivation of liberty, in principle, do not define in detail the nature of legal remedies, nor in how many instances should the legality of detention or termination of detention be examined. From this, it follows that as long as the aforementioned guarantees from Article 5 of the ECHR have been respected, their further regulation is determined by the domestic law of each country, and which regulations the countries must respect.

132. In this regard, the Court notes that Article 171 (Authorized Measures to Ensure Presence of Defendant) of the Criminal Procedure Code, has defined detention as a measure to ensure the presence of the defendant in the proceedings. The Court also notes that according to the aforementioned article, in addition to detention, other measures have been provided for the successful implementation of the criminal procedure, namely other more lenient measures, such as: (i) summons; (ii) order for arrest; (iii) the defendant's promise that he will not leave his place of residence; (iv) prohibition to approach the specified place or person; (v) attendance at the police station; (vi) bail; and (vii) house arrest.

133. In this regard, the Court reiterates that the CPCRK has established the procedure according to which detention is imposed and extended, also determining the right to appeal against decisions on detention, both for the defendant and for the state prosecutor. In this respect, the Court recalls that, unlike the previous codes, the contested CPCRK in paragraph 4 of Article 432 has also defined the request for protection of legality that can be submitted not only in terms of the imposition and extension of detention, but also in terms of the termination of detention.

134. The Court notes that paragraph 4 of article 432 of the CPCRK does not determine the effects of the Supreme Court's decision in relation to the final decision regarding detention, but only the possibility that such a legal remedy can be used as request for protection of legality. Therefore, the effects of the decision of the Supreme Court to the detriment of the defendant are regulated in paragraph 2 of Article 438 of the Criminal Code, which will be examined separately in this Judgment.

135. The Court also notes that based on Article 433 (Persons Authorized to File Requests for Protection of Legality) of the CPCRK, it is foreseen that a request for protection of legality can be submitted by the Office of the Chief State Prosecutor, the defendant and his defense.

136. In this respect, the contested provision of the CPCRK defines the right to request an assessment of the legality of the final decision both in the case of imposing and extending

detention, as well as in the case of termination of detention. This legal remedy can be used by the prosecution, just as the legal remedy can be used against the decision to impose or extend detention by the defendant. Moreover, this provision does not foresee any limitation for the defendant, or any right that the other party would have available regarding the request for protection of legality, but not the defendant. Therefore, all the rights in the procedure that are available to the prosecution are also available to the defendant, and as such respect, in principle, the principle of "*adversariality*" and that of "*equality of arms*", mentioned above. This is also in harmony with Article 29 of the Constitution and Article 5 of the ECHR and the obligation to regulate procedural issues at the level of the law.

137. Also, in a comparative context, the Court notes that from the answers received from the member states' courts of the Venice Commission Forum, it follows that, depending on the legal regulation of the state, there is no unified practice regarding the prosecutor's right to use legal remedies such as the request for protection of legality, including in the detention procedure. Accordingly, in the respective legislations of some of the abovementioned states: (i) the prosecutor does not have an extraordinary remedies available to contest the final decisions of the regular courts, such as Sweden, the Czech Republic and Liechtenstein, while in some of the states, (ii) the prosecutor is enabled to use extraordinary legal remedies, including in the context of detention, however the latter differ in terms of the effects of the decisions when they are to the detriment of the defendant, in which case most of them, establish that this legal remedy cannot have an effect to the detriment of the defendant.

138. Therefore, the Court assesses that the determination by paragraph 2 of Article 432 of the CPCRK, that the request for protection of legality can be filed also in terms of "*termination of detention*", is not in itself contrary to Article 29 of the Constitution, in conjunction with Article 5 of the ECHR.

139. Whereas, regarding the issue raised by the Supreme Court that the provisions of detention should be interpreted in favor of remaining at liberty and that this measure should be reduced within the shortest possible time, the Court notes that in cases where a request is filed for the protection of legality due to termination of detention, the defendant has already been released from detention, therefore, it is up to the Supreme Court to decide, similarly as in cases where a request for protection of legality is filed due to the imposition or extension of detention on the legality of the termination of detention, if such a request is submitted.

140. In this regard, the Court recalls that the effects of the decision-making of the Supreme Court, as regards the request for protection of legality, including the decision-making to the detriment of the defendant, are not established by Article 432 of the Criminal Procedure Code, but by Article 438 thereof, which constitutionality will be assessed following this Judgment.

141. In the light of the above, the Court finds that the wording "*or terminating*" of paragraph 4 of Article 432 (Grounds for Filing a Request for Protection of Legality) of Code no. 08/L-032 on the Criminal Procedure, is not contrary to Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the ECHR.

II. Constitutional review of paragraph 2 of article 4 (Ne Bis In Idem), and paragraph 2 of article 438 (Judgment on Request for Protection of Legality)

142. In what follows, the Court will present, (i) the allegations of the referring Court and the arguments of the interested parties; (ii) the general principles established by the Court and the ECtHR regarding the right to liberty and security, as far as they are relevant in the circumstances of the present case; to continue with (iii) the constitutional review of

paragraph 2 of article 4 (Ne Bis In Idem), and paragraph 2 of article 438 (Judgment on Request for Protection of Legality).

(i) Allegations of the referring Court and arguments of the parties

143. The Court notes that in the context of the referrals submitted to the Court, the referring Court specifies that the cases related to the final decisions regarding detention, objection to the evidence and the dismissal of the indictment, and the final decision in the criminal proceedings, raise issues of the principle *ne bis in idem*, guaranteed by article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with paragraph 2 of article 4 (Right not to be tried or punished twice) of Protocol No. 7 of the ECHR. This is due to the fact that according to the referring Court, the Supreme Court based on paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of the CPCRK may find that the final decision is "*manifestly inappropriate or based on serious error*" and in this case, this decision-making could have an effect on the final decision even to the detriment of the defendant. In this regard, the referring Court contests paragraph 2 of article 4 of the CPCRK which stipulates that "*A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code"*; and paragraph 2 of Article 438 of the CPCRK *"If the Supreme Court of Kosovo finds that a request for protection of legality filed to the disadvantage of the defendant is well-founded, it only determines that the law was violated but without interfering in the final decision, unless if the final decision is manifestly inappropriate or based on serious error."*

144. In relation to these two provisions contested by the referring Court, the latter claims that according to the previous codes of criminal procedure, the request for protection of legality filed to the detriment of the defendants had only a declarative effect, namely the Supreme Court could only find violation of the law but without affecting the final decision. While in relation to paragraph 2 of article 438 of the CPCRK, according to them (i) it is not clear what is meant by the term used by the legislation "*manifestly inappropriate or based on serious error*"; (ii) how should the court act after finding that it is a question of a "*manifestly inappropriate decision or based on serious error*"; and (iii) if the decision to the detriment of the defendant, according to the request for the protection of the legality of the Office of the Chief State Prosecutor, with an extraordinary legal remedy, is in accordance with the constitutional principles and provisions, as well as with the judicial practice of the ECtHR. The same claims of the referring court are also supported by the People's Advocate according to which it is unacceptable for procedural actions to be based on a norm which does not clearly define when a final decision is *"inappropriate",* or when it is "*based on serious error",* as procedural norms must be clear and foreseeable.

(ii) general principles established by the Court and ECtHR regarding the right not to be tried or punished twice for the same offense

145. Regarding the allegations of the referring Court for violation of the right not to be tried or punished twice for the same offence, the Court refers to the relevant provisions of the Constitution and Article 4 of Protocol No. 7 of the ECHR.

146. The Court recalls that Article 34 of the Constitution stipulates that: *"No one shall be tried more than once for the same criminal act."*

147. The Court also refers to paragraph 1 of Article 4 of Protocol No. 7 of the ECHR which establishes that: *"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".*

[*Clarification of the Court:* for the term "*finally*", in the English version defined in Article 4 of Protocol No. 7 of the ECHR, in the Albanian version in the Judgment the term *"përfundimisht*" is used, as this term corresponds to the English term "*finally*"].

148. The Court also refers to paragraph 2 of Article 4 of Protocol No. 7 of the ECHR, which stipulates that: *"The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."*

149. From the above, it follows that according to Article 4 of Protocol No. 7 of the ECHR (i) no one can be prosecuted or punished twice for the same criminal offense for which he was finally convicted or acquitted; unless the case (ii) is reopened in accordance with the law and criminal procedure in case there are new or newly discovered facts, or there has been a fundamental defect in the previous proceedings.

150. In the following, the Court will present and elaborate the general principles of the ECtHR in conjunction with Article 4 of Protocol No. 7 of the ECHR, and the requirements that must be met so that Article 4 of Protocol No. 7 of the ECHR is applicable, focusing on the essential elements related to the circumstances of the present case. If it turns out that Article 4 of Protocol No. 7 of the ECHR is not applicable, then in the present case the guarantees of principle *ne bis in idem*, established in Article 4 of Protocol No. 7 of the ECHR, cannot be applied.

151. According to the case law of the ECtHR, the guarantee enshrined in Article 4 of Protocol no. 7 of the ECHR, occupies a prominent place in the protection system of the ECHR, as underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. The protection against duplication of criminal proceedings is one of the specific safeguards associated with the general guarantee of a fair hearing in criminal proceedings (see, the case of the ECHR, *Mihalache v. Romania* no. 54012/10, Judgment of 8 July 2019, paragraphs 47 and 48).

152. According to the ECtHR, Article 4 of Protocol no. 7 of the ECHR, states that the principle *ne bis in idem* aims to protect persons who are already "*found innocent or finally convicted"*. Explanatory Report of Protocol no. 7, in conjunction with article 4 of the ECHR, states that: "*the principle established in this provision applies only after the person has been finally acquitted or convicted in accordance with the law and penal procedure of the State concerned"*. For a person to qualify for protection under this Article, a final decision is therefore not sufficient; the final decision must also involve the person's "*acquittal or conviction*". Therefore, in each case, the ECtHR must determine whether there was an acquittal or a conviction (see, case *Mihalache v. Romania*, cited above, paragraph 88).

153. Following this, the ECtHR has underlined that he deliberate choice of the words "*acquitted or convicted*" implies that the accused's "*criminal*" responsibility has been established following an assessment of the circumstances of the case, in other words that there has been a determination as to the merits of the case. In order for such an assessment to take place, it is vital that the authority giving the decision is vested by domestic law with decision-making power enabling it to examine the merits of a case. The authority must review or evaluate the evidence in the case file and assess the applicant's involvement in one or all of the events prompting the intervention of the investigative bodies, for the purposes of determining whether "*criminal*" responsibility has been established (see, case *Mihalache v. Romania*, cited above, paragraph 97).

154. In this respect, the ECtHR places emphasis on the "*final*" decision on the conviction or acquittal of the defendant. The ECtHR has also clarified its methodology for assessing what decision is *"final*". It explained that, in ascertaining "*ordinary*" legal remedies in a particular case for the purpose of Article 4 of Protocol no. 7 of the ECHR, it refers to domestic law and procedure as its starting-point, where the characteristics of such a remedy are defined. Domestic law, both substantive and procedural, must satisfy the principle of legal certainty, which requires both that the scope of a remedy for the purposes of Article 4 of Protocol No. 7 of the ECHR (i) be clearly circumscribed in time and that (ii) the procedure for its use be clear for those parties that are permitted to avail themselves of the remedy in question. In other words, for the principle of legal certainty to be satisfied, a principle which is inherent in the right not to be tried or punished twice for the same offence, a remedy must operate in a manner bringing clarity to the point in time when a decision becomes "*final*". In particular, the Court observes in this context that the requirement of a time-limit in order for a remedy to be regarded as "*ordinary*" is implicit in the wording of the explanatory report itself, which states that a decision is irrevocable where the parties have permitted the "*time-limit*" to expire without availing themselves of such a remedy. In this regard, according to the ECtHR, a law conferring an unlimited discretion on one of the parties to make use of a specific remedy or subjecting such a remedy to conditions disclosing a major imbalance between the parties in their ability to avail themselves of it would run counter to the principle of legal certainty (see, case *Mihalache v. Romania*, cited above, paragraph 115).

155. Therefore, from the point of view of Article 4 of Protocol no. 7 of the ECHR, a legal remedy which results in a final decision, to which the guarantees of Article 4 of Protocol 7 of the ECHR apply, is not necessarily characterized by the name according to the domestic law of the state, as an "*ordinary"* remedy, but is characterized based on the characteristics of the same according to the aforementioned criteria established by the ECtHR.

156. Therefore, the ECtHR reiterated that the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings (principle *ne bis in idem*) that have been concluded by a *"final decision*". According to the Explanatory Report to Protocol No. 7, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "*decision is final*" if, according to the traditional expression, it has acquired the force of - *res judicata*. This is the case when it is irrevocable, that is to say when no further "*ordinary remedies"* are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them (see in this regard, ECtHR cases, *Sergey Zolotoukhin v. Russia*, no. 14939/03, Judgment of 10February 2009, paragraph 107; and *Nikitin v. Russia*, no. 50178/99, Judgment of 20 July 2004, paragraph 37).

157. Following this, the ECtHR has specified that, decisions against which an "*ordinary*" appeal lies are excluded from the scope of the guarantee contained in Article 4 of Protocol No. 7 as long as the time-limit for lodging such an appeal has not expired. On the other hand, according to the ECtHR, extraordinary remedies such as a (i) request for the reopening of the proceedings or an (ii) application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although these remedies represent a continuation of the first set of proceedings, the "*final*" nature of the decision does not depend on their being used (see, the case of *Sergey Zolotukhin v. Russia*, cited above, paragraph 108).

158. In case *Mihalache v. Romania*, in 2008 the applicant was stopped by the police while driving his vehicle and after he underwent a breath test, he appeared to be positive, he refused to give a biological sample in order to establish his blood alcohol level. The criminal proceedings initiated against him was terminated after the prosecutor's office decided that his actions were not serious enough to bring criminal charges. Therefore, he was only obliged to pay an administrative fine. The possibilities to appeal against this decision were

exhausted. In 2009, the high prosecutor's office reopened his case on the grounds that the administrative fine was not sufficient in light of the danger the applicant had caused to society. In this respect, the ECtHR found that he had been tried twice for the same offense and that, as a consequence, Article 4 of Protocol no. 7 of the ECHR was applicable since the case had been reopened as a result of the order of the higher level prosecution for reopening the case. In this context, in assessing whether in the present case the legal remedy used by the prosecution was "*ordinary*", the ECtHR found that this was not the case. This is because according to the ECtHR, an opportunity to review and reopen (i) on its own initiative, in the context of hierarchical supervision, the merits of decisions taken by a prosecutor of a lower instance, regarding which the possibilities of appeal were exhausted, and to annul it, (ii) without being bound by any specific deadline by the prosecution, did not constitute an "*ordinary legal remedy*" and as such, this legal remedy did not affect the question of the finality of the decision taken by the prosecutor's office that had decided that his actions were not serious enough to bring criminal charges in 2008, against which even the possibilities for appeal had been exhausted.

159. In case *Sundqvist v. Finland,* the ECTHR, in the light of the applicable domestic law, it found that a prosecutor's decision not to initiate a prosecution should not be regarded as a "*final*" decision. Consequently, the fact that the General Prosecutor had later filed charges against the Applicant even though a state prosecutor had decided not to prosecute the person for a criminal offense, did not constitute any new proceedings that were included in the scope of Article 4 of Protocol no. 7 of the ECHR. The ECtHR emphasized that the waiver of criminal prosecution by a prosecutor is not equivalent to either a conviction or finding not guilty and that, therefore, Article 4 of Protocol no. 7, does not apply in this situation (see the case of ECHR *Smirnova and Smirnova v. Russia* no. 75602/01, Decision of 25 November 2005).

160. The ECtHR has also emphasized that Article 4 of Protocol No. 7 of the ECHR is not applicable even in the closure of a criminal proceeding decided for reasons of amnesty for acts that constitute serious violations of fundamental rights, such as war crimes against civilian population. In this regard, the ECtHR stated that it would be contrary to the state's obligations under Articles 2 and 3 of the ECHR to grant amnesty for murder or ill-treatment of civilians, and it has pointed out the existence of a growing tendency in international law to consider amnesty for serious violations of human rights as unacceptable. Consequently, it came to the conclusion that the filing of a new indictment against a person granted amnesty for such acts should not be included in the scope of Article 4 of Protocol no. 7 of the ECHR (see the case of the ECHR, *Marguš v. Croatia,* no. 4455/10, Judgment of 27 May 2014).

(iii) Application of these principles in the present case

161. Based on the aforementioned principles established by the ECtHR, it follows that:

(i) no one can be prosecuted or punished twice for the same criminal offense for which he was "*finally"* convicted or acquitted ; unless
(ii) the case is reopened in accordance with the law and criminal procedure where there are new or newly found facts, or there was a fundamental defect in the previous proceedings.

162. In order for Article 34 of the Constitution and Article 4 of Protocol no. 7 of the ECHR, to be applicable, and the defendants to enjoy protection from the aforementioned article, in addition to other criteria, it must be assessed if the criteria below are met cumulatively:

(i) Whether both procedures were "*criminal*" in nature; and if so,
(ii) did both proceedings relate to the same offense for which a person is "*acquitted or convicted"* by a "*final decision*".

163. In the present case, based also on the allegations of the referring Court, which raise the issue of deciding to the detriment of the defendants by the request for protection of legality, and that in terms of the clarity of the term "*inappropriate decision or based on serious error*" but also in context of principle *ne bis in idem*, first, it must be assessed whether the request for protection of legality, before the Supreme Court, consists in duplicating the procedure against the defendants, namely whether a decision of the Court of Appeals is "*final*" decision within the meaning of principle *ne bis in idem*, guaranteed by Article 34 of the Constitution and Article 4 of Protocol No. 7 of the ECHR.

164. Based on the aforementioned principles, in order to assess whether a decision is "*final*" from the point of view of Article 4 of Protocol No. 7 of the ECHR, regarding "*acquittal or conviction for a criminal offense*", the aforementioned principles established by the ECtHR will be taken into account, according to which it results that: (i) in order that the guarantees of Article 4 of Protocol no. 7 of the ECHR to be applicable, a "*final decision*" is not sufficient, but the final decision must also include the finding of "*acquittal or conviction of the person*"; (ii) the decision-making authority must possess the decision-making power conferred by domestic law enabling it to consider the merits of a case; (iii) a decision is "*final*" if the latter, according to one of the essential principles of the right to a fair and impartial trial, has become *res judicata*, namely if the decision is irrevocable, that means that against that decision there is not any possibility of submitting legal remedies that meet the criteria of Article 4 of Protocol No. 7 of the ECHR, or when the parties have exhausted these remedies or missed the deadlines set by law without exercising them; (iv) in the assessment of whether a legal remedy is "*ordinary*" or "*extraordinary*", the law and domestic procedures are taken as a starting point, but the assessment is based on the characteristics of the legal remedy, and not only its name, namely that the latter must be in harmony with the principle of legal certainty, within the meaning of Article 4 of Protocol no. 7 of the ECHR, namely that a legal remedy for the purposes of Article 4 of Protocol no. 7 of the ECHR must be (a) clearly defined in time; and that (b) the procedure for its use is clear to those parties who are affected and who are allowed to use the legal remedy in question; (v) decisions against which it is possible to use legal remedies according to the aforementioned criteria, do not benefit from the guarantee contained in Article 4 of Protocol no. 7 of the ECHR, as long as the appeal deadline has not expired; and (vi) a law that (a) confers an unlimited discretion, including in terms of time, to one of the parties to use a particular legal remedy; or (b) subjecting such a remedy to conditions which point out a great imbalance between the parties in their possibility to exercise it, would be contrary to the principle of legal certainty.

165. Therefore, in the following, the Court will assess the aforementioned criteria in relation to paragraph 2 of article 4 of the CPCRK which determines that the final decision can be modified by extraordinary legal remedies and paragraph 2 of article 438 of the CPCRK which establishes that through the request for protection of legality, the Supreme Court, exceptionally, can also decide to the detriment of the defendant if *"the final decision is manifestly inappropriate or based on serious error"*.

166. The Court once again refers to paragraph 1 of article 4 (Ne Bis In Idem) of the CPCRK, which establishes that: **"***No one may be prosecuted and convicted of a criminal offense for which he has been acquitted or for which he has been convicted by a final court decision, respectively if the criminal proceedings against him have been terminated by a final decision of a court or the indictment has been rejected by a final court decision."*

167. However, paragraph 2 of article 4 stipulates that *"A final decision of a court may be reversed through extraordinary legal remedies, except when otherwise provided by this Code."*

168. Consequently, it results that according to Article 4 of the CPCRK, the final decision can be modified through extraordinary legal remedies. This provision does not determine whether (i) such a decision can be modified to the benefit or even to the detriment of the defendant; nor (ii) other effects in relation thereto. Moreover, this provision refers to all extraordinary legal remedies, therefore in addition to (i) the request for protection of legality; also applies in relation to (ii) the request for the reopening of proceedings; and (iii) the request for extraordinary mitigation of punishment.

169. However, the manner of filing extraordinary legal remedies, the parties authorized to file them, as well as the effects in relation to the defendants, are regulated by other provisions of the CPCRK, including paragraph 2 of Article 438 of the CPCRK. As a result of this, in the following, paragraph 2 of article 4 of the CPCRK will be assessed in conjunction with paragraph 2 of its article 438, in the sense of the effects of the request for protection of legality, namely those that may also result to the detriment of the defendant.

170. In this regard, the Court reiterates that sub-chapter V [Extraordinary Legal Remedies] of the CPCRK establishes extraordinary legal remedies which include (i) requests for reopening of criminal proceedings; (ii) request for protection of legality; and (iii) request for extraordinary mitigation of punishment.

171. According to paragraph 3 of Article 419 (Extraordinary Legal Remedies) of the CPCRK *"A party may request protection of legality within three (3) months from the day of filing the final judgment or final ruling against which protection of legality is sought,"* which results that the request is limited in time.

172. The Court further notes that according to paragraph 1 of Article 433 (Persons Authorized to File Requests for Protection of Legality) of the CPCRK *"A request for protection of legality may be submitted by the Office of the Chief State Prosecutor, the defendant and his defense counsel."* While according to paragraph 2 of this article*: "The Office of the Chief State Prosecutor, the defendant and his defense counsel and the persons listed in Article 424 paragraph 1 of the present Code may file a request for protection of legality within three (3) months of the service of the final judicial decision".* From this, it turns out that the request for protection of legality is open to both the defendant and the prosecution.

173. Based on paragraph 1 of Article 432 of the CPCRK, the request for protection of legality may be submitted (i) on the ground of violation of the criminal law; (ii) on the ground of essential violation of the provisions of the criminal procedure provided for in article 384, paragraph 1 of the CPCRK; or (iii) on the ground of other violations of the provisions of the criminal procedure when such violations have affected the legality of the court decision. Based on paragraph 3 of article 432 of the CPCRK, the Chief State Prosecutor can submit a request for the protection of legality on the grounds of any violation of law. However, based on paragraph 2 of the same article: *"A request for protection of legality may not be filed on the ground of an erroneous or incomplete determination of the factual situation, nor against a decision of the Supreme Court of Kosovo in which a request for the protection of legality was decided upon".*

174. Also, the Court notes that according to article 440 (Protection of Rights Under the Constitution of the Republic of Kosovo, European Convention on Human Rights and European Court of Human Rights) of the CPCRK, the extraordinary legal remedies under the present Chapter may be filed on the basis of rights available under the CPCRK which are protected under the Constitution of the Republic of Kosovo or the European Convention on Human Rights and its Protocols, as well as any decision of the European Court of Human Rights.

175. Moreover, based on paragraph 1 of Article 438 of the CPCRK, when the Supreme Court ascertains that the request for the protection of legality is grounded, it renders a judgment

by which, taking into account the type of violation: (i) modifies the final decision; (ii) annuls the decision of the basic court and of the higher court in whole or in part and remands the case; or (iii) is limited only to proving a violation of law. Moreover, based on paragraph 2 of this article, which has also been contested before the Court, the Supreme Court decides in favor of the defendant, unless the final decision is "*manifestly inappropriate or based on serious error"*, which means that in this case it can also decide to the detriment of the defendant.

176. As for the effects of the final decision, the Court refers to article 485 (Finality and Enforceability of Decisions) of the CPCRK, whereby in paragraph 1 establishes that: "*A judgment shall become final when it may no longer be contested by an appeal or when no appeal is permitted*." While paragraph 2 of article 485 of the CPCRK establishes that *"A final judgment is executed if its service has been effected and if there are no legal obstacles to its execution. If an appeal has not been filed, or if the parties have waived the right to appeal or abandoned the appeal filed, the judgment is considered executable upon the expiry of the period of time prescribed for appeal or upon the day of the waiver or abandonment of the appeal."* Moreover, according to paragraph 4 of article 435 of the CPCRK "*The provisions applicable to the execution of criminal sanctions are set forth in separate legislation*."

177. Therefore, the Criminal Procedure Code defines two issues related to the effects of a final decision, namely, (i) that a Judgment becomes such if it is not contested by appeal or the appeal is not permitted; and that in case a decision becomes final, the latter is (ii) enforceable; except (iii) when after the request for protection of legality, it is decided that the execution of the same is postponed.

178. Therefore, based on the above, it follows that:

(i) the request for protection of legality may be submitted within three (3) months from the service of the final decision, thus it is limited in time and is not at the discretion of the prosecution without legal deadlines;
(ii) the effect of a final court decision is that it becomes enforceable, but may be subject to postponement or interruption of execution by a court decision if the legal requirements are met;
(iii) the request for protection of legality can be submitted in cases of violation of substantive and procedural law, but not for erroneous or incomplete determination of the factual situation;
(iv) the request for protection of legality is open (a) as to the defendant; as well as for (b) the state prosecutor's office; and that
(v) the Supreme Court has the jurisdiction to uphold or modify the final decision, remand the case for retrial or render a declaratory decision.

179. Following this, the Court assesses that a criminal decision becomes final, in the sense of *res-judicata*, for the purposes of Article 34 of the Constitution and Article 4 of Protocol 7 of the ECHR, when the law does not establish a legal remedy according to the legislation in force to object it; or when legal remedies, provided by law are not exercised against it within the legal deadlines, either by the defendant or by the prosecutor; or when the latter is upheld by the highest court instance.

180. Furthermore, the Venice Commission has emphasized that the principle of *res judicata* means that when an appeal has been finally adjudicated, further appeals are not possible. Final judgments must be respected, unless there are compelling reasons for reopening them (see, *Compilation of Venice Commission Opinions and Reports Concerning Legal Certainty*, [CDL-PI(2022)004] of 21 March 2022, para. 63).

181. In this regard, the Court also refers to its case KO95/20, in which case the disputed was whether on the day of voting one of the deputies was convicted of a criminal offense, and the Court found that the latter (i) *"was convicted of a criminal offense by a final decision of the Court of Appeals*", and (ii) "*received the final decision of the Court of Appeals and the final decision of the Supreme Court*", by placing the emphasis on the final decision of the Supreme Court (see, the case of the Court KO95/20, applicants *Liburn Aliu and 16 other deputies of the Assembly of the Republic of Kosovo,* Judgment of 21 December 2020, paragraph 253).

182. In this respect, the Court assesses that in content, despite the name and for the purpose of defining its nature and scope based on the principles of Article 4 of Protocol no. 7 of the ECHR, the request for protection of legality is a complaint on a matter of law (substantive and procedural) that, in principle, does not stay the execution, and that assesses the legality of the decisions of lower instances. In this regard, according to the CPCRK, the Supreme Court has full jurisdiction to confirm, modify or remand the case for retrial in the lower courts, and in this case, its decision is final.

183. Therefore, the Court assesses that from the very nature of the request for protection of legality results that the latter is included as an "*extraordinary legal remedy*" according to the naming of the CPCRK, but it is the continuation of the same criminal procedure that has resulted in a final decision, which decision becomes *res-judicata* for the purpose of *the ne bis in idem* principle, established in Article 34 of the Constitution and Article 4 of Protocol No. 7 of the ECHR, (i) is not contested in the Supreme Court through the request for protection of legality or the deadlines for such a thing lapse; or (ii) after the decision of the Supreme Court, if such a request has been made. In this regard, the request for protection of legality concerns allegations of legal violations that occurred in lower-instance proceedings, and does not concern the discovery of new facts previously unknown.

184. Moreover, the Court assesses that the request for protection of legality, regardless of the name, meets the criteria defined by the ECtHR regarding legal certainty, as the latter:

(i) is open to both the defendant and the prosecution;
(ii) is limited in time, namely it can be filed only within three (3) months from the date of receipt of the final decision;
(iii) the jurisdiction of the Supreme Court regarding this legal remedy is clear in terms of the violations that may be filed, including substantive and procedural law, and the fact that the latter cannot be filed on the grounds of erroneous determination of factual situation;
(iv) is a continuation of the procedure of the lower instance and does not consider new facts that were not dealt with earlier in the procedure;
(v) the provisions of the CPCRK clearly define the effects of decision-making in the Supreme Court, in which case, the latter can only decide in favor of the defendant, unless the final decision *"is manifestly inappropriate or based on serious error"*.

185. Based on the elaboration and clarification as above, it cannot be concluded that the request for protection of legality falls within the scope of Article 4 of Protocol no. 7 of the ECHR, since before the decision of the Supreme Court in the framework of the request for protection of legality, the person was not convicted or acquitted by a decision that is *res-judicata* for a criminal offense, according to the principles established by the case law of the ECtHR.

186. Consequently, in the present case, the Court assesses that the guarantees established in Article 4 of Protocol No. 7 of the ECHR cannot be applied.

187. Moreover, the Court also notes that, unlike the request for protection of legality, the Criminal Procedure Code has defined the request for reopening of proceedings as a separate legal remedy.

188. In this context, the Court refers to Article 422 (Reopening of Criminal Proceedings Dismissed by a Final Ruling) and Article 423 (Reopening Criminal Proceedings Terminated by Final Judgment) of the CPCRK, which are related with the cases where we are dealing with the reopening of the procedure, namely if we are dealing, among others, with (i) the commission of criminal offenses by the state prosecutor, namely the judge; (ii) when the judgment is based on forged documents; or (iii) if new facts are discovered. This legal remedy, unlike the request for protection of legality, clearly falls within the scope of Article 4 of Protocol no. 7, as it reopens the case decided by a final decision or by a *res-judicata* decision, and is subject to its reconsideration, based on the new facts and circumstances and with long time limits, up to (5) years, when such a remedy may be used.

189. In this context, the aforementioned conclusion is related to the cases that have been submitted before the Court and are related to the decision to dismiss the indictment and the decision ending the criminal proceedings. As for the cases of detention, it should be reiterated that in those cases we also do not have a final decision regarding "*acquittal or conviction*" for a criminal offense, as it is a procedure that is only related to ensuring the presence of the defendants in criminal proceedings which is ongoing.

190. Furthermore, the Court notes that the referring Court also requests the Court to clarify the term used in paragraph 2 of Article 438 of the CPCRK "*manifestly inappropriate or based on serious error*", as this may cause ambiguity in interpretation; raising the question of how the latter should act after having ascertained that it is a matter of a "*manifestly inappropriate decision or based on serious error*".

191. The Court recalls that paragraph 2 of Article 438 must be interpreted within the framework of the procedural guarantees established in Articles 29 and 31 of the Constitution and Articles 5 and 6 of the ECHR, respectively as well as within the framework of other guarantees that may affect the defendant's rights and freedoms, which are embodied in the Constitution, and throughout all the provisions of the CPCRK. Therefore, during the interpretation of the term "*manifestly inappropriate"* or "*serious error*", the Supreme Court must take into account the constitutional norms, including Article 53 of the Constitution, which stipulates that the interpretation of human rights is done in accordance with the decisions of the ECtHR, which obligation applies to all courts, including the Supreme Court.

192. In this regard, as far as legal certainty is concerned, the Venice Commission emphasized that it is "*essential to the confidence in the judicial system and the rule of law",* which requires that the legal rules be clear and precise, and that they aim for legal situations and relationships to remain predictable (see, *Opinion of the Venice Commission on the draft law on introducing the amendments and addenda to the judicial code of Armenia*, [CDL-AD(2014) 021], of 16 June 2013, paragraph 18).

193. In this regard, the Court recalls the case law of the ECtHR that the expression "*in accordance with law"* not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the persons concerned and foreseeable as to its effects. One of the requirements flowing from the expression "*in accordance with law*" is foreseeability. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct. Therefore, they must be able, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, according to ECtHR, such consequences need not be foreseeable with absolute certainty: experience shows this to be

unattainable. (see case of ECtHR, *Tommasi v. Italy*, no, 43395/09, Judgment of 23 February 2017, paragraphs 106 and 107).

194. In relation to the above, the Court emphasizes that Article 438 of the CPCRK stipulates that the request for protection of legality filed to the detriment of the defendant, if it is grounded, in principle, has only a declarative effect. Exceptionally, the latter may have an effect to the detriment of the defendant, if the final decision is "*manifestly inappropriate or based on serious error*".

195. Therefore, as the terminology used by the legislator suggests, the decision to the detriment of the defendant comes to expression only in very exceptional cases when we are dealing with a "*manifestly inappropriate*" or based on a "*serious error*" decision. In this respect, it should be clearly stated that both of these grounds necessarily entail serious legal, procedural or substantive violations, which call into question the integrity of the decision-making that resulted in a final decision. The Court also emphasizes that such decision-making, including based on legal mechanisms to ensure consistency in its case law, to the detriment of the defendant must be in full compliance with the human rights guaranteed by the Constitution and the case law of the ECtHR, as well as other provisions of the CPCRK, as will be clarified below.

196. Therefore, the Court assesses that these exceptions can be applied only in cases of serious violations of the law by the lower courts, according to the abovementioned clarifications. In other circumstances, the Supreme Court must adhere to the principle that the decision to the detriment of the defendant has only a declarative effect.

197. The Court also emphasizes that the determination in paragraph 2 of article 438 of the CPCRK that the decision-making in the Supreme Court, if it is to the detriment of the defendant, has only a declarative effect, should come to expression all the more in cases of detention , in which case, as the Supreme Court itself points out, "*the right to liberty and security should be interpreted in favor of remaining at liberty and this measure (as a more severe measure) should be reduced in the shortest possible time*".

198. In this respect, the Court emphasizes that, as it has been emphasized in its case law, the regular courts, including the Supreme Court, have the right and moreover the obligation to adjudicate, initially according to the Constitution, during the exercise of their functions, and then according to the law (see the case of the Court KI207/19, applicant *The Social Democratic Initiative, New Kosovo Alliance and the Justice Party*, Judgment of 10 December 2020, paragraph 124). Having said that, also the Supreme Court is obliged that, in addition to the procedural rights of the defendants established in the CPCRK, it must also take care of the fundamental rights stipulated by the Constitution and the ECHR, including the right to a fair and impartial trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, as well as the right to liberty and security established in Article 29 of the Constitution and Article 5 of the ECHR.

199. As for the actions that the Supreme Court should undertake in those cases when it has to decide to the detriment the defendants, the Court recalls that based on paragraph 1 of Article 438 of the CPCRK, when the Supreme Court finds that the request for the protection of legality is grounded, renders a judgment by which, given the type of violation, it can (i) modify the final decision; or (ii) annul in whole or in part the decision of the basic court and the higher court and remands the case for retrial.

200. In this regard, the Court recalls its case KI104/16, in which it found that by not summoning the applicant to be present at the session of the Court of Appeals in which his guilt was determined, the applicant was denied the opportunity to defend himself against the charges against him. As a result, the Court concluded that there has been a violation of the applicant's right to a fair trial, as guaranteed by Article 31 of the Constitution in conjunction

with Article 6, paragraphs 1 and 3, subparagraphs (c) and (d) of the ECHR (see the case of the Court KI104/16, applicant *Miodrag Pavić*, Judgment of 29 May 2017).

201. In this regard, the Court also in the present case emphasizes that, in terms of legal certainty, including the foreseeability and consistency of decision-making, it is up to the Supreme Court that during its decision-making, in addition to being consistent in the way the aforementioned exception "*manifestly inappropriate or based on serious error"* is applied, that it is also the purpose of this norm, to only exceptionally decides to the detriment of the defendants. In this regard, it is also up to it to use, if necessary, legal mechanisms to ensure consistency in its case law.

202. Likewise, the Court assesses that it is up to the Supreme Court that in case through request for protection of legality, it considers that the contested decision is "*manifestly inappropriate or based on serious error",* it is obliged to offer the parties all the procedural safeguards guaranteed by the Constitution and ECHR. More specifically, in determining whether the latter, (i) modifies the final decision; or (ii) in whole or in part annuls the decision of the basic court and of the higher court and remands the case for retrial, it must make those legal solutions that it considers ensure the rights of the defendants in the procedure, as guaranteed by Constitution, ECHR and the CPCRK, with emphasis on the principles of the right to a fair trial guaranteed by Article 31 of the Constitution and Article 6 of the ECHR, which establish, among others, (i) the right to be heard; (ii) the "*adversarial*" principle and that of the "*equality of arms*"; and (iii) the right to legal remedies and judicial protection of rights. It is up to the Supreme Court to also, when this is necessary, take into account paragraph 2 of Article 3 (Presumption of Innocence of Defendant and In *Dubio Pro Reo*) of the CPCRK which stipulates that "*Doubts regarding the existence of facts relevant to the case or doubts regarding the implementation of a certain criminal law provision shall be interpreted in favor of the defendant and his rights under the present Code and the Constitution of the Republic of Kosovo.*"

203. In this respect, the Court emphasizes that the decision-making of the Supreme Court, including issues raised above, may be subject to constitutional review at the request of the authorized parties, based on paragraph 7 of Article 113 (Jurisdiction and Authorized Parties) of the Constitution.

204. Based on the above, and based on the procedural guarantees that must be ensured during the implementation of the contested provisions of the CPCRK, including the case law of the ECtHR, the Court finds that paragraph 2 of Article 4 (Ne Bis In Idem); as well as the wording "*unless if the final decision is manifestly inappropriate or based on serious error*" from paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of Code no. 08/L-032 of Criminal Procedure, are not contrary to Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with Article 4 (2) (Right not to be tried or punished twice) of Protocol No. 7 of the European Convention on Human Rights.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with articles 113.8 and 116 of the Constitution, articles 51, 52 and 53 of the Law and based on rules 75 and 48 (1) (a) of the Rules of Procedure, on 15 May 2024:

DECIDES

I. TO DECLARE, unanimously, the Referral admissible;

II. TO HOLD, unanimously, that the wording "*or terminating"* of paragraph 4 of article 432 (Grounds for Filing a Request for Protection of Legality) of the Code no. 08/L-032 of the Criminal Procedure, is not contrary to item 2 of paragraph 1 of Article 29 [Right to Liberty and Security] of the Constitution in conjunction with Article 5 (Right to liberty and security) of the European Convention on Human Rights;

III. TO HOLD, unanimously, that paragraph 2 of article 4 (Ne Bis In Idem) of Code no. 08/L-032 of Criminal Procedure is not contrary to Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with paragraph 2 of Article 4 (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights;

IV. TO HOLD, with five (5) votes for and four (4) against, than the wording "*unless if the final decision is manifestly inappropriate or based on serious error"* of paragraph 2 of Article 438 (Judgment on Request for Protection of Legality) of Code no. 08/L-032 of Criminal Procedure, is not contrary to Article 34 [Right not to be Tried Twice for the Same Criminal Act] of the Constitution in conjunction with paragraph 2 of Article 4 (Right not to be tried or punished twice) of Protocol no. 7 of the European Convention on Human Rights;

V. TO NOTIFY this Judgment to the Parties;

VI. TO HOLD that this Judgment is effective on the date of its publication in the Official Gazette, in accordance with paragraph 5 of Article 20 (Decisions) of the Law.

Judge that prepared Judgment	**President of the Constitutional Court**
Jeton Bytyqi	Gresa Caka-Nimani

This translation is unofficial and serves for informational purposes only.