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SPECIALIST PROSECUTOR'S OFFICE
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In:	**KSC-BC-2023-12/IA002** **Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi**
Before:	**Court of Appeals** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Dr Fidelma Donlon
Filing Participant:	Specialist Prosecutor's Office
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Public redacted version of 'Prosecution appeal against the "Decision on the Confirmation of the Indictment" (F00036) with Public Annexes 1 and 2'

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I. INTRODUCTION

1. On 29 November 2024, the Pre-Trial Judge ('PTJ') rendered a decision confirming, in part, the SPO's indictment which alleges obstructive criminality perpetrated in concert by Hashim THAÇI, Bashkim SMAKAJ, Isni KILAJ, Fadil FAZLIU and Hajredin KUÇI.[1]

2. At the SPO's request, four discrete issues were certified for appeal.[2] Each of these issues involve manifest misinterpretation of the Kosovo Criminal Code[3] that materially affected the Confirmation Decision, causing the PTJ to not confirm certain counts in whole, or in part.

3. By failing to interpret the relevant provisions according to their plain and ordinary meaning, and by adopting legal positions wholly unsupported by the plain text, the PTJ erred in law. The remedial intervention of the Court of Appeals is therefore required to reverse these errors, apply the law correctly pursuant to its standard of review,[4] and reinstate the relevant indictment counts as described below.[5]

II. SUBMISSIONS

A. GROUND ONE: THE PRE-TRIAL JUDGE MISINTERPRETED ARTICLES 35(1) AND 401(2) KCC BY REQUIRING ALL MATERIAL ELEMENTS OF THE AGREED OFFENCE TO BE PRESENT

4. On 3 September 2023, THAÇI and KUÇI met in the Detention Centre and agreed on a detailed plan to interfere with SPO witnesses. However, the PTJ declined to

[1] Decision on the Confirmation of the Indictment, KSC-BC-2023-12/F00036, Confidential, 29 November 2024 ('Confirmation Decision').
[2] Decision on Specialist Prosecutor's Request for Leave to Appeal the "Decision on the Confirmation of the Indictment", KSC-BC-2023-12/F00149, 30 January 2025.
[3] Criminal Code of the Republic of Kosovo, Code No. 06/L-074, Official Gazette of the Republic of Kosovo, No. 2, 14 January 2019 ('KCC').
[4] Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, KSC-BC-2020-07/IA001/F00005, 9 December 2020, paras 4-14.
[5] Annex 1 contains a List of Authorities. Annex 2 is the SPO's internal translation of the *Salihu et al.* commentary on Article 35 KCC, which was relied on by the PTJ and is discussed below in relation to the First Issue certified for appeal.

confirm Counts 2 and 19 in respect of this conduct,[6] namely, the alleged *agreement* by THAÇI and KUÇI to commit the offence of obstructing official persons in performing official duties, in violation of Articles 35(1) and 401(2) KCC. The PTJ's core reasoning was that, when agreeing to commit an offence, per Article 35(1) KCC, 'the material elements of the offence *must exist at the time of the agreement*' (emphasis added); and that if the existence or formation of a 'group' of three or more persons is not demonstrated by the supporting material, per Articles 401(2) and 113(12) KCC, the charge cannot be legally sustained.[7]

5. The PTJ misunderstood the nature of the liability at issue, and misapplied the law by introducing legal conditions not required by Article 35(1) KCC, which reads as follows:

> **Article 35**
> **Agreement to commit criminal offense**
>
> 1.Whoever *agrees* with *one or more* other persons to commit a criminal offense and one or more of such persons *does any substantial act towards* the commission of the criminal offense, shall be punished as provided for the criminal offense. (emphasis added)

6. It is clear that *nothing* in the wording of Article 35(1) KCC requires all of the material elements of the agreed offence to be in place for this provision to apply.[8] Indeed, when setting out the applicable law for Article 35(1) KCC, the PTJ noted that

[6] Confirmation Decision, KSC-BC-2023-12/F00036, paras 173-180.
[7] Confirmation Decision, KSC-BC-2023-12/F00036, paras 175-178.
[8] The sole authority cited by the PTJ in support of this view is the non-binding *Salihu et al.* commentary. *See* Confirmation Decision, KSC-BC-2023-12/F00036, fn.378. However, the SPO considers that such a strict view is incompatible with the plain wording and legal nature of Article 35(1) KCC, which is, in substance, a provision that criminalises activity that pre-exists the realisation of the offence, i.e. *before* the material elements crystallise. Notably, the *Salihu et al.* commentary does not state that *all* material elements of the agreed offence need to be present, but rather that the agreement 'defines *at least*, *some* elements which make the act more concrete' and '*some* important factual elements must be defined' (emphasis added). *See Salihu et al.* commentary, Article 35, marginal number 5, found at Annex 2 to this filing. As such, the commentary is not persuasive and clear authority for the proposition that all material elements of the planned offence be present at the point of agreement.

'a perpetrator attempts the commission of an offence by […] fulfilling *one or more* of the material elements of the offence' – not all of them.[9]

7. Thus, the provision is inchoate in nature – it criminalises the *agreed preparation* of criminality, not its actual fulfilment. By analogy, and similarly, the attempted commission of a previously agreed crime is characterised by the fact that the perpetrator does not (yet) fulfil *all* objective elements despite his or her intention to do so.[10] The PTJ's reasoning, which is converse to KSC caselaw,[11] thus erroneously conflates an agreement to commit a crime with its substantive enaction.

8. It follows that in the context of group criminality, such as that proscribed by Article 401(2) KCC, where two persons initially *agree* to commit that offence, for criminal liability to attach via Article 35(1) KCC, it is ultimately irrelevant (both in fact and in law) whether a third person later participates in the (initially bilaterally agreed) criminality.[12] This is the logical import of Article 35(2) KCC, which provides that: 'the term "substantial act towards the commission of a crime", *need not be a criminal act*, but shall be a *substantial preparatory step* towards the commission of the crime which the persons have agreed to commit.' (emphasis added)

9. The 3 September 2023 meeting between THAÇI and KUÇI was such a preparatory step, as the PTJ expressly found.[13] Importantly, conduct proscribed by

[9] Confirmation Decision, KSC-BC-2023-12/F00036, para.107. It is only later in the decision, when applying the law at para.175, that the PTJ stipulates that 'the material elements must be present.'
[10] *Ongwen* Trial Judgment, para.2699; *Katanga* Confirmation Decision, para.460.
[11] In the *Gucati & Haradinaj* case, when discussing Article 35(1) KCC, neither the Confirmation Decision nor the Trial Judgement stipulate that, as a matter of law, the material elements of the agreed offence must be present at the point of agreement. *See Gucati & Haradinaj* Confirmation Decision, paras 93-94, 142-145; and *Gucati & Haradinaj* Trial Judgment, paras 197-199, 776-780.
[12] This would not 'create a new offence', as the PTJ opines. Confirmation Decision, KSC-BC-2023-12/F00036, para.180. Rather, it is simply the plain application of the terms of Article 35(1), which provides for the criminalisation of two people *agreeing* to commit another offence, irrespective of what that separate offence materially requires *in toto* at the point of *commission*. Moreover, while framed as a mode of liability, Article 35(1) KCC nevertheless provides for criminal sanction itself, thus enabling it to punish an agreement to carry out prohibited conduct *that does not factually come about*.
[13] Confirmation Decision, KSC-BC-2023-12/F00036, para.296.

Articles 35(1) read with 401(2) KCC need not occur simultaneously. As a matter of plain logic, it is entirely possible – and indeed foreseeable – that two persons may agree to set in motion conduct intended to violate Article 401(2) KCC, without each objective element of the latter offence being extant at the point of agreement.[14] To hold otherwise would collapse the distinction between agreeing to commit a crime, and the realisation of that crime, and would effectively render Article 35's criminalisation of an agreement between 'one or more persons' a nullity in a case such as this.[15]

10. Given that the PTJ,[16] and KSC caselaw generally,[17] refers to the 'material elements' as those which constitute the '*actus reus*' of the crime, the PTJ's insistence that 'the material elements must be present' would effectively make Article 35(1) KCC – and the specific concept of (pre-commission) conspiracy liability it entails – redundant, and contrary to the principle of effectiveness.[18]

11. More generally, the PTJ's standard that 'the material elements must exist at the time of the agreement', made without any legal authority in support,[19] would generally be an unclear and unworkable standard, and necessarily exclude many criminal offences in its application. For example, where two people agree to commit

[14] By way of analogy, the crime of genocide and conspiracy to commit genocide are distinct and separate criminal violations. Liability for the latter does not require proof of the former. *See Tolimir* Appeal Judgment, para.582.
[15] This logic is likewise evident in the *Gucati & Haradinaj* Trial Judgment's presentation of its findings in relation to conduct that was deemed to be in violation of Article 35(1) and 401(2) KCC. The analytical focus of Trial Panel II was on the *agreement* to commit the charged offences (and related preparatory steps), *not* the material elements of the offence itself. Indeed, when determining Article 35(1) liability, Trial Panel II does *not* stipulate that, as a matter of law, the material elements of the offence must have been present at the point of agreement, nor does it embark on such a material element-based analysis in order to assign Article 35(1) liability. *See Gucati & Haradinaj* Trial Judgment, paras 776-780.
[16] Confirmation Decision, KSC-BC-2023-12/F00036, para.51.
[17] *See e.g. Mustafa* Trial Judgment, para.646; *Thaçi et al.* Confirmation Decision, para.57.
[18] *Katanga* Trial Judgement, para.46.
[19] The reference to paras 678-691 of the *Gucati & Haradinaj* Trial Judgment at fn.381 of the Confirmation Decision does not assist the PTJ's reasoning, as Gucati and Haradinaj were not convicted of Article 35(1) KCC liability in respect of Article 401(2) KCC, but rather *fully perpetrating the offence* pursuant to Article 17 KCC. *See Gucati & Haradinaj* Trial Judgement, paras 776-780, 1012(b), 1015(b).

the crime of murder, it is unclear how the material elements of this crime could possibly exist at the time of an agreement to commit this crime.

12. It is a fundamental tenet of statutory interpretation, and a general principle of law, that legal provisions be interpreted in good faith, according to their ordinary meaning, in light of their object and purpose,[20] and that when construing written instruments – including domestic criminal codes – the grammatical and ordinary sense of the words should be adhered to.[21] The KCC should be treated no differently.[22] By requiring that the material elements of Article 401(2) KCC be present at the point of agreement, the PTJ misapplied Articles 35(1) read with 401(2) KCC, by adopting a legal position that has no textual basis.[23]

13. The PTJ's error materially affected the Confirmation Decision, as it directly led her to erroneously find that the group element cannot be construed by the agreement between THAÇI and KUÇI alone.[24] Indeed, the PTJ erroneously required proof of the third person's involvement in the plan to contact Witness 6, whereas all that was required for the offence to materialise was the *agreement to involve* a third person.[25]

14. The agreement to recruit another person's assistance – in some form – in the planned approach of Witness 6 is evident, *inter alia*, from the multiple references to third parties during the visit at key points related to the planned interference, and in

[20] *Thaçi et al.* Appeal Decision, para.26.
[21] *See Ieng Sary* Appeal Decision, para.122.
[22] *See similarly*, KSC Constitutional Court Decision, para.13.
[23] *See similarly*, *Bemba et al.* Appeal Decision, paras 79-80.
[24] Confirmation Decision, KSC-BC-2023-12/F00036, para.180.
[25] The PTJ also erroneously focused too heavily on the *named* individual [REDACTED] and rejected other forms of contributions envisioned by THAÇI and KUÇI to be performed by the third person: *see* Confirmation Decision, KSC-BC-2023-12/F00036, paras 177-179. In doing so, the PTJ contradicted her own statements of principle that Article 401(2) does not require proof of the identity of each member of the group and penalises *any* conduct that contributes to or enables in some other form the common action: *see* Confirmation Decision, KSC-BC-2023-12/F00036, paras 52, 177.

particular from the following part of the recorded conversation between THAÇI and KUÇI:

> HASHIM THAÇI: [The sentence continues from the previous audio file 030923-092409.wav] [Whispers very quietly] -- "We have at the latest", tell him, "until …" -- "as he will leave", tell him, "on [REDACTED]". You tell him that "He will leave on [REDACTED]", because he might leave on [REDACTED].
> HAJREDIN KUÇI: Yes.[26] […]
> [Noise of paper shuffling and of a page being torn off]
> "Until [REDACTED]", tell him, "because [REDACTED]", tell him, "you never know". "[REDACTED], for example", tell him, "he has to be seen the day next, the day after the next day.

15. To begin with, the PTJ accepted that this part of the conversation between THAÇI and KUÇI concerned their plan to approach Witness 6,[27] so that the only open question is whether the participation of a person other than THAÇI and KUÇI was contemplated. Crucial to answering that query is the Albanian version of the transcript. As the translator's note explains, in Albanian, 'him' and 'he' in this passage refer to two different individuals,[28] which means that THAÇI told KUÇI to tell a third person that Witness 6 *'will leave on [REDACTED]'* and that Witness 6 *'has to be seen the day next, the day after the next day'*. THAÇI's instructions to convey a message to a third person about when Witness 6 'has to be seen', and KUÇI's assent thereto, unambiguously proves that THAÇI and KUÇI agreed to involve a third person in the plan to approach Witness 6. This is particularly clear when viewed in the context of the entire recorded conversation and THAÇI's demonstrated pattern – a finding the Pre-Trial Judge recognised in confirming multiple other counts – to use third persons in approaching witnesses to interfere with their testimony.[29]

[26] 115009 030923-092909_Enhanced-TR-AT Rev-ET Rev, p.1.
[27] Confirmation Decision, KSC-BC-2023-12/F00036, paras 143 (fn.274), 178.
[28] 115009 030923-092909_Enhanced-TR-AT Rev-ET Rev, p.7.
[29] Confirmation Decision, KSC-BC-2023-12/F00036, paras 185, 282, 292.

16. All the required factual ingredients were present on the evidence to confirm Article 35(1) KCC liability for Counts 2 and 19, i.e. THAÇI and KUÇI *agreed* to take steps to violate Article 401(2) KCC. This notwithstanding, the PTJ required further proof of legal elements not required by Article 35(1) KCC. This led to the incorrect dismissal of Counts 2 and 19.[30] But for this error, a substantially different decision would have been made,[31] i.e. Counts 2 and 19 would have been confirmed. Given this discernible error of law, the Court of Appeals should apply the plain terms of Article 35(1) according to its ordinary meaning, and reinstate Counts 2 and 19. Alternatively, the issue should be remanded to the PTJ to apply the law correctly.[32]

B. GROUND TWO: THE PRE-TRIAL JUDGE MISINTERPRETED ARTICLE 393 KCC BY RULING THAT ONLY 'PARTIES' CAN BE LIABLE FOR CONTEMPT OF COURT

17. With regard to Contempt of Court allegations against SMAKAJ, KILAJ and FAZLIU, the PTJ held that because they were not 'parties' to the *Thaçi et al.* proceedings, they could not logically disobey judicial orders that were not addressed to and did not place legal obligations upon them *per se*.[33] However, the term 'party' is *not* found in Article 393 KCC, which reads as follows:

> **Article 393**
> **Contempt of court**
>
> 1.*Whoever* fails to obey any final order, ruling, decision or judgment of any Court in the Republic of Kosovo or who refuses or obstructs the publication of any final decision or, judgment of such court shall be punished by a fine or imprisonment up to six (6) months. (emphasis added)

18. By interpreting 'whoever' to mean only 'parties' to given proceedings, the PTJ adopted a mistaken understanding of the term, the ordinary meaning of which is plainly broader than simply 'parties' to a case.[34] Logically, a person can disobey a court

[30] *See similarly Al Bashir* Appeal Decision, para.41.
[31] *DRC* Appeal Decision, para.14.
[32] *Al Bashir* Appeal Decision, para.42.
[33] Confirmation Decision, KSC-BC-2023-12/F00036, paras 244-246.
[34] The Oxford English dictionary defines 'whoever' as 'whatever person or persons'. *See* "Whoever, Pronoun., Sense I.2.", *Oxford English Dictionary* (Oxford University Press, 2023).

order regardless of whether there are express legal obligations binding upon the person or whether the person is a party to the case to which the order relates. For example, at the ICTY, members of the public were frequently prosecuted for violating court orders that prohibited the disclosure/dissemination of confidential information.[35]

19. In the *Marijačić & Rebić* case, in a similar context of alleged contempt by a non-party, the Trial Chamber held that:

> 'The power of the Tribunal to prosecute individuals for interfering with the administration of justice is not limited to individuals who are parties to proceedings before the Tribunal, nor to any other category of individuals. Rather, the Tribunal has the power to prosecute and punish any person who knowingly and wilfully interferes with its administration of justice.'[36]

20. This position was affirmed both at trial[37] and on appeal, with the ICTY Appeals Chamber holding that the offence of violating an order not to disclose information 'applies to all persons coming into possession of the protected information.'[38] As such, defiance of a court order, by any person, amounts to contempt and interference with the administration of justice.[39] Like the ICTY, holding persons accountable for such conduct is necessary to protect witnesses on whose behalf protective measures have been ordered, so the KSC can fulfil its mandate.[40] The PTJ's approach therefore creates a concerning impunity gap, and sends a dangerous message to non-parties that they can disobey court orders regarding protected witnesses, with all of the attendant risk that follows such conduct.

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[35] *Margetić* Trial Judgement, paras 41-50; *Haxhiu* Trial Judgement, paras 22-32. *See also Al Khayat* Decision, para.59.
[36] *Marijačić & Rebić* Jurisdiction Decision, para.18.
[37] *Marijačić & Rebić* Trial Judgement, para.28.
[38] *Marijačić & Rebić* Appeal Judgement, para.24. It is notable that the provision charged in this *Marijačić & Rebić*, Rule 77(A)(ii) of the ICTY Rules of Procedure and Evidence, which prohibits the disclosure of 'information […] in *knowing violation of an order* of a Chamber', is similar in language, object and purpose, to Article 393 KCC, which prohibits conduct that '*fails to obey any order*'. (emphasis added)
[39] *Marijačić & Rebić* Appeal Judgement, para.44; *See also Fatuma et al*. Appeal Judgement, para.75.
[40] *Marijačić & Rebić* Appeal Judgement, para.24.

21. Moreover, it is also incorrect to require that, for the purposes of committing contempt, a particular decision must be legally binding upon the direct perpetrator[41] – it is enough for the perpetrator to simply be aware of its content.[42] Indeed, such knowledge may be passed on by formal 'parties' to external individuals – as occurred in the present case. As held by Trial Panel II, in the context of Article 392 KCC, such an approach would be inconsistent with the very purpose of the provision, and 'would enable anyone other than the formal recipient of the information to fall beyond the reach of the law.'[43]

22. There is no reason to treat the object and purpose of Article 393 KCC differently, and more restrictively, than its sister provision, Article 392 KCC, which prohibits violating the secrecy of proceedings by 'whoever' – which is the *same language* as Article 393 KCC.

23. Judicial interpretation of a term that clearly deviates from its ordinary meaning should be reversed and corrected.[44] By holding that only a 'party' may commit Contempt of Court within the meaning of Article 393 KCC, the PTJ erred by adopting an interpretation that has no textual basis, and which plainly defeats the object and purpose of the provision.

24. The PTJ's holding materially affected the Confirmation Decision, by specifically excluding co-perpetration liability[45] (but confirmed accessorial liability),[46] thereby

[41] *Contra* Confirmation Decision, KSC-BC-2023-12/F00036, paras 244-246. ICTY jurisprudence has repeatedly rejected this proposition. *See Jović* Trial Judgement, para.21.
[42] *Jović* Appeal Judgement, para.27.
[43] *Gucati & Haradinaj* Judgement, para.75. *See also Fatuma et al*. Appeal Judgement, paras 77-78.
[44] *See similarly Ruto & Sang* Appeal Decision, paras 76, 96.
[45] Confirmation Decision, KSC-BC-2023-12/F00036, para.251.
[46] Confirmation Decision, KSC-BC-2023-12/F00036, para.288. Confirmation of accessorial liability was on the basis that, according to the PTJ, SMAKAJ, KILAJ and FAZLIU could, as non-parties, be legitimately charged with assisting THAÇI with the offence, but not with perpetrating it themselves. However, if a person can assist a crime by means of a contribution, then it follows they can also be a co-perpetrator by means of a contribution. There is no logical reason to make one scenario criminal, and the other not. Articles 31 and 33 KCC are not proscribed in their application in any way – they both

reducing the ways the accused's conduct may be characterised at trial. But for this error, a substantially different decision would have been made,[47] i.e. co-perpetration liability would have been retained.

25. Given this discernible error of law, the Court of Appeals should apply the plain terms of Article 393 KCC according to its ordinary meaning, and reinstate the Contempt of Court charges against SMAKAJ, KILAJ and FAZLIU, namely Counts 14, 16 and 18, to include co-perpetration liability per Article 31 KCC. Alternatively, the issue should be remanded to the PTJ to apply the law correctly.

C. GROUND THREE: THE PRE-TRIAL JUDGE WRONGLY EXCLUDED CO-PERPETRATION AS A MODE OF LIABILITY IN RESPECT OF THAÇI, SMAKAJ, KILAJ AND FAZLIU FOR COUNTS 9, 11, 12, 14, 16 AND 18

26. As submitted in Ground Two above, the PTJ wrongly held that SMAKAJ, KILAJ and FAZLIU could not directly commit Contempt of Court (by virtue of not being 'parties'), and thus excluded the possibility of co-perpetration liability in respect of Counts 14, 16 and 18.[48] This finding later expressly informed the PTJ's assessment of co-perpetration liability for Counts 9, 11 and 12, contaminating the reasoning therein, because the erroneous starting-point of the PTJ's analysis was that SMAKAJ, KILAJ and FAZLIU could not, in effect, be 'perpetrators'.[49]

27. The PTJ subsequently held that because THAÇI's role was more central compared to the 'more limited' contributions of SMAKAJ, KILAJ and FAZLIU, which were 'not of the same level and of the same quality', the latter three accused were 'best

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apply to 'criminal offences', and do not place any conditions who may be liable. Moreover, that accessorial liability is retained does not ameliorate the wrongful exclusion of co-perpetration liability that should be available to the forthcoming Trial Panel (which will also impact sentencing considerations if convicted), nor should it be a reason to allow a clearly erroneous holding to go uncorrected, in circumstances where material impact is evident.

[47] *DRC* Appeal Decision, para.84.

[48] Confirmation Decision, KSC-BC-2023-12/F00036, paras 244-245.

[49] Confirmation Decision, KSC-BC-2023-12/F00036, para.262.

captured' as accessories.[50] On this basis, the PTJ considered that co-perpetration could not be made out.

28. While the PTJ correctly recalled the law on co-perpetration at the outset of the Confirmation Decision,[51] she applied it incorrectly. It is commonplace and self-evident that co-perpetrators will contribute differently to joint criminality, and for individual contributions to be of different degrees. It is wrong in law to require (or expect) that each contribution, be of the same degree, quality or gravity, particularly when, as the PTJ noted, 'Article 31 KCC *does not delimit* what constitutes participation in, or substantial contribution to, the commission of the offence.'[52] (emphasis added)

29. Rather, all that is required for co-perpetration is that the individual contribution be 'substantial.' The provision reads as follows:

> **Article 31**
> **Co-perpetration**
> When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by *substantially contributing* to its commission *in any other way*, each of them shall be liable and punished as prescribed for the criminal offense. (emphasis added)

30. KSC jurisprudence has not expounded upon the meaning of 'substantially contributing' within the meaning of Article 31 KCC.[53] In this and in international courts (and although in the context of different modes of liability), a 'substantial contribution' has been interpreted to mean more than 'significant',[54] and one which has a 'substantial effect on the crime'.[55] Ultimately, whether or not a person

[50] Confirmation Decision, KSC-BC-2023-12/F00036, paras 262, 284-288.
[51] Confirmation Decision, KSC-BC-2023-12/F00036, paras 95-97.
[52] Confirmation Decision, KSC-BC-2023-12/F00036, para.97.
[53] *See e.g. Haradinaj & Gucati* Trial Judgment, para.186.
[54] Which is the threshold contribution in the context of the Joint Criminal Enterprise doctrine espoused at the *ad hoc* tribunals, and adopted at the KSC. *See Prlić et al*. Appeal Judgement, para.2768. *See also Thaçi et al.* Confirmation Decision, para.110.
[55] Which is the relevant threshold for aiding and abetting at the *ad hoc* tribunals, and adopted at the KSC. *See Taylor* Appeal Judgement, para.385. *See also Thaçi et al.* Confirmation Decision, para.116.

'substantially contributed to a crime', per Article 31 KCC, is an evidence-based assessment requiring a case-by-case determination.

31. However, this does *not* mean that, where one co-perpetrator contributes *more* to joint criminality (for example, by instructing and orchestrating obstructive conduct) when compared to the conduct of other co-perpetrators (for example, those who implement the obstructive instructions), that this justifies downgrading the latter contributions to those of 'accessories'. That is incorrect as a matter of law. This is because co-perpetration involves two or more persons working together in the commission of the crime, so that the *sum* of their coordinated individual contributions results in the realisation of the objective elements of that crime.[56] Contributions of higher and lesser degrees may thus legitimately combine to co-perpetrate a criminal offence.[57] This is further established by the stipulation in Article 31 KCC that a co-perpetrator can contribute 'in any other way'. In other words, contributions *other* than direct commission, but which still *substantially contribute* to the crime, may be properly categorised as co-perpetration.

32. In the Confirmation Decision, the PTJ found that SMAKAJ, KILAJ and FAZLIU visited THAÇI in the Detention Centre, where they received information and instructions to interfere with SPO witnesses[58] – a scheme which they implemented. Despite this manifest central involvement from the very moment of conception, the

[56] *See Al Mahdi* Confirmation Decision, para.24. That ICC doctrine requires an 'essential contribution' for co-perpetration does not affect the correctness of the sum-based assertion made here, and its persuasive applicability to co-perpetration in Article 31 KCC – as both forms fundamentally concern joint criminality characterised by coordinated contributions by co-perpetrators, and which therefore may be imputed to one another.
[57] For example, and in a similar factual context to the present case, in *Bemba et al*. at the ICC, one accused was referred to as 'a liaison' between more active and leading co-perpetrators, but was still committed for trial as co-perpetrator. *See Bemba et al.* Confirmation Decision, paras 75-76, 105.
[58] Confirmation Decision, KSC-BC-2023-12/F00036, para.262.

PTJ held that the contributions of the SMAKAJ, KILAJ and FAZLIU were 'not of the same level and of the same quality' as THAÇI's.[59]

33. However, the contributions at issue, were, by any standard, manifestly substantial. These included up to four visits to the Detention Centre, and 'providing advice, feedback and moral support; taking notes; providing and taking confidential documents; contacting witnesses; and conveying Mr Thaçi's instructions […].'[60] These facts notwithstanding, the relegation of these acts to the 'accessorial' category was an error of law – because this relegation was motivated by the PTJ's view that those contributions were 'not of the same level and of the same quality'.[61]

34. As stated above, co-perpetration is characterised by of the *sum* of coordinated individual contributions to the commission of a crime. That individual contributions of co-perpetrator(s) may be of a *different* quality or level from one another, is legally irrelevant. All that is required is that each contribution be *substantial*.

35. As such, where there is a well-grounded suspicion that one or more alternative modes of liability are indicated in the evidence, then the PTJ should confirm *each* mode of liability,[62] regardless of the PTJ's preferred understanding of the facts.[63] The Trial Panel is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence.[64]

36. The PTJ's holding materially affected the Confirmation Decision, as co-perpetration was wrongly excluded as a mode of liability due to an erroneous application of the law. But for this error, a substantially different decision would have been made, namely, the retention of co-perpetration liability for Counts 9, 11, 12, 14,

[59] Confirmation Decision, KSC-BC-2023-12/F00036, para.262.
[60] Confirmation Decision, KSC-BC-2023-12/F00036, para.282.
[61] Confirmation Decision, KSC-BC-2023-12/F00036, paras 262, 280.
[62] *Thaçi et al.* Confirmation Decision, KSC-BC-2020-06/F00026, 26 October 2020, paras 478, 482, 491, 498, 505, 512; *Gicheru* Confirmation Decision, para.218. *See also Ndahimana* Decision, para.12.
[63] *See e.g. Ongwen* Confirmation Decision, paras 146-149.
[64] *Naletilić & Martinović* Appeal Judgement, para.103.

16 and 18. The Court of Appeals should therefor correct this error, apply the law correctly, and reinstate Article 31 KCC for the foregoing counts. Alternatively, the issue should be remanded to the PTJ to do so.

D. GROUND FOUR: THE PRE-TRIAL JUDGE ERRED BY RULING THAT ARTICLE 401(3) AND (5) KCC DOES NOT PROVIDE FOR A TERM OF 5 YEARS

37. In relation to the third form of incitement, per Article 32(3) KCC, when applied to the offence of Obstruction of Official Persons, per Article 401(3) and (5) KCC, the PTJ held that because the latter provisions only provide for punishment of 1 to 5 years imprisonment, Article 32(3) KCC was 'inapplicable' as this provision 'applies only to offences punishable by imprisonment of *at least* five (5) years.'[65]

38. The PTJ misinterprets the terms of Article 32(3) KCC, which reads as follows:

> **Article 32**
> **Incitement**
>
> […]
>
> 3.Whoever intentionally incites another person to commit a criminal offense punishable by imprisonment of at least five (5) years and the offense is not even attempted, the inciter shall be punished for attempt.

39. If an offence technically provides for the *issuance* of a term of imprisonment of 5 years – which Article 401(3)[66] and (5)[67] both provide for at the upper limit – then Article 32(3) KCC may lawfully apply to that conduct. The PTJ thus equates the phrase

[65] Confirmation Decision, KSC-BC-2023-12/F00036, para.276. Emphasis in original.
[66] Article 401(3) KCC states: 'The leader or organizer of the group which commits the offense provided for in paragraph 2. of this Article shall be punished by imprisonment of *one (1) to five (5) years*.' (Emphasis added).
[67] Article 401(5) KCC states: 'When the offense provided for in paragraph 1. or 2. of this Article is committed against a judge, a prosecutor, an official of a court […] the perpetrator shall be punished by imprisonment *of one (1) to five (5) years*.' (Emphasis added).

'at least' with requiring a *minimum* term of 5 years, which amounts to error.[68] A similar position was taken by Trial Panel II in *Gucati & Haradinaj*.[69]

40. However, the former PTJ in the *Gucati & Haradinaj* Confirmation Decision took the opposite view.[70] The SPO submits that this view is the correct one – as it applies the plain terms of Article 32(3) according to their ordinary meaning, in light of its object and purpose, and is in line with the interpretation of similar provisions of the Kosovo judicial system. The Court of Appeals can therefore address this divergence in jurisprudence. The plain and ordinary interpretation is the one that should be adopted.

41. As such, the PTJ erred by misreading the plain terms of Article 32(3) KCC read with Article 401(3) and (5) KCC. This error materially affected the Confirmation Decision, as the PTJ wrongly excluded Article 32(3) KCC liability. But for this error, a substantially different decision would have been made, namely, the retention of Article 32(3) KCC liability for the offence of Obstruction of Official Persons, per Article 401(3) and (5) KCC. The Court of Appeals should therefore reinstate Article 32(3) KCC liability for Counts 1, 3 and 4, or, alternatively, remand the issue to the PTJ to do so.

[68] This approach would also lead to inconsistent applications of other provisions in the KSC legal framework that contain similar formulations of 'at least' within its terms, for example Article 21(5)(b) of the Law. To have proper effect, that provision must be understood to mean: a crime for which a punishment of ten years or more can be imposed (and not a minimum of 10). Similarly, provisions in extradition laws and treaties such as art. 8 (1) of Kosovo Law 04/L-031 in International Legal Cooperation in Criminal Matters, limiting extradition to offences punishable by deprivation of liberty for a period of at least one year, are universally interpreted to refer to a minimal maximum sentence, not a minimal minimum sentence.

[69] *Gucati & Haradinaj* Judgement, para.193. Notably, the only authority relied upon by Trial Panel II is the *Salihu et al*. commentary.

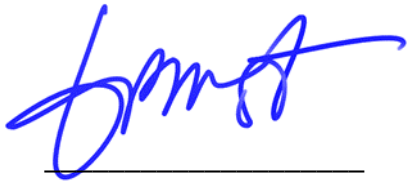
[70] *Gucati & Haradinaj* Confirmation Decision, paras 89-90: 'Pursuant to Article 32(3) of the KCC, the inciter also incurs responsibility for inciting an offence punishable by imprisonment of at least five (5) years, even if this offence is not attempted. Accordingly, incitement under Article 32(3) of the KCC may only be punishable in relation to the offences under Counts 1-3 and 6, as they provide respective imprisonment sentences of one to five years (Article 401(1) and (5) or 401(2)-(3) and (5) of the KCC), two to ten years (Article 387 of the KCC) and six months to five years (Article 392(2)-(3) of the KCC).'

III. CONCLUSION

42. For foregoing reasons, the SPO respectfully requests the Court of Appeals Panel to grant the four appeal grounds described above.

43. This filing is confidential pursuant to Rule 82 of the Rules because it contains sensitive information which, if publicly disclosed, could severely compromise an ongoing SPO investigation. The SPO will file a public redacted version in due course.

Word count: 5,513



Kimberly P. West

Specialist Prosecutor

Wednesday, 12 February 2025

At The Hague, the Netherlands.