PUBLIC
Date original: 03/04/2025 19:13:00
Date public redacted version: 03/04/2025 19:27:00

KOSOVO SPECIALIST CHAMBERS
DHOMAT E SPECIALIZUARA TË KOSOVËS
SPECIJALIZOVANA VEĆA KOSOVA

In:	**KSC-BC-2023-12/IA002**
Before:	**A Panel of the Court of Appeals Chamber** Judge Michèle Picard Judge Emilio Gatti Judge Nina Jørgensen
Registrar:	Fidelma Donlon
Date:	3 April 2025
Original language:	English
Classification:	**Public**

Public Redacted Version of Decision on the Specialist Prosecutor's Office's Appeal Against the Decision on the Confirmation of the Indictment

Specialist Prosecutor's Office:
Kimberly P. West

Counsel for Hashim Thaçi:
Sophie Menegon

Counsel for Bashkim Smakaj:
Jonathan Elystan Rees

Counsel for Isni Kilaj:
Iain Edwards

Counsel for Fadil Fazliu:
David Young

Counsel for Hajredin Kuçi:
Alexander Admiraal

THE PANEL OF THE COURT OF APPEALS CHAMBER of the Kosovo Specialist Chambers ("Court of Appeals Panel", "Appeals Panel" or "Panel" and "Specialist Chambers", respectively),[1] acting pursuant to Article 33(1)(c) of the Law on Specialist Chambers and Specialist Prosecutor's Office ("Law") and Rule 169 of the Rules of Procedure and Evidence ("Rules"), is seised of an appeal filed on 12 February 2025 by the Specialist Prosecutor's Office ("Appeal" and "SPO", respectively),[2] against the "Decision on the Confirmation of the Indictment" ("Impugned Decision" or "Confirmation Decision").[3] Hashim Thaçi ("Thaçi") and Isni Kilaj ("Kilaj") responded on 24 February 2025 and Bashkim Smakaj ("Smakaj") and Fadil Fazliu ("Fazliu") on 3 March 2025 that the Appeal should be rejected ("Thaçi Response", "Kilaj Response", and "Smakaj and Fazliu Joint Response", respectively).[4] The SPO replied on 7 March 2023 ("Reply").[5]

I. BACKGROUND

1. On 12 November 2024, the SPO filed before the Pre-Trial Judge an indictment against Thaçi, Smakaj, Kilaj, Fazliu and Hajredin Kuçi ("Kuçi") ("Submitted Indictment").[6]

---

[1] IA002/F00001, Decision Assigning a Court of Appeals Panel, 3 February 2025.
[2] IA002/F00002/RED, Public redacted version of 'Prosecution appeal against the "Decision on the Confirmation of the Indictment" (F00036) with Public Annexes 1 and 2', 14 February 2025 (confidential version filed on 12 February 2025) ("Appeal").
[3] F00036/RED, Public Redacted Version of Decision on the Confirmation of the Indictment, 12 February 2025 (strictly confidential and *ex parte* version filed on 29 November 2024, reclassified as confidential on 13 December 2024) ("Impugned Decision").
[4] IA002/F00005, Thaçi Defence Response to Prosecution appeal against the 'Decision on the Confirmation of the Indictment', 24 February 2025 ("Thaçi Response"); IA002/F00006, Kilaj response to Prosecution appeal against the "Decision on the Confirmation of the Indictment" (F00036), 24 February 2025 (confidential) ("Kilaj Response"); IA002/F00009/COR, Corrected Version of Smakaj and Fazliu Joint Response to Prosecution Appeal KSC-BC-2023-12/IA002, 5 March 2025 (confidential, uncorrected confidential version filed on 2 March 2025) ("Smakaj and Fazliu Joint Response").
[5] IA002/F00010, Prosecution consolidated reply to Thaçi, Smakaj, Kilaj and Fazliu responses to IA002/F00002, 7 March 2025 (confidential) ("Reply").
[6] F00028/RED, Public redacted version of 'Submission of Further Amended Indictment for confirmation with strictly confidential and ex parte Annexes 1-2', 4 February 2025 (strictly confidential and *ex parte*

2. On 29 November 2024, the Pre-Trial Judge issued the Confirmation Decision confirming, in part, the charges against Thaçi, Smakaj, Kilaj, Fazliu and Kuçi.[7]

3. On 2 December 2024, the SPO filed the indictment, as confirmed by the Pre-Trial Judge ("Confirmed Indictment").[8]

4. On 9 December 2024, the SPO filed a request for leave to appeal the Confirmation Decision on four issues ("Certification Request").[9] On 22 January 2025, Thaçi and Kilaj responded, requesting that the Certification Request be rejected in its entirety.[10] The SPO replied on 27 January 2025.[11]

5. On 31 January 2025, the Pre-Trial Judge certified the four issues raised by the SPO ("Certified Issues"),[12] defined as follows:

---

version filed on 12 November 2024, reclassified as confidential on 13 January 2025); F00028/A01, Further Amended Indictment, 12 November 2024 (strictly confidential and *ex parte*, reclassified as confidential on 13 January 2025) ("Submitted Indictment"). The Panel recalls that, prior to the Submitted Indictment, the SPO filed before the Pre-Trial Judge three previous versions of the indictment on respectively 15 December 2023, 11 March 2024, and 27 June 2024. See Impugned Decision, paras 1-8 for a summary of the procedural background. The Submitted Indictment was prompted by an order by the Pre-Trial Judge. See F00025/RED, Public Redacted Version of Order Pursuant to Rule 86(4)(b) of the Rules Relating to Counts 2 and 19 of the Amended Indictment, 14 March 2025 (strictly confidential and *ex parte* version filed on 6 November 2024, reclassified as confidential on 13 March 2025) ("Order Relating to the Amended Indictment").

[7] Impugned Decision.

[8] F00040, Submission of Confirmed Indictment, 2 December 2024 (strictly confidential and *ex parte*, reclassified as strictly confidential on 3 December 2024); F00040/A01, Confirmed Indictment, 2 December 2024 (strictly confidential and *ex parte*, reclassified as strictly confidential on 3 December 2024). See also F00055/A01, Public redacted Confirmed Indictment, 6 December 2024.

[9] F00071, Prosecution request for leave to appeal the 'Decision on the Confirmation of the Indictment' (F00036), 9 December 2024 (strictly confidential and *ex parte*, reclassified as confidential on 18 December 2024, and as public on 11 February 2025).

[10] F00131, Thaçi Defence Response to "Prosecution request for leave to appeal the 'Decision on the Confirmation of the Indictment' (F00036)", 22 January 2025 (confidential, reclassified as public on 31 January 2025); F00132, Kilaj response to Prosecution request for leave to appeal "Decision on the Confirmation of the Indictment" (F00036), 22 January 2025 (confidential, reclassified as public on 11 February 2025).

[11] F00139, Prosecution consolidated reply to Defence responses to leave to appeal request, 27 January 2025 (confidential, reclassified as public on 30 January 2025).

[12] F00149, Decision on Specialist Prosecutor's Request for Leave to Appeal the "Decision on the Confirmation of the Indictment", 31 January 2025 ("Certification Decision").

(a) Whether the Pre-Trial Judge misinterpreted Articles 35(1) and 401(2) of the [Kosovo Criminal Code ("KCC")] by requiring all material elements of the agreed offence to be present ("First Certified Issue");[13]

(b) Whether the Pre-Trial Judge misinterpreted Article 393 of the KCC by ruling that only "parties" can be liable for contempt of court ("Second Certified Issue");[14]

(c) Whether the Pre-Trial Judge wrongly excluded co-perpetration as a mode of liability in respect of Messrs Thaçi, Smakaj, Kilaj and Fazliu under Counts 9, 11, 12, 14, 16 and 18 ("Third Certified Issue");[15] and

(d) Whether the Pre-Trial Judge erred by ruling that Article 401(3) and (5) of the KCC does not provide for a term of 5 years [of imprisonment] ("Fourth Certified Issue").[16]

II. STANDARD OF REVIEW

6. The Court of Appeals Panel adopts the standard of review for interlocutory appeals established in its first decision and applied subsequently.[17]

[13] Certification Decision, paras 7(a), 26. See also Certification Decision, paras 23-25, 31.
[14] Certification Decision, paras 7(b), 30. See also Certification Decision, paras 27-29, 31.
[15] Certification Decision, paras 7(c), 30. See also Certification Decision, paras 27-29, 31.
[16] Certification Decision, paras 7(d), 26. See also Certification Decision, paras 23-25, 31. The Panel notes that the Pre-Trial Judge certified the issue as formulated by the SPO and understands that the issue before the Appeals Panel is whether the Pre-Trial Judge erred by ruling that Article 32(3) of the KCC does not apply to the offence of obstructing official persons under Article 401(3) and (5) of the KCC.
[17] KSC-BC-2020-07, IA001/F00005, Decision on Hysni Gucati's Appeal on Matters Related to Arrest and Detention, 9 December 2020 ("*Gucati* Appeal Decision"), paras 4-14.

III. PRELIMINARY MATTERS

A. ADMISSIBILITY OF THE APPEAL

1. Submissions of the Parties

7. In response to the Appeal, Smakaj and Fazliu argue that Rule 75(1) of the Rules bars the SPO from seeking interlocutory appeal of the Confirmation Decision, as "alternative remedies […] otherwise than by way of interlocutory appeal" are available to the latter pursuant to Article 39(2) of the Law and Rule 86(9) of the Rules, through which the SPO can seek to "resurrect charges" which were not confirmed.[18] They argue that, given that the applicable legal framework circumscribes an accused's ability to challenge a confirmation decision, "fairness dictates" that the SPO's ability in this regard be likewise limited.[19] They also submit that Rule 86(4) of the Rules affords "sufficient opportunity for participation" in the confirmation process to the SPO.[20] They submit that, by seeking interlocutory appeal rather than amendment of the charges, the SPO seeks to deprive Smakaj and Fazliu of the opportunity to make submissions on, *inter alia*, the evidential sufficiency of the non-confirmed charges, contrary to fairness.[21] Smakaj and Fazliu thus request the Panel to dismiss the Appeal on the basis that the SPO is not permitted to seek appeal of the Confirmation Decision; and, in the alternative, to find that "both the [SPO] and the defence may seek to appeal" the Confirmation Decision.[22]

8. The SPO replies that the Court of Appeals has jurisdiction to hear the Appeal.[23] It argues that, as the Appeal concerns alleged errors of law, as opposed to alleged

[18] Smakaj and Fazliu Joint Response, paras 8-10.
[19] Smakaj and Fazliu Joint Response, paras 11-18, referring to Article 39(1) of the Law; Rules 86(7), 97 of the Rules.
[20] Smakaj and Fazliu Joint Response, para. 19.
[21] Smakaj and Fazliu Joint Response, paras 22-24.
[22] Smakaj and Fazliu Joint Response, para. 25. Smakaj and Fazliu's request that the Appeal be dismissed on its merits is addressed below; see below, para. 56.
[23] Reply, para. 1.

evidential insufficiencies, resubmitting the indictment pursuant to Article 39(2) of the Law and Rule 86(9) of the Rules would be "illogical and would serve no purpose".[24] Citing the *ex parte* nature of the confirmation process and the fact that it is triggered by the Prosecution, the SPO submits that it "stands to reason" that it is able to appeal legal errors arising from the Confirmation Decision.[25] It argues that the Defence are "full participants" in the Appeal and thus suffer no prejudice.[26]

2. Assessment of the Court of Appeals Panel

9. As a preliminary matter, the Panel considers that Smakaj and Fazliu's challenge to the admissibility of the Appeal ought properly to have been raised in response to the Certification Request, rather than in response to the Appeal itself. Noting, however, that Counsel for Smakaj and Fazliu were only assigned after the issuance of the Certification Decision,[27] the Panel will nonetheless consider the merits of their challenge.

10. In the view of the Panel, the term "except where otherwise provided by the Rules", as found in Rule 75(1) of the Rules, serves two functions.[28] First, it establishes that Rule 75(1) of the Rules is the *lex generalis* establishing a party's default ability to "apply before the competent Panel for a relief"; and second, it signals that the Rules may otherwise provide for limits to this default ability.[29]

---

[24] Reply, para. 1.
[25] Reply, para. 2.
[26] Reply, para. 2.
[27] See IA002/F00004, Decision on Smakaj and Fazliu Joint Motion for Extension of Time to Respond to the Specialist Prosecutor's Office's Appeal Against the Decision on the Confirmation of the Indictment, 25 February 2025, para. 3 and references therein.
[28] Rule 75(1) of the Rules states, "[t]he Specialist Prosecutor and the Registrar, and, after the initial appearance of the Accused, any Party may apply before the competent Panel for a relief, except where otherwise provided by the Rules."
[29] *Cf.* regarding similar phrasing found in Article 30 of the Rome Statute, ICC, *Prosecutor v. Katanga,* ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 770; Ambos, K. (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Fourth Edition), C. H. Beck, Hart, Nomos 2022, Article 30, mn. 6.

11. The Panel interprets Article 39(2) of the Law and Rule 86(9) of the Rules as not limiting, or otherwise affecting, the SPO's general ability to seek relief pursuant to Rule 75(1) of the Rules.[30] In accordance with the ordinary meaning of their terms, and noting the language in which they are couched,[31] the Panel understands these provisions to simply preserve the SPO's right to conditionally re-submit charges for confirmation, or to seek to file an amended indictment.[32] The Panel cannot discern therein any intention on the part of the drafters to "otherwise provide" within the meaning of Rule 75(1) of the Rules, and to thereby limit the SPO's default right to seek appropriate relief, appellate or otherwise, including vis-à-vis a confirmation decision.[33] In this regard, an illustrative contrast can be found in Rules 86(7) and 97 of the Rules which, as Smakaj and Fazliu correctly indicate,[34] together expressly limit the grounds on which an accused is permitted to challenge a confirmation decision.[35]

12. Moreover, the mere fact that alternative avenues for seeking specific relief – in this case, the "reinstatement" of non-confirmed charges[36] – may be available to the SPO under other provisions in the Rules does not per se limit the SPO's general ability to seek appropriate relief pursuant to Rule 75(1). In this regard, the Panel also notes the limited efficacy of the cited "alternative remedies" of Article 39(2) of the Law and

[30] Contra Smakaj and Fazliu Joint Response, paras 10, 15-17.
[31] Article 39(2) of the Law provides in relevant part that: "[t]he [SPO] *shall not be precluded* from subsequently requesting the confirmation of the indictment if the request is supported by additional evidence" (emphasis added). Rule 86(9) of the Rules provides in relevant part that, "[t]he non-confirmation of any charges in an indictment *shall not preclude* the [SPO] from subsequently filing an amended indictment or from including the same charge in an indictment supported by new evidentiary material" (emphasis added). The Panel considers that this language appears to emphasise that a decision not confirming charges is not per se with prejudice to the subsequent re-submission of said charges for confirmation or amendment of an indictment (provided the relevant conditions are met).
[32] See also Rule 90 of the Rules, governing the amendment of an indictment.
[33] See also [REDACTED].
[34] Smakaj and Fazliu Joint Response, paras 11-13.
[35] Rule 86(7) of the Rules states, "[c]hallenges by the Defence to a decision on the indictment shall be limited to those under Rule 97." Rule 97(1) of the Rules states, "[t]he Accused may file preliminary motions before the Pre-Trial Judge in accordance with Article 39(1) of the Law, which (a) challenge the jurisdiction of the Specialist Chambers; (b) allege defects in the form of the indictment; and (c) seek the severance of indictments pursuant to Rule 89(2)."
[36] See Appeal, paras 16, 25, 36, 41.

Rule 86(9) of the Rules which apply to the resubmission or amendment of an indictment with "new evidentiary material". [37] Here, in the view of the SPO, the non-confirmation of charges was the result of erroneous legal interpretation on the part of the Pre-Trial Judge, rather than of any evidential insufficiency.[38]

13. Nor does the Panel agree that "fairness dictates" that an accused be afforded rights of interlocutory appeal vis-à-vis a confirmation decision identical to those (conditionally) afforded to the SPO under the applicable framework.[39] The Panel finds that it is not contrary to fairness per se that parties might be afforded different rights of appeal in a given situation, noting that other such examples can be found within both the Law and the Rules.[40]

14. The Panel also finds Smakaj and Fazliu's reliance on the ICC's pre-confirmation procedural framework,[41] under which both an accused and the Prosecution are permitted to seek interlocutory appeal of a confirmation decision,[42] inapposite in light of the fact that the pre-confirmation stage of proceedings as conducted at the ICC is *inter partes* in nature,[43] whereas that of the Specialist Chambers is conducted *ex parte*.[44]

[37] See Smakaj and Fazliu Joint Response, paras 10, 15; see also Smakaj and Fazliu Joint Response, paras 19, 22-24.
[38] See Appeal, paras 2-3.
[39] Contra Smakaj and Fazliu Joint Response, paras 11-18.
[40] See for example, Rule 130(4) of the Rules, which expressly preserves the SPO's right to seek appeal of a decision dismissing an indictment or charge upon a Defence motion after the close of the SPO's case, and expressly bars the Defence from appealing a decision rejecting such a motion; Article 47(1) of the Law and Rule 186(1) of the Rules, stating that "a convicted person" may appeal a Court of Appeals Panel judgment on specific grounds. See also, as applicable at the ICC, Rome Statute, Articles 56(3)(b), 81(1)(a)-(b).
[41] Smakaj and Fazliu Joint Response, para. 17, fn. 9.
[42] See Rome Statute, Article 82(1)(d); ICC, *Prosecutor v. Lubanga*, ICC-01/04-01/06-915, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, paras 19-21.
[43] See for example, Rome Statute, Article 61.
[44] See for example, Rule 86 of the Rules; see also Smakaj and Fazliu Joint Response, para. 19.

15. Lastly, it would be plainly contrary to the Law and Rules, as effectively conceded by Smakaj and Fazliu in their Response,[45] to afford the defence a general right to seek interlocutory appeal of the Confirmation Decision.[46]

16. In light of the above, the Panel rejects Smakaj and Fazliu's challenge to the admissibility of the Appeal.

B. PUBLIC FILINGS

17. The Panel recalls that all submissions filed before the Specialist Chambers shall be public unless there are exceptional reasons for keeping them confidential; and that Parties shall file public redacted versions of all submissions filed before the Panel. The Panel files the present Decision publicly, and further notes that the SPO has filed a public redacted version of the Appeal. The Panel therefore instructs Kilaj, Smakaj and Fazliu, and the SPO to file public redacted versions of their respective Responses and Reply, or to indicate, through a filing, whether they can be reclassified as public within ten days of receiving notification of this Decision.

IV. DISCUSSION

18. The Appeals Panel observes that all of the four issues raised by the SPO in the Appeal concern the interpretation of provisions of the KCC related to specific offences and modes of liability. In this context, the Panel considers that it is important to recall,

[45] Smakaj and Fazliu Joint Response, paras 11-14, 17. See also F00202/RED, Smakaj Application for a Stay of Proceedings as an Abuse of Process, 5 March 2025 (confidential version filed on 4 March 2025), paras 10-12.
[46] See above, para. 11. See also F00084, Order for Submissions on the Specialist Prosecutor's Request for Leave to Appeal the "Decision on the Confirmation of the Indictment", 13 December 2024 (confidential, reclassified as public on 31 January 2025), para. 8, and references cited therein. *Cf.* KSC-BC-2020-07, IA004/F00007, Decision on the Defence Appeals Against Decision on Preliminary Motions, 23 June 2021 ("*Gucati and Haradinaj* Appeal Decision on Preliminary Motions"), para. 23. Contra Smakaj and Fazliu Joint Response, paras 22, 25(b)(i).

at the outset, its understanding of the principle of legality and the rules of interpretation before turning to the specific Certified Issues.

19. The Panel recalls that the principle of legality is explicitly provided for by Article 33 of the Constitution of the Republic of Kosovo ("Constitution")[47] and guaranteed by Article 7 of the European Convention on Human Rights ("ECHR"). The principle of legality, which requires that "only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*)", encompasses the corollary "principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy" (strict interpretation or *lex stricta*).[48] Similarly, Article 2 of the KCC provides that:

> 1. Criminal offenses, criminal sanctions and measures of mandatory treatment are defined only by law.
>
> […]
>
> 3. The definition of a criminal offence shall be strictly construed and interpretation by analogy shall not be permitted. In case of ambiguity, the definition of a criminal offense shall be interpreted in favour of the person against whom the criminal proceedings are ongoing.

20. The Panel further considers that in its interpretation of criminal offences (and modes of liability), it shall be guided by the ordinary meaning of the terms used (literal interpretation) as well as the object and purpose of the applicable law (purpose-based interpretation), according to general principles of interpretation.[49] The Panel will also

[47] Article 33(1) of the Constitution provides that "[n]o one shall be charged or punished for any act which did not constitute a penal offense under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law."
[48] See for example, ECtHR, *Vasiliauskas v. Lithuania*, No. 35343/05, Judgment, 20 October 2015, para. 154; ECtHR, *Kokkinakis v. Greece*, No. 14307/88, Judgment, 25 May 1993, para. 52. See similarly Rule 4(3) of the Rules.
[49] See similarly KSC-BC-2020-06, IA009/F00030, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021, para. 139. See also KSC-CC-PR-2017-01, F00004, Judgment on the Referral of the Rules of Procedure and Evidence Adopted by Plenary on 17 March 2017 to the Specialist Chamber of the Constitutional Court Pursuant to Article

take into consideration, when appropriate, the principle of effectiveness (or principle of *effet utile*).[50]

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

1. Submissions of the Parties

21. The SPO submits that the Pre-Trial Judge erred in law when finding that when agreeing to commit an offence under Article 35(1) of the KCC, the "material elements" of the offence must exist at the time of the agreement, and if the existence or formation of a "group" of three or more persons under Article 401(2) of the KCC is not demonstrated by the supporting material, the charge cannot be legally sustained.[51]

22. The SPO argues that: (i) the Pre-Trial Judge's interpretation of this mode of liability goes against and exceeds the plain terms of Article 35(1) of the KCC, as nothing in the wording of Article 35(1) of the KCC requires all of the material elements of the agreed offence to be in place for this provision to apply;[52] (ii) this interpretation is unsupported by any legal authority and contradicts the Specialist Chambers' case law;[53] and (iii) the Pre-Trial Judge misunderstands the (inchoate) nature of the liability

19(5) of Law no. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 26 April 2017, para. 126.

[50] See ICJ, *The Corfu Channel Case (merits)*, Judgment, 9 April 1949 ("*Corfu Channel* Judgment"), p. 24; ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, paras 50–51; ICTY, *Prosecutor v. Blaškić*, No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 21.

[51] Appeal, paras 4-5; Reply, paras 5-6.

[52] Appeal, paras 5-6, 11, 16; Reply, paras 3, 7.

[53] Appeal, paras 7-8, 11; Reply, para. 4. See also Appeal, paras 3, 6. The SPO submits that the *Salihu et al.* Commentary, which is the only authority which the Pre-Trial Judge relies upon, does not support the Pre-Trial Judge's interpretation but only indicates that an agreement needs to cover "some" factual elements. See Appeal, fn. 8; Reply, para. 4, referring to Salihu, I. et al., Commentary on the Criminal Code of the Republic of Kosovo, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH 2014 ("*Salihu et al.* Commentary").

under Article 35 of the KCC, which criminalises the agreed preparation, not its actual fulfilment.[54]

23. The SPO further argues that Article 35 of the KCC only requires that one of the persons agreeing to the criminal offence has done a "substantial act towards the commission of the criminal offense", an element which is fulfilled in the present case as the Pre-Trial Judge has found that the 3 September 2023 Visit between Thaçi and Kuçi[55] constitutes such substantial preparatory step.[56] Underlining that in the Specialist Chambers case law, "material elements" refer to the elements which constitute the *actus reus* of the crime, the SPO argues that in the context of Article 35 of the KCC, requiring that the material elements of the agreed offence exist at the time of the agreement would make Article 35(1) of the KCC redundant, and create an unclear and unworkable standard.[57]

24. The SPO further submits that the Pre-Trial Judge's error materially affected the Confirmation Decision, as it directly led her to erroneously find that the group element under Article 401(2) of the KCC could not be construed by the agreement between Thaçi and Kuçi alone, but required proof of the third person's involvement in the plan to contact Witness 6.[58] In the SPO's view, all that was required for the offence to materialise under Articles 35(1) and 401(2) of the KCC was the agreement to involve a third person, which had been demonstrated with sufficient evidence in the present case.[59]

---

[54] Appeal, paras 5, 7.
[55] The SPO alleges that on 3 September 2023, Kuçi visited Thaçi at the Detention Facilities of the Specialist Chambers and agreed on a detailed plan to interfere with SPO witnesses, including Witness 6. See Appeal, paras 4, 9. See also Impugned Decision, paras 14, 131-144, 173-181.
[56] Appeal, paras 8-9.
[57] Appeal, paras 9-11; Reply, paras 5-6.
[58] Appeal, para. 13; Reply, para. 7.
[59] Appeal, paras 14-15; Reply, para. 8. The SPO argues that the agreement between Thaçi and Kuçi to recruit another person's assistance in the planned approach of Witness 6 is clear from the multiple references to third parties during the visit at key points. See Appeal, para. 14.

25. The SPO argues that as a result of her error, the Pre-Trial Judge wrongly rejected liability under Article 35(1) of the KCC ("Article 35(1) KCC Liability") for Counts 2 and 19 (Obstruction of Official Persons under Article 401(2) of the KCC) against Thaçi and Kuçi, and ultimately wrongly dismissed those counts. In conclusion, the SPO requests the Appeals Panel to reinstate Article 35(1) KCC Liability for Counts 2 and 19 of the Submitted Indictment, or, alternatively, to remand the issue to the Pre-Trial Judge to apply the law correctly.[60]

26. Thaçi responds that the SPO fails to show that the Pre-Trial Judge erred in law in her interpretation and application of Articles 35(1) and 401(2) of the KCC or that she erred in her factual assessment.

27. First, Thaçi submits, relying on the *Salihu et al.* Commentary, that an agreement to commit an offence within the meaning of Article 35 of the KCC, must contain not only an agreement on the main material elements of the criminal offence, but also the concrete aspects of a criminal offence, which are not necessarily prescribed by law.[61] Thaçi argues that in the context of Article 401(2) of the KCC, criminal liability under Article 35(1) is triggered only if the agreement includes the agreement to commit this criminal offence as part of a group of at least three persons.[62]

28. Thaçi further submits that the Pre-Trial Judge correctly found that "the material elements of the offence must exist at the time of the agreement" and that the existence or formation of a group of at least three persons must be demonstrated by evidence.[63] In his view, the SPO's contrary interpretation would require the Pre-Trial Judge to recognise a new offence of obstruction by two persons under Article 401(2) of the KCC, and to disregard a constitutive material element, namely the participation in a group

[60] Appeal, para. 16; Reply, para. 9.
[61] Thaçi Response, para. 9.
[62] Thaçi Response, para. 10.
[63] Thaçi Response, paras 9-11.

of at least three persons.[64] Thaçi also contends that the SPO's analogy to attempt under Article 28 of the KCC is unconvincing given that attempt and criminal agreement to commit a criminal offence do not have the same constitutive elements.[65]

29. Finally, Thaçi submits that the SPO, in fact, disputes the Pre-Trial Judge's factual assessment and her conclusion that the supporting material does not demonstrate the existence or formation of a group of at least three persons, nor even the agreement reached between Thaçi and Kuçi to involve a third person.[66] In Thaçi's view, the SPO submissions are speculative and the transcript of the 3 September 2023 visit is so vague, confusing and ambiguous that it cannot establish that Thaçi and Kuçi discussed the involvement of a third individual in a purported plan to approach Witness 6.[67]

30. The SPO replies that this phase of the proceedings is not the proper forum for Thaçi to dispute the accuracy of the evidence, as it is for trial.[68]

2. Assessment of the Court of Appeals Panel

31. The SPO challenges the Pre-Trial Judge's interpretation of Articles 35(1) and 401(2) of the KCC and her subsequent decision to reject Thaçi's and Kuçi's criminal liability under Article 35 of the KCC in relation to the offences of obstructing official persons under Counts 2 and 19 of the Submitted Indictment.

32. The Appeals Panel notes that Article 35 of the KCC, which proscribes the "agreement to commit criminal offences", provides as follows:

> 1. Whoever agrees with one or more other persons to commit a criminal offense and one or more of such persons does any

[64] Thaçi Response, para. 11.
[65] Thaçi Response, para. 11.
[66] Thaçi Response, para. 12.
[67] Thaçi Response, para. 13 wherein Thaçi also disputes the accuracy and admissibility of the translator's clarification, which he argues amounts in fact to a subjective opinion on what Thaçi intended to say rather than what he said.
[68] Reply, para. 8.

> substantial act towards the commission of the criminal offense, shall be punished as provided for the criminal offense.
>
> 2. For the purposes of this Article, 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.

33. The offence of obstructing official persons, within the meaning of Article 401(2) of the KCC, is defined as follows:

> Whoever participates in a group of persons which by common action obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished by a fine or by imprisonment of up to three (3) years.

34. The Panel notes that a "group of people" under Article 113(12) of the KCC is defined as "three or more persons".

35. The Panel recalls that the Pre-Trial Judge, after setting out the legal requirements for Article 35(1) KCC Liability,[69] noted that "an agreement to commit an offence within the meaning of Article 35 of the KCC must relate to the material elements of the concerned offence as well as any concrete factual elements necessary for the commission of the offence".[70] The Pre-Trial Judge then considered that "the material elements of the offence must exist at the time of the agreement".[71] In the context of Article 401(2) of the KCC, the Pre-Trial Judge found that any agreement between Thaçi and Kuçi "must relate to the fact that the intended obstruction is to be committed as part of a 'group'",[72] and that the existence or formation of a group comprising at least three persons must be supported by evidence.[73] In the Pre-Trial Judge's view, it would be insufficient to support the existence or formation of a group

[69] Impugned Decision, paras 104-105.
[70] Impugned Decision, para. 175.
[71] Impugned Decision, para. 175.
[72] Impugned Decision, para. 176.
[73] Impugned Decision, paras 176-177.

by solely showing that two persons agree to involve "other persons" in their obstruction plan, "whose link to and participation in the group is hypothetical or unclear".[74]

36. At the outset, the Appeals Panel observes that the agreement to commit a criminal offence under Article 35 of the KCC is an inchoate form of collaboration in criminal offences that criminalises certain acts preparatory to the commission of the agreed crime prohibited under the law.[75] The Panel notes that this mode of liability resembles the offence of conspiracy to commit a criminal offence, which exists in other domestic systems.[76] Under the KCC, it is however specifically required, in addition to the agreement itself, that one or more of the persons in agreement "undertakes substantial preparatory steps towards the commission of a criminal offence".[77] As with conspiracy, under Article 35(1) of the KCC, the agreed criminal offence is punishable even if the substantive offence has not actually been perpetrated.[78]

37. The Appeals Panel turns to the SPO's argument challenging the Pre-Trial Judge's finding that "the material elements of the offence must exist at the time of the agreement".[79] The Panel finds merit in the SPO's contentions that Article 35(1) of the

[74] Impugned Decision, para. 177.
[75] *Salihu et al.* Commentary, Article 35, mn. 2, p. 176. The Appeals Panel has further taken into consideration the *Salihu et al*. Commentary as an informative, but not necessarily persuasive, source of interpretation in all relevant respects. See also KSC-CA-2022-01, F00114, Appeal Judgment, 2 February 2023 ("*Gucati and Haradinaj* Appeal Judgment"), para. 28.
[76] See for example, Croatian Criminal Code, Article 332 ("Conspiracy to Commit a Criminal Offense"); Serbian Criminal Code, Article 345 ("Conspiracy to Commit a Crime"), Macedonian Criminal Code, Article 393 ("Conspiracy to commit a crime"); United Kingdom, Criminal Law Act 1977, Part I ("Conspiracy"); Spanish Criminal Code, Article 17; Dutch Criminal Code, Section 80. See also German Criminal Code, Section 30 ("Attempted Participation").
[77] Article 35(2) of the KCC. While mere agreement is usually sufficient in the case of conspiracy, the liability of a person who agrees with another to commit a crime, as per Article 35 of the KCC, will depend, not only on the making of an agreement, but on substantial preparatory acts towards the commission of the crime.
[78] See for example, in the context of the crime of conspiracy to commit genocide, ICTR, *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Trial Judgement, 16 May 2003, para. 423; ICTR, *Prosecutor v. Gatete*, ICTR-00-61-A, Judgement, 9 October 2012, para. 262. See also *Salihu et al*. Commentary, Article 35, mns 2, 6, pp. 176-177.
[79] Impugned Decision, para. 175.

KCC does not require all of the material elements of the agreed offence to be in place for this provision to apply and that all of the material elements, which constitute the *actus reus* of the crime, cannot de facto exist at the time of the agreement; should that be the case, the crime would be fully consumed – to the extent that the *mens rea* element is satisfied.[80] In this respect, the Panel recalls that, as the agreement to commit a criminal offence is an inchoate form of criminal liability, the agreed criminal offence is punishable under Article 35(1) of the KCC, even if the substantive offence has not actually been perpetrated.[81] Therefore, the Panel finds that the Pre-Trial Judge erred in stating that "the material elements of the offence must exist at the time of the agreement" under Article 35(1) of the KCC.

38. The Panel also notes, however, the Pre-Trial Judge's finding, which the SPO does not challenge, that an agreement to commit an offence within the meaning of Article 35 of the KCC must *relate to* the material elements of the concerned offence, as well as any concrete factual elements necessary for the commission of the offence.[82] This is supported by the interpretation in the *Salihu et al.* Commentary according to which, in order to establish that an agreement has been made within the scope of the offence, it is not sufficient that the agreement comprises the abstract elements of the criminal offence defined in the law; it is also required that it comprises or features some important factual elements that make it concrete, including in terms of the concrete circumstances thereof.[83]

39. In the context of the offence under Article 401(2) of the KCC (i.e. participation in a *group of persons*, which, by common action obstructs or attempts to obstruct an

[80] Appeal, paras 6-7, 9-11; Reply, para. 5.
[81] See above, para. 36. See also, in the context of the crime of conspiracy to commit genocide, ICTR, *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Trial Judgement, 16 May 2003, para. 427; *Salihu et al.* Commentary, Article 35, mns 2, 6, pp. 176-177.
[82] Impugned Decision, para. 175, referring to *Salihu et al*., Article 35 of the 2012 Kosovo Criminal Code ("2012 KCC"), mns 4-5, p. 175.
[83] See *Salihu et al*. Commentary, Article 35 of the 2012 KCC, mn. 5, p. 176.

official person in performing official duties), the Panel considers that this does not mean that all the material elements of this offence – for example, the act of obstruction itself – must exist. However, it does mean that the agreement between the alleged perpetrators – Thaçi and Kuçi – must relate to the fact that the intended obstruction is to be committed as part of a "group" comprising at least three persons, as defined under Article 113(12) of the KCC.[84] In other words, the alleged perpetrators need to have an agreement on the constitutive elements of the offence under Article 401(2) of the KCC, including the participation of a third person.[85]

40. Moreover, with respect to the participation of the third person, the competent panel cannot rule in hypothetical terms.[86] The Panel agrees with the Pre-Trial Judge that concretely, in order to establish the existence of an agreement under Article 35(1) of the KCC, the group cannot be construed by including a third person through agreement between Thaçi and Kuçi alone, "without evidence that the third person is part (or is to be part) of the group".[87] Otherwise, a constitutive material element of the offence under Article 401(2) of the KCC would be disregarded, namely a group consisting of three persons, which could lead to a new offence with less strict requirements not envisaged by the KCC, namely criminalising agreements of obstruction by two persons.[88] In this context, the Panel also shares the Pre-Trial Judge's concern vis-à-vis the risk of prosecuting two persons who agree to involve in their

[84] Impugned Decision, paras 176-177.
[85] See also Thaçi Response, para. 11 ("[O]therwise it cannot be maintained that they have agreed to commit such an offence"). The Panel also notes that the SPO incorrectly referred to the Pre-Trial Judge as setting out the applicable law for Article 35(1) of the KCC by quoting the applicable law as set out by the Pre-Trial Judge for attempt under Article 28 of the KCC. See Appeal, para. 6, referring to Impugned Decision, para. 107: "'a perpetrator attempts the commission of the offence by […] fulfilling *one or more* of the material elements of the offence' – not all of them".
[86] See Impugned Decision, para. 177.
[87] See Impugned Decision, para. 180.
[88] See Impugned Decision, para. 180. See also Thaçi Response, para. 11. Contra Reply, para. 7.

obstruction plan "other persons", whose link to and participation in the group is hypothetical or unclear.[89]

41. With respect to the degree of specificity of the "agreement", the Panel notes that the Pre-Trial Judge found that, while Article 401(2) of the KCC does not necessarily require proof of the identity of each member of the group,[90] it must be ascertained that a group of at least three persons is to be constituted for liability to be retained under Article 35 of the KCC.[91] The Panel recalls that the degree of specificity to be provided in an indictment will depend on the nature and circumstances of the case, in particular, the proximity of the Accused to the events and the scale of the alleged crimes.[92] In a case of joint criminality such as obstruction under Article 401(2) of the KCC, when the facts involve a crowd, it would not be required to identify each and every member of the group even at the stage of conviction.[93] However, when the purported group involves a small circle of persons such as the present case,[94] the identity of each individual should be specified[95] and supported by sufficient evidence to establish a well-grounded suspicion that the offence contemplated by the parties to the agreement is to be committed by a group.[96] Therefore, the Panel agrees with the

[89] Impugned Decision, para. 177.
[90] See Impugned Decision, para. 177, referring to Kosovo, District Court of Pristina, *Prosecutor v. Albin Kurti*, P. Nr. 281/07, Verdict, 14 June 2010 ("*Kurti* Judgment"). See also Kosovo, Court of Appeals, *Prosecutor v. R.K.*, PAKR 147/16, Judgment, 4 August 2016 ("*R.K.* Appeal Judgment").
[91] See similarly KSC-BC-2020-07, F00611/RED, Public Redacted Version of the Trial Judgment, 18 May 2022 (confidential version filed on 18 May 2022) ("*Gucati and Haradinaj* Trial Judgment"), paras 684, 690-691.
[92] See *Gucati and Haradinaj* Appeal Decision on Preliminary Motions, para. 46; KSC-BC-2020-04, IA004/F00008, Public Redacted Version of Decision on Pjetër Shala's Appeal against Decision on Motion Challenging the Form of the Indictment, 22 February 2022 (confidential version filed on 22 February 2022), paras 17, 27.
[93] See *Kurti* Judgment; *R.K.* Appeal Judgment. See also *Gucati and Haradinaj* Trial Judgment, paras 684, 690-691.
[94] See Submitted Indictment, paras 16, 26, 29; F00028/A02/RED, Public redacted version of 'Annex 2 to Submission of Further Amended Indictment for confirmation', Rule 86(3)(b) Outline, 4 February 2025 (strictly confidential and *ex parte* version filed on 12 November 2024, reclassified as confidential on 17 December 2024, pp. 43-44; Impugned Decision, paras 174, 178-179.
[95] See Order Relating to the Amended Indictment, paras 7-8.
[96] Article 39(2) of the Law. See also Article 38(4) of the Law.

Pre-Trial Judge that, in the present case, it would not be sufficient to show that two persons agree to involve "other persons" in their obstruction plan.[97]

42. The Panel thus rejects the SPO's argument that all that was required for the offence to materialise was the agreement to involve a "third person" or that the participation of a third person was contemplated;[98] rather there needs to be evidence that the third person is part (or is to be part) of the group under Article 401(2) of the KCC.[99] The Panel considers that this interpretation is in line with the ordinary meaning of the terms used and the object and purpose of both Article 35(1) and Article 401(2) of the KCC. In so finding, the Panel is specifically mindful that the object and purpose of Article 35 of the KCC requires a strict application of this inchoate mode of liability because the agreed criminal offence is punishable even if the substantive offence has not actually been perpetrated.[100] In any event, to the extent that there would be ambiguity in the interpretation of these provisions, it must be resolved in favour of the Accused, in line with the principles of legality and strict interpretation of criminal law.

43. The Panel thus finds that, although it was incorrect to state that "the material elements of the offence must exist at the time of the agreement" under Article 35(1) of the KCC, the SPO fails to show an error in the Pre-Trial Judge's finding that "the group cannot be construed by including a third person through agreement between Mr Thaçi and Mr Kuçi alone, without evidence that the third person is part (or is to be part) of the group."[101]

[97] Impugned Decision, para. 177.
[98] Appeal, paras 13, 15.
[99] Impugned Decision, para. 180.
[100] In addition, the Panel notes that Article 35(1) of the KCC provides that an agreement to commit a criminal offence shall be punished as provided for the criminal offence, which also invite judges to adopt a strict and cautious application of this mode of liability.
[101] Impugned Decision, para. 180.

44. In any event, the Panel finds that such error is immaterial and would not affect the Pre-Trial Judge's ultimate conclusion not to confirm the charges against Thaçi and Kuçi under Article 35 of the KCC in relation to the offences under Counts 2 and 19.[102] The Panel recalls that the Pre-Trial Judge found that there was a problem of evidential sufficiency regarding the agreement and therefore the "group" requirement. Indeed, the Pre-Trial Judge found that the evidence did not demonstrate the existence or formation of a group comprising at least three persons in the context of the 3 September 2023 visit. Moreover, and most importantly, she also considered that the supporting material did not allow her to find the requisite evidentiary threshold of a well-grounded suspicion that Thaçi and Kuçi actually agreed to involve any of the individuals identified by the SPO in their plan to approach Witness 6 as regards his (then) impending testimony in the *Thaçi et al.* trial (or any other witness).[103]

45. In light of the above, the Court of Appeals Panel dismisses Ground 1 of the Appeal.

B. WHETHER THE PRE-TRIAL JUDGE MISINTERPRETED ARTICLE 393 OF THE KCC BY RULING THAT ONLY "PARTIES" CAN BE LIABLE FOR CONTEMPT OF COURT (GROUND 2)

1. Submissions of the Parties

46. The SPO submits that the Pre-Trial Judge erred by finding that because Smakaj, Kilaj and Fazliu were not "parties" to the proceedings in case KSC-BC-2020-06

[102] Impugned Decision, paras 291, 301. See also Impugned Decision, para. 181.
[103] Impugned Decision, para. 178. In any event, Pre-Trial Judge in this instance, is best placed to assess the evidence presented by the parties, and therefore has broad discretion in assessing the appropriate weight to be given to it. See [REDACTED]; KSC-CA-2023-02, F00038/RED, Public Redacted Version of Appeal Judgment, 14 December 2023 (confidential version filed on 14 December 2023), paras 24, 38 and jurisprudence cited therein; ICC, *Prosecutor v. Bemba*, ICC-01/05-01/08-2151-Red, Public redacted version Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled "Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'", 5 March 2012, para. 16.

("Case 06 proceedings"), they were not bound by the legal obligations, and could not be held liable, under Article 393 of the KCC.[104] The SPO argues that the Pre-Trial Judge misinterpreted the term "whoever" in Article 393 of the KCC to mean only "parties" to a given proceedings, instead of the ordinary meaning of the term, an interpretation which plainly defeats the object and purpose of the provision.[105]

47. In support, the SPO argues that at the International Criminal Tribunal for the former Yugoslavia ("ICTY"), non-parties were prosecuted for contempt, including for the disclosure of confidential information.[106] The SPO contends that the Pre-Trial Judge's approach creates a "concerning impunity gap", sending a dangerous message to non-parties that they can disobey court orders regarding protected witnesses.[107]

48. According to the SPO, for the purposes of committing contempt, it is not necessary for a decision to be legally binding on the direct perpetrator but only that the perpetrator be aware of its content, including when such knowledge is passed on by formal "parties" to external individuals.[108] In this context, the SPO avers there is no reason to treat the object and purpose of Article 393 of the KCC more restrictively than Article 392 of the KCC which prohibits the violation of the secrecy of proceedings by "whoever".[109]

---

[104] Appeal, para. 17.
[105] Appeal, paras 18, 23. See also Appeal, para. 25.
[106] Appeal, paras 18-20, referring to e.g. ICTY, *Prosecutor v. Marijačić and Rebić*, IT-95-14-R77.2, Decision on Motions to Dismiss the Indictment due to Lack of Jurisdiction and Order Scheduling a Status Conference, 7 October 2005, para. 18; ICTY, *Prosecutor v. Marijačić and Rebić*, IT-95-14-R77.2, Judgement, 10 March 2006 ("*Marijačić and Rebić* Trial Judgement"), para. 28; ICTY, *Prosecutor v. Marijačić and Rebić*, IT-95-14-R77.2-A, Judgement, 27 September 2006 ("*Marijačić and Rebić* Appeal Judgement"), para. 24.
[107] Appeal, para. 20; Reply, paras 10, 15.
[108] Appeal, para. 21.
[109] Appeal, para. 22. See also Appeal, para. 21, wherein the SPO refers to a finding by Trial Panel II in the KSC-BC-2020-07 proceedings that in the context of Article 392 of the KCC, requiring that a particular decision be legally binding only on the direct perpetrator would be inconsistent with the purpose of the provision and enable anyone other than the formal recipient of the information to fall beyond the reach of the law. See *Gucati and Haradinaj* Trial Judgment, para. 75.

49. Finally, the SPO submits that the Pre-Trial Judge's error had the effect of excluding co-perpetration liability, while confirming accessorial liability, which reduces the ways the Accused's conduct may be characterised at trial.[110] The SPO therefore requests that the Appeals Panel reinstate Counts 14, 16 and 18 of the Submitted Indictment to include co-perpetration liability pursuant to Article 31 of the KCC or, alternatively, that the Panel remand the issue to the Pre-Trial Judge to apply the law correctly.[111]

50. Thaçi responds regarding the specific language of Article 393 of the KCC, arguing that the use of the term "obey" in Article 393(1) indicates that this criminal offence can be perpetrated only by a person to which a final court order, ruling, decision or judgment has been directed and/or against whom the latter produces legal effects.[112] According to Thaçi, while this provision most frequently applies to parties in court proceedings, it can also be used against other participants, such as witnesses, who may also be subject to a final court order, ruling, decision or judgment.[113] As such, Thaçi argues that as the Pre-Trial Judge correctly found that Smakaj, Kilaj and Fazliu were neither parties nor participants in the Case 06 proceedings, the decisions in that case did not impose any direct obligations upon them that could be disobeyed.[114]

51. Kilaj responds that the SPO misrepresents the Pre-Trial Judge's reasoning in the Confirmation Decision, in particular arguing that she did not find that non-parties to a case are incapable, as a matter of law, of committing contempt within the meaning of Article 393 of the KCC.[115] According to Kilaj, the Pre-Trial Judge's reasoning

[110] Appeal, para. 24.
[111] Appeal, para. 25.
[112] Thaçi Response, para. 15.
[113] Thaçi Response, para. 15, wherein Thaçi submits that this conclusion is corroborated by the fact that under Article 393(2) of the KCC, a fine can be imposed on a daily basis until the person complies with the relevant final court order, ruling, decision or judgment.
[114] Thaçi Response, para. 15.
[115] Kilaj Response, paras 5, 8, 9, 15. As a result of this misrepresentation, Kilaj argues that the SPO's reliance on the ICTY *Marijačić and Rebić* case is irrelevant. See Kilaj Response, para. 5.

specifically related to judicial orders in the Case 06 proceedings, namely the Contact Protocol Decision and the Protective Measures Decision, which clearly apply to the Parties and Participants in those proceedings.[116] Kilaj submits that the Pre-Trial Judge carefully considered the specific wording of the applicable decisions in the Case 06 proceedings and reasonably concluded that they could not apply to Kilaj, Smakaj and Fazliu.[117]

52. Moreover, Thaçi and Kilaj argue that the cases from the ICTY and Special Tribunal for Lebanon cited by the SPO in the Appeal are inapposite and non-binding, as well as distinguishable from this case.[118] Thaçi also argues that in the ICTY cases, the offence for which the Accused were prosecuted is similar to the offence in Article 392 of the KCC, not that of Article 393 of the KCC.[119] Kilaj further submits that the SPO does not refer to any jurisprudence from Kosovo higher courts to demonstrate that its interpretation of Article 393 of the KCC is preferable.[120]

53. Finally, Thaçi and Kilaj respond that the SPO's comparison of Articles 392 and 393 of the KCC, as well as Trial Panel II's reasoning in the *Gucati and Haradinaj* Trial Judgment related to Article 392 of the KCC, are misplaced.[121]

54. The SPO replies to Thaçi and Kilaj's arguments that interpreting the word "whoever" in Article 393 of the KCC as limited to "parties" defeats the object and purpose of the provision and is antithetical to the very administration of justice and

[116] Kilaj Response, paras 5-9, referring to KSC-BC-2020-06, F00854, Decision on Framework for the Handling of Confidential Information during Investigations and Contact Between a Party or Participant and Witnesses of the Opposing Party or of a Participant, 24 June 2022 ("Contact Protocol Decision"); [REDACTED] ("Protective Measures Decision").
[117] Kilaj Response, paras 8-9, 15-16. See also Kilaj Response, para. 7.
[118] Kilaj Response, paras 10-13; Thaçi Response, para. 16.
[119] Thaçi Response, para. 16.
[120] Kilaj Response, para. 10.
[121] Thaçi Response, para. 16, wherein Thaçi submits that in the *Gucati and Haradinaj* case, the Accused were prosecuted under Article 392 of the KCC, which does not contain the term "obey"; Kilaj Response, para. 14.

"would legalise Contempt".[122] The SPO also argues that "revealing" information under Article 392 of the KCC can logically result from "failing to obey" an order that has prohibited such revelation under Article 393 of the KCC.[123]

55. According to the SPO, Kilaj's argument that he could not disobey the Applicable Case 06 Decisions as they were not directed at him personally is irrational and furthermore the operation of the rule of law in Kosovo requires that the public not wilfully violate judicial orders, irrespective of whether they are involved in a proceeding.[124] The SPO also replies that there is no functional difference between Kilaj as a member of the public and the accused in the ICTY cases cited by the SPO, and the implied suggestion that under Article 393 of the KCC, Kilaj needed to be warned by further or repeated judicial correspondence – or postal letter – to be held criminally responsible is without merit.[125]

2. Assessment of the Court of Appeals Panel

56. As a preliminary matter, the Appeals Panel notes the adoption by reference by Smakaj and Fazliu , without further elaboration, of the arguments submitted by Co-Accused Thaçi and Kilaj on Grounds 2 and 3.[126] The Panel reminds Counsel for Smakaj and Fazliu that the Appeals Panel in principle will not consider a party's arguments made in other documents, for example the submissions of his Co-Accused, as properly substantiated.[127]

---

[122] Reply, paras 10, 15.
[123] Reply, para. 11.
[124] Reply, para. 12, wherein the SPO further contends that if an accused person wishes to raise the defence of mistake of fact, he can do so at trial, but that it does not exclude responsibility *ab initio*.
[125] Reply, para. 13.
[126] See Smakaj and Fazliu Joint Response, paras 5, 25(b).
[127] See KSC-BC-2020-06, IA004/F00005/RED, Public Redacted Version of Decision on Hashim Thaçi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), para. 88; KSC-BC-2020-06, IA002/F00005/RED, Public Redacted Version of Decision on Jakup Krasniqi's Appeal Against Decision on Interim Release, 30 April 2021 (confidential version filed on 30 April 2021), para. 81.

57. The Panel first notes that under Counts 9 to 12, 14, 16, 18 and 20 of the Submitted Indictment, the SPO alleged that between at least 26 June and 2 November 2023, Thaçi, Fazliu, Smakaj, Kuçi and Kilaj failed to obey final orders contained in the Contact Protocol Decision, and that Thaçi and Kilaj also failed to obey the final Protective Measures Decision, both decisions issued by the Pre-Trial Judge in the Case 06 proceedings (together, the "Case 06 Decisions").[128]

58. The Panel notes that in the Contact Protocol Decision, the Pre-Trial Judge in the Case 06 proceedings ordered, *inter alia*, the "Parties and participants" in that case not to: (i) disclose to third parties any confidential documents or information, unless such disclosure is directly and specifically necessary for the preparation and presentation of their case; (ii) disclose the identity of a witness to a third party unless such disclosure is directly and specifically necessary for the preparation and presentation of their case, or reveal to third parties that any protected witness is involved with the activities of the Specialist Chambers or SPO or the nature of such involvement; and (iii) contact a witness of another Party outside the terms specified therein.[129]

59. The Panel further notes that in the Protective Measures Decision, the Pre-Trial Judge in the Case 06 proceedings ordered *inter alia*, protective measures as regards Witness 4.[130]

60. In the Confirmation Decision, the Panel notes that the Pre-Trial Judge found that the Contact Protocol Decision and related decisions are addressed to the Parties and participants in the Case 06 proceedings and that as Fazliu, Smakaj and Kilaj "are neither Parties nor participants" in the Case 06 proceedings, these decisions "do not impose any direct obligations upon them that could be disobeyed".[131] The Pre-Trial

[128] See Submitted Indictment, paras 34, 36-37, 40, 42-46, 48, 50-54.
[129] Contact Protocol Decision, para. 212 (I)(a), (c), (e)-(f); (II)(a)-(o).
[130] Protective Measures Decision.
[131] Impugned Decision, para. 244. The Pre-Trial Judge further noted that Fazliu, Smakaj and Kilaj's alleged failure to obey the Contact Protocol Decision concerns the order not to disclose to third parties

Judge further found regarding the Protective Measures Decision, that as it is classified as confidential and was not addressed to Kilaj, who is neither a Party nor a participant in the Case 06 proceedings, it does not impose any direct obligations upon him that could be disobeyed.[132] Therefore, the Pre-Trial Judge found that, in relation to Counts 14, 16 and 18 of the Submitted Indictment, the supporting material did not demonstrate that there was a well-grounded suspicion that Fazliu, Smakaj and Kilaj committed the offence of contempt of court under Article 393 of the KCC.[133]

61. The Panel recalls that Article 393 ("Contempt of court") of the KCC provides that:

> 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 of up to six (6) months.
>
> 2. Fines imposed under this Article may be daily and may be imposed until the perpetrator complies with the final order, ruling, decision or judgment that is the subject of the action.
>
> […].

62. The Panel first notes that in Article 393(1) of the KCC, the language "[w]hoever *fails to obey* any final order, ruling, decision or judgment" is the crux of the provision

(i) any confidential documents or information unless such disclosure is directly and specifically necessary for the preparation and presentation of their case; and (ii) the identity of a witness unless such disclosure is directly and specifically necessary for the preparation of their case, or reveal to third parties that any protected witness is involved with the activities of the Specialist Chambers/SPO or the nature of such involvement. See Impugned Decision, fn. 507. The Pre-Trial Judge also defined the term "failure to obey" in Article 393 of the KCC as meaning "non-compliance with something due or required". See Impugned Decision, para. 87, citing, *inter alia*, *Salihu et al.* Commentary, Article 401 of the 2012 KCC, mn. 2, p. 1145.

[132] Impugned Decision, para. 245, wherein the Pre-Trial Judge further noted that the status of Witness 4 as a (protected) SPO witness, the SPO summary of the witness, and the prior statements of Witness 4 were also disclosed confidentially to the Defence teams in Case 06, including the accused in that case.

[133] Impugned Decision, paras 246, 251, wherein the Pre-Trial Judge further found that this finding is "without predjudice" to the finding that Fazliu, Smakaj and Kilak may incur individual criminal responsibility as accessories to the offence of contempt.

by which the Panel understands that the offence can be committed only by a person to which a final court order, ruling, decision or judgment has been directed and/or against whom the latter produces legal effects. The Panel recalls that a panel can be guided in its interpretation of a provision by considering the plain and ordinary meaning of the terms, in accordance with general principles of interpretation.[134] According to a plain reading of the language of Article 393 of the KCC, the Panel understands this provision to apply to parties in proceedings to which a final court order, ruling, decision or judgment is directed, as they have a duty to "obey", or comply with, such order.[135] The Panel considers that this provision could also apply to other participants in the court proceedings, such as witnesses, who may be subject to the relevant court order, ruling, decision or judgment, or individuals against whom it produces legal effects.

63. In this specific case, the Panel notes that the relevant orders, rulings, decisions or judgments, within the meaning of Article 393 of the KCC, were the Case 06 Decisions, and the Pre-Trial Judge in the Case 06 proceedings instructed the Parties and participants in that case to obey the orders included therein.[136]

64. The Panel further considers that in determining that Fazliu, Smakaj and Kilaj could not be held liable under Article 393 of the KCC, the Pre-Trial Judge took account of the SPO's specific allegations in the Submitted Indictment as to whether during the relevant period, Fazliu, Smakaj and Kilaj, among others, "failed to obey" the Case 06 Decisions.[137] The Pre-Trial Judge directly applied the language from the Case 06 Decisions, which specifically provided that the "Parties and participants" must obey

[134] See above, paras 18-20.
[135] See *Salihu et al*. Commentary, Article 401 of the 2012 KCC, mn. 1, p. 1145 (commenting that the offence of contempt of court was "entirely new" in the Kosovo system in the context of which a "legal basis was put in place whereby *parties* which have, for years on end, been unwilling to obey and comply with court orders, shall now face the risk of a prison sentence" (emphasis added)). The Panel notes that Article 393 of the 2019 KCC corresponds to Article 401 of the 2012 KCC.
[136] See above, paras 58-59.
[137] See Impugned Decision, paras 244-246.

certain orders to not disclose to third parties any confidential documents or information.[138] The Panel considers that it is clear in both of the Case 06 Decisions that the Parties and participants were the subjects of the relevant orders, and not a wider group. Moreover, the Panel considers that the Pre-Trial Judge's finding was based on whether Fazliu, Smakaj and Kilaj were bound by the Case 06 Decisions, not whether they were "parties and participants" per se. The Panel considers that the SPO misrepresents the Confirmation Decision in this regard.[139] The Panel further considers that the Pre-Trial Judge did not generally find that any non-party to proceedings is incapable of committing contempt under Article 393 of the KCC, but rather she applied the provision in light of the specific language in the Case 06 Decisions.

65. The Appeals Panel turns to the SPO's argument that the Pre-Trial Judge erred by treating the object and purpose of Article 393 of the KCC more restrictively than "its sister provision", Article 392 of the KCC.[140] The Panel notes that Article 392 of the KCC deals with the offence of violating the secrecy of proceedings, through the unauthorised revelation of secret information disclosed in official proceedings. The Appeals Panel recalls that it considered in the *Gucati and Haradinaj* Appeal Judgment that "whoever" in the context of Article 392(1) of the KCC "applies to *any person*, regardless of whether that person is part of the official Specialist Chambers' proceedings", finding that a "different interpretation would be inconsistent with the plain meaning of the text of the provision, as well as with the purpose of this provision, that is the protection of the secrecy of the proceedings."[141]

[138] See above, para. 58.
[139] See Appeal, paras 17-18, 23.
[140] See Appeal, paras 21-22.
[141] *Gucati and Haradinaj* Appeal Judgment, para. 131 (emphasis in original), further finding that "the Panel […] agrees with the Trial Panel's finding that Article 392(1) of the KCC does not specifically require that the information must have been disclosed directly to the perpetrator of the offence." See also *Salihu et al*. Commentary, Article 400(1) of the 2012 KCC, mns 4, 11, pp. 1142-1143; *Gucati and Haradinaj* Trial Judgment, para. 75.

66. The Panel considers however, that as distinguished from Article 393 of the KCC, Article 392 of the KCC does not include the language of "fails to obey" a final court order, ruling, decision or judgment, which the Panel has found refers to a party or participants in a proceeding to whom such order is directed, or individuals against whom it produces legal effects, all of whom have a duty to comply with such order.[142] In the same vein, the Appeals Panel notes the SPO's argument that for the purposes of committing contempt, it is sufficient for a perpetrator to "simply be aware" of the content of a decision or order, not that it be legally binding on the direct perpetrator.[143] The Panel considers that in this respect the SPO misconstrues the relevant provision. For the purposes of Article 393 of the KCC, it is not sufficient for the perpetrator to only have knowledge of the content of a decision or order, but rather that it is necessary for the perpetrator to have a duty to comply with such decision or order, by way of the plain and ordinary meaning of the provision.

67. The Panel will turn to the ICTY jurisprudence which the SPO cites in support of its arguments on this issue. The Panel notes that in the *Marijačić and Rebić*, *Jović* and *Margetić* cases at the ICTY, the accused were prosecuted under Rule 77(A)(ii) of the ICTY Rules of Procedure and Evidence ("ICTY Rules").[144] Rule 77(A)(ii) of the ICTY Rules provides that the Tribunal "may hold in contempt those who knowingly and willfully interfere with its administration of justice, including any person who discloses information relating to those proceedings in knowing violation of an order of a Chamber".[145] The Panel is not persuaded by the SPO's argument that the provision "in knowing violation of an order of a Chamber" in Rule 77(A)(ii) of the ICTY Rules

[142] See above, para. 62.
[143] See Appeal, para. 21.
[144] See *Marijačić and Rebić* Trial Judgement; *Marijačić and Rebić* Appeal Judgement; ICTY, *Prosecutor v. Jović*, IT-95-14 & IT-95-14/2-R77, Judgement, 30 August 2006; ICTY, *Prosecutor v. Jović*, IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007; ICTY, *Prosecutor v. Margetić*, IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007.
[145] ICTY Rules, Rule 77(A)(ii). Rule 77(A)(iii) of the ICTY Rules provides similarly for any person who without just excuse "*fails to comply* with an order to attend or produce documents before a Chamber". See ICTY Rules, Rule 77(A)(iii).

is similar in language, object and purpose to Article 393 of the KCC ("fails to obey an order").[146]

68. In this regard, the Panel notes that the KCC criminalises different conduct, or acts, of contempt under different provisions, such as the disclosure of confidential information by non-parties through Article 392 of the KCC as opposed to contempt of court through Article 393 of the KCC. The Panel considers this framework under Kosovo law to be more specific and thus distinguishable from that of the ICTY, and other *ad hoc* tribunals, where each act is captured under the overall umbrella of contempt.

69. In light of this, the Panel considers that the SPO's interpretation of the relationship between Articles 392 and 393 of the KCC is not convincing and similarly finds the ICTY jurisprudence cited in support to be inapposite as the offences for which the accused were charged in those cases were clearly distinguishable.[147] The Panel therefore dismisses the SPO arguments in this regard.

70. Finally, with regard to the SPO's argument that the Pre-Trial Judge's interpretation of Article 393 of the KCC creates a "concerning impunity gap",[148] the Panel recalls that the Pre-Trial Judge did not make a general finding that "non-parties" in proceedings could never be held liable for the offence of contempt of court, rather she interpreted Article 393 of the KCC in light of the specific language in the Case 06 Decisions and with the particular facts of the case before her.[149] The Panel finds that

[146] The Panel considers that the term "obey" an order as provided for in Article 393 of the KCC is missing in Rule 77(A)(ii) of the ICTY Rules and that "in knowing violation of an order" is distinguishable from "fails to obey an order". Contra Appeal, fn. 38.
[147] The Appeals Panel further considers that the issue of an accused being warned or put on notice by judicial correspondence (or postal letter) is outside the scope of the issue here. Contra Reply, para. 13; Kilaj Response, paras 12-13. See also above, paras 62, 66.
[148] See Appeal, para. 20.
[149] See also above, para. 64.

the SPO has not shown an error in the Pre-Trial Judge's finding and dismisses its argument in this regard.

71. In light of the above, the Appeals Panel dismisses Ground 2 of the Appeal.

C. WHETHER THE PRE-TRIAL JUDGE WRONGLY EXCLUDED CO-PERPETRATION AS A MODE OF LIABILITY IN RESPECT OF MESSRS THAÇI, SMAKAJ, KILAJ AND FAZLIU UNDER COUNTS 9, 11, 12, 14, 16 AND 18 (GROUND 3)

1. Submissions of the Parties

72. The SPO argues that the Pre-Trial Judge erred in the application of the law by excluding the possibility of co-perpetration liability for Smakaj, Kilaj and Fazliu and that this finding was determinative and directly led to the Pre-Trial Judge's erroneous exclusion of co-perpetration liability for Counts 9, 11, 12, 14, 16 and 18 of the Submitted Indictment.[150]

73. Kilaj responds that as the Pre-Trial Judge committed no error with respect to Ground 2, there was no "erroneous starting point that contaminated the reasoning that followed" and thus, the error alleged under Ground 3 is not established.[151] Thaçi and Kilaj argue that, in any event, it was within the Pre-Trial Judge's discretion to determine the form of criminal responsibility that best captures the Accused's alleged contribution and the SPO fails to demonstrate that the challenged findings were so unreasonable as to constitute an abuse of discretion.[152]

2. Assessment of the Court of Appeals Panel

74. The Appeals Panel recalls that it dismissed above the SPO's challenge to the Pre-Trial Judge's finding in the Confirmation Decision that the supporting material

[150] Appeal, paras 26-27, 36; Reply, para. 16. See also Appeal, paras 28-35.
[151] Kilaj Response, para. 17.
[152] Thaçi Response, para. 20; Kilaj Response, para. 19. See also Thaçi Response, paras 19, 21-22; Kilaj Response, para. 18.

did not demonstrate that there was a well-grounded suspicion that Fazliu, Smakaj and Kilaj committed the offence of contempt of court pursuant to Article 393 of the KCC under Counts 14, 16 and 18 of the Submitted Indictment.[153] The Panel considers that as it found no error in the Pre-Trial Judge's reasoning, finding that Fazliu, Smakaj and Kilaj "did not commit the offences under Counts 14, 16 and 18, given that their alleged conduct does not fulfil the material elements of the offence of contempt of court pursuant to Article 393 of the KCC",[154] there can be no error with regard to the Pre-Trial Judge's assessment of co-perpetration liability under Counts 9, 11 and 12 of the Submitted Indictment.[155]

75. Therefore, the Appeals Panel dismisses Ground 3 of the Appeal.

D. WHETHER THE PRE-TRIAL JUDGE ERRED BY RULING THAT ARTICLE 32(3) OF THE KCC DOES NOT APPLY TO THE OFFENCE OF OBSTRUCTING OFFICIAL PERSONS UNDER ARTICLE 401(3) AND (5) OF THE KCC (GROUND 4)

1. Submissions of the Parties

76. The SPO challenges the Pre-Trial Judge's interpretation of the plain terms of Article 32(3) of the KCC (third form of incitement), and her conclusion vis-à-vis the offence of obstructing official persons under Article 401(3) and (5) of the KCC.[156] In the SPO's view, the Pre-Trial Judge erred in finding that because Article 401(3) and (5) of the KCC only provides for punishment of one to five years imprisonment, Article 32(3) was inapplicable as this provision applies only to offences punishable by imprisonment of at least five years.[157]

[153] See above, para. 71.
[154] Impugned Decision, para. 262.
[155] See Appeal, paras 26-27, 36. See also Appeal, paras 28-35; Reply, para. 16.
[156] Appeal, paras 37-39, 41.
[157] Appeal, para. 37.

77. The SPO submits that: (i) the Pre-Trial Judge's equating of the phrase "at least" with a requirement of a *minimum* term of five years of imprisonment contradicts the plain terms and ordinary meaning of Article 32(3) of the KCC, as well as its object and purpose, which applies to offences punishable by at least five years of imprisonment at the upper limit;[158] (ii) the SPO's interpretation is supported by the *Gucati and Haradinaj* Confirmation Decision and the interpretation of similar provisions of the Kosovo judicial system;[159] (iii) there exists a divergence in interpretation between lower panels of the Specialist Chambers which must be addressed by the Appeals Panel;[160] and (iv) as a result of her error, the Pre-Trial Judge wrongly excluded liability under Article 32(3) of the KCC ("Article 32(3) KCC Liability") for the offence of obstruction of official persons pursuant to Article 401(3) and (5) of the KCC.[161] The SPO therefore requests the Appeals Panel to reinstate Article 32(3) KCC Liability for Counts 1, 3 and 4 (with respect to Thaçi), or, alternatively, remand the issue to the Pre-Trial Judge to do so.[162]

78. Thaçi responds that the Pre-Trial Judge correctly interpreted Articles 32(3) and 401(3) and (5) of the KCC, in accordance with the plain terms of these provisions and their ordinary meaning.[163] Thaçi submits that the *Gucati and Haradinaj* Confirmation Decision, on which the SPO relies, was contradicted by the *Gucati and Haradinaj* Trial Judgment.[164] Finally, Thaçi adds that criminal law must be interpreted strictly and, in case of ambiguity, in favour of the Accused.[165]

---

[158] Appeal, paras 39-40; Reply, paras 17-20.
[159] Appeal, para. 40.
[160] Appeal, paras 39-40.
[161] Appeal, para. 41.
[162] Appeal, para. 41.
[163] Thaçi Response, paras 24-25.
[164] Thaçi Response, para. 26. In their joint response, Smakaj and Fazliu also submit that the interpretation of Article 32(3) of the KCC has been adversely determined in the *Gucati and Haradinaj* Trial Judgment, to which the SPO did not seek to appeal and that this interpretation has not been amended or reversed by the Court of Appeal Chamber. See Smakaj and Fazliu Joint Response, para. 21.
[165] Thaçi Response, para. 27.

79. The SPO replies that Thaçi fails to explain why Trial Panel II's interpretation in the *Gucati and Haradinaj* Trial Judgment – which ignores the context, object and purpose of Article 32(3) of the KCC – should be preferred over the one of the then Pre-Trial Judge in the *Gucati and Haradinaj* Confirmation Decision.[166]

2. Assessment of the Court of Appeals Panel

80. The Appeals Panel recalls that Article 32 of the KCC, which includes "incitement" as a form of collaboration in criminal offences, provides in paragraph 3 that:

> 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.

81. The Panel notes that, when applying this mode of liability to the offence of obstruction of official persons, the Pre-Trial Judge, having considered that this offence is punishable in its aggravated forms under Article 401(3) and (5) of the KCC by imprisonment "of one (1) to five (5) years", found that this form of incitement was not applicable in the present case.[167] The Pre-Trial Judge therefore excluded Thaçi's liability under Article 32(3) KCC Liability for Counts 1, 3 and 4 of the Confirmed Indictment.

82. The Panel understands that the Pre-Trial Judge interpreted the phrase "punishable by imprisonment of at least five (5) years" as meaning that the third form of incitement could only be applied to offences that provide for five years or more as the *minimum* term of imprisonment.[168] The SPO challenges this interpretation and argues that if the charged offence has a sentencing range that includes or exceeds five

[166] Reply, para. 19.
[167] Impugned Decision, para. 276.
[168] Impugned Decision, para. 276. See also Appeal, para. 39.

years, even if not the minimum sentence, then the third form of incitement under Article 32(3) of the KCC can be applied to that offence.

83. The Panel observes that Article 32(3) of the KCC is subject to interpretation, noting the divergence within the jurisprudence of the lower panels of the Specialist Chambers,[169] where Article 32(3) of the KCC has been interpreted as applying to either (i) criminal offences carrying a *minimum* term of imprisonment of five years or more (the Pre-Trial Judge's interpretation);[170] or (ii) criminal offences carrying a *maximum* term of imprisonment of five years or more (the SPO's interpretation).[171]

84. Having conducted a careful assessment, the Appeals Panel agrees, by majority, with the SPO and considers that the plain terms of Article 32(3) of the KCC, according to their ordinary meaning, shall be understood as applying to offences for which the sentencing range includes or exceeds five years, even if not the minimum sentence.[172]

---

[169] *Compare* Impugned Decision, para. 276 and *Gucati and Haradinaj* Trial Judgment, para. 193 *with* KSC-BC-2020-07, F00074/RED, Public Redacted Version of the Decision on the Confirmation of the Indictment, 22 December 2020 (confidential version filed on 11 December 2020) ("*Gucati and Haradinaj* Confirmation Decision"), paras 89-90.

[170] Impugned Decision, para. 276; *Gucati and Haradinaj* Trial Judgment, para. 193.

[171] *Gucati and Haradinaj* Confirmation Decision, paras 89-90.

[172] The Panel notes that Trial Panel II, in the *Gucati and Haradinaj* Trial Judgment, relied on the English translation of the *Salihu et al*. Commentary. See *Gucati and Haradinaj* Trial Judgment, fn. 295. However, the Panel notes that in the original Albanian version, the commentator did not provide any clarification as to the interpretation of the phrase "punishable by imprisonment of at least five (5) years". For this reason, the Panel does not rely on the *Salihu et al*. Commentary for this interpretation. See *Salihu et al*., Article 32(3) of the 2012 KCC, mn. 1, p. 163 ("vepër penale të dënueshme me së paku pesë (5) vjet burgim" which means "punishable by at least five (5) years' imprisonment"; "vepër penale parashihet dënimi së paku pesë vjet burgim" which means "a sentence of at least five years' imprisonment"; and "veprën penale për të cilën mund të shqiptohet dënimi së paku pesë vjet burgim" which means "punishable by a sentence […] of at least five years' imprisonment"). The Panel further notes that Trial Panel II also relied, in support of their interpretation, on the difference in wording between Article 32(3) and Article 28(2) of the KCC, which reads "[a]n attempt to commit a criminal offense for which a punishment of three or more years may be imposed shall be punishable". However, the Panel observes that in the previous version of Article 28(2) of the KCC, the legislator had used the same wording as in Article 32(3) of the KCC. See Article 20(2) of the 2003 Provisional Criminal Code of Kosovo, which reads "[a]n attempt to commit a criminal offence punishable by imprisonment of at least three years shall be punishable while with regard to other criminal offences, an attempt shall be punishable only if expressly provided for by law." The Appeals Panel thus considers, by majority, that this amendment

85. This interpretation, in the Majority's view, is in accordance with the object and purpose of Article 32(3) of the KCC and consistent with the principle of effectiveness. While under the first and second form of incitement, pursuant to Article 32(1) and (2) of the KCC, the inciter incurs responsibility if the criminal offence is committed or attempted,[173] under the third form, pursuant to Article 32(3) of the KCC, the inciter incurs responsibility for inciting an offence, even if the offence is not attempted. The addition of this form of incitement – "failed incitement" – in the 2012 KCC aimed to encompass cases where, due to various reasons (personal or objective), the incitee does not commit nor attempt to commit the offence to which they have been incited.[174] Because this mode of liability criminalises conduct at an early stage of the *iter criminis* (or "path of crime"), it only applies to crimes of a certain gravity (offences punishable by imprisonment of at least five years) for which waiting for initiation would pose an unacceptable risk. The Panel observes, by majority, that should the third form of incitement under Article 32(3) of the KCC be interpreted as to apply only to criminal offences carrying a *minimum* term of imprisonment of five years or more, many crimes of extreme gravity would be excluded from its application.[175] Thus in order to give Article 32(3) of the KCC appropriate effect, the Panel considers, by majority, that the provision must be understood to apply to crimes for which the sentencing range includes or exceeds five years, even if not the minimum sentence.

in fact clarifies that the language "punishable by imprisonment of at least [a number] years" shall be understood as "a punishment of [a number of years or more] may be imposed".

[173] Article 32 of the KCC provides, in paragraphs 1 and 2, that: "1. Whoever intentionally incites another person to commit a criminal offense shall be punished as if he or she committed the criminal offense if the criminal offense is committed. 2. Whoever intentionally incites another person to commit a criminal offense shall be punished as if he or she committed the criminal offense if the criminal offense is attempted but not committed."

[174] See *Salihu et al.* Commentary, Article 32(3) of the 2012 KCC, mns 1-4, pp. 163-164.

[175] For example, conscription or enlisting of children in armed conflict under Article 149 of the KCC, slavery under Article 163(1)-(4) of the KCC, kidnapping or attack on the person or liberty of an internationally protected person under Article 167(2) of the KCC, hostage-taking under Article 169(1) of the KCC, torture under Article 196 of the KCC, rape under Article 227(1)-(2) of the KCC.

86. Furthermore, the Panel considers, by majority, that the above interpretation is coherent with the interpretation of similar provisions of the KCC,[176] the Law,[177] and the Kosovo judicial system.[178]

87. As a result, the Panel finds, by majority, that given that the offence of obstructing official persons is punishable in its aggravated forms under Article 401(3) and (5) of the KCC, as charged in the Submitted Indictment in relation to Thaçi, by imprisonment "of one (1) to five (5) years", the third form of incitement provided in Article 32(3) of the KCC shall be deemed applicable in the present case.

[176] The Panel notes, by majority, that Article 34 of the KCC (criminal association) which is applicable to offences of the same gravity has been applied by Kosovo courts to offences for which the minimum term of imprisonment was inferior to five years. See for example, Basic Court of Pëja/Peć, *M. S. and B. Sh.*, PKR.P. nr. 4/15, Judgment, 23 December 2015, in which the court found the accused guilty under Articles 34 and 273(2) of the KCC (the perpetrator of a crime under 273(2) [organizing, managing or financing trafficking in narcotic drugs or psychotropic substances] shall be punished by imprisonment of three to 15 years). The Panel notes, by majority, that Article 34 of the KCC was adopted to more efficiently address organised crime and very serious criminal offences such as drug trafficking, arms trafficking, human trafficking, corruption, or money laundering; and that, should Article 34 of the KCC be interpreted as to apply only to criminal offences carrying a *minimum* term of imprisonment of five years or more, those very same crimes would be excluded from its application. See for example, Articles 164 (smuggling of migrants), 259 (unlawful transplantation and trafficking of human organs and tissues), 267-275 (narcotic drug offences), 364-369 (weapon offences), 414-430 (official corruption and criminal offences against official duty) of the KCC; Law No. 03/L-196 on the Prevention of Money Laundering and Terrorist Financing. See also *Salihu et al*. Commentary, Article 34 of the 2012 KCC, mns 5-14, pp. 170-172. The Panel also observes that the KCC legislator did not always use consistent language; for example in Article 277 of the KCC, the legislator used a similar formulation but specified therein that reference is made to the "maximum" term of imprisonment (Participation in or organization of an organized criminal group).

[177] The Panel notes, by majority, that Article 21(5)(b) of the Law contains a similar formulation ("[t]he accused cannot represent him/herself without legal representation (mandatory representation) in the following circumstances: […] b. from the filing of an indictment, if the indictment has been brought against him or her for a crime punishable by imprisonment of at least ten (10) years"), and agrees with the SPO that in order to have proper effect, that provision must be understood to mean: a crime for which a *maximum* punishment of ten years or more can be imposed (and not a *minimum* of ten years). See Appeal, fn. 68.

[178] See for example, Article 187(2)-(3) of the Kosovo Criminal Procedure Code, as regards the limit of the duration of detention on remand. As pointed out by the SPO, Article 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, shall be interpreted as to apply to offences carrying a *maximum* sentence of imprisonment of one year or more. See European Convention on Extradition of 13 December 1957, Article 2(1).

88. In light of the above, the Court of Appeals Panel finds, by majority, that the Pre-Trial Judge erred in finding that the mode of liability under Article 32(3) of the KCC (third form of incitement) was inapplicable to the aggravated forms of obstruction of official persons under Article 401(3) and (5) of the KCC, and in dismissing Thaçi's liability under Article 32(3) KCC Liability for Counts 1, 3 and 4 of the Confirmed Indictment. Accordingly, the Appeals Panel grants, by majority, Ground 4 of the Appeal.

89. Considering that the Pre-Trial Judge's ultimate conclusion on the existence of a well-grounded suspicion that Thaçi incited, within the meaning of Article 32(3) of the KCC, Fazliu, Smakaj and Kilaj to commit the criminal offence of obstructing official persons under Article 401(3) and (5) of the KCC (Counts 1, 3 and 4), involves a factual assessment of the evidence, and that the review of an indictment and its supporting evidence falls within the discretionary powers the Pre-Trial Judge is vested with pursuant to Article 39(2) of the Law, the Panel remands, by majority, the matter to the Pre-Trial Judge.

V. DISPOSITION

90. For these reasons, the Court of Appeals Panel:

GRANTS, Judge Jørgensen dissenting, Ground 4 of the Appeal;

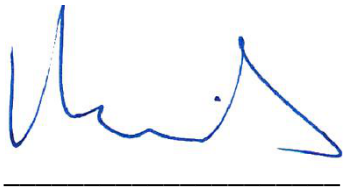
REMANDS, Judge Jørgensen dissenting, the matter to the Pre-Trial Judge for further consideration consistent with paragraphs 80-89 of this Decision;

DISMISSES all other aspects of the Appeal (Grounds 1, 2 and 3);

ORDERS Kilaj, Smakaj and Fazliu and the SPO to submit a public redacted version of the Kilaj Response (IA002/F00006), the Smakaj and Fazliu Joint Response (IA002/F00009/COR) and the Reply (IA002/F00010) or indicate,

through a filing, whether they can be reclassified as public, within ten days of receiving notification of the present Decision; and

INSTRUCTS the Registry to execute the reclassification of the Kilaj Response (IA002/F00006), the Smakaj and Fazliu Joint Response (IA002/F00009/COR) and the Reply (IA002/F00010), upon indication by Kilaj, Smakaj and Fazliu and the SPO, if any, that they can be reclassified.



Judge Michèle Picard,
Presiding Judge

Judge Nina Jørgensen appends a partially dissenting opinion.

Dated this Thursday, 3 April 2025

At The Hague, the Netherlands

PARTIALLY DISSENTING OPINION OF JUDGE NINA JØRGENSEN

1. I concur with the reasoning and conclusions of the Appeals Panel on Grounds 1, 2 and 3. However, for the reasons outlined below, I would have interpreted Article 32(3) of the KCC differently from the Majority and denied Ground 4 of the Appeal.

2. The words "punishable by imprisonment of at least five (5) years" in the English version of Article 32(3) of the KCC are open to two interpretations: (i) punishable by a *minimum* term of imprisonment of five years; and (ii) punishable by a term of imprisonment that *includes* five years within any specified range. The former interpretation was adopted by the Pre-Trial Judge in the Impugned Decision and by the Trial Chamber in the *Gucati and Haradinaj* case.[1] The latter interpretation was adopted by the Pre-Trial Judge in the *Gucati and Haradinaj* case[2] and is the approach put forward by the SPO and preferred by the Majority.

3. The Majority bases its preference for interpreting Article 32(3) of the KCC to cover a sentencing range that includes five years, even as its upper limit, on the ordinary meaning of the relevant term, the object and purpose of Article 32(3) of the KCC and the principle of effectiveness.[3]

4. As it concerns the ordinary meaning of the relevant term, "at least" is commonly understood to mean "not less than".[4] The English version of the KCC in fact uses both the terms "at least" and "not less than", sometimes in different sub-

[1] Impugned Decision, para. 276; *Gucati and Haradinaj* Trial Judgment, para. 193.
[2] *Gucati and Haradinaj* Confirmation Decision, paras 89-90.
[3] Decision, paras 84-85.
[4] Soanes, C. and Stevenson, A. (eds), *Concise Oxford English Dictionary* (11th Edition), Oxford University Press 2008: "Least", "not less than; at the minimum"; Oxford English Dictionary <https://doi.org/10.1093/OED/5793107813> accessed 31 March 2025: "'at least' in least (adj., pron., n., adv.), sense P.1.a.i": "at least (also at the least (now less common), †atte leste)", "Modifying a designation of quantity or extent, indicating that the amount is the smallest admissible or is otherwise a minimum, e.g. *at least two*, *at least once*, *at least double*." (emphasis in original)

sections of a single article.[5] In many KCC provisions, language similar to Article 32(3) – "punished by imprisonment of at least [a certain number of] years" – is used to designate a minimum term of imprisonment.[6] The language of Article 72 of the KCC on mitigation of punishments also tends to suggest that a period of "at least" a certain number of years refers to a minimum term of imprisonment for a criminal offence, subject to mitigation.[7] The more precise language of "punishable by a maximum imprisonment of at least four (4) years or more" which appears in Article 277 of the KCC seems to be used only exceptionally, suggesting a distinction between "at least [a term of years]" and "a maximum of at least [a term of years]" as employed in the KCC. However, as the English version of the KCC is a translation, I would acknowledge that the ordinary meaning of the term "at least" is not free from ambiguity in this context.

5. When considering the object and purpose of Article 32(3) of the KCC, it is notable that under this form of incitement, the offence need not even be attempted for liability to be incurred with the result that "the inciter shall be punished for attempt". In my view, precisely because the provision criminalises conduct at an early preparatory stage and serves to prevent serious harm, it should be interpreted as applying to offences punishable by a minimum of five years' imprisonment corresponding to the threshold of gravity determined by the legislator. The offence of obstructing official persons in its aggravated forms under Article 401(3) and (5) of the KCC is undoubtedly grave, and this is reflected in the applicable sentencing range of

[5] See for example, Article 228 of the KCC: Sexual services of a victim of trafficking. Article 228(5) of the KCC refers to a punishment of "not less than ten (10) years of imprisonment or lifelong imprisonment", while Article 228(7) of the KCC refers to a punishment "by imprisonment of at least ten (10) years", and Article 228(8) of the KCC refers to a punishment "by imprisonment of at least fifteen (15) years or lifelong imprisonment".
[6] See for example, Articles 116, 117(2)-(3), 124(5), 126(3), 142, 143, 164(10.1) and (10.3), 227(7)-(9), 228(7)-(8), 229(7), 230(6)-(7), 236(2)-(4), 239(5) of the KCC.
[7] See for example, Article 72(1.2) of the KCC: "[i]f a period of at least five (5) years is provided as the minimum term of imprisonment for a criminal offense, the punishment can be mitigated to imprisonment of up to three (3) years".

one to five years' imprisonment.[8] However, it does not appear contrary to the object and purpose of Article 32(3) of the KCC to exclude offences with a sentencing range that incorporates a lower minimum sentence than five years' imprisonment from its scope. Furthermore, there is no limitation in terms of a punishment threshold on the availability of the forms of incitement under Article 32(1) and (2) to offences within the KCC.

6. The Majority highlights a valid concern regarding the possible exclusion of certain serious offences from the scope of application of Article 32(3) of the KCC if the provision is interpreted narrowly to refer to a minimum term of imprisonment of five years.[9] However, reading the KCC as a whole, many serious offences are punishable by sentences of "at least" a specified number of years.[10] The fact that some offences that may be deemed inherently grave are subject to a sentencing range with a minimum that is lower than five years, and would consequently fall outside the scope of application of Article 32(3) of the KCC, does not render the provision "devoid of purport or effect".[11] To the contrary, the narrower interpretation affords the provision appropriate weight and effect in accordance with the ordinary meaning of the relevant term – "at least" – in its context and with reference to the object and purpose of Article 32(3) of the KCC which is to restrict the application of this form of incitement to a category of offences defined by their gravity.

[8] By contrast, as Thaçi notes, Article 401(6) of the KCC refers to a term of imprisonment of "at least five (5) years", corresponding to the sentencing range under Article 32(3) of the KCC. See Thaçi Response, para. 25.
[9] Decision, para. 85.
[10] See for example, Articles 142(1) of the KCC on Genocide and 143(1) of the KCC on Crimes against humanity, both of which provide for punishment "by imprisonment of at least fifteen (15) years or by lifelong imprisonment"; the war crime of conscripting or enlisting children under the age of fifteen years into the national armed forces, armed forces or groups or using them to participate actively in hostilities under Article 145(2.26) of the KCC (international armed conflict) and Article 147(2.7) of the KCC (non-international conflict) is punishable by imprisonment of "not less than five years" or life imprisonment in both instances; murder under Article 172 of the KCC is punishable "by imprisonment of not less than five (5) years".
[11] *Corfu Channel* Judgment, p. 24.

6. For these reasons, I do not consider that the Pre-Trial Judge erred in her interpretation of Article 32(3) of the KCC. In any event, to the extent that there is ambiguity in this provision, I would have resolved it in favour of the Accused, in line with the principles of legality and strict interpretation of criminal law as set out in paragraph 19 of the Appeals Panel's decision. I would therefore have denied Ground 4 of the Appeal.

Judge Nina Jørgensen

Dated this Thursday, 3 April 2025

At The Hague, the Netherlands