

In: KSC-BC-2023-12

Specialist Prosecutor v. Hashim Thaçi, Bashkim Smakaj, Isni Kilaj, Fadil Fazliu and Hajredin Kuçi

Before: Single Trial Judge
Judge Christopher Gosnell

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

Date: 24 August 2026

Language: English

Classification: Public

Public Redacted Version of Thaçi Defence Final Trial Brief
with Public Annexes 1, 2, 5, 8 and Public Redacted Annexes 3, 4, 6, 7

Specialist Prosecutor's Office
Kimberly P. West

Specialist Counsel for Hashim Thaçi
Sophie Menegon
Luka Mišetić

Specialist Counsel for Bashkim Smakaj
Jonathan Elystan Rees KC
Huw Bowden

Specialist Counsel for Isni Kilaj
Iain Edwards
Joe Holmes

Specialist Counsel for Fadil Fazliu
David A. Young

Specialist Counsel for Hajredin Kuçi
Alexander Admiraal

I. INTRODUCTION	3
II. ANNEXES AND CLASSIFICATION	5
III. APPLICABLE KOSOVO LAW.....	6
A. Charged Offences as Interpreted in Kosovo Law	8
1. Article 401(2): Obstruction of a public official through common action of a group	8
2. Article 392(1) and (2): Violation of secrecy of proceedings	28
3. Article 393: Contempt.....	32
B. Modes of Liability	33
1. Completed commission of an offence	33
2. Article 28: Attempt.....	34
3. Article 35: Agreement.....	39
4. Article 32: Incitement.....	43
C. Why The Court Must Apply the Law as Understood in Kosovo	47
1. Nullem crimen sine lege	47
2. Jurisdictional limitations of the KSC and the intended meaning of the KSC Law	51
3. Equality before the law	53
4. Precedent from hybrid criminal tribunals.....	53
IV. DEFECTS IN THE INDICTMENT	54
A. Legal Principles	55
B. Lack of Particulars regarding Article 401(2)	56
1. Lack of particulars regarding the official person who was targeted.....	59
2. Lack of particulars regarding the official duties which were targeted	62
3. Lack of particulars regarding how the official duties were to be obstructed	63
4. Reasons for the lack of particulars, and impact on the Defence	63
C. Invalid charging of modes of Liability concerning Article 401(2)	67
1. Attempt.....	70
2. Agreement.....	74
3. Incitement.....	76
4. The impact of the charging errors	76
5. The errors in the Indictment cannot be corrected at this stage	79
V. STANDARD AND BURDEN OF PROOF	79
VI. MATTERS RELEVANT TO ALL CHARGED VISITS.....	81

A. The SPO Transcripts are unreliable	81
B. THAÇI did not print the disputed documents	150
1. The lack of probative value of HERLAAR's Evidence	152
2. The lack of evidence regarding THAÇI's printing of the Six Documents	157
C. Pre-existing relationships and knowledge	161
1. Relevant factual matters	162
2. The relevance of these matters to the charges	168
D. The non-charged visits are irrelevant	172
E. Flaws in the SPO's Inferences of Intent	175
VII. THE CHARGED VISITS	179
A. The FAZLIU Visit of 2 July 2023	179
1. Count 1, Obstruction of official persons in performing official duties	180
2. Count 4, Violating secrecy of proceedings	201
3. Count 8, Contempt of court	210
B. The KUÇI Visit of 3 September 2023	210
1. Absence of an agreement to commit a contempt	211
2. Absence of any substantial act towards the commission of the offence	213
C. The SMAKAJ Visits of 9 September and 7 October 2023	224
1. Count 2, Obstruction of official persons in performing official duties	225
2. Count 5, Violating secrecy of proceedings	254
3. Count 10, Contempt	263
D. The KILAJ Visit of 6 October 2023	263
1. Counts 3, Obstruction of official persons in performing official duties	264
2. Counts 6 and 7, Violating the secrecy of proceedings	283
3. Count 11, Contempt of Court	290
VIII. CUMULATIVE CONVICTIONS	290
IX. ALTERNATIVE SUBMISSIONS ON SENTENCE	291
A. Applicable Sentencing Principles	291
B. Gravity of the alleged crime and its consequences	292
C. Individual circumstances	294
D. Appropriate sentencing range and aggregation	295
X. CONCLUSION	300

I. INTRODUCTION

1. In early 2023, with *Case 06* about to begin, the SPO convinced a Single Judge to issue a series of invasive *ex-parte* orders, which resulted in **THAÇI** being covertly recorded for a period of six months during his non-privileged visits in the Kosovo Specialist Chambers (“KSC”) Detention Centre (“DC”).¹ The justification was a claim that **THAÇI** was interfering with witnesses in order to influence their *Case 06* testimony.
2. Six months later, the SPO had no evidence of witness interference. No *Case 06* witness would state that he or she had been approached on behalf of **THAÇI**. The SPO had only a collection of mostly unintelligible audio recordings. How could it maintain its claims of witness interference and justify the invasion of **THAÇI**’s privacy?
3. First, it flouted basic principles of forensic science, and had its own internal investigative personnel analyse the covert audio recordings to produce evidence. It ignored that these personnel lacked both the expertise and independence necessary for this work, and had them transcribe words and sounds they thought they heard in the audio, as well as purporting to identify the speakers. It ignored the fact that these transcribers had pre-existing expectations about what they would hear in the audio, making this a self-fulfilling exercise.
4. Next, it used these flawed transcripts to justify search operations, in the hope of finding the evidence of witness interference that it lacked. But although it searched the homes and devices of multiple people, the SPO still found no evidence of witness interference. It had no evidence of *Case 06* being discussed with even a single witness, let alone any form of coercion being applied. At most,

¹ INV/F00012/CONF/RED2; INV/F00014/COR/CONF/RED2; INV/F00028/CONF/RED. See Annex 1, List of Authorities, for the full references of these filings and the subsequent ones.

it found some *Case 06*-related documents, but nothing to connect them to witness interference.

5. It was clear that the SPO could not make use of the offence intended to address witness interference in the Kosovo Criminal Code ("KCC"): Article 386 would require proof of "*compulsion or bribe*". Determined to proceed anyway, the SPO fell back on the approach of distorting other, unrelated offences which it had previously used with little resistance in *Case 07* and *Case 10*.
6. One of these offences is the violation of the secrecy of proceedings (Article 392). The SPO has stretched the meaning of this crime to absurdity, applying it to discussions of matters which were widely known among the general public, as well as other matters which were part of the shared history of **THAÇI** and his visitors. If such discussions were criminal, then thousands of others in Kosovo would also be subject to similar prosecution.
7. The other Kosovo domestic offence reinvented by the SPO to suit its own interests is the obstruction of an official person in the performance of public duties. The SPO has entirely ignored the extensive body of Kosovo case law which has only ever applied this offence to conduct which *physically* obstructs a *specific official* from carrying out a *particular task* in his or her work.
8. But no amount of legal distortion could overcome the fact that the SPO had no evidence of any conversation with a *Case 06* witness about *Case 06*. Accordingly, the SPO charged a series of inchoate forms of participation in the crime: attempt, agreement, and incitement. Apparently failing to understand how the latter concepts operate in Kosovo law, the SPO sought to combine some with each other; and applied others to minor offences clearly not intended to be subject to inchoate liability. And despite the centrality of these concepts to the SPO's case, it provided not a single sentence in its Indictment, Pre-Trial Brief or opening

statements to explain how these inchoate modes of liability could be made out on the facts which the SPO alleges.

9. The result has been a case which not only has fatal evidentiary gaps (notably, no evidence at all of improper contact with witnesses or no independent and reliable transcripts of the covert audio recordings), but which is charged in a vague and incoherent manner. If the SPO itself has a clear picture of the domestic offences and modes of liability it is relying on, it has never shared this with the Defence. It seems more likely that the SPO has simply taken no interest in understanding the Kosovo law on which it relies: its submissions have never referred to Kosovo legal authorities or practice. And meanwhile, ignoring the charges which it has actually brought, the SPO has continued to speak about “interference” and to make claims about the freedom of witnesses to testify without intimidation, matters which have no apparent connection at all with the facts alleged by the SPO in this case.
10. The charges which *are* found in the Indictment in this case are vague and incoherent and misapply Kosovo law. Many must be dismissed as defective. The remaining charges simply cannot be substantiated beyond reasonable doubt.

II. ANNEXES AND CLASSIFICATION

11. The following Annexes are filed with this brief:
 - i. Annex 1: A list of authorities which also serves as a key to the short forms used in the brief;
 - ii. Annex 2: A Defence translation of relevant portions of the KCC Commentary;²

² I. Salihu, H. Zhitija, F. Hasani, *Commentary on the Criminal Code of The Republic of Kosovo* (Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, 2014) (“KCC Commentary”). For Defence translations of certain excerpts, see Annex 2.

- iii. Annexes 3 and 4: Tables summarising relevant facts from Kosovar cases on obstruction of official persons, with extracts from court decisions and Defence translations of them;
 - iv. Annexes 5 to 7: Kosovo court decisions which are not available online, respectively with full Defence translations (Annex 5);³ in original language only (Annex 6);⁴ and in English (Annex 7).
 - v. Annex 8: Table comparing different transcription results from selected segments of SPO covert audio recordings.
12. This brief and Annex 1 are classified confidential because they include reference to evidence and filings with a confidential classification. Annexes 3, 4, 6 and 7 are classified confidential because they contain the names of defendants, injured persons and others from Kosovo court decisions which would ordinarily be redacted before these decisions are made available online. Unredacted versions were provided to the Defence in the interests of expedition and on the basis that they would remain confidential until redacted.

III. APPLICABLE KOSOVO LAW

13. Article 12 of the Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law") provides that the KSC must apply *"the substantive criminal law of Kosovo, insofar as it is in compliance with customary international law, both as applicable at the time the crimes were committed"*. Article 15(2) specifically identifies certain offences under Kosovo law over which the KSC has jurisdiction. These include the offences with which **THAÇI** is charged:

³ Decisions relied on for substantive reasoning have been translated in full and are included in Annex 5.

⁴ For cases relied on only to cite the facts which were the basis of a charge or conviction, relevant extracts from the decisions have been translated and are included in Annexes 3 and 4. The full original language decisions are compiled in Annex 6.

namely, those under Articles 392, 393 and 401 of the KCC. Article 16(3) provides that in respect of those offences, specific modes of liability under the KCC shall apply, including those modes of liability with which **THAÇI** is charged, namely those under Articles 28, 32 and 35 of the KCC.

14. The essence of these provisions is to highlight that the substantive criminal law which **THAÇI** is charged with is *Kosovo law*. To determine **THAÇI**'s criminal responsibility, or otherwise, the Single Trial Judge must first identify the contents of this applicable law. In fact, in some key respects – and particularly concerning Article 401 – the SPO has either misunderstood, or consciously contorted the applicable Kosovo criminal law in an attempt to make it fit the conduct which is alleged. This is impermissible.
15. The subsequent portions of the Defence submissions explain: (A) the correct interpretation of the charged offences, according to Kosovo law; (B) the correct interpretation of the charged modes of liability, according to Kosovo law; and (C) why the KSC must interpret these provisions of the KCC so as to be consistent with the interpretation of Kosovo courts.
16. In identifying the correct contents of Kosovar law, the Defence has had regard to three main sources. The first one is the Kosovo legislation, including the KCC itself, and its previous versions. Secondly, the Defence has carried out a detailed review of Kosovo case law, with the assistance of Kosovar jurists. In some instances, these decisions explicitly set out their interpretation of the applicable law. In others, they include less reasoning; yet even cases of this kind are important in demonstrating how the offences and modes of liability have been understood, by reference to the kinds of conduct which they have been applied to in Kosovo. Thirdly, the Defence has relied on the *Salihu et al.* Commentary to

the KCC. This publication is an authoritative text in Kosovo and has also frequently been relied on as an interpretive guide by Panels of the KSC.⁵

A. CHARGED OFFENCES AS INTERPRETED IN KOSOVO LAW

17. **THAÇI** is charged in reliance on three offences from the KCC. Each must be correctly interpreted. This process of interpretation must involve reference to the context of the KCC and how its provisions are understood and applied by prosecutors and judges in Kosovo.

1. Article 401(2): Obstruction of a public official through common action of a group

18. Article 401 of the KCC establishes two categories of offences concerning the “obstruction of an official person”. While aggravating circumstances are set out in paragraphs (3) to (6), the two offences themselves are found in paragraphs (1) and (2). Paragraph (1) concerns the obstruction of an official person by “force or serious threat”. Paragraph (2) concerns the obstruction of an official person by the “common action” of a “group of persons”. For ease of reference, the Defence uses the terms “individual obstruction” and “group obstruction” to differentiate between these two forms of obstruction of an official person.
19. In practice, individual obstruction is overwhelmingly the charge more commonly used in Kosovo. The Defence has been able to identify almost 100 cases involving a charge or conviction of obstruction under Article 401 of the KCC (or its equivalent provision at the time);⁶ of those, fewer than 10 cases involve a charge of group obstruction.⁷

⁵ For example: [Case 07 Appeal Judgment](#), para.28; [IA002/F00012/RED](#), para.38; [Case 07 Trial Judgment](#), para.67; [Case 07 Supreme Court Decision](#), paras 42,49.

⁶ See Annex 3, which summarises 91 individual obstruction cases and 7 cases involving group obstruction. The ‘Table of Kosovo Cases without factual details’ at the end of Annex 3 identifies a further 5 cases in which individual obstruction was initially charged, but where the judgment does not identify the material facts.

⁷ See Annex 4.

20. **THAÇI** is charged only with group obstruction, under Article 401(2), and not with individual obstruction. Nonetheless, correct interpretation of the offence of group obstruction involves reference to caselaw on the more commonly used offence of individual obstruction, because the two offences are found in the same provision of the KCC, and contain several common elements.
21. Earlier versions of the two forms of obstruction of official persons existed in the 2003 UNMIK Provisional Criminal Code of Kosovo ("2003 Provisional Code"). At that time, the two forms existed in separate offences: Article 316 for individual obstruction of an official person; and Article 318 for group obstruction of an official person. In the 2012 Criminal Code of the Republic of Kosovo, Code No. 04/L-082 ("2012 Criminal Code"), these two offences were merged into a single offence, then Article 409, with some wording changes particularly for individual obstruction. In 2014, the current KCC adopted the same provision without changes, but now as Article 401. Over the course of these reforms, the only substantive change was a modification of what type of threat would suffice for individual obstruction.⁸ Neither the specific elements of group obstruction, nor the common elements shared by both offences has been modified. Accordingly, in its review of Kosovar practice, the Defence has had regard to cases brought under all historical versions of these offences.
22. **THAÇI** is not charged with the completed commission of an offence under Article 401(2), but rather with an *attempt* at such an offence. Nonetheless, for clarity, the Defence will first address the elements of the offence of group obstruction of an official person; the requirements for an attempt are dealt with in Section III.B.2 below, along with the other charged modes of liability.

⁸ Article 316 of the 2003 Provisional Code required "force or threat of immediate use of force". Article 409(1) of the 2012 Criminal Code required "force or serious threat" (as does Article 401(1) of the current KCC).

23. As early as 2007, EULEX courts in Kosovo clarified the relevant⁹ material elements of this offence:
- i. The accused person participated in a “group”;
 - i. The group undertook “common action”;
 - ii. One or more “official person” was performing official duties;
 - iii. The “official person” was “obstructed” in performing those official duties by the common action.¹⁰
24. This reflects the position taken in KSC decisions,¹¹ and filings by the SPO appear to indicate that it shares the Defence’s position regarding the existence of these elements.¹²
25. In addition, the accused must have acted with either direct or eventual intent.¹³ For an offence under Article 401(2), the required mental elements are:
- i. The accused acted with “awareness of, and desire for, participating in a group in order to obstruct by common action an official person in performing official duties” (direct intent) or the accused acted with “the awareness that, as a result of his or her participation in the group, the obstruction by common action of an official person in performing official duties can occur, and acceded to that occurrence” (eventual intent);¹⁴ and

⁹ The offence could, alternatively, be committed where the common action resulted in a public official being *compelled* to act, but this form of the crime does not appear to be relied on by the SPO.

¹⁰ District Court of Pristina (EULEX), [P.Nr.281/07](#), 14 June 2010 (“District Court of Pristina, P.Nr.281/07 Judgment”), p.7.

¹¹ [Case 07 Trial Judgment](#), para.158; [Case 10 Confirmation Decision](#), para.48; [Case 11 Confirmation Decision](#), para.48; Confirmation Decision, para.51.

¹² F00028/A02, pp.1,29; SPO PTB, paras 210,219.

¹³ KCC, Article 21(1).

¹⁴ [Case 07 Trial Judgment](#), paras 176-177; [Case 10 Confirmation Decision](#), paras 52-52; [Case 11 Confirmation Decision](#), paras 52-53.

- ii. All other members of the group also had either direct or eventual intent;¹⁵
26. It is necessary to clarify what is meant by several terms used in these elements. The Defence emphasises, with respect to all the following sub-sections, that the Single Trial Judge is not bound by the decisions of Pre-Trial Judges or Trial Panels in this case or in *Case 07* and *Case 10*, including in relation to their legal interpretations of the elements of the offence under Article 401(2).¹⁶
- a) Meaning of a “official person”
27. Various factors indicate that “official person” refers to a *natural person* who carries out an official function in a public institution or similar body.
28. First, this is made clear by the definition of “official person” in Article 113(2) of the KCC. It identifies five categories of “official person”, all of them clearly natural persons. The definitions mention various kinds of legal persons (“state body”, “local government body”, “institution, enterprise or other entity”) but clearly indicate that the “official person” is a person “*in*” such a body.
29. While Article 113(1) defines “person” as meaning “legal persons and natural persons”, it is clear from the remainder of Article 113 that most of the specific types of persons defined there are categories of *natural person*. That is the case in the definitions of “foreign official person or foreign public official”, “person under international protection or internationally protected person”, and “responsible person”.¹⁷ Where it is intended that a defined term can include *either* a legal or a natural person, this is stated as in Article 113(7).
30. Secondly, throughout the KCC, where an offence makes reference to legal persons or other collectivities, this is made explicit in the offence itself. For

¹⁵ [Case 07 Trial Judgment](#), para.178; [Case 10 Confirmation Decision](#), para.51; [Case 11 Confirmation Decision](#), para.51.

¹⁶ [Aleksovski Appeal Judgment](#), para.114; [Rutaganda Appeal Judgment](#), para.188; [Mladić Appeal Judgment](#), para.243, and references cited therein.

¹⁷ KCC, Article 113(3),(4), and (5).

example, a number of offences use the terms “entity”,¹⁸ “body”,¹⁹ “institution”.²⁰

The fact that Article 401 does *not* make use of such terms makes clear that it targets conduct which obstructs a *natural* person holding an official role.

31. Thirdly, this is also the understanding of “official person” set out in the Confirmation Decision in this case, and in decisions from *Case 07* and *Case 10*. The Pre-Trial Judge considered that the “official persons” in this case might be a “a judge, a prosecutor, an investigator or any other [K]SC or SPO official”.²¹ Similarly, in *Case 10*, Trial Panel I considered whether the alleged conduct “could in principle, impede, hinder and/or delay the work of SPO prosecutors and investigators, as well as [K]SC staff members”.²² No previous decision of the KSC has suggested that the “official person” can be an institution such as the KSC or the SPO.
32. Fourthly, this interpretation is also borne out by a review of the extensive body of cases in which obstruction under Article 401 and its precursors have been tried. The Defence has reviewed the facts from 91 Kosovar cases in which this offence was charged by prosecutors or imposed by judges as a result of legal reclassification. In none of these cases was the “official person” identified as an entity, institution or organisation. The Kosovar caselaw demonstrates a clear and consistent pattern that the “injured party” in the case, who is the obstructed official, is a specific identified natural person. Annex 3 sets out a table of these cases, indicating the official person or persons identified in each case. As elaborated below (see paragraph 176), in one case the Kosovo Court of Appeals

¹⁸ KCC, Articles 128(1), 249(1), 260(2), 261(2), 309(1), 310(1), 319, 320(2.2), 320(3), 325(1), 325(2), 325(3), 336(6), 359(1), 359(2), 407.

¹⁹ KCC, Articles 124(7), 220(1), 365(4).

²⁰ KCC, Articles 114(1), 203(3), 246(2), 320(2.2), 320(3), 323(3).

²¹ Confirmation Decision, para.53; see also [Case 07 Confirmation Decision](#), para.69; [Case 10 Confirmation Decision](#), para.41; [Case 11 Confirmation Decision](#), para.41.

²² [Case 10 Decision on Plea Agreements](#), para.40.

specifically quashed a conviction where the trial judgment had *not* identified which specific official(s) had been obstructed.²³

33. Accordingly, the “official person” referred to in Article 401(2) must be an individual, *natural* person, and cannot be an institution or organisation.

b) Meaning of “official duty”

34. Both Article 401(1) and (2), require that – for the completed commission of the offence – the conduct in question had the consequence of obstructing “*an official person in performing official duties.*” These “official duties” are central to the offence. As the KCC Commentary explains, “*the primary target of protection is the duty, more specifically, the unhampered performance of the official duties by the official person.*”²⁴
35. The concept of “official duties” has two aspects. First, the duty must be an “official” one, as distinct – for example – from something that the official undertakes for personal or private reasons. Secondly, it must be a “duty”. It is this second aspect which requires further analysis in the present case.
36. The English word “duties” is a translation of the Albanian “*detyrave*”. These terms are similar in having multiple possible meanings. Both can mean *either*: (i) *obligations*; or (ii) *tasks*. This introduces a potential ambiguity into the meaning of Article 401.
37. Despite this being the third KSC case in which charges were brought under Article 401, this central element has been given inadequate judicial attention. In this case, as well as in *Case 07* and *Case 10*, KSC judges have merely repeated a phrase first used by the *Case 07* Pre-Trial Judge, namely that the “official duties” of a KSC or SPO official:

²³ See Annex 5, Court of Appeals of Kosovo, PA1.no.1708/21, 13 May 2022.

²⁴ See [KSC-BC-2020-07/F00341/A01](#), p.1164, para.2.

*[...] relate to any responsibility or work within the context of official proceedings of the Specialist Chambers, including SPO investigations [...].*²⁵

38. However, that statement does not meaningfully resolve the issue of whether “duties” in Article 401 means “obligations” or “tasks”. Neither has any explanation been given by KSC judges as to how this interpretation was arrived at. No reference has been made to statutory interpretation principles or to Kosovo case law. Defence submissions in previous cases did not address this question in detail and made no reference to Kosovo sources on the meaning of “official duties”. This allowed both *Case 07* and *Case 10* to proceed without the SPO ever having identified any “official duty” which was obstructed (or in respect of which an obstruction attempt was made). Despite this being an element of the offence, it has repeatedly been glossed over.
39. Nonetheless, sources strongly indicate that the meaning given to this term by the Kosovar courts is *tasks*. In other words, the obstruction must affect specific tasks which are to be undertaken as part of the official person’s job. Several sources point to this conclusion.
40. The first of these is the content of Article 401. Offences under Article 401(1) and (2) can be committed in two different ways. First (as alleged by the SPO in this case), an offence can involve an official person being *obstructed* in performing “official duties”. But equally, an offence can be committed by *compelling* a person to perform “official duties”. While the first usage of “official duties” might conceivably be misread as meaning broad obligations (such as, in the framing of the SPO, “investigations and prosecutions”),²⁶ the second usage would become absurd on such an interpretation. This second form of the offence only makes sense if “official duties” is understood as meaning a concrete action which forms

²⁵ [Case 07 Confirmation Decision](#), para.69. See also [Case 07 Trial Judgment](#), para.147; [Case 10 Confirmation Decision](#), para.41; [Case 11 Confirmation Decision](#), para.41; Confirmation Decision, para.53.

²⁶ SPO PTB, para.221.

part of the official person's role: for example, a security guard being compelled to grant access to some premises.

41. Secondly, earlier iterations of the Kosovo criminal law support this interpretation. As set out above, the offence now found in KCC Article 401 was initially included in the 2003 Provisional Code as Articles 316 and 318, but with materially identical terminology. Article 107 of the 2003 Provisional Code defined "official person" as a person who "exercises specific official duties, based on authorisation provided by law".²⁷
42. Thirdly, the KCC Commentary repeatedly explains "official duties" as meaning "actions" (veprime). For example, it explains that: "In performing their duties, the official people undertake certain actions, i.e. they are obliged to undertake such actions."²⁸ It defines an official duty as an official action:

*[...] undertaken by an official person within his or her responsibilities, i.e. a lawful action. Therefore, this criminal offense exists even when it has been carried against an official person who was not on official duty at that moment, if he is authorized to undertake official actions in such cases.*²⁹

43. The KCC Commentary also gives concrete examples of the same nature: "for instance, damaging the measurement instrument of a surveyor to prevent him from surveying the land";³⁰ and:

*[...] for instance, subjecting a person or a dwelling or other buildings to a search, the registration and seizure of things through forceful execution procedure, the performance of an inspection, a person's detention etc. Such obstruction might also occur to the performance of other official actions, such as the compilation of a protocol on the implementation of an official action, the opening of polling stations, etc.*³¹

44. Fourthly, this interpretation is evident throughout Kosovo caselaw. As seen in Annex 3, cases involving this offence in Kosovo uniformly concern instances in

²⁷ 2003 Provisional Code, Article 107(1)(3). See also Article 107(1)(2).

²⁸ [KSC-BC-2020-07/F00341/A01](#), p.1164, para.1.

²⁹ [KSC-BC-2020-07/F00341/A01](#), p.1166, para.5.

³⁰ [KSC-BC-2020-07/F00341/A01](#), p.1165, para.4.

³¹ [KSC-BC-2020-07/F00341/A01](#), p.1166, para.6.

which the obstruction concerned a specific, concrete action which the official person was seeking to undertake, such as carrying out an arrest,³² disconnecting a building's electricity supply,³³ issuing a parking ticket,³⁴ conducting a court hearing,³⁵ or conducting a search and seizure operation.³⁶ Moreover, Kosovo courts have explicitly articulated this understanding. In Decision no. 281/07, the EULEX District Court of Pristina, referring to Article 107 of the 2003 Provisional Code, ruled that the term "official duty" then used in Article 318 "*refers to activities exercised by the official person(s) within the scope of its/their function or delegated power*".³⁷ It went on to state that, in that case, the police officers:

*[...] were assigned by their superiors the task (ie the official duty) to form a police barrier in order to prevent the crowd from continuing the march along Mother Teresa Street, thus reaching the government buildings and possibly damaging them [...].*³⁸

In other words, as the judges explained it: "*More precisely, the duty of the police officers forming the barrier was to keep the demonstrators behind the line formed by the barrier itself.*"³⁹

45. Accordingly, the completed commission of an offence under Article 401(1) or 401(2) requires that the accused's conduct has the consequence of obstructing the official person in undertaking specific *actions* or *tasks* which form part of his or her official role.

³² Annex 3, items 24,85.,

³³ Annex 3, items 15,42.

³⁴ Annex 3, item 25, 37.

³⁵ Annex 3, items 46.

³⁶ Annex 3, item 52.

³⁷ District Court of Pristina, [P.Nr.281/07 Judgment](#), p.11 (emphasis added).

³⁸ *Ibid.* (emphasis added).

³⁹ *Ibid.* (emphasis original).

c) Meaning of “obstruction”

46. The word “obstruction” has also been interpreted to date at the KSC without reference to Kosovar sources. In *Case 07*, the Pre-Trial Judge ruled that “obstruct” means:

*[...] to prevent, impede, hinder, or delay the motion, passage, or progress of something.*⁴⁰

That ruling, made without reference to any Kosovar sources, was adopted without discussion or reasoning by the Trial Panel in *Case 07*,⁴¹ and again by the Pre-Trial Judge in *Case 10*⁴² and in the present case.⁴³

47. However, this interpretation is at odds with Kosovar sources.
48. The KCC Commentary describes the completed commission of obstruction as occurring where the official person is “*prevented [...] from performing official duties*”.⁴⁴ Later it describes obstruction as resulting in “*the failure to perform official actions*”.⁴⁵
49. This interpretation is supported by consistent case law of the Kosovar courts, which focuses on whether or not the official duties are rendered “impossible”. The Basic Court of Mitrovica explained:

*[...] obstruction, within the meaning of this criminal offence, shall be understood [as] every active act of the perpetrator that is directed at making impossible the performance of the official duty [...].*⁴⁶

Similarly, the Basic Court of Prizren has said:

⁴⁰ [Case 07 Confirmation Decision](#), para.70.

⁴¹ [Case 07 Trial Judgment](#), para.145.

⁴² [Case 10 Confirmation Decision](#), para.42; [Case 11 Confirmation Decision](#), para.42.

⁴³ Confirmation Decision, para.54.

⁴⁴ [KSC-BC-2020-07/F00341/A01](#), pp.1166-1167 (emphasis added).

⁴⁵ [KSC-BC-2020-07/F00341/A01](#), p.1167.

⁴⁶ See Annex 5, Basic Court of Mitrovica, P.nr. 461/2020, 21 April 2022.

[...] obstruction means an active act by the perpetrator directed at the official person with the aim of making it impossible to perform the official duty.⁴⁷

The Kosovo Court of Appeals has endorsed this approach:

The first-instance court correctly established that obstruction, within the meaning of this criminal offence, consists of any active action by the perpetrator aimed at making it impossible for the official person to perform official duties [...].⁴⁸

50. It is therefore clear that under Kosovo law, obstruction is not constituted where the official duties are merely rendered more difficult, more time-consuming or more expensive. Obstruction requires that the official duty is halted or prevented, at least temporarily.

d) Meaning of “common action” by a “group”

51. As indicated above (see paragraph 19), group obstruction has rarely been used by the Kosovo courts. There is accordingly less guidance on the concepts of “common action” and “group”. Nonetheless, such practice is consistent, and the scenarios covered by those cases are notably unlike the conduct alleged in the present case. Annex 4 tabulates the relevant facts from these cases.
52. The KCC defines a “group of people” as three or more persons.⁴⁹ The question arises as to what the three or more identified persons must have in common to constitute a group for the purpose of the offence. The Defence submits that it is the “common action”, and participation in it, which defines the group. Otherwise, any three persons could always be identified who constitute a “group” and the element would become redundant. Thus, the members of the group must all undertake the “common action” (and, as submitted at paragraph 64, all must have the necessary intent). Accordingly, the “common action” must be undertaken by at least three persons.

⁴⁷ See Annex 5, Basic Court of Prizren, P.nr. 384/16, 15 May 2018.

⁴⁸ See Annex 5, Court of Appeals of Kosovo, PA1.nr. 947/2022, 21 February 2023.

⁴⁹ KCC, Article 113(12).

53. The central question is what constitutes “common action”. Yet, it has never been meaningfully interrogated in KSC proceedings. In *Case 07*, the Pre-Trial Judge ruled that:

*As to the group’s common action, Article 401(2) of the KCC does not delimit its contours. Accordingly, common action may include any activity jointly undertaken by the group members.*⁵⁰

He cited no authority. Trial Panel II continued this pattern. In rejecting a defence argument that the common action must involve violence, it ruled that:

*While “common action” could indeed relate to the use of force and other forms of violent conduct by a group, it can also take other forms, such as putting up barricades or blocking roads. While such examples usually denote a “crowd” action, nothing in the wording of Article 401(2) of the KCC suggests that “common action” should only refer to “crowd” or “mob” violence or should be limited to any particular type of acts. Article 401(2) of the KCC punishes joint criminality without limiting it to any particular form. Accordingly, “common action” under Article 401(2) of the KCC cannot be limited to “crowd” or “mob” violence but covers in principle any type of collective criminal activity that pursues the relevant obstructive purpose.*⁵¹

54. Again, no reference was made to any Kosovar authorities, other than to disagree (without explanation) with the KCC Commentary.⁵² These issues were not addressed on appeal, because the Appeals Panel quashed the conviction under Article 401(2) for other reasons.⁵³ The approach from *Case 07* was then followed in confirmation decisions in both *Case 10* and the present case, again without reference to Kosovo authorities.⁵⁴ Other than arguments made by the *Gucati* Defence that the “common action” must involve violence, no defence team has previously challenged the interpretation of this element as devised by the *Case 07* Pre-Trial Judge.

⁵⁰ [Case 07 Confirmation Decision](#), para.75.

⁵¹ [Case 07 Trial Judgment](#), para.162.

⁵² *Ibid.*, fn.256.

⁵³ [Case 07 Appeal Judgment](#), para.311.

⁵⁴ [Case 10 Confirmation Decision](#), para.49; [Case 11 Confirmation Decision](#), para.49; Confirmation Decision, para.52.

55. The Defence submits that the interpretation of “common action” in these previous KSC decisions is wrong. What they describe (and what the SPO alleges in this case) is not *common* action but *coordinated* action. Several sources indicate that what Article 401(2) means by “common action” is action which is *physically taken together* by a *physical group* – that is, a group that acts together in a single location.
56. One indication of this is the KCC Commentary, which repeatedly describes the required group as being a “crowd”.⁵⁵ Contrary to what was argued in *Case 07*, the Defence does not submit that this implies that *violence* is required. It is clear from Kosovar cases that the commission of intentional violence by the group is not a requirement.⁵⁶ However the term “crowd” is instructive in that it indicates that the members of the group must be located together at the relevant moment – that is, when the common action occurs.
57. This is also supported by the KCC Commentary’s explanation that the rationale for the provision is the “social danger” posed by a group. It is clear that this refers to the danger posed by a *crowd*. A group of persons physically separated from each other would not be inherently more dangerous or more able to prevent official duties than an individual.
58. This interpretation is also supported by the Kosovo Court of Appeals’ explanation of why two forms (individual and group) of this offence exist:

Obstructing Official Persons in Performing Official Duties (Article 316. 1 and 3 CCK) consists of obstructing an official person in performing official duties of public security, order and policing by use of force or threat of immediate use of force and is punishable with imprisonment of 3 months to 3 years. This provision covers the situations in which there is evidence of individual specific actions of obstruction performed by the perpetrator. Participation in a Group Obstructing

⁵⁵ [KSC-BC-2020-07/F00341/A01](#), pp.1167-1168.

⁵⁶ See for example two cases in which group obstruction was found to have been established, and where the courts found there was no evidence of intentional violence or threat: District Court of Pristina, [P.Nr.281/07 Judgment](#), p.14; Basic Court of Mitrovica (EULEX), [P.nr.61/2016](#), 21 November 2016, pp.40-41; Court of Appeals (EULEX), [PAKR 158/17](#), 7 December 2017, paras 113-115.

*Official Persons in Performing Official Duties (Article 318.1 CCK) consists in participating in a common action of a group to obstruct or attempt to obstruct an official person in performing official duties or to force him/her to execute official duties and is punishable with fine or imprisonment of up to 3 years. This provision covers the situations in which there is evidence that the perpetrator was in the group and took part in the common actions, **but it is not possible to establish the specific individual actions of obstruction committed by him/her.** The rationale behind this lesser punishment for actions aimed to produce the same result in violation of the same protected value lies in the fact that the gravity of the offense is lower when is not proven that specific acts against public authority were committed by the perpetrator.⁵⁷*

59. That position was endorsed by the KSC Court of Appeals Panel (“Appeals Panel”) in *Case 07*, which ruled that:

*[...] similarly to what the Kosovo Court of Appeals held in the Kosovo Appeal Judgment of 28 May 2014, Article 401(1) of the KCC requires specific individual actions of obstruction committed by an accused. By contrast, under Article 401(2) of the KCC, the perpetrators act as part of a group, **where it would generally not be possible to establish the specific individual actions of obstruction committed by an accused** and which, in turn, may entail varying degrees of risk.⁵⁸*

60. This understanding seems to rely on the concept of action of a crowd. It is in the context of a crowd that it is possible to say that a group of people acted in a certain way, without being able to identify how each individual within the group acted. In other kinds of group scenarios, the logic is contrary: action is attributed to the group because it is known what separate specific contributions various individuals made. The latter scenario is covered already by the possibility of co-perpetration, suggesting that “common action” in Article 401(2) was intended to indicate something different.
61. Indeed, interpreting “common action” as any coordinated action would render this element redundant. That is because the drafters of the KCC also included modes of liability specifically addressing situations of planned criminality and separate but coordinated activities of a group – notably co-perpetration. Had

⁵⁷ Court of Appeals (EULEX), [PAKR 513/2013](#), 28 May 2014 (“Court of Appeals, PAKR 513/2013 Judgment”), p.28 (emphasis added).

⁵⁸ [Case 07 Appeal Judgment](#), para.307 (emphasis added).

they intended to create criminal liability for a situation in which a group of persons acted in a separate but coordinated fashion to obstruct, they only needed to include the “group” requirement.

62. Moreover, the few cases in which this offence has been used in Kosovo *all* involve instances in which the group members were *physically* co-located at the time of the “common action”. Rather than implementing a series of separate but coordinated and complementary actions, they took physical action together and simultaneously. This can be seen from Annex 4. There is not a single Kosovo court decision in which group obstruction has been charged where members of a group coordinated and acted separately to advance a plan. In all cases a “social danger” was created by the members of the group being physically present together and acting in unison.

e) Mental elements

63. As set out above in paragraph 25, the offence requires not only that the accused had intent, but that *each* member of the group had intent. While it is not necessary that all group members had the same *kind* of intent (direct or eventual), it is necessary that all had one or the other form of intent.⁵⁹
64. However, panels of the KSC have not addressed this intent requirement in more detail. Based on Kosovo sources, the Defence submits that it is required that the accused and all members of the group:
- i. Were aware that the target of the common action was an official person;⁶⁰
 - ii. Were aware that the official person was acting in execution of an official duty;⁶¹

⁵⁹ [Case 07 Trial Judgment](#), para.178.

⁶⁰ See for example, District Court of Pristina, [P.Nr.281/07 Judgment](#), p.13.

⁶¹ *Ibid.*, p.13.

iii. Intended to undertake common action;⁶²

iv. Intended that the common action result in the obstruction of the official duty.⁶³

f) Interpretation of Article 401 in the broader context of the KCC

65. The above submissions, and analysis of Kosovo caselaw set out in Annexes 3 and 4, should make clear that the meaning given to Article 401 of the KCC in Kosovo is dramatically different from that presented by the SPO. The offence addresses the *physical* obstruction of specific public officials from carrying out an immediate task as part of their work.

66. A thorough review of Kosovo criminal cases has not revealed a *single instance* in which any individual has ever been charged in Kosovo under Article 401 in a situation of alleged witness interference. That is particularly striking given the often-repeated insistence at this Court that Kosovo has a “*prevalent climate of witness intimidation*”,⁶⁴ something which has even been judicially noticed in the present case.⁶⁵ If such a climate does exist, the question might be asked as to why cases of unlawful contact with witnesses or efforts to influence their testimony have *never* been charged in Kosovo under Article 401.

67. It is not the case that such conduct has not been alleged in criminal cases in Kosovo. Such cases have been brought. Rather, they are charged using Chapter XXXI of the KCC which sets out criminal offences against the administration of justice and public administration. These include most relevantly:

⁶² [KSC-BC-2020-07/F00341/A01](#), p.1167, para.1 (speaking of the requirement that among the group members there is “[an] intent on carrying out a joint action, i.e. to jointly seek to achieve the illegal outcome”).

⁶³ *Ibid.* See also District Court of Pristina, [P.Nr.281/07 Judgment](#), p.13.

⁶⁴ [Case 07 Trial Judgment](#), para.577.

⁶⁵ [F00706](#).

- i. Article 386 of the KCC, concerning the “*obstruction of evidence or official proceedings*”. It creates three offences: in (1), an offence whereby the collection of witness evidence is hampered in any of a number of identified ways through the use of compulsion or bribe; and in (2) and (3), offences concerning tampering with documentary and real evidence. Earlier versions of this offence were contained in Article 394 of the 2012 Criminal Code and Article 309 of the 2003 Provisional Code.
 - ii. Article 387 of the KCC, regarding the offence of “*intimidation during criminal proceedings*”. It concerns the use of compulsion (such as force, serious threat, or promising benefits) to influence the content or provision of witness statements. This offence was previously set out in Article 395 of the 2012 Criminal Code.
 - iii. Article 388 of the KCC, which creates a series of offences concerning “retaliation” and includes retaliating against persons who have reported crimes or provided information in respect of crimes. It was previously set out in Article 396 of the 2012 Criminal Code.⁶⁶
68. Several other offences exist which concern various forms of interference with real and documentary evidence.⁶⁷
69. The Defence has identified several cases initiated in Kosovo based on allegations similar to those made by the SPO in the present case:
- i. In a 2013 EULEX case,⁶⁸ the former Permanent Secretary of the Ministry of Health, Ilir Tolaj,⁶⁹ and a number of other men, including former Deputy Prime Minister Bujar Bukoshi, were charged with various offences relating

⁶⁶ It does not seem to have been included in the 2003 Provisional Code.

⁶⁷ See KCC, Articles 389-391.

⁶⁸ Basic Court of Pristina, [P.nr.709/12 Judgment](#).

⁶⁹ Referred to in the EULEX judgments as “IT”.

to allegations of corruption and tax evasion.⁷⁰ Tolaj was additionally accused of having attempted to have the charges against him withdrawn and of having “discussed names of parties involved in the case and spoke[n] about neutralizing witnesses.”⁷¹ Tolaj was charged with obstruction of evidence contrary to Article 309 of the 2003 Provisional Code, although he was eventually acquitted. The Court explained that:

The acts described in the indictment and considered proven by the presented evidence are not acts that can be categorized under the acts described in article 309 paragraph 1 and 2 of the CCK. Since there is no proof that experts or witnesses were actually approached by the defendant or on his behalf, the Court concludes there was no attempt made to obstruct the evidence. The Court remarks that the way the defendant tried to interfere with the proceedings is not acceptable, but does not constitute the criminal offence of obstructing evidence.

Preparation of a criminal offence was not punishable under the applicable CCK. Even if the actions undertaken by the defendant IT would fulfill the criteria for this form of criminal liability, which they do not, there would be no ground for a conviction.

*Therefore the defendant IT is to be acquitted since the proven acts do not constitute a criminal offence.*⁷²

On appeal, the Court of Appeals overturned the acquittal on this count and remanded the matter for retrial,⁷³ following a prosecution argument that “the conversation between Ilir and Imer shows that a witness has been approached and “neutralized”. I.T. was ready to pay. The conversation shows a plan to attempt to influence the experts. This is a clear evidence [sic] of obstruction of evidence.”⁷⁴ The Defence has been unable to locate decisions from the further proceedings.

- ii. At least two prosecutions for witness interference were initiated in relation to the so called “Drenica Group” war crimes trial before the Mitrovica Basic

⁷⁰ See [BIRN Court Monitoring Report 2013](#), p.35; [UNMIK Report 2013](#), p.16.

⁷¹ Basic Court of Pristina, [P.nr.709/12 Judgment](#), p.28.

⁷² Basic Court of Pristina, [P.nr.709/12 Judgment](#), p.28.

⁷³ Court of Appeals (EULEX), [PAKR 487/13](#), 13 September 2016, p.3 and paras 44,49.

⁷⁴ *Ibid.*, p.13.

Court. In the first of these, *M.Z. and R.R.* (P.nr.51/2014),⁷⁵ the two defendants were accused of interfering with “Witness A”. R.R. was said to have shared confidential information about Witness A with M.Z., who then contacted Witness A, made arrangements to meet him, and met him on two occasions, allegedly with the objective of influencing his testimony. R.R. and M.Z. were both charged with violating secrecy of proceedings (then Article 400, now Article 392); and M.Z. was additionally charged with attempted obstruction of evidence or official proceedings (then Article 394, now Article 386). Ultimately the factual allegations could not be made out and both men were acquitted.⁷⁶

- iii. A second case in relation to the “Drenica Group” trial was initiated in 2016 against a number of men, including the Mayor of Skenderaj, Sami LUSHTAKU, for an escape from a medical centre during the “Drenica Group” proceedings, and alleged witness interference. This case appears to remain ongoing and the Defence has been unable to access formal court documents. According to media reports in 2025, Count 16 in the case involved an allegation that four men successfully induced witness “C” to recant his prior statement in return for benefits such as employment, money, an apartment, and payments for medical treatment for his wife. Count 17 involved an allegation that a group of five men successfully forced witness “F” to give a false statement by means including threats and the payment of money. Both allegations were charged using Article 394 of the 2012 Criminal Code (obstruction of evidence or official proceedings).⁷⁷

⁷⁵ Basic Court of Mitrovica, [P.nr.51/2014](#) Judgment.

⁷⁶ *Ibid.*, pp.2-4, confirmed on appeal: Court of Appeals (EULEX), [PAKR 336/16](#), 13 December 2016.

⁷⁷ Betimi Për Drejtësi, [“Dëshmitari për Sami Lushtakun: S’kam pas nevojë me akuzu se kurrë kurgja nuk më ka ba”](#), 25 February 2025.

iv. In 2014, the Basic Court of Mitrovica was scheduled to try Z.V., who was accused of attempted aggravated murder for driving at speed towards two police officers (although following trial the charge was eventually recharacterized and led to a conviction for obstruction of official persons in performing official duties).⁷⁸ In that context, in March 2014, police arrested two defence counsel, F.K. and D.V.,⁷⁹ who were representing Z.V. in that case.⁸⁰ It was said that Serb witnesses in the Z.V. case had been contacted by the lawyers *“in order to instruct them in view of the upcoming court hearings. The purpose of the instructions was to pressure the witnesses to alter their statements, to lie in front of the court and to testify in contradiction to the truth”*.⁸¹ This conduct was charged under KCC Article 394 as obstruction of evidence or official proceedings, although eventually at trial the prosecution withdrew the charges and the accused were acquitted.⁸²

70. The Defence acknowledges that in *Case 07*, a Panel of the Supreme Court Chamber ruled that:

“[t]he fact that another crime may be fulfilled through the same conduct, does not justify a narrower interpretation of a criminal provision [...] especially where the criminalisation of the conduct serves different protective interests. Article 401 of the Kosovo Criminal Code protects the interest and trust of the general public in the lawful exercise of official duties and at the same time serves to protect the officials called upon to exercise such powers. Articles 386 and 387 of the Kosovo Criminal Code, by contrast, protects the truthful ascertainment of facts and the integrity of judicial proceedings. It would be flawed to request a different interpretation of a criminal norm simply because a conduct may result in two different crimes. Rather, such tensions are commonly addressed through other legal principles, more specifically the general principles on the concurrence of crimes.”⁸³

⁷⁸ See Basic Court of Mitrovica, [P.nr.933/2013 Judgment](#); and Court of Appeals, [PAKR 542/14 Judgment](#), discussed below at paragraph 221 and in Annex 3, Item 62, fn.33.

⁷⁹ See, *inter alia*, KoSSev, [“Detained lawyers from North Mitrovica”](#), 25 March 2024.

⁸⁰ Basic Court of Mitrovica, [P.nr.933/2013 Judgment](#), para.5.

⁸¹ Basic Court of Mitrovica (EULEX), [P.No.28/2016](#), 31 August 2016, para. 1.

⁸² *Ibid.*

⁸³ [Case 07 Supreme Court Decision](#), para.41.

71. This is clearly correct as a statement of principle. It is possible for a single course of conduct to constitute two different criminal offences. However, as the Supreme Court Panel rightly identified, this will ordinarily occur where the conduct violates two different protected interests.
72. The difficulty in the present case is that, in fact, the SPO has only ever identified one single such protected interest which they say **THAÇI** and the co-Accused violated. As discussed below in Section IV.B.4, that is the interest in protecting witnesses' ability to "*testify freely, without fear or influence.*"⁸⁴ In fact, this is *not* the interest which Article 401 protects: it protects the public interests in official persons being able to carry out their tasks. It is the offences in Chapter XXXI of the KCC which protect the public interest in ensuring that victims can testify without impediment.
73. In such circumstances, the Defence submits that it is relevant for the Single Trial Judge to take into account the available offences which *do* exist for protecting the interest which the SPO has focused on. The SPO has distorted the meaning of KCC Article 401. It has no connection with the allegations made by the SPO in the present case, or with the protected interest which the SPO claims has been violated. Defence submissions on this question are elaborated in subsequent parts of these submissions, particularly in Section IV.B.4. In evaluating them, it is relevant for the Single Trial Judge to take into account that *other* offences in the KCC exist to address the protected interest which the SPO has repeatedly spoken of in this case, but which Article 401 is not concerned with.

2. Article 392(1) and (2): Violation of secrecy of proceedings

74. KCC Article 392 creates an offence of violating official proceedings, including court proceedings.

⁸⁴ T.265, 1.9-10 (Opening Statements).

75. An earlier version of this offence was set out in Article 311 of the 2003 Provisional Code. That version contained only one paragraph, of a general nature concerning the unauthorised revelation of information disclosed in various types of official proceedings (including court proceedings) and punishable by up to one year of imprisonment. The 2012 Criminal Code, in Article 400, expanded this. The original form of the offence became Article 400(1), with minor wording changes. A second, more specific, form of the offence was added, in Article 400(2), which addresses the unauthorised revelation of information on the identity or personal data of a person under protection in criminal proceedings or in a special program of protection, punishable by up to three years of imprisonment. Aggravating factors were added in paragraphs (3) and (4). This offence was retained in the current KCC and simply renumbered to Article 392.
76. The Defence submits that the material elements of an offence under Article 392(1) are:
- i. The accused revealed information;
 - ii. The revelation of the information was not authorised;
 - iii. The information had been disclosed in an official proceeding;
 - iv. The information was not to be revealed according to law, or had been declared to be secret by a decision of a court or competent authority.⁸⁵
77. Regarding the mental elements, for the accused to have acted with intent, it is required that he:
- i. Knew that the revelation of the information was not authorised;
 - ii. Knew that the information had been disclosed in an official proceeding;

⁸⁵ [Case 07 Confirmation Decision](#), para.34; [Case 07 Trial Judgment](#), para.69.

- iii. Knew that the information was not to be revealed according to law, or had been declared to be secret by a decision of a court or competent authority;
 - iv. Had direct or eventual intent to reveal the information.
78. An offence under Article 392(2) contains the same first two material elements, but different elements (iii) and (iv):
- i. The accused revealed information;
 - ii. The revelation of the information was not authorised;
 - iii. The information revealed was the identity or personal data of a person;
 - iv. The person was under protection in criminal proceedings or was in a special program of protection.⁸⁶
79. Accordingly, the required mental elements are that the accused:
- i. Knew that the revelation of the information was not authorised;
 - ii. Knew that the revealed information was the identity or personal data of a person;
 - iii. Knew that the person was under protection in criminal proceedings or was in a special program of protection;
 - iv. Had direct or eventual intent to reveal the information.

a) Meaning of “reveals”

80. Both forms of the offence require that the accused “revealed” information. However, no KSC panel has previously explicitly analysed what “revelation” involves.

⁸⁶ [Case 07 Confirmation Decision](#), para.41; [Case 07 Trial Judgment](#), para.89.

81. The present case raises the question of whether “revealing” occurs when a person discusses matters with another individual who is already aware of those matters. The closest authority on this question from the Kosovo courts is the afore-discussed case of *M.Z.* In that case the information was the identity of a protected prosecution witness, referred to as “A”. One of the allegations against *M.Z.* was that when A denied being a witness, *M.Z.* showed him a document from the court proceedings, indicating his status as a witness. The Basic Court of Mitrovica and the Kosovo Court of Appeals both ruled that *M.Z.* had not “revealed” A’s identity as a witness through this conduct.⁸⁷ While it may seem intuitive that the “revelation” of personal information cannot be to the protected witness himself, it is important to interrogate why that is so. In the Defence’s submission, this did not constitute “revealing” the information because A was already aware of the information in question. Nothing was “revealed” in such an interaction.
82. The same logic applies where the accused has spoken about other information protected under Article 392(1) or (2) with any other person *who was already aware of the information*. This not only reflects the interest protected by the offence (the need to avoid the *spread* of confidential information). It also gives meaning to the fact that the provision uses the term “reveals” (the plain meaning of which is to make known something which was previously *unknown*), rather than different term such as “discloses”.
83. This is also the only practical interpretation: the alternative approach would risk criminalising a person who responded to discussion of confidential information. For example, if **THAÇI**’s visitors had spoken to him about matters protected in *Case 06*, they could also be charged with the same offence, notwithstanding that **THAÇI** already knew the information.

⁸⁷ Basic Court of Mitrovica, [P.nr.51/2014 Judgment](#), p.8.

84. Accordingly, the Defence submits that to satisfy the element of “revealing” information, the SPO must prove that the purported recipient of that information was not previously aware of it.

3. Article 393: Contempt

85. Contempt of court is criminalised in KCC Article 393. The 2012 Criminal Code included the same offence in Article 401. This offence has not been previously prosecuted at the KSC.

86. Based on the plain meaning of Article 393, the Defence submits that the (relevant) material elements of this offence are:

- i. A Kosovo court has issued an order, ruling, decision or judgment;
- ii. The order, ruling, decision or judgment is final;
- iii. The accused failed to obey the order, ruling, decision or judgment.

87. Accordingly, the mental elements are:

- i. The accused knew of the contents of the Kosovo court’s order, ruling, decision or judgment;
- ii. The accused knew that the order, ruling, decision or judgment was final;
- iii. The accused acted with intent (direct or eventual) to fail to obey the order, ruling, decision or judgment.

88. Inadvertent disclosure of confidential information is insufficient to satisfy the mental element of contempt.⁸⁸ Moreover, actual knowledge of the contents of the order, ruling, decision or judgment in question is required; negligence in failing

⁸⁸ [Nshogoza Trial Judgment](#), para.176; [Griffiths Contempt Judgment](#), para.45. See also [Hartman Appeal Judgment](#), para.128 (disclosure must be “deliberate not accidental”).

to ascertain whether such an order or decision had been made is insufficient to attract criminal liability for contempt.⁸⁹

B. MODES OF LIABILITY

89. In the charges against **THAÇI**, the Indictment makes use of four modes of liability from the KCC: (i) (complete) commission; (ii) attempt; (iii) incitement; and (iii) agreement. This section sets out the meaning and requirements for each under Kosovo law.
90. Later sections of this brief address how the Indictment is defective in its charging of these modes of liability (Section IV); and why the evidence is insufficient to establish them (Sections VI and VII).

1. Completed commission of an offence

91. The classic or “normal” form of an offence is its full, completed commission. This occurs where all material and mental elements of the offence are present.
92. The Defence notes that the KCC does not use a distinct term for this form of mode of liability. The term “commit” is used in two senses in the KCC. The first is its generic sense of carrying out some action (see for example KCC Articles 9 and 10). The second use is more precise: it covers the situation where an offence is *completed*, as opposed (for example) to merely having been incited, agreed to, or attempted. “Commit” is clearly used in the latter sense in Articles 28(3), Article 32(1), Article 32(2) and Article 35. The Commentary also includes uses of this kind. For example, regarding Article 28 it states that an attempt arises where “*the commission of a criminal offence has begun but is not completed, and the offence is not committed*”;⁹⁰ regarding Article 35, it states that “*an agreement is considered*

⁸⁹ [Nobilo Appeal Judgment](#), para.45; [Haxhiu Trial Judgment](#), para.11; [Hartman Trial Judgment](#), para.22.

⁹⁰ KCC Commentary, p.130. Also: an attempt occurs when “*the offence is not committed*” (p.130); and can be distinguished from “*a completed/committed criminal offence*” (p.131).

*reached even if the criminal offence has not been committed”;*⁹¹ regarding Article 32 it explains that *“accomplices do not participate in the act of committing the criminal offence”*.⁹²

93. As elaborated below in Section IV.C, the conflation of these two meanings of “commit” by the Pre-Trial Judge and the SPO has caused significant confusion in the charges in the present case. To avoid such confusion, in these submissions the Defence will refer to the second meaning of “commit” by using the phrase “complete commission” or “completed commission”.

2. Article 28: Attempt

94. The KCC Commentary sets out the requirements for criminal responsibility via attempt:
- i. An act of committing the criminal offence is taken;
 - ii. The act is taken intentionally;
 - iii. The offence is not completed, that is “the consequence of the criminal offence is not caused”.⁹³
95. This aligns with the interpretation in previous decisions of the KSC Court.⁹⁴ However, several aspects of this mode of liability warrant clarification in the present case.

⁹¹ *Ibid.*, pp.176-177. Also: an agreement exists even if it covers “the commission of two or more criminal offences of which only one is committed” (p.177).

⁹² *Ibid.*, p.155. Also, for example: incitement and aiding and abetting occur where “actions are contributed to another person committing a criminal offence” (p.155); and a principle act is “the act by which the criminal offence is committed” as opposed to auxiliary or accessory acts which “do not constitute the commission of the offence itself but merely facilitate its commission” (p.156).

⁹³ See Annex 2, KCC Commentary, p.130.

⁹⁴ [Case 07 Confirmation Decision](#), para.95; [Case 07 Trial Judgment](#), para.201; [Case 10 Confirmation Decision](#), para.66; [Case 11 Confirmation Decision](#), para.66; Confirmation Decision, paras 106-7.

a) Requirement for act(s) towards commission exceeding preparation

96. It is well settled that an attempt requires act(s) towards the complete commission of the offence. The KCC Commentary describes an attempt as being situated on the spectrum or chain “*between preparatory actions and the completed offence*”.⁹⁵
97. KCC Article 27 provides that intentionally preparing for a criminal offence is not punished unless expressly provided for. This means that, to constitute an attempt, the action must amount to *more than* preparatory acts. This has been recognised in several decisions of this court.⁹⁶
98. The key question is how to differentiate a preparatory act from an act sufficient to amount to an attempt. The available authorities provide several forms of guidance:
99. First, KSC caselaw recognises that where one of the material elements of the offence has been fulfilled, this is more than mere preparation.⁹⁷
100. Secondly, conduct which is specifically identified in Article 27 as mere “preparation” cannot amount to an attempt. Article 27 gives examples of mere preparation:

*[...] includes supplying with means or making available the means to commit a criminal offense; removing the impediments to the commission of a criminal offense; agreeing, planning or organizing with another person the commission of a criminal offense; as well as, other activities that create conditions for the direct commission of a criminal offense, but which do not constitute the act itself.*⁹⁸

101. Applying the same principles, it is clear that a mere agreement among a group of persons to act, without more, cannot constitute an attempt. Article 35 creates a mode of liability for “agreement to commit criminal offences”, however it (i) is

⁹⁵ See Annex 2, KCC Commentary, p.130.

⁹⁶ [Case 07 Confirmation Decision](#), para.96; [Case 10 Confirmation Decision](#), para.67; [Case 11 Confirmation Decision](#), para.67.

⁹⁷ [Case 07 Confirmation Decision](#), para.96; [Case 10 Confirmation Decision](#), para.67; [Case 11 Confirmation Decision](#), para.67.

⁹⁸ KCC, Article 27(2).

distinct from an attempt; and (ii) only creates criminal responsibility where one or more of those who agreed does a “substantial act” towards the complete commission of the offence (see further below at paragraphs 113 *et seq*). Accordingly, merely agreeing to act, without more, does not create criminal responsibility and cannot be characterised as an attempt.

102. Thirdly, the KCC Commentary addresses in some detail how Kosovo law differentiates a mere preparatory act from an attempt. It explains that preparatory acts “*create the conditions for the efficient commission of the criminal offence*”. In contrast, attempts “*initiate*” the offence.⁹⁹ The KCC Commentary sets out three tools for applying this distinction:

- i. An act sufficient to amount to an attempt is one which constitutes an “integral part” of the realization of the offence.¹⁰⁰
- ii. The distinction should be drawn taking into account the plan for the criminal offence – for example, whether the act constitutes a part of that plan.¹⁰¹
- iii. The distinction should be drawn taking into account the specific concrete situation of the offence, and particularly the “*volume or intensity of the social danger*” arising from the act in question.¹⁰²

103. Fourthly, in line with the principle *in dubio, pro reo*, any doubt about this question must be resolved in favour of the accused. This is explicitly addressed in the KCC Commentary, which recognises that the distinction between preparation and an act sufficient to constitute an attempt:

[...] is of particular direct practical importance for the perpetrator (person), since for preparatory acts the person is usually not punished, whereas for attempts he is more often punished. Therefore, viewed from the perspective of the principle of

⁹⁹ Annex 2, KCC Commentary, p.132.

¹⁰⁰ Annex 2, KCC Commentary, p.132.

¹⁰¹ Annex 2, KCC Commentary, p.133.

¹⁰² Annex 2, KCC Commentary, p.133.

legality or lawfulness and legal certainty of citizens, the legislator should use such formulations, based on which the difference between preparatory actions and attempts should be clearly seen, and this difference should truly be a legal issue, and not a matter of free assessment of state bodies.¹⁰³

104. This raises the question of what conduct would constitute sufficient acts towards the complete commission of group obstruction under Article 401(2). The SPO has never made its position on this question clear, despite it being absolutely central to the most serious charges in the Indictment.
105. The Defence submits that to *initiate* an offence under Article 401(2) requires more than the mere formation of a group. The formation of a group of three persons, in a given location, with a shared intent, would constitute a classic example of “preparatory action”, by agreeing with others and “creat[ing] the conditions” for the offence.¹⁰⁴ In contrast, the action which would constitute the “initiation” of the offence, and an “integral part” of the offence,¹⁰⁵ is the *common action*. If an attempt could be constituted by less than the beginning of common action, this would mean that any gathering of three or more persons, with the relevant intent would constitute an attempted Article 401(2) offence, without any action needing to be taken by members of that gathering. Accordingly, the Defence submits that an attempted offence under Article 401(2) requires that some part of the “common action of the group” has been commenced.
106. The Defence notes that for the common action to begin, a group must necessarily already exist. That is because the common action is “of a group of persons”. Thus, while the existence of a group is not *sufficient* for an attempt under Article 401(2), it is nonetheless *necessary*.

¹⁰³ Annex 2, KCC Commentary, p.130.

¹⁰⁴ See paras 100-102 above.

¹⁰⁵ See para.102 above.

b) Requirement that the complete commission of the offence is intended

107. While it is clear from the elements set out above that the accused must act intentionally, a correct understanding of attempt requires further elaboration.

108. First, the Defence submits that the accused must have intended not only whatever conduct was taken, but also *the actual complete commission of the crime*. In other words, the intent requirements for attempt are the same as those for completed commission. These include intending any *results* which are elements of the crime.

109. Accordingly, in the case of Article 401(2), to be liable for an attempt, it is not sufficient that the accused intended to take common action; the accused must have done so with the intention that the official person's official duties be actually obstructed. This not only reflects the approach explained in the KCC Commentary,¹⁰⁶ but it was also made clear in the specific context of Article 401 by the Appeal Chamber's analysis in *Case 07*:

*Under Count 1, the Trial Panel specifically assessed whether these statements and acts translated into an intent to obstruct Specialist Chambers/SPO officials in performing their Specialist Chambers/SPO work. The Appeals Panel therefore considers that the Trial Panel's conclusion on the Accused's mens rea under Count 1 included, in line with the set legal definition of the mens rea, that the Accused directly intended using serious threat against (potential) witnesses to obstruct Specialist Chambers/SPO officials in performing their Specialist Chambers/SPO work.*¹⁰⁷

110. Secondly, a question arises as to whether it is sufficient that the accused had such intent, or whether it must also be shared by the other members of the group which has begun to carry out "common action". Logic dictates that the correct position is the latter. That is because both the "group" and the "common action" are defined in part by the shared intent. Without a shared intent, the group element will be met every time three persons are physically present together.

¹⁰⁶ Annex 2, KCC Commentary, pp.130-131.

¹⁰⁷ [Case 07 Appeal Judgment](#), para.291 (emphasis added).

And without a shared intent, action taken is not “common action”, but merely coincidental action in parallel. Accordingly, the very existence of a “group” and a “common action” for this purpose implies that all members of the group had a shared intent.

111. This is also demonstrable by the fact that if intent only had to exist in one member of the group, this would create a situation where an attempt is constituted any time a single individual intended to obstruct an official person through any means, and began to carry out steps towards that. This would render meaningless the elements of Article 401(1), according to which an individual is only liable for obstruction of an official person where this is done by “force or serious threat”.
112. Accordingly, the Defence submits that for an attempted offence under Article 401(2), it is necessary that all members of the group intend the complete commission of the offence, including that an official person be obstructed in performing official duties.

3. Article 35: Agreement

113. The requirements for criminal responsibility by agreement are set out in KCC Article 35. As explained in previous decisions of the KSC, this form of criminal responsibility arises where:

(i) the perpetrator agrees with one or more other persons to commit a criminal offence and (ii) one or more of these persons undertakes any substantial act towards the commission of the criminal offence.¹⁰⁸

114. The agreement must cover all elements of the offence¹⁰⁹ and their achievement in concrete terms.¹¹⁰ This has been explicitly confirmed by the Appeals Panel in the

¹⁰⁸ [Case 07 Confirmation Decision](#), para.93; [Case 07 Trial Judgment](#), para.198; [Case 10 Confirmation Decision](#), para.64; [Case 11 Confirmation Decision](#), para.64; Confirmation Decision, para.104.

¹⁰⁹ See Annex 2, KCC Commentary, p.176.

¹¹⁰ See Annex 2, KCC Commentary, p.176.

present case.¹¹¹ It is also necessary for those entering the agreement to intend the complete commission of the criminal offence.¹¹² The Defence submits that this latter requirement is an implicit part of the *agreement* to commit the offence.

a) The requirement for a “substantial act” in furtherance of the agreement

115. Article 35 explicitly requires *more* than an agreement among two or more persons to establish criminal liability. This mode of liability can only operate when there is also a “substantial act” towards the commission of the offence. While this act can be preparatory in nature (that is, less than what is required for an attempt), it nonetheless must be something separate from and additional to the forming of an agreement itself. That is clear from the fact that Article 35 requires that there be agreement between two or more persons “*and one or more of such persons does any substantial act towards the commission of the criminal offense*” (emphasis added). If the act of reaching agreement itself was sufficient for liability, those words would be redundant.

116. Accordingly, for any liability to be possible under Article 35, the SPO must prove that some “substantial act” was undertaken *beyond* the discussions which constitute the reaching of an agreement.

b) Agreement as a preparatory act which only applies when explicitly provided

117. Agreement as defined in Article 35 is a form of preparatory act. This is made clear by:

- i. the wording of Article 35(2), which describes the conduct required as a “*preparatory step towards the commission of the crime*”;

¹¹¹ [IA002/F00012/RED](#), paras 38-39.

¹¹² See Annex 2, KCC Commentary, p.177.

- ii. Article 27 which provides that the preparation of a criminal offence includes “agreeing, planning or organizing with another person the commission of a criminal offence”; and
 - iii. Article 113(38) which defines “preparation of a criminal offence” as including “agreeing, planning or organizing with other persons the commission of a criminal offence”.
 - iv. The KCC Commentary, which states in its analysis of Article 35 that: “The agreement to commit a criminal offence is part of *delictum praeparatum*, namely, preparatory actions punishable by law.”
118. The consequence is that Article 27(1) is applicable to agreement, such that it “*shall be punished only if expressly provided for by law*”. This is explicitly pointed out by the KCC Commentary: “*As the provision of Article 35 is defined, it should apply only in cases where, for the commission of a particular criminal offence, even preparation is incriminated, namely, reaching an agreement to commit that offence.*”¹¹³
119. This is also logical, when analysed both in terms of other provisions of the KCC, and general principles of criminal law. Other forms of inchoate liability in the KCC are limited to more serious offences: Article 28(2) limits liability for attempt to offences punishable by three or more years, or other offences specifically identified. Article 32(3) (incitement where the offence was not attempted) and Article 34 (criminal association) are both limited to offences punishable with at least five years’ imprisonment. If Article 35 was read without the limitation imposed by Article 27, this would create an aberration, whereby *agreement* could be a form of liability for even minor offences to which *attempt* is not applicable. Indeed, as a result of the SPO’s incorrect understanding of Article 35, the Indictment in the present case gives an example of just such an anomaly. Count

¹¹³ See Annex 2, KCC Commentary, p.176.

9 seeks to apply Article 35 to contempt under Article 393, an offence with a maximum sentence of 6 months imprisonment, and which does not permit liability for attempt. It would be absurd if this offence, which cannot be *attempted*, can nonetheless be charged as a mere agreement.

120. The Defence recognises that in *Case 07* and *Case 10*, the SPO was permitted to bring counts combining Article 35 with Article 401, as well as other offences which do not explicitly provide for the criminalization of preparatory acts. However, the defence in those cases made no submissions on this issue and none of the KSC Panels considered it.

c) Agreement and Article 401(2)

121. Even if the Single Trial Judge does not accept that agreement under Article 35 is generally limited to more serious offences, a further issue arises with its application to group obstruction under Article 401(2). The Defence has elaborated above at paragraphs 51 *et seq.* the understanding which is given to “common action” of a “group” in Kosovo law. This is the physical activity, at one time, of a physical (co-located) group. However, previous decisions of this Court have given “common action” an incorrect understanding, which also has the result of removing any possible meaning for Article 35. That is because the interpretation of “common action” adopted by KSC panels wrongly treats it as a form of joint participation in a crime akin to co-perpetration or joint criminal enterprise, whereby a group of persons intentionally coordinate to contribute various parts of the criminal act.

122. The Defence reiterates that this interpretation is incorrect. However, if the Single Trial Judge rejects the Defence’s submissions in this respect, and maintains the position that “common action” means any coordinated collaboration between a group of persons, then a necessary corollary of that position is that this offence cannot be charged using the mode of liability of agreement in Article 35.

123. This is for the same reasons that KSC Pre-Trial Judges have rejected the use of co-perpetration in Article 31 as a mode of liability for Article 401(2). Based on the interpretation that they gave to “common action”, they have ruled that:

Co-perpetration cannot be applied in relation to the offence under Count 2 offence (Article 401(2) of the KCC), as the material elements of that —obstructing an official person in performing official duties by common action of a group of persons —already entail joint commission. Each participant in such a group acts as an individual perpetrator.¹¹⁴

124. While the same logic was not applied to Article 35 in *Case 07* and *Case 10*, it is not clear why. The group component is already subsumed in the approach taken by the Pre-Trial Judges which in practice requires that the members of the group agreed to act together to achieve obstruction. On the (incorrect) meaning given to this offence in *Case 07* and *Case 10*, it is impossible for the offence to be completely committed *without* the agreement of the group members.

125. Accordingly, unless the Single Trial Judge corrects the interpretation of “common action” which was adopted in previous KSC cases, he should rule that an offence under Article 401(2) cannot be charged using Article 35 agreement.

4. Article 32: Incitement

126. KCC Article 32 establishes criminal liability for incitement. Prior KSC decisions have explained that this requires that the accused:

[...] exert[ed] psychological influence on another person with a view to creating or strengthening the decision of that other person to commit a criminal offence. Such influence may take the form of, inter alia, encouraging, urging or pressuring the person to commit the offence, as well as guiding or instructing him or her in the commission thereof.¹¹⁵

127. Accordingly, to establish incitement, the SPO must prove “psychological influence”. This would not be made out in a situation where the person already intended to carry out the criminal offence, since the accused’s acts or statements

¹¹⁴ [Case 07 Confirmation Decision](#), para.87; KSC-BC-2023-10/F00008/RED2/COR, para.61.

¹¹⁵ [Case 07 Confirmation Decision](#), para.88; see also [Case 07 Trial Judgment](#), para.191; Confirmation Decision, para.98.

had no psychological influence. The KCC Commentary explains that incitement can only occur where the person had previously no intention of (completely) committing the offence; or where the person was previously unsure about whether to (completely) commit the offence or not.¹¹⁶ It is also clear that at least two persons must be involved: the accused must have exerted psychological influence *on another person*.

128. Article 32 sets out three forms of incitement. The above requirements of (i) psychological influence (ii) towards another person are necessary for any form of incitement, however the forms differ depending on whether the offence was completely committed, or attempted, or neither:

- i. Article 32(1) incitement applies only “*if the criminal offence is committed*” – that is, complete commission;
- ii. Article 32(2) incitement applies only “*if the criminal offence is attempted but not committed*”.
- iii. Article 32(3) incitement occurs where the offence was not even attempted, but it applies only in respect of “*a criminal offence punishable by imprisonment of at least five (5) years*”.

129. As with the other inchoate modes of liability, it remains necessary that the person who carries out incitement intends that the offence be completely committed:¹¹⁷

“the inciter must desire or consent to the commission of the criminal offence”.¹¹⁸

a) Paragraph (3) incitement does not apply to the offences charged in this case

130. In *Case 07*, Trial Panel II ruled that the third form of incitement, in Article 32(3), “*can only be applied to offences that provide for a minimum imprisonment of five (5)*

¹¹⁶ See Annex 2, KCC Commentary, pp.159-160.

¹¹⁷ *Ibid.*, pp.161-162.

¹¹⁸ *Ibid.*, p.162.

years."¹¹⁹ That approach was followed by the Pre-Trial Judge in this case,¹²⁰ but an Appeals Panel ruled by majority (Judge Jørgensen dissenting) that Article 32(3) can be applied to "*crimes for which the sentencing range includes or exceeds five years, even if not the minimum sentence*".¹²¹

131. However, Judge Jørgensen gave compelling reasons why the majority's position was incorrect, based on the ordinary meaning of the words used in Article 32, their object and purpose, and the terminology used throughout the KCC. She also highlighted that any ambiguity should be resolved in favour of the Accused.¹²²

132. The Defence respectfully submits that the Appeals Panel majority erred in this ruling. The Defence reviewed Kosovo case law on this subject which was not before the Appeals Panel. That case law clearly supports the position taken by Judge Jørgensen. In a series of five cases in 2017, the Supreme Court interpreted the following phrase in Article 63 of the 2012 Criminal Code (now KCC Article 60):

*[...] the court shall remove from the perpetrator of a criminal offence the right to stand for election (passive electoral right) for a period of one (1) to four (4) years, if that person, with the aim of being elected, commits any of the criminal offences against voting rights or another criminal offence for which a penalty of at least two (2) years' imprisonment is prescribed.*¹²³

133. In all five cases the Supreme Court explained that this phrase referred to criminal offences "*for which the minimum sentence (the special minimum) must be 2 years imprisonment.*"¹²⁴ The same phrase used in Article 32(3) should be given the same

¹¹⁹ [Case 07 Trial Judgment](#), para.193,781.

¹²⁰ Confirmation Decision, para.276.

¹²¹ [IA002/F00012/RED](#), para.85.

¹²² [IA002/F00012/RED](#), Partially Dissenting Opinion of Judge Jørgensen, pp.1-4.

¹²³ *Inter alia*, Annex 5, Supreme Court of Kosovo, AA.-Uzh.nr.20/2017, 21 September 2017.

¹²⁴ See Annex 5, Supreme Court of Kosovo, AA.-Uzh.nr.16/2017, 19 September 2017; Annex 5, Supreme Court of Kosovo, AA.-Uzh.nr.17/2017, 19 September 2017; Annex 5, Supreme Court of Kosovo, AA.-Uzh.nr.18/2017, 20 September 2017; Annex 5, Supreme Court of Kosovo, AA.-Uzh.nr.19/2017, 21 September 2017; Annex 5, Supreme Court of Kosovo, AA.-Uzh.nr.20/2017, 21 September 2017.

interpretation – namely that it applies to offences for which the *minimum sentence* is 5 years or more.

134. The Defence has also carried out an exhaustive search, with the assistance of Kosovar lawyers, for any instance in which Article 32(3) was charged or applied in respect of an offence with a *maximum* sentence of five years (as is the case for Article 401(3) and Article 401(5)). It has not found a single example of such a case. Rather, Article 32(3) is only used in relation to more serious offences such as murder.¹²⁵

b) Incitement cannot be used with Article 401(3)

135. Even if the Single Trial Judge does not accept this argument regarding the meaning of Article 32(3) and considers that it can be used with Article 401, the Defence highlights that it cannot be applied in a manner which is duplicative of Article 401(3). Article 401(3) creates an aggravating circumstance where the accused is the 'leader' of a group which obstructs an official person. Kosovo caselaw shows that it has been applied in scenarios where the accused called for and thereby caused the obstructive action of a group. Thus, in Decision no. 281/07, the EULEX District Court of Pristina imposed a conviction under Article 401(3) where the accused had "exhorted" a crowd to take action.¹²⁶ It is clear that the aggravating conduct in question is the very same conduct which amounts to incitement. Accordingly, the Defence submits that Article 32 and Article 401(3) cannot be charged concurrently.¹²⁷

¹²⁵ See, *inter alia*, Annex 5, Court of Appeals of Kosovo, PAKR 381/23, 13 July 2024.

¹²⁶ District Court of Pristina, [P.Nr.281/07 Judgment](#), p.10.

¹²⁷ The Defence notes that in Decision 281/07, where Article 401(3) was applied, no charge of incitement was brought: District Court of Pristina, [P.Nr.281/07 Judgment](#).

C. WHY THE COURT MUST APPLY THE LAW AS UNDERSTOOD IN KOSOVO

136. Fair trial principles require that the Single Trial Judge adopt an interpretation of offences and modes of liability under the KCC that conform to established practice in Kosovo.

137. The Defence notes the ruling of the Appeals Panel in *Case 07* that “while the jurisprudence of courts in Kosovo may offer some guidance, it is not binding on the Specialist Panels.”¹²⁸ The Defence understands the Panel to have been endorsing the position put by the SPO in that litigation that the KSC “does not operate on principles of *stare decisis*.”¹²⁹ In other words, any one specific ruling of a Kosovo court does not *bind* other judicial panels in the Kosovo court system, including KSC panels. The Defence does not dispute that position.

138. Nonetheless, several applicable principles of law have the effect of requiring that the KSC interpret criminal offences in a way which conforms to the consistent practice of Kosovo courts.

1. *Nullem crimen sine lege*

139. First, this is required by the principle of *nullem crimen sine lege* (the principle of legality), found in Article 33(1) of the Kosovo Constitution and Article 7(1) of the European Convention on Human Rights (“ECHR”).¹³⁰

140. The principle has been interpreted extensively by the European Court of Human Rights (“ECtHR”).¹³¹ It has also been applied by panels of the KSC,¹³² as well as

¹²⁸ [Case 07 Appeal Judgment](#), para.301.

¹²⁹ [Case 07 SPO Appeal Brief](#), para.47.

¹³⁰ See also article 2(2) of the KCC.

¹³¹ For example: [Başkaya and Okçuoğlu v. Turkey](#), para.36; [Pessino v. France](#), paras 34-37; [Dragotoniū and Militaru-Pidhorni v. Romania](#), paras 40-48.

¹³² [Case 06 Appeal Decision on Jurisdiction](#), paras 211-217; [Case 07 Constitutional Court Judgment](#), para.133 *et seq.*; [Case 05 Constitutional Court Judgment](#), para.104 *et seq.*

international criminal tribunals.¹³³ It was explained by Judge Ambos in a partially dissenting opinion in *Case 07*:

The legality principle is enshrined in Kosovo's legal tradition as a civil law jurisdiction as reflected in the law of the former Yugoslavia. In line with this tradition, the principle is often paraphrased with the Latin maxim nullum crimen, nulla poena sine lege and encompasses as its basic components the rules of lex praevia (prohibition of retroactive criminalisation), lex certa (certainty of the elements of the offence), lex stricta (strict interpretation and prohibition of analogy in malam partem) and lex scripta (written law).¹³⁴

a) Certainty and foreseeability

141. *Lex certa* mandates that a criminal offence must be sufficiently *certain*.

142. This aspect of the *nullem crimen* principle has been interpreted by the KSC as requiring “that the law clearly defines the criminal offences and the sanctions by which an individual is punished, such as to be accessible and foreseeable in its effects”;¹³⁵ thus, “the Accused must have been able to appreciate that their conduct is criminal”.¹³⁶ It is not required that the accused was aware of the specific provision prohibiting the conduct, but rather could have generally foreseen that it would be criminalized by some law.¹³⁷ It is also not required that the accused could have reached this conclusion alone: criminalization is foreseeable if the accused could have foreseen this with the assistance of appropriate legal advice.¹³⁸

143. Most international criminal tribunal decisions on this subject are not comparable to this case. They generally concern modes of liability linked to historical war crimes proceedings, and/or conduct so clearly reprehensible that it has been easy for tribunals to find that the accused must have foreseen its criminality. The

¹³³ For example: [Ojdanić Appeal Decision on Jurisdiction](#), paras 37-38; [Hadžihasanović Appeal Decision on Jurisdiction](#), para 34; [Duch Appeal Judgment](#), para.96 *et seq.*; [Abd-Al-Rahman OA8 Appeal Judgment](#), paras 85-86.

¹³⁴ [Case 07 Appeal Judgment](#), Partially Dissenting Opinion of Judge Ambos, para.4.

¹³⁵ [Case 06 Appeal Decision on Jurisdiction](#), para.211.

¹³⁶ *Ibid.*, para.212.

¹³⁷ *Ibid.*, para.212.

¹³⁸ *Ibid.*, para.215; [Case 07 Supreme Court Decision](#), para.45; [Case 07 Constitutional Court Judgment](#), paras 137,149; [Case 05 Constitutional Court Judgment](#), para.106.

STL's consideration of corporate liability for contempt is a notable exception. There, the STL Appeals Panel ruled that such corporate criminal liability *was* foreseeable because it had been explicitly legislated in Lebanese law.¹³⁹

144. That is not the case here. Even at its highest, what is alleged by the SPO is a plan to contact witnesses and discuss their testimony *without bribery or coercion*. The unambiguous wording of the relevant KCC provisions – especially Articles 386 and 387 – make clear that such conduct is not covered by them. Moreover, the Defence has been unable to find a single instance in which such conduct resulted in a prosecution in Kosovo (including under Article 401 or its antecedents), let alone a conviction.¹⁴⁰
145. The Defence recognises that a similar argument regarding Article 401(1) was rejected in *Case 07*.¹⁴¹ However, the point of interpretation argued there about Article 401(1) was different from that raised in the present case. And perhaps even more importantly, in *Case 07* only one Kosovo court decision was put before the KSC as a means of demonstrating how Kosovo courts interpret Article 401. That is not the case here. The analysis set out in Section III.A above, and in Annexes 3 and 4 demonstrates a long-established and consistent practice of interpreting Article 401 in such a way that the identification of *specific* officials and *specific* duties are essential to the offence. They also demonstrate that Article 401(2) is applied where a group of persons is physically co-located and act in unison, as in the movement of a crowd. From the more than 90 cases analysed by the Defence, not a single case involved a fact pattern like that alleged in the present case. At the same time, *all* identified Kosovo cases arising from witness

¹³⁹ [New TV Appeal Decision on Jurisdiction](#), paras 68-71; [Akhbar Beirut Appeal Decision on Jurisdiction](#), paras 56-58.

¹⁴⁰ See Annex 3.

¹⁴¹ [Case 07 Supreme Court Decision](#), paras 40-49; [Case 07 Constitutional Court Judgment](#), paras 145-53.

interference allegations were charged under KCC Article 386, and these consistently resulted in acquittal where compulsion or bribe was not proved.¹⁴²

146. In *Case 07* the Constitutional Court Panel placed reliance on the “essence” of the offence, finding that “an interpretation of the scope of the offence which was consistent with the essence of that offence must be considered as foreseeable.”¹⁴³ In the present case, the situation is very different: the essence of the offence under Article 401(2) has no connection to the alleged facts. Meanwhile the essence of the facts alleged – which might be described as a plan to contact witnesses about their testimony but without any coercion or incentives – is clearly not criminalized by the KCC provisions which are directed to witness interference. It was simply not foreseeable that such conduct would be criminalized.
147. Finally, the Defence anticipates a possible response from the SPO which argues that *Case 07* itself made the criminalization of this conduct foreseeable. That case was the subject of a Trial Judgment on 18 May 2022¹⁴⁴ and an Appeal Judgment in February 2023,¹⁴⁵ that is, before the Indictment period in this case. However, this one deviation from well-established practice would not make the present prosecution foreseeable. That is even more so because two levels of appeal and review in *Case 07* remained pending in 2023 in which the correct interpretation of Article 401 remained a live issue. However, most fundamentally, *Case 07* involved very different facts from the present case. Specifically, it involved allegations of coercive measures (in particular, “serious threat”)¹⁴⁶ such as would have made the criminal nature of the conduct foreseeable. Those very different circumstances cannot be compared to the present case.

¹⁴² See Section III.A.1.f) above.

¹⁴³ [Case 07 Constitutional Court Judgment](#), para.150.

¹⁴⁴ [Case 07 Trial Judgment](#).

¹⁴⁵ [Case 07 Appeal Judgment](#).

¹⁴⁶ Under Count 1 of the Indictment, pursuant to Article 401(1) and (5); see [Case 07 Indictment](#), para.48.

b) Lex stricta and in dubio pro reo

148. A second relevant principle is that of *lex stricta*. Article 2(3) of the KCC states that:

The definition of a criminal offense 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 favor of the person against whom the criminal proceedings are ongoing.

149. In *Case 07*, Judge Ambos treated this as part of *nullum crimen*,¹⁴⁷ but as distinct from the requirement of certainty,¹⁴⁸ explaining that:

*the applicable criminal law must not lightly be interpreted broadly or expansively to the detriment of the accused; any doubt as to the meaning of a statutory provision, including as to its objective elements (actus reus), has to be resolved in favour of the accused.*¹⁴⁹

150. A similar and overlapping concept is *in dubio pro reo*. While principally used as a tool for assessing evidence according to the burden of proof, this principle has also been held to mean that when there is doubt about the elements of an offence, it should be interpreted in a manner favourable to the accused.¹⁵⁰

151. Accordingly, the elements of the offences and modes of liability must be strictly construed in terms of their plain meaning. If doubt exists, it must be resolved in favour of the Accused.

2. Jurisdictional limitations of the KSC and the intended meaning of the KSC Law

152. There is an additional reason why the SPO cannot be permitted to broaden the scope of the offense charged beyond the meaning given to them in Kosovo. The

¹⁴⁷ [Case 07 Appeal Judgment](#), Partially Dissenting Opinion of Judge Ambos, paras 3-5.

¹⁴⁸ *Ibid.*, para.6.

¹⁴⁹ *Ibid.*, para.10.

¹⁵⁰ [Limaj Appeal Judgment](#), para. 21, and Declaration of Judge Shahabuddeen, paras 2-5; [Gbagbo and Blé Goude OA8 Judgment](#), para.83; [STL Appeal Decision on Applicable Law](#), para.32; [Ngudjolo Chui Concurring Opinion of Judge Van den Wyngaert](#), paras 18-20; [Bemba et al. Separate Opinion of Judge Pangalangan](#), paras 10-12; [Katanga Trial Judgment](#), paras 52-54; [Čelebići Trial Judgment](#), para.413; [Akeyasu Trial Judgment](#), para.500-501; [Kayishema and Ruzindana Trial Judgment](#), para.103; Mettraux, p.226.

KSC's subject-matter jurisdiction is prescribed by the KSC Law. Specifically, only certain offences under Kosovo law can be tried by the KSC, including pursuant to Article 15(2). Only certain offences are available from the KCC for prosecution before the KSC. This jurisdictional limitation would be circumvented if the SPO can merely enlarge the offences in question by giving them a wider meaning than that they carry in the Kosovo courts.

153. The drafters of the KSC Law deliberately opted – through Articles 15(2) and 16(3) – to address offences against the administration of justice by use of Kosovo domestic crimes. It was open to them to do otherwise: for example, to treat contempt as an aspect of inherent jurisdiction as the *ad hoc* tribunals did,¹⁵¹ or to create offences similar to those in Article 70 of the Rome Statute. The decision not to do so, but rather to incorporate specific offences from the KCC into the KSC's jurisdiction, must be given meaning. The obvious intention of the drafters was to ensure consistency between the offences triable in Kosovo courts, and those prosecuted before the KSC. The obvious benefit of such consistency was voiced by the STL Appeals Panel in a situation directly opposite to that arising here: where domestic law expressly *did* include a prohibition which was unclear in the STL's texts:

*It would be an oddity for a Lebanese company to face criminal sanction in Lebanon [...] and at the same time enjoy impunity for similar acts before an internationalised Tribunal guided by Lebanese law in carrying out its judicial work. In light of Lebanese law on this subject and the unique link between that body of law and this Tribunal, it was not unforeseeable for a Lebanese company to be prosecuted for contempt before the Tribunal under Rule 60 bis.*¹⁵²

154. It would equally be an oddity if conduct not liable to prosecution in Kosovo could become the subject of a conviction at the KSC, which does not merely have a “unique link” to Kosovo, but is itself a Kosovar court. Such an outcome would

¹⁵¹ [Vujin Appeal Judgment](#), paras 13-28; [Nobilo Appeal Judgment](#), para.38.

¹⁵² [Akhbar Beirut Appeal Decision on Jurisdiction](#), para. 59. See also [New TV Appeal Decision on Jurisdiction](#), paras 69-71.

defeat the obvious legislative objective of consistency, and create clear unfairness against the Accused, who could potentially be imprisoned for conduct which would not create criminal liability before the Kosovo courts.

3. *Equality before the law*

155. Article 3 of the Kosovo Constitution guarantees the right to equality before the law.¹⁵³ Previous panels of the KSC have ruled that this principle requires that accused prosecuted within the same jurisdiction must be treated equally.¹⁵⁴ They have ruled that persons prosecuted before the KSC may only be treated differently from persons tried in other Kosovo courts where this is “*objectively and reasonably justified*”.¹⁵⁵ In *Case 04* and *Case 06*, that was held to be the case because the accused were being prosecuted for international crimes under the KSC Law.¹⁵⁶ That is not the case here. The Accused are prosecuted for ordinary crimes under domestic Kosovo law. They must be treated in the same way as any other person prosecuted for the same crimes, most fundamentally by being subject to the same definition of those crimes.

4. *Precedent from hybrid criminal tribunals*

156. Lastly, guidance can also be drawn from the approach of the STL, which also dealt with specific crimes established under Lebanese domestic law. The STL Appeals Chamber ruled that in interpreting Lebanese domestic law for this purpose “*generally speaking the Tribunal will apply Lebanese law as interpreted and applied by Lebanese courts*”.¹⁵⁷ It would depart from the approach of the national courts only “*when such interpretation or application appears to be unreasonable, or may*

¹⁵³ See also ECtHR rulings on this principle, such as: [Fabris v. France](#), para.56; [Mola Sali v. Greece](#).

¹⁵⁴ [Case 04 Appeal Judgment](#), para.923; [Case 06 Krasniqi and Veseli Constitutional Court Decision](#), para.23.

¹⁵⁵ [Case 04 Appeal Judgment](#), para.923; [Case 06 Appeal Decision on Jurisdiction](#), para.46.

¹⁵⁶ [Case 04 Appeal Judgment](#), para.923; [Case 06 Appeal Decision on Jurisdiction](#), para.46.

¹⁵⁷ [STL Appeal Decision on Applicable Law](#), para.34 (emphasis added).

*result in a manifest injustice, or is not consonant with international principles and rules binding upon Lebanon”.*¹⁵⁸

157. This approach was derived from the fact that the STL was “*mandated to apply national law*”.¹⁵⁹ The same rationale applies to the KSC, and even more so given that the KSC is itself a national Kosovar court; established by Kosovar legislation.

158. For all of the above reasons, although no single Kosovo decision is strictly binding on the Single Trial Judge, the Defence submits that the KSC should not depart from the well-established meanings given to provisions of the KCC by Kosovar courts. To do so would violate the principle of *nullem crimen* and create an unfair double standard of treatment as between KSC accused and other persons.

IV. DEFECTS IN THE INDICTMENT

159. Pre-trial, the Defence raised a number of defects in the Indictment’s charges concerning Article 401(2) of the KCC.¹⁶⁰ These arguments were rejected by the Pre-Trial Judge,¹⁶¹ and a Defence request for leave to appeal¹⁶² was refused.¹⁶³

160. The Defence maintains its position that the Indictment is defective in its charging of Article 401(2). In addition, a number of further defects have since become clear, especially regarding the modes of liability charged. The SPO has failed to remedy these defects by providing notice through other instruments. The defects are such that it is impossible for the Single Trial Judge to convict **THAÇI** without introducing matters outside the Indictment of which no notice has been given, rendering the trial unfair.

¹⁵⁸ *Ibid.*, para.39 (emphases omitted).

¹⁵⁹ *Ibid.*, para. 33.

¹⁶⁰ [F00288](#). See also [F00321](#).

¹⁶¹ [F00347](#).

¹⁶² [F00358](#).

¹⁶³ [F00392](#).

A. LEGAL PRINCIPLES

161. The Defence reiterates the principles of law set out in its preliminary motion.¹⁶⁴

It is long-established in international criminal law that:

- i. The indictment need not identify the evidence which will be relied on, but must plead all material facts underpinning the charges.¹⁶⁵ This includes the material facts relevant to each mode of liability charged.¹⁶⁶ Not only material, but also mental, elements must be pleaded.¹⁶⁷
- ii. Defective pleading in an indictment can only be remedied if prosecutors provide the defence with “*timely, clear and consistent information*” which resolves the ambiguity or vagueness in the indictment.¹⁶⁸
- iii. A vague indictment which has not been remedied causes prejudice to the accused and may only be deemed harmless if it is demonstrated that the accused’s ability to prepare his defence was not materially impaired.¹⁶⁹ Where an accused raises a lack of notice in trial proceedings, the burden rests on the prosecution to demonstrate that the accused has not had his ability to prepare a defence materially impaired.¹⁷⁰

¹⁶⁴ [F00288](#), paras 5-8.

¹⁶⁵ [Case 07 Appeal Decision on Preliminary Motions](#), paras 35-38; [Case 06 Appeal Decision on Defects in the Indictment](#), paras 18,20; [Martić Appeal Judgment](#), para.162; [Munyakazi Appeal Judgment](#), para.36; [Renzaho Appeal Judgment](#), para.53; [Nahimana Appeal Judgment](#), para.322; [Kupreškić Appeal Judgment](#), para.114.

¹⁶⁶ [Simić Appeal Judgment](#), para.21; [Renzaho Appeal Judgment](#), paras 53-54; [Kupreškić Appeal Judgment](#), para.114. See also [Case 07 Appeal Decision on Preliminary Motions](#), para.38; [Case 06 Appeal Decision on Defects in the Indictment](#), para.18.

¹⁶⁷ [Blaškić Appeal Judgment](#), para.219; [Nahimana Appeal Judgment](#), para.347.

¹⁶⁸ [Case 04 Appeal Judgment](#), para.194; [Case 07 Appeal Decision on Preliminary Motions](#), para.51; [Martić Appeal Judgment](#), para.163; [Simić Appeal Judgment](#), para.23; [Munyakazi Appeal Judgment](#), para.36; [Renzaho Appeal Judgment](#), para. 55; [Nahimana Appeal Judgment](#), para.325; [Kupreškić Appeal Judgment](#), para.114.

¹⁶⁹ [Case 04 Appeal Judgment](#), paras 191,194; [Martić Appeal Judgment](#), para.163; [Simić Appeal Judgment](#), para.24; [Nahimana Appeal Judgment](#), para.326.

¹⁷⁰ [Simić Appeal Judgment](#), para.25; [Renzaho Appeal Judgment](#), para.56; [Ndindiliyimana Appeal Judgment](#), para.195.

B. LACK OF PARTICULARS REGARDING ARTICLE 401(2)

162. The SPO has never made clear the facts it alleges regarding the charges based on Article 401(2). The Defence has had no notice of the SPO's allegations regarding: *which official persons* were targeted for obstruction; *which official duties* were to be obstructed; or *how* such duties would be obstructed.
163. This is unsurprising once it is understood that Article 401 offences have only ever been applied in Kosovo in entirely different scenarios. This is a provision aimed at addressing tangible, physical confrontations with officials, which prevent them from carrying out a specific official task. Where the offence is properly charged – for example, where an accused prevented a specific police officer from carrying out an arrest – it will be a simple matter to identify all elements of the offence. In the present instance, the SPO has distorted the offence, and seeks to apply it to an allegation of three men (or more) planning for one of them to speak to a prosecution witness. It is clearly impossible for the SPO to identify the material elements of the offence in such an allegation (even if it could be proved). Accordingly, the SPO instead tries to proceed on the basis of an assumption that *any* contact with a witness amounts to “obstruction” of *all* SPO and KSC officials. This is simply not how criminal law works. The SPO cannot “prove” its case with assumptions: it must identify the elements of the offence and explain how they are met by specific alleged material facts.
164. The Pre-Trial Judge appears to have rejected the Defence preliminary motion on defects on the basis that the charges in this case concern attempt rather than commission.¹⁷¹ For reasons articulated in the Defence's request for leave to appeal,¹⁷² that approach is incorrect. While the mode of liability charged can affect the level of specificity required in an indictment, this relates to the question

¹⁷¹ [F00347](#), paras 48,51,55.

¹⁷² [F00358](#), paras 10-11.

of what it implies about the proximity of the accused to the crimes.¹⁷³ Thus, “a lesser degree of specificity” is required where the accused is not alleged to have directly participated in crimes but rather to have been a commander or part of a joint criminal enterprise.¹⁷⁴ This principle is not applicable to a scenario in which **THAÇI** himself is said to have directly attempted a crime.

165. **THAÇI** could only be responsible for an attempt if he had the required intent regarding all material elements of the crime. He must have intended to participate in the common action of a group; and he must have intended that this common action would obstruct one or more official duties of one or more official persons.
166. Despite this, the SPO has provided no particulars as to what **THAÇI**’s alleged intent was: who did he intend to obstruct, from doing what, and how? This is akin to an allegation of attempted murder which fails to identify the intended victim, or the means to be used. It is impossible for an accused to answer such a vague and unparticularised allegation.
167. The same applies for the other modes of liability which are charged: agreement (Article 35) and incitement (Article 32). In addition to the defects addressed below in Section IV.C, the SPO has also failed to provide particulars of the material facts which it alleges underpin these modes of liability.
168. As set out above (paragraphs 113 *et seq.*), **THAÇI** could only be liable for an agreement under Article 35 if he entered into an agreement which covers all material elements of the offence; and if he actually intended the completed commission of the offence. As the Appeals Panel explained it:

¹⁷³ [Case 07 Appeal Decision on Preliminary Motions](#), para.42; [Case 05 Appeal Decision on Form of Indictment](#), para.17; [Case 06 Appeal Decision on Defects in the Indictment](#), para.18.

¹⁷⁴ [Case 06 Appeal Decision on Defects in the Indictment](#), para.73. See also [Kvočka Appeal Judgment](#), para.65.

*[...] 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. 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.*¹⁷⁵

169. The Appeals Panel ruled that for such an agreement to exist:

*[...] the alleged perpetrators need to have an agreement on the constitutive elements of the offence under Article 401(2) of the KCC [...].*¹⁷⁶

There the Appeals Panel ruled that the agreement must cover the creation a group of at least three persons (one element of Article 401(2)). However, the same reasoning applies to the other elements of Article 401(2): the agreement must also cover the common action to be taken by the group, and the goal of obstructing the official duties of an official person. Accordingly, insofar as the SPO alleges that **THAÇI** made an agreement to commit an offence under Article 401(2), it must particularise the details of that agreement regarding the elements of the offence.

170. As set out above, incitement under Article 32 requires that (i) the accused exerted psychological influence over another person to commit a *specific offence*; and (ii) the accused intended for the other person to commit the offence. To be liable for incitement, **THAÇI** would have needed to intend the obstruction of an official person from performing official duties. The SPO must therefore particularise what it is that they allege **THAÇI** intended to incite.

171. This is demonstrated by previous international tribunal decisions which addressed the notice requirements for an indictment charging inchoate forms of criminal responsibility. For example, in *Nahimana*, the ICTR Appeals Chamber

¹⁷⁵ [IA002/F00012/RED](#), para.38.

¹⁷⁶ *Ibid.*, para.39.

made clear that a charge of conspiracy requires identifying in the indictment the fact of an agreement between individuals aimed at the commission of the specific crime; and the fact that the individuals intended to achieve a particular *identified* criminal outcome.¹⁷⁷ Likewise, the ICTR ruled that the indictment must plead the state of mind of the accused or the evidentiary facts from which it is to be inferred.¹⁷⁸

172. In the present case, none of the central elements of the alleged attempt, agreement or incitement were pleaded by the SPO.

1. Lack of particulars regarding the official person who was targeted

173. The Indictment provides no information regarding which official person(s) **THAÇI** is alleged to have targeted for obstruction.

174. As set out above, this offence requires that one or more specific official individuals is targeted. The conduct is not directed at an institution, but at an individual official. It is an essential element of the completed commission of the offence that a specific individual official person experiences obstruction during his/her official duties. It is therefore a requirement of any inchoate form of the offence that the accused at least intended to obstruct a specific official person.

175. In the Kosovo case law which the Defence has reviewed, charges of attempted obstruction under Article 401(2) identify the individual who was targeted by the accused. For example, in *P.nr.127/19*, K.GJ. was convicted of having attempted to obstruct two police officers, S.K. and XH.SH., who were operating a checkpoint and sought to issue him a ticket for his vehicle's tinted windows.¹⁷⁹ In *P.nr. 297/19*, R.X. was convicted of having attempted to obstruct a judge from holding a hearing by threatening him with violence.¹⁸⁰

¹⁷⁷ [Nahimana Appeal Judgment](#), para.344.

¹⁷⁸ *Ibid.*, para.347. See also [Blaškić Appeal Judgment](#), para.219.

¹⁷⁹ Basic Court of Peja, *P.nr.127/19*, 6 April 2020 (See Annex 3, item 37).

¹⁸⁰ Basic Court of Ferizaj, *P.nr.297/19*, 14 November 2019 (See Annex 3, item 53).

176. In the case of *B.B. and K.B.* the Kosovo Court of Appeals overturned a conviction under Article 401(1) because “nowhere in the operative part [of the impugned judgment] is the official person mentioned at all, nor which official person was obstructed”.¹⁸¹
177. The need to plead the official person targeted in an alleged crime of obstruction (or any inchoate form of it) is also made clear by the broader case law which indicates that an indictment must identify the victim(s) of an offence “to the greatest degree of specificity possible in the circumstances.”¹⁸² The Kosovo courts have consistently made clear that the victim of an offence under Article 401 is the official person whose duties were obstructed: that person is consistently identified as the “injured party” in the cases reviewed by the Defence.¹⁸³
178. It is therefore clear that the Indictment was required to plead the material fact of *which official person was to be obstructed*, according to the attempt, plan or incitement which the SPO alleges **THAÇI** undertook.
179. The Defence reiterates its earlier submissions that this is not a case in which the SPO can claim to be unable to identify intended targets. This is not a case involving mass crimes, where details cannot be provided because of their “sheer scale”.¹⁸⁴ It is also not case where the information is unknowable in details due

¹⁸¹ Kosovo Court of Appeal, PA1.no.1708/21, 13 May 2022. The Court elaborated: “while in the part of the operative part finding the accused guilty, the aggrieved party D. is mentioned, and subsequently the first-instance court directed the aggrieved party to civil proceedings, which means that in the reasoning of the judgment the aggrieved party was also heard in the capacity of a witness, but the first-instance court did not provide reasoning and did not specify why the aggrieved party is not included in the operative part of the judgment, only elaborating that the official person in the performance of official duties was deliberately obstructed while police officers were together with municipal inspectors, without specifying whether the aggrieved party was alone or who was obstructed, since on the critical day there were also other official persons such as police officers or an inspector of the Municipality of Suhareka while they were on patrol of the cafes in that town.”

¹⁸² [Lubanga Appeal Judgment](#), para.123; see also [Kvočka Decision on Preliminary Motions](#), para.23.

¹⁸³ See Annex 3, Items 24,37,42,53.

¹⁸⁴ [Muhimana Appeal Judgment](#), para.79; [Taylor Appeal Judgment](#), para.40, highlighting that this concept provides only a “narrow” exception that would permit less detailed pleading.

to the “fallibility of witness recollection”.¹⁸⁵ To the contrary, the SPO appears to allege that **THAÇI** sought to obstruct KSC officials, including members of the SPO staff. It should therefore have been possible for the SPO to detail who these persons are.

180. Despite this, the Indictment nowhere mentioned which officials were targeted for obstruction. Its paragraph 6 states that all crimes charged “*relate to official proceedings of the Kosovo Specialist Chambers (‘KSC’), including investigations of the Specialist Prosecutor’s Office (‘SPO’)*”. Paragraph 25 also refers to the “KSC/SPO”. By reading these paragraphs together with paragraph 23, the Defence infers that the officials referred to are officials of the KSC and SPO. However, beyond this, the Indictment provides no particulars. The list set out in paragraph 23 is broad enough to include any KSC judge, any SPO prosecutor, any staff of the SPO, and any staff of the KSC (including Registry or Chambers).

181. This defect has not been remedied. The SPO’s PTB, which ran 146 pages, includes one sentence which purports to address this question, yet it does so in only the vaguest terms:

*The official persons subject of the attempted obstruction were the SPO investigators, prosecutors and other staff members in charge of investigating and prosecuting crimes within the KSC jurisdiction, as well as the KSC judges vested with the authority to hear and assess the evidence in Case 6, and deliver a judgment.*¹⁸⁶

182. In other areas, the matter is further confused, with the SPO PTB framing the target of the obstruction not as particular official persons, but rather as the KSC or SPO as an institution. Thus, it is alleged that the conduct of the accused “*threatened the ability of the KSC/SPO*” to obtain testimony, and led to the diversion of “*SPO time and resources*”.¹⁸⁷ It is also alleged that the conduct was

¹⁸⁵ [Kvočka Appeal Judgment](#), para.30.

¹⁸⁶ SPO PTB, para.221.

¹⁸⁷ SPO PTB, para.220.

intended to “prevent, impede, hinder and/or delay the KSC proceedings”.¹⁸⁸ These latter statements reveal the true thinking behind the SPO’s case regarding this element: the SPO has treated Article 401 as an offence carried out *against an institution*. It therefore appears to consider that it does not need to particularise which specific official persons were targeted. This is not supportable considering the plain words of Article 401 and the very consistent practice of Kosovo courts in trying this offence.

2. Lack of particulars regarding the official duties which were targeted

183. The Indictment also provides no information regarding which official duties were being undertaken and which the SPO alleges **THAÇI** intended to obstruct.
184. As explained above in Section III.A.1.b), “official duties” refers to specific tasks which the official person was to carry out as a part of his or her role. In the Kosovo cases, these are identified and include actions such as effecting an arrest, maintaining a barricade, carrying out a traffic stop, or cutting a ceremonial ribbon: many examples can be seen in the table set out in Annex 3. It is an essential element of the offence that the official person was carrying out a specific task of this kind (or was about to so) when the obstructive conduct occurred.
185. However, the Indictment does not identify such official tasks. Instead, it only speaks of broad objectives of the KSC or SPO as an institution. Paragraph 25 of the Indictment states that the accused and others attempted “to compromise the KSC/SPO’s ability to effectively investigate and prosecute crimes, including the KSC/SPO’s ability to obtain and secure relevant witness evidence”. This paragraph focuses on *institutional efficacy* rather than on the activities of a particular official person. No other reference is made in the Indictment to which official duties may have been targeted for obstruction.

¹⁸⁸ SPO PTB, para.219.

186. This defect has not been remedied since. The SPO PTB is again almost silent on this issue. Only one single sentence addresses the question, in similarly vague terms:

*The official duties engaged by these facts relate to the SPO/KSC's work and responsibility within the context of official proceedings of the KSC, including SPO investigations and prosecutions.*¹⁸⁹

3. Lack of particulars regarding how the official duties were to be obstructed

187. As set out above in Section III.A.1.c), the obstruction of an official duty occurs where the official person is prevented from carrying out that duty. Although it is not (anymore) alleged that **THAÇI** in fact obstructed any official duties of any official persons, nonetheless, the charge that he either attempted to do so, agreed to do so, or sought to incite others to do so means that the SPO must indicate the means by which this obstruction was intended to occur. The SPO's case in this regard only goes as far as stating that the accused "*coordinated to influence witnesses*"¹⁹⁰ but does not explain how influencing witnesses would have caused the obstruction of a public official's duties.

4. Reasons for the lack of particulars, and impact on the Defence

188. The Indictment and the SPO PTB do not lack factual allegations against **THAÇI** and his co-accused. Both contain lengthy narrative segments (based largely on the flawed SPO's Transcripts). What the Indictment and the SPO PTB lack is an explanation of how these factual allegations align to the elements of the charges under Article 401(2).

189. The most obvious explanation for that is that the sort of conduct which the SPO alleges – even if it had occurred – *does not fit within Article 401*. As explained above in Section III.A.1.f), separate provisions exist in the KCC for prosecuting interference with court proceedings, including efforts to influence witnesses.

¹⁸⁹ SPO PTB, para.221.

¹⁹⁰ [Indictment](#), paras 7,24.

However, the SPO must have recognised that it could never meet the elements of those charges, since even within the unreliable SPO Transcripts it never found any evidence of *“compulsion or bribe”* (as required under Article 386(1)) or any evidence of *“force or serious threat, or other means of compulsion, a promise or a gift or any other form of benefit”* (as required by Article 387). The SPO therefore chose to contort its allegations and reframe them as an obstruction of unspecified official duties of unspecified official persons, presumably because Article 401(2) was the only provision it could identify which did not explicitly require coercion.

190. It is telling to compare this picture with the public narrative which the SPO has created around this case. In public statements, SPO officials have repeatedly presented *Case 12* as one concerning *“obstruction of justice”* and *“attempting to interfere with witness testimony”*.¹⁹¹ The clear insinuation in these public statements is that **THAÇI** imposed undue pressure on witnesses with a view to influencing their testimony. For example, it is said that the accused *“deliberately violated judicial decisions that were designed to ensure witnesses and victims could testify freely, without fear or influence”* and that *“[t]his conduct represents a clear and present danger to the rule of law, which requires that witnesses must be able to come to court and tell their stories free of pressure, influence or interference of any kind”*.¹⁹²

191. This narrative also permeated the SPO’s opening statements. Ms West referred to attempts at influencing witnesses,¹⁹³ interfering with witness testimony,¹⁹⁴ and intervening in the truthful testimony of witnesses.¹⁹⁵ She claimed that the protected interests at the centre of the case is *“that witnesses must be able to come to court and tell their stories free of pressure, influence or interference of any kind”*.¹⁹⁶

¹⁹¹ Ward Ferdinandusse, Deputy Specialist Prosecutor at the Kosovo Specialist Prosecutor’s Office, [LinkedIn post](#), 26 February 2026.

¹⁹² KSC, [“Specialist Prosecutor Says Rule of Law Must be Upheld”](#), 27 February 2026.

¹⁹³ T.265, 1.22; T.267, 1.16; T.268, 1.2 (Opening Statements).

¹⁹⁴ T.265, 1.13 (Opening Statements).

¹⁹⁵ T.265, 1.25- T.266, 1.1 (Opening Statements).

¹⁹⁶ T. 269, 1.9-11 (Opening Statements).

192. Mr Hafetz continued this theme: he made clear at the outset that, according to the SPO, this case is about “Mr. Thaçi's sustained and systematic efforts to obstruct this Tribunal's work by attempting to influence and interfere with witness testimony.”¹⁹⁷ He repeatedly referred to witness interference,¹⁹⁸ and also spoke of “obstruction of court proceedings”,¹⁹⁹ “preventing testimony from witnesses”,²⁰⁰ and efforts to “minimise or eliminate [...] testimony”.²⁰¹ He consistently identified the “targets” of the accused’s conduct as Case 06 witnesses.²⁰² In contrast, Mr Hafetz never once spoke of any conduct of **THAÇI** or the co-accused that was targeted at any official of the SPO or the KSC. Neither did he express any narrative which explained that **THAÇI** or the co-accused were motivated by an interest in obstructing the work of such persons.

193. Indeed, Ms West and Mr Hafetz could not have been more explicit in identifying what the SPO alleges was **THAÇI**’s intent and who were the targets of his actions. According to Ms West:

*All the charged conduct had a single and precise goal: Obstruct and undermine the war crimes proceedings to the benefit of Hashim Thaçi.*²⁰³

194. According to Mr Hafetz:

*The targets were the specific witnesses whose testimony Thaçi deemed a threat to him, and the goal was to neutralise each threat so that Thaçi could evade justice.*²⁰⁴

¹⁹⁷ T.270, l.8-10 (Opening Statements).

¹⁹⁸ T.268, l.13; T.269, l.10; T.270, l.10; T.271, l.1; T.274, l.19; T.274, l.25 to T.275, l.1; T.275, l.23; T.277, l.9; T.277, l.17-18; T.281, l.17; T.282, l.4-5; T.282, l.23; T.282, l.25 to T.283, l.1; T.283, l.5; T.283, l.6; T.283, l.17; T.284, l.16; T.285, l.15-16; T.286, l.17; T.288, l.4-5; T.289, l.23; T.291, l.1-2; T.291, l.18; T.295, l.19-20; T.295, l.24-25; T.297, l.1; T.297, l.7-8 (Opening Statements).

¹⁹⁹ T.273, l.23 (Opening Statements).

²⁰⁰ T.274, l.9 (Opening Statements).

²⁰¹ T.274, l.14 (Opening Statements).

²⁰² T.270, l.15; T.274, l.18-19; T.275, l.2; T.275, l.15; T.277, l.16; T.281, l.19-20; T.283, l.9; T.283, l.16-17; T.284, l.3; T.284, l.8; T.284, l.15-16; T.285, l.7; T.288, l.4-5; T.291, l.1-2; T.295, l.24-25; T.297, l.7-8; T.297, l.18; T.298, l.22-23; T.299, l.3 (Opening Statements).

²⁰³ T.269, l.5-7 (Opening Statements).

²⁰⁴ T.270, l.15-17 (Opening Statements).

195. While such rhetoric might assist the SPO in convincing others (or itself) that it is acting for noble motives, it has absolutely no relevance to the charges which the SPO itself brought in this case. A “single and precise goal”²⁰⁵ of undermining the *Case 06* proceedings – which is disputed – is emphatically *not* the same as intent to obstruct official persons in the conduct of their official duties. An intent to target a witness and to “neutralise” his testimony” – *even if true* – is not an intent to target official persons in their official duties.
196. Ultimately, this is why the SPO has completely failed to plead the elements of Article 401: because their case has absolutely nothing to do with the obstruction of official persons in performing official duties.²⁰⁶ The SPO is running a case concerning the obstruction of evidence. But this is not how criminal justice works. If the SPO knows that it cannot succeed under Article 386 or 387, in the absence of any compulsion, bribe, promise or gift from **THAÇI** and his visitors, it should acknowledge that and cease presenting a false picture of coercive witness interference. If it believes it can succeed under one of those charges, then one may wonder why those charges were not brought. And above all, if the SPO seeks to have **THAÇI** convicted under Article 401(2), it must explain how the conduct – which apparently has nothing to do with targeting official persons, even in the SPO’s telling of the narrative – could possibly meet the elements of that offence or some mode of liability in respect of it.
197. To date, the SPO has given absolutely no explanation of how it says that the conduct alleged can fit within the meaning of Article 401(2)’s elements, even if charged as an attempt. The SPO has identified not a single official person whom

²⁰⁵ T.269, 1.5-6 (Opening Statements).

²⁰⁶ This point is also demonstrated by the fact that the SPO argues that a “pattern” of conduct exists which includes but is wider than the five charged visits. But the alleged “pattern” does not itself constitute an offence under Article 401, as demonstrated by the fact that **KUÇI** is not charged in respect of Article 401(2) even though the SPO Pre-Trial Brief alleges that the 3 September Visit was part of this pattern: SPO PTB, paras 1, 279.

THAÇI targeted, and not a single official duty that he sought to interfere with. Stating that **THAÇI** intended to make contact with specific *Case 06* witnesses does not answer this question: it remains unknown which SPO official would have had some part of his or her work obstructed through such conduct. This is even more shocking when it is recalled that the SPO began this case requesting a charge of *commission*. Accordingly, one would expect that the proposed indictment, and the Rule 86 outline would have identified *which officials* were obstructed, in the performance of *which official duties*. No such information was provided.

198. The Defence has been left to answer a series of factual allegations which, aside from being unproven, have never been connected to the elements of the charged offence and modes of liability. The Defence should not have to speculate about how the SPO imagines these allegations relate to the elements of Article 401(2). Nonetheless, the Defence has tried to do so, and has simply been unable to see any tenable theory as to how this could be done. There is no question that this has caused prejudice to the Defence. It simply does not know how the SPO considers that the elements of the charged offences are constituted. It is now too late for the SPO to correct the defects in the indictment, and the charges relating to Article 401(2) should be dismissed.

C. INVALID CHARGING OF MODES OF LIABILITY CONCERNING ARTICLE 401(2)

199. If the Indictment is vague and unparticularised regarding the material facts alleged in respect of Article 401(2), on the subject of modes of liability, it is entirely incoherent. At the end of this trial the Defence remains entirely in the dark as to how **THAÇI** is charged in respect of Article 401(2), and therefore what the case is that he must answer.

200. As identified above, the mode of liability charged is an essential aspect of the case which must be made clear in an indictment. The ICTY Appeals Chamber explained:

The practice of both the International Tribunal and the ICTR requires that the Prosecution plead the specific mode or modes of liability for which the accused is being charged. The Prosecution has repeatedly been discouraged from the practice of simply restating Article 7(1) of the Statute unless it intends to rely on all of the modes of liability contained therein, because of the ambiguity that this causes. When the Prosecution is intending to rely on all modes of responsibility in Article 7(1), then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective. The Appeals Chamber further reaffirms that the Prosecution should only plead the modes of responsibility on which it intends to rely, and considers that the alleged mode(s) of liability of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in the indictment.²⁰⁷

201. The SPO has never explained the modes of liability relied on. The counts listed in paragraph 46 of the Indictment do not explain these, but instead simply list numerous provisions of the KCC, including those concerning modes of liability, such that it is entirely unclear how the various modes of liability relate to each other. Neither does the part of the Indictment headed “B. Modes of Liability” clarify matters. It does nothing beyond asserting a list of the modes of liability used.

202. It may be that the procedural history of the case helps to explain the lack of coherence regarding the modes of liability charged for Article 401(2). Initially, the SPO sought to charge **THAČI** with completed commission of an offence under Article 401(2). Accordingly, the original proposed indictment presented charges of commission.²⁰⁸ In some places, alternative reference appeared to be made to attempt, although this was not spelled out clearly.²⁰⁹ The SPO also included the modes of liability of agreement and incitement, but did not make clear whether these modes of liability were alternatives to each other, and if so

²⁰⁷ [Simić Appeal Judgment](#), para.21. See also authorities in fn. 166.

²⁰⁸ F00028/A01, paras 38,50.

²⁰⁹ F00028/A01 paras 28,29.

how.²¹⁰ Nonetheless, the Defence infers that the SPO had intended to rely primarily on commission, with agreement or incitement as alternative submissions.

203. However, the Pre-Trial Judge refused to confirm charges of completed commission regarding Article 401(2), holding that she would instead confirm charges of attempt.²¹¹ The SPO responded to this ruling by replacing allegations that **THAÇI** had “committed” the offence with allegations that he had “committed the crime of attempted obstruction of official persons pursuant to KCC Article 401(2).”²¹² Agreement and incitement were now framed in relation to this “commission of attempted obstruction”, such that **THAÇI** is charged with “agree[ing] to commit the crime of attempted obstruction of official persons”; and “incit[ing others] [...] to commit the crime of attempted obstruction of official persons”.²¹³

204. For the reasons elaborated below, these constructions are non-sensical and must be dismissed as invalid charging. Initially, the Defence speculated that this construction might have been an inadvertent error. However, an analysis of the Confirmation Decision indicates that it was intentional.

205. The Pre-Trial Judge opined that an offence under Article 401(2) “can be committed either when the obstruction has occurred, or when it has only been attempted”.²¹⁴ She repeatedly used this construction which combined both commission and attempt,²¹⁵ and explicitly rejected the relevance of Article 28 of the KCC, instead treating the offence in question (attempted obstruction) as a form of

²¹⁰ F00028/A01, paras 43,45-47.

²¹¹ Confirmation Decision, para.313.

²¹² [Indictment](#), para.36; see also paras 40,42-44.

²¹³ *Ibid.*, paras 40,42.

²¹⁴ Confirmation Decision, para.51; see also para.274.

²¹⁵ *Ibid.*, paras 210,211,267,272,277,287.

commission.²¹⁶ She went on to explicitly decide that the relevant form of incitement was that under Article 32(1) (for when an offence has been committed), rather than Article 32(2) (for when an offence has been attempted).²¹⁷ Thus, she deliberately framed the offence as *commission* rather than as Article 28 *attempt*, even going so far as to rule that “*punishment for attempting this offence is not provided by law*”.²¹⁸

206. Having read the Confirmation Decision, the SPO cannot have failed to understand what the Pre-Trial Judge intended. At that time, the SPO had the possibility to appeal, an option not available to the Defence. Indeed, the SPO chose to appeal other aspects of the Confirmation Decision and did not appeal the Pre-Trial Judge’s approach to modes of liability. Instead, the SPO consciously adopted this approach in the Indictment.

207. For the reasons below, the result is a set of charges which are fatally flawed.

1. Attempt

208. The approach adopted by the Pre-Trial Judge and now the SPO, and reflected in the Indictment, treats “attempt” as a form of the Article 401(2) offence, rather than as a mode of liability under which a person may be liable in respect of the offence in Article 401(2). In other words, they see Article 401(2) as containing two sub-offences: one where obstruction results, and one where obstruction is attempted but does not result.

209. According to the Confirmation Decision:

The wording of Article 401(2) of the KCC (“obstructs or attempts to obstruct”) indicates that the offence can be committed either when the obstruction has occurred, or when it has only been attempted. For the fulfilment of the actus reus

²¹⁶ *Ibid.*, para.304.

²¹⁷ *Ibid.*, para.274.

²¹⁸ *Ibid.*, para.275.

*of the offence, it suffices that a person carries out either of the two alternatives provided in Article 401(2) of the KCC.*²¹⁹

210. It is apparent that the Pre-Trial Judge conflated the two meanings of “commit” (see above at paragraph 92). She may have been influenced in this respect by comments of Trial Panel II in *Case 07*:

*The Panel further finds that the wording of Article 401(2) of the KCC (“obstructs or attempts to obstruct”) indicates that the offence can be committed either when the obstruction has occurred or when it has only been attempted.*²²⁰

211. However, Trial Panel II did not make explicit in which sense it was using the term “commit”. It certainly did not provide any reasoning to support an interpretation according to which “attempt” is an *element* of one form of Article 401, rather than a reference to the form of liability set out in Article 28.

212. Nonetheless, the Indictment now reflects the Pre-Trial Judge’s interpretation. **THAÇI** is charged, in Counts 1 to 3, with “attempted obstruction”, but without any reference to Article 28. The Indictment reflects the Pre-Trial Judge’s erroneous position that “attempt” is *part* of an offence under Article 401, and that therefore **THAÇI** is charged with the *complete commission* of an “attempted obstruction”.

213. The Defence submits that the approach is incorrect and must be rejected, for several reasons.

214. First, it is wrong as a matter of logic. Where different forms of an offence (that is, separate sub-offences) exist, these differ because they contain different material or mental elements. Accordingly, creating a standalone offence of “attempted obstruction” requires giving some meaning to “attempt” as an element of the offence. The Defence cannot see any meaning which could reasonably be given to this term in the context of the KCC other than that which is set out in Article

²¹⁹ *Ibid.*, para. 51.

²²⁰ [Case 07 Trial Judgment](#), para.158; see also paras 141,636,694.

28. Indeed, neither the Pre-Trial Judge nor the SPO have explained what alternative meaning they give to “attempt”. Thus, they appear to propose an offence which carries exactly the same meaning as an Article 28 attempt, but which is in fact a “commission” rather than “attempted” offence.
215. On the approach of the SPO and the Pre-Trial Judge, this offence would *in substance* be an attempt, since liability would only arise where the requirements of Article 28 were met. However, different legal consequences might follow from the fact that it is treated as a completed “commission”. For example, the stipulation in Article 28(3) that an attempt may attract a reduced punishment compared to the completed commission of an offence, would not apply.
216. The Defence submits that this is clearly contrary to the intention of the legal framework of the KCC. The policy reasons which led the KCC’s drafters to treat attempts and completed offences differently apply equally whether the word “attempt” is included in the content of an offence or not. If the substance of an attempt under Article 28 is the same as the “commission of an attempt” (as the Pre-Trial Judge and SPO frame it) under Article 401, there is no reason why these would lead to different legal results.
217. The notion of a specific offence which itself includes “attempt” as an element of the offence is also inherently problematic. As set out above in Section III.B, the central difference between the completed commission of an offence and its attempt can be seen as the extent to which the material elements of the offence match the mental elements. For an attempt, all elements of the offence are intended, but not all occur. For completed commission, all elements are intended, and all occur. If “attempt” becomes a material element of the offence, the correlative mental element is that *the suspect intended to “attempt” the offence, rather than to complete it*. This is a position of *less* culpability than an Article 28 attempt, which requires the full *intent* to complete all elements of the offence.

Indeed, it is this ‘guilty mind’ which is the rationale for criminalising and punishing attempts. Without it, it is unclear why Article 401 would intend to criminalise this scenario, let alone to apply a *higher* sentence than would apply for an Article 28 attempt, by treating it as a completed commission of an offence (and therefore as not subject to Article 28(3)).

218. Indeed, as demonstrated further below, treating an Article 401 attempt as a form of completed commission also creates absurd and impossible scenarios when combined with other modes of liabilities.
219. Secondly, Kosovo legal sources make clear that the approach taken by the Pre-Trial Judge and the SPO is incorrect. In Kosovo, when *attempted obstruction* of an official person has been tried, it has been done by reference to the provision in the code which sets out attempt as a mode of liability (currently Article 28, but previously Article 20 in the 2003 Provisional Code). This makes clear that the reference to “attempted obstruction” is an incorporation of the concept of attempt in Article 28, rather than a standalone offence.
220. For example, in *K.GJ.*, prosecutors charged an offence under (then) Article 409(1), alleging the completed commission of obstruction. At trial, the prosecutor sought to modify the charge, recognising that obstruction had only been attempted. The result was a charge – and eventually a conviction – “*under Article 409, paragraph 1 in conjunction with Article 28*”.²²¹
221. Similarly, in the earlier case of *Z.V.*, the Court of Appeals confirmed a conviction for attempted obstruction of an official person performing official duties pursuant to (then) Article 316 of the 2003 Provisional Code, and made clear that this was because “*the immediate action intentionally taken toward the commission of*

²²¹ See Annex 5, Basic Court of Peja, P.nr.127/19, 6 April 2020.

the offence pursuant to Article 20(1) [of the 2003 Provisional Code] has been established.”²²²

222. Accordingly, there is no such concept as “committing attempted obstruction”. A charge brought against **THAÇI** for attempted obstruction of an official person in performing official duties could only exist using the mode of liability of attempt in Article 28.

223. Although the Single Trial Judge is not permitted to give a new legal characterization to the matters pleaded in the Indictment,²²³ as regards attempt the Defence accepts that it has had notice of the *substance* of the case against it,²²⁴ and that therefore this mode of liability need not be dismissed. Nonetheless, the Indictment must be interpreted in a manner which gives it a current and coherent meaning in law. The only coherent interpretation of the SPO’s allegations is that **THAÇI** is charged with attempted obstruction of a public official (under Article 28 and Article 401(2) in combination).

2. Agreement

224. The Indictment’s conflation of completed commission and attempt has created more substantial difficulties for the other modes of liability charged.

225. Regarding Article 35 “agreement”, the Indictment charges **THAÇI** with having *“agreed to commit the crime of attempted obstruction of official persons.”²²⁵* The Defence agrees with the Kilaj Defence that this construction is “legally incoherent”.²²⁶

²²² Court of Appeals, [PAKR 542/14 Judgment](#), p.8.

²²³ See paragraph 241 below.

²²⁴ Though the listing, in the SPO PTB, of the alleged acts toward the commission of the offence required by Article 28(1).

²²⁵ [Indictment](#), para.40.

²²⁶ Kilaj PTB, paras 24(i),39. However, the Defence notes that for the reasons set out above, it does not agree with the Kilaj Defence that “commission of the attempt may be a viable charge” (see para.24(iii) and see also paras 21-22).

226. An attempt occurs when a person *intends* the complete commission of an offence but external factors prevent the offence from being completed. It is therefore not a crime if a person decides consciously to merely *attempt* rather than to complete an offence: the decision to not complete the offence would mean that it did not amount to an offence. As the Kilaj Defence explained, if the agreement was merely to *attempt* the offence and *not* to complete it, this would imply that the suspects had voluntarily desisted or withdrawn.²²⁷
227. Two additional, and even more fatal, difficulties with this construction are also evident.
228. First, as elaborated above, the Appeals Panel has made clear that an agreement must cover all the material elements of the offence.²²⁸ If the agreement in this case was to merely *attempt* the offence, such that ultimately no official person was obstructed in the performance of official duties, this would mean that a material element (effective obstruction of an official person) was not covered by the agreement.
229. Secondly, and in a similar vein, liability under Article 35 requires that the accused *intended* for the offence to be completed.²²⁹ If the parties only agreed to *attempt* the offence, without ultimately causing obstruction, this would indicate that they did not have the required mental element for the offence.
230. The SPO may counter these points by claiming that the complete offence in this instance is an attempt, rather than actual obstruction. However, it is difficult to see what policy objective would be served by criminalising conduct wherein people agreed to undertake conduct which fell short of a criminal offence.

²²⁷ Kilaj PTB, para.43.

²²⁸ [IA002/F00012/RED](#), para.38.

²²⁹ See above at III.B.3.

231. Accordingly, the charges under Article 35 in the Indictment are meaningless and must be dismissed.

3. Incitement

232. The charges of incitement are affected by related and also additional difficulties.

233. The charge of incitement under Article 32(1) is inapplicable in a situation where the obstruction of the official person in the performance of official duties was not completed. This paragraph cannot be used with an attempt. This charge is therefore invalid and must be dismissed.

234. In any event, the allegation that **THAÇI** “*incited [the other accused] to commit the crime of attempted obstruction*”,²³⁰ is also legally incoherent. As explained above at paragraph 129, incitement requires an intent on the part of the accused that the crime be fully completed. If **THAÇI** only sought an *attempt* and not completed obstruction, this would indicate that he did not have the necessary intent for liability via incitement.

235. Regarding the charge under Article 32(3), the Defence notes that paragraph 43 of the Indictment correctly defines it as incitement to *obstruct*, rather than incitement to attempt. However, for the reasons set out above in Section III.B.4.a), Article 32(3) is inapplicable to offences under Article 401(3) and (5), since five years is the *maximum* penalty for these offences if committed, not the *minimum*.

4. The impact of the charging errors

236. The Defence emphasizes that these charging errors are not merely a matter of form. They have had substantive impacts on the Defence’s ability to respond to the charges and therefore the fairness of the proceedings. The Defence has spent considerable time trying to understand the nature of the charge under Article 35

²³⁰ [Indictment](#), para.42.

and 32(1), and has been unable to come up with a meaningful interpretation of it which could be used as a basis for preparing **THAÇI**'s defence. This situation is a violation of the clear legal requirements set out above in Section IV.A that the prosecution's case must be clearly pleaded in the indictment so as to provide fair notice to the Defence.

237. This situation has been exacerbated by the fact that the SPO Pre-Trial Brief provided no explanation as to how the SPO understood these modes of liability to operate. In the Pre-Trial Brief's 146 pages, one sentence was devoted to each of these modes of liability. These did nothing more than assert the application of the mode of liability the accused:

- i. Paragraph 272 of the SPO Pre-Trial Brief merely asserts that **THAÇI** "*agreed [...] to commit the crime of attempted obstruction*". It provides no elaboration as to how this could operate, or what material facts constituted this mode of liability.²³¹ The SPO does not explain what it alleges **THAÇI**'s intent was, such as to establish this form of liability: merely asserting that he had "the required intent".²³²
- ii. Paragraph 273 of the SPO Pre-Trial Brief similarly restates in one sentence the SPO's claim that liability arises under Article 32 for having "*incited [other persons] to commit the crime of attempted obstruction*".²³³ The SPO does not elaborate on what this means or what material facts would constitute this offence. For example, the SPO does not explain what it alleges **THAÇI**'s intent was, such as to establish this form of liability: instead, it merely makes the meaningless assertion that he had "the required intent".²³⁴

²³¹ SPO PTB, para.272.

²³² SPO PTB, para.272.

²³³ SPO PTB, para.273.

²³⁴ SPO PTB, para.273.

238. The SPO's opening statement at trial again gave no explanation of these issues. Two speakers were said to be addressing the applicable law, yet neither explained how the modes of liability used in relation to Article 401(2) are understood by the SPO.²³⁵ This is particularly striking in light of the fact that two days earlier, on 25 February 2026, the Kilaj Defence filed its Pre-Trial Brief, which identified flaws in the Indictment's charging of modes of liability.²³⁶ The SPO was aware of these issues and yet chose to provide no notice to the Defence of what the modes of liabilities in the Indictment mean.
239. Indeed, it is astonishing that throughout trial, the SPO never explained what it meant by these modes of liability. In a case where the most serious offence is *not* alleged to have been completely committed, but rather where the Indictment relies heavily on inchoate modes of liability, it should be obvious that the meaning of those forms of liability are central questions. The absolute and consistent silence of the SPO is inexplicable, unless perhaps it signals that the SPO itself does not know how to make sense of the charges it has brought.
240. In any event, the result is that as at today – at the *conclusion* of trial –, the SPO has never explained how it understands these modes of liability to operate in this case. In contrast to the charge under Article 28, which was flawed but could nonetheless be understood in *substance*, the Defence still cannot make sense of the confusion in the Indictment regarding Articles 32(1) and 35. At this point, the lack of notice cannot be corrected and there is no longer any possibility of a fair trial on these aspects of the charges, even if it were possible to render them legally coherent.

²³⁵ T.300-T.304 (Opening Statements).

²³⁶ Kilaj PTB, paras 22-23.

5. *The errors in the Indictment cannot be corrected at this stage*

241. The legal framework of the KSC does not allow for a modification of the charged modes of liability at the end of trial. In *Case 04*, the Appeals Panel explicitly ruled that, unlike at the ICC, it is not possible for a KSC Trial Panel to recharacterize the charges.²³⁷ The SPO has also argued this position earlier in the same case.²³⁸
242. Accordingly, it is not open to the Single Trial Judge to correct these errors in the Indictment. Even if this procedural avenue existed at the KSC, which it does not, to do so at this point in the proceedings would cause substantial prejudice to the Defence, which has not been in a position to answer to correctly formulated charges at trial.
243. In consequence, the aspects of the charges which are reliant on Articles 32 and 35 must be dismissed.

V. STANDARD AND BURDEN OF PROOF

244. Article 21(3) of the KSC Law presumes the innocence of the accused “*until proved guilty beyond reasonable doubt according to the provisions of this Law*”. The principle is also found in Article 31(5) of the Kosovo Constitution and Article 6(2) of the ECHR. **THAÇI** cannot be convicted unless the SPO establishes the charged offences *beyond reasonable doubt*.
245. This standard requires that “*the evidence establishes a particular point and it is beyond dispute that any reasonable alternative is possible*”.²³⁹ The Single Trial Judge must be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.²⁴⁰

²³⁷ [Case 04 Appeal Judgment](#), para.245.

²³⁸ [KSC-BC-2020-04/F00070/RED](#), para.16.

²³⁹ [Ngirabatware Appeal Judgment](#), para.20; [Mrkšić and Šljivančanin Appeal Judgment](#), para.220.

²⁴⁰ [Mladić Appeal Judgment](#), para.272; [Milošević Appeal Judgment](#), para.20; [Martić Appeal Judgment](#), para.61.

246. This standard is to be applied to the facts alleged to constitute the elements of the crimes and the modes of liability as charged in the Indictment. It is the SPO's burden to prove these facts, and any others on which a conviction depends.²⁴¹
247. As referenced already above,²⁴² this also entails the principle of *in dubio pro reo*: “the court, in its inquiry into the facts, must find for the accused in case of doubt”.²⁴³ It is recognised in Article 3 of the Criminal Procedure Code of Kosovo²⁴⁴ and numerous ECtHR judgments,²⁴⁵ and has been applied by the KSC.²⁴⁶
248. Lastly, is well-established that in order for trial judges to draw an inference from circumstantial/indirect evidence, that inference must be the only reasonable inference.²⁴⁷ At the KSC, this principle is reflected in Rule 140(3): “*In respect of circumstantial evidence, the standard of proof beyond reasonable doubt is only satisfied if the inference from that evidence is the only reasonable one that could be drawn from the evidence presented. If the evidence allows for other reasonable conclusion(s) to be drawn, the standard of proof beyond reasonable doubt is not satisfied.*” This principle was extensively applied by the Appeals Panel in *Case 04*.²⁴⁸

²⁴¹ Harris et al., p.461.

²⁴² Para.150 above.

²⁴³ Harris et al., p.461 (emphasis added).

²⁴⁴ CPC, Article 3. Note that while not expressly incorporated into the Law or Rules, the CPC is nevertheless applicable: [Case 07 Trial Judgment](#), para.799.

²⁴⁵ See, *inter alia*, [Kerimoğlu v. Türkiye](#), para.67; [Kartvelishvili v. Georgia](#), para.62; [Barberà, Messegue and Jabardo v. Spain](#), para.77; [Tsalkitzis v. Greece \(No.2\)](#), para.60.

²⁴⁶ [Case 04 Appeal Judgment](#), para.356; [Case 05 Appeal Judgment](#), para.345.

²⁴⁷ [Čelebići Appeal Judgment](#), para.458; [Krstić Appeal Judgment](#), paras 41,155; [Renzaho Appeal Judgment](#), paras 318-319; [Karadžić Appeal Judgment](#), para.599, and references cited therein.

²⁴⁸ [Case 04 Appeal Judgment](#), especially paras 789,807,826; but see also paras 662,687,689,692,699,703, 706,709,713,716,718,733,815,826,837.

VI. MATTERS RELEVANT TO ALL CHARGED VISITS

A. *THE SPO TRANSCRIPTS ARE UNRELIABLE*

249. The foundation of the SPO's case is its claims about what was discussed during five non-privileged visits to **THAÇI** in the DC. The only evidence as to those discussions are (i) the covert audio recordings created in the DC;²⁴⁹ and (ii) Albanian transcripts *created by the SPO* which purport to reflect those audio recordings (and English translations thereof) (collectively, the "SPO Transcripts").
250. It is noteworthy that the key documents in this case filed by the SPO – for example: the Indictment and the SPO PTB – make no reference at all to the audio recordings themselves. Not a single reference is made to any timestamp within those audio recordings.
251. Instead, the SPO relies exclusively on the SPO Transcripts. It effectively treats the SPO Transcripts as though they themselves are the evidence of what was said in the DC visits, rather than – as they in fact are – a record of what several unidentified SPO staff members say that they heard when attempting over many months to decipher the audio.
252. And yet, for the reasons elaborated below, the SPO Transcripts can absolutely not be assumed to reliably reflect the contents of the DC audio. It is no exaggeration to say that in this case, the SPO has simply created its own evidence, and has done so in the absence of any known procedure, let alone a procedure recognised as good practice for forensic transcription. As elaborated below, the SPO Transcripts are fundamentally unreliable, both in respect of the words shown in them and in respect of their claims about voice attribution.

²⁴⁹ P00105; P00106; P00108; P00109; P00110.

a) Relevant legal principles

253. This is the first case in an international(ised) criminal tribunal where a question has been litigated about the treatment of forensic transcription.²⁵⁰ However, this does not justify a presumption whereby any forensic practices not specifically prohibited by previous caselaw are permitted. Neither should it leave the Single Trial Judge in any difficulties regarding how to assess the evidence. The Defence submits that the general principles applicable to any evidence are sufficient to resolve the question.

254. The SPO bears the burden of proof. This applies to every part of the SPO's case, including the reliability of the evidence it relies on.²⁵¹ It is for the SPO to demonstrate to the Single Trial Judges that the transcripts are reliable; not for the Defence to disprove it.²⁵²

255. The matters of linguistic science on which **Prof. FRASER** testified constitute the evidence which will assist the Single Trial Judge to determine whether or not the SPO has discharged that burden.

b) The SPO Transcripts are unreliable regarding the words contained in them

(1) The evidence regarding the applicable scientific principles

256. The Defence's case regarding the SPO Transcripts relies on the expert evidence of Professor **Helen FRASER**. **Prof. FRASER** is a leading expert in the field of linguistics and specifically phonetics relating to forensic transcription. She has worked for more than 25 years in this field.²⁵³ She has published extensively on

²⁵⁰ Although *Bemba et al.* involved forensic transcription, the only issue litigated regarding the audio evidence in that case concerned a different question related to sequencing in the audio recordings themselves. No issue was ever litigated or determined regarding appropriate procedures for forensic transcription.

²⁵¹ [Musema Appeal Judgment](#), para.47.

²⁵² See for example: [Orić Decision on Exclusion](#), para.22; [Brdanin Decision on Intercept Evidence](#), para.68.

²⁵³ T.766, 1.3 (Prof. FRASER); 1D00136, pp.3,23-24.

questions relating to transcription, audio enhancement, and voice attribution in forensic contexts.²⁵⁴

257. The SPO did not challenge **Prof. FRASER's** expertise. They brought no evidence of their own which contradicted her or called into doubt the reliability of her evidence.

258. **Prof. FRASER's** evidence sets out a number of scientific propositions which explain how forensic audio evidence should be understood and handled, particularly when used in criminal proceedings. The most important of these are the following:

- i. Forensic transcription must be differentiated from bureaucratic transcription.²⁵⁵ "Bureaucratic transcription" refers to the transcription of audio when the contents of that audio are *uncontested*, and the purpose of the transcription is therefore simply to create a written record.²⁵⁶ It usually involves good quality audio, which is clear (or at worst partially "unclear", in the sense of the terms explained below). Indeed, because bureaucratic transcripts usually involves recording words which are clear and uncontested, the focus in this process is not on the first step of the transcription process (speech perception) but rather on the accurate recording of what is perceived.²⁵⁷ "Forensic transcription", in contrast, is a process intended to assist in *determining the contents of contested audio*,²⁵⁸ and usually relates to audio which has been covertly recorded and as a result is of much lower quality (such that it is very often "indistinct").²⁵⁹ In forensic transcription, the primary challenge is not the accurate recording of what has

²⁵⁴ 1D00136, pp.23-24, confirmed at T.766, l.11-14 (Prof. FRASER).

²⁵⁵ 1D00136, p.1.

²⁵⁶ 1D00136, p.1; T.785-786 (Prof. FRASER).

²⁵⁷ 1D00136, p.9.

²⁵⁸ T.786, l.3-10 (Prof. FRASER).

²⁵⁹ 1D00136, p.1.

been heard, but the initial step of correctly perceiving the speech itself.²⁶⁰ The differences between these types of transcription mean that they must be treated differently: for example, processes which might be apt for creating, or for evaluating or verifying bureaucratic transcripts would not be useful for forensic transcripts.²⁶¹

- ii. Broader, well-established principles for the handling of forensic evidence in criminal proceedings apply equally to the handling of forensic audio material. One of the most important of these is that forensic analysis should not be done by investigators or in close collaboration with them, because this leads to biased forensic evidence.²⁶² As **Prof. FRASER** explains, such close collaboration between investigators and forensic evidence “*encourage[s] circular reasoning – in which a prosecution perspective influences the evidence, and then the evidence supports the prosecution case*”.²⁶³ One of the most important, internationally recognised solutions to this problem is to maintain a “*strict separation*” between investigators and forensic analysts.²⁶⁴
- iii. Another important principle of general application is to recognise the limitations of “common knowledge”. **Prof. FRASER** noted that scientists have demonstrated that a number of beliefs widely believed as part of “common knowledge” in the context of human cognition have been shown by scientists to be incorrect.²⁶⁵ One example well-known in the context of criminal proceedings was the recognition of how visual identification operates, a development which eventually led to changes in the way that investigators gather identification evidence, and how it is evaluated in court

²⁶⁰ 1D00136, p.9.

²⁶¹ 1D00136, p.1.

²⁶² 1D00136, pp.5-6.

²⁶³ 1D00136, pp.5-6.

²⁶⁴ 1D00136, p.6.

²⁶⁵ 1D00136, p.6.

proceedings.²⁶⁶ The lesson from these experiences is to be wary of assumptions based on “common knowledge”, and to actively avoid such assumptions where they have been demonstrated through scientific experimentation to be wrong.²⁶⁷

- iv. One specific and highly relevant assumption from common knowledge, which science has demonstrated to be incorrect, is the belief that our understanding of speech is purely based on the sound signal we are hearing. In fact, speech perception is the combination of two types of information: in expert terminology these are described as “bottom-up” information, which consists of information from the sounds themselves; and “top-down” information, which is derived from the listener’s own understanding of the context.²⁶⁸ In other words, the words that we hear in speech are dependent to some extent on our pre-existing expectations about that speech. The degrees to which speech perception is influenced respectively by top-down and bottom-up information depends on the quality of the audio.²⁶⁹ Where audio is very poor (“indistinct”) this means that the audio itself contains less bottom-up information, with the result that a listener will need to apply more top-down information to make sense of it. This means that for indistinct audio, what a listener eventually perceives from the sound will be highly dependent on that listener’s own expectations, based on contextual information (whether that contextual information is correct or incorrect).²⁷⁰
- v. **Prof. FRASER** described the categorisation of audio quality which she uses in her work as follows: **Clear** audio is audio that is “*easy for any competent*

²⁶⁶ 1D00136, p.6; T.771-772, l.19 (Prof. FRASER).

²⁶⁷ 1D00136, p.6.

²⁶⁸ 1D00136, p.7; T.773-776 (Prof. FRASER).

²⁶⁹ 1D00136, p.8; T.774-776 (Prof. FRASER).

²⁷⁰ T.775, l.13-23 (Prof. FRASER).

speaker of the language to understand”.²⁷¹ **Unclear** audio “requires careful attentive listening, but can be understood by professional transcribers on the basis of internal context alone”.²⁷² Or put differently “if you just listen to it, it will be difficult to understand what is said. But if you’re a skilled listener, if you give the same audio to half a dozen skilled listeners and ask them to write down what they hear, they might take some time, they might have to listen numerous times, but eventually they should all get roughly the same content.”²⁷³ **Indistinct** audio is audio in which the quality is so poor that “the content is not retrievable only from the bottom-up information from the speech signal itself. It is affected very much by the top-down information available to the listener. So in that situation, if you gave the same recording to half a dozen skilled listeners, they would hear differently depending on how they were briefed to understand that audio.”²⁷⁴ In other words, indistinct audio “is open to different interpretations to such an extent that, even for skilled listeners, priming with different external expectations is liable to result in different hearing.”²⁷⁵

- vi. **Prof. FRASER** uses the term “priming” to refer to the process by which top down information is used in speech perception.²⁷⁶ Priming can occur through the use of contextual information of a general kind (“contextual priming”) or it can occur where specific words are suggested to the listener, as where subtitles or a transcript are used while listening to audio (“textual priming”).²⁷⁷ Textual priming has an even stronger effect on the perception

²⁷¹ 1D00136, p.8. See T.774, 1.19-23 (Prof. FRASER): “clear audio [...] is audio where the speakers are speaking slowly and clearly. The audio is recorded to a high level, in high quality, and essentially anybody who speaks the language can listen to that audio and easily hear the content of the audio.” See also T.919 (Prof. FRASER).

²⁷² 1D00136, p.8. See also T.919 (Prof. FRASER).

²⁷³ T.775, 1.7-12 (Prof. FRASER).

²⁷⁴ T.775, 1.17-23 (Prof. FRASER).

²⁷⁵ 1D00136, p.8. See also T.919-920 (Prof. FRASER).

²⁷⁶ T.777, 1.15-22 (Prof. FRASER).

²⁷⁷ 1D00136, pp.8-9; T.777-778 (Prof. FRASER).

of indistinct audio than contextual priming,²⁷⁸ as demonstrated by the video explained by **Prof. FRASER** during her evidence.²⁷⁹

vii. **Prof. FRASER** explained that priming is not always problematic. In fact, it is a necessary tool where audio is indistinct. The difficulty with priming arises where the top-down information used for priming is not reliable. Because this top-down information has a considerable impact on speech perception, if the top-down information is wrong, the listener will perceive the speech wrongly.²⁸⁰

viii. Another important concept in this context is that of cognitive bias. As **Prof. FRASER** explained it, bias is "*perhaps more specific.*"²⁸¹ Not every instance of priming involves bias,²⁸² but it is also well recognised in the literature on this subject that priming through "top down" information is a mechanism by which cognitive bias can operate (not only in speech perception but in all areas of human cognition).²⁸³ In a forensic context, cognitive bias refers to "the class of effects through which an individual's preexisting beliefs, expectations, motives, and situational context influence the collection, perception, and interpretation of evidence during the course of a criminal case."²⁸⁴ Experts emphasize that cognitive bias is not a question of personal character, integrity or competence, and that it cannot be avoided by mere willpower, but only through the use of appropriate procedures.²⁸⁵

²⁷⁸ 1D00136, p.8; T.779, 1.2-12 (Prof. FRASER).

²⁷⁹ 1D00139.

²⁸⁰ 1D00136, p.8.

²⁸¹ T.780, 1.20 (Prof. FRASER).

²⁸² T.781, 1.1-4 (Prof. FRASER).

²⁸³ For a useful overview of cognitive bias in legal proceedings from the leading expert on this subject, see [Dror](#), p.3.

²⁸⁴ *Ibid.*, citing [Kassin et al.](#), p.45.

²⁸⁵ [Dror](#), pp.3-4.

ix. Importantly, these processes operate subconsciously and most people are unaware of them, instead believing the “common knowledge” assumption that what they perceive is based entirely on the audio signal. This is important because it means that even where a person is heavily influenced by their own contextual expectations (“top-down” material), they will likely remain unaware of this, and genuinely believe that their perception of the speech reflects nothing but the sounds in the recording (“bottom-up information”). Because of this, persons listening to indistinct audio are frequently *confident* even when they are wrong about what they are hearing.²⁸⁶

259. **Prof. FRASER** testified that these fundamental principles of phonetics are “*extremely well established and well accepted*” and have been since at least the 1950s.²⁸⁷ Indeed, the Defence has been unable to identify any source in the literature which posits a different position.

260. **Prof. FRASER’s** evidence, and the principles set out above, make clear that an important factor in evaluating transcripts of forensic audio is the question of how clear the audio material is which the transcripts purport to reflect. Audio material which is *indistinct* cannot be understood without significant top down information, making it susceptible to being misheard, and requiring that it be transcribed using appropriate forensic processes.

261. It is therefore essential to determine whether the DC recordings, or at least some of the material parts of them, are indistinct.

²⁸⁶ 1D00136, pp.8,10.

²⁸⁷ T.779-781 (Prof. FRASER).

(2) The evidence regarding the audio quality of the DC recordings

262. **Prof. FRASER's** evidence was that the audio material she was given had quality ranging from unclear to indistinct.²⁸⁸ **Prof. FRASER** readily acknowledged that this assessment would have been easier for her to make if the audio was in a language that she spoke (which Albanian is not).²⁸⁹ Nonetheless, she based her assessment on the following factors:

- i. An impression formed from listening to the audio, and noting some features of it which were apparent even without knowledge of the language used (in other words, by making an observation of the *audio* quality as opposed to the *speech* quality²⁹⁰). She noted that parts of the audio featured overlapping utterances and background noise, and that the conversation appears to be “informal”. She also noted that the audio included parts with “*low-amplitude or whispered speech*”.²⁹¹
- ii. A test run using an AI transcription tool. **Prof. FRASER** explained that the objective of this test was not to suggest that AI should be used to transcribe forensic audio.²⁹² Rather, this test was intended to provide an illustration²⁹³ how much “bottom up” information was contained in the recordings, by attempting to transcribe them without contextual information.²⁹⁴ This gave an indication of the quality of the audio.²⁹⁵ In contrast to audio of an Albanian news broadcast, which the AI was able to fully transcribe, the sample of DC recordings were transcribed by the AI as “*mostly nonsense*”, indicating that

²⁸⁸ 1D00136, p.17.

²⁸⁹ 1D00136, p.17; T.790-791 (Prof. FRASER); P00233, paras 27-28, endorsed and elaborated on at T.924 (Prof. FRASER).

²⁹⁰ T.959, l.13-15 (Prof. FRASER).

²⁹¹ 1D00136, p.17.

²⁹² 1D00136, p.17.

²⁹³ T.959, l.24-25, T.962-963 (Prof. FRASER).

²⁹⁴ 1D00136, pp.17-18; T.793, l.20-21 (Prof. FRASER).

²⁹⁵ T.794, l.14-16 (Prof. FRASER).

the audio is indistinct and cannot be transcribed without reference to contextual (“top down”) information.²⁹⁶

iii. Her expertise and experience in examining forensic audio.²⁹⁷

iv. **Prof. FRASER** also testified that, in her experience, covert recordings often have a “*very low*” audio quality.²⁹⁸

263. **Prof. FRASER** testified that she was “*very confident*” in her conclusion that at least parts of the DC recordings are indistinct.²⁹⁹

264. Several other pieces evidence support the conclusion that the DC audio contains a mix of unclear and indistinct audio. In particular, the Defence requested independent transcription of 12 segments of the DC audio, to be carried out by three different transcription services outside the SPO, without reference to the SPO Transcripts or other contextual information. Annex 8 provides an overview of the audio and transcription material related to these requests.

i. First, the Defence requested an independent Kosovar Albanian translator and interpreter, **Hysni REÇICA** (“**REÇICA**”), to transcribe **two segments** of the 3 September 2023 Visit audio (Example 1). He responded: “*I am very sorry, but the sound quality is much worse than I first thought, so I could not do anything useful, even though I tried a few times using different audio players.*”³⁰⁰

ii. Secondly, the Defence requested the Language Service Unit (“LSU”) to transcribe the unenhanced versions of the same **two segments** from the 3

²⁹⁶ 1D00136, p.18.

²⁹⁷ T.922, l.22-24 (Prof. FRASER).

²⁹⁸ T.1015, l.14 (Prof. FRASER).

²⁹⁹ T.1015, l.10 (Prof. FRASER).

³⁰⁰ 1D00037, p.DHT1201170. See also Annex 8, Example 1.

September Visit audio (Example 2). CMU responded on behalf of LSU that “[REDACTED].”³⁰¹

- iii. Thirdly, the Defence sent a similar request to **REÇICA** regarding **three segments** of audio, respectively taken from the 2 July, 9 September and 6 October 2023 DC Visits (Examples 3 to 5). **REÇICA** responded with partial transcripts for the segments relating to the 2 July Visit³⁰² and the 9 September Visit³⁰³ which vary significantly from the equivalent SPO Transcripts of the same audio.³⁰⁴ Regarding the 6 October Visit, he was not able to provide a transcript, and explained that it was “*almost completely inaudible*.”³⁰⁵
- iv. Fourthly, the Defence requested the transcription of **five segments** of audio which were used by the SPO in an audiovisual presentation during its opening statements. These five segments were excerpts from the 2 July, 6 October, and 7 October Visits (Examples 6 to 10). The Defence sent these five segments to **REÇICA** and also to a separate independent translation/interpretation firm, “Eurideas Language Experts” (“**EURIDEAS**”). The resulting transcription was variable: As summarised in Annex 8, the resulting transcripts produced by the two independent transcribers were in some parts similar to the SPO’s transcripts and each other, and in other parts were significantly different. Where differences were apparent, they related to the level of detail, the words transcribed and their apparent meaning, the number of turns and even the number of speakers.

³⁰¹ 1D00121, p.DHT1201173. See also Annex 8, Example 2.

³⁰² D100038.1, p.DHT1201183.

³⁰³ D100038.1, pp.DHT1201183- DHT1201184.

³⁰⁴ See Annex 8, Examples 3 and 4.

³⁰⁵ D100038, p.DHT1201180. See also Annex 8, Example 5.

265. These transcription exercises support the conclusions that most of the material in question was *indistinct*, while parts were *unclear*.
266. For Examples 1, 2 and 5, the exercise demonstrated that professional translators/interpreters accustomed to working in Kosovar Albanian were not able to produce *any* transcript in the absence of contextual information. These portions of the audio are examples that are indistinct, as confirmed by **Prof. FRASER** during her testimony. *"We can see that producing a transcript of this material benefits greatly from top-down information, which I believe Hysni [REÇICA] did not have. So this is a common scenario. [...] When you listen to something with no top-down information, it's very difficult to understand. When you do have that top-down information, it becomes far more intelligible. So I think in general, that that's what – the sort of thing that we're seeing here."*³⁰⁶ In respect of another example, **Prof. FRASER** explained that: *"without the contextual information, this audio is very difficult to understand. That would be the minimal way to state it. And with the contextual information, it becomes easier to understand."*³⁰⁷
267. For Examples 3, 4, 6, 7, 9 and 10 the exercise demonstrated that professional translators/interpreters accustomed to working in Kosovar Albanian could produce partial transcripts, but with significant gaps as well as portions reflecting low confidence. The words that were transcribed in some parts varied significantly from the SPO Transcripts both as regards the specific words identified and their apparent meaning. The transcripts made from the same audio also varied in their overall length, the number of "turns"³⁰⁸ taken between speakers, and their contents. For Examples 6, 7 9 and 10, the independently transcribed material was also different from *each other* in some of these ways, at

³⁰⁶ T.798, 1.4-12 (Prof. FRASER).

³⁰⁷ T.799, 1.23-25, T.800, 1.1-2 (Prof. FRASER).

³⁰⁸ In a conversation, a "turn" is one continuous stretch of speech which is attributed to one speaker. Each "turn" is bounded by a change of speaker.

least in parts. These portions of the audio are examples that are indistinct, as confirmed by **Prof. FRASER** during her testimony: *“Again, this seems much less clear. There seems to be a lot of variation, and especially the one[s] with no contextual knowledge or contextual expectations was able to hear a lot less.”*³⁰⁹

268. The only example which appears to be different is Example 8. In this example, two independent transcribers were able to produce transcripts with similar contents, with the contents also being similar to the relevant parts of the SPO Transcripts. As explained by **Prof. FRASER**, this indicates that this portion of the audio is clearer, such that with a careful review, various translators will create a similar transcript on listening to it, such that we could categorise the audio as “unclear”.³¹⁰

269. It is true that confirming these conclusions during her testimony, **Prof. FRASER** described these tests run by the Defence as “not a very well-controlled experiment”³¹¹ because she had not seen any material demonstrating the aptitude of the transcribers (**REÇICA**, **EURIDEAS**, and **LSU**).³¹² The Defence understands **Prof. FRASER** to have been explaining that where a single piece of audio is transcribed differently by different transcribers, this may be because the transcribers have different aptitude levels, and/or because the audio is indistinct and the transcribers have applied different top-down information. To be fully certain that the audio is indistinct, one should eliminate the possibility that the differences resulted from different transcriber aptitude levels. The Defence notes it has obtained and tendered CVs for **REÇICA** and the transcribers at **EURIDEAS**.³¹³ However, the Defence was not in a position to ask **Prof. FRASER** to compare their expertise with those of the **LSU** and **SPO** transcribers. Despite

³⁰⁹ T.806, 1.7-9 (Prof. FRASER).

³¹⁰ T.804-T.805 (Prof. FRASER).

³¹¹ T.797, 1.21-22 (Prof. FRASER).

³¹² T.797-T.799, T.799-T.800 (Prof. FRASER).

³¹³ 1D00045 (REÇICA); 1D00127; 1D00128; 1D00129 (EURIDEAS transcribers).

requests beginning in December 2025,³¹⁴ the Defence received the CVs of the SPO's transcribers³¹⁵ only *during* the examination-in-chief of **Prof. FRASER**.³¹⁶ The CVs of LSU transcribers have not been made known to the Defence. The Defence returns to the question of the relative expertise of the various transcribers used in this case below at paragraphs 293 and 335.

270. In any event, despite the qualification given concerning the unknowns regarding transcriber expertise, **Prof. FRASER** nonetheless considered that these tests demonstrated that the transcribers appeared to be dealing with *indistinct* audio, which they were unable to transcribe without top-down information.³¹⁷ She was able to contrast Example 8, in which independent transcribers produced similar transcripts, with other examples that was not the case. When asked overall what relevance these tests had, **Prof. FRASER** explained that *"I think they – they add weight to the observation that the audio is of poor quality and is indistinct and requires external evidence to – external contextual information to assist. And of course the importance of that is that we have to be sure that the external contextual information is reliable and that the analysts are independent [...]"*.³¹⁸

271. These tests carried out by the Defence therefore serve to corroborate **Prof. FRASER's** opinion that the audio quality of the DC recording ranges from "indistinct" to "unclear".

272. The Defence recognises that the steps it took to assess the audio quality by requesting independent transcriptions cover only a small portion of the DC audio recordings. Likewise, the Defence acknowledges that **Prof. FRASER** was provided with only a small sample of audio material for her review.³¹⁹ It was well

³¹⁴ KSC-BC-2023-12/F00688/A06, pp.3-9.

³¹⁵ 1D00141; 1D00142; 1D00143; 1D00145; 1D00146; 1D00147; 1D00148.

³¹⁶ SPO Disclosure package n°129 notified on 11 May 2026, at 11:56.

³¹⁷ T.797-T.800 (Prof. FRASER).

³¹⁸ T.1015, 1.21-T.1016, 1.1 (Prof. FRASER).

³¹⁹ This was also repeatedly acknowledged by Prof. FRASER herself: T.919; 1D00136, p.17.

beyond the limited time and means of the Defence to fund analysis of the entire body of audio disclosed by the SPO, which runs to 35 hours.

273. However, the Defence submits that the sample of audio provided to **Prof. FRASER** is representative of the overall body of covert DC recordings. **Prof. FRASER** testified that if asked to determine the representativeness of an audio sample and the transcripts made from it for the purpose of examining a wider body of audio and transcript evidence, she would be looking at whether the *“level of intelligibility of the audio was approximately similar throughout”*³²⁰ and also the *“process that was followed in creating those transcripts”*.³²¹ The SPO has not indicated what processes it used in creating the Transcripts (see below at paragraph 285 *et seq.*), so there is no suggestion that a different process was used for the material reviewed by **Prof. FRASER** as compared to other parts of the SPO Transcripts. There is likewise no evidence which suggests that the audio quality of the portions sent to **Prof. FRASER** are materially different from the rest of the DC audio.

274. Moreover, additional factors strongly suggest that most of the audio material relied on by the SPO can be considered indistinct.

- i. First, regarding the 3 September Visit, the SPO itself sought the “enhancement” of parts of this material. For the reasons explained by **Prof. FRASER** in her report and testimony,³²² the Defence disputes that this “enhancement” process was capable of producing an unmodified yet magically clearer version of the audio, and the SPO has provided no relevant evidence to suggest that it did. Nonetheless, the fact that the SPO *tried* to

³²⁰ T.790, 1.6-10 (Prof. FRASER).

³²¹ T.790, 1.15-16 (Prof. FRASER).

³²² 1D00136, p.14; T.795-T.796, T.800 (Prof. FRASER).

improve the audio quality of these files indicates that the SPO itself considered the quality to be very low.

- ii. Secondly, the SPO Transcripts all include a very large number of notations that parts of the audio were “Indiscernible”. As the Defence noted in one earlier filing,³²³ the tendered version of the SPO Transcript (English version) for the 6 October Visit includes the word “Indiscernible” 1224 times.³²⁴ The picture is similar for the other SPO Transcripts: the word “Indiscernible” appears 700 times in the English version of the SPO Transcript of the 2 July Visit;³²⁵ 919 times in the English version of the SPO Transcript of the 3 September Visit (unenhanced audio);³²⁶ 976 times in the English version of the SPO Transcript of the 9 September Visit;³²⁷ and 957 times in the English version of SPO Transcript of the 7 October Visit.³²⁸
- iii. Thirdly, the SPO produced its DC Transcripts over a lengthy period of time, making extensive, successive revisions to those documents. From the information eventually disclosed by the SPO on 11 May 2026,³²⁹ it became clear that all of the SPO Transcripts³³⁰ were created over a period of more than a year. The five charged visit Transcripts took more than 3893 days (10.6 years) to produce if the time taken for each is combined, or an average of 778 days (25.5 months)). During period when this work was being done, the SPO appears to have continuously revised its Transcripts. All have been disclosed

³²³ F00688, para.56.

³²⁴ P00109_ET.

³²⁵ P00105_ET.

³²⁶ P00106_ET.

³²⁷ P00108_ET.

³²⁸ P00110_ET.

³²⁹ 1D00140.

³³⁰ Two of the transcripts listed in 1D00140 were created over a period shorter than one year, but they are not among the SPO Transcripts (i.e. the transcripts tendered by the SPO and admitted in the present case).

to the Defence in multiple versions, over a lengthy period of time, with one having six different versions.³³¹ The changes between these different versions are not minor or immaterial, as evidenced by one example discussed with **Prof. FRASER** during her evidence.³³² The fact that the SPO was continually changing its own view of what was said in the audio recordings, repeatedly and over such a long period of time, also contributes strongly to the conclusion that much of the audio in these recordings is *indistinct*.

275. In any event, it is the SPO which bears the burden of proof in this case, including the burden of showing that the evidence underpinning its case is reliable. If the SPO wants to argue that the audio material recorded in the DC is so clear that it was appropriate for the SPO to dispense with good practices for forensic transcription, and indeed to dispense in general with broad and universally accepted requirements for forensic analysis to be done at a distance from investigators, this is then a matter for the SPO to prove. That cannot be done simply by engaging in baseless and unprofessional attacks on a highly respected expert.³³³ Rather, if the SPO seeks to argue that the audio quality of the DC recordings is not indistinct, it must itself bring evidence to demonstrate this. It could have done so by calling its own expert and/or having some audio samples transcribed by an independent expert.³³⁴ It did not do so.

(3) The evidence regarding how forensic transcription of indistinct audio *should* be done

276. Once it is established that the DC audio recordings are largely indistinct (although the Defence accepts that some parts are merely unclear), this has

³³¹ [REDACTED].

³³² T.831 (Prof. FRASER), discussing the second and sixth disclosed versions of the 9 September Visit (1D00113_ET and P00108_ET).

³³³ F00913, paras 1-4; T.960, 1.1-8 (Prof. FRASER).

³³⁴ T.1016, 1.6-7 (Prof. FRASER).

implications for the process which should be followed to create a reliable transcript from these recordings.

277. **Prof. FRASER** explained that there is not yet *“a single, definitely established ‘best practice’ for forensic transcription”*,³³⁵ although experts including those at her Research Hub are working to develop that kind of best practice.³³⁶ The Defence highlights the following practical guidelines, which **Prof. FRASER** highlighted in her evidence as matters which she *would* expect to see within a responsible forensic transcription process; and what she would expect to see being avoided:
278. *Indicators of transcriber competence:* First, **Prof. FRASER** testified that the proficiency of the transcribers is a factor in the quality of forensic transcription. Deciphering indistinct audio is a distinct skill from translation or interpretation, and transcribers should be tested specifically for their aptitude with indistinct audio.³³⁷ As **Prof. FRASER** explained, *“many people are trained in transcription and translation in that bureaucratic sense that we’re speaking about. They have very high-level skills that we can all respect. That is a different set of skills from the skill of deciphering indistinct audio.”*³³⁸ That is because in forensic transcription (unlike bureaucratic transcription), the focus is not on recording what is heard, but on the *“hard part”* which is *“determining what words were spoken”*.³³⁹ **Prof. FRASER** acknowledged that while there is not necessarily a formal certification available for forensic transcription, *“most of the units that I’m aware of who do this kind of work would have some sort of induction and training process for their transcribers.”*³⁴⁰ She also explained the procedure which she uses in her own Research Hub to test the aptitude of transcribers when working with forensic audio.³⁴¹

³³⁵ 1D00136, p.16.

³³⁶ T.786-T.787 (Prof. FRASER).

³³⁷ 1D00136, p.18.

³³⁸ T.792, 1.3-7 (Prof. FRASER).

³³⁹ T.792, 1.8-14 (Prof. FRASER).

³⁴⁰ T.827-826 (Prof. FRASER).

³⁴¹ T.825, 1.5 to 17 (Prof. FRASER).

279. **A documented process:** Secondly, **Prof. FRASER** testified that she would expect that the process used for transcription would be documented.³⁴² Proper documentation of the process which is used ensures the accountability of the process.³⁴³ While a statement from each individual transcriber would not necessarily be usual, a report from the person overseeing the transcription process – for example a case manager of that process – is something that would be expected.³⁴⁴ Indeed, as **Prof. FRASER** indicated, it is difficult to see any reason why such a report would not be provided.³⁴⁵
280. **Common good practices within the process:** Thirdly, **Prof. FRASER** explained that there exists some variation in the kinds of processes which are used in forensic transcription. Nonetheless, she identified the kinds of processes which are often used. In particular “as a minimum” she would expect that in the first step transcribers would have *“first been asked to transcribe with no contextual information and no access to each other’s transcripts, just independently transcribing before the comparison took place. And that would give us some indication of what could be heard in that audio by skilled transcribers just from the audio itself.”*³⁴⁶ Thereafter, different options exist: *“Some people like to give some relevant, reliable general information about the nature of the audio. Some people like to ask the transcribers to compare each other’s transcripts and work together in that way. But some sort of process should be followed.”*³⁴⁷ **Prof. FRASER** further described some good practices for the presentation of forensic transcripts. These include the use of regular

³⁴² T.843, l.14-18, T807, l.10-11 (Prof. FRASER). See also: T.806, l.17-20 (Prof. FRASER): *“we would like to know that the transcribers had some demonstrable aptitude or demonstrable skill in deciphering indistinct audio, and we would like to know that they had also followed a process.”*

³⁴³ T.850-851 (Prof. FRASER).

³⁴⁴ T.850-851 (Prof. FRASER).

³⁴⁵ T.851, l.6 (Prof. FRASER).

³⁴⁶ T.807, l.1-5; see also T.843, l.21-22 (Prof. FRASER).

³⁴⁷ T.807, l.6-11; see also T.843, l.21-23 (Prof. FRASER).

timestamps, indications in some form of the transcribers' confidence levels, and minimal punctuation.³⁴⁸

281. **Recognised bad practices to avoid:** Fourthly, although there remains scope for different kinds of good practices, **Prof. FRASER** made very clear that there are *"well understood bad practices that responsible practitioners are at pains to avoid."*³⁴⁹ The most important point she emphasized is the need to minimise any risk of priming with misleading information, and the risk of bias. This is done by *"maintaining maximum distance between transcribers and clients",*³⁵⁰ or, put differently, to *"avoid [...] the transcribers working closely with the client, whether that's the prosecution or the defence".*³⁵¹

*"[T]he transcribers should be well protected from any detailed case-related information that tends to go to the outcome of the trial. That is exactly the same practice and procedure that is followed by other forensic science --- responsible forensic science where there is -- as we spoke earlier, we generally expect some separation between the parties in the trial and the work of the transcription."*³⁵²

282. It would also be important to ensure that transcribers *"didn't have an interest in the outcome of the trial."*³⁵³ As **Prof. FRASER** explained, it was once a common practice that police and other law enforcement agencies would either produce their own transcripts, or provide detailed briefings to those who did, for example on what they might "look for" in the audio; *"most people strongly avoid that now. Most law enforcement agencies avoid that as well."*³⁵⁴ Where forensic transcription is to be used in court,³⁵⁵ it should be done through *"an evidence-based method that controls the flow of information to transcribers."*³⁵⁶

³⁴⁸ 1D00136, pp. 16-17; T.809-812, T.843, 1.23-25 (Prof. FRASER).

³⁴⁹ 1D00136, p.16; T.787, 1.2-4; see also T.969, 1.25 (Prof. FRASER).

³⁵⁰ 1D00136, p.16.

³⁵¹ T.787, 1.7-9; see also T.970, 1.7-11 (Prof. FRASER).

³⁵² T.807, 1.11-16 (Prof. FRASER).

³⁵³ T.853, 1.5-6 (Prof. FRASER).

³⁵⁴ T.788, 1.20-21 (Prof. FRASER).

³⁵⁵ Cf. where transcripts are used purely for lead in investigations and are not relied on in court: T.789, 1.3-17 (Prof. FRASER).

³⁵⁶ 1D00136, p.18.

(4) The evidence regarding the process which was used to create the SPO Transcripts

283. Little information has been provided – and even less evidence tendered – by the SPO regarding the process and personnel used to create the SPO Transcripts.

284. In December 2025, the Defence requested disclosure of information regarding the SPO's transcription, including the dates between when the work was done, the identification of the individuals who were involved, any instructions given to those individuals, their roles in the work, their expertise and experience qualifying them for their transcription work, their levels of Albanian and relevant dialects, their prior involvement in *Case 06* proceedings and other SPO investigations, and the processes used to carry out the transcription. The SPO refused to disclose this information.³⁵⁷

285. Next, in a filing of 14 January 2026, the SPO stated that the SPO Transcripts:

*[...] were all prepared and/or reviewed and verified by two interpreters/translators/transcribers with extensive relevant experience (the 'Transcribers'). [REDACTED].*³⁵⁸

286. In April 2026, following a request from the Defence to compel the disclosure of information regarding the SPO's transcription process, the Single Trial Judge ruled that the requested material did not fall within Rule 103, but could potentially fall within Rule 102(3), and accordingly ordered the SPO to update its Rule 102(3) notice to include such material.³⁵⁹ This order covered all five categories of information requested by the Defence, namely:

(i) "the dates for when the work on the Albanian transcription, English translation and revision/editing was begun and completed"; (ii) the identity of all persons involved in this process of transcription and translation; (iii) "any written

³⁵⁷ F00688/A06.

³⁵⁸ F00666, para.8.

³⁵⁹ F00884.

instructions which were given to these individuals regarding how they were to carry out these tasks”; (iv) various details about the individuals identified in category (ii), including “what role they played”, their “expertise and experience”, whether they are “a staff or contractor”, and details concerning their involvement in specific prior cases before the SC; and (v) “details” concerning speaker-attribution, the transcription of non-verbal sounds, and “how the individuals involved in each task resolved ambiguities.”³⁶⁰

287. Nonetheless, the Single Trial Judge apparently did not expect that any such material existed, or that it would not be relevant to the testimony of **Prof. FRASER**, since he ordered that the updated Rule 102(3) notice be filed by 4pm on 7 May 2026 (the last business day before **Prof. FRASER**’s testimony would begin) and refused a Defence request for an earlier deadline, stating “[REDACTED]”.³⁶¹

288. On 7 May 2026, the SPO filed a supplementary Rule 102(3) Notice with part of the information that had been requested by the Defence, including the anonymised CVs of seven persons involved in creating the SPO Transcripts, and other compilations of information including the *Case 06* and *Case 12* investigative activities that these individuals had been involved in.³⁶² Disclosure of this material was eventually made during **Prof. FRASER**’s examination-in-chief, on 11 May 2026.³⁶³

289. From this procedural history the Single Trial Judge may deduce that the SPO did not have any other documents in its position which fell within the five categories of requested disclosure material. Notably, the SPO did *not* include on its updated Rule 102(3) Notice any material at all concerning procedures used or instructions given regarding transcription – for example regarding separation of transcribers from analysts and investigators, regarding formats of transcription (use of

³⁶⁰ [F00884](#), para.4, and see para.15 regarding the “broad relevance of the five categories requested by the Defence”.

³⁶¹ Email decision of the Single Trial Judge, forwarded by CMU on 29 April 2026, 10:02AM, ‘Re: Case 12 – Request related to Decision F00884’.

³⁶² F00906.

³⁶³ SPO Rule 102(3) Disclosure Package n°129.

punctuation, indications of confidence, etc). Neither did the updated SPO Notice include any *post-facto* reports regarding how this work had been done in fact.

290. The Defence submits that the Single Trial Judge must infer from this that the SPO simply has *no internal procedures or guidelines for transcription*, or certainly none which were used to create the SPO Transcripts in this case.

291. Despite this lack of procedures and guidelines, some information can be gleaned from the disclosed items regarding what did actually occur:

- i. First, it is absolutely clear that there was no separation between the persons responsible for creating the SPO Transcripts, and the SPO's investigative work on *Cases 12* and *06*. For instance, three of the persons who worked on the SPO Transcripts (LA-1, SPO-0031/18 and LA-3) were involved in creating 29 items disclosed in *Case 12*, including transcripts of SPO interviews with THAÇI and contact notes with **Bislim ZYRAPI (W04752, 'Witness 2' or 'ZYRAPI')**, [REDACTED] ([REDACTED] or '**Witness 3**'), and [REDACTED] ([REDACTED], or '**Witness 4**') and other SPO witnesses.³⁶⁴ Those three persons, and an additional two others (LA-20 and LA-21) were also involved in witness interviews, witness preparation and/or witness contacts in *Case 06*.³⁶⁵ The SPO identified 144 instances of such involvement for these five individuals,³⁶⁶ but has not made known the extent of the contact for each.³⁶⁷ As **Prof. FRASER** explained it, this is "*the kind of interaction between the contextual information and the work on the transcripts and translations that we've been --- as discussing before, is not good practice.*"³⁶⁸

³⁶⁴ 1D00144.1.

³⁶⁵ 1D00144.2.

³⁶⁶ 1D00144.2. For instance, [REDACTED].

³⁶⁷ 1D00144.2.

³⁶⁸ T.824, l.19-22 (Prof. FRASER).

- ii. Secondly, two of individuals who created the SPO Transcripts, SPO-0036/18 and SPO-0031/18, do not even appear to work in a language-related role, but rather to serve in functions of a general analysis and investigations nature. Thus, SPO-0036/18 is an [REDACTED] contractor who is described as having an “[REDACTED]”.³⁶⁹ SPO-0036/18’s tasks in the SPO are described in a general way in the disclosed CV (“[REDACTED]”), but it appears that his work involves evidence review and analysis.³⁷⁰ While SPO-0036/18 is an [REDACTED] national³⁷¹ who speaks Albanian as a mother tongue,³⁷² SPO-0036/18’s work experience includes various functions concerning [REDACTED], and no work in transcription, translation or interpretation.³⁷³ The other individual, SPO-0031/18, is a [REDACTED] staff member whose role in the SPO is described as “[REDACTED]”.³⁷⁴ SPO-0031/18’s duties are said to include some language-related tasks: “[REDACTED]”; but also some analysis and case management tasks: “[REDACTED] [...]”.³⁷⁵ SPO-0031/18’s previous work experience, to the extent that it has not been redacted from the CV, is a mixture of [REDACTED] and language work.³⁷⁶ SPO-0031/18’s educational qualifications are entirely redacted from the CV, and no qualifications relating to transcription, translation, interpretation are visible. As **Prof. FRASER** explained, the “*legal support function*” played by these individuals in the investigation “*seems to involve a lot of contextual information*”

³⁶⁹ 1D00141, p.SPOE00411795.

³⁷⁰ 1D00141, p.SPOE00411795.

³⁷¹ 1D00141, p.SPOE00411795.

³⁷² 1D00141, p.SPOE00411796.

³⁷³ 1D00141, pp.SPOE00411795-SPOE00411796.

³⁷⁴ 1D00142, p.SPOE00411775.

³⁷⁵ 1D00142, p.SPOE00411775.

³⁷⁶ 1D00142, pp.SPOE00411776-SPOE00411779.

in an uncontrolled way.”³⁷⁷ In other words, “there’s a lot of interaction between working on the case and working on the linguistic material.”³⁷⁸

- iii. Thirdly, the SPO has provided no evidence that any of these seven individuals have any demonstrated aptitude at forensic transcription. Five of them (LA-3, LA-1, LA-20, LA-21, and LA-53) appear to have been contracted as language assistants, or in similar roles. But none of the seven has any formal qualification or training in transcription, let alone forensic transcription. Only one of the seven (LA-3) has a CV which mentions previous work transcribing covertly recorded audio in an investigation context.³⁷⁹ As **Prof. FRASER** remarked, having been shown one of the CVs, there is a question about whether the CV contains anything “*that shows an aptitude or skill demonstrated in relation to deciphering indistinct audio-recordings*”.³⁸⁰ Regarding the CV of LA-3, **Prof. FRASER** noted that “*I think I did not notice any reference to proficiency in transcribing indistinct audio.*”³⁸¹
- iv. Fourthly, aside from forensic transcription skills, the disclosed CVs provide extremely minimal information regarding the language skills of these individuals. Two state that they have C2 level English; for the others no level is given and none cites a formal certification. Certainly no identified formal certification for particular language functions (such as being recognised as a “[REDACTED]”).³⁸² Some, but not all, are identified as mother-tongue speakers of Albanian, but their levels of familiarity with Kosovo Albanian is not clear. One (LA-3) is identified as being a native speaker of both

³⁷⁷ T.819, 1.10-12 (Prof. FRASER).

³⁷⁸ T.822, 1.20-21 (Prof. FRASER).

³⁷⁹ 1D00143, pp.SPOE00411418-SPOE00411419.

³⁸⁰ T.819, 1.8-9 (Prof. FRASER).

³⁸¹ T.824, 1.23-24 (Prof. FRASER).

³⁸² F00666, para.8.

[REDACTED];³⁸³ a second (LA-53) is identified as knowing and having worked in both [REDACTED];³⁸⁴ and a third (LA-21) is said to be “fluent” in “[REDACTED]”.³⁸⁵ However even for these three individuals, no further detail is provided as to their proficiency in the Gheg Albanian spoken in Kosovo. For the other four, no information is provided at all about their familiarity (or otherwise) with Gheg Albanian.

292. The paucity of information disclosed by the SPO about its transcription process and its transcribers is alarming in itself. What is even more concerning is that the information eventually disclosed in May 2026 contradicts the statements made by the SPO in its 14 January 2026 filing. Rather than two individuals,³⁸⁶ the SPO has now identified *seven* persons who were involved in creating the SPO Transcripts.³⁸⁷ Only one of these (LA-3) has a CV which remotely could be said to justify the description of transcriber experience contained in the 14 January 2026 filing. Indeed, the phrase used in the 14 January 2026 filing seems to have been lifted virtually verbatim from LA-3’s CV.³⁸⁸ Of the six others, one (LA-53) has a CV which briefly mentions past work on “[REDACTED]” including on “[REDACTED]”.³⁸⁹ However, nothing in that CV suggests that this work has involved transcription in “[REDACTED]” cases, or that it involved “[REDACTED]” of audio.³⁹⁰

293. The Single Trial Judge must accordingly set aside any picture previously created by the SPO about the personnel or procedures used to create the SPO Transcripts.

³⁸³ 1D00143, pp.SPOE00411417-SPOE00411418, SPOE00411420.

³⁸⁴ 1D00147, pp.SPOE00411413-SPOE00411414.

³⁸⁵ 1D00145, p.SPOE00410896.

³⁸⁶ F00666, para.8.

³⁸⁷ 1D00140.

³⁸⁸ 1D00143, pp.SPOE00411418-SPOE00411419: this CV gives as one example of work performed in the past: “[REDACTED].” Compare with F00666, para.8, where the SPO described the experience of “both” of the “two” transcribers in its 14 January 2026 filing: “[REDACTED].”

³⁸⁹ 1D000147, p.SPOE00411413.

³⁹⁰ As stated in F00666, para.8.

It is clear that it cannot be *assumed* that the SPO has acted professionally, properly or even honestly. The only evidence which the Single Trial Judge may take into account in assessing the reliability of the transcripts is the material which is in evidence in this case. And in that respect the SPO has provided almost *no evidence* to support the reliability of the SPO Transcripts. In short:

- i. The SPO has not shown that the personnel used to create the SPO Transcripts had demonstrated aptitude in forensic transcription;
- ii. The SPO has not shown that it used an appropriate procedure – or indeed *any* procedure – to create the SPO Transcripts;
- iii. More specifically, the SPO has not shown that it took any steps to mitigate the risk of priming and cognitive bias; to the contrary, it is clear that persons involved in creating the SPO Transcripts were substantively involved in other parts of the SPO investigation, whether as language staff or in some cases as analysts. Indeed, longstanding workers in the SPO (some for more than 5 years³⁹¹), it seems very likely that these individuals had an “*interest in the outcome of the trial*”.³⁹²

(5) Additional specific difficulties regarding the “enhanced” audio of the 3 September Visit

294. In addition to the problems which affect all of the SPO Transcripts, specific problems arise in respect of the Transcripts of the 3 September Visit. For this visit the SPO sought to “enhance” some segments of its audio recordings. This has

³⁹¹ SPO-0031/18 appears to have worked in the SPO for around [REDACTED] years (1D00142, p.SPOE00411775); LA-20 has worked there for around [REDACTED] (1D00146, p.SPOE00410888); SPO-0036/18 has worked there for “[REDACTED]” (1D11141, p.SPOE00411795). The Defence notes that not all of the CVs make clear the length of time for which these individuals have worked in the SPO. This is not known, for example, for LA-3 (see 1D00143), who according to 1D00140 appears to have played a very extensive role in the creation of the SPO Transcripts.

³⁹² T.853, 1.5-6 (Prof. FRASER).

introduced additional reasons for doubt about the reliability of the SPO Transcripts of that visit.

295. First, there is no evidence regarding this “enhancement process”. Short reports as to the *process* followed (steps taken in a software program) were disclosed³⁹³ but were not tendered and are not in evidence. In any event those reports did not make clear what effect those steps had on the audio or on listener perception of the audio.³⁹⁴ Indeed, the reports also did not even postulate a hypothesis about *why* the process applied might have an effect on the audio or listener perception.³⁹⁵ In short: the SPO hired somebody to *change the audio evidence*, and have tendered that modified evidence without any supporting report or oral evidence to explain (i) the ways in which it was changed – that is, the extent to which it is different from the original audio; and (ii) why the newly created audio is (more) reliable, relevant and probative (and not, to the contrary, misleading as a result of its modification).

296. Secondly, the only evidence before the Single Trial Judge about how audio enhancement operates in general is that of **Prof. FRASER**. In her report she explained that regarding *indistinct* audio,

*[...] there are currently no techniques that can consistently, reliably and objectively improve the intelligibility of material that is not already intelligible in the original recording.*³⁹⁶

When testifying, **Prof. FRASER** elaborated further:

[...] in common knowledge, if audio is very difficult to hear, we often have the experience or the impression that there is some clear speech behind a veil or a mask of noise. And this gives us the idea that if only we could remove that veil or mask of noise, we would be able to hear the clear speech behind it. This is completely false. This is not how it is at all. What makes indistinct audio indistinct is the lack of bottom-up information. Enhancing cannot, or at least should not, add

³⁹³ Cited and relied on by the SPO as proving the authenticity of the enhanced audio in: F00632/A01, item 42.

³⁹⁴ 1D00136, p.20; T.795 (Prof. FRASER).

³⁹⁵ 1D00136, p.20.

³⁹⁶ 1D00136, p.14.

*information. Reducing the noise does not really make the speech clearer. And sometimes -- and I've done a lot of work on this and a lot of experiments both by myself and with others. Sometimes the attempt to reduce the noise can actually make the speech objectively less intelligible. It sounds strange, but it is true that in reducing the noise, it's also removing information.*³⁹⁷

297. Where tested through controlled experiments, it has sometimes been shown that such enhancements do not make the audio more intelligible and may in fact make it less intelligible.³⁹⁸ The process of changing the audio may also have other uncontrolled and undesirable impacts on listener perception.³⁹⁹

298. Thirdly, there is no evidence about the ways in which the “enhanced” audio recordings were used by the SPO in the creation of its Transcripts of the 3 September visit. **Prof. FRASER** explained that it is poor practice for transcribers to “go back and forth” between enhanced and unenhanced versions of the same audio.⁴⁰⁰ Otherwise the perception of what is heard in one will have a priming influence on the perception of what is heard in the other. Ideally then, different people should transcribe each.⁴⁰¹ However, in the present case, there is no indication from the SPO that this is what was done. To the contrary, the only information disclosed about the creation of the SPO Transcripts of the 3 September Visit is 1D00140, which merely states that these Transcripts were created by LA-20, LA-1, and LA-3, without any indication of a differentiation having been made between original and “enhanced” audio during this process.⁴⁰²

³⁹⁷ T.795-796 (Prof. FRASER).

³⁹⁸ 1D00136, p. 14 (including the papers by Prof. FRASER cited there).

³⁹⁹ 1D00136, p.14.

⁴⁰⁰ T.800 (Prof. FRASER).

⁴⁰¹ T.800 (Prof. FRASER).

⁴⁰² 1D00140, item 9.

(6) The evidence regarding how to evaluate the reliability of a transcript created from indistinct audio

299. **Prof. FRASER** explained that evaluating the reliability of a transcript once it has been completed is difficult.⁴⁰³ This cannot be done simply by looking at the transcript itself. Reference must be made to the “*process that was followed in creating those transcripts.*”⁴⁰⁴ **Prof. FRASER** explained that to assess whether or not a transcript of forensic audio is reliable, she would look for the following things:

*[...] we’d certainly need some sort of demonstration of the aptitude or skills of the transcribers. We’d need some demonstration that they’d been protected from potentially misleading case-related contextual priming, and then we would want a documented process probably, from my perspective.*⁴⁰⁵

In other words, **Prof. FRASER** said she would look to the factors which are set out above in Section (3) and which indicate good or bad process for forensic transcription.

300. These matters would ordinarily be addressed in a report, in the same way as a report would be used to explain how other kinds of forensic evidence have been produced or analysed.⁴⁰⁶ This report would address the key matters relevant to the transcripts’ reliability, particularly the qualifications of the transcribers, and the process that was followed to produce the transcripts, including quality assurance practices.⁴⁰⁷

301. **Prof. FRASER** identified one other way to evaluate a transcript, where information about process and transcribers of this kind is not available, namely

⁴⁰³ T.790, l.17-19, T.833, l.9-15 (Prof. FRASER).

⁴⁰⁴ T.790, l.15-16 (Prof. FRASER).

⁴⁰⁵ T.843, l.14-18 (Prof. FRASER). See also: T.806, l.17-20 (Prof. FRASER): “*we would like to know that the transcribers had some demonstrable aptitude or demonstrable skill in deciphering indistinct audio, and we would like to know that they had also followed a process [...]*”.

⁴⁰⁶ 1D00136, pp.12,17-18; T.850-851 (Prof. FRASER).

⁴⁰⁷ 1D00136, p.18.

to “create a new transcript through accountable evidence-based processes and then compare the two of them.”⁴⁰⁸

(7) What the evidence shows about the reliability of the transcripts in this case

302. **Prof. FRASER** concluded that for the SPO Transcripts, “reliability is low”, and that “I don’t think we can rely on them as being accurate, accurate enough for this kind of context”.⁴⁰⁹

303. The reasons for this conclusion were clearly reasoned in terms of the principles that she had explained:

- i. First, the SPO transcribers have not been demonstrated to have any relevant skills in forensic transcription: “we do not have the demonstrable aptitude or skill for deciphering poor quality audio.”⁴¹⁰ **Prof. FRASER** recognised that the SPO has said its transcribers are experienced. However “experience and expertise are two different things. We need demonstrable expertise in this particular skill.”⁴¹¹
- ii. And secondly, the SPO has not shown that it followed a reliable process in creating the SPO Transcripts: “the lack of a process that was followed in the way that I have described, we do not have this kind of staged process that I think is a prerequisite for reliable transcripts”.⁴¹²
- iii. Thirdly, as a more specific aspect of the lack of proper process, **Prof. FRASER** noted the apparent close relationship between the SPO’s transcribers and its investigators which is “poor practice overall and very highly recognised as poor practice throughout all the responsible forensic sciences.”⁴¹³

⁴⁰⁸ T.835, l.17-18 (Prof. FRASER).

⁴⁰⁹ T.807, l.21-24, see also T.827, l.16-18 (Prof. FRASER).

⁴¹⁰ T.808, l.6-7 (Prof. FRASER).

⁴¹¹ T.808, l.11-12 (Prof. FRASER).

⁴¹² T.808, l.12-15 (Prof. FRASER).

⁴¹³ T.812, l.18-20 (Prof. FRASER).

304. While these were the primary reasons why **Prof. FRASER** considered that the SPO Transcripts could not be relied on, she also noted other features in the content of the transcripts themselves which indicated their deviation from good practices. One such features is the inclusion in the SPO Transcripts of descriptions of noises which go beyond what can be observed in the audio itself.⁴¹⁴
305. Additional features of concern include the lack of timestamps (“I would never put forward a transcript without detailed timestamps”⁴¹⁵); heavy use of punctuation (“[the SPO Transcripts] end up looking very much like written texts rather than like transcripts of spoken language”⁴¹⁶) and the very minimal use of confidence indications (“we seem to have here mostly a two-way distinction. Things are either indiscernible or they’re given quite detailed interpretation [...] usually there would be some variation in confidence [...]. This is very, very common practice in English transcription.”)⁴¹⁷ **Prof. FRASER** said it was “surprising” that the various versions of the SPO Transcripts are not dated.⁴¹⁸
306. By way of comparison, examples of the kinds of formats which might be expected in forensic transcription can be found in some domestic court documents. For example, *R v Eastman* (2018) includes extracts from transcripts created by phonetics expert Professor Peter French for the retrial in that case. These have detailed timestamps and numerous indicators of lower confidence levels (in this case through the use of parentheses) and possible alternative interpretations.⁴¹⁹ These provide a striking counterpoint to the transcripts prepared by the SPO in the present case, which are formatted in the same way

⁴¹⁴ T.811, 1.6-12 (Prof. FRASER); 1D00136, p.19.

⁴¹⁵ T.809, 1.5-6 (Prof. FRASER).

⁴¹⁶ T.809, 1.12-13 (Prof. FRASER).

⁴¹⁷ T.811-T.812 (Prof. FRASER).

⁴¹⁸ T.834, 1.22-24 (Prof. FRASER).

⁴¹⁹ [Eastman \(No.43\) \[2018\] ACTSC 186](#) (P00227).

as KSC court transcripts (bureaucratic transcripts) despite their entirely different function.

307. The Defence observes that the features identified by **Prof. FRASER** are features that we are accustomed to seeing in the *court transcripts* produced at the KSC and in other international tribunals. However, as explained by **Prof. FRASER**, those are “bureaucratic” transcripts, which serve the purpose of *creating a record of uncontested speech*; rather than a “forensic” transcript which aims to assist in *determining the content of the speech*. It seems probable to the Defence that the SPO simply operated without any appropriate expertise in *forensic transcription*, and without having instructed an expert on these matters, and that accordingly it made the false assumption that its transcripts of the DC recordings should be done in the same way as court transcripts. While this is an understandable error for an unskilled person relying on “common knowledge”, it is inexcusable for a prosecution service which seeks to impose a prison sentence and must operate to the highest standards and ensure that any evidence it generates is created according to best practices. The Single Trial Judge must therefore set aside any question of whether the SPO’s errors in this respect are considered understandable. The only question is whether the process used by the SPO to create the SPO Transcripts has been shown in evidence to be such as can be trusted to create reliable transcripts. The answer to that question is no.

(8) Additional difficulties created by the SPO Transcripts’ multiple versions

308. For all the reasons set out above, the SPO Transcripts are, as a whole, unreliable. This conclusion is illustrated and compounded by an additional challenge. Even if the Single Trial Judge believes that some part of any of the SPO Transcripts are reliable, he has no way of determining *which version* of any given SPO Transcript to rely on.

309. For every one of the covertly recorded DC visits, the SPO has disclosed more than one version of an SPO Transcript. Some of the Transcripts have had five or six different versions. As demonstrated by two sets of examples during **Prof. FRASER's** evidence, the difference between these versions is not minor or immaterial.⁴²⁰

310. For example, concerning **SMAKAJ's** visit of 7 October 2023, the Defence has identified very significant discrepancies in the terms used by the SPO transcribers for the same excerpts between the first Transcript disclosed by the SPO, 1D00118_ET, and the last Transcript disclosed by the SPO, P00110_ET (*"Revised2"* version):

- i. "HASHIM THACI: [...] Albanians and some... Because now that they have **heard** them [Unintelligible] **hearing** names, **hearing** [Unintelligible]."⁴²¹

became:

" [...] Albanians and some -- because now that they have **removed** them, they are considering them [Indiscernible] **removed** names, **removed** [Indiscernible]."⁴²²

- ii. "[REDACTED]"⁴²³

was subsequently amended to read:

"[REDACTED]"⁴²⁴

- iii. "ARTAN BEHRAMI: **Code**"⁴²⁵

⁴²⁰ T.831-T.834 (Prof. FRASER).

⁴²¹ 1D00118_ET, p.21, l.3-4.

⁴²² P00110_ET, p.21, l.12-14.

⁴²³ 1D00118_ET, p.22, l.15.

⁴²⁴ P00110_ET, p.23, l.1.

⁴²⁵ 1D00118_ET, p.25, l.14.

was transformed to:

“[In English] **Cold..**”⁴²⁶

iv. “ARTAN BEHRAMI: But will you be able to catch him or not..”⁴²⁷

was thereafter amended to:

“I brought coffee but did not bring some tea..”⁴²⁸

v. “BASHKIM SMAKAJ: [With a low voice] Some time ago I did [Unintelligible]. Can I **bring** the papers [Unintelligible]”⁴²⁹

became:

“[Whispering] Can I **take** these papers??”⁴³⁰

vi. “HASHIM THACI: How is it going with that??”⁴³¹

was amended to:

“I was not referring to him..”⁴³²

311. Significant differences were also observed between the first and last versions of the Transcripts of **SMAKAJ**’s visit of 9 September 2023 disclosed by the SPO, 1D00113_ET and P00108_ET (“*Revised4*” version). For instance, “*HASHIM THAÇI: Yes, that’s right. That’s right. **The declarations** [Unintelligible]*”⁴³³ was subsequently amended to read: “*Yes, that’s right. That’s right. **The communiques***

⁴²⁶ P00110_ET, p.26, l.3.

⁴²⁷ 1D00118_ET, p.48, l.18

⁴²⁸ P00110_ET, p.49, l.15.

⁴²⁹ 1D00118_ET, p.49, l.18,19.

⁴³⁰ P00110_ET, p.50, l.18.

⁴³¹ 1D00118_ET, p.221, l.3

⁴³² P00110_ET, p.221, l.19.

⁴³³ 1D00113_ET, p.202, l.15,16.

[Indiscernible]. The communiques, [Indiscernible]. There was communiques [Indiscernible].]"⁴³⁴

312. Moreover, the Defence highlights that the various versions of the SPO Transcripts also differed significantly regarding the voice attribution, without any explanation by the SPO as to such changes.
313. For instance, in the first Transcript of the 7 October visit disclosed by the SPO, 1D00118_ET, the statement: *"[...] No, no. No, that is very important to..."*⁴³⁵ was attributed to **SMAKAJ**. In the revised transcript P00110_ET, the same statement was attributed instead to **THAÇI**.⁴³⁶
314. Similarly, the initial transcript 1D00118_ET identified the speaker of the following excerpt as: *"HASHIM THAÇI: Nah, nah, nah."*⁴³⁷ Its subsequent version, P00110_ET, reassigned the same words to: *"ARTAN BEHRAMI: Nah, nah, nah."*⁴³⁸
315. The following exchange was initially attributed, in the transcript 1D00118_ET, to **SMAKAJ**: *"BASHKIM SMAKAJ: Are you doing well?"*⁴³⁹; the latest revised transcript, P00110_ET, attributed it to an unidentified person: *"UNIDENTIFIED MALE 3: [From the hallway] Are you doing well?"*⁴⁴⁰
316. Similarly, regarding the 2 July Visit, the speaker's identity of the following excerpt varied across versions. *"FADIL FAZLIU: I have never"*⁴⁴¹, in the first disclosed transcript, 1D00105_ET, became: *"HASHIM THACI: [...] I have never"* in the revised transcript P00105_ET.⁴⁴²

⁴³⁴ P00108_ET, p.215, l.12-14.

⁴³⁵ 1D00118_ET, p.50, l.7,8.

⁴³⁶ P00110_ET, p.51, l.10,11.

⁴³⁷ 1D00118_ET, p.107, l.3.

⁴³⁸ P00110_ET, p.108, l.7.

⁴³⁹ 1D00118_ET, p.26, l.17.

⁴⁴⁰ P00110_ET, p.27, l.6.

⁴⁴¹ 1D00105_ET, p.48, l.12.

⁴⁴² P00105_ET, p.50, l.7.

317. With regard to the 6 October Visit, the first transcript disclosed, 1D00116_ET, recorded **KILAJ** as saying: “[REDACTED].”⁴⁴³ The revised version of the transcript, P00109_ET, instead recorded **THAÇI** as the speaker: “[REDACTED].”⁴⁴⁴ Here too, the inconsistencies compound one another: not only is the speaker reattributed between versions, but the words themselves change.
318. However, the SPO has provided no evidence explaining the difference between these multiple disclosed versions. Indeed, the SPO Transcript versions are not even dated.⁴⁴⁵ It is impossible for the Single Trial Judge to determine what additional “top-down” information was accessed by the SPO’s transcribers in the intervals between each version. Where such “top-down” information was unreliable, the new Transcript version would become *less reliable* than the previous version. Without evidence as to the dates of the Transcript versions and the management of “top-down” information accessed between these versions, the Single Trial Judge has absolutely no basis on which to conclude that the most recent versions of the SPO Transcripts are the most reliable. **Prof. FRASER** elaborated on this in her evidence:

*[...] it’s not clear to me what the Court is supposed to do with these versions. I would personally prefer to recommend that the Court just got one final -- one final version that was supported as being the outcome of all the procedures. I don’t see how the Court could possibly look at those -- I think there was mainly three versions, from memory, some maybe only two. How can you look at them and decide which one is better.*⁴⁴⁶

319. There is simply no basis on which the Single Trial Judge can assume that the latest versions of the SPO Transcripts are the best or least unreliable. Accordingly, even if the Single Trial Judge considers that the SPO Transcripts

⁴⁴³ 1D00116_ET, p.51, l.3,4.

⁴⁴⁴ P00109_ET, p.54, l.20,21.

⁴⁴⁵ Something which Prof. FRASER called “surprising”: T.834, l.24.

⁴⁴⁶ T.830, l.16-22; see also T.833 (Prof. FRASER).

can be used for any purpose in this case, he is bound by the principle *in dubio pro reo* to use only the versions which are most favourable to the Defence.

(9) Whether the LSU “verification” has cured this unreliability

320. The first time that any suggestion was made in this proceeding that the SPO Transcripts should be subject to LSU “verification” was during the Trial Preparation Conference on 28 November 2025. The Single Trial Judge referred to the Registry Instruction on Requesting Translation, Interpretation and Verification Services⁴⁴⁷ and implied that this process was something that would be used to address disputes about the SPO’s transcriptions.⁴⁴⁸ Prior to this, neither the Pre-Trial Judge nor any party had suggested – whether in formal court records or in *inter partes* correspondence – that this Registry Instruction was applicable to the SPO Transcripts.

321. On 14 January 2026, the SPO reacted to the Single Trial Judge’s “direction” by requesting that a deadline be set by which the Defence must identify portions of the SPO Transcripts for LSU “verification”.⁴⁴⁹ The Defence argued against the use of this process, both on the basis that it would violate the right to silence of the Accused, and that it was premature since the SPO Transcripts had not yet been admitted and indeed the Defence had not yet filed its arguments regarding why they should not be.⁴⁵⁰ On 29 January 2026 the Single Trial Judge granted the SPO request.⁴⁵¹ He rejected the Defence arguments, ruled that the Decision on Working Languages regulated this issue, and fixed a series of deadlines for the Defence to submit any challenges “to the accuracy of the [SPO Transcripts] and other relevant transcripts” to LSU.⁴⁵² He also set out “certain additional directions”,

⁴⁴⁷ [Registry Instruction on Translation Services](#).

⁴⁴⁸ T.244, l.1-14 (Prof. FRASER).

⁴⁴⁹ F00666.

⁴⁵⁰ F00683.

⁴⁵¹ [F00708](#).

⁴⁵² [F00708](#), para.19.

including a stipulation that “*there shall be no communications between LSU and SPO translators concerning this task in general or the specific excerpts*”,⁴⁵³ but he did not specify whether LSU should make reference to the SPO Transcripts.⁴⁵⁴

322. On 4 February 2026, the five Accused jointly applied for partial reconsideration and clarification of the Single Trial Judge’s decision.⁴⁵⁵ They explained why that decision was premised on incorrect understandings of linguistic science (the Single Trial Judge having yet to receive **Prof. FRASER**’s report or hear her evidence). Central among these was the premise that the transcription of covertly recorded audio evidence should be handled in the same way as the transcription of court hearings (something which would conflate forensic and bureaucratic transcription). The Defence also highlighted that the process to be undertaken by the LSU could only be of any value if the LSU *made no reference to the SPO Transcripts*. As the Defence explained, use of those transcripts would result in textual priming, with the result that the LSU would be significantly influenced to hear the words in the SPO Transcripts, regardless of their reliability or accuracy. Accordingly, the Defence requested the Single Trial Judge to clarify that the LSU must not access or have any regard to the SPO Transcripts.

323. Pending the Single Trial Judge’s Decision, the Defence began to comply with the deadlines which had been set for “verification” requests.

324. On 18 February 2026 the Single Trial Judge rejected the Defence request for partial reconsideration and clarification.⁴⁵⁶ He considered that “priming” was not a danger in a case of the present kind, and that LSU transcribers would not be at risk of priming because they are “*professionally trained staff*”.⁴⁵⁷ He ruled that

⁴⁵³ [F00708](#), fn.41.

⁴⁵⁴ [F00708](#), para.20.

⁴⁵⁵ [F00722](#).

⁴⁵⁶ [F00745](#).

⁴⁵⁷ [F00745](#), paras 33-34.

the LSU “*may refer*” to the SPO Transcripts “*as part of the process of evaluating*” their accuracy.⁴⁵⁸

325. The Defence maintains its position that the Single Trial Judge erred in these rulings. An LSU verification process for forensic transcripts is foreseen in neither of the KSC’s language-related practice directions,⁴⁵⁹ nor in the Decision on Working Languages.⁴⁶⁰ Insofar as these documents cover transcription (as opposed to translation), they relate only to the transcription of KSC court hearings.⁴⁶¹ The reasons why forensic transcription cannot be assimilated to the transcription of a court hearing should now be very clear in light of **Prof. FRASER**’s evidence, and in particular the portion of it that is summarised above at paragraph 258.
326. Between 24 February 2026 and 18 May 2026, LSU issued 18 memos setting out the results of its “verification” processes.⁴⁶² As the Defence had anticipated, these were almost identical to the respective SPO Transcripts which they purported to have “verified”. Only occasional words and some descriptions of sounds were changed.
327. On 1 April 2026, at the Defence Preparation Conference, the Defence informed the Single Trial Judge that it maintains its objections to the methodology adopted by the LSU and as a result will not rely on any LSU memos, with the exception of those concerning the 3 September Visit.⁴⁶³

⁴⁵⁸ [F00745](#), para.38.

⁴⁵⁹ [Registry Practice Direction on Translation](#).

⁴⁶⁰ [F00076](#).

⁴⁶¹ F00854, para.6.

⁴⁶² P00105_LSU.1; P00105_LSU.2; P00106_LSU.1; P00106_LSU.2; P00107.1_LSU.1; P00107.1_LSU.2; P00107.2_LSU.1; P00107.2_LSU.2; P00107.3_LSU.1; P00107.3_LSU.2; P00107.4_LSU.1; P00107.4_LSU.2; P00108_LSU; P00109_LSU.1; P00109_LSU.2; P00110_LSU.1; P00110_LSU.2; P00110_LSU.3. The Defence has not included in this number P00115, which is a LSU memo reviewing an SPO *translation* of an SMS message, since this memo did not relate to forensic transcription issues.

⁴⁶³ T.758-T.760 (Defence Preparation Conference). See also Email from Thaçi Defence to CMU dated 10 April 2026, re ‘Case 12 – Update re LSU verifications’.

328. Indeed, no party requested the admission of the LSU memos. Nonetheless, on 29 April 2026 the Single Trial Judge ruled that:

[...] “associated transcriptions and translations of audio-visual material are ‘automatically’ admitted with the source material” and are not “subject to separate admission requirements from the audios that they purport to represent”. Accordingly, LSU’s memoranda are part of the evidentiary record, together with the audio-recordings of the visits and their corresponding transcripts and translations, as tendered by the SPO.⁴⁶⁴

329. This statement is at odds with the entire scientific evidence of **Prof. FRASER**, which makes clear that a transcript of indistinct audio will always contain some element based on the “top-down” information available to the transcribers, such that it not a direct reflection of the audio.⁴⁶⁵ Indeed, it is unclear to the Defence why, if any document purporting to be a transcript of certain audio material is “automatically” admitted together with that audio, the Single Trial Judge did not “automatically” admit into evidence the transcripts provided by **REÇICA** and by **EURIDEAS**. Neither did the Single Trial Judge apply his “automatic” admission approach to the earlier versions of SPO Transcripts which the Defence tendered. Both of these categories of material, tendered by the Defence, are transcripts of the very same covert DC audio recordings (or parts thereof). However, instead of “automatically” admitting this material, the Single Trial Judge assessed their compliance with the requirements of Rule 138(1).⁴⁶⁶ The Defence submits that this should also have been his approach regarding the LSU memos. By “automatically” admitting these memos, the Single Trial Judge has included in the evidence of the case material which has not been shown to *prima facie* meet the requirements of Rule 138(1) (a fact which is all the more clear in light of **Prof. FRASER**’s evidence). Moreover, he did so via an unfair process in

⁴⁶⁴ F00890, para.19, see fn.30 citing his own previous decision: F00737, para.33.

⁴⁶⁵ See in particular Section VI.A.b)(1) and VI.A.b)(3).

⁴⁶⁶ F00894, paras 40-42.

which the parties were not given an opportunity to make submissions on the admissibility of the material

330. The Defence maintains its submission that the LSU memos are the result of textual priming. They therefore add nothing at all to the reliability of the SPO Transcripts, and are themselves unreliable.

331. **Prof. FRASER** addressed this question in her report and her testimony. In her report she stated that:

*This is a wholly inadequate method of ensuring reliable understanding by the court of indistinct forensic audio that represents crucial evidence to be used in determining a verdict regarding serious criminal offences [...]*⁴⁶⁷

332. As set out above, **Prof. FRASER** explained in her evidence that there are two ways to evaluate a transcript once it has been made. One is by reference to information about the persons who made it (their skill levels and independence), and the process by which it was created). The second is to create a new transcript through “accountable evidence based processes” and compare it to the existing transcript.

333. Neither of these methods were used in the present case. The process which LSU has undertaken is not an “accountable evidence-based process”, for all the same reasons and more that the SPO transcription process was not. The Single Trial Judge knows even less about the LSU transcribers, their pre-existing states of contextual knowledge, and the processes they followed to create the LSU memos, than he knows about the SPO transcribers, since at least their CVs have now been put into evidence.

334. The one salient thing that *is* known about the LSU process is that it made use of the existing SPO Transcripts. **Prof. FRASER** addressed this approach in her testimony:

⁴⁶⁷ 1D00136, p.21.

*The danger, of course, is that in reviewing the transcript while listening to the audio, that the transcript will be giving you textual priming all the way.*⁴⁶⁸

335. **Prof. FRASER** referred to case she was aware of from the 1990s in which a prosecution expert had been asked to undertake a process similar to that which the LSU has performed in this case, “reviewing” a police transcript by reading it while listening to the audio in question, which demonstrated how priming operates unconsciously in such a process with the result that the “reviewed” transcript will unduly mirror the original even though the reviewer believes they are conducting a genuine review.⁴⁶⁹ In that example, the priming was only discovered because the prosecution expert attempted to create his own version of a short section of the audio *without reference to the existing prosecution transcript*, and discovered that the resulting transcript was far more different from the original than the other “reviewed” transcripts had been.

336. In the present case, a similar comparison can be made between the results of the LSU verification memos (which resulted from listening to the DC audios while reading the SPO Transcripts) and the earlier attempt made by the LSU to transcribe two segments of audio from the 3 September Visit. As set out above (see paragraph 264.ii) and in Annex 8, Example 2, LSU responded to that request by indicating that “[REDACTED]”.⁴⁷⁰

337. **Prof. FRASER** explained that, while she would prefer to have some information about the individuals who had done the LSU transcription,⁴⁷¹ even in the absence of such information she could conclude that the LSU memos were the result of textual priming.⁴⁷²

[...] on the face of it, I think everybody can see, based on all that we’ve said today, that what we’re seeing here is textual priming. And in a way it’s the reverse

⁴⁶⁸ T.835, l.12-14 (Prof. FRASER).

⁴⁶⁹ T.835-837 (Prof. FRASER).

⁴⁷⁰ 1D00121, p.DHT1201173.

⁴⁷¹ T.840, l.16-25 (Prof. FRASER).

⁴⁷² T.840-T.841 (Prof. FRASER).

*situation to the situation that I was describing from that case in the 1990s, where the person first did the editing and then did the independent transcription from their own – off their own bat and found that the latter was much more difficult. Here it's been the other way around. First they've attempted to transcribe independently and with no text to follow, and then they've had a text to follow here.*⁴⁷³

338. **Prof. FRASER** was unequivocal that in the light of such priming, LSU's "verification" "certainly does not" increase the reliability of the SPO Transcripts.⁴⁷⁴

339. She highlighted three further factors which, in her opinion, highlighted the problematic nature of the review conducted by LSU and its results.

- i. First, she noted that the SPO had produced many versions of the SPO Transcripts, with slightly different results each time, revealing a significant number of "uncertainties" which had existed in the transcription process. In contrast, the LSU had immediately reached an almost identical result to the last SPO version (namely the one that it reviewed). As **Prof. FRASER** said, *"it's remarkable that none of the uncertainty that appears to have been part of the SPO's process is coming up for the LSU transcribers."*⁴⁷⁵
- ii. Even more importantly, **Prof. FRASER** drew attention to just how similar the LSU "verified" memos are to the SPO Transcripts they relate to. Counter-intuitively, this makes the LSU memos *less* reliable, not more. As **Prof. FRASER** explained, even if two independent transcribers were able to reach results which were very similar in terms of *content*, there would nonetheless be many differences. Two independent transcripts will never be identical, as shown in the different transcript versions produced as part of Example 8 in Annex 8:

Even if they were both coming [...] to something quite similar, they would definitely have some differences in their transcripts and even more so in their

⁴⁷³ T.841, 1.2-10 (Prof. FRASER).

⁴⁷⁴ T.841, 1.14 (Prof. FRASER).

⁴⁷⁵ T.841-T.842 (Prof. FRASER).

*translations. We saw that earlier with the other ones you commissioned, not from the LSU, but from the other independent organizations. Even the ones where we said, oh, this is relatively clear audio, they are all coming to a similar interpretation, they were only similar. They were not identical. You never, ever get – very rarely do you get absolutely identical transcripts or translations of indistinct or poor quality audio. So the fact that these are so completely identical is almost working against their reliability for me.*⁴⁷⁶

In other words, the reason why the LSU memos are so similar to the SPO Transcripts is not because they are right, it is because they are the result of textual priming with the SPO Transcripts.

- iii. Thirdly, **Prof. FRASER** expressed concern that LSU had not declined to undertake this task in this way. This fact indicates that LSU does not have an understanding of how forensic transcription operates, and particularly the risks of priming:

*[...] I think most of the people or practitioners that I know who work in this field of transcribing indistinct audio and understand about priming and reliability, all the things that we've been speaking about, I think they would generally decline to do the task in this way because they would know themselves that this is not a way to come to the reliable transcription. So I think I also said that in my report, again respectfully. The lack of awareness of the kinds of issues that we've been discussing today is quite problematic to me.*⁴⁷⁷

340. It is therefore unequivocally clear from **Prof. FRASER's** evidence, and from the scientific principles underpinning it, that the LSU's "verification" of the SPO Transcripts is not reliable. In fact, because LSU was simply primed using the SPO Transcripts, the LSU products merely reproduced the problems already found in the SPO Transcripts.

(10) The SPO's violation of its disclosure obligations and its impact

341. Finally, the Defence asks that in evaluating the SPO Transcripts and the appropriate level of weight they should be accorded, the Single Trial Judge

⁴⁷⁶ T.842, 1.10-22 (Prof. FRASER).

⁴⁷⁷ T.842, 1.23-T.843, 1.6 (Prof. FRASER).

should have regard to the SPO's violation of its disclosure obligations, and the prejudice which this has caused to the Defence.

342. The procedural history set out above at paragraphs 284 to 289 should make clear that the SPO made *no* disclosure concerning the process and personnel involved in creating its Transcripts until 11 May 2025. That is despite the fact that it began creating those transcripts on 3 July 2023.⁴⁷⁸ From July 2023, the SPO must have known how those transcripts were created, and which individuals were involved in their creation. It would be highly surprising if no written records exist addressing those matters.
343. The SPO has apparently chosen not to disclose any information regarding the creation of the SPO Transcripts on the premise that it is not subject to Rule 103.⁴⁷⁹ This was also the conclusion reached by the Single Trial Judge in his decision F00884 of 28 April 2026.⁴⁸⁰ However, that decision must be revisited in light of the material which *has* now been disclosed pursuant to Rule 102(3). What that information reveals – as set out above in paragraph 291 – is that none of the individuals who created the SPO Transcripts were appropriately qualified; and that they were not independent, or in any way kept distant, from the SPO's investigations.
344. That this material was exculpatory must have been known to the SPO from the outset. That would have been even more apparent following the Defence's disclosure requests and explanations, which began in December 2025, and following the Defence's disclosure of **Prof. FRASER's** report on 27 March 2026. Any last vestige of doubt would have been removed in light of **Prof. FRASER's**

⁴⁷⁸ 1D00140, item 1.

⁴⁷⁹ [F00805](#).

⁴⁸⁰ [F00884](#), paras 24-27.

testimony. As the Single Trial Judge identified, Rule 103 imposes an obligation of continuous review, to which his decision F00884 on Rule 103 was subject.⁴⁸¹

345. And yet despite this, the SPO did not make timely disclosure of material indicating the extent of the contamination involved in the creation of its Transcripts. The Defence notes, for example, that in 1D00140, disclosed on 11 May 2026, the SPO identified which of its personnel were involved in the creation of 16 SPO Transcripts which it tendered in this case, *i.e.* LA-1, LA-3, LA-20, LA-21, LA-53, SPO-0031/18, SPO-036/18. These relate to 13 covertly recorded visits to **THAÇI** and [REDACTED].⁴⁸² 1D00144.1 and 1D00144.2 identified SPO witness interviews, witness preparation session and witness contacts which were interpreted by any of the seven identified transcribers. However, the material identified in the supplementary Rule 102(3) Notice did not include anything about the extent to which these 7 identified transcribers were involved in listening to or transcribing *other* DC visits.

346. More significantly, the SPO has never disclosed any internal instructions given to these personnel regarding the manner in which the Transcripts were to be created or reviewed.

347. This disclosure violation by the SPO has caused concrete prejudice to the Defence.

348. First, prejudice was caused by the *late* disclosure of disclosure package 129. Had this material been disclosed to the Defence at the beginning of the case, the Defence would have immediately identified that there were questions about the quality of the transcripts, perhaps even before seeking expert advice on that question, given the (lack of) qualification of those who produced them. Certainly, if this material had been disclosed by December 2025, when the

⁴⁸¹ [F00884](#), para.28.

⁴⁸² 1D00140.

Defence explicitly requested it, that would have permitted the Defence to make submissions on these matters as part of its response to the SPO bar table motion, and may have led to a different decision from the Single Trial Judge regarding the admissibility of the Transcripts. Disclosure at that time would have also permitted the Defence to seek **Prof. FRASER**'s review of the material, and for her to address it in her report. Instead, as it happened, the Defence only received the material *during Prof. FRASER's* evidence. The Defence was not even able to show this material to her in a timely manner before the hearing for her assessment and careful consideration, for example during the preparation session held on 5 May 2026.⁴⁸³ **Prof. FRASER** only had the opportunity to make fleeting comments based on a first reading of a few of the documents while on the stand. She made clear that this limited what she could say on the matter: *"It's very difficult to just look at something and respond instantly like this";*⁴⁸⁴ *"I want to emphasise I don't really like to just look at something and immediately make a strong commentary"*.⁴⁸⁵

349. Secondly, to this day the Defence has not been able to assess the full extent of the contamination of the SPO transcription process. The SPO has never disclosed the procedure followed in creating the transcripts. While this material might be included in "internal documents", such material is not exempt from disclosure under Rule 103 and should have been disclosed.⁴⁸⁶ While the burden remains on the SPO to demonstrate that its Transcripts are reliable, it remains the case that the Defence is prejudiced when the SPO withholds material which clearly demonstrate the *unreliability* of those Transcripts.

⁴⁸³ P00233.

⁴⁸⁴ T.819, 1.5-6 (Prof. FRASER).

⁴⁸⁵ T.819, 1.14-15 (Prof. FRASER).

⁴⁸⁶ Rule 106.

350. Rule 110 of the Rules provides the Single Trial Judge with a broad discretion regarding the appropriate measures to be taken where a party has violated its disclosure obligations. In the present case, the Defence submits that the Single Trial Judge should limit even further the weight which can be given to the SPO's Transcripts, considering that the SPO has not made available the material which would have enabled a full assessment of their reliability.

(11) Whether repetition *within* the SPO Transcripts increases reliability

351. The Single Trial Judge has at least twice expressed some version of the idea that Defence submissions regarding the SPO Transcripts having been created in an unreliable manner can be overcome because of repeated incriminating content within the SPO Transcripts themselves.

352. Thus, in refusing the Defence's request for partial reconsideration and clarification of the verification deadline decision, the Single Trial Judge stated that:

[...] the audio in the present case is voluminous and involves alleged incriminating content repeated many times in different parts of audios recorded on different occasions. By contrast, the academic literature cited by the Defence concerning the dangers of "priming" involve extremely short audios involving singularly decisive statements.⁴⁸⁷

353. Later, in ruling on the SPO Bar Table Motion, the Single Trial Judge repeated this idea:

[...] the purported methodological requirements identified by the Defence on the basis of academic literature, in particular to avoid transcribers being improperly influenced ("primed") by contextual information, appears to be based on research concerning very short audios, often of several seconds' length only, that may be viewed as "especially problematic".⁹³ This is a very different context from that in the present case in which incriminating content is purportedly expressed, repeatedly and in different ways, and in respect of different subject-matters, in disparate parts of conversations lasting many hours. The scenario of main concern in the academic literature – involving potential miscarriages of justice arising

⁴⁸⁷ [F00745](#), para.33.

*from highly incriminating transcriptions of audio-recordings of ambiguous speech over a few seconds – is inapposite to the present situation.*⁴⁸⁸

354. The Defence respectfully submits that the Single Trial Judge’s approach on this issue, while perhaps understandable from an intuitive perspective, is wrong as a matter of science and logic.
355. First, there is nothing in the academic literature which limits these principles to “short audios” that are “especially problematic”.⁴⁸⁹ To the contrary, some of the criminal cases discussed by **Prof. FRASER** and other experts in the field have involved far more voluminous audio material than the present case. As the Defence has previously noted, *R v Eastman* (which was raised by the SPO with **Prof. FRASER** during her testimony) involved thousands of hours of covert audio, while **Prof. FRASER** has also specifically written about other cases involving many days’ worth of recordings.⁴⁹⁰
356. During her testimony, **Prof. FRASER** was specifically asked whether the good and the bad practices she had described as determining the reliability of forensic transcripts vary depending on the length of the audio in the case and how much of it is contested. She responded “No, not at all, it’s the same”.⁴⁹¹
357. However, the Single Trial Judge seemed to have in mind a more specific point, namely the question of how much *repetition* there is within a lengthy transcript.
358. Based on questions that he asked to **Prof. FRASER**, the Defence understands that the Single Trial Judge’s reasoning in this regard relates to the notion of “internal context”.⁴⁹² **Prof. FRASER** explained this concept in her report: internal contextual information is information concerning the listener’s understanding of other words within the same recording (while in contrast external context relates

⁴⁸⁸ F00737, para.35.

⁴⁸⁹ F00737, para.35.

⁴⁹⁰ F00868, para.46.

⁴⁹¹ T.788, l.25 (Prof. FRASER).

⁴⁹² T.1016, l.20-22, T.1017, l.1-4, T.1017, l.3-5, T.1017-T.1018 (Prof. FRASER).

to the listener's understanding of the situation in which the speech is heard).⁴⁹³ Thus, if the listener is able to decipher one part of the recorded conversation, and thereby determine what the subject matter of the discussion is, or who the speakers are, this provides context which will influence the listener's understanding of other portions of the audio. However, although this material appears to come from within the audio itself (hence: "internal"), it is nonetheless "top-down" information. It is not information from the sound signal itself, but from the listener's expectation based on the listener's interpretation of other parts of the audio. This means that precisely the same risks attend "internal context" or "internal top-down" information as apply for external contextual information: while it can play an essential role in perceiving speech, if it is *wrong*, it will lead to a *wrong perception* of the speech.

359. **Prof. FRASER** explained this in response to the Single Trial Judge's questions:

*As you start to hear some words, it helps you to hear additional words. And as with many things in this field, it's a double-edged sword. It helps, but then it could hinder. If it's wrong in the beginning, it can become further wrong. We've seen that many times. When people get a wrong idea about what audio is about, the errors compound and compound.*⁴⁹⁴

And:

*[...] if you start with some errors, they will compound and you may never be aware of them.*⁴⁹⁵

360. What this makes clear is that the distinction (or relationship) between external and internal context is not as simple as that suggested by the Single Trial Judge's questions to **Prof. FRASER**.⁴⁹⁶ That is because if proper procedures have not been put in place to protect against uncontrolled influence of external context (for example, an assumption by prosecutors that a conversation involves a plan to

⁴⁹³ 1D00136, p.7.

⁴⁹⁴ T.1017, l.16-21 (Prof. FRASER).

⁴⁹⁵ T.1018, l.4-6 (Prof. FRASER).

⁴⁹⁶ Especially at T.1017-1018 (Prof. FRASER).

commit witness interference), then that *external context* will influence which words the transcriber begins to hear in the indistinct audio. The transcriber's perception of those words (which become the internal context) are unreliable because they are influenced by unreliable *external context*. This is the compounding effect that **Prof. FRASER** described. The resulting transcript will have been influenced by *both* external and internal contextual information. And if the external information was misleading, it will have contaminated the internal contextual information too.

361. This is a problem which experts in cognition have written about, in which various independent data points appear to corroborate each other, but in fact are all the result of a single source of cognitive bias which has cascaded or snowballed.⁴⁹⁷ Perhaps it appears that **THAÇI** must have said "tell him", because this phrase appears so many times in the transcript that it could not have been misheard. However, it is equally possible that the SPO transcribers wrongly heard "tell him", and then were highly suggestible to continuing to hear it. If every "tell him" suffers from the same question of reliability, they can no more corroborate each other than a group of hearsay witnesses who all obtained their information from the same original source. A collection of 100 unreliable datapoints cannot create more certainty than 10 unreliable data points, particularly when the source of their unreliability stems from the same original bias.

362. If this were not the case, every long audio recording would be able to effectively "cure" itself of the risks of priming that **Prof. FRASER** described. And experts would recommend that independent transcription under controlled conditions

⁴⁹⁷ [Dror](#), pp.8-13. Professor Dror writes about the danger of bias cascading or snowballing even between different type of forensic analysts in a given case. But the same principle applies where one bias source influences multiple conclusions of a single forensic analysis, or a single group of forensic analysts working on a single transcript.

was only necessary for short audio. That is not the case according to **Prof. FRASER**'s evidence or the expert literature.

(12) Conclusions regarding the words in the SPO Transcripts

363. The DC recordings are a mixture of indistinct and unclear audio. This means that they cannot be understood without significant reliance on contextual information, and that the content of any transcript created from them will be significantly influenced by the expectations of the transcriber.

364. This means that for a transcript made from this audio to be reliable, it must have been made by appropriately skilled transcribers, acting independently from any party and with access to contextual information carefully limited and managed.

365. The little that we know about the SPO transcription process indicates that this was not done. To the contrary, the SPO used transcribers without any demonstrated aptitude for forensic transcription and who had been directly involved in various parts of the SPO's *Case 06* and *Case 12* investigations, giving them wide and uncontrolled exposure to biasing contextual information. Moreover, the SPO has provided no information about any process followed for the creation of the SPO Transcripts. Moreover, the SPO Transcripts themselves have various characteristics which reveal that they do not reflect standard forensic transcription practice, such as the adoption of detailed punctuation and a format akin to court transcripts, and the absence of timestamps and indications of confidence variation.

366. Finally, the process of "verification" undertaken by the LSU is tainted by textual priming and therefore cannot strengthen the reliability of the SPO Transcripts.

c) The SPO Transcripts are unreliable as regards voice attribution

367. The SPO Transcripts are not only unreliable as regards the words that they contain. They are also unreliable regarding the attribution of given words to a speaker.

368. This is another area on which the SPO has simply adduced no evidence. There is every indication that the SPO simply treated voice attribution as a matter of “common sense” which could be simply done by any lay person, and without so much as a basic awareness of the risks of cognitive bias.

369. The following submissions provide an overview of what the uncontested expert evidence is in this case regarding the science of voice attribution, and how it should be done in order to achieve reliable voice identification. They then address the available evidence regarding how the SPO came to the voice attribution which is set out in the SPO Transcripts. Finally, as above, some reference is made to the approach taken on this issue by courts in other jurisdictions.

(1) The evidence on scientific principles relating to voice attribution

370. The only evidence in this case regarding how voice attribution operates as a matter of science comes from **Prof. FRASER**. She explained that, just like *word* recognition, *speaker* recognition is not a simple process reliant entirely on information in the sound signal. It is also “*heavily affected by contextual priming, both internal and external – meaning that it is very easy for listeners to be confident but wrong in their recognition.*”⁴⁹⁸

371. It is a common misconception that it is easy to recognise voices, but the voice recognition that we undertake every day is heavily influenced by context.⁴⁹⁹

⁴⁹⁸ 1D00136, p.12.

⁴⁹⁹ T.828 (Prof. FRASER).

Experiments on voice recognition without contextual information show “surprisingly poor” results, “even for recognition of close family members.”⁵⁰⁰ **Prof. FRASER** explained that research in this area is well established, going back many decades – to the 1930s.⁵⁰¹

372. Since the same risks of priming arise for voice recognition, the same kinds of measures must be taken to prevent priming with unreliable information. Voice identification should be carried out by independent experts who operate at a distance from the investigation so as to avoid uncontrolled exposure to contextual information.⁵⁰²

373. **Prof FRASER** also explained some standard practices in this area:

- i. Speaker attribution should be done in two separate stages. The first step is “internal attribution”, in which the transcriber “traces the voices through the recording”.⁵⁰³ This is done without linking them to a particular known individual, but rather by use of pseudonyms (for example: Speaker 1, Speaker 2, etc).⁵⁰⁴ Only in the second step is an attempt made at “external identification”, which involves linking the voices in the audio to a known individuals.⁵⁰⁵
- ii. Speaker attribution is usually done through the process of “forensic voice comparison”.⁵⁰⁶ This involves an expert comparing characteristics from the forensic audio to voices in a “reference sample” known/agreed to be of the speaker, which would usually be taken in a police interview.⁵⁰⁷ Based on

⁵⁰⁰ 1D00136, p.13; T.828 (Prof. FRASER).

⁵⁰¹ T.828, 1.18-20 (Prof. FRASER).

⁵⁰² 1D00136, p.16.

⁵⁰³ 1D00136, p.12.

⁵⁰⁴ 1D00136, p.12.

⁵⁰⁵ 1D00136, p.12.

⁵⁰⁶ 1D00136, p.13.

⁵⁰⁷ 1D00136, p.13.

various comparison techniques to analyse the characteristics of the voices, and any other material in the case, the expert would then advise the court on the likelihood that the voices are from the same person.⁵⁰⁸ **Prof. FRASER** explained that forensic voice comparison is a well-established area of forensic speech science, which law-enforcement agencies are familiar with.⁵⁰⁹

- iii. The identification process can incorporate reliance on internal factors in the recording – for example, the names used by speakers to refer to each other – however there are limits in how much reliance can be put on these factors, and any such reliance should be mapped out and documented.⁵¹⁰

(2) SPO attribution in the present case

374. As with the words in the SPO Transcripts, the SPO has provided no evidence in the present case about *how* it carried out voice attribution. No expert evidence was given, nor did the SPO provide evidence from its own personnel about how they reached the voice identification conclusions contained in the SPO Transcripts.

375. The Defence notes in this regard that *submissions* made in SPO filings cannot take the place of evidence. That should be clear as a matter of principle.⁵¹¹ The Defence has not had the opportunity to cross-examine any witness regarding the matters contained in those filings. Indeed, the matters identified in Section VI.A.b)(4) above, regarding the number and experience of the SPO Transcribers (and especially paragraph 292), demonstrate clearly how factual assertions contained in filings and not made the subject of tendered evidence can prove to be wrong and misleading.

⁵⁰⁸ 1D00136, p.13.

⁵⁰⁹ 1D00136, p.13.

⁵¹⁰ 1D00136, p.12.

⁵¹¹ Cf. [Bemba OA6 Judgment](#), para.43.

376. In any event, the submissions made by the SPO on this matter raise more questions than they answer. The suggestion that a recording of a voice on a phone can be compared to an environmental recording (such as those in the DC recordings) has not been supported by any expert evidence. To the contrary, **Prof. FRASER**, described this as “*even less – far less reliable than recognising the voices of people that you know*”.⁵¹² As **Prof. FRASER** explained, telephone recordings tend to be quite clear, and thus quite different from the indistinct recordings from the DC.⁵¹³ This is a problem described in open-source material as a mismatch between the questioned (forensic) and reference recordings.⁵¹⁴
377. In several respects, the limited information available about how the SPO identified voices in the recordings demonstrates clear *bad practice*.
378. Several of these forms of bad practice are the same problems as have already been identified at length above:
- i. No effort appears to have been made to create a distance between the seven individuals who performed the voice identification and potentially biasing contextual expectations within the SPO team. In other words, the persons carrying out the voice identification appear to have been exposed in an unrestricted way to other investigative steps and evidence analysis. This means they have had exposure to “top down” information which will have influenced them in identifying voices in the same way that it will have influenced their perception of the words spoken.
 - ii. None of the seven individuals who did this work appear to have any expertise, or even experience, in doing voice comparison work. None of the

⁵¹² T.829, 1.6-7 (Prof. FRASER).

⁵¹³ T.829, 1.10-11 (Prof. FRASER).

⁵¹⁴ [ENFSI Best Practice Manual](#), p.13.

CVs⁵¹⁵ makes mention of any relevant competence in this area, let alone actual expertise such as, for example, a qualification in phonetics or linguistics.⁵¹⁶

- iii. It appears that the two-steps process described by **Prof. FRASER** as usual practice was not followed here. Instead, “internal attribution” and “external identification” have been merged together into one step.
- iv. No specific forms of analysis which would normally form part of a forensic voice comparison appear to have been conducted. Open source guidance documents, which explain current approaches to forensic voice comparison, give examples of these processes as including “*auditory phonetic analysis, acoustic phonetic analysis, semi-automatic acoustic analysis, automatic speaker recognition, human-assisted speaker recognition, and combined human and automatic speaker recognition analysis.*”⁵¹⁷ A range of voice characteristics can be compared, including language, dialect and accent; fundamental frequency and variation; voice quality; formal frequencies; speech tempo; hesitation phenomena; and speech pathologies.⁵¹⁸ The SPO has identified none of these areas of comparison.

379. Indeed, the only technique that the SPO has referred to (repeatedly) as a means which it used to identify voices within the DC recordings is the reliance on names spoken.⁵¹⁹ This is clearly problematic for several reasons. One is that while a name spoken in a given “turn” might be somewhat useful to identify, by elimination, the speaker of that particular turn (assuming that the number of

⁵¹⁵ 1D00141; 1D00142; 1D00143; 1D00145; 1D00146; 1D00147; 1D00148.

⁵¹⁶ According to the ENSFI, a master’s degree in one of these or a related science in speech and auditory analysis is “strongly recommended as a minimum requirement.” [ENFSI Best Practice Manual](#), p.6.

⁵¹⁷ [OSAC Forensic Science Standard Guide to the Forensic Speaker Recognition](#), p.4. These methods are detailed in this guidance document.

⁵¹⁸ [ENFSI Best Practice Manual](#), pp.7-10.

⁵¹⁹ See for example: T.949-T.952 (Prof. FRASER).

persons in the room are known⁵²⁰), it does not follow that voice identification for the entire rest of the conversation could flow from this. This is a conflation of the two stages (internal attribution and external identification) of the process.

380. Relatedly, the SPO has produced no documentation as to how it used such names to identify speakers. **Prof. FRASER** gave an example of a technique that she has used to map internal indicators such as these by creating a detailed spreadsheet, setting out names and factors which might have a bearing on identification, along with confidence levels, which could then be assessed in the whole for the conversation.⁵²¹

381. More fundamentally still, as pointed out by **Prof. FRASER**, the SPO's approach assumes that the names in the SPO Transcripts are reliable.⁵²² It was **Prof. FRASER's** evidence that names in particular are often difficult to discern.⁵²³ This would be even more so when, as here, parts of the audio are indistinct.⁵²⁴ Even when they can be heard by the transcriber, it would usually be expected that there is some degree of variation in levels of confidence in the names heard.⁵²⁵ The SPO's reliance on names to make voice identification is therefore fundamentally flawed by the lack of reliability in the words which are shown in the SPO Transcripts. Indeed, the SPO entirely conflated the audio with the contents of the SPO Transcripts, even during cross-examination, revealing a tendency to simply *assume* that every word in the SPO Transcripts is correct.⁵²⁶

⁵²⁰ T.951 (Prof. FRASER).

⁵²¹ T.951-T.952, T.1014, l.21-22 (Prof. FRASER).

⁵²² T.952, T.1014, l.19-20 (Prof. FRASER).

⁵²³ T.952, l.8-9 (Prof. FRASER).

⁵²⁴ T.953, l.4-6 (Prof. FRASER).

⁵²⁵ T.952, l.10-13 (Prof. FRASER).

⁵²⁶ T.952, l.22-25 (Prof. FRASER). Prof. FRASER asked in response: "*I assume you're counting that 50 times from the transcript, not from the audio itself*": T.953, l.1-2 (Prof. FRASER).

382. The SPO's approach to voice attribution has been nothing short of amateurish. Prof. FRASER politely describe it as "rather intuitive"⁵²⁷ Rather than making use of expert analysis, as it attempted to do with **Koen HERLAAR (W04906, "Witness 8", or "HERLAAR")**, the SPO simply asked its own, untrained, unqualified and inexperienced language assistants and analysts to listen to the audio recordings in the case and take a guess at who was speaking. No attempt was made to document this process. No attempt was made to distance it from the "top down" expectations and biases which these SPO personnel would have brought with them to the task, having already been involved extensively in *Case 06* and *Case 12*. It is hard to think of a clearer example of forensic analysis that has been done in a flawed and unreliable manner.

d) Relevant precedents from other jurisdictions on forensic audio transcription and voice attribution

383. In rejecting Defence submissions about the danger of priming in the proposed LSU "verification" process, the Single Trial Judge opined that the Defence "*has provided no evidence that any legal system in the world has adopted the types of procedures that it argues are legally and scientifically necessary*".⁵²⁸ He made a similar point in his decision on the SPO Bar Table Motion: "*the Defence has not cited a single precedent in which the procedures advocated in the academic literature upon which it relies have been adopted by a court, let alone in respect of audio recordings lasting many hours*".⁵²⁹

384. Respectfully, in doing so the Single Trial Judge fell into various errors. The overarching principles of law remain applicable, as set out above in Section VI.A.a), particularly that the SPO bears the burden of proving its case, including the reliability of any evidence it relies on to do so. The fact that this evidence is

⁵²⁷ T.828, 1.22 (Prof. FRASER).

⁵²⁸ [F00745](#), para.35.

⁵²⁹ F00737, para.36.

unreliable is a question of fact, and of opinion evidence. It is not incumbent on the Defence to point to legal authorities of this kind, and in any event, at the time of those rulings, the Defence had not yet opened its case, and had not yet had a chance to provide the Single Trial Judge with **Prof. FRASER**'s evidence. The Defence maintains its submission that it was not, in any event, *required* to produce legal precedents accepting the science of priming. The fact that scientific evidence demonstrates these principles suffice to create a doubt about the reliability of the evidence.

385. However, in any event, there *are* judicial decisions which reflect the scientific principles set out in **Prof. FRASER**'s report.

386. Indeed, the Defence notes as a starting point, that these principles are evident within a number of the Australian cases which the SPO itself addressed during **Prof. FRASER**'s evidence.

387. In *Clark*,⁵³⁰ a judge of the New South Wales Supreme Court considered an application to review a criminal conviction on the basis of "fresh evidence". **Prof. FRASER** had prepared an expert report for the review which addressed the possibility that, at trial, the jury had been misled because they had been provided with a transcript prepared by a police officer (Detective Sergeant Maree) which **Prof. FRASER** considered was unreliable due to priming. Justice Harrison did *not* doubt the science that **Prof. FRASER** had set out in her report. To the contrary, he said that these principles are "well recognised",⁵³¹ and described **Prof. FRASER**'s analysis as "interesting and compelling."⁵³² However, he considered that the direction given to the jury had already taken account of these risks, and that therefore **Prof. FRASER**'s analysis was not "fresh evidence."⁵³³

⁵³⁰ [Clark \[2015\] NSWSC 1206](#) (P00226).

⁵³¹ P00226, para.26.

⁵³² P00226, para.28.

⁵³³ P00226, para.28.

388. The scientific principles addressed by **Prof. FRASER** were also accepted and endorsed by the Supreme Court of Australian Capital Territory (“ACT Supreme Court”) in the retrial in *R v Eastman*. Eastman had been convicted in 1995 of murder, and sentenced to life imprisonment, in a case involving various forensic evidence including gunshot residue and extremely voluminous covert audio recordings which had been transcribed by the police themselves and then evaluated by a Professor French.⁵³⁴ A 2014 judicial inquiry concluded that Eastman had not received a fair trial and that a substantial miscarriage of justice had occurred.⁵³⁵ While that conclusion turned principally on demonstrated significant failings regarding the gunshot residue evidence, the inquiry in no way suggested that the audio and transcription evidence was without problems.⁵³⁶ Eventually, Eastman was acquitted in a retrial and compensated for his wrongful conviction.⁵³⁷ In 2018 decision, as part of that retrial, Justice Kellam of the ACT Supreme Court ruled on the admissibility of some enhanced segments of the audio evidence and of *new* transcripts which were prepared by Professor French in 2018.⁵³⁸ It is immediately apparent from this is that *no police transcripts* were relied on by the prosecution during the 2018 trial. Nor did the prosecution rely on the transcripts which Professor French had prepared in 1995; rather it sought to introduce fresh transcripts prepared by him in 2018. The prosecution themselves appears to have accepted that those transcripts were unreliable. It is particularly telling that the transcript sections tendered by the prosecution in the 2018 retrial did not include the allegedly incriminating

⁵³⁴ See [Eastman Board of Inquiry Report](#), p.25 *et seq.*

⁵³⁵ *Ibid.*

⁵³⁶ To the contrary, the Board of Inquiry noted that it would have been dangerous for a conviction to have rested solely on this evidence, given the poor quality of the recordings: *Ibid.*, para.1795.

⁵³⁷ [Eastman \[2019\] ACTSC 280](#).

⁵³⁸ P00227.

admissions which the 1995 police transcripts had included (“He was the first man I ever killed” etc).⁵³⁹

389. Accordingly, the matters to be decided in this 2018 decision, and which were the subject of expert forensic evidence, related to enhanced versions of the audio, and to the transcripts prepared by Professor French in 2018. Regarding the transcripts, there was no dispute between the parties that priming operates in the way **Prof. FRASER** has testified in this case; rather, the question was whether Professor French’s involvement with the audio material and creation of an earlier transcript in 1995 would have had the consequence of priming him when he made the 2018 transcripts.⁵⁴⁰ On the question which is before the Single Trial Judge in the present case, about how forensic transcripts should be prepared in order for them to be reliable, Justice Kellam accepted and applied **Prof. FRASER**’s requirements:

[...] Dr Fraser states that creating a reliable transcript of indistinct forensic audio is straight forward assuming two main requirements being an independent transcriber to avoid cognitive bias and a transcriber with sufficient expertise in relevant branches of linguistics science to understand the role of priming on perception and know the steps necessary to manage it.

*I accept that Professor French clearly meets both of these requirements.*⁵⁴¹

390. The SPO has been at pains to highlight certain parts of this decision from *Eastman* which it appears to believe cast doubt on **Prof. FRASER**’s evidence. However, the SPO conveniently ignored the parts of the decision which endorse that evidence. Moreover, the Defence emphasizes that the SPO’s conduct in the present case is in no way comparable to that which was before the ACT Supreme Court in the 2018 *Eastman* retrial. There, the prosecution had itself rejected the transcripts made in-house by police investigators, and had instructed an

⁵³⁹ Compare P00227, paras 10-14 with [Eastman Board of Inquiry Report](#), pp.26-27.

⁵⁴⁰ P00227, paras 63-65.

⁵⁴¹ P00227, paras 102-103.

independent expert to create transcripts according to an evidence-based and accountable process, and had also put evidence about that process before the court. That is precisely the kind of approach to forensic transcription which **Prof. FRASER** has highlighted the absence of in the present case.

391. A third case mentioned during **Prof. FRASER**'s testimony is *R v Murrell*.⁵⁴² Murrell had been convicted of murder based on covertly recorded audio. New expert evidence regarding that audio showed that the police transcripts used in the original trial were wrong. On that question, both the defence and prosecution had instructed experts for the review, the prosecution expert being **Prof. FRASER**. Both experts agreed that the police transcript had been misleading. The prosecution accepted, and the court agreed, that the conviction should be quashed and the only issue in dispute was whether a retrial should be ordered.⁵⁴³
392. Soon after *Murrell*, a similar approach was taken in *R v Hall and others*.⁵⁴⁴ In that case Justice James expressed similar concerns about transcripts of indistinct audio produced by police,⁵⁴⁵ noting that he was particularly cognizant of the dangers presented by these precisely because of *Murrell*.⁵⁴⁶
393. A number of other Australian and UK authorities even more clearly support the principles which **Prof. FRASER** addressed in her evidence, particularly regarding what might be the minimum requirements for a transcript to be treated as reliable.
394. *R v Dunn*⁵⁴⁷ is unusual in that it was a judge-only trial, and therefore in some respects might be considered particularly relevant to the (non-jury) proceedings at the KSC. There, the case was based entirely on covert police recordings, and it

⁵⁴² [Murrell \[2001\] NSWCCA 179](#), discussed at T.1013-1014 (Prof. FRASER).

⁵⁴³ *Ibid.*, paras 18-21.

⁵⁴⁴ [Hall and others \[2001\] NSWSC 827](#).

⁵⁴⁵ *Ibid.*, para.39.

⁵⁴⁶ *Ibid.*, para.47.

⁵⁴⁷ [Dunn \[2012\] NSWDC 192](#).

was accepted by the defence that the speakers in the recordings were responsible for the offences charged, and the only question was that of voice identification. The prosecution relied for that voice identification on police officers who had listened to the recordings themselves. Justice Berman noted the “obvious honesty” of the police officers, but nonetheless considered that their identification was not reliable, as it had been influenced by their pre-existing expectations that the accused would be heard in the recordings.⁵⁴⁸ While he did not use the term “priming”, his conclusions were based on the recognition that “[h]uman beings are very suggestible and they tend to hear what they are told they are going to hear.”⁵⁴⁹ As a result he found the accused not guilty.⁵⁵⁰

395. In a 2014 decision, *R v Nguon and Ream*, the judge critiqued the notion of police “ad hoc experts” in the context of forensic transcription, including by reference to concerns about cognitive bias, and refused to allow the transcripts to be seen by the jury.⁵⁵¹ That was the case even though there had been considerable evidence provided by the prosecution as to the process followed by the police in creating their transcripts – something which is lacking in the present case.⁵⁵²

396. More recently, in *R v Bushell; R v Tozer (No 6)*, Justice Johnson excluded from the evidence a transcript of indistinct audio prepared by a police officer.⁵⁵³ This was based on expert evidence from a Dr Rhodes which was very similar to that which **Prof. FRASER** has given in the present trial, including on the concept of indistinct audio and how it is to be identified,⁵⁵⁴ and also on the concept of

⁵⁴⁸ *Ibid.*, paras 18-19.

⁵⁴⁹ *Ibid.*, para.18.

⁵⁵⁰ *Ibid.*, paras 39-41.

⁵⁵¹ [Nguon and Ream \[2014\] NSWDC 385](#), especially paras 60-70.

⁵⁵² *Ibid.*, paras 9-31.

⁵⁵³ [Bushell; Tozer \(No.6\) \[2021\] NSWSC 750](#).

⁵⁵⁴ *Ibid.*, para.45, quoting from Dr Rhodes: “So the essential standard is that I try to transcribe this recording. I ask my colleagues to do the same. And I found that it wasn’t possible to transcribe the speech sounds in those sections. The audio that was there was of too poor a quality. And while I’ve done that, I’ve also been looking at

priming in the context of police investigators creating transcripts of indistinct audio.⁵⁵⁵ Justice Johnson found that “[t]he evidence of Dr Rhodes about the ‘priming’ effect is important” and excluded the police transcript. He took the view that the standard jury direction (that the audio is the evidence, and the transcript is merely an aide) was insufficient to protect the jury from the risk of being unduly influenced by the police transcript.⁵⁵⁶

397. In *DPP v Roberts (Ruling No 4)*,⁵⁵⁷ Judge Kaye of the Victoria Supreme Court ruled on the admissibility of various segments of covertly recorded audio. Although the question for the court was the admissibility of the audio itself, the question arose as to whether, in deciding that question, the court could have regard to police transcripts of the audio. The court had before it evidence of how the police transcripts had been prepared, as well as defence expert evidence (from Professor French and a Dr James Tompkinson) which highlighted that:

*[...] that transcripts should not be produced by who were anyone might have interest in the interpretation of the content of the recording In particular the participation of such police members necessarily involved the risk of cognitive bias due to their inside knowledge of facts about the investigation which might influence their interpretation of the sounds heard the recordings As result police officers who have external knowledge about the investigation might have difficulty in separating their knowledge from their perception of the sounds contained in the recordings.*⁵⁵⁸

the speech signal itself, what’s actually present in the recordings and assessing those police transcripts against what’s present and finding that some of what’s in the transcript really have no basis in the audio signal.”

⁵⁵⁵ *Ibid.*, para.51: “Reliance was placed upon the concept of “priming”, explained in the evidence of Dr Rhodes, whereby a transcript prepared by someone which comes before the jury may in fact lead the jury into a particular understanding of what is allegedly audible, even though it is not, in truth, audible. It was submitted as well that “priming” can operate in that Detective Senior Constable Oldfield, as an active investigator in the case, can himself have some understanding of the issues in the trial, relating to drug toxicity, the combination of drugs, and the allegation against the Accused of homicide by administration of drugs to Mr Ciano. Therefore his knowledge of those matters may serve to mould, direct or fashion what he understands that he is hearing in what are, on any view of it, low quality recordings.”

⁵⁵⁶ *Ibid.*, paras 74-77.

⁵⁵⁷ [Roberts \(No.4\) \[2021\] VSC 778](#).

⁵⁵⁸ *Ibid.*, para.15.

The judge there determined that he should place “particularly limited weight” on the police transcripts.⁵⁵⁹

398. The Defence has identified similar rulings from the United Kingdom. In *R v Flynn and St John*, the Court of Appeals of England and Wales ruled that a trial judge had been wrong to admit police transcripts and police voice identification evidence regarding covertly recorded audio.⁵⁶⁰ The factors considered by the court included the following:

[...] nothing is known of the ability of any of the police officers to recognise voices. There is no evidence that any of them had any training in auditory analysis.

[...]

*There are other reasons why, in our judgment, the judge ought also to have excluded the evidence under s.78 of PACE. First, in our opinion, when the process of obtaining such evidence is embarked on by police officers it is vital that the process is properly recorded by those officers. The amount of time spent in contact with the defendant will be very relevant to the issue of familiarity. Secondly, the date and time spent by the police officer compiling a transcript of a covert recording must be recorded. If the police officer annotates the transcript with his views as to which person is speaking, that must be noted. Thirdly, before attempting the voice recognition exercise the police officer should not be supplied with a copy of a transcript bearing another officer's annotations of whom he believes is speaking. Any annotated transcript clearly compromises the ability of a subsequent listener to reach an independent opinion. Fourthly, for obvious reasons, it is highly desirable that such a voice recognition exercise should be carried out by someone other than an officer investigating the offence. It is all too easy for an investigating officer wittingly or unwittingly to be affected by knowledge already obtained in the course of the investigation.*⁵⁶¹

399. *R v Fitzsimmons and others* was a judge-only trial in Northern Ireland in which three men were accused of carrying out an armed attack for the IRA on a police convoy, with the evidence including covert audio recordings, and related transcripts, including voice identification.⁵⁶² In that case, there was no dispute about the words spoken in the transcript, but the voice identification was

⁵⁵⁹ *Ibid.*, para.20.

⁵⁶⁰ [Flynn and St John \[2008\] EWCA Crim 970](#).

⁵⁶¹ *Ibid.*, paras 51-53.

⁵⁶² [Fitzsimmons and others \[2022\] NICC 27](#).

contested. Initially, a transcript had been prepared by police investigators, which also included voice attribution. A firm of experts (JP French Associates, of Professor French, who was also involved in this case) then revised the police transcripts. However, JP French Associates had been provided with the police transcripts, including police voice attribution, and also held meetings with the police during the process which included listening to audio and discussing voice attribution.⁵⁶³ Indeed, JP French Associates agreed that this had created a risk of bias.⁵⁶⁴ The trial judge refused to admit the evidence of voice attribution:

I have been provided with a significant number of authorities, speeches and reports which emphasise the importance of maintaining the independence of expert witnesses by excluding from their brief information which is capable of influencing their approach to evidence or their analysis of it. To be fair to the experts in this case the awareness of this issue has increased significantly since they did their primary work in 2014 but it is an issue to which everyone involved, the police and the experts, should have been alive in 2014. I am concerned that there is a real risk that the unfortunate combination of factors referred to above gives rise to more than a possibility that the work of J P French Associates was influenced in a manner which makes the admission of their evidence as to attribution of words unfair. Accordingly, I exclude from the evidence in this case their attribution of words to the various defendants.

It is not part of my role to be prescriptive as to what should be done better in the future. There are too many variables about what might happen in the different circumstances of each case. However, I suggest that it will almost inevitably be inappropriate to provide experts with a transcript with attributions in a case as the present [...].⁵⁶⁵

400. The same approach was followed, with some further elaboration regarding the dangers of cognitive bias in the factually similar case of *R v Gleeson*.⁵⁶⁶ The court set out the applicable guidance on avoiding cognitive bias in forensic science, highlighting the need to carefully manage forensic analysts' exposure to potentially biasing information,⁵⁶⁷ and opined that "it is clear that the issue of

⁵⁶³ *Ibid.*, paras 70, 74.

⁵⁶⁴ *Ibid.*, para.74.

⁵⁶⁵ *Ibid.*, paras 80-81.

⁵⁶⁶ [Gleeson \[2023\] NICC 17](#).

⁵⁶⁷ *Ibid.*, para.83.

cognitive bias needs to be addressed by prosecuting authorities and experts in the particular context of forensic voice comparison analysis.”⁵⁶⁸

401. These decisions from domestic courts demonstrate an increasing awareness of the dangers of priming and cognitive bias where forensic audio is used in criminal trials and show a willingness in Anglo-Australian judges to exclude transcript and voice attribution evidence where it has not been produced through a documented, independent process.
402. The Defence submits that such principles are, if anything, *even more* important in a case – such as the present one – in which the contested audio material is in a language not spoken by the trier of fact. Where this is the case, the tribunal will be extremely limited in its ability to assess any aspects of the audio evidence itself, without reliance on a transcript. This has the result that any transcript used as a representation of the audio is highly likely to be treated as supplanting the audio evidence, rather than merely acting as an aid to it.

e) Conclusions

403. Both general evidentiary principles and judicial experience in other jurisdictions support the proposition that the Single Trial Judge cannot merely *assume* that the SPO Transcripts are reliable. In the present case the SPO has not only failed to demonstrate that the SPO Transcripts (including voice attribution) were produced in such a way as to avoid or minimise cognitive bias through priming; but in fact that available evidence indicates practices which are likely to have *enabled* such bias through priming.
404. The SPO has provided the Single Trial Judge with no evidence at all that demonstrates the reliability of its Transcripts. The only evidence on this question comes from **Prof. FRASER**. It is telling that the SPO did not seek to counter her

⁵⁶⁸ *Ibid.*, para.107.

evidence with an expert of its own. That is clearly because there was no expert which would contradict the well-settled principles of phonetics which she testified to. Indeed, the SPO has not even been able to tender a single scientific source which calls into question those principles.

405. The fact that the SPO Transcripts are the very foundation of its case must not dissuade the Single Trial Judge from ruling that they are unreliable. To the contrary, the foundational nature of the Transcripts makes it absolutely essential that they are not relied on if there is any reasonable doubt about them.

B. *THAÇI DID NOT PRINT THE DISPUTED DOCUMENTS*

406. In support of the charges against **THAÇI**, the SPO alleges that:

- i. **THAÇI** printed a typed 10-page document in colour, or a version thereof, on multiple occasions, including on 7 October 2023,⁵⁶⁹ which the SPO alleges was later found in **SMAKAJ**'s car⁵⁷⁰ (the "10-Page Document").⁵⁷¹
- ii. **THAÇI** provided **KILAJ**, during the 6 October 2023 Visit, with printed copies of portions of two of **Witness 4**'s confidential prior statements, his [REDACTED]⁵⁷² Statement (KSC-BC-2020-06-051765-051770 RED2) and his [REDACTED] Statement (KSC-BC-2020-06-053191-TR-AT Part 6 Revised RED2),⁵⁷³ both of which the SPO alleges were later found (torn-up) in **KILAJ**'s home.⁵⁷⁴ The SPO contends that the two statements were printed on the same DC Printer as the 10-Page Document and that **THAÇI** printed the [REDACTED] Statement on or around 4 October 2023.⁵⁷⁵

⁵⁶⁹ SPO PTB, para.112.

⁵⁷⁰ Indictment, para.18; SPO PTB, para.110 – this specific point is challenged in Section VI.B.

⁵⁷¹ P00125 – named '*Smakaj Document*' in the SPO PTB.

⁵⁷² [REDACTED].

⁵⁷³ Indictment, para.21; SPO PTB, paras 124, 126.

⁵⁷⁴ Indictment, para.22; SPO PTB, para.126, referring to P00003.

⁵⁷⁵ SPO PTB, para.126.

- iii. **THAÇI** showed and discussed a printed copy of the prior evidence of [REDACTED] with AHMETAJ during the 22 September 2023 visit,⁵⁷⁶ which the SPO allege was the “[REDACTED]” document.⁵⁷⁷

407. The SPO relies, *inter alia*, on data extracted from the laptop located in the DC printing room, which was used to print documents on the DC Printer located in the same room.⁵⁷⁸ Based on its analysis of this data, [REDACTED] found it its Report P00133 that the following documents (collectively, the “Six Documents”) were successfully printed from the DC Printer,⁵⁷⁹ by an unidentified person or persons.⁵⁸⁰

- i. On 19 September 2023 at 11.39, a document titled “[REDACTED]”,⁵⁸¹
- ii. On 4 October 2023 at 12.26, a document titled “KSC-BC-2020-06-053191-TR-AT Part 6 Revised RED2.pdf”,⁵⁸²
- iii. On 5 October 2023 between 14.52 and 14.54, three documents titled “([REDACTED]) KSC-BC-2020-06-051773-051774 RED2.pdf”, “([REDACTED]) KSC-BC-2020-06-SPOE00126367-00126368.pdf”, and “([REDACTED]) KSC-BC-2020-06-051765-051770 RED2.pdf”,⁵⁸³

⁵⁷⁶ SPO PTB, para.171.

⁵⁷⁷ F00754/A01, item 117, referring to P00216.

⁵⁷⁸ P00133, Table 1, p.8, pursuant to which [REDACTED] is a forensic copy of the hard drive extracted from the laptop located in the DC printing room (the page numbers mentioned for P00133 here and thereafter are the ones of the pdf document).

⁵⁷⁹ P00133, p.12 and Appendix A, p.19.

⁵⁸⁰ P00133, p.12: “[REDACTED]” [our emphasis].

⁵⁸¹ P00133, Appendix A, Table 7, p.19, print job number 342. The Independence Counsel (“IC”) transmitted a copy of the “[REDACTED]” document purportedly printed from the DC Printer, admitted as P00216_ET.

⁵⁸² P00133, Appendix A, Table 7, p.19, print job number 362; see also P00128, Table 5, p.13.

⁵⁸³ P00133, Appendix A, Table 7, p.19, print job numbers 366-368.

iv. On 7 October 2023 at 10.02, a document titled “*per avokatet*”⁵⁸⁴ – whose content would correspond in part to the 10-Page Document pursuant to the SPO.⁵⁸⁵

408. The SPO further relies on (i) data extracted from the computer in **THAÇI**’s cell, and (ii) on the evidence of **HERLAAR** who testified that he had [REDACTED] microdots⁵⁸⁶ on certain extracts of the 10-Page Document,⁵⁸⁷ of the torn statements found at **KILAJ**’s home,⁵⁸⁸ and on a sample of paper printed from the DC Printer.⁵⁸⁹

409. The SPO thus alleges that **THAÇI** printed the Six Documents using the DC Printer, prior to giving some of these documents to several visitors during non-privileged detention visits.

410. Yet, the SPO has failed to prove this assertion beyond reasonable doubt. Even taken at its highest, the SPO’s evidence only shows that this material was printed at the DC, but it doesn’t reveal *who* in the DC printed it.

1. The lack of probative value of HERLAAR’s Evidence

411. No or very little weight should be afforded to **HERLAAR**’s Evidence.⁵⁹⁰ The SPO has not shown his opinion to be the product of an expertise sufficiently organised or recognised beyond the *prima facie* standard, and both his methodology and his refusals in cross-examination lack transparency. Separately or together, these render its probative value minimal.

⁵⁸⁴ P00133, Appendix A, p.19, print job number 369; see also P00128, Table 5, p.13.

⁵⁸⁵ SPO PTB, para.110.

⁵⁸⁶ P00234, p.118302.

⁵⁸⁷ P00125.

⁵⁸⁸ P00003.

⁵⁸⁹ P00241.

⁵⁹⁰ **HERLAAR**’s Report (P00234), the Associated Materials (P00235; P00236; P00236_ET; P00237; P00237_ET; P00238; P00238_ET; P00239; P00240; P00241), and his oral testimony.

412. The Single Trial Judge may discretionarily “accept or [...] reject, in whole or in part, the testimony of an expert witness”.⁵⁹¹ Relevant factors include “the bases upon which the expert witness formed that opinion”, “the extent to which the expert has been able to provide details about those bases”, and “the extent to which the accused [...] have had the opportunity to test the veracity of the assertions”.⁵⁹² Methodology “must be clearly indicated and accessible”,⁵⁹³ and “limited weight, if any” attaches to parts whose “sources [...] are unclear”.⁵⁹⁴ Other tribunals have routinely disregarded or given little weight to expert evidence marred by significant methodological flaws,⁵⁹⁵ as **HERLAAR’s Evidence** is.

413. Whether other evidence supports **HERLAAR’s** conclusions is irrelevant. **HERLAAR’s Evidence** rests solely on [REDACTED].⁵⁹⁶ Thus, absent an independent “*comparative microdot analysis*”, there can be no corroboration; the Report involves no “*interdependence of facts to be proven and interpretive opinion*” as a historical or social science-based expert report would.⁵⁹⁷ No evidence has been produced regarding [REDACTED].⁵⁹⁸

a) “Microdot analysis” is insufficiently organised or recognised as an expertise

414. The Single Trial Judge considered **HERLAAR** an expert in “Striations, Impressions and Shape Analysis” (“SISA”), but found SISA’s “*precise scope*” “*not self-evident*” and [REDACTED] not “*conclusive as to whether ‘microdot analysis’ falls*

⁵⁹¹ [Kayishema and Ruzindana Appeal Judgment](#), para.210. See also [Renzaho Appeal Judgment](#), para.289, and references cited therein.

⁵⁹² [Bizimungu Decision on Expert Witness](#), para.21.

⁵⁹³ [Gotovina Decision on Expert Materials](#), para.10. See also [Galić Decision on Expert Statements](#), p.6; [Ongwen Decision on Expert Disclosure](#), para.12.

⁵⁹⁴ [Galić Reconsideration Decision](#), para.12.

⁵⁹⁵ See, for example, [Perišić Trial Judgment](#), para.50; [Popović Trial Judgment](#), para.637; [Bemba Trial Judgment](#), paras 368-369; [Mladić Trial Judgment](#), para.1910; [Ongwen Trial Judgment](#), paras 2527, 2574.

⁵⁹⁶ P00234, p.118301.

⁵⁹⁷ F00825, para.54.

⁵⁹⁸ T.516, I.13-T.517, I.10 (HERLAAR). In any case, HERLAAR does not claim that [REDACTED]: T.637, I.16-23 (HERLAAR).

within” it.⁵⁹⁹ He found an expertise only for “*establishing the prima facie reliability*” of **HERLAAR**’s Evidence.⁶⁰⁰ That finding does not prejudice the determination of whether “*microdot analysis*” is sufficiently organised and recognised as an expertise—beyond the low prima facie admission standard—for **HERLAAR**’s Evidence to be afforded weight.⁶⁰¹

415. Whether or not a sub-field of SISA, “*comparative microdot analysis*” is the subject of no significant academic publication or validation, and no judicial decision recognises it as an expertise.⁶⁰² Although not dispositive of *prima facie* reliability,⁶⁰³ this indicates a field lacking the organisation and recognition needed to carry more than *de minimis* weight.⁶⁰⁴

b) Transparency issues affecting **HERLAAR**’s Evidence warrant affording it no weight

(1) The transparency of **HERLAAR**’s methodology is deficient

416. **HERLAAR** testified that he [REDACTED],⁶⁰⁵ [REDACTED],⁶⁰⁶ he could “[REDACTED]”,⁶⁰⁷ [REDACTED].⁶⁰⁸ He then “[REDACTED]”.⁶⁰⁹

⁵⁹⁹ F00949, paras 21,24.

⁶⁰⁰ F00949, para.30.

⁶⁰¹ [Rutaganda Appeal Judgment](#), fn.63; [Nyiramasuhuko Appeal Decision on Admissibility](#), para.7.

⁶⁰² F00825, paras 60-61.

⁶⁰³ IA009/F00005, paras 34-36.

⁶⁰⁴ Cf. IA009/F00003, paras 8-11.

⁶⁰⁵ T.535, l.5 (HERLAAR).

⁶⁰⁶ T.635, l.13 (HERLAAR).

⁶⁰⁷ T.535, l.6 (HERLAAR).

⁶⁰⁸ T.535, l.6-12; see also T.635, l.14-18 (HERLAAR).

⁶⁰⁹ T.635, l.14-20 (HERLAAR).

417. Although **HERLAAR** disclosed [REDACTED], he disclosed neither [REDACTED]⁶¹⁰ nor [REDACTED],⁶¹¹ nor has he described [REDACTED].⁶¹² He could point only to [REDACTED],⁶¹³ [REDACTED].⁶¹⁴

418. The Single Trial Judge found these omissions “constitute serious deficiencies in the transparency of [**HERLAAR**]’s methodology”, the undisclosed items being [REDACTED] and “an essential part of [...] the analysis leading to his conclusion”.⁶¹⁵ The Appeals Panel did not question that assessment per se, holding only that **HERLAAR**’s Evidence was not “so lacking in [...] indicia of reliability” as to not meet the low admission threshold,⁶¹⁶ and that “the appropriate weight [...], in light of any deficiencies, is to be assessed by the Single Trial Judge at a later stage”.⁶¹⁷ This lack of transparency significantly diminishes any probative value **HERLAAR**’s Evidence may have.

(2) **HERLAAR**’s Evidence is insufficiently transparent as to the purported confidentiality restrictions

419. **HERLAAR**’s refusals to answer questions on non-transparent confidentiality grounds restricted the Defence’s right to cross-examination and even further diminishes the probative value of his Evidence and the extent to which the Single Trial Judge can properly rely on it.⁶¹⁸

⁶¹⁰ T.650, 1.9-14; see also T.639, 1.3 (HERLAAR).

⁶¹¹ T.535, 1.5, 9 (HERLAAR).

⁶¹² T.637, 1.24-T.638, 1.5 (HERLAAR). HERLAAR provided only very vague descriptions of [REDACTED]: T.535, 1.3-6; T.636, 1.21-T.637, 1.2 (HERLAAR).

⁶¹³ P00234, p.118304, fn.6; T.638, 1.17-22 (HERLAAR).

⁶¹⁴ T.639, 1.2-4 (HERLAAR).

⁶¹⁵ F00825, para.29.

⁶¹⁶ IA009/F00005, paras 51,53,55-56, quote at para.51 (emphasis in original).

⁶¹⁷ IA009/F00005, para.56.

⁶¹⁸ Cf. [Vigden v. Netherlands](#), paras 42-48; [Cabral v. Netherlands](#), paras 33-38; [Kaste and Mathisen v. Norway](#), paras 48-56.

420. The Appeals Panel recognised that “*at least some of*” **HERLAAR**’s refusals “*related to the specific analysis he performed in this case*”.⁶¹⁹ **HERLAAR**’s Evidence’s probative value depends on his observation that [REDACTED] and on the evidential value [REDACTED] afforded to that conclusion.⁶²⁰
421. Cross-examination revealed [REDACTED];⁶²¹ that [REDACTED];⁶²² and that [REDACTED].⁶²³ Whether [REDACTED] is critical. **HERLAAR** refused every question on this issue, *inter alia* when asked about [REDACTED],⁶²⁴ [REDACTED],⁶²⁵ and [REDACTED].⁶²⁶ Furthermore, his near-absolutely certain [REDACTED] conclusion⁶²⁷ rests on no disclosed validation study or error rate, and could not be tested against the alternative, [REDACTED] method. He declined to confirm that method’s *existence*,⁶²⁸ whether [REDACTED],⁶²⁹ or whether [REDACTED].⁶³⁰ He said only that [REDACTED].⁶³¹ This is incoherent and untransparent.
422. The (legal) basis and scope of the restrictions underpinning both these and the methodology-related refusals have never been disclosed, and the NFI’s, the SPO’s and **HERLAAR**’s representations as to their scope have been contradictory and not always consistent with the scope he asserted in testimony.⁶³²

⁶¹⁹ IA009/F00005, para.85 (citing examples).

⁶²⁰ F00825, paras 25-27; P00234, pp.118302, 118304, fn.5.

⁶²¹ T.603, 1.21-25 (HERLAAR).

⁶²² T.604, 1.19-T.605, 1.1 (HERLAAR).

⁶²³ T.575, 1.5-7; T.640, 1.14 (HERLAAR).

⁶²⁴ T.571, 1.17-18 (HERLAAR).

⁶²⁵ T.575, 1.25-T.576, 1.1 (HERLAAR).

⁶²⁶ T.577, 1.6-9 (HERLAAR).

⁶²⁷ P00234, p.118304 and fn.5.

⁶²⁸ T.560, 1.1-2 (HERLAAR).

⁶²⁹ T.580, 1.3-4 (HERLAAR).

⁶³⁰ T.649, 1.10-15 (HERLAAR).

⁶³¹ T.560, 1.1-3; see also T.559, 1.15-24 (HERLAAR).

⁶³² F00825, paras 37-42.

423. Moreover, reports of three forensic document examiners publicly filed in United States domestic courts⁶³³ show that professionals likely bound by the same or materially similar regimes have publicly disclosed the very matters **HERLAAR** claimed he could not address. Mr LaPorte and Ms Naso held United States federal law enforcement posts almost certainly within the ambit of any such restrictions;⁶³⁴ Mr Flynn trained with the United States Secret Service and held leading state law enforcement roles.⁶³⁵
424. Mr LaPorte stated that microdot codes “[REDACTED]”, described [REDACTED] microdot code to [REDACTED].⁶³⁶ Mr Flynn confirmed the [REDACTED] method, explaining that it “[REDACTED]”, that [REDACTED], and [REDACTED].⁶³⁷ Ms Naso [REDACTED], likewise [REDACTED].⁶³⁸ The existence of “[REDACTED]”, the [REDACTED] and [REDACTED] were thus each disclosable, and in fact disclosed, by comparably placed examiners in public legal documents.
425. That similarly placed examiners disclosed such material publicly indicates either that the restrictions invoked by **HERLAAR** did not extend as far as his refusals implied, or that, given his lack of transparency, the Single Trial Judge cannot be satisfied that they did. Either way, no or very little weight should be afforded to **HERLAAR**’s Evidence.

2. The lack of evidence regarding THAÇI’s printing of the Six Documents

426. From the Registrar’s Submissions P00102 on the process by which detainees, including **THAÇI**, were able to print documents during the Relevant Period, the following is clear:

⁶³³ 1D00149; 1D00150; 1D00151.

⁶³⁴ 1D00149, paras 3-10; 1D00151, paras 4-8.

⁶³⁵ 1D00150, paras 4-10, and pp.DHT1201828-DHT1201834.

⁶³⁶ 1D00149, [REDACTED].

⁶³⁷ 1D00150, [REDACTED].

⁶³⁸ 1D00151, [REDACTED].

- i. “there was only one printer (‘Subject Printer’) in the Detention Facilities for Detainee printing, connected to one standalone laptop (‘Printing Laptop’), both located in [REDACTED] of the Detention Facilities during the Relevant Period”;⁶³⁹
- ii. “both Detainees and Detention Officers could operate the Printing Laptop to print during the Relevant Period”;⁶⁴⁰
- iii. “Detainees can copy relevant data/documents on a CD-R/DVD using the desktop computer available in their cell. There is no other option for Detainees to burn CD-Rs/DVDs. The Detainee would then take the CD-R/DVD containing the data one wishes to print with them and request a Detention Officer’s assistance to print. The Detention Officer would accompany the Detainee to the cell the printer is located in, [REDACTED] and remain with the Detainee until the printing is finalised. [REDACTED]. [REDACTED]. One would thereafter select the relevant data/documents and sent to the printer, after which the Detainee would pick up the CD-R/DVD from the Printing Laptop and the printed papers from the Subject printer, which is located in the same cell. [REDACTED].”⁶⁴¹
- iv. “The Procedure is for Detention Officers to then mark the occurrence in the Wing Journal”.⁶⁴²

427. This evidence was tendered by the SPO itself. It is also the only evidence before the Single Trial Judge regarding printing procedures in the DC, the SPO having declined to make any witnesses available for cross-examination on these

⁶³⁹ P00102, para.6.

⁶⁴⁰ P00102, para.8.

⁶⁴¹ P00102, para.9.

⁶⁴² P00102, para.9.

questions. From this evidence, the Single Trial Judge must conclude that any time **THAÇI** used the DC Printer, it was recorded in the Wing Journal P00103.

428. Thus, if any of the Six Documents were printed by **THAÇI**, rather than by another detainee, it must be the case that: (1) the documents were on the computer in **THAÇI**'s cell, (2) he burnt a CD with such documents, (3) the documents were successfully printed, and (4) such printing occurred at a date and hour when **THAÇI** used the printing room according to the Wing Journal. Yet this is not what is seen in the evidence tendered by the SPO.

429. First, [REDACTED] analysed the content of [REDACTED] hard drives present on the desktop computer located in **THAÇI**'s cell, [REDACTED],⁶⁴³ and identified several 'responsive files' corresponding to the content of the 10-Page Document and to **Witness 4**'s [REDACTED] Statements.⁶⁴⁴ Yet, [REDACTED] could not identify who accessed those files since the user was simply named '[REDACTED]'.⁶⁴⁵ Moreover, there is no evidence that the files named "[REDACTED]", "[REDACTED]", and "[REDACTED]", were stored on **THAÇI**'s computer.

430. Thereafter, to find out whether **THAÇI** burnt certain items onto a CD, [REDACTED] checked the [REDACTED] and registered the results in:

- i. [REDACTED] Report P00128; and
- ii. [REDACTED] report P00133,⁶⁴⁶ which does not refer to any of the Six Documents.

⁶⁴³ P00133, Table 1, p.8.

⁶⁴⁴ P00128, p.SPOE00374648, Table 3.

⁶⁴⁵ P00128, p.SPOE00374653-SPOE00374654.

⁶⁴⁶ P00133, Appendix B, pp.21-23.

431. [REDACTED] found no trace of **Witness 4's** [REDACTED] Statement ([REDACTED]), or of the "[REDACTED]" document, being burned onto a CD on **THAÇI's** computer.
432. In its Report P00128, [REDACTED] stated that it "[REDACTED]".⁶⁴⁷ Nevertheless, [REDACTED] observed, for the results listed [REDACTED], that "[REDACTED]".⁶⁴⁸ This means that the SPO has failed to establish beyond reasonable doubt that the contents of these items match the content of the 10-Page Document or of **Witness 4's** [REDACTED]. Moreover, regarding the result [REDACTED], '[REDACTED]', [REDACTED] noted that "[REDACTED]".⁶⁴⁹ This means that even if the document in question matched the content of the **Witness 4's** [REDACTED], the evidence is insufficient to establish that this file was successfully burnt onto a CD.
433. Therefore, based on the evidence adduced in this case, the SPO has failed to prove beyond reasonable doubt that **THAÇI** burnt the Six Documents onto a CD, let alone that he then printed them.
434. Indeed, the Wing Journal P00103, which covers the period [REDACTED], shows that **THAÇI** only made use of the DC Printer on three instances: [REDACTED].⁶⁵⁰
435. Accordingly, the SPO's own evidence demonstrates that **THAÇI** did not print any of the document identified by the [REDACTED] Report as having been printed on 19 September, and 4 and 5 October 2023. With regard to the "[REDACTED]" document, the Defence further observes that no version of that document was found on **THAÇI's** computer and that its format differs from any of the Word documents extracted from his computer.⁶⁵¹

⁶⁴⁷ P00128, p.SPOE00374652.

⁶⁴⁸ P00128, p.SPOE00374651-SPOE00374652.

⁶⁴⁹ P00128, p.SPOE00374651.

⁶⁵⁰ P00103.

⁶⁵¹ For instance, the "[REDACTED]" document P00216_ET mentions the [REDACTED].

436. Regarding the use of the DC Printer on 7 October 2023, the Defence notes that the Wing Journal P00103 shows [REDACTED]. Moreover, the Wing Journal entry for **THAÇI** on 7 October [REDACTED].⁶⁵² Without that information, it is impossible to conclude [REDACTED]. The SPO has not proven beyond reasonable doubt that **THAÇI** printed the “*per avokatet*” document.
437. Accordingly, the SPO has failed to establish beyond reasonable doubt that **THAÇI** printed *any* of the Six Documents. A contrary finding would necessarily be based on unproven assumptions. The Six Documents may have been printed by any of **THAÇI**’s co-accused in *Case 06*, who had access to the very same *Case 06* information and documents as him, and to the same DC Printer. Thus, this also puts in doubt the SPO’s allegation that **THAÇI** gave these materials to **SMAKAJ, KILAJ**, or **AHMETAJ**, as will be further discussed below.

C. PRE-EXISTING RELATIONSHIPS AND KNOWLEDGE

438. The SPO’s case rests on a series of assumptions about the contacts between **THAÇI**, his visitors, and others, and about the matters which they discussed. The SPO asks the Single Trial Judge to assume that (i) such contacts and discussions were always concerned with the KSC and *Case 06*, and – even more specifically – must have been directed at interfering with *Case 06* witnesses, and (ii) that any knowledge about the events contested in *Case 06* could only have arisen from *Case 06* SPO disclosure. Both assumptions are flawed, given that the actors in this case had pre-existing relationships and pre-existing knowledge about the matters in question, which were also largely in the public domain.
439. In this section, the Defence sets out an overview⁶⁵³ of these relationships and areas of pre-existing knowledge; then explains the relevance of these matters to the present case.

⁶⁵² P00103, p.SPOE00354226. For the other days, it is indicated that [REDACTED].

⁶⁵³ Specifics are included in respect of each charged visit, in Section VII below.

1. *Relevant factual matters*

a) Pre-existing relationships and shared history

440. Kosovo is a small state, with an area of 10 887 km² and a population of only 1,5 million inhabitants.⁶⁵⁴ This scale means that the “degrees of separation” between individuals are small, with social and professional connections frequently overlapping.

441. This interconnectedness is intensified among the alleged protagonists in *Case 06* and *Case 12*. They shared a common history, having been actively involved in the conflict with Serbia and/or in Kosovo’s politics. Close relationships of this kind existed between the members of each of the “groups” alleged by the SPO.

442. **THAÇI** is a former KLA leader, member of its General Staff, a founding member of the PDK, Democratic Party of Kosovo. He was Prime Minister of Kosovo from 2008 to 2014 and President of Kosovo from 2016 until his surrender to the KSC in 2020.⁶⁵⁵

443. **SMAKAJ**, who has known **THAÇI** since 2009, was a member of the Kosovo Police, the director of the Kosovo Intelligence Agency between 2009 and 2015 and served as National Security Advisor to President **THAÇI** between 2017 and 2020.⁶⁵⁶

444. Blerim SHALA (“SHALA”) and **THAÇI** have been friends since 1992; SHALA published the newspaper *Zëri* during the war, and was present at the Rambouillet conference in 1999. He served as **THAÇI**’s adviser when he was

⁶⁵⁴ [World Bank Kosovo Data](#).

⁶⁵⁵ F00469/A01, Agreed Facts n°4-5.

⁶⁵⁶ F00469/A01, Agreed Facts n°11-12; P00015, pp.SPOE00363621-SPOE00363622; P00041_ET, p.SPOE00363998.

President, coordinated the Kosovo delegation in the Status negotiations, and was parliamentarian.⁶⁵⁷

445. Ismail SYLA ("SYLA") has known **THAÇI** since 2000. He worked for the media outlet *Rilindja/Bujku* between 1994 and 1998 and served as **THAÇI**'s political advisor and Prime Minister between 2008 and 2020.⁶⁵⁸

446. Artan BEHRAMI ("BEHRAMI") has known **THAÇI** "*from long time ago*"; he is a journalist, former spokesperson of the Ministry of Education and of the Foreign Ministry, former diplomat in Washington, and served as **THAÇI**'s political advisor⁶⁵⁹

447. **KILAJ** has known **THAÇI** since 1999. He was a KLA founding member and Commander of the Lumi Uni in Malisheva, and was PDK chairman for Malisheva, while **THAÇI** was the PDK chairman; he was mayor of Malisheva for two mandates and Deputy Minister of Finance and for the Diaspora for four years: "*We were associates in the party and the Government. We are lifelong friend.*"⁶⁶⁰

448. Vllaznim KRYEZIU ("KRYEZIU") has known **THAÇI** since 2000. After the war, he became a member of the Kosovo Guard in the TMK (Kosovo Protection Corps), a deputy in Malisheva Municipality Assembly, and a member of the PDK leadership in Malisheva when **THAÇI** was PDK chairman; they are "*friend[s] and political associate[s]*"".⁶⁶¹

449. **FAZLIU** and **THAÇI** have known each other since their studies. KLA veteran, **FAZLIU** has strong social and family links with **THAÇI**.⁶⁶²

⁶⁵⁷ P00015, pp.SPOE00363627-SPOE00363628; P00040_ET, pp.SPOE00363990-SPOE00363991; P00044_ET, p.SPOE00363187; 1D00048, para.56.

⁶⁵⁸ P00044_ET, pp.SPOE00363181-SPOE00363182; P00042_ET, pp.SPOE00364005-SPOE00364006.

⁶⁵⁹ P00039_ET, pp.SPOE00363983-SPOE00363984; P00044_ET, pp.SPOE00363175- SPOE00363175.

⁶⁶⁰ P00001_ET, 116809-TR-AT Part 1-ET, pp.11,13; 116809-TR-AT Part 2-ET, pp.8,15,29-30; 116809-TR-AT Part 4-ET, pp.2,10-11; P00009_ET, pp.SPOE00362802-SPOE00362803; P00066_ET, pp.SPOE00363199-SPOE00363200.

⁶⁶¹ P00066_ET, pp.SPOE00363206-SPOE00363207.

⁶⁶² P00021_ET, p.SPOE00363893; P00023_ET, p.SPOE00363355.

450. **KUÇI** and **THAÇI** have known each other for around 30 years, having been friends during their studies and throughout their activities in the PDK (when **THAÇI** was chairman and **KUÇI** deputy chairman), as well as in the Government of Kosovo; **KUÇI** was Deputy Prime Minister from 2008 to 2017 and Minister of Justice from 2011 to 2016, when **THAÇI** was Prime Minister. They have *“very close friendly relations”*.⁶⁶³
451. Consequently, the relationships between **THAÇI** and his co-accused are defined by decades of shared history, formed through Kosovo’s independence struggle and subsequent governance. This also explains why they were already aware of the story of numerous *Case 06* witnesses, such as those listed in the Indictment.
452. For example, **FAZLIU** was an active member of the KLA in the Llap Operational Zone (“OZ”), when **Rrustem MUSTAFA (W04746, ‘Witness 1’ or ‘MUSTAFA’)** was Commander of the Llap OZ,⁶⁶⁴ and they presently live near each other in Pristina.⁶⁶⁵ **MUSTAFA** has been a friend of the **FAZLIU** family for years. He has been photographed in social settings with **FAZLIU** and **THAÇI**,⁶⁶⁶ and regularly communicated with **FAZLIU**’s son, Fahri **FAZLIU**,⁶⁶⁷ regarding social events such as [REDACTED].⁶⁶⁸ Indeed, the **FAZLIU** family includes two war heroes, the brothers Bahri and Fahri **FAZLIU** who fought for the liberation of Kosovo, and is a well-known and respected family.⁶⁶⁹
453. Similarly, **SMAKAJ** and **ZYRAPI** have both a professional and personal relationship.⁶⁷⁰ They worked together between 2016 and 2020 as advisers in

⁶⁶³ F00469/A01, Agreed Fact n°26; P00033_ET, p.SPOE00363941; P00035_ET, p.SPOE00363953.

⁶⁶⁴ 1D00087_ET; 1D00080_ET.

⁶⁶⁵ T.710-T.711 (KELLY).

⁶⁶⁶ 4D0001; 4D0002; T.462-T.465 (Witness 7 identified **FAZLIU**, **THAÇI**, Salih Mustafa and **MUSTAFA** on the pictures 4D0001 and 4D0002).

⁶⁶⁷ For instance, **MUSTAFA** and Fahri **FAZLIU** were in contact on Facebook since at least May 2020, which was confirmed by KELLY (T.693; 1D00032, p.SPOE00369428).

⁶⁶⁸ 1D00032_ET.

⁶⁶⁹ 1D00103; 1D00104.

⁶⁷⁰ F00756/A01, Agreed Fact, paras 5-6.

civilian emergencies and national security under **THAÇI**'s presidency⁶⁷¹ and, more recently, have taught similar modules in higher education.⁶⁷²

454. **KILAJ** and **Witness 4** have known each other [REDACTED]. After the war, **KILAJ** [REDACTED].⁶⁷³ Similarly, **KILAJ** and **Witness 3** have [REDACTED].⁶⁷⁴

455. As a final example, **KUÇI**'s communications clearly show an established social relationship with **MUSTAFA**, covering matters such as [REDACTED].⁶⁷⁵

b) Pre-existing knowledge about events from the war

456. In this context, it cannot be assumed that **THAÇI**'s visitors could only obtain information relating to the historical facts of *Case 06* (i.e. stories relating to SPO's narrative, witnesses' narratives, etc.) from **THAÇI**. The SPO implicitly suggests that any matter discussed by **THAÇI** regarding *Case 06* allegations amounts to a revelation of confidential information. However, the roles that **THAÇI** and his visitors played during and after the armed conflict, and the relationships between them and *Case 06* witnesses, mean that they already possessed significant information about the events which are the subject of *Case 06*. They possessed such information well before the creation of the KSC, let alone the charged DC visits.

457. This is not even refuted by the SPO's version of the DC visits, based on its Transcripts. For instance, according to the SPO Transcripts, during the 2 July Visit,⁶⁷⁶ **FAZLIU** volunteered names, made connections and added comments demonstrating his prior, extensive factual knowledge on these topics, without **THAÇI** providing that information to him.⁶⁷⁷

⁶⁷¹ 1D00014_ET; F00469/A01, Agreed Fact n°12; F00756/A01, Agreed Fact, para.5.

⁶⁷² F00756/A01, Agreed Fact, para.6; 1D00014_ET; SPO PTB, para.113.

⁶⁷³ P00001_ET, 116809 TR AT Part 2 ET, pp.4-5.

⁶⁷⁴ P00001_ET, 116809-TR-AT Part 2-ET, p.8.

⁶⁷⁵ P00213_ET, p.21.

⁶⁷⁶ Assuming this portion of the transcript be reliable.

⁶⁷⁷ P00105_ET, p.27, l.9-14, p.28, l.3-4, p.30, l.11-12.

458. Similarly, the SPO Transcripts of the 9 September Visit has SHALA commenting on his own encounter with Chris Hill, Richard Holbrooke and **ZYRAPI** during the war,⁶⁷⁸ with SYLA adding the name of other participants in these meetings.⁶⁷⁹ According to the SPO Transcripts, when **THAÇI** recalled the KLA history, SHALA responded that these were “*well known*” facts,⁶⁸⁰ and **SMAKAJ**, SHALA, and BEHRAMI discussed key protagonists in the war.⁶⁸¹ Pursuant to the Transcripts of the 7 October Visit, **SMAKAJ** also explained to **THAÇI** how his case was perceived, according to “*the word from the foreigners and the insiders*”,⁶⁸² suggesting that **SMAKAJ** discussed *Case 06* with other individuals.

c) Public knowledge and discourse in Kosovo about *Case 06* events and information

459. In addition to the specific knowledge which the alleged protagonists in this case had about the subject matter of *Case 06*, these same events, as well as their treatment at the KSC, have been widely covered in the Kosovo media and discussed in Kosovo. The matters which have become established public knowledge in Kosovo include not only the historical events themselves, but also the evidence given on them by prominent Kosovar figures, many of whom have testified at the ICTY and/or in domestic trials. Many of these witnesses are prominent personalities in Kosovo, and some are active in the traditional media and on social media, which has attracted further attention as a result of *Case 06* proceedings.

⁶⁷⁸ P00108_ET, pp.205-207.

⁶⁷⁹ P00108_ET, p.206, l.5.

⁶⁸⁰ P00108_ET, p.191, l.12, p.193, l.6,9, *etc.*

⁶⁸¹ See, for instance, P00108_ET, pp.150-151 (regarding Steve Bennett); p.187, l.16-24 (regarding Fred Abrahams).

⁶⁸² P00110_ET, p.176, l.2-3, l.23-25.

460. For instance, **MUSTAFA**, who was described by **Witness 7** as a “*very well-known person and figure in Kosovo*”,⁶⁸³ was often discussed in the media.⁶⁸⁴ His social media posts collect hundreds of “likes” and “comments”.⁶⁸⁵
461. Similarly, **ZYRAPI** was also considered as a public figure by **Witness 7**: he “*is also well-known and public figure in Kosovo, and he testified before international courts before*”.⁶⁸⁶ **ZYRAPI** has regularly commented on the 1998-1999 conflict and the KLA’s organisation,⁶⁸⁷ thus making his views on these matters well-known.
462. **Witness 7** also acknowledged the public status of several other *Case 06* SPO witnesses, such as [REDACTED],⁶⁸⁸ [REDACTED],⁶⁸⁹ **Sylejman SELIMI** (W04290, ‘Witness 5’ or ‘SELIMI’),⁶⁹⁰ Shukri BUJA (W01453),⁶⁹¹ Sokol BASHOTA (W04401 or ‘BASHOTA’),⁶⁹² Nuredin IBISHI (W04758 or ‘IBISHI’).⁶⁹³
463. Even regarding witnesses who could not be considered as “famous public figures”, **Witness 7** acknowledged that their names and stories were in the public domain before the DC visits.⁶⁹⁴

⁶⁸³ T.381, 1.1-2, T.382, T.386, 1.23-25 (Witness 7) referring to “*hundreds and hundreds of similar news articles about his interview in The Hague*”; and T.390, 1.12-15: “*Mr. Mustafa was public person, and he was publishing everything, and especially everything related to the SPO. So I don’t recall that specific moment, but I recall – I remember that he made public that he’s going to testify*”, T.392, 1.21-22: “*It was well-known fact and public information that he’s going to testify in the Case 06*”.

⁶⁸⁴ See, for instance, 1D00003_ET; 1D00004_ET; 1D00005_ET; P000153_ET. On his participation in KSC proceedings: 1D00007_ET; 1D00008_ET; 1D00009_ET.

⁶⁸⁵ 1D00006_ET.

⁶⁸⁶ T.397, 1.20-21 (Witness 7). On his participation in KSC proceedings: T.400 (Witness 7). See also 1D00012; 1D00013_ET.

⁶⁸⁷ T.398 (Witness 7). See also 1D00010_ET; 1D00011.

⁶⁸⁸ T.404, 1.2-3, T.407 (Witness 7). See also 1D00016; 1D00017.

⁶⁸⁹ 1D00018_ET. This is confirmed by other evidence adduced in this case: see for instance P00001_ET; 116809 TR AT Part 2 ET, pp.22-23.

⁶⁹⁰ T.416, 1.12-14, T.419 (Witness 7). See also 1D00019.

⁶⁹¹ T.425, 1.4-5 (Witness 7). See also 1D00023_ET; 1D00024_ET.

⁶⁹² T.427, 1.19-23 (Witness 7). See also 1D00025.

⁶⁹³ T.429, 1.3-4 (Witness 7). See also 1D00026; 1D00027_ET; 1D00028; 1D00029.

⁶⁹⁴ For instance, regarding [REDACTED].

464. Interest in *Case 06* was increased by the participation of important Kosovar public figures. The Kosovo public has had ample opportunity since the war to learn of and discuss those persons' views about events during the Kosovo conflict; and in many cases it was also public knowledge that these individuals were engaged with the SPO and would testify in *Case 06*. In the words of **Witness 7**, "*most of the high-ranking commanders and also KLA members SPO interviewed, they go publicly and inform public that they are going to be interviewed by the SPO*".⁶⁹⁵

465. According to the SPO's own Transcripts, **THAÇI**'s visitors indicated that they were following the *Case 06* proceedings,⁶⁹⁶ and provided details about what they heard concerning *Case 06* testimonies, **SMAKAJ** referring for instance to evidence involving "[REDACTED]", "[REDACTED]", etc.⁶⁹⁷

466. The extent to which these matters were already in the public domain is set out below in detail, in respect of each SPO *Case 06* witness, in Section VII.

2. The relevance of these matters to the charges

467. These factual matters are relevant to the charges in several ways:

468. *First*, the longstanding and close relationships between the alleged protagonists in this case means that it cannot be inferred that any contact between them must concern the KSC or *Case 06*. There are numerous reasons why these men would contact and meet each other, and various matters that they might discuss. If the SPO asks the Single Trial Judge to infer that a specific instance of contact concerned the KSC and *Case 06*, that must be the only available inference on the evidence. Yet the SPO has never explained how it can rule out other explanations for such contact.

⁶⁹⁵ T.385, I.9-12 (Witness 7).

⁶⁹⁶ See P00108_ET, p.146, I.20-22 (for BEHRAMI), p.147, I.11-25 (for BEHRAMI, SMAKAJ, and SHALA); p.148, I.22-25 (for SMAKAJ and BEHRAMI); p.187, I.15 (for SYLA).

⁶⁹⁷ P00108_ET, p.139, I.7,16.

469. *Secondly*, and similarly, even if and when these men discuss the events of the Kosovo war, it cannot be assumed that they are discussing the KSC or the evidence in *Case 06*. These men lived through these events. They were accustomed to discussing that shared history before the creation of the KSC. If the SPO asks the Single Trial Judge to infer that a discussion about events during the Kosovo war is in fact a discussion about *Case 06* evidence or forms part of a plan to interfere with that evidence, that must be the only available inference on the evidence. Again, the SPO has never excluded the other reasonable explanations for any such discussions.

470. *Thirdly*, several of these matters are relevant to an element of the offence of violation of secrecy of proceeding under Article 392, namely whether any disclosure made by **THAÇI** “revealed” information to his visitors.⁶⁹⁸ As set out in Section III.A.2, an offence under Article 392 requires that the information in question is “revealed”. This is different from merely publishing, disseminating, or repeating information. It requires that the recipient of the information did not already have the information. And yet – perhaps based on a mis-reading of the offence – the SPO has made no effort to prove this element of the offence, merely assuming that any information that is expressed is also “revealed”. In fact, there is not only a reasonable doubt, but indeed a strong likelihood, that the information in question was already known to **THAÇI**’s visitors before their DC visits. Much was known to them through their own involvement in the events which form the subject of *Case 06*, and their prior relationship with protagonists of the conflict, including *Case 06* witnesses. In addition, considerable information regarding *Case 06* has been widely disseminated in the Kosovo media and on social media.

⁶⁹⁸ SPO PTB, Section III.B.

471. The SPO's only submissions to date addressing this issue have been to refer to a Trial Panel ruling from *Case 07*:⁶⁹⁹

*Third, the fact that a Witness or Potential Witness under SITF/SPO protection makes his or her protected status publicly known does not mean that the SITF/SPO is no longer required to protect that person or that others are entitled to further disseminate such information. The Panel underscores that the protected status of a Witness or Potential Witness in SITF/SPO investigations derives from the SC legal framework. Accordingly, it is only the SPO or the SC that can waive or alter such protected status in accordance with the relevant provisions. In other words, the authority and responsibility of the SPO and the SC to maintain the protected status of a person does not cease because that status has become known in one of the aforementioned ways or in any other manner not authorised by the SC legal framework.*⁷⁰⁰

This misses the point. The Trial Panel was addressing the question of whether the revelation was “without authorization” – that is, a different element of the Article 392 offence. The Defence does not dispute that information retains its KSC classification regardless of whether it is made public. However, this does not address the *other* element of the offence, namely that the information in question must have been *revealed* by the accused.

472. By ignoring this element, the SPO elides the Article 392 offence with contempt. Article 392 is not merely a more specific form of contempt (defined by Article 393) in which the order breached is that for the confidentiality of information. If that were the case, Article 392 would be redundant. In fact, while Article 393 (contempt) protects the public interest in compliance with court orders, Article 392 protects a different public interest, namely preventing the actual spread of sensitive information. Thus, it does not apply where a conduct formally breaches a court order but does not cause the spread of confidential information. Were it otherwise, an Article 392 offence would have been committed by every person in Kosovo who has discussed any of the *Case 06* Witnesses information that had been made public, for example after **MUSTAFA** and **ZYRAPI** openly discussed

⁶⁹⁹ T.339, 1.2-3 (Witness 7).

⁷⁰⁰ [Case 07 Trial Judgment](#), para.524.

their witness status and evidence in the media.⁷⁰¹ Yet, no person – even **MUSTAFA** and **ZYRAPI** themselves – has been prosecuted for having revealed that information.

473. *Fourthly*, the public nature of the information counters the SPO's case regarding the mental elements of the offences charged: namely that **THAÇI** knew that he was discussing confidential information; that he intended to disclose confidential information to his visitors, and that he intended to obstruct the work of SPO or KSC official persons by doing so. In fact, **THAÇI** merely discussed with his visitors events during the war and how they were raised in *Case 06*, his main source of information being his own experience and relationship with the protagonists of the war, and not *Case 06* disclosure. While it is true that **THAÇI** was bound by confidentiality obligations in *Case 06*, this does not establish as a matter of fact that he *knew* in detail at any given time the current classification of every piece of information relevant to *Case 06*. Tracking such matters in a large, complex international criminal case is extremely difficult, and genuine errors are even more likely to occur in a context where significant amounts of case-related information are being discussed in the national media. While unauthorized publication of confidential information does not change its confidential status, it does make it objectively far harder for a participant in the case to track which information remains confidential and which does not. This distinction becomes even more challenging for an Accused who has a personal knowledge of the facts. This was the situation with a significant amount of the *Case 06* information which had either already been in the public domain prior to receiving a confidential status in *Case 06* – such as the ICTY transcripts of several *Case 06* witnesses – or which was released to the public subsequently - for example by

⁷⁰¹ See Sections VII.A.2.a)(1) and VII.C.2.a)(1).

the witnesses themselves, a number of whom spoke publicly about their involvement in *Case 06*.

474. This situation is relevant because it calls into question whether the SPO has made clear, for each piece of confidential information which it says was unlawfully revealed, whether it has been proved beyond reasonable doubt that (i) **THAÇI**'s knowledge came exclusively from *Case 06* disclosure, and not from his personal knowledge; (ii) **THAÇI** knew that the information was confidential in *Case 06*; (iii) **THAÇI** intended to effect an unauthorized revelation of that information; and (iv) **THAÇI**'s visitors had no prior knowledge of that information. Additionally, the public status of the information also calls into questions the SPO's contended inference that any discussion of these matters by **THAÇI** reflected an intention to obstruct SPO official persons in performing their duties. The SPO appears to infer that intent in part from its assertion that **THAÇI** was acting illicitly in revealing confidential information. If instead it is understood that **THAÇI** was merely discussing with his visitors information which was well-known to them, and in many cases also widely available in Kosovo, this calls into question the SPO's inferences regarding intent to obstruct.

D. THE NON-CHARGED VISITS ARE IRRELEVANT

475. The SPO asserts that the Accused's actions were part of a "*broader pattern of conduct intended to obstruct the Thaçi et al. case*",⁷⁰² and seeks to rely on the four visits outside the Indictment as evidence of that pattern: the visits of 4 August 2023 by Sami LUSHTAKU and Isni **THAÇI**,⁷⁰³ of 15 September 2023 by Milaim CAKIQI, Idriz **THAÇI** and Gani **THAÇI**,⁷⁰⁴ of 22 September 2023 by Milaim

⁷⁰² Indictment, para 8.

⁷⁰³ P00111_ET.

⁷⁰⁴ P00112_ET.

AHMETAJ;⁷⁰⁵ and of 1 October 2023 by Blerim THAÇI and Isni THAÇI⁷⁰⁶ (the “Non-Charged Visits”).

476. The Defence maintains its position that this material is not relevant or probative.⁷⁰⁷

477. In any event, the SPO’s contention that these visits show a ‘pattern’ of conduct is unconvincing.

478. *First*, the evidence does not establish a pattern. The SPO Transcripts of the Non-Charged Visits are unreliable.⁷⁰⁸ A body of unreliable forensic material cannot be made *more* reliable simply by expanding its size. The non-transcript evidence also fails to establish a pattern. For instance, regarding the visit of 22 September 2023, contrary to the SPO’s allegations,⁷⁰⁹ the evidence makes clear that THACI did not print the “[REDACTED]” document⁷¹⁰ and discuss it with AHMETAJ.⁷¹¹

479. *Second*, far from revealing systematic obstructive conduct, the material suggests that conversations during the Non-Charged Visits were largely discursive in nature. According to the SPO Transcripts, THAÇI discussed the *Case 06* proceedings in general terms,⁷¹² describing them as politically motivated: “*this is political, nothing else*”,⁷¹³ and asked his visitors for their impressions of the proceedings.⁷¹⁴ When the subject of witness testimony arose, THAÇI’s remarks were general in nature;⁷¹⁵ he noted, for instance, that a witness who had previously testified had told the truth: “*However, when he came here, he put it right.*”

⁷⁰⁵ P00113_ET.

⁷⁰⁶ P00114_ET.

⁷⁰⁷ See F00688, paras 133-148.

⁷⁰⁸ Section VI.A.

⁷⁰⁹ *Contra* SPO PTB, para.171.

⁷¹⁰ P00216.

⁷¹¹ See Section VI.B.2 above.

⁷¹² P00113_ET p.77, l.11-12; P00111_ET, p.21, l.15-18; P00112_ET, p.226, l.1-8.

⁷¹³ P00114_ET, p.93, l.6-8.

⁷¹⁴ P00114_ET, p.84, l.24 to p.85, l.2.

⁷¹⁵ P00111_ET, p.22, l.1-7.

The thing is that he told the truth".⁷¹⁶ Moreover, the Non-Charged Visit conversations concerned **THAÇI**'s intended defence. For instance, **THAÇI** told his visitors *"The lawyers will ask him, "Was your situation similar to the one Remi described?". That's it,"*⁷¹⁷ and *"He is ideal because the lawyers now - ",*⁷¹⁸ *"will he meet with the lawyers in [Indiscernible] there?"*⁷¹⁹

480. *Third*, what the SPO Transcripts of the Non-Charged Visits actually show is the opposite of obstructive intent, since according to them, **THAÇI** repeatedly expressed the view that witnesses should tell the truth remarking, for instance, that a witness *"was very good. He just spoke the truth."*⁷²⁰ and that *"whoever is set to come here, has it very easy. Simply [tell] the truth [...] He said, 'How did he turn out to be so wise? [Indiscernible]. He said, 'No, how did he turn out so convincing?'[...] it couldn't be any easier because he just told the truth. That's all. And he had no fear."*⁷²¹ This is inconsistent with the conduct of someone seeking to manipulate witness testimony. On the contrary, **THAÇI** wanted the truth to come out because he believed it would work in his favour: *"He did good. And he did good"*⁷²², *"No, in the sense, if they just tell the truth [...] Just the truth. And what do these prosecutors have then?"*⁷²³

481. *Fourth*, it is noteworthy that the SPO has never precisely defined what conduct it claims constitutes the alleged "pattern". Certainly it cannot be a pattern of obstructing official persons, since the SPO includes the 3 September Visit in this claim and yet **KUÇI** is not charged under Article 401.

⁷¹⁶ P00114_ET, p.51, l.5-7.

⁷¹⁷ P00114_ET, p.54, l.18-22.

⁷¹⁸ P00114_ET, p.200, l.10-14.

⁷¹⁹ P00114_ET, p.75, l.20-25.

⁷²⁰ P00111_ET, p.396, l.1-4.

⁷²¹ P00112_ET, p.156, l.18 to p.157, l.7.

⁷²² P00112_ET, p.206, l.24 to p.207, l.5.

⁷²³ P00112_ET, p.231, l.19-22.

482. In fact, the only actual “pattern” shown by the Non-Charged Visits is a complete lack of any witness interference following these visits. The SPO has never explained why, if **THAÇI** repeatedly gave instructions to pass on to witnesses, no result ever eventuated.

E. FLAWS IN THE SPO’S INFERENCES OF INTENT

483. The evidence in this case contains no direct evidence of an intent to reveal protected information or obstruct any SPO official in official duties. The SPO’s case therefore depends on proving intent via inferences. But across the charges, the SPO’s approach to such inferences is consistently flawed.

484. Most fundamentally, the SPO ignores the principle enshrined in Rule 140(3) that a conviction may only rest on an inference if it “*is the only reasonable one that could be drawn from the evidence presented*”.⁷²⁴ The SPO’s case relies on inferences, but it does nothing to discount *other reasonable* (and often *more reasonable*) inferences. No conviction can result from that approach.

485. To give one example: the SPO claims that **THAÇI**’s visitors willingly embraced instructions from him and left the DC with the intent to contact *Case 06* witnesses and convey **THAÇI**’s instructions to them. It asserts that this can be inferred from instances in which the SPO Transcripts present the visitors as agreeing (or not disagreeing) with words allegedly spoken by **THAÇI**. Yet nowhere has the SPO ever addressed the possibility that **THAÇI**’s visitors may have *expressed* agreement regardless of their genuine intentions, for example as a matter of politeness. Such an inference is clearly reasonable given the esteem in which **THAÇI** is held by his visitors. Moreover, given that **THAÇI** is detained thousands of kilometres from his home, visitors may be understandably

⁷²⁴ See paragraph 248 above.

reluctant to create conflict or show disrespect during a rare opportunity for him to spend time with friends.

486. The SPO also selectively ignores facts that work against such an inference. There is no evidence that *any* discussion ever eventuated with any *Case 06* witness regarding *Case 06* testimony. If **THAÇI**'s visitors all left the DC with intent to have such discussions, it would be peculiar that not a single one of them did so. The SPO's case ignores this, apparently depending on an assumption that such discussions did occur but have merely not been proven. However, the SPO must *prove* its case: if it asks the Single Trial Judge to proceed on the basis that *Case 06* witnesses were asked to modify their testimony, then it must prove this. If no such evidence exists, it must explain why the Single Trial Judge should discount the clearly reasonable inference that there never existed any plan or intention to engage in such conduct.

487. Yet the SPO has not explained why the Single Trial Judge should rule out the reasonable inference that **THAÇI**'s visitors never intended to take any action: that *even if* the SPO Transcripts are correct about **THAÇI** giving "instructions", that his visitors simply nodded and smiled to be polite; and left with an intent *to do nothing*.

488. A second example of poorly justified inferences relates to the SPO's repeated claim that **THAÇI** and his visitors must have been plotting witness interference because their recorded conversations contained whispering. The SPO asks the Single Trial Judge to infer from the act of whispering that a speaker must have had a guilty mind. However, the SPO case is also founded on the assumption that **THAÇI** and his visitors did not know they were being recorded. And there is no evidence in the case that any guard in the DC understands Albanian. It is therefore unclear, and has never been explained by the SPO, why **THAÇI** and his visitors would whisper to conceal their discussions from the SPO or DC

guards. It is more plausible that whispering occurred to keep their conversations private *vis-à-vis* the other Albanian speakers potentially within earshot: that is, the other KSC detainees and/or their visitors. This would not support an inference that whispering demonstrates an illegal conspiracy.

489. The SPO's case is replete with premises of this kind. The SPO asks the Single Trial Judge to draw an inference; but fails entirely to explain away other reasonable inferences which are available on the evidence.

490. Regarding the charges of obstructing a public official in the performance of official duties, additional systematic flaws are apparent in the SPO's case regarding intent. On this charge, the SPO has never even attempted to demonstrate that any of the specific elements of the offence were intended. Instead, the SPO presents (i) arguments concerning a *different* intent: that is, an intent to contact and give instructions to witnesses; and/or (ii) arguments concerning some vague and undefined intent to hinder the *Case 06* proceedings. Neither of these arguments addresses the elements of the offence that must have been intended in order to establish an offence under Article 401(2) (including by use of inchoate modes of liability).

491. Indeed, the SPO has not clearly explained how it understands the connection between the conduct which it alleges was planned (giving instructions to SPO witnesses about their testimony) and the result required under Article 401(2) (obstructing an official person in performing official duties). To satisfy the required *mens rea* for obstruction of an official person (or an attempt, agreement or incitement to so obstruct), the SPO must prove beyond a reasonable doubt that **THAÇI** acted with the intent to physically obstruct or render impossible a concrete official task being performed by a natural SPO or KSC official.

492. Lacking any evidence that **THAÇI** targeted an official task or intended to prevent an investigator or judge from doing their job, the SPO initially fell back

on a completely self-referential premise: it asserted that **THAÇI** intended to obstruct SPO officials *because* he intended his conduct to cause SPO officials to spend time and resources investigating him for obstructing them.⁷²⁵ This was an entirely circular argument which manufactured a crime out of the SPO's own action. By such reasoning, any person investigated by the SPO would be treated as having the required intent for this offence. In her Confirmation Decision, the Pre-Trial Judge rejected this aspect of the SPO's case:

*[...] the use of resources by investigative or prosecutorial authorities to respond to criminal activity undermining their work is the normal and expected course of action, and is not necessarily evidence of obstruction.*⁷²⁶

493. Accordingly, while the SPO did maintain this argument in its Pre-Trial Brief,⁷²⁷ it now appears to principally rely on an argument that the conduct of **THAÇI** and his visitors:

*[...] threatened the ability of the KSC/SPO to obtain accurate and truthful testimony of the witnesses concerned, with resulting potential impacts on the integrity, course and conduct of proceedings in Case 6, as well as on the wellbeing and circumstances of the targeted witnesses. The Accused's actions also resulted in the deferral and delay of witness testimony.*⁷²⁸

494. This cannot suffice. First, even if the "conduct" in question *did* threaten these outcomes (which is disputed), that is different from demonstrating that **THAÇI** and his visitors *intended* that outcome. The SPO has never produced any evidence suggesting such an intention on the part of **THAÇI** or his visitors. Secondly, no SPO or KSC official is identified as the person whose work was intended to be obstructed. Thirdly, "*obtain[ing] accurate and truthful testimony*" may be an objective of the SPO and KSC, but it is not an official duty of a specific KSC official in which that term is used in Article 401.⁷²⁹ Fourthly, as set out above,

⁷²⁵ KSC-BC-2023-12/F00028/A01, para. 27.

⁷²⁶ Confirmation Decision, para. 191.

⁷²⁷ SPO PTB, para.220: "*[...] significant SPO time and resources were diverted to addressing the actual and potential consequences of the Accused's conduct.*"

⁷²⁸ SPO PTB, para.220.

⁷²⁹ Section III.A.1.b).

“obstruction” requires more than hinderance or delay to an official duty: the SPO would need to show that the intention of the Accused was to *prevent* an official from carrying out some specific task.

495. The facts alleged by the SPO – even if they could be established beyond reasonable doubt - are so far from meeting these requirements that the SPO has not even attempted to explain how they could. The Defence maintains its position that the SPO Transcripts are not a reliable record of what occurred during the DC visits. However, even those Transcripts include no mention of any SPO or KSC official and never speak of any official duty which is to be hindered, let alone obstructed. Even a plot to suborn perjury – as alleged by the SPO – would not meet these requirements. But the Defence also emphasizes that no such plot has ever been proved. The SPO’s own Transcripts never show any indication of an intention for witnesses to lie: to the contrary, the Transcripts repeatedly show **THAÇI** as having emphasized the importance of witnesses testifying clearly and truthfully.

496. The specific evidence on these matters regarding each of the charged visits is addressed in the following section of this brief.

VII. THE CHARGED VISITS

A. *THE FAZLIU VISIT OF 2 JULY 2023*

497. The SPO alleges that during the 2 July 2023 Visit, **THAÇI** revealed confidential information to **FAZLIU** regarding SPO witnesses, and provided instructions that **FAZLIU** was to convey to **MUSTAFA** about how he should testify in *Case 06*, via a meeting between **MUSTAFA** and **FAZLIU**’s son, Fahri **FAZLIU**.⁷³⁰ The SPO

⁷³⁰ Indictment, paras 9-10.

alleges that on 3 July 2023, Fahri FAZLIU contacted **MUSTAFA** by text message to arrange such a meeting.⁷³¹

498. Based on these allegations, the SPO has brought three sets of charges against **THAÇI**.⁷³²

- i. Count 1 concerns obstruction of official persons in performing official duties under KCC Article 401(2). As explained in Section IV.C, the modes of liability charged are legally incoherent but refer to attempt, agreement (Article 35) and incitement (Article 32(1) and (3)).
- ii. Count 4 charges the completed commission of an offence under KCC Article 392(1): violating secrecy of proceedings.
- iii. Count 8 charges the completed commission of contempt of court under KCC Article 393.

499. The SPO has failed to establish these charges beyond a reasonable doubt.

1. Count 1, Obstruction of official persons in performing official duties

500. **THAÇI** is charged with attempted obstruction, agreement to commit an attempted obstruction; and incitement to commit an attempted obstruction.

501. The constitutive elements of the offence of obstruction under KCC Article 401(2), required for the *completed commission* of this offence, are the following: (i) the Accused participated in a group; (ii) the group undertook common action, namely undertook a single unified physical action, while together in one location; (iii) an official person – understood as a natural person – was obstructed, *i.e.* halted or prevented, in performing specific tasks part of his or her official role, as a result of the common action; (iv) all members of the group acted

⁷³¹ Indictment, para.10.

⁷³² Indictment, para.46.

with direct or eventual intent, *i.e.* they were aware that the target of the common action was an official person acting in execution of an official duty and they intended to undertake common action which would or may result in the obstruction of the official duty.⁷³³

502. As a preliminary point, the Defence reiterates that:

- i. Count 1 of the Indictment is defective because the SPO has not identified which specific natural official persons and which specific tasks were the object of attempted obstruction, and how these tasks were to be obstructed.⁷³⁴
- ii. The SPO has applied an incorrect, extensive interpretation of Article 401 distorting the intended meaning of that provision to match the facts at hand and thus contravening the interpretation of this Article by Kosovo doctrine and case law, the principle of legality in its variation of *lex stricta*, the principle of foreseeability. This interpretation must be rejected in accordance with the principle *in dubio pro reo*.⁷³⁵
- iii. The modes of liability in Count 1 are incoherent. The charges relating to agreement and incitement, in particular, are defective and must be struck out.⁷³⁶

Count 1 should be dismissed for these reasons. The following submissions are made in the alternative.

⁷³³ Section III.A.1.

⁷³⁴ Section IV.B.

⁷³⁵ Section III.A and III.C.1.b).

⁷³⁶ Section IV.C.

a) Attempt

503. As elaborated above,⁷³⁷ in order to establish an attempt under Article 401(2) and Article 28, the SPO must prove that: (i) a group of persons existed; (ii) each member of the group intended the actual commission of the crime,⁷³⁸ *i.e.* intended to take common action and that it result in the official person's official duties actually being obstructed; and (iii) they took action toward the commission of the offence – that is, the common action of the group was initiated through something amounting to more than preparatory acts – but the offence was not completed.

504. In the instant case, none of these elements have been proven regarding **THAÇI**, **FAZLIU** and Fahri FAZLIU.

(1) There was no “FAZLIU Group”

505. The Defence submits that the SPO has failed even to establish the existence of a “FAZLIU Group”. For the reasons explained above in Section III.A.1.d), the correct understanding of “group” in Article 401(2) is that it is based on the physical collocation of at least three persons who share a certain intent. No such group ever existed in respect of Count 1. The SPO alleges that the group consisted of **THAÇI**, **FAZLIU** and Fahri FAZLIU,⁷³⁹ but during the Indictment period, there is no evidence that these three individuals were ever *present* in the same location as each other. Fahri FAZLIU was not present during the 2 July Visit.⁷⁴⁰ This simple observation is enough to disprove the existence of a group.

⁷³⁷ Section III.B.2.

⁷³⁸ The SPO does not appear to dispute that it must prove that each member of the group had such an intent - see for example SPO PTB, para.211, claiming that “*the group members acted jointly to pursue the obstructive purpose*”.

⁷³⁹ Indictment, para.23; SPO PTB, para.210. The SPO PTB gives no explanation as to what features connect these three men such that they constitute a “group”, implicitly suggesting that a “group” can be constituted by any three individuals at all. Such an interpretation would render the concept of a group entirely meaningless.

⁷⁴⁰ P00008.

506. Even if the Single Trial Judge rejects the Defence submission that a group must be physically co-located, there nonetheless can be no “FAZLIU Group”: there is no evidence of any *contact* between Fahri FAZLIU and **THAÇI**, and as elaborated below at Section VII.A.1.a)(2), there is no indication that a shared intent existed between these three men either to act together, or to obstruct SPO or KSC officials.
507. The “FAZLIU Group” as alleged by the SPO is merely three individuals. Two of them are father and son; two of them met in the DC on 2 July 2023. There is no “group” of three persons within the meaning of that term in Article 401(2).
- (2) The alleged members of the group did not intend to take common action to obstruct the work of the KSC/SPO Officials.
508. The SPO alleges that **THAÇI**, **FAZLIU** and Fahri FAZLIU shared a common objective of passing “instructions” from **THAÇI** to **MUSTAFA**, to “influence” his testimony.⁷⁴¹
509. However, (a) this factual allegation has not been proven beyond reasonable doubt, and even if it had been established, it would not amount (b) to an intention to take “common action” within the meaning of that term under Article 401(2), and (c) to obstruct an official person in the performance of official duties.
- (a) The SPO has not proved that the members of the alleged group intended to influence MUSTAFA’s testimony*
510. *Firstly*, the Defence notes that the foundation of the SPO’s allegations concerns the intention of **THAÇI**. The SPO alleges that **THAÇI** intended to influence **MUSTAFA**’s testimony, and that he induced **FAZLIU**, and through him, Fahri FAZLIU, to intend the same. However, the SPO has not even proved beyond reasonable doubt that **THAÇI** had this intention.

⁷⁴¹ Indictment, paras 7,9-10,24.

511. The SPO's principal evidence of **THAÇI**'s intent is the SPO Transcripts. They are unreliable,⁷⁴² and therefore not capable of proving **THAÇI**'s intent beyond reasonable doubt.
512. The SPO also overstates the extent to which the contents of the SPO Transcripts would suggest such an intention (even if they were reliable). Significant portions of the SPO Transcripts of the 2 July Visit, including portions which the SPO seeks to frame as the provision of illicit instructions, are better understood as conversations recalling the war. Such reminiscences about Kosovo, the KLA, and the conflict are to be expected, given that **THAÇI**'s life was (and continues to be) dominated by a trial concerning those events. **FAZLIU** is a longstanding trusted friend, with whom **THAÇI** can share recollections about those events. In his visitor application form, **FAZLIU** specified that he has strong social and family links with **THAÇI** and that they have been friends for thirty years.⁷⁴³
513. In this context, any comments from **THAÇI** regarding the conflict in Kosovo, the KLA or the OZs⁷⁴⁴ cannot be assumed to be suggestions intended to modify **MUSTAFA**'s evidence. Such comments simply represent **THAÇI**'s understanding of the events and memories of a shared past, which, in his view, is the truth. For example, when the SPO Transcripts indicate that **THAÇI** mentioned Adem Demaçi, no specific instruction can be inferred. **THAÇI** simply acknowledges the important role he played during the war.⁷⁴⁵ Similarly, when **THAÇI** refers to *communiqués* as propaganda tools, he is stating a fact.⁷⁴⁶ The formulation allegedly used in no way suggests that this is an instruction.

⁷⁴² Section VI.A.

⁷⁴³ P00023_ET, pp.SPOE00363353, SPOE00363355. See also P00105_ET, pp.6-7.

⁷⁴⁴ P00105_ET, pp.41,48-51.

⁷⁴⁵ P00105_ET, p.42, l.4, p.49, l.13: "HASHIM **THAÇI**: [Whispers] "The boss was **DEMAÇI** [Indiscernible] [...]."

⁷⁴⁶ P00105_ET, p.50, l.17: "HASHIM **THAÇI**: -- [Whispers] the communiques were propaganda."

514. The same is true in respect of the SPO allegations that **THAÇI** spoke of **MUSTAFA**'s testimony as being "decisive".⁷⁴⁷ Given that **MUSTAFA** was the KLA Commander of the Llap OZ,⁷⁴⁸ one of only seven KLA OZs during the conflict, and that he was one of only three zone commanders called by the SPO to testify, this is simply an observation of fact.
515. More generally, these examples highlight that the events described during the visit are neither fabricated nor exaggerated. They are entirely consistent with **THAÇI**'s position since the beginning of the KSC proceedings in *Case 06*.⁷⁴⁹ As elaborated further below at paragraphs 532-534, there is no indication anywhere in the SPO's evidence (even within its own Transcripts), that **THAÇI** sought to have **MUSTAFA** lie.
516. Lastly, concerning the SPO's allegations that **THAÇI** whispered,⁷⁵⁰ the Defence observes that this is not a basis for inferring illicit intent. As explained above,⁷⁵¹ the SPO has not explained why **THAÇI** would whisper to avoid detection when he did not know that his visits were being recorded.
517. *Secondly*, the SPO has not proved beyond reasonable doubt that **FAZLIU** had any intent to influence **MUSTAFA**'s testimony. Again, the primary source of the SPO's evidence is the SPO Transcripts, which are unreliable.⁷⁵² However, even

⁷⁴⁷ P00105_ET, p.40, l.16: "*HASHIM THAÇI: He is very decisive. I am being honest with you*". Contra SPO PTB, para.36.

⁷⁴⁸ P00170, p.125824, para.1; 1D00080_ET.

⁷⁴⁹ Compare, *inter alia*, P00105_ET, pp.42,49, with 1D00048, pp.DHT1200956-DHT1200957; 1D00049, pp.DHT1200802-DHT200803 (role of Adem DEMAÇI); Compare P00105_ET, pp.41,58, with 1D00050, pp.DHT1201354, DHT1201388, DHT1201390, DHT1201512-DHT1201513, DHT1201525, DHT1201528, DHT1201549; 1D00049, pp.DHT1200801, DHT1200806, and also 1D00051, p.DHT1201037 (authority of zone commanders in the KLA); Compare P00105_ET, p.50, with 1D00049, pp.DHT1200851-DHT1200852; 1D00050, pp.DHT1201474, DHT1201476, and 1D00051, pp.DHT1201046-DHT1201047 (*Communiqués*).

⁷⁵⁰ SPO PTB, para.43.

⁷⁵¹ Para.488.

⁷⁵² Section VI.A.

if the Single Trial Judge treats the SPO Transcripts as reliable, their contents do not prove such intent on the part of **FAZLIU**.

518. The SPO claims that **FAZLIU** “engaged with **THAÇI**’s instructions, providing suggestions and showing his approval, and agreed to convey them to Witness 1, as instructed”.⁷⁵³ However, the passages cited do not support that conclusion.⁷⁵⁴ Those passages merely indicate superficial platitudes from **FAZLIU**, such as “[t]hat’s right”⁷⁵⁵ and “[t]his is why it is a good deed”.⁷⁵⁶ These isolated remarks, without more, do not prove beyond reasonable doubt any intent on **FAZLIU**’s part. As elaborated above,⁷⁵⁷ they show simple politeness.

519. The SPO contends that **FAZLIU** must have intended to influence **MUSTAFA** because he informed **THAÇI** that he had recently seen **MUSTAFA** who was willing to receive instructions.⁷⁵⁸ Nevertheless, the SPO Transcripts do not support that interpretation. Even if **FAZLIU** stated that he had seen **MUSTAFA** “[p]rior to leaving to come here”,⁷⁵⁹ that does not establish any intent. Nor do the SPO Transcripts indicate that **MUSTAFA** was said to be willing to receive instructions. Rather, they say that **FAZLIU** reported **MUSTAFA** as having said that “[i]f they have any messages, they can send them”, this comment having been made only after **FAZLIU** asked **MUSTAFA** if he had any messages for **THACI**.⁷⁶⁰ It cannot be assumed that “messages” means instructions regarding *Case 06*

⁷⁵³ SPO PTB, para.38.

⁷⁵⁴ SPO PTB, para.38, fn.81.

⁷⁵⁵ P00105_ET, p.41, l.22-25: “HASHIM THAÇI: [Whispers very quietly] “In fact, I am unhappy with them because they did not help me, they did not help me neither with money or logistics, nor with weapons, and I was unhappy””, p.42, l.1: “FADIL FAZLIU: “I did everything myself. That’s right”.

⁷⁵⁶ P00105_ET, p.55, l.1-4 (“HASHIM THAÇI: Because he -- if he does this well, [Whispers] he will stop the rest of them, including Hajrullah, Leke, [Indiscernible] KASTRATI and everyone else.”), p.55, l.5 (“FADIL FAZLIU: This is why it is a good deed”).

⁷⁵⁷ Paragraph 485.

⁷⁵⁸ SPO PTB, para.41, fn.94.

⁷⁵⁹ P00105_ET, p.40, l.10.

⁷⁶⁰ P00105_ET, p.40, l.17-20: “FADIL FAZLIU: I asked him “Do you have any messages?”, he said “No”. He said “If they have any messages, they can send them and I will get it done, it is not a problem”. I said, “I believe [Indiscernible]”.

evidence. The SPO has again discounted an alternative reasonable inference - namely that the possible "messages" concerned matters other than the KSC and *Case 06*.

520. Indeed, a similar discussion is found in a later section of the SPO Transcripts, where **FAZLIU** is alleged to have said:

*FADIL FAZLIU: Yes. A friend of my son's had a problem [Indiscernible] with a handgun, pulled out the handgun and shot him in the leg, said something to his friend who [Indiscernible] in masks, wounded the person and fled. "No one will ever catch him, he is an idiot", he said. This one said, "He was the first to point the handgun." Remi said 'Get it done. When you come back from over there, we can sit down and talk, in fact let me know if he has any messages', I said to him 'I will meet up with him, if he has any messages, we can have a coffee once I am back'."*⁷⁶¹

521. This appears to be a summary of the same exchange between **FAZLIU** and **MUSTAFA** regarding messages. Yet, based on the SPO's Transcripts, it appears to refer to a gunshot incident in Pristina, involving a friend of Fahri FAZLIU⁷⁶² and a friend of **MUSTAFA**'s brother (Meriton PAJAZITI, who was injured).⁷⁶³ Indeed, according to reports in Kosovo media, Meriton PAJAZITI, a friend of **MUSTAFA**'s brother, was wounded in a shooting on 23 June 2023 and one of the suspects was reportedly Leutrim KRASNIQI, a friend of the FAZLIU family.⁷⁶⁴ According to the Albanian customary code known as "*Kanun*", a serious wrong committed by one person can lead to retaliation involving their family or clan.⁷⁶⁵ In such situations, as **Witness 7** acknowledged, a "*besa*", a pledge of honour, can be used to deescalate conflict and promote peace.⁷⁶⁶

⁷⁶¹ P00105_ET, p.57, l.9-18.

⁷⁶² P00105_ET, p.57, l.9: "FADIL FAZLIU: Yes A friend of my son s had a problem [...]".

⁷⁶³ P00105_ET, p.52, l.19-20 ("FADIL FAZLIU: I called him to come to a gathering someone got wounded in Pristina. A friend was wounded"), l.24 ("FADIL FAZLIU: -- a friend of Remi's brother.").

⁷⁶⁴ 4D00003_ET; 4D00004_ET; 4D00005_ET; T.470-472 (Witness 7).

⁷⁶⁵ 1D00050, para.88.

⁷⁶⁶ T.472 (Witness 7).

522. This shooting incident was reported in the media on 23 June 2023,⁷⁶⁷ *i.e.* three days before the 26 June 2023 phone contact between Fahri FAZLIU and **MUSTAFA**,⁷⁶⁸ a few days before the alleged 29 June 2023 meeting between **MUSTAFA**, **FAZLIU** and Fahri FAZLIU,⁷⁶⁹ and a few days before **FAZLIU**'s 2 July 2023 Visit to **THAÇI**. **FAZLIU**'s alleged comments regarding **MUSTAFA** and "*messages*" came in the context of his discussion of this shooting incident in which "[a] friend of my son's, had a problem [Indiscernible] with a handgun [...]"⁷⁷⁰ It is therefore reasonable to infer that the potential "*messages*" concerned that incident and were unrelated to *Case 06*.
523. Accordingly, even if they were reliable, the SPO Transcripts do not indicate that **FAZLIU** intended to convey instructions to **MUSTAFA** regarding his testimony. Even if **FAZLIU** had intended to contact **MUSTAFA** through his son,⁷⁷¹ this does not mean that he intended to convey instructions regarding *Case 06*.
524. *Thirdly*, regardless of what was discussed and intended by **THAÇI** and **FAZLIU**, there is no evidence at all regarding the intent of Fahri FAZLIU. Indeed, there is no evidence that he was even aware of his father's discussions with **THAÇI**, much less that he intended to influence **MUSTAFA**'s testimony. The SPO Transcripts contain no evidence on this. There is also no evidence of any contact between Fahri FAZLIU and **THAÇI**.
525. The only conduct attributed to Fahri FAZLIU is his alleged contacts or meetings with **MUSTAFA**. The SPO appears to allege that the required intent on the part of Fahri FAZLIU can be inferred simply from a small number of brief messages

⁷⁶⁷ 4D0005_ET; 4D00003; 4D00004_ET; T.468-T.470 (Witness 7).

⁷⁶⁸ P00180_ET, p.125705; SPO PTB, para.28.

⁷⁶⁹ SPO PTB, para.29.

⁷⁷⁰ P00105_ET, p.57, l.9-10.

⁷⁷¹ SPO PTB, para.42.

between him and **MUSTAFA** on 26 and 29 June and 3 July 2023, in which they twice agreed to meet for a coffee.⁷⁷²

526. This entirely ignores the pre-existing and longstanding relationship between **MUSTAFA** and the FAZLIU family in general, and with Fahri FAZLIU in particular (see Section VI.C.1.a) above). The two have often been in contact. The evidence explicitly shows them communicating for purposes unrelated to *Case 06*, such as [REDACTED].⁷⁷³ Thus, if they did meet on 29 June and 3 July 2023, it could have been to discuss any number of subjects unrelated to *Case 06*.

527. Indeed, as discussed above,⁷⁷⁴ the SPO's own Transcript of the 2 July Visit suggests that meetings between them around this time would have been to address a shooting incident involving a friend of Fahri FAZLIU⁷⁷⁵ and a friend of **MUSTAFA**'s brother⁷⁷⁶ that the two men were trying to resolve and which occurred on 23 June 2023, shortly before the 26 June 2023 phone contact between Fahri FAZLIU and **MUSTAFA**,⁷⁷⁷ the alleged 29 June 2023 meeting between **MUSTAFA**, FAZLIU and Fahri FAZLIU,⁷⁷⁸ and **FAZLIU**'s 2 July 2023 Visit to **THAÇI**. This also explains why a further meeting might have occurred on 3 July 2023.⁷⁷⁹ Accordingly, the SPO has not proved the mental state of Fahri FAZLIU. No intent to "influence" **MUSTAFA** can be inferred from the bare fact that the two friends exchanged messages and may have met. That is clearly not the only reasonable inference available on this evidence.

⁷⁷² Indictment, para.10; P00180_ET.

⁷⁷³ 1D00032; 1D00032_ET.

⁷⁷⁴ Paragraphs 521-522.

⁷⁷⁵ P00105_ET, p.57, l.9.

⁷⁷⁶ P00105_ET, p.52, l.19-20,24.

⁷⁷⁷ P00180_ET, p.125705; SPO PTB, para.28.

⁷⁷⁸ SPO PTB, para.29.

⁷⁷⁹ SPO PTB, para.45.

(b) The alleged intent would not amount to an intent to take common action

528. In any event, even if the Single Trial Judge were to conclude that **THAÇI, FAZLIU** and Fahri FAZLIU intended to arrange for a meeting between the FAZLIU family and **MUSTAFA** in order to influence the latter's *Case 06* testimony, this would not amount to an intention to take "common action" within the meaning of that term under Article 401(2), understood as a physical group acting together in a single location (see Section III.A.1.d).

(c) The alleged intent would not amount to an intent to obstruct an official person

529. Finally, regarding intent, even if the SPO *were* able to demonstrate beyond reasonable doubt that each of **THAÇI, FAZLIU**, and Fahri FAZLIU had intended to influence the testimony of **MUSTAFA** in *Case 06*, and even if the Single Trial Judge considered that this would constitute "common action", the Defence submits that it would nonetheless not amount to an intent to *obstruct an official person in performing official duties* within the meaning of Article 401(2).

530. **MUSTAFA** is not an official person and has no official duties. The Defence accepts that it may be theoretically possible to target an official person indirectly – for example, by harming or threatening to harm a family member – however, it remains the case that the intent to obstruct a specific official person must be proved.⁷⁸⁰ In the present case, no official person has even been identified, let alone shown to be the target of obstructive intentions.

531. The SPO has never identified which official person or official duty is said to have been the target of the alleged attempted obstruction. In its PTB the SPO claims that the conduct "*threatened the ability of the KSC/SPO to obtain accurate and truthful testimony of the witnesses concerned*".⁷⁸¹ Yet, this is not an "official duty", for the

⁷⁸⁰ [Case 07 Appeal Judgment](#), Partially Dissenting Opinion of Judge Ambos, para.12.

⁷⁸¹ SPO PTB, para.220.

reasons which are explained above in Section III.A.1.b). It is also a baseless assertion in factual terms. There is no evidence, even from the SPO's own Transcripts, that **MUSTAFA** would have been instructed to lie or to refuse to speak to the SPO.

532. Indeed, even if certain parts of the discussion were considered to be instructions, **THAÇI** did not request that **MUSTAFA** lie or withhold his testimony from the SPO.

533. According to the SPO Transcript, **THAÇI** advises being concise,⁷⁸² keeping answers short,⁷⁸³ sticking to the facts,⁷⁸⁴ recalls that a witness can correct his prior statement during his preparation session, since once under oath he will be required to tell the truth,⁷⁸⁵ or that he may admit that he does not know or does not remember.⁷⁸⁶ In none of these alleged statements is **THAÇI** asking or suggesting that **MUSTAFA** modify the content of his testimony or provide false testimony. These alleged comments relate solely to the manner of testifying and the procedure. Even if conveyed to a witness, they would not cause obstruction of any KSC or SPO official's duties.

534. Finally, contrary to what the SPO suggests,⁷⁸⁷ none of the statements in question can be considered as any form of pressure.

535. Therefore, the SPO has not proved that **THAÇI**, **FAZLIU** and Fahri **FAZLIU** intended to obstruct an official person in the performance of official duties.

⁷⁸² P00105_ET, p.44, l.2-3: "HASHIM THAÇI: Tell him, "Shorten things, and do not let them open ended".

⁷⁸³ P00105_ET, p.41, l.6-10, p.43, l.7-8,12-13,23, p.47, l.9-10, p.48, l.19.

⁷⁸⁴ P00105_ET, p.41, l.7: "HASHIM THAÇI: [...] Tell him, "Do not philosophise".

⁷⁸⁵ P00105_ET, p.46, l.16 to p.43, l.5.

⁷⁸⁶ P00105_ET, p.56, l.10-13: "HASHIM THAÇI: [Whispers] The other thing, "When you are cornered" tell him, "I don't know, I have no comment, I do not remember". [Normal voice] He will be told "When you are not sure...", this is it. But...".

⁷⁸⁷ SPO PTB, para. 207.

(3) No “common action” of a “group” was initiated

536. The SPO has failed to establish not only the existence of an alleged “FAZLIU Group”, as demonstrated above, but also of any commencement of common action among **THAÇI**, **FAZLIU** and Fahri **FAZLIU** which would have illustrated their intent to convey **THAÇI**’s purported instructions to **MUSTAFA**. None of them took any action which could be considered the commencement of “common action”.

537. The SPO contends that **THAÇI**, **FAZLIU** and Fahri **FAZLIU**, “acted jointly and in synergy”⁷⁸⁸ and appears to argue that sufficient initiation of the common action of a group can be constituted by “(i) **THAÇI**’s and **FAZLIU**’s discussion of, and agreement on, the instructions to Witness 1, and the means by which Witness 1 should be contacted, which entailed having Fahri **FAZLIU** reach out to Witness 1; (ii) Fahri **FAZLIU**’s messages to Witness 1 to arrange a meeting, in line with the plan agreed by **THAÇI** and **FAZLIU**; and (iii) Fahri and Fadil **FAZLIU**’s meeting with Witness 1 on 29 June and again on 3 July 2023, in compliance with **THAÇI**’s instructions.”⁷⁸⁹

538. The Defence submits that these alleged acts cannot be qualified as the commencement of the common action of a group.

539. As set out above in Section III.A.1.d), common action of a group means unified action in a common location.⁷⁹⁰ This is clearly not made out. What the SPO alleges is merely separate (and coordinated) action by individuals, not common action *by a group*.

540. Even if the Single Trial Judge rejects the Kosovo courts’ interpretation of this element, and considers that a group existed, the SPO has not demonstrated that the group initiated a “common action”.

⁷⁸⁸ SPO PTB, para.213.

⁷⁸⁹ SPO PTB, para.213.

⁷⁹⁰ Section III.A.1.d).

541. A verbal agreement, without more, cannot characterise an attempt (see above in Section III.B.2.a). Thus, **THAÇI**'s and **FAZLIU**'s purported agreement on the instructions to **MUSTAFA** and the means by which he should be contacted⁷⁹¹ would be, at most, a preparatory act, but nothing more.
542. To the extent that the SPO seems to rely on conduct subsequent to the 2 July Visit as indicating something beyond preparatory acts, it has failed to even demonstrate that such conduct has any connection with the KSC, *Case 06* or **THAÇI**. The alleged messages and meetings between **FAZLIU**'s family and **MUSTAFA** can, at most, only demonstrate that there was communication between these people,⁷⁹² but says nothing about the *subject* or *purpose* of such contact.
543. The Defence again emphasizes that the ties between **MUSTAFA** and **FAZLIU**'s family are longstanding, close and unrelated to the proceedings before the KSC. **FAZLIU** is a KLA veteran who was active in the Llap OZ ("OZ") under **MUSTAFA**'s command. The two men are from the same region. They share a common past shaped by war and significant family, social, and professional connections. In May 2023, **MUSTAFA** was invited [REDACTED].⁷⁹³ Photographs taken at **FAZLIU**'s home show **FAZLIU**, **MUSTAFA** and **THAÇI** gathered around the same table,⁷⁹⁴ i.e. prior to **THAÇI**'s arrest on 5 November 2020.⁷⁹⁵ **FAZLIU** and **MUSTAFA** are neighbours, their homes in Pristina being just a few hundred meters apart.⁷⁹⁶

⁷⁹¹ SPO PTB, para.213.

⁷⁹² P00180_ET; P00196_ET.

⁷⁹³ 1D00032_ET.

⁷⁹⁴ 4D00001; 4D00002.

⁷⁹⁵ F00740/A01, Fact of Common Knowledge n°2: "[...] the Accused **THAÇI** was arrested on 5 November 2020 and transferred to the Detention Facilities of the KSC".

⁷⁹⁶ T.710-T.711 (KELLY).

544. Data from **MUSTAFA** and Fahri FAZLIU's phones show that their contact was not limited to June or July 2023. They have been in contact on Facebook since at least May 2020,⁷⁹⁷ on WhatsApp since at least May 2022,⁷⁹⁸ and for instance, in April-May 2023, they exchanged messages regarding [REDACTED].⁷⁹⁹
545. During his SPO interview on 18 November 2023, **MUSTAFA** confirmed that **FAZLIU** was his friend and that they continue to see each other.⁸⁰⁰
546. In the context of these longstanding ties, it cannot be assumed that contact between the FAZLIU family and **MUSTAFA** would be related to the proceedings in *Case 06*. The SPO asserts, wrongly, that **FAZLIU** and Fahri FAZLIU met **MUSTAFA** on 29 June and again on 3 July 2023, "*in compliance with THAÇI's instruction*".⁸⁰¹ On the contrary, and as discussed above (paras 526-527), the evidence shows there are reasonable inferences available on the evidence that any such contact was for other reasons.
547. First, while the SPO relies on the meeting of 29 June 2023, this pre-dated the 2 July Visit, which itself refutes the SPO's allegation that this meeting was "*in compliance with THAÇI's instruction*".⁸⁰²
548. Second, regarding the alleged meeting on 3 July 2023, the SPO relies on messages exchanged between Fahri FAZLIU and **MUSTAFA** to argue that they met together with **FAZLIU**;⁸⁰³ however, at most those messages only show a plan to meet, but not that the meeting ultimately took place. Unlike the exchange of 29 June 2023, which included a message from both Fahri FAZLIU and **MUSTAFA**

⁷⁹⁷ 1D00032, p.SPOE00369428. See also T.693, l.14-16 (KELLY).

⁷⁹⁸ 1D00032, p.SPOE00370103.

⁷⁹⁹ 1D00032_ET, p.DHT1200398.

⁸⁰⁰ F00742/A01, Agreed Fact, para.7.

⁸⁰¹ SPO PTB, para.213.

⁸⁰² SPO PTB, para.213.

⁸⁰³ SPO PTB, para.44.

stating “*I am here*” and “*We arrived*”,⁸⁰⁴ there is no message confirming arrival on 3 July 2023. In the absence of geolocation data of the phones and contemporaneous confirmation of the meeting, neither the exchanged messages nor the map showing the route between **FAZLIU**’s house and the Route 66 Café⁸⁰⁵ establish beyond reasonable doubt that **FAZLIU**, Fahri **FAZLIU** and **MUSTAFA** actually met on 3 July 2023.

549. Third, even assuming that such a meeting took place, as explained above,⁸⁰⁶ the evidence shows that the likely reason for the meeting was to arrange a *besa* in relation to a gunshot incident involving a friend of **MUSTAFA**’s brother and a friend of Fahri **FAZLIU**. The SPO Transcript itself shows that a previous meeting between **FAZLIU** and **MUSTAFA** had been held for this purpose;⁸⁰⁷ **FAZLIU** expressly referred to that incident during his conversation with **THAÇI**. The same incident was also addressed during the cross-examination of **Witness 7**.⁸⁰⁸

550. Accordingly, the evidence provides a reasonable explanation for contact between Fahri **FAZLIU** and **MUSTAFA** around this time.

551. Therefore, the SPO has failed to prove beyond reasonable doubt that any meeting of 3 July 2023, even if it occurred, had anything to do with **MUSTAFA**’s *Case 06* evidence.

552. Finally, there is no evidence in this case that **MUSTAFA** was interfered with in any way regarding his involvement in *Case 06*.

553. When the SPO searched the phones of **MUSTAFA**, **FAZLIU** and Fahri **FAZLIU**, it did not find any such evidence. The exchanges between **MUSTAFA** and Fahri

⁸⁰⁴ P00180_ET, p.125705.

⁸⁰⁵ P00196.

⁸⁰⁶ Paragraphs 521-522.

⁸⁰⁷ P00105_ET, pp.52,57.

⁸⁰⁸ T.467-T.474 (Witness 7).

FAZLIU contained no reference to *Case 06* or to his testimony.⁸⁰⁹ No evidence of communication between **MUSTAFA** and **FAZLIU** was found.⁸¹⁰

554. The absence of interference was confirmed by **MUSTAFA** himself, who told the SPO that he had not been subject to any interference and was not someone who could be easily interfered with or influenced: *"What I said before the Court was public and was related to the past. No one has interfered regarding me, and no one can interfere"*, adding *"I know that it is easy to understand for whoever investigated me that I'm not a person who can be influence"*.⁸¹¹ This was also confirmed by **Witness 7**.⁸¹²

555. **MUSTAFA**'s testimony remained consistent both before and after the alleged contacts with **FAZLIU** family.⁸¹³ Contrary to the Single Judge's findings, **MUSTAFA** did not *"[deviate] from his previous SPO interview on points which conformed to the instructions Mr Thaçi gave to Mr Fazliu during the 2 July 2023 Visit, namely regarding [REDACTED]"*.⁸¹⁴ During his preparation session of 6 July 2023, **MUSTAFA** confirmed that he stands behind all of his prior statements, including his public ones. He confirmed that the prior statements are accurate, and he had no corrections, changes or clarifications to make.⁸¹⁵

⁸⁰⁹ P00180_ET; 1D00032_ET.

⁸¹⁰ T.688, 1.22-T.689, 1.2 (KELLY): *"Q. Okay. Now, I'd like to turn to the extraction concerning Mr. Fadil Fazliu and Rrustem Mustafa. You were tasked to extract data from Fadil Fazliu's phone. And while you were searching his phone, you did not identify any communications between Mr. Fadil Fazliu and Mr. Mustafa; is that correct? A. That's correct, sir."*

⁸¹¹ F00742/A01, Agreed Fact, paras 5, 7.

⁸¹² T.480, 1.20-25-T.481, 1.1 (Witness 7): *"Q. But Witness 1 was clear, was he not, that no one had interfered with him? A. That is correct. Q. And, indeed, can I finally suggest this, that nor did Witness 1 in any interview, at any stage, suggest that anybody had even attempted to interfere with him or obstruct him; is that right? A. That is right."*

⁸¹³ *Contra* Confirmation Decision, para.128; SPO PTB, para.34.

⁸¹⁴ Confirmation Decision, para.128.

⁸¹⁵ F00767/A01, Agreed Fact n°2.

556. Regarding the communiqués, **MUSTAFA** had already told the SPO, on 14 January 2019, that “[REDACTED]”.⁸¹⁶ His later testimony before the KSC, in which he stated that the communiqués contained “*doses of propaganda*”,⁸¹⁷ is in line with this position. This analysis is further corroborated by other witnesses.⁸¹⁸ Likewise, regarding appointments within the OZ, **MUSTAFA** had already maintained that the zone commanders played a central role in this process. In the book *Commander Remi Speaks*, he explained, regarding the Llap OZ, that “*sometime in April [1998]”, he “appointed people in charge for the villages”, observing that “[t]he Staff was working in establishing its true structure in the town. Even before we got up to the mountains we already had a complete structure”*.”⁸¹⁹ During his testimony before the KSC, on 11 July 2023, he did not alter this version of events, but simply clarified it by stating that certain appointments were then approved by the General Staff.⁸²⁰ This position remains consistent with his previous statement as well as with other witnesses, according to whom authority remained primarily in the hands of the zone commanders.⁸²¹
557. The SPO itself, in *Case 06*, at the end of **MUSTAFA**’s live testimony, requested the admission of prior statements which had been put to him during his examination in chief, observing that “*throughout his testimony before the KSC, W04746 repeatedly stood behind his prior statements, and noted that he would in fact prefer to rely on them as they were proximate in time.*”⁸²²

⁸¹⁶ F00740/A01, Fact of Common Knowledge n°52, referring to 082894-TR-ET Part 4, pp.1-2.

⁸¹⁷ F00740/A01, Fact of Common Knowledge n°46, referring to KSC-BC-2020-06 20230712 ENG RED, pp.5558-5559.

⁸¹⁸ 1D00050, pp.DHT1201476-DHT1201477.

⁸¹⁹ 1D00080_ET, p.DHT1200548-ET.

⁸²⁰ F00740/A01, Fact of Common Knowledge n°45, referring to KSC-BC-2020-06 20230711 ENG pp 5468-5507, pp.5482,5484-5485.

⁸²¹ F00740/A01, Fact of Common Knowledge n°45, referring to KSC-BC-2020-06 20230711 ENG pp 5468-5507, pp.5481, 5488, 5500. See also 1D00050, pp.DHT1201384, DHT1201388.

⁸²² 1D00046, paras 7-8, fn.15-17. See also 1D00047.

558. Thus, far from showing any interference, the evidence demonstrates that **MUSTAFA** maintained the same account of events throughout. It is clear that no interference took place. While the Defence acknowledges that the charge of attempt does not *per se* require demonstrating a result, what is to be expected is some kind of explanation as to why the intended result was not achieved. In the present case, the SPO has never explained why the concerted and coordinated efforts it alleges were made to influence **MUSTAFA's** testimony all failed so completely. The Defence submits that the obvious explanation is that no such efforts were ever made.

559. For the above reasons, the Defence submits that the SPO has failed to prove beyond reasonable doubt that **THAÇI** attempted to obstruct an official person's official duties in relation with the 2 July Visit.

b) Agreement

560. An agreement under Article 35 requires that (i) the perpetrator agrees with one or more other persons to commit a criminal offence and (ii) one or more of these persons undertakes any substantial act towards the commission of the criminal offence.

561. For the reasons set out above in Section III.B.3.a), this mode of liability cannot be charged in connection with Article 401(2). Additionally, for the reasons set out in Section IV.C.2, the charge based on this mode of liability is incoherent and must be dismissed. However, if the Single Trial Judge does not dismiss this mode of liability, the Defence submits that its requirements are not met.

562. First, unless the Single Trial Judge corrects the interpretation of "common action" adopted in previous KSC cases and by the SPO, he should rule that an

offence under Article 401(2) cannot be charged using Article 35 agreement, since it would be duplicative.⁸²³

563. Secondly, the requirements have not been proven by the SPO. As discussed above,⁸²⁴ the SPO has failed to prove that **THAÇI** and the other alleged members of the group agreed to obstruct the work of KSC/SPO officials. In particular: (i) no official persons were targeted; (ii) **THAÇI** did not give any instructions that **MUSTAFA** lie or withhold his testimony, and (iii) the SPO has not demonstrated that **FAZLIU** and Fahri FAZLIU agreed and intended to convey his alleged instructions to **MUSTAFA**. The Defence stresses that an agreement under Article 35 needs to cover every material element of the offence. In the instant case, an agreement to obstruct an official person's official duty would need to include the obstruction of the SPO, which means that each member of the group would need to agree that the target of the obstruction is the SPO, which is clearly not the case here. At no point **THAÇI**, **FAZLIU** and Fahri FAZLIU expressed the will to obstruct the work of the KSC/SPO or discussed the purported impact of any contact with **MUSTAFA** on the work of the KSC/SPO. Thus, even if **THAÇI** and the two other alleged members of the group had agreed to talk to a witness, this would be insufficient to characterise an agreement to obstruct the work of KSC/SPO officials.

564. Besides, neither **THAÇI**, **FAZLIU** nor Fahri FAZLIU undertook any *substantial* act towards the commission of the criminal offence. The SPO has never explained which conduct it claims amounts to "substantial acts" for the purposes of this count. However, the facts alleged in the indictment cannot meet this requirement since (i) an agreement alone, without more, cannot be qualified as a "substantial act",⁸²⁵ and (ii) the SPO has failed to prove that the contacts between **FAZLIU**,

⁸²³ Section III.B.3.

⁸²⁴ See Section VII.A.1.a)(2).

⁸²⁵ Section III.B.3.a).

Fahri FAZLIU and **MUSTAFA** concerned *Case 06* proceedings and had any relationship to the discussions with **THAÇI** during the DC visits.⁸²⁶

565. This mode of liability should therefore be dismissed.

c) Incitement

566. An incitement is materialised by psychological influence on another person with a view to causing that other person to commit a criminal offence.

567. **THAÇI** is charged under Article 32(1) and Article 32(3). However, as explained above, Article 32(3) does not apply since obstruction under Article 401(2), (3) and (5) is not an offence punishable by imprisonment of *at least* five years.⁸²⁷ Accordingly, this mode of liability should be dismissed.

568. Regarding Article 32(1), this provision is not applicable, since the SPO does not allege the completed commission of Article 401(2) obstruction, but only that it was attempted.⁸²⁸

569. Besides, even if the SPO had charged **THAÇI** under Article 32(2), incitement would still not be established. That is because the SPO has not proved that any conduct which did occur after the 2 July Visit was caused by **THAÇI**.

570. The evidence indicates that it was **FAZLIU** who first raised the prospect of passing messages and meeting **MUSTAFA** upon his return from his DC visit⁸²⁹ and, as noted above, the possibility of such a meeting had already been discussed with **MUSTAFA** before the visit to **THAÇI**.⁸³⁰ Thus, the idea of a meeting with

⁸²⁶ Section VII.A.1.a)(2).

⁸²⁷ Section III.B.4.

⁸²⁸ See para. 128.i above.

⁸²⁹ P00105_ET, p.40, 1.14-24: "FADIL FAZLIU: We had a coffee there at 66 and we talked. [Indiscernible], I told him "We are going to see them". HASHIM THAÇI: He is very decisive. I am being honest with you. FADIL FAZLIU: I asked him "Do you have any messages?", he said "No". He said "If they have any messages, they can send them and I will get it done, it is not a problem". I said, "I believe [Indiscernible]". HASHIM THAÇI: I can't, because he -- when will you return? FADIL FAZLIU: Tomorrow. I will find him, in fact, he was not with -- I will meet him. HASHIM THAÇI: I don't think you can --".

⁸³⁰ P00105_ET, p.57, 1.9-21: "FADIL FAZLIU: Yes. A friend of my son's, had a problem [Indiscernible] with a

MUSTAFA did not originate and was not strengthened by **THAÇI**. At most, the evidence shows that **FAZLIU** was already contemplating meeting **MUSTAFA** upon his return from The Hague independently of any discussion with **THAÇI**. This is consistent with the fact that the meetings in question were concerned with the organising of a “*besa*” to settle the dispute affecting friends of the two families.

571. Accordingly, this mode of liability should be dismissed.

2. Count 4, Violating secrecy of proceedings

572. The SPO alleges that, during the 2 July Visit, **THAÇI** revealed confidential information to **FAZLIU** without authorization, regarding **MUSTAFA**, [REDACTED] and **W04758**, including their status as *Case 06* witnesses.⁸³¹

573. To prove the completed commission of a violation of the secrecy of proceedings under Article 392(1), the SPO must demonstrate that: (1) **THAÇI** *revealed* information disclosed to him in an official proceeding, whose revelation was not authorised according to law or a decision of a court; (2) he knew that the revelation of such information disclosed in an official proceeding was not authorised according to law or a decision of a court and he had direct or eventual intent to reveal the information.⁸³²

574. In the present case, **THAÇI** did not “reveal” information because the matters allegedly discussed were already public and known to **FAZLIU**, and in any event there is no evidence that **THAÇI** intended to reveal confidential information

handgun, pulled out the handgun and shot him in the leg, said something to his friend who [Indiscernible] in masks, wounded the person and fled. “No one will ever catch him, he is an idiot”, he said. This one said, “He was the first to point the handgun”. Remi said, “Get it done. When you come back from over there, we can sit down and talk, in fact, let me know if he has any messages”. I said to him, “I will meet up with him, if he has any messages, we can have a coffee once I am back on Monday”. He said “Done deal”. You know, that’s it, I asked how many days [Indiscernible], after I met him here [Indiscernible] if you do have any messages [Indiscernible]”.

⁸³¹ SPO PTB, paras 31-32,39-40,231,235.

⁸³² Section III.A.2.

a) FAZLIU's prior knowledge of the information disclosed

575. Information is not "revealed" when it is shared with a person who is already aware of it.⁸³³ In the present case, the information about MUSTAFA would have already been well known to FAZLIU because it was widely known information in the public domain in Kosovo.

(1) Public information regarding MUSTAFA

576. The SPO asserts that THAÇI disclosed information regarding MUSTAFA "found only" in documents classified as confidential in *Case 06*, "including Witness 1's identity as an SPO witness, the substance of his evidence, Witness 1's estimated time of direct examination, the fact that Witness 1 would testify publicly, the use of a specific associated exhibit in Witness 1's examination".⁸³⁴

577. MUSTAFA testified before the KSC in *Case 06* on 11-14 and 17-18 July 2023,⁸³⁵ and did not benefit from protected measures⁸³⁶ because, as acknowledged by **Witness 7**, MUSTAFA "*previously testified openly, and he's [a] very well-known person and figure in Kosovo*".⁸³⁷

578. Indeed, contrary to the SPO submissions, the SPO witness status of MUSTAFA, his imminent testimony in *Case 06*, and the substance of his evidence about the Kosovo conflict and the KLA were already public prior to 2 July 2023.

(a) MUSTAFA's status as an SPO Witness and his imminent testimony in Case 06 were already public prior to 2 July 2023

579. On 6 and 7 December 2018, MUSTAFA informed the press that he was going to be interviewed by the SPO in January 2019, in The Hague, as a "suspected

⁸³³ Section III.A.2.a) above.

⁸³⁴ SPO PTB, para.39.

⁸³⁵ F00469/A01, Agreed Fact n°33.

⁸³⁶ P00168, p.118243.

⁸³⁷ T.381, 1.1-2 (Witness 7).

witness”.⁸³⁸ On 15 January 2019, the press confirmed that he had been interviewed by the SPO over two days.⁸³⁹ Subsequent articles referred to his interview by the SPO on 14-15 January 2019.⁸⁴⁰ **Witness 7** observed that “*Mr. Mustafa is a well-known and public person, and there was hundreds and hundreds of similar news articles about his interview in The Hague*”.⁸⁴¹ In addition, **MUSTAFA** [REDACTED].⁸⁴² Subsequently, in a Facebook post of 15 January 2023, **MUSTAFA** referred again to his 2019 SPO interview and provided extensive details on its contents.⁸⁴³ This post had a wide reach, as indicated by the number of likes. On 12 April 2023, **MUSTAFA** also gave a public interview on the TV show *Konfront*, where he discussed his SPO interview.⁸⁴⁴

580. On 1 July 2023, *i.e.* one day before the Charged Visit of 2 July 2023, the press widely reported that **MUSTAFA** was going to travel to The Hague the following week in order to testify as a SPO witness in the case “*against the former KLA leaders*”,⁸⁴⁵ an explicit reference to *Case 06*.⁸⁴⁶ For instance, one of the articles stated that **MUSTAFA** was about to testify “[*at*] the invitation of the Specialized Prosecutor’s Office [...] about the organization of the KLA and the prosecution’s claims in the trial against former KLA leaders.”⁸⁴⁷

581. **Witness 7** confirmed the public nature of **MUSTAFA**’s status as a SPO witness in *Case 06* and of his upcoming testimony. He testified that **MUSTAFA** was a “*public person*” who was publishing “*everything related to the SPO,*” and he

⁸³⁸ 1D00003_ET, pp.DHT1200039-ET-DHT1200040-ET; 1D00004_ET, p.DHT1200331-ET; 1D00081_ET; T.383-T.385 (Witness 7). See also 1D00029, p.DHT1200317.

⁸³⁹ 1D00005_ET, pp.DHT1200333-ET-DHT1200334-ET.

⁸⁴⁰ 1D00102_ET, p.DHT1200264-ET; 1D00012, p.DHT1200048.

⁸⁴¹ T.386, l.23-25 (Witness 7).

⁸⁴² [REDACTED].

⁸⁴³ 1D00006_ET, p.SPOE00330366.

⁸⁴⁴ P00153.

⁸⁴⁵ 1D00083; 1D00007_ET; 1D00008_ET; 1D00009; 1D00082_ET; 1D00084_ET; 1D00085_ET; F00764, Agreed Fact, para.1.

⁸⁴⁶ T.392 (Witness 7).

⁸⁴⁷ 1D00083.

remembered that *"he made public that he's going to testify"*.⁸⁴⁸ Therefore, he confirmed that *"it was well-known fact and public information that he's going to testify in the Case 06"*, which was widely broadcast in Kosovo via several media outlets.⁸⁴⁹

582. **FAZLIU** himself already knew it as evidenced by the fact that he stated during the 2 July Visit, pursuant to the SPO Transcript, that *"He will travel either on the 6th or the 4th"* and *"He told me on Tuesday, but someone said that -- in the newspaper it said on the 6th."*⁸⁵⁰ This shows that he learnt directly from **MUSTAFA** himself that he was going to testify the following week in The Hague and that it was confirmed by the newspaper he read, hereby corroborating the public nature of **MUSTAFA**'s status as a SPO witness and of the imminence of his testimony. Therefore, **THAÇI** did not "reveal" him any new information.

583. The SPO further alleges that **THAÇI** disclosed that **MUSTAFA** would testify publicly.⁸⁵¹ Yet, given that **MUSTAFA** himself publicly confirmed his upcoming testimony in The Hague and had previously testified openly before other courts, the underlying publicity of said testimony was obvious.⁸⁵² As **Witness 7** explained, when witnesses "[REDACTED]", or *"if [they] testified openly before in the public sessions before other international tribunals or before domestic courts"*, "[REDACTED]".⁸⁵³

⁸⁴⁸ T.390, 1.9-15 (Witness 7): "Q. And, Mr. Witness, are you aware that Mr. Mustafa himself disclosed to the media on 1 July 2023 that he was going to testify within a week for the SPO in Case 06? A. As I said, Mr. Mustafa was public person, and he was publishing everything, and especially everything related to the SPO. So I don't recall that specific moment, but I recall -- I remember that he made public that he's going to testify."

⁸⁴⁹ T. 392, 1.21-22 (Witness 7).

⁸⁵⁰ P00105_ET, p.40, 1.21-p.41, 1.5: "HASHIM THAÇI: I can't, because he -- when will you return? FADIL FAZLIU: Tomorrow. I will find him, in fact, he was not with -- I will meet him. HASHIM THAÇI: I don't think you can -- FADIL FAZLIU: He will travel either on the 6th or the 4th. HASHIM THAÇI: No, he will travel on Tuesday. FADIL FAZLIU: He told me on Tuesday, but someone said that -- in the newspaper it said on the 6th. HASHIM THAÇI: Really? FADIL FAZLIU: Unless they have changed it."

⁸⁵¹ SPO PTB, para.39.

⁸⁵² 1D00083.

⁸⁵³ T.359, 1.22-24; T.380, 1.23-25; T. (Witness 7).

(b) *The scope and substance of MUSTAFA's evidence was in the public domain prior to 2 July 2023*

584. As confirmed by **Witness 7**, most of the subject matter of **MUSTAFA**'s evidence was already in the public domain prior to the 2 July Visit and his in-court testimony.⁸⁵⁴

585. It is common knowledge that **MUSTAFA** was the KLA's Commander of the Llap OZ during the conflict.⁸⁵⁵

586. Prior to his testimony in *Case 06*, **MUSTAFA** had already testified extensively before other courts about the Kosovo conflict of 1998/1999 and his role within the KLA.⁸⁵⁶ In particular, between 2003 and 2015, he testified publicly numerous times as an accused in the *Latif Gashi et al.* case, before the District court of Pristina⁸⁵⁷ and the Court of Appeals of Pristina.⁸⁵⁸ During such testimony, he testified about the KLA organisation and the Llap OZ, as well as his roles, especially as Commander of this OZ from late 1998 to June 1999. Issues such as detention, collaborators, the KLA's objectives, *etc.*, were also addressed.⁸⁵⁹ He was ultimately convicted.

587. **MUSTAFA**'s trial was public and was followed contemporaneously by people in Kosovo. The content of his testimony and conviction was widely commented on in the press.⁸⁶⁰

⁸⁵⁴ T.397, I.5-12 (Witness 7): "Q. So, Mr. Witness, we have reviewed some of the media articles regarding Mr. Mustafa's cooperation with the KSC. Would it be fair to say that since Mr. Mustafa was a well-known public figure, who had extensively testified publicly before Kosovo courts in the past about his role in the Kosovo conflict, the scope of his anticipated evidence in Case 06 was to a large extent, as a zone commander, already in the public domain? A. Yes, that is correct." See, for example, P00153_ET.

⁸⁵⁵ See, for instance, 1D00087_ET; 1D00080_ET.

⁸⁵⁶ T.381 (Witness 7).

⁸⁵⁷ F00740/A01, Fact of Common Knowledge n°54; 1D00053; 1D00054; 1D00055; 1D00056; 1D00057; 1D00058; 1D00059; 1D00060; 1D00061; 1D00062.

⁸⁵⁸ 1D00060, p.SPOE00086965; F00740/A01, Fact of Common Knowledge n°55.

⁸⁵⁹ F00740/A01, Fact of Common Knowledge n°54; 1D00053; 1D00054, pp.SPOE00119378-SPOE00119381.

⁸⁶⁰ 1D00003_ET, pp.DHT1200038-ET-DHT1200039-ET; 1D00007_ET; 1D00081_ET.

588. In addition, prior to the 2 July Visit, **MUSTAFA** had regularly spoken publicly about the war in Kosovo and had commented on the content of his SPO interview and his views on the *Case 06* charges, including in video interviews and Facebook posts.⁸⁶¹
589. In a book titled '*War for Kosova (Commander Remi speaks)*', published in 2000,⁸⁶² **MUSTAFA** provided detailed information on the history of the KLA, its organisation in general and in the Llap OZ in particular, the General Staff's role and authority, various military operations, the role of international organisations such as NATO in Kosovo, his connections with other members of the KLA and the General Staff, and, above all, his role as Commander of the Llap OZ,⁸⁶³ matters which were also the subject of his *Case 06* 2019 SPO interview⁸⁶⁴ (and ultimately his *Case 06* testimony⁸⁶⁵).
590. A review of these various publications and public statements makes clear that over time **MUSTAFA** remained consistent on the subjects he addressed regarding the events of 1998-99. This reinforces the fact that there was no uncertainty in the public realm about **MUSTAFA**'s recollections and views on these matters.

⁸⁶¹ P00153_ET (video interview of MUSTAFA on the TV show *Konfront* on KTV on 12 April 2023, where he commented extensively his role during the 1998/1999 conflict and the charges in *Case 06*, including which information he reported, or not, to the General Staff, in particular regarding detention (pp.18-19), THAÇI's (limited) knowledge of what was happening in the Llap zone ("*Hashim THAÇI could not and should not know what happened in the Llap Operational Zone*", p.18), the behaviour of the KLA ("*well-behaved*", p.2), the lack of plan of the KLA to "liquidate" the LDK or any other social group (p.4), the *Communiqué* 59 (p.24), *etc.*, topics also present in his SPO interview); 1D00006_ET (15 January 2023 Facebook post by MUSTAFA, where he developed his role within the KLA, his understanding of the powers at play at the time, the collaboration between the KLA and NATO, and the critics it generated).

⁸⁶² 1D00080, p.DHT1200609.

⁸⁶³ 1D00080_ET, pp.DHT1200536-ET, DHT1200548-ET, DHT1200558-ET, DHT1200562-ET, DHT1200570-ET, DHT1200573-ET.

⁸⁶⁴ F00740/A01, Fact of Common Knowledge n°52, referring to 082894-TR-ET combined, for instance, Part 1, p.7; Part 2, pp.1-5.

⁸⁶⁵ F00740/A01, Facts of Common Knowledge n°46 to n°50.

591. Therefore, the matters which would be covered in the evidence of **MUSTAFA** about the Kosovo conflict, the KLA organisation and his role during the war were already public at the time of the 2 July Visit.

592. The SPO has failed to demonstrate that **THAÇI** revealed any information regarding **MUSTAFA** that originated exclusively from *Case 06* disclosures. Prior to *Case 06*, **THAÇI** and **FAZLIU** already had extensive information about **MUSTAFA**'s views and role during the conflict, especially considering his prior testimony, his public statements and interviews, his book, and of the fact that they had met each other during or after the war, for instance in social gatherings.⁸⁶⁶

(2) Public information regarding [REDACTED]

593. The SPO alleges that **THAÇI** disclosed confidential information relating to [REDACTED] during the **FAZLIU** 2 July Visit, his status as *Case 06* witness and *"identifying information as well as portions of his evidence provided in private session"*;⁸⁶⁷ but also during **SMAKAJ**'s 9 September Visit, *"his identity as an SPO protected witness and portions of his evidence provided in private session"*;⁸⁶⁸ and during the **KILAJ** 6 October Visit, *"his status as a Case 6 witness and many identifying aspects of his private session testimony before the KSC"*.⁸⁶⁹

594. [REDACTED] testified in *Case 06* on [REDACTED] and accordingly had already testified at the time of the all the DC visits.⁸⁷⁰

595. Yet, in their contacts prior to [REDACTED]'s *Case 06* testimony, the SPO and [REDACTED] discussed the fact that [REDACTED].⁸⁷¹

⁸⁶⁶ 4D00001; 4D00002; T.462-465 (Witness 7 identified **FAZLIU**, **THAÇI**, **Salih MUSTAFA** and **MUSTAFA** on the pictures 4D0001 and 4D0002).

⁸⁶⁷ SPO PTB, paras 31-32, 235.

⁸⁶⁸ SPO PTB, paras 91-93, 239.

⁸⁶⁹ SPO PTB, paras 143-144, 242.

⁸⁷⁰ F00523/A01, Agreed Fact n°[REDACTED].

⁸⁷¹ F00762/A01, Agreed Fact n°[REDACTED]. [REDACTED]. See also [REDACTED].

596. Indeed, [REDACTED].⁸⁷²

597. Additionally, the fact that [REDACTED] was publicly known in Kosovo at the time of the visits, since [REDACTED].⁸⁷³ Although [REDACTED]. From [REDACTED], one can easily understand that [REDACTED].⁸⁷⁴ From this information, any person with knowledge of [REDACTED] at the relevant time could [REDACTED]. Indeed, [REDACTED],⁸⁷⁵ [REDACTED].

598. Accordingly, **THAÇI** did not “reveal” [REDACTED]’s status as a SPO witness during the 2 July Visit, since it was already in the public domain.

(3) Public information regarding IBISHI

599. According to the SPO, during the **FAZLIU** 2 July Visit, **THAÇI** disclosed **IBISHI**’s identity as an SPO witness.⁸⁷⁶ Yet, his status as a SPO witness was public prior to **FAZLIU**’s Visit.

600. **Witness 7** explained that the SPO did not seek any protective measure for **IBISHI**,⁸⁷⁷ because he was a “*well-know and public figure in Kosovo*”.⁸⁷⁸ **Witness 7** further confirmed that the witness [REDACTED].⁸⁷⁹ In the course of his exchanges with the SPO, **IBISHI** qualified himself as a “[REDACTED]”.⁸⁸⁰

601. In addition, numerous articles published since 2018 have confirmed **W04758**’s status as a SPO witness in *Case 06* and the contents of his evidence. For instance, on 20 October 2019, the press announced that **W04758** “*was summoned by the Special Court two days ago*” and “*was invited as a witness*”.⁸⁸¹ At the same time,

⁸⁷² [REDACTED]. See also [REDACTED].

⁸⁷³ F00762/A01, Agreed Fact n°[REDACTED].

⁸⁷⁴ F00740/A01, Fact of Common Knowledge n°[REDACTED].

⁸⁷⁵ [REDACTED]. See also [REDACTED].

⁸⁷⁶ SPO PTB, paras 31,235.

⁸⁷⁷ SPO PTB, para.236.

⁸⁷⁸ T.429, 1.3-4 (Witness 7).

⁸⁷⁹ T.430, 1.9-14 (Witness 7): “[REDACTED]”. See also F00762/A01, Agreed fact n°24.

⁸⁸⁰ F00762/A01, Agreed fact n°24.

⁸⁸¹ 1D00028, p.SPOE00368758.

W04758 posted a message on Facebook confirming that he had accepted an invitation to be interviewed by the SPO in mid-November 2019 in The Hague.⁸⁸² Thus, his cooperation with the SPO was a matter of public interest, commented on in the media.⁸⁸³

602. Moreover, **IBISHI** had already testified publicly before the KSC as a Defence witness in *Case 05* for Salih Mustafa, in April 2022.⁸⁸⁴ Accordingly, several articles reported his role and views about the Llap OZ and the Kosovo conflict at the time.⁸⁸⁵

603. Accordingly, **THAÇI** did not “reveal” **IBISHI**’s status as a SPO witness during the 2 July Visit, since his collaboration with the SPO was public knowledge.

b) **THAÇI** lacked the relevant intent

604. Additionally, there is no evidence to suggest that **THAÇI** intended to reveal confidential information to **FAZLIU**. **FAZLIU**, who is a former KLA member, had lived through the war so he was already well-informed about it and its key actors and **THAÇI** had no reason to believe that he was revealing information that he did not previously know. In addition, their exchanges took place within the context of informal conversations in which visitors freely discussed their shared memories and commented on certain events or people.

605. Thus, the comments regarding these witnesses did not imply any intention to reveal confidential information. They were part of discussions among people who shared deep knowledge of the same events and were based primarily on information already known or easily deducible.

⁸⁸² 1D00028, p.SPOE00368758-9 (referring to the “*Special Court*” and the “*Special Investigation Team*”, i.e. the SPO); 1D00100.

⁸⁸³ T.430, 1.12-14 (Witness 7): “Q. And his cooperation with the SPO was also commented in the media, his interviews; correct? A. That is correct.”; T.431, 1.1-3 (Witness 7): “Q. So, Mr. Witness, is it right that this article also reports that Mr. Ibishi was going to be interviewed by the SPO? A. Yes, it is right”.

⁸⁸⁴ T.429 (Witness 7); 1D00026.

⁸⁸⁵ 1D00027_ET; 1D00028; 1D00029; 1D00026.

606. Accordingly, the SPO has failed to prove beyond reasonable doubt that **THAÇI** committed the offence of violation of secrecy of proceedings during **FAZLIU's** Visit. The mere reference to public individuals or materials does not constitute a violation or wrongful conduct.

3. Count 8, Contempt of court

607. To prove a contempt under Article 393, the SPO must establish that: (i) **THAÇI** failed to obey a final order from a Kosovo court and (ii) he acted with direct or eventual intent to fail to obey this order.⁸⁸⁶

608. The SPO's allegations in regard⁸⁸⁷ are based solely on the content of the SPO Transcripts. As these are unreliable (see Section VI.A above), Count 8 has not been proven beyond reasonable doubt.

B. THE KUÇI VISIT OF 3 SEPTEMBER 2023

609. The SPO alleges that during the 3 September 2023 Visit, **THAÇI** provided instructions for **Hajredin KUÇI** to convey to three SPO witnesses, **SELIMI**, **ZYRAPI** and **Witness 6**, regarding how each should testify, and that **KUÇI** agreed with **THAÇI's** instructions, provided suggestions on the instructions to be given to **SELIMI** and **Witness 6**, and confirmed that he had previously met with **SELIMI** to discuss his testimony.⁸⁸⁸ The SPO maintains that **THAÇI** and **KUÇI** were prohibited from contacting SPO witnesses outside the framework of the Contact Protocol.⁸⁸⁹

610. Regarding this visit, **THAÇI** is charged with contempt of court under KCC Article 393 (Count 9).⁸⁹⁰ While the Indictment does not explain the modes of

⁸⁸⁶ Section III.A.3.

⁸⁸⁷ SPO PTB, para.261.

⁸⁸⁸ Indictment, paras 13-14; SPO PTB, para.7.

⁸⁸⁹ Indictment, para.32, referring to [Case 06 Protocol](#).

⁸⁹⁰ Indictment, para.46.

liability relied on in respect of Count 9, it refers to Article 35 (agreement).⁸⁹¹ The Defence notes that the SPO PTB appears to treat Count 9 as being *exclusively* concerned with agreement under Article 35: paragraphs 276-277 of the PTB which address the completed commission of contempt do not reference Count 9; and paragraph 278 which refers to Count 9 mentions specifically the mode of liability of agreement. Accordingly, the Defence understands Count 9 to charge **THAÇI** only with *agreeing* to commit contempt of court. For the reasons set out above, Article 35 liability cannot arise in respect of contempt of court, which is a minor offence for which preparation is not criminalised.⁸⁹² However, even if this charge is valid, the SPO has failed to establish it beyond reasonable doubt.

611. As set out above, the completed commission of contempt under Article 393 requires that a person failed to obey a final order from a Kosovo court.⁸⁹³ Liability for an agreement under Article 35 requires that (i) the perpetrator forms an agreement with one or more other persons which addresses all elements of a criminal offence (with the parties to the agreement intending the completed commission of the offence); (ii) one or more of these persons undertakes any substantial act/preparatory step towards the commission of the criminal offence.⁸⁹⁴

1. Absence of an agreement to commit a contempt

612. The SPO's allegation of an agreement between **THAÇI** and **KUÇI** is dependent on the SPO Transcripts. These are unreliable, and do not allow the Single Trial Judge to conclude anything beyond reasonable doubt about the content of the conversation between **THAÇI** and **KUÇI** on 3 September 2023.

⁸⁹¹ Indictment, para.46.

⁸⁹² Section III.B.3.a).

⁸⁹³ Section III.A.3.

⁸⁹⁴ Section III.B.3; Confirmation Decision, para.105.

613. In any event, even if the SPO Transcripts were reliable, their contents do not prove an agreement between **THAÇI** and **KUÇI** to commit contempt.
614. The SPO Transcripts merely show **THAÇI** recalling his memories from the Kosovo conflict and the KLA, repeatedly emphasizing that he is telling the truth.⁸⁹⁵
615. Moreover, while the SPO Transcripts present **KUÇI** as assenting to certain statements of **THAÇI**, this is insufficient to prove his actual agreement. As submitted above,⁸⁹⁶ in the context of these detention visits, a visitor may have merely been responding politely. In **KUÇI**'s case, this is especially so since he qualifies **THAÇI** as *"one of the best friends in my life, as we've been almost a lifetime together"*.⁸⁹⁷ In this context, a genuine acceptance to undertake any step for **THAÇI** is not the only reasonable inference from the words allegedly spoken.
616. The inference that there, in fact, no agreement is reinforced by the fact that **KUÇI** took no steps to contact *Case 06* witness. Indeed, the SPO does not allege that **KUÇI** made contact with **SELIMI**, **ZYRAPI** or **Witness 6** (or any other *Case 06* witness) after having visited **THAÇI**, or that he made any other arrangement towards direct or indirect contact with *Case 06* witnesses. And the evidence establishes that none of **SELIMI**, **ZYRAPI** or **Witness 6** experienced any unlawful contact or attempted interference:
- i. On 13 December 2024, **SELIMI** confirmed that he had not had contacts with anyone about his testimony; while he had, some years ago, a coffee with the Defence lawyers for [REDACTED], in the end they did not have any substantive discussion about his evidence.⁸⁹⁸

⁸⁹⁵ P00106_ET, p.60, l.2-3, p.61, l.6-8, p.66, l.13-15, p.68, l.5-9, pp.70-71, p.74, l.15, p.75, l.15-16, p.79, l.11-12, p.85, l.21, p.87, l.7-8, p.93, l.7-9, p.97, l.5, 13, p.103, l.2-5, p.105, l.12-14.

⁸⁹⁶ Paragraph 485.

⁸⁹⁷ P00033_ET, p.SPOE00363941.

⁸⁹⁸ F00762/A01, Agreed Fact n°11.

ii. In his SPO interview of 6 December 2023, **ZYRAPI** was asked whether he was contacted by anybody that year about his impending testimony before the KSC. He responded that he had not been approached during 2023.⁸⁹⁹

iii. **Witness 6**, in contact with the SPO before and after the 3 September Visit, did not mention any interference. On 27 January 2023, he told the SPO that nobody had contacted him about his cooperation with the SPO or anticipated testimony.⁹⁰⁰ On [REDACTED], he stated that [REDACTED].⁹⁰¹ **Witness 6** testified [REDACTED],⁹⁰² and was in contact with the SPO [REDACTED] for [REDACTED],⁹⁰³ his preparation session and post testimony security checks; yet the SPO has not tendered any item according to which **Witness 6** reported any interference. Last, [REDACTED].⁹⁰⁴

617. Not only was no step ever taken to contact **SELIMI**, **ZYRAPI** or **Witness 6**, there was also no subsequent visit from **KUÇI** to **THAÇI** in detention, and there are no records of calls or correspondence between **THAÇI** and **KUÇI** subsequently.⁹⁰⁵ Thus there is no evidence of **KUÇI** briefing **THAÇI** on measures taken, results, setbacks, *etc*, something which supports the conclusion that there was never any intent to commit contempt.

2. Absence of any substantial act towards the commission of the offence

618. To establish liability under Article 35, the SPO must prove not only the existence of an agreement, but also at least one distinct, subsequent substantial act aimed at implementing that agreement: the agreement itself cannot be qualified as a

⁸⁹⁹ F00756/A01, Agreed Fact, para.4.

⁹⁰⁰ F00762/A01, Agreed Fact n°13.

⁹⁰¹ F00740/A01, Fact of Common Knowledge n°83, referring to 114827-114831 RED, para.9.

⁹⁰² F00469/A01, Agreed Fact n°46.

⁹⁰³ P00165.

⁹⁰⁴ 1D00031 ([REDACTED]).

⁹⁰⁵ The SPO received all the visit and correspondence logs of **THAÇI** until at least 29 October 2023 pursuant to INV/F00028/CONF/RED. See, for instance, the logs after 3 September 2023: P00046, P00049, P00055, P00062, P00068.

substantial act toward commission. For instance, in *Case 07*, the accused had taken steps to organize a press conference, including inviting the media.⁹⁰⁶

619. The SPO has failed to establish that either **THAÇI** or **KUÇI** undertook any substantial act towards the completed commission of contempt. There is no evidence of any act taken after the 3 September Visit. A verbal agreement in the DC, even if it had existed, without any subsequent preparatory step toward completed commission, is insufficient.⁹⁰⁷

620. The SPO maintains that “**THAÇI** and **KUÇI** undertook substantial acts towards the commission of the offence by (i) agreeing on the instructions to convey to them; (ii) agreeing on how to make **THAÇI**’s instructions clear to them; (iii) discussing how to establish contact and communicate with the witnesses; (iv) reading **Witness 2**’s prior statements; (v) making certain phone calls; (vi) involving third parties such as ‘Sami’ and ‘Stilli’ in the plan to contact Witness 6; (vii) discussing **KUÇI**’s travel plans; (viii) providing the ‘case files’; and (ix) handling paper documents”.⁹⁰⁸

621. These allegations have not been proven beyond reasonable doubt, and several have no apparent link with any alleged agreement to contact witnesses.⁹⁰⁹ In any event, all are alleged to have been part of the discussion of 3 September 2023 and thus would, at most, constitute the purported “agreement” between **THAÇI** and **KUÇI**. Even if they occurred, they could not be qualified as distinct, substantial acts towards the completed commission of the offence, as required by Article 35(2). In the following submissions the Defence reviews the various categories of alleged “substantial act”.

⁹⁰⁶ [Case 07 Trial Judgment](#), para. 777, referencing the extensive findings of fact regarding numerous steps taken to prepare and carry out a media campaign at paras 728-744 and 747-762.

⁹⁰⁷ Section III.B.3.a).

⁹⁰⁸ SPO PTB, para.263.

⁹⁰⁹ SPO PTB, para.263.

- (1) Agreeing on the instructions and discussing contacts with witnesses (allegations (i) to (iii))

622. The first three items alleged by the SPO to constitute a substantial act are clearly merely part of the alleged discussion which (if they had been proven) would constitute the element of “agreement” and not additional steps.

- (2) Reading **ZYRAPI**’s prior statements (allegation (iv))

623. The SPO’s allegation that **THAÇI** and **KUÇI** read **ZYRAPI**’s prior statements “*in the context of the 3 September Visit*”⁹¹⁰ lacks any basis. When making this allegation in paragraph 263 of the PTB, the SPO refers only to paragraph 66 of its PTB,⁹¹¹ which does not mention any reading of statements by **THAÇI** or **KUÇI**. It is accordingly unclear even what evidence the SPO considers to be relevant to this allegation. The Defence can only speculate as to which parts of paragraph 66 of the PTB and its footnotes the SPO has in mind, since none of them supports the conclusion that **ZYRAPI**’s prior statements were read.

624. In paragraph 66 of the PTB, and its footnotes, the SPO claims that certain words shown in the SPO Transcripts were references to **ZYRAPI**’s prior statements. For instance, in footnote 198 of its PTB, the SPO cites **THAÇI**’s alleged statement (according to the disputed SPO Transcripts), “*In his interview, he puts me above the Staff*”⁹¹² and alleges that this “*is likely reference to Witness 2’s following statement in his SPO interview [...]*”.⁹¹³ Similarly, in paragraph 66 of the PTB, the SPO asserts that **THAÇI** instructed that **ZYRAPI** testify that “*(x) in his prior statements Witness 2 presented certain events the way they ‘should have happened’ but that the reality was different*”. However, even if these words were uttered, and uttered by **THAÇI**, which is disputed, they do not prove that **THAÇI** and **KUÇI** read any statement

⁹¹⁰ SPO PTB, paras 263,266.

⁹¹¹ SPO PTB, fn.871.

⁹¹² P00106_ET, p.96.

⁹¹³ SPO PTB, fn.198.

of **ZYRAPI** during the 3 September Visit. The SPO has not identified any evidence, even from within the disputed SPO Transcripts, that **THAÇI** or **KUÇI** had with them any statements of **ZYRAPI**, nor is there any direct quote from such statements found in any of the SPO Transcripts of the 3 September Visit. Moreover, there is no explicit reference to **THAÇI** being “above the staff” in **ZYRAPI**’s SPO interview,⁹¹⁴ such that footnote 198 in the PTB is mere speculation rather than evidence as to what may have been meant by these words, if they were even spoken.

625. Besides, **ZYRAPI**’s SPO interview was disclosed to the Defence in *Case 06* on [REDACTED],⁹¹⁵ several years before the visit, and **ZYRAPI** being a KLA leader and core SPO witness, the contents of his anticipated evidence were obviously well known and regularly discussed by **THAÇI** and his *Case 06* team. Accordingly, even if **THAÇI** had referred to this material during the 3 September Visit, which is disputed, this would not demonstrate that he read it during this visit.

626. To the extent that the SPO may be alleging that **THAÇI** and/or **KUÇI** read **ZYRAPI**’s statements *prior* to the 3 September Visit, this does not establish a substantial act towards the completed commission of contempt. First, as participants in the *Case 06* trial, **THAÇI** and **KUÇI** were entitled to read these documents. Doing so was part of their preparation for *Case 06* and cannot simply be asserted to have some connection with a criminal agreement. Secondly, and relatedly, any such reading must have occurred prior to the 3 September Visit. However, the SPO has produced no evidence to suggest that any “agreement” existed prior to 3 September. The Defence submits that acts *preceding* an

⁹¹⁴ F00740/A01, Fact of Common Knowledge n°57, referring to 083280-TR-ET.

⁹¹⁵ F00740/A01, Fact of Common Knowledge n°57, referring to 083280-TR-ET.

agreement cannot satisfy the elements of Article 35, which demand that the acts in question were in furtherance of the agreement.

(3) Making certain phone calls (allegation (v))

627. Again, the SPO provides no detail to support the allegation that a substantial act was constituted by “making certain phone calls”. In the SPO PTB, this assertion is supported only with a reference to paragraphs 64 and 73 of the PTB. However, those paragraphs themselves are limited to allegations about what was discussed during the 3 September Visit, not what occurred after it.

628. For the reasons set out above, any discussion about phone calls made prior to the 3 September Visit⁹¹⁶ cannot amount to a substantial act in furtherance of an agreement alleged to have been made on 3 September such as would be required to establish liability under Article 35.

629. Any discussion *during* the 3 September Visit about future phone calls⁹¹⁷ – even if it did occur, which is contested - would not constitute a substantial act toward commission distinct from their purported agreement; it remained a discussion and not a subsequent preparatory step.⁹¹⁸

630. Moreover, there is no evidence of any phone communication between **KUÇI** and **SELIMI** or **Witness 6**, before or after the visit, despite the SPO having seized and searched the phone of [REDACTED].⁹¹⁹

⁹¹⁶ For example, the SPO alleges that “*KUÇI informed THAÇI that he had spoken with Witness 5*”: SPO PTB, para.64.

⁹¹⁷ The SPO alleges that THAÇI instructed KUÇI to contact SELIMI and Witness 6: SPO PTB, para.64, fn.184, referring to P00106_ET, p.70; SPO PTB, para.73, fn.233, referring to P00107.4_ET, p.3.

⁹¹⁸ For the reasons explained above in Section III.B.3.a).

⁹¹⁹ 1D00030 ([REDACTED]); 1D00031 ([REDACTED]); T.684, T.686-T.687 (KELLY). The SPO further seized several electronic devices, including phones, from KUÇI, which were extensively searched by the Independent Counsel (see F00783) and did not show any communication between KUÇI and SELIMI or Witness 6.

(4) Involving third parties such as ‘Sami’ and ‘Stilli’ in the plan to contact Witness 6 (allegation (vi))

631. The SPO appears to allege that **THAÇI** and **KUÇI** “involved” third parties such as ‘Sami’ and ‘Stilli’ in their plan to contact **Witness 6**.⁹²⁰ The allegation is vague and unsupported by any evidence. First, it is not specified what the SPO means by “involving third parties”. Secondly, and once more, the SPO relies only on the SPO Transcripts of the 3 September Visit in support of this assertion (P00107.3_ET), and thus refers to a mere discussion and not to a distinct additional step toward commission. Thirdly, this portion of the audio recording is so indistinct,⁹²¹ and the SPO Transcripts so unclear, that no conclusion can be drawn as to what was intended by any alleged reference to ‘Sami’ or ‘Stilli’; in particular, the excerpts quoted by the SPO do not demonstrate that **THAÇI** intended to involve them in a plan to contact **Witness 6**; it is not even clear in the SPO Transcripts that **Witness 6** was discussed. The Defence also emphasizes that when it asked both **REÇICA**⁹²² and LSU⁹²³ respectively to transcribe the enhanced and non-enhanced versions of this precise excerpt, both indicated that they were unable to do so due to the poor quality of the audio recording.

632. The SPO position seems to be significantly based on the ‘clarifications’ appearing at pp. 7-9 of the SPO Transcript P00107.3_ET. This amounts to an impermissible witness statement from an unidentified person whom the Defence has been unable to cross-examine.⁹²⁴ The reasons why the SPO Transcripts are unreliable

⁹²⁰ SPO PTB, paras 263, 73, fn.241, referring to P00107.3_ET, pp.3-5.

⁹²¹ 1D00136, pp.8,17.

⁹²² 1D00036, paras 7-9; 1D00037 (in this exchange of emails, REÇICA indicated that he was unable to transcribe and translate the audio files P00107.4 (115009 030923-092409_Enhanced) and P00107.3 (115009 030923-092909_Enhanced), because of the audio quality of the files); 1D00045.

⁹²³ 1D00121 (in this exchange of emails, LSU stated that it was unable to transcribe and translate the audio files 030923-092409 and 030923-092909 (extracted from P00106) corresponding to two extracts of the KUÇI 3 September Visit, based on the audio quality of the files).

⁹²⁴ Especially regarding the purported intent of **THAÇI**, *i.e.* whether he was referring to one or two persons.

have been set out above at length in Section VI.A. The same considerations apply to this “clarification””, which was presumably made by one of the individuals who created the SPO Transcripts of the 3 September Visit,⁹²⁵ and who had been primed in light of his prior work for the SPO.⁹²⁶ This is illustrated by the reference in the “clarification” to “[REDACTED]”,⁹²⁷ which could refer to the full audio of the 3 September Visit, to the other visits, or to the entire SPO investigation. Despite a Defence request,⁹²⁸ the SPO failed to call any of its interpreters⁹²⁹ to explain how they created the transcripts or to be cross-examined on their stated understanding of certain words. Accordingly, the interpreter’s subjective comments should be disregarded.

633. Indeed, the Pre-Trial Judge dismissed this SPO allegation and concluded that:

[...] the aforementioned supporting material does not allow her to conclude to the requisite evidentiary threshold that Messrs Thaçi and Kuçi agreed to involve any of these individuals in their plan to approach Witness 6 as regards his (then) impending testimony in the Thaçi et al. trial (or any other witness). In this regard, the Pre-Trial Judge is acutely aware that the SPO’s hypothesis need not be the only reasonable conclusion drawn from the supporting material in order to meet the evidentiary threshold applicable at this stage of the proceedings, i.e. well-grounded suspicion, since that would amount to requiring a level of proof for conviction, i.e. beyond reasonable doubt. However, the Pre-Trial Judge’s conviction at this stage must exceed mere theory or suspicion, and must be based on tangible supporting material. The Pre-Trial Judge finds that, in the present case, the evidence is simply too vague and inconclusive to draw any reasonable conclusion therefrom against the requisite threshold. In particular, the mention of suggested meetings or locations in the context of the discussion on the (then) impending testimony of Witness 6 and arrangements to approach said witness, as recorded in the aforementioned supporting material, is insufficient to draw the connection between any of the persons mentioned and said suggested meetings or

⁹²⁵ According to 1D00140, p.SPOE00412759, these were LA-20, LA-1 and LA-3, with LA-3 having conducted the final full review. The specific author of the comments at the end of P00107.3_ET is not identified.

⁹²⁶ See above in Section VI.A. According to 1D00144.1 and 1D00144.2, LA-20, LA-1 and LA-3 all worked also as interpreters during interviews with SPO witnesses. See also their CVs at 1D00148 (LA-1); 1D00146 (LA-20); 1D00143 (LA-3). T.800, 822-825 (Prof. FRASER).

⁹²⁷ P00107.3_ET, p.8.

⁹²⁸ F00688, paras 61-67,96.

⁹²⁹ See F00713/RED, para.7.

*locations and the plan, discussed between Mr Thaçi and Mr Kuçi, to approach Witness 6.*⁹³⁰

634. In any event, and as the Pre-Trial Judge's explanation makes clear, even if this evidence was reliable and convincing, at absolute most it could be relevant to the contents of the alleged *agreement*, since it appears to be suggested that this was a discussion about "involving" such persons *in the future*. There is no evidence that any *act* was ever taken, substantial or otherwise, towards achieving that.

(5) Discussing KUÇI's travel plans (allegation (vii))

635. The SPO further refers to an alleged discussion between THAÇI and KUÇI about KUÇI's travel plans, claiming this to be a substantial act towards the commission of contempt.⁹³¹ Yet, even if such a discussion occurred, this mischaracterises it.

636. First, such a conversation about an innocuous topic should not readily be inferred to have a criminal object and therefore any connection to an alleged illicit agreement. The SPO Transcripts claim that THAÇI and KUÇI had discussed KUÇI's journey during an early part of the 3 September Visit,⁹³² following a discussion about recent construction at home and other banalities.⁹³³ It is common for friends to discuss travels especially when one is commuting internationally. In the context of THAÇI and KUÇI's friendship,⁹³⁴ such a conversation is unremarkable.

637. Secondly, and in any event, for the reasons already elaborated above, a mere discussion during the 3 September Visit about steps allegedly planned in the future could not constitute a substantial act towards commission. Even if such a discussion occurred and was related to an agreement for instructing witnesses,

⁹³⁰ Confirmation Decision, para.178.

⁹³¹ SPO PTB, para.263, referring to para.73, fn.240; P00107.3_ET, p.1.

⁹³² P00106_ET, p.20, l.16-25.

⁹³³ P00106_ET, pp.19-20.

⁹³⁴ See para.447 above.

it would merely have formed part of the *agreement*, and not a subsequent preparatory step.

(6) Providing the 'case files' (allegation (viii))

638. The SPO further alleges that **THAÇI** and **KUÇI**, undertook substantial acts toward commission by "*providing the 'case files'*".⁹³⁵

639. Again, the SPO relies only on its Transcripts and not on any act subsequent to the 3 September Visit, citing a portion of the Transcripts where **KUÇI** is alleged to have said "*I will give him [...] the case documents'*".⁹³⁶

640. Even if the SPO Transcripts were accurate, which is disputed, it is unclear to whom the "case files" would be given (for example, whether to another *Case 06* accused or defence team member).

641. In any event, as with the allegations discussed above, at its highest this could only amount to part of the alleged agreement. There is no evidence of the actual provision of any case file by **KUÇI** to anyone, and thus no substantial act toward the completed commission of a contempt.

(7) Handling paper documents (allegation (ix))

642. The SPO alleges that **THAÇI** and **KUÇI** were "*handling paper documents'*".⁹³⁷ The SPO PTB's footnote for this claim refers to paragraph 74,⁹³⁸ which alleges that sounds and comments relating to documents are reflected in the SPO Transcripts of the 3 September Visit.⁹³⁹ For the following reasons, this claim has not been proven, and even if it had this would not amount to a substantial act.

⁹³⁵ SPO PTB, para.263.

⁹³⁶ SPO PTB, para.73, fn.241, referring to P00107.3_ET, pp.3-5.

⁹³⁷ SPO PTB, para.263.

⁹³⁸ SPO PTB, para.263, fn.867.

⁹³⁹ SPO PTB, para.74; see also para.68.

643. First, the evidence does not establish that documents were handled during the 3 September Visit. Again, the only evidence given of this is the SPO Transcripts, which are unreliable for the reasons set out above in Section VI.A. The Single Trial Judge may be tempted to treat non-verbal sounds described in the SPO Transcripts differently to words, since they would not require Albanian language skills to listen to (and could in principle be assessed by the Single Trial Judge himself). However, that is not the case, since the SPO has failed to provide the timestamps which would enable the Defence and the Single Trial Judge to listen to the sounds described in the SPO Transcripts. The sounds described in the SPO Transcript must be treated as just as unreliable as their other contents.
644. No other evidence has been tendered to support the contention that documents were handled during the 3 September Visit. While the SPO asserts that **THAÇI** “seemingly provided something for **KUÇI** to take with him at the end of his instructions for Witness 2”,⁹⁴⁰ it has tendered no such evidence, despite having searched **KUÇI**’s home. The assertion appears to be based on the claim that **THAÇI** spoke the words ‘Take this too’.⁹⁴¹ Even if **THAÇI** had spoken those words, it is not clear what was meant by them. It could be a reference to food or drink: the SPO Transcripts indicate that **THAÇI** regularly offers coffee or tea to his visitors, and brought some tea to **KUÇI** at the beginning of the visit.⁹⁴²
645. In any event, detainees and visitors are permitted to have papers and pen during non-privileged visits. Therefore, even if papers had been handled, it would remain necessary for the SPO to prove that such documents were in some way related to the alleged agreement to commit contempt. The SPO has not even made clear what it alleges were the content of the documents allegedly handled, let alone proven this.

⁹⁴⁰ SPO PTB, para.68, fn.218.

⁹⁴¹ P00106_ET, p.109, l.23.

⁹⁴² P00106_ET, p.15, l.1-10, p.17, l.24 to p.18, l.13.

646. Finally, as with the other allegations made by the SPO in this regard, *even if* paper documents had been handled during the 3 September Visit, this is not a matter subsequent to the agreement. It could therefore not constitute a separate substantial step in furtherance of the purported agreement allegedly reached during the 3 September Visit.

(8) Prior contact with SELIMI

647. Finally, the SPO alleges that **KUÇI** had spoken or met with **SELIMI** before the 3 September Visit.⁹⁴³ It is unclear from the Pre-Trial Brief what the relevance of this allegation is said to be. Nonetheless, since it follows in the same paragraph and immediately after the points above in which the SPO alleges that “*THAÇI and KUÇI undertook substantial acts*”⁹⁴⁴, the Defence will address it here in the assumption that it is somehow relevant to demonstrating this requirement.

648. The Defence notes that this allegation is based on two indistinct excerpts from the SPO Transcripts of the 3 September Visit.⁹⁴⁵ For the reasons set out above, the SPO Transcripts are unreliable.

649. In any event, even if those words were spoken, it need not mean that they were true. There is no evidence of phone contacts or emails exchanges between **KUÇI** and **SELIMI**, despite the SPO having seized and searched [REDACTED] phones and **KUÇI**’s electronic devices.⁹⁴⁶ **SELIMI** further confirmed to the SPO that except one coffee with the Defence lawyers for [REDACTED], during which they did not have any substantive discussion about his evidence, he has not had contacts with anyone about his testimony.⁹⁴⁷

⁹⁴³ SPO PTB, para.263.

⁹⁴⁴ SPO PTB, para.263.

⁹⁴⁵ SPO PTB, para.263, referring to para.64, which contains fn.188, referring to 1D00108_ET, pp.67-68, 83.

⁹⁴⁶ See fn.919.

⁹⁴⁷ F00762/A01, Agreed Fact n°11.

650. Indeed, even if **KUÇI** *had* spoken or met with **SELIMI** prior to the 3 September Visit, it cannot be assumed that such contact concerned an agreement for contempt. The Defence recalls that **KUÇI** was a member of Mr Kadri Veseli's defence team in *Case 06*. [REDACTED].⁹⁴⁸ The SPO has not proved that any contact which may have occurred prior to 3 September 2023 between these two men had anything to do with the allegations in this case.

651. Finally, even if **KUÇI** had spoken or met with **SELIMI** prior to the 3 September Visit, and even if **KUÇI** had met with him to influence his testimony, such conduct preceded the alleged agreement said to have been reached during the 3 September Visit, and therefore it could not constitute a substantial act toward commission.

652. In consequence, Count 9 must be dismissed.

C. THE SMAKAJ VISITS OF 9 SEPTEMBER AND 7 OCTOBER 2023

653. The SPO alleges that **THAÇI** provided confidential information regarding SPO witnesses to **SMAKAJ**, **BEHRAMI**, **SHALA** and **SYLA** during the 9 September 2023 Visit;⁹⁴⁹ and to **SMAKAJ** and **BEHRAMI** during the 7 October 2023 Visit.⁹⁵⁰ The SPO also alleges that **THAÇI** directed one or more of his visitors to provide instructions to **ZYRAPI** on how to testify in *Case 06*.⁹⁵¹

654. Based on these allegations, the SPO has brought three sets of charges against **THAÇI**:

- i. Count 2 concerns obstruction of official persons in performing official duties under KCC Article 401(2). As explained above in Section IV.C, the modes of

⁹⁴⁸ [REDACTED].

⁹⁴⁹ Indictment, para.16; SPO PTB, para.5.

⁹⁵⁰ Indictment, para.17.

⁹⁵¹ Indictment, paras 16-17.

liability charged are legally incoherent but refer to attempt, agreement (Article 35) and incitement (Article 32(1) and (3)).

- ii. Count 5 charges the completed commission of an offence under KCC Article 392(1): violating the secrecy of proceedings.
- iii. Count 10 charges the completed commission of contempt of court under KCC Article 393.

655. The SPO has failed to establish these charges beyond a reasonable doubt.

1. Count 2, Obstruction of official persons in performing official duties

656. **THAÇI** is charged with attempted obstruction, agreement to commit an attempted obstruction, and incitement to commit an attempted obstruction.

657. The constitutive elements of the offence of obstruction under KCC Article 401(2), which would be required for the *completed commission* of this offence, have been developed in Section III.A.1. and summarised at paragraph 501.

658. As a preliminary point, the Defence reiterates that:

- i. Count 2 is defective because the SPO has not identified which specific natural official persons and which specific tasks were the subject of attempted obstruction, and how these tasks were to be obstructed.⁹⁵²
- ii. The SPO has applied an incorrect, extensive interpretation of Article 401 which must be rejected in accordance with the principle *in dubio pro reo*.⁹⁵³
- iii. The modes of liability in Count 2 are incoherent. The charges relating to agreement and incitement, in particular, are defective and must be struck out.⁹⁵⁴

⁹⁵² Section IV.BIV.

⁹⁵³ Section III.A and III.C.

⁹⁵⁴ Section IV.C.

659. Count 2 should be dismissed for these reasons. The following submissions are made in the alternative.

a) Attempt

660. As elaborated above,⁹⁵⁵ in order to establish an attempt under Article 401(2) and Article 28, the SPO must prove that (i) a group of persons existed; (ii) each member of the group intended the actual commission of the crime,⁹⁵⁶ *i.e.* intended to take common action and that it result in the official person's official duties actually being obstructed; and (iii) they took action toward the commission of the offence – that is, the common action of the group was initiated through something amounting to more than preparatory acts – but the offence was not completed.

661. In the present case, this has not been established.

(1) There was no “SMAKAJ” Group

662. The SPO initially claimed that a “SMAKAJ Group” was constituted by **SMAKAJ**, **SHALA**, and **BEHRAMI**.⁹⁵⁷ Later, in its PTB, the SPO expanded the alleged group to include **SYLA**.⁹⁵⁸

663. A correct analysis of the applicable law and the admitted evidence makes clear that neither group composition has been proved as having existed during the Indictment period. Even taken at its highest, the SPO's evidence – if given weight – would only support a conclusion that two slightly different groups may have existed during the respective DC visits – but there is no evidence that they agreed to undertake, and initiated, any common action to obstruct an official person.

⁹⁵⁵ Section III.B.2.

⁹⁵⁶ The SPO does not appear to dispute that it must prove that each member of the group had such an intent - see for example SPO PTB, para.211, claiming that “*the group members acted jointly to pursue the obstructive purpose*”.

⁹⁵⁷ Indictment, para.23; SPO PTB, para.210.

⁹⁵⁸ SPO PTB, para.210.

664. First, as explained above in Section III.A.1.d), Article 401(2) requires a group to be physically collocated. Accordingly, the SPO's own evidence does not support the existence of one fixed group. While **SMAKAJ**, **SHALA**, **BEHRAMI** and **SYLA** visited **THAÇI** on 9 September 2023, only **SMAKAJ** and **BEHRAMI** subsequently returned to visit **THAÇI** on 7 October 2023.⁹⁵⁹ There is no evidence about these individuals being in each other's presence in the intervening period, and as far as concerns **THAÇI**, that could not have been the case given his detention. At most, if the SPO can establish that **THAÇI**, **SMAKAJ**, **SHALA**, **BEHRAMI** and **SYLA** were present together in the DC on 9 September 2023, they would have constituted a group during that visit. Since the SPO alleges that only **SMAKAJ**, and **BEHRAMI**, visited the DC on 7 October 2023, at most they could show that a different group – **THAÇI**, **SMAKAJ** and **BEHRAMI** – existed during that visit. The Defence emphasizes that in considering the existence of these groups, the Single Trial Judge should not give weight to the SPO Transcripts which, as explained above in Section VI.A.c), are entirely unreliable not only regarding the words spoken (including names) but also speaker identification.
665. Even if the Single Trial Judge declines to follow Kosovo court practice regarding the meaning of "group", in any event the existence of a group has not been proved. A group cannot exist without a shared intent, and awareness of the group from all of its members. As elaborated below, it has not been established that **THAÇI**, **SMAKAJ**, **SHALA**, **BEHRAMI** and **SYLA** each had an intent to approach and influence **ZYRAPI**, much less that they all understood each other to be part of such an initiative. Rather, the evidence shows that **SMAKAJ**, **SHALA**, **BEHRAMI** and **SYLA** were individuals who each had their own relationship with **THAÇI**. Beyond this connection to **THAÇI**, there is nothing consistent which unites them with each other in the evidence.

⁹⁵⁹ P00008.

666. This is evident from the visits of these men to the DC. Between October 2022 and October 2023, BEHRAMI visited **THAÇI** [REDACTED].⁹⁶⁰ SYLA visited **THAÇI** [REDACTED].⁹⁶¹ Both SHALA and **SMAKAJ** visited **THAÇI** [REDACTED].⁹⁶² This is inconsistent with the existence of an identifiable group and has not been explained by the SPO.

667. Lastly, as developed below, the Defence stresses that the SPO relies only on the alleged conduct of **SMAKAJ** and **THAÇI** to argue that a “common action” of this group was initiated.⁹⁶³ This means that, to the extent a “group” is defined not only by the physical presence and intent of its members but by its “common action”, no group of three persons existed, even on the SPO’s own evidence. This is insufficient to materialise the existence of a group of at least three persons. Therefore, the evidence demonstrates, at most, the simultaneous presence of several individuals during visits, not the existence of an identified group acting jointly to pursue an obstructive purpose.

(2) The alleged members of the group did not intend to obstruct the work of KSC/SPO Officials

668. The SPO alleges that **THAÇI**, **SMAKAJ**, SHALA, BEHRAMI and SYLA shared a common objective of influencing **ZYRAPI**’s testimony in accordance with instructions from **THAÇI**.

669. However, (a) this factual allegation has not been proven beyond reasonable doubt, and even if it had been established, it would not amount to an intention (b) to take “common action” within the meaning of that term under Article 401(2), and (c) to obstruct an official person in the performance of official duties.

⁹⁶⁰ P00008: BEHRAMI visited **THAÇI**: [REDACTED]; (8) on 9 September 2023, with **SMAKAJ**, SHALA and SYLA; (9) on 7 October 2023, with **SMAKAJ**.

⁹⁶¹ P00008: SYLA visited **THAÇI**: [REDACTED] on 9 September 2023, with **SMAKAJ**, SHALA and BEHRAMI.

⁹⁶² P00008: SHALA and **SMAKAJ** visited **THAÇI** [REDACTED].

⁹⁶³ See Section VII.C.1.a)(3) below.

(a) The SPO has not proved that the members of the alleged group intended to influence ZYRAPI's testimony

670. The SPO alleges that it was **THAÇI** who originally developed an intention to influence **ZYRAPI**'s testimony, and that he induced his visitors to share this intent.

671. Regarding the intent of **THAÇI**, the SPO's case depends on the SPO Transcripts, which are unreliable for the reasons explained above in Section VI.A. Moreover, even if they were reliable, the SPO has overstated the meaning and relevance of their contents.

672. In fact, much of the interaction described in the SPO Transcripts is merely a discussion about Kosovo, the war, and the KLA. All of **SMAKAJ**, **BEHRAMI**, **SHALA** and **SYLA** had longstanding relationships with **THAÇI**, as demonstrated by their multiple visits to him⁹⁶⁴ and their visitor application forms.⁹⁶⁵ For example, **BEHRAMI** served as political advisor to **THAÇI** during his presidency, since 2015.⁹⁶⁶ **SMAKAJ** was member of the Kosovo police, the Director of the Kosovo Intelligence Agency between 2009 and 2015,⁹⁶⁷ and served as National Security Advisor to President **THAÇI** between 2017 and 2020.⁹⁶⁸ **SYLA** was also a political advisor in **THAÇI**'s administration between 2008 and 2020, and has known **THAÇI** since at least 2000.⁹⁶⁹ **SHALA** is **THAÇI**'s oldest acquaintance among these visitors. They have been friends since 1992⁹⁷⁰ and lived through the war together. **SHALA** was **THAÇI**'s advisor, former

⁹⁶⁴ See above, paragraphs 665-666.

⁹⁶⁵ P00044_ET, p.SPOE00363174, SPOE00363176, SPOE00363180-82, SPOE00363186, SPOE00363188, SPOE00363192, SPOE00363194; P00072_ET, pp.SPOE00364062, SPOE00364064, SPOE00364068, SPOE00364070.

⁹⁶⁶ P00044_ET, pp.SPOE00363175-SPOE00363176; P00072_ET, p.SPOE00364063.

⁹⁶⁷ F00469/A01, Agreed Fact n°11.

⁹⁶⁸ P00044_ET, p.SPOE00363193; P00072_ET, p.SPOE00364069. See also F00469/A01, Agreed Fact n°12.

⁹⁶⁹ P00044_ET, pp.SPOE00363181-SPOE00363182.

⁹⁷⁰ P00044_ET, p.SPOE00363188.

Coordinator for the definition of the status of Kosovo, and deputy and was the owner and editor-in-chief of *Zëri*,⁹⁷¹ a newspaper active during the war. Thus, the existing relationships between **THAÇI** and his visitors explain any discussions of Kosovo's past between them. In the context of **THAÇI**'s trial in *Case 06*, it is natural that on meeting each other these men would discuss the course of that trial and the reality they lived through. Accordingly, the Single Trial Judge should not readily infer from such discussions that, as alleged by the SPO, **THAÇI** intended to provide instructions to his visitors for the purpose of influencing **ZYRAPI**.

673. That is particularly the case with respect to **ZYRAPI**, perhaps even more so than other witnesses. His stature as public figure and extensive experience as witness before numerous jurisdictions, mean that he is not someone who could be thought to be susceptible to influence.

674. In any event, even if the Single Trial Judge is convinced that **THAÇI** did have such an intent, no such intent has been proven on the part of his visitors, the other members of the alleged "SMAKAJ Group". The SPO's assertion that those men "engaged" with instructions from **THAÇI**⁹⁷² is not supported by the evidence. The SPO relies on isolated comments allegedly made during the two visits. Yet, the SPO Transcripts are not reliable and, even if they were reliable, the excerpts identified by the SPO do not prove an intent to contact and instruct **ZYRAPI**.

675. As regards **BEHRAMI**, although the SPO alleges that he was present throughout two charged visits which lasted for almost six hours in total, the SPO only cites *two* brief sentences from the 9 September Visit, which they allege he spoke, as demonstrating his intent:

⁹⁷¹ P00044_ET, p.SPOE00363187.

⁹⁷² SPO PTB, paras 214-215.

- i. The SPO alleges that BEHRAMI stated *"He used it. Fred used it a lot"*.⁹⁷³ Yet, "Fred" presumably refers to W04408 (Fred ABRAHAMS), a Human Right Watch researcher who testified publicly on 5-11 September 2023 in *Case 06*, *i.e.* at the time of this visit. As this was public testimony, there was nothing improper in it being discussed. Moreover, a comment on what "Fred" did during his evidence provides no insight into BEHRAMI's views on what Fred had done, let alone proving an intention on BEHRAMI's part to draw some instructions from that for **ZYRAPI**, or an intention to convey such instructions to **ZYRAPI**.
- ii. The SPO further alleges that during the 9 September Visit, BEHRAMI provided concrete suggestions as to the content and manner of **ZYRAPI**'s testimony by saying *"They formed their own command"*.⁹⁷⁴ Yet these words, if they were spoken, appear to have been part of a general discussion about the history of the conflict and of the KLA, where the visitors simply exchanged their memory about key players and events such as the Milosevic-Holbrooke agreement, the withdrawal of Azem Sylva, *etc.*, such comments being clearly not addressed to **ZYRAPI**. The SPO has not demonstrated that any member of the alleged exchange was exhibiting an intention to contact and influence **ZYRAPI**.

676. Neither is any mental state of BEHRAMI proved by the fact that he returned to visit **THAÇI** on 7 October 2023.⁹⁷⁵ [REDACTED].⁹⁷⁶ While the SPO alleges that **THAÇI** "directed" or "urged" **SMAKAJ** and BEHRAMI to return to visit him,⁹⁷⁷ it is not explained on what basis this assertion is made. Even if the SPO

⁹⁷³ SPO PTB, paras 215,98, fn.346, referring to P00108_ET, pp.210-211.

⁹⁷⁴ SPO PTB, paras 215,98, fn.347, referring to P00108_ET, p.194.

⁹⁷⁵ *Contra*, SPO PTB, paras 215-216.

⁹⁷⁶ P00008.

⁹⁷⁷ SPO PTB, paras 98-99,223, referring to P00108_ET, pp.211-212,293.

Transcripts were reliable, they cannot reveal *to whom* any given words are spoken.⁹⁷⁸ It also cannot be apparent from a transcript what tone was used and therefore whether this was a “direction” or “instruction” or a mere invitation for a further visit. And regardless of any request, the fact that BEHRAMI and **SMAKAJ** came to visit again does not reveal any intent to contact or pass instructions to **ZYRAPI**.

677. As regards SYLA, the SPO builds its position that he “engaged” with instructions from **THAÇI** on his alleged utterance of the single word “*Allegations*”.⁹⁷⁹ This is clearly untenable. The meaning of this interjection – even if it was made, and was made by SYLA – is unclear and cannot prove any intent on the part of SYLA to influence **ZYRAPI**’s testimony.
678. With regards to SHALA, the SPO relies on several comments allegedly made by him to assert that he “*engaged with*” **THAÇI**’s instructions.⁹⁸⁰ Nevertheless, most of these observations consist solely of comments regarding the testimony of past witnesses who had already been heard⁹⁸¹ and general discussions about their shared experience during the war. For instance, the SPO makes particular reference to P00108_ET, p.190 l. 19 to p.208, l.6. However, even if that SPO Transcript were reliable, it merely reflects that **THAÇI**, SHALA and the other visitors were recounting their memories of the conflict, and in particular of the Rambouillet conference, with **THAÇI** *de facto* summarising his Defence case in *Case 06*.⁹⁸² This extract from the SPO Transcripts does not indicate the giving of

⁹⁷⁸ Being noted that SYLA also intervened shortly before **THAÇI** spoke: P00108_ET, p.211, l.8, p.293, l.5. Thus, the comments inserted by primed SPO transcribers (P00108_ET, p.293, l.16-17) are not reliable.

⁹⁷⁹ SPO PTB, paras 215,98, fn.346, referring to P00108_ET, pp.210-211.

⁹⁸⁰ SPO PTB, para.98.

⁹⁸¹ See, *inter alia*, P00108_ET, pp.126-127.

⁹⁸² The issues discussed are consistent with **THAÇI**’s *Case 06* Defence case as expressed in, *inter alia*, 1D00048, paras 54-59 (Rambouillet conference), 62-64 (Provisional Government); 1D00049, pp.DHT1200791-DHT1200792, DHT1200800DHT1200808 (the removal of Azem Sylja and the Rambouillet Conference); 1D00050, paras 485, 554-555 (the removal of Azem Sylja during the “coup”),

instructions, let alone to any specific witnesses.⁹⁸³ The Defence recalls that SHALA was a journalist and owner / editor-in-chief of the newspaper *Zëri*, and was present during the Rambouillet conference as a member of the Kosovo Albanian delegation, alongside **THAÇI**.⁹⁸⁴ It is therefore a reasonable inference that he and **THAÇI** were simply remembering the events surrounding the conflict.⁹⁸⁵ Other alleged comments attributed to SHALA, such as *"If you have a long sentence, three or four lines long, you could lose the meaning"*⁹⁸⁶ bear absolutely no evidence of an agreement to convey instructions or influence **ZYRAPI**. SHALA was merely commenting on a prior interview of **THAÇI**.

679. Thus, such isolated remarks fall far short of establishing BEHRAMI, SYLA and SHALA's intent to participate in a coordinated plan to convey instructions from **THAÇI** and/or to influence the testimony of **ZYRAPI**.

680. In addition, contrary to the SPO submissions, there is no evidence that **SMAKAJ** intended to convey any instructions to **ZYRAPI** or to influence his testimony. The SPO maintains that **SMAKAJ** *"engaged with THAÇI's instructions providing specific input"* and *"offered to 'deal with this' and 'clarify it'"*.⁹⁸⁷ Yet, the portions of the Transcripts quoted by the SPO in support of such assertions do not demonstrate any intention to implement **THAÇI**'s instructions. Rather, even if those SPO Transcript segments were reliable, they (i) only show **SMAKAJ** and **THAÇI** discussing the war and various testimonies considered significant for the case,⁹⁸⁸ rather than any alleged specific instructions addressed to **ZYRAPI**;

564-588, and especially 579-584 ('Rambouillet as the emblematic example of THAÇI's lack of effective control').

⁹⁸³ *Contra* SPO PTB, para.94, fn.314.

⁹⁸⁴ 1D00048, para.56.

⁹⁸⁵ See, for instance, the following examples showing that SHALA was a key actor during the conflict, and wrote several articles or books about it: P00108_ET, p.189, l.15-17; p.195, l.23-p.196, l.1; p.199, l.9; p.208, l.1-4; pp.205-207.

⁹⁸⁶ P00108_ET, p.190, l.3-4.

⁹⁸⁷ SPO PTB, para.214.

⁹⁸⁸ SPO PTB, fn.399, referring to P00110_ET, pp.53,225,226-227.

and (ii) **SMAKAJ**'s alleged comments do not indicate an intention to convey instructions.

681. Parts of the Transcripts relied on by the SPO to allege that **SMAKAJ** “engaged with” alleged instructions from **THAÇI** are simply incomprehensible. For example, one excerpt relied on⁹⁸⁹ contains eleven references to “Indiscernible” on a single page,⁹⁹⁰ with many sentences incomplete. Even if the SPO Transcripts were reliable, with so much missing from them, material like this cannot be said to establish only one reasonable inference of an intent to influence **ZYRAPI**'s testimony.

682. Moreover, even portions of the SPO Transcripts which are more comprehensible do not establish **SMAKAJ**'s intent. For example, **SMAKAJ**'s alleged generic responses, such as “I understand”,⁹⁹¹ cannot prove an intent to convey any instruction. Likewise, **SMAKAJ**'s reaction “put a full stop somewhere” after **THAÇI** allegedly stated “Put a full stop” does not constitute an agreement to relay any improper instruction to **ZYRAPI**.⁹⁹² The same applies to **SMAKAJ**'s

⁹⁸⁹ SPO PTB, para.109.

⁹⁹⁰ P00110_ET, p.48, 1.24 to p.49, 1.24: “BASHKIM SMAKAJ: [Whispers] [Noise] All of those but [Indiscernible] we had [Indiscernible] however he doesn't have [Indiscernible]. ARTAN BEHRAMI: [Coughs 00:02:22:00:02:33 while Hashim THAÇI and Bashkim SMAKAJ whisper]. [Indiscernible whispering between Hashim THAÇI and Bashkim SMAKAJ]. BASHKIM SMAKAJ: [Whispering] There is nothing. [Indiscernible]. HASHIM THAÇI: [Whispering] [Indiscernible]. BASHKIM SMAKAJ: [Whispering] [Indiscernible] marketing. Yes, of course, if you do all these -- BASHKIM SMAKAJ: [Whispering] [Indiscernible] We were all trying to become commanders there, so get out of here. HASHIM THAÇI: [Whispering] Yes, yes, one should tell him. One should tell him. ARTAN BEHRAMI: I brought coffee but did not bring some tea. BASHKIM SMAKAJ: [Whispering] No, it is really interesting [Indiscernible]. ARTAN BEHRAMI: Someone? BASHKIM SMAKAJ: [Speaks quietly] [Indiscernible] his whole directorate saw [Indiscernible]. HASHIM THAÇI: [Whispering] That's it! BASHKIM SMAKAJ: [Whispering] “And the others”, he said, “they didn't have any, neither a director nor any other human being”.

⁹⁹¹ P00110_ET, p.109, 1.4-9: “HASHIM THAÇI: What did he want explanations for? To elaborate further?! BASHKIM SMAKAJ: [Indiscernible]. No, no, in the aspect that in some spots he was afraid he harmed you. HASHIM THAÇI: No. No, nothing. BASHKIM SMAKAJ: That's what he thought.”; 1.16-20: “HASHIM THAÇI: But, okay, but here you should -- you should talk about that, uh? BASHKIM SMAKAJ: Don't hurt yourself at all! HASHIM THAÇI: [Whispers] No. BASHKIM SMAKAJ: I understand”.

⁹⁹² P00110_ET, p.47, 1.2-3.

comments “Fred was also trying to do that”,⁹⁹³ “with or without a name”,⁹⁹⁴ and “no, on paper, an ambition”.⁹⁹⁵ None of these remarks proves that **SMAKAJ** intended to convey any instruction regarding **ZYRAPI**’s evidence. Even if that is one possible inference from these words, it is not the only reasonable inference.

683. Besides, even if instances of apparent acquiescence may be discerned in the SPO Transcripts, they were not in response to any improper instruction regarding **ZYRAPI**. For example, **SMAKAJ**’s response “Yes, of course. He just needs to avoid the rhetoric, you know” following **THAÇI**’s alleged statement “Yes. [Whispers] [Indiscernible]. Tell him, “Don’t rush, stay calm. Bam, bam, bam, [Inaudible]”. [With a normal voice] He doesn’t like it”⁹⁹⁶ does not indicate an intent to influence the contents of **ZYRAPI**’s testimony. The same applies to **SMAKAJ**’s comment, “Okay” following **THAÇI**’s alleged statement “What explanations?! Ah, tell him, “These are your problems””.⁹⁹⁷ If anything, this segment suggests that **THAÇI** refused to tell **ZYRAPI** how he should testify.

684. The SPO also seeks to infer illicit intent from an allegation that **SMAKAJ** “engaged in separate discussions with **THAÇI** in whispering tones”,⁹⁹⁸ relying on transcripts annotations indicating, on one occasion that “[Artan BEHRAMI has a

⁹⁹³ P00108_ET, p.210, l.20-25: “HASHIM THAÇI: And it is not a shame here to say he doesn’t remember or does not know, “I don’t remember”. The most emblematic sentence is “I don’t know”, “I don’t remember”. BLERIM SHALA: Yes. HASHIM THAÇI: Nobody can ask you to answer. BASHKIM SMAKAJ: Fred was also trying to do that”.

⁹⁹⁴ P00108_ET, p.190, l.25-p.191, l.9: “HASHIM THAÇI: Even if there had been no KLA at all in March, after the JASHARIS’, the armed resistance in Kosovo would have occurred. BLERIM SHALA: Yes. Yes. HASHIM THAÇI: Even if there had been no KLA. BLERIM SHALA: Under another name. BASHKIM SMAKAJ: With or without a name. HASHIM THAÇI: Huh? BLERIM SHALA: [Rustling noise] One could say it might have taken another name”.

⁹⁹⁵ P00108_ET, p.212, l.13-17: “HASHIM THAÇI: [Whispers] [Chair creaking noise] What Intelligence Service, man?! He has to remove it [Inaudible]. No, because he does our head in during interviews, blah-blah-blah. BASHKIM SMAKAJ: [Whispers] No, on paper, an ambition”.

⁹⁹⁶ P00110_ET, p.48, l.14-18.

⁹⁹⁷ P00110_ET, p.108, l.17-22: “HASHIM THAÇI: Is Bisa coming? Yes, uh? BASHKIM SMAKAJ: [Indiscernible]. “Perhaps”, he said, “some explanations [Indiscernible]”. HASHIM THAÇI: What explanations?! Ah, tell him, “These are your problems”. BASHKIM SMAKAJ: Okay”.

⁹⁹⁸ SPO PTB, para.214.

*separate conversation with Ismail SYLA with a normal voice]*⁹⁹⁹ while “[Hashim THAÇI and Bashkim SMAKAJ talk to each other whispering]”¹⁰⁰⁰ and on another occasion that “[Hashim THAÇI and Bashkim SMAKAJ hold a conversation whispering]”.¹⁰⁰¹ Even if the SPO’s voice attribution was entirely unreliable,¹⁰⁰² for the reasons already set out above, whispering does not demonstrate *male fides*.¹⁰⁰³ Neither is it unusual that among a group of four or five persons, two parallel conversations would occur. The SPO argues for an inference from these factors which suits its case, while simply ignoring all other available inferences. This cannot found a conviction.

685. Accordingly, the evidence does not establish beyond reasonable doubt that **THAÇI**, **SMAKAJ**, **BEHRAMI**, **SHALA**, and **SYLA** intended to provide instructions to **ZYRAPI** regarding his evidence.

(b) The alleged intent would not amount to an intent to take common action

686. In any event, even if the Single Trial Judge were to conclude that **THAÇI**, **SMAKAJ**, and at least one other visitor (that is, a sufficient number to constitute a group) intended to convey instructions from **THAÇI** to **ZYRAPI** in order to influence the latter’s *Case 06* testimony, this would not amount to an intention to take “common action” within the meaning of that term under Article 401(2), understood as a physical group acting together in a single location (see Section III.A.1.d).

⁹⁹⁹ P00108_ET, p.213, l.22-23.

¹⁰⁰⁰ P00108_ET, p.213, l.25- p.214, l.1.

¹⁰⁰¹ P00108_ET, p.293, l.16-17.

¹⁰⁰² Section VI.A.c).

¹⁰⁰³ Paragraph 488.

(c) *The alleged intent would not amount to an intent to obstruct an official person*

687. Finally, regarding intent, even if the SPO *were* able to demonstrate beyond reasonable doubt that each member of the alleged groups had intended to influence **ZYRAPI**'s *Case 06* testimony, and even if the Single Trial Judge considered that this would constitute "common action", such an intent would nonetheless not amount to an intent to *obstruct an official person in performing official duties* within the meaning of Article 401(2).

688. **ZYRAPI** is not an official person and has no official duties. As explained above, the Defence accepts the theoretical possibility of targeting an official person indirectly;¹⁰⁰⁴ however, the intent to target a specific official person must nonetheless be demonstrated.¹⁰⁰⁵ No official person has even been identified in the present case, let alone shown to be the target of obstructive intentions.

689. For the same reasons as were addressed above regarding Count 1, the Defence rejects the SPO assertion that the alleged objective (to influence **ZYRAPI**'s evidence) could have "threatened the ability of the KSC/SPO to obtain accurate and truthful testimony". There is no suggestion, even in the SPO's allegations (let alone the evidence), that **THAÇI** or others intended for **ZYRAPI** to lie or to withhold cooperation from the SPO or KSC. Even according to the SPO's own transcripts, **THAÇI** stated that the witness must be honest and cooperate with the KSC.

690. Regarding the 9 September Visit, much of what the SPO presents as "instructions"¹⁰⁰⁶ reveals nothing at all that is potentially obstructive of any SPO investigator or other official. Rather, the alleged "instructions" have the following features:

¹⁰⁰⁴ See para. 530 and Section III.A.1.a).

¹⁰⁰⁵ [Case 07 Appeal Judgment](#), Partially Dissenting Opinion of Judge Ambos, para.12.

¹⁰⁰⁶ SPO PTB, paras 94-98.

- i. In some parts of the SPO Transcripts, **THAÇI** is alleged to have given “instructions” concerning a *manner* of speaking. The SPO alleges that he recommended using more full stops than commas;¹⁰⁰⁷ advised being concise,¹⁰⁰⁸ not speaking too much,¹⁰⁰⁹ not giving an opinion,¹⁰¹⁰ taking time to answer,¹⁰¹¹ breathing before speaking,¹⁰¹² and said that it is perfectly acceptable to respond “*I don’t know*” or “*I don’t remember*”.¹⁰¹³ Even if such statements were made by **THAÇI**, this is not in any way potentially obstructive of the work of any KSC or SPO official.
- ii. In other places the SPO references an alleged statement from **THAÇI** emphasizing the importance of **ZYRAPI**’s testimony.¹⁰¹⁴ Such a comment, if made, has no possible connection to any obstruction of SPO officials.
- iii. The SPO has highlighted alleged comments by **THAÇI** regarding the conflict in Kosovo and the history of the KLA and Provisional Government of Kosovo (“PGoK”).¹⁰¹⁵ However, they have not shown that these can *only* be interpreted as instructions for **ZYRAPI** to modify his evidence. **THAÇI** simply stated his recollection of the events, consistent with what he has asserted through his *Case 06* Defence Pre-Trial Brief, Opening Statements and Final Briefs.¹⁰¹⁶ For example, the SPO alleges that **THAÇI** instructed that **ZYRAPI** should testify that the PGoK was not functional but merely

¹⁰⁰⁷ P00108_ET, p.189, l.11-13, p.204, l.9-10, p.210, l.2-5.

¹⁰⁰⁸ P00108_ET, p.189, l.22: “HASHIM THAÇI: Shorter is better.”

¹⁰⁰⁹ P00108_ET, p.190, l.8-11.

¹⁰¹⁰ P00108_ET, p.190, l.16.

¹⁰¹¹ P00108_ET, p.208, l.21-25.

¹⁰¹² P00108_ET, p.208, l.21-25: “BLERIM SHALA: The friend, he waited for five seconds and then answered. He should also take the same approach as him. He needs to breathe. HASHIM THAÇI: Those five seconds let them become seven seconds.”

¹⁰¹³ P00108_ET, p.210, l.20-22.

¹⁰¹⁴ P00108_ET, p.189, l.4-5: “HASHIM THAÇI: Now Bisa is decisive, he is decisive. He is decisive.” and l.11.

¹⁰¹⁵ P00108_ET, pp.190-207.

¹⁰¹⁶ 1D00048; 1D000049; 1D000050.

aspirational, and claims that this would amount to a deviation from ZYRAPI's SPO interview.¹⁰¹⁷ However, this misrepresents ZYRAPI's SPO interview. ZYRAPI had acknowledged that [REDACTED]¹⁰¹⁸ and that [REDACTED].¹⁰¹⁹ Besides, THAÇI's observation regarding the aspirational nature of the PGoK were not directed at ZYRAPI but part of his memory of this time where NATO bombed the country, between March and June 1999, rendering any communication extremely difficult,¹⁰²⁰ which is consistent with his *Case 06 Defence*.¹⁰²¹

691. The contents of the SPO Transcripts support other reasonable inferences which are not improper. When THAÇI is reported as saying *"He no longer has any idea about -- he should remove it. [...] We are humans"*,¹⁰²² this could mean that if a witness does not remember an event, he should say so. When SMAKAJ allegedly reports to THAÇI that ZYRAPI had said *"'Perhaps', he said, 'some explanations [Indiscernible]'"* and THAÇI allegedly responds *"What explanations?! Ah, tell him, 'These are your problems'"*, and that *"nothing"* from his evidence can harm him, this suggests that THAÇI did not want to tell ZYRAPI how to testify.¹⁰²³

¹⁰¹⁷ SPO PTB, para.110, referring to, *inter alia*, 1D00115_ET, pp.203, 211, and to F00740/A01, Fact of Common Knowledge n°57, referring to 083280-TR-ET Part 11, pp.19-22.

¹⁰¹⁸ F00740/A01, Fact of Common Knowledge n°57, referring to 083280-TR-ET, Part 7, pp.20-21.

¹⁰¹⁹ F00740/A01, Fact of Common Knowledge n°57, referring to 083280-TR-ET, Part 11, p.20.

¹⁰²⁰ P00108_ET, p.203

¹⁰²¹ 1D00048, paras 62-64; 1D00049, pp.DHT1200808-DHT1200811, DHT1200835-DHT1200837; 1D00050, paras 193-228.

¹⁰²² P00108_ET, p.209, l.2-13: *"HASHIM THAÇI: He should think that he is in a courtroom, not -- the other thing --BLERIM SHALA: Yes, yes, of course. HASHIM THAÇI: He no longer has any idea about -- he should remove it. ARTAN BEHRAMI: No, no, no, no, no, no! BLERIM SHALA: No, no, no! [Other voices are heard saying "no"]. HASHIM THAÇI: He should, he should remove it. This is very important. We are humans, Bler! BLERIM SHALA: It is very important. You are right. HASHIM THAÇI: [Indiscernible] we are humans."*

¹⁰²³ The same is true for THAÇI's alleged comments regarding other witnesses. For instance, concerning [REDACTED]. (P00108_ET, p.186, l.10-12.)

692. The same applies to the 7 October Visit. On the SPO's version of the meetings, **THAÇI** emphasized the need to tell the truth,¹⁰²⁴ to be clear¹⁰²⁵ and to use short sentences.¹⁰²⁶
693. Finally, contrary to what the SPO suggests,¹⁰²⁷ the Defence notes that none of the alleged statements can be considered as any form of pressure.
694. Accordingly, the evidence does not support a conclusion that **THAÇI** or any of his visitors intended to obstruct the ability of any KSC or SPO official to "obtain accurate and truthful testimony".¹⁰²⁸
695. The SPO additionally sought to argue in its PTB that the conduct of the accused "resulted in the deferral and delay of witness testimony."¹⁰²⁹ Despite this broad claim, the only specific witness testimony referred to is that of **ZYRAPI**, which the SPO says "was delayed in significant part by the attempted interference with his testimony".¹⁰³⁰ The Defence refutes this unfounded claim that **ZYRAPI**'s evidence was delayed
696. To support its allegation, the SPO only points to the fact that **ZYRAPI** was initially expected to testify among the first forty witnesses, as reflected in a provisional list filed on 18 November 2022,¹⁰³¹ but ultimately started to testify on

¹⁰²⁴ P00110_ET, p.46, l.3-5: "HASHIM THAÇI: [Speaks quietly] This is easy for him. After the little one, it is very easy for him. To tell the truth, only that pattern and – but –".

¹⁰²⁵ P00110_ET, p.113, l.22-23: "HASHIM THAÇI: [...] He needs to have these things clear; it was done by November."

¹⁰²⁶ P00110_ET, p.46, l.18-19: "HASHIM THAÇI: "And use some full stops". You know these Yugoslavs do not use any full stops, it's all commas for them."

¹⁰²⁷ SPO PTB, para.207.

¹⁰²⁸ THAÇI's alleged intent to obstruct the activities of the KSC is contradicted by his purported statements during the 9 September Visit, supporting the KSC, pursuant to which he is reported as saying: "Even today I would vote to pass this court in parliament. Even if tomorrow it harms me as much as it can." (P00108_ET, p.154, l.2-3). This is not consistent with an individual who would be trying to obstruct this same court.

¹⁰²⁹ SPO PTB, para.220.

¹⁰³⁰ SPO PTB, para.220. See also F00028/A02, p.24.

¹⁰³¹ SPO PTB, para.220, fn.734, referring to, *inter alia*, F00740/A01, Fact of Common Knowledge n°24, referring to KSC-BC-2020-06/F01117/A02/RED2, p.6.

1 July 2024.¹⁰³² No evidence at all is referenced by the SPO regarding the *reason* for that change. In fact, there are several clear reasons which have no connection to the allegations in this case.

697. The 18 November 2022 witness list was filed approximately six months before the start of the SPO case,¹⁰³³ and was expressly described as a “*provisional list*”.¹⁰³⁴ The filing itself emphasised its “*provisional nature*”, stating that “*the list remains under review and adjustments to both witnesses and statements may be necessary*”.¹⁰³⁵

698. As acknowledged by **Witness 7**, numerous factors can cause a change of the SPO’s witness order because that order relies upon a large number of competing factors.¹⁰³⁶ The SPO itself has said that adjustments may be necessary due to “*witness availability and other factors potentially impacting order*”¹⁰³⁷ and that scheduling decisions are influenced by numerous, often competing considerations, including “(i) publicity; (ii) witness availability, testimony modes, examination estimates, sitting schedules, and inter partes consultations; (iii) the scope, nature, and subject matter of the witness’s anticipated testimony and related materials; (iv) the status of the presentation of evidence; (v) the witness’s personal circumstances; (vi) security concerns; and (vii) the need to provide adequate notice”.¹⁰³⁸ According to **Witness 7**,¹⁰³⁹ witness schedules are frequently revised due to the sudden unavailability of a witness, cross-examinations which proceed faster than

¹⁰³² T.372, 1.9-11 (Witness 7).

¹⁰³³ T.370, 1.3-5 (Witness 7).

¹⁰³⁴ F00740/A01, Fact of Common Knowledge n°24, referring to KSC-BC-2020-06/F01117, para.1.

¹⁰³⁵ F00740/A01, Fact of Common Knowledge n°24, referring to KSC-BC-2020-06/F01117, para.1.

¹⁰³⁶ T.370, 1.6-11 (Witness 7): “Q. And do you agree that numerous factors may have intervened in the meantime which could lead to a change of the witness order? A. Yes, I do agree. Q. In fact, is it right that the schedule of witnesses generally relies upon a large number of competing factors? A. Yes, I do agree”.

¹⁰³⁷ F00740/A01, Fact of Common Knowledge n°24, referring to KSC-BC-2020-06/F01117, para.1, fn.5.

¹⁰³⁸ F00740/A01, Fact of Common Knowledge n°31, referring to KSC-BC-2020-06/F01811, para.3, n°32, referring to KSC-BC-2020-06/F01828, para.4, n°35, referring to KSC-BC-2020-06/F02007.

¹⁰³⁹ T.371, 1.14-19 (Witness 7).

expected,¹⁰⁴⁰ the removal of witnesses from the SPO witness list,¹⁰⁴¹ or changes in the mode of testimony of witnesses.¹⁰⁴²

699. In **ZYRAPI**'s case, there were specific circumstances that provided a reasonable explanation for scheduling difficulties. According to **Witness 7**, significant challenges arose in arranging **ZYRAPI**'s testimony because of his serious medical condition.¹⁰⁴³ The Defence notes that [REDACTED].¹⁰⁴⁴

700. Accordingly, the SPO's claim that **ZYRAPI**'s testimony was delayed as a result of the conduct of the *Case 12* accused must be rejected. There is nothing in the evidence which explains *how* **ZYRAPI**'s testimony would have been delayed *even if* the SPO's allegations about a plan to contact him and give instructions to him had existed and been implemented.

(3) No common action was initiated

701. The SPO appears to argue that sufficient initiation of the common action of a group can be constituted by "(i) the SMAKAJ Group members' agreement on the instructions for Witness 2; (ii) **THAÇI**'s and **SMAKAJ**'s coordinated actions aimed at influencing Witness 2's testimony, which included discussing the instructions, contacting Witness 2, and instructing Witness 2 to provide evidence in accordance with **THAÇI**'s preferred narrative of events, as laid out in the SMAKAJ Document; (iii) **THAÇI** and **SMAKAJ** handling papers; and (iv) **SMAKAJ** and BEHRAMI returning to visit **THAÇI** on 7 October 2023 to receive

¹⁰⁴⁰ F00740/A01, Fact of Common Knowledge n°32, referring to KSC-BC-2020-06/F01828, para.2.

¹⁰⁴¹ F00740/A01, Fact of Common Knowledge n°12, referring to KSC-BC-2020-06/F02576, paras 2-3.

¹⁰⁴² F00740/A01, Fact of Common Knowledge n°12, referring to KSC-BC-2020-06/F02576, paras 2-3.

¹⁰⁴³ T.372, l.11-18 (Witness 7): "A. Yes, I agree. Q. Thank you. Mr. Witness, is it right that you were confronted with particular difficulties to schedule the testimony of this witness? A. Yes, that is true. Q. And in particular, he had serious medical issues. Do you agree? Do you remember? A. Yes, I remember. It's correct".

¹⁰⁴⁴ 1D00001_ET.

further instructions for witness interference, in compliance with **THAÇI**'s directions during the 9 September Visit."¹⁰⁴⁵

702. These alleged acts cannot be qualified as the commencement of the common action of a group. As set out above in Section III.A.1.d), common action of a group means unified action in a common location.¹⁰⁴⁶ This is clearly not made out. What the SPO alleges is merely separate (and coordinated) action by individuals, not common action *by a group*.

703. However, even if the Single Trial Judge rejects the Kosovo courts' interpretation of this element, and considers that a group existed, the SPO has not demonstrated that the group initiated a "common action" such as is required for an attempt under Article 28. This is for several reasons:

704. First, regarding items (i) and (iv) identified by the SPO, these simply allege *discussions* between **THAÇI** and his visitors, rather than any (common) *action*. As discussed above (see Section III.B.2.a), a verbal agreement, without more, cannot amount to an attempt.

705. Item (iii) in the SPO's list is similar: it relates to the alleged "*handling of papers*" during the discussions. The SPO has not explained how "handling" of papers could amount to the commencement of a "common action" which is capable of obstructing a public official. The Defence submits that an alleged exchange of papers during a DC visit is of the same nature as a discussion – that is, the sharing of information – and thus may at most constitute a preparatory act rather than the initiation of an obstructive common action.

706. Item (ii) from the SPO's list warrants more detailed attention. It alleges that the common action in question was constituted by: "*(ii) THAÇI's and SMAKAJ's coordinated actions aimed at influencing Witness 2's testimony, which included*

¹⁰⁴⁵ SPO PTB, para.216.

¹⁰⁴⁶ Section III.A.1.d).

discussing the instructions, contacting Witness 2, and instructing Witness 2 to provide evidence in accordance with THAÇI's preferred narrative of events, as laid out in the SMAKAJ Document."¹⁰⁴⁷ This covers three specific allegations. The first, that **THAÇI** and **SMAKAJ** discussed instructions, is repetitive of item (i) above and can be dismissed as incapable of amounting to the initiation of common action. This leaves an allegation of "*contacting Witness 2*"; and an allegation of instructing Witness 2 to give evidence in line with the contents of the 10-Page Document. The Defence will address each of these allegations in turn.

(a) Contact between SMAKAJ and ZYRAPI

707. The Defence does not dispute that contact occurred between **SMAKAJ** and **ZYRAPI**. However, there is no evidence that this contact concerned *Case 06* proceedings and **ZYRAPI**'s testimony therein.

708. **SMAKAJ** and **ZYRAPI** have a long-standing professional and personal relationship, as evidenced by the phone calls, emails, and messages they have exchanged.¹⁰⁴⁸ **ZYRAPI** and **SMAKAJ**, professors, respectively, at the Business College and at the University for Business and Technology in Pristina, taught the same modules, focused on civil emergencies, which brought them together.¹⁰⁴⁹ They also worked together from 2016 to 2020 in the **THAÇI** administration. **SMAKAJ** was an advisor on national security matters,¹⁰⁵⁰ and **ZYRAPI** was an advisor on civilian emergencies and military issues.¹⁰⁵¹

709. It is therefore unsurprising that **SMAKAJ** and **ZYRAPI** were often in contact. Data from **SMAKAJ**'s phone reveals that they had been in contact on this phone

¹⁰⁴⁷ SPO PTB, para.216.

¹⁰⁴⁸ F00756/A01, Agreed Fact, para.7.

¹⁰⁴⁹ F00756/A01, Agreed Fact, para.6; F00469/A01, Agreed Fact n°13. See also 1D00014_ET.

¹⁰⁵⁰ F00469/A01, Agreed Fact n°12.

¹⁰⁵¹ F00756/A01, Agreed Fact, para. 5. See also 1D00014_ET.

since at least 2020¹⁰⁵² and that they had frequent exchanges in 2023, well before the charged visits; the exchanges extracted by the SPO do not refer to *Case 06* or **THAÇI**.¹⁰⁵³ These communications show a level of familiarity normal among friends: **SMAKAJ** calling **ZYRAPI** by the nickname "*Bislo*"; and the two men wishing each other a happy Eid, and discussing their families.¹⁰⁵⁴ Thus, the fact that they were also in contact between August and October 2023¹⁰⁵⁵ does not reveal any suspicious conduct.

710. **ZYRAPI** confirmed during his SPO interview of 6 December 2023 that he and **SMAKAJ** had regular contact including calls, social media and in-person meetings.¹⁰⁵⁶ He stated that their meetings were simply friendly occasions to have coffee together at a restaurant. He confirmed that they never discussed matters related to his testimony.¹⁰⁵⁷

711. Indeed, **ZYRAPI** has constantly denied having been subject to any kind of attempts to influence his evidence. According to an SPO note dated 6 April 2023, prior to his testimony, **ZYRAPI** did not report any security concerns or issues regarding his status; and he explicitly confirmed that he had not been approached by anyone regarding the case or his role in the proceedings.¹⁰⁵⁸ Subsequently, in his SPO interview on 6 December 2023,¹⁰⁵⁹ **ZYRAPI** specified that he had never discussed his testimony before the KSC with **SMAKAJ**.¹⁰⁶⁰ He

¹⁰⁵² 1D00033, p.SPOE40011078. T.698, l.12-23 (KELLY): "Q. Mr. Kelly, from the table at the top of the page, we understand that the following messages below that are Viber messages between Bashkim Smakaj and Bislim Zyrapi; is that correct? A. Yes, sir. That's correct. Q. And in front of start time, we see the date of 17 March 2020. Does that again mean that this is when the conversation in Viber started? A. Yes. Q. On this page, we can see - and we can scroll down on the page - messages sent at different dates between them: 1 March 2023, 31 March 2023, 2 May 2023, and 6 June 2021; is that correct? A. That's correct, sir." See also T.699-701 (KELLY)

¹⁰⁵³ 1D00033_ET.1; 1D00034_ET.

¹⁰⁵⁴ 1D00033_ET.1; 1D00034_ET.

¹⁰⁵⁵ P00183; F00756/A01, Agreed Fact, paras 6-14.

¹⁰⁵⁶ F00756/A01, Agreed Fact, paras 7, 11, 14.

¹⁰⁵⁷ F00756/A01, Agreed Fact, paras 8-11,14.

¹⁰⁵⁸ F00762/A01, Agreed Fact n°2, referring to 112765-112766 RED.

¹⁰⁵⁹ F00756/A01, Agreed Fact n°1, para. 4.

¹⁰⁶⁰ F00756/A01, Agreed Fact n°1, para. 11.

also affirmed that **SMAKAJ** had never given him or shown him any documents during their meetings.¹⁰⁶¹ Subsequently, the SPO contacted **ZYRAPI** to inform him that his name may appear in the context of the *Case 12* public proceedings and that he should contact the SPO if he had any security or related concerns; **ZYRAPI** did not report any such concern.¹⁰⁶²

712. Thus, there is no basis to conclude that he lied about his exchanges with **SMAKAJ**.

713. Against that background, the SPO has failed to establish, beyond reasonable doubt, any causal link between the alleged attempted interference and the timing of **ZYRAPI**'s testimony.

*(b) The 10-Page Document*¹⁰⁶³

714. As set out above, the SPO alleges that **THAÇI** and **SMAKAJ** coordinated actions aimed at instructing **ZYRAPI** to provide evidence in accordance with **THAÇI**'s preferred narrative of events, as laid out in the 10-Page Document,¹⁰⁶⁴ which was allegedly found in an envelope in **SMAKAJ**'s car,¹⁰⁶⁵ and that they handled papers.¹⁰⁶⁶ Yet, the SPO has failed to prove beyond reasonable doubt that the 10-Page Document was seized from **SMAKAJ**, that it emanated from **THAÇI**, or that it was meant to be used to convey instructions to **ZYRAPI**/was ever shown or given to **ZYRAPI**.

715. First, the Defence submits that the SPO has failed to prove that the 10-Page Document was seized from **SMAKAJ**'s vehicle. The circumstances in which the document was allegedly discovered are not supported by direct evidence.¹⁰⁶⁷

¹⁰⁶¹ F00756/A01, Agreed Fact n°1, para. 12.

¹⁰⁶² F00762/A01, Agreed Fact n°3.

¹⁰⁶³ P00125; P00125_ET.

¹⁰⁶⁴ P00125_ET.

¹⁰⁶⁵ SPO PTB, para.110.

¹⁰⁶⁶ SPO PTB, para.216.

¹⁰⁶⁷ F00688/RED, paras 107-114.

Documents quoted in the SPO PTB in support of this assertion, related to the purported chain of custody of the 10-Page Document,¹⁰⁶⁸ have not been admitted into evidence. The SPO relies on eight low-quality photographs of the purported search and seizure operations, showing a car¹⁰⁶⁹ and two pieces of paper in a car,¹⁰⁷⁰ and a registration booklet of a car in the name of **SMAKAJ**,¹⁰⁷¹ the licence plate of which corresponds to the car in the pictures. Yet, the SPO has not produced any evidence regarding the creator of the pictures, or their creation date, or location. In particular, it tendered no evidence that the pictures showing two documents were taken inside the separately photographed car. Those photographs could have been taken in another car, another day. The SPO has failed to call a witness capable of specifying the date, time, and location at which the 10-Page Document was discovered and the photographs taken. In addition, the pictures show only two pages which appear to be similar to some of the ones included in the 10-Page Document, but not all. Without a witness who can speak to these matters, the SPO has failed to establish any link between the 10-Page Document and **SMAKAJ**. Accordingly, the 10-Page document is not relevant and has no probative value.¹⁰⁷²

716. Second, for the reasons detailed above in Section VI.B, the SPO has not proven that **THAÇI** printed the 10-Page Document.

717. Third, the SPO has not proved that **THAÇI** gave the 10-Page Document to **SMAKAJ** during a charged visit. The SPO alleges **THAÇI** and **SMAKAJ** handled certain documents,¹⁰⁷³ and that, during the 7 October Visit, **THAÇI** and **SMAKAJ** “referred to certain papers while the noise of handwriting and paper rustling

¹⁰⁶⁸ SPO PTB, para.110, fn.406-407, referring to 117524-117532 and 119227-119227 RED.

¹⁰⁶⁹ P00126, p.SPOE00344053.

¹⁰⁷⁰ P00126, pp.SPOE00344051-SPOE00344052.

¹⁰⁷¹ P00185.

¹⁰⁷² Being noted that **SMAKAJ** maintains that he has never seen that document before: T.315 (Opening Statements).

¹⁰⁷³ SPO PTB, para.214.

is heard in the audio recording of the visit".¹⁰⁷⁴ This allegation is unsupported by reliable evidence.

718. As elaborated in Section VI.A, the SPO Transcripts are unreliable. This applies not only to the words recorded in them, but also non-verbal sounds. As noted by **Prof. FRASER**, the SPO Transcripts contain descriptions of such sounds which go beyond what can be heard in the sound signal itself.¹⁰⁷⁵

719. In addition to the general problems affecting the SPO Transcripts, the Defence highlights particular inconsistencies between their versions in the portions relied on by the SPO to prove that papers were handled by **THAÇI** and **SMAKAJ**. The first transcript of the 7 October Visit contained no reference to paper-related noises, which appear only in later revisions.¹⁰⁷⁶ Indeed, a passage initially transcribed as "*Some time ago I did*" was subsequently replaced by "[*Short silence*] [*Handwriting noise*]" .¹⁰⁷⁷ Likewise, passages originally marked "[*Unintelligible*]", were later replaced by specific noises such as "[*Paper rustling noise*]" .¹⁰⁷⁸

720. In any event, even assuming that paper-related sounds could be identified, this would not establish which documents were involved, what was done with them, or by whom.

721. Fourth, the 10-Page Document does not contain any instructions addressed to **ZYRAPI**. The SPO alleges that the 10-Page Document "contains **THAÇI**'s

¹⁰⁷⁴ SPO PTB, para.105.

¹⁰⁷⁵ 1D00136, p.19: "*The transcripts also include a good deal of contextual commentary regarding who is entering and leaving rooms, interpretation of various sounds like paper rustling or pages turning – all of which goes far beyond what is objectively derivable from the audio itself*".

¹⁰⁷⁶ Compare 1D00118_ET, p.49 with P00110_ET, p.50.

¹⁰⁷⁷ Compare 1D00118_ET, p.49, l.17-19: "*HASHIM THAÇI: No, no. BASHKIM SMAKAJ: [With a low voice] Some time ago I did [Unintelligible]. Can I bring the papers [Unintelligible].*" with P00110_ET, p.50, l.16-18: "*HASHIM THAÇI: No, no. [Short silence] [Handwriting noise] BASHKIM SMAKAJ: [Whispering] Can I take these papers?*".

¹⁰⁷⁸ Compare 1D00118_ET, p.49, l.19: "*BASHKIM SMAKAJ: [...] Can I bring the papers [Unintelligible].*" with P00110_ET, p.50, l.18-19: "*BASHKIM SMAKAJ: [Whispering] Can I take these papers? [Paper rustling noise]*".

preferred narrative of key events of the war in Kosovo and the KLA history, consistent with instructions provided to his visitors”.¹⁰⁷⁹ This is an overly speculative interpretation of what is in reality, a ten-page document setting out an account of the Kosovo war and the history of the KLA.

722. Indeed, the 10-Page Document is best understood as a compilation of the **THAÇI Case 06** Defence narrative, developed over time. It summaries themes, positions and arguments advanced by the *Case 06* Defence throughout the proceedings. It is not a document intended to convey instructions to **SMAKAJ** to influence the testimony of **ZYRAPI** or any other witness. Throughout the document, none of the phrasing reads like orders or instructions. It consists simply of declarative sentences written in a narrative and description style. Indeed, no verbs are conjugated in the imperative, and no punctuation marks, other than full stops, are used. Even the SPO itself, in its PTB, acknowledges that this document is a “*narrative of events*”.¹⁰⁸⁰

723. Most of the information contained in the document merely reflects *Case 06* Defence position that have already been advanced in filings, or statements throughout the proceedings. The document is organized by topic and each of those topics corresponds to issues that have been addressed by the Defence in *Case 06*. In particular, the themes that the SPO seeks to link to alleged instructions¹⁰⁸¹ simply concern historical events and aspects of the war that have consistently formed part of the Defence case such as the voluntary nature of the

¹⁰⁷⁹ SPO PTB, para.110.

¹⁰⁸⁰ SPO PTB, paras 5,110,173.

¹⁰⁸¹ SPO PTB, paras 173-199: “[...] (i) Voluntary nature of the KLA between at least March and July 1998 [...] (ii) The GS’ composition until November 1998 and THAÇI’s membership therein [...] (iii) THAÇI and VESELI were abroad between November 1998 and March 1999 [...] (iv) DEMAÇI was the highest KLA authority [...] (v) OZ Commanders had authority and did not receive orders or support from the GS [...] (vi) The communiques and KLA post-war publications were propaganda [...] (viii) In April 1999, the PGoK was not functional and its members, including THAÇI as the Prime Minister, were only proposed but not appointed [...]”.

KLA at the beginning,¹⁰⁸² the General Staff composition,¹⁰⁸³ the fact that **THAÇI** was abroad,¹⁰⁸⁴ the General Political Representative of the KLA,¹⁰⁸⁵ the authority of the zone commanders,¹⁰⁸⁶ the communiqués,¹⁰⁸⁷ the PGok.¹⁰⁸⁸

724. The SPO alleges that the narrative contained in the 10-Page Document is consistent with discussions that allegedly took place during visits, *“including in particular during the 9 September and 7 October Visits”*.¹⁰⁸⁹ However, any such

¹⁰⁸² SPO PTB, p.95: *“(i) Voluntary nature of the KLA between at least March and July 1998”*. Compare P00125_ET, p.SPOE00344952: *“This is the moment of the start of the KLA transformation from voluntary units into military transformation”* with 1D00049, p.DHT1200824; 1D00050, para.76.

¹⁰⁸³ SPO PTB, p.96: *“(ii) The GS’ composition until November 1998 and THAÇI’s membership therein”*. Compare P00125_ET, p.SPOE00344953: *“Until November 1998, HTH and KV have dealt with POLITICAL AND MEDIA related issues, as well as meetings with internationals inside and outside of Kosovo”* with 1D00048, paras 117-118; 1D00049, pp.DHT1200827-DHT1200828; 1D00050, para.521.

¹⁰⁸⁴ SPO PTB, p.98: *“(iii) THAÇI and VESELI were abroad between November 1998 and March 1999”*. Compare P00125_ET, p.SPOE00344953: *“Jakup is appointed one of the deputies of A. Sylja only in November 1998; Hashim gets elected Director of the Political Directorate and gets appointed for the first time as a member of the GS of the KLA; KV gets elected head of the Information Service and a member of the GS of the KLA. But immediately after their election, both of them go abroad and return only in March 1999, after the conference of Rambouillet”* with 1D00048, paras 117, 119; 1D00049, p.DHT1200825; 1D00050, para.513.

¹⁰⁸⁵ SPO PTB, p.99: *“(iv) DEMAÇI was the highest KLA authority”*. Compare P00125_ET, p.SPOE00344954: *“The second week of August Adem DEMAÇI was appointed the General Political Representative of the KLA. From this moment onwards Adem DEMAÇI was the main political DECISION TAKING AUTHORITY of the KLA. The seats of the political directorate of the GS also became public in August but Adem DEMAÇI was the superior; he had authority even over the GS”* with 1D00048, para.55; 1D00049, pp.DHT1200803, DHT1200829; 1D00050, para.521.

¹⁰⁸⁶ SPO PTB, p.100: *“(v) OZ Commanders had authority and did not receive orders or support from the GS”*. Compare P00125_ET, p.SPOE00344957: *“Zone commanders accused the GS of incompetency in organization skills, and regarding lack of weapon supply, lack of finance, guidance and orders”* with 1D00051, p.DHT1201103; 1D00050, paras 77, 476, 500.

¹⁰⁸⁷ SPO PTB, p.104: *“(vi) The communiques and KLA post-war publications were propaganda”*. Compare P00125_ET, p.SPOE00344958: *“Communiques: They were a propaganda. [...] They had no significance, they were not orders to the KLA, but a propaganda for the public opinion”* with 1D00049, p.DHT1200851; 1D00050, paras 394, 397; 1D00051, p.DHT1201047.

¹⁰⁸⁸ SPO PTB, p.105: *“(viii) In April 1999, the PGoK was not functional and its members, including THAÇI as the Prime Minister, were only proposed but not appointed”*. Compare P00125_ET, p.SPOE00344960: *“Hashim was only proposed Prime Minister of the PGK, but he was not elected at this stage. Therefore, Hashim had no rights to distribute tasks. The same month, in April 1999, Hashim made public some of the names that were proposed to be appointed ministers and vice ministers in the PGK. B. Zyrapi was proposed the Vice Minister of Defense. [...] Unfortunately, the establishment of the PGK did not take place during NATO bombing. A government is considered elected only when it passes through the legal and constitutional procedures... when it is approved by the parliament... At the time Kosovo had no parliament, no constitution, and no laws. [...] THAÇI ‘did not have the authority neither to commence nor to stop operation “Arrow”’”* with 1D00049, p.DHT1200835; 1D00050, paras 177, 564; 1D00051, pp.DHT1201109-DHT1201110.

¹⁰⁸⁹ SPO PTB, para.110.

consistency is entirely to be expected. If the discussions concerned the visitors' recollections of the war, it is unsurprising that they would overlap with a document devoted to the history of the Kosovo war and the KLA. The SPO also alleges that **THAÇI** "*provided instructions on the content of the targeted witness' testimony*"¹⁰⁹⁰ and that those alleged instructions are reflected in the 10-Page Document purportedly "*tailored for Witness 2*".¹⁰⁹¹ Yet, it is not surprising that the narrative in the document is similar to that of **ZYRAPI**. After all, **THAÇI** and **ZYRAPI** experienced the war and played a key role in it as members of the KLA GS and then of the PGoK together, meeting each other during and after the war. Thus, they share a common past and a common narrative. Accordingly, the SPO has failed to prove that the 10-Page Document was used by **THAÇI** to convey instructions to **ZYRAPI**.

725. Finally but crucially, the Defence highlights that the only conduct which the SPO points to as constituting the commencement of "common action" are steps taken by **THAÇI** and **SMAKAJ**.¹⁰⁹² Even if the Single Trial Judge does not adopt the meaning of "common action" used by judicial actors in Kosovo, this is clearly not common action by a "group". Considering that this offence could be established by action from only one or two persons would defeat the statutory intention of including the "group" requirement in this offence.

726. For the above reasons, the Defence submits that the SPO has failed to prove beyond reasonable doubt that **THAÇI** attempted to obstruct an official person's official duties within the meaning of Article 401(2).

¹⁰⁹⁰ SPO PTB, para.173.

¹⁰⁹¹ SPO PTB, para.111.

¹⁰⁹² SPO PTB, para.216, quoted above at paragraph 701.

b) Agreement

727. An agreement under Article 35 requires that (i) the perpetrator agrees with one or more other persons to commit a criminal offence and (ii) one or more of these persons undertakes any substantial act towards the commission of the criminal offence.
728. For the reasons set out above in Section III.B.3.a), this mode of liability cannot be charged in connection with Article 401(2). Additionally, for the reasons set out in Section IV.C.2, the charge based on this mode of liability is incoherent and must be dismissed. However, in the event that the Single Trial Judge does not dismiss this mode of liability, the Defence submits that its requirements are not met.
729. First, unless the Single Trial Judge corrects the interpretation of “common action” adopted in previous KSC cases and by the SPO, he should rule that an offence under Article 401(2) cannot be charged using Article 35 agreement, since it would be duplicative.¹⁰⁹³
730. Secondly, the requirements have not been proven by the SPO. As discussed above,¹⁰⁹⁴ the SPO has failed to prove that **THAÇI** and his visitors agreed to obstruct the work of KSC/SPO officials. Specifically, (i) no official persons were targeted; (ii) **THAÇI** did not give any instructions that **ZYRAPI** lie or withhold his testimony, and (iii) the SPO has not demonstrated that **THAÇI**’s visitors agreed and intended to convey his alleged instructions to **ZYRAPI**. The Defence stresses that an agreement under Article 35 must cover every material element of the offence. An agreement to obstruct an official person’s official duty would therefore require agreement on the target of the obstruction: in this case an official of SPO or KSC. That is clearly not the case here, since at no point is

¹⁰⁹³ Section IV.C.2.

¹⁰⁹⁴ See Section VII.C.1.a)(2).

THAÇI or his visitors alleged to have expressed the will to obstruct the work of the KSC/SPO, let alone any specific members of its personnel. Thus, even if **THAÇI** and his visitors had agreed to talk to a witness, this would be insufficient to characterise an agreement to obstruct the work of KSC/SPO officials.

731. Besides, neither **THAÇI** nor any of his visitors undertook any *substantial* act towards the commission of the criminal offence, since (i) an agreement itself, including an exchange of papers within it, cannot be qualified as a “substantial act”,¹⁰⁹⁵ and (ii) the SPO has failed to prove that the contacts between **SMAKAJ** and **ZYRAPI** concerned *Case 06* proceedings and had any relationship to the discussions with **THAÇI** during the DC visits.¹⁰⁹⁶

732. This mode of liability should therefore be dismissed.

c) Incitement

733. An incitement is materialised by psychological influence on another person with a view to causing that other person to commit a criminal offence.

734. **THAÇI** is charged under Article 32(1) and Article 32(3). As explained above, Article 32(3) does not apply since obstruction under Article 401(2), (3) and (5) is not an offence punishable by imprisonment of *at least* five years.¹⁰⁹⁷ Accordingly, this mode of liability should be dismissed.

735. Article 32(1) is also inapplicable, since the SPO does not allege the completed commission of obstruction under Article 401(2) but only that it was attempted.

736. Besides, even if the SPO had charged **THAÇI** under Article 32(2), incitement would still not be established. That is because the SPO has not proved, regarding any conduct which did occur after the 9 September Visit, that such conduct was caused by **THAÇI**.

¹⁰⁹⁵ Section III.B.3.a).

¹⁰⁹⁶ See Section VII.C.1.a)(3)(a)

¹⁰⁹⁷ Section III.B.4.

737. Accordingly, this mode of liability should be dismissed.

2. Count 5, Violating secrecy of proceedings

738. The SPO alleges that, during the 9 September and 7 October Visits, **THAÇI** disclosed confidential information to his visitors regarding **ZYRAPI**, [REDACTED], [REDACTED], [REDACTED], [REDACTED], and **W04401**,¹⁰⁹⁸ namely “(i) *in relation to Witness 2: his identity as an SPO witness, and the contents of his SPO interview; (ii) in relation to [REDACTED]: identifying information including his age, job, his [REDACTED] and other identifying facts, the fact that during private session testimony [REDACTED], the location of the events which were the subject of the witness’s testimony as well as portions of his private session testimony; (iii) in relation to [REDACTED]: identifying information including his family relationships, life story, his [REDACTED] and other identifying facts, the location of the events which were the subject of the witness’s testimony and portions of his private session testimony; (iv) in relation to [REDACTED]: her identity as SPO protected witness and portions of her evidence provided in private session; (v) in relation to [REDACTED]: his identity as an SPO protected witness and portions of his evidence provided in private session*”.¹⁰⁹⁹ The SPO further alleges that **THAÇI** revealed the identity of upcoming witness **W04401**, and the removal of a certain number of witnesses from the SPO witness list.¹¹⁰⁰

739. To prove the completed commission of a violation of the secrecy of proceedings under Article 392(1), the SPO must demonstrate that: (1) **THAÇI** revealed information disclosed to him in an official proceeding, whose revelation was not authorised according to law or a decision of a court; (2) he knew that the revelation of such information disclosed in an official proceeding was not

¹⁰⁹⁸ SPO PTB, para.239.

¹⁰⁹⁹ SPO PTB, para.239.

¹¹⁰⁰ SPO PTB, para.239.

authorised according to law or a decision of a court and he had direct or eventual intent to reveal the information.¹¹⁰¹

740. These requirements are not met. **THAÇI** did not “reveal” confidential information because the matters allegedly discussed were already public and known to his visitors; and in any event there is no evidence that **THAÇI** intended to reveal confidential information.

a) Prior knowledge among **THAÇI**’s visitors regarding the information

741. Information is not “revealed” when it is shared with a person who is already aware of it.¹¹⁰² In the present case the information in question would have already been well known to **THAÇI**’s visitors because it was widely known information in the public domain in Kosovo.

(1) Public information regarding **ZYRAPI**

742. The SPO alleges that, during the 9 September and 7 October Visits, **THAÇI** revealed to his visitors information about **ZYRAPI** which had been disclosed in the context of *Case 06* proceedings, including “*his identity as an SPO witness, and the contents of his SPO interview*”.¹¹⁰³

743. However, both **ZYRAPI**’s identity as an SPO witness and the substance of his SPO interview were already in the public domain prior to **SMAKAJ**’s Visits, and would have been well known to **THAÇI**’s visitors.

744. *First*, **ZYRAPI**’s status as an SPO Witness was public. On 20 July 2019, **ZYRAPI** told the press that he had been summoned by the SPO as a suspect.¹¹⁰⁴ Thereafter, it was reported in several articles that he had been interviewed by the SPO in

¹¹⁰¹ Section III.A.2.

¹¹⁰² Section III.A.2.a) above.

¹¹⁰³ SPO PTB, para.239, referring to Section II, paras 94, 96, 104, 106.

¹¹⁰⁴ 1D00012, p.DHT1200047.

August 2019 as a suspect.¹¹⁰⁵ **ZYRAPI** [REDACTED].¹¹⁰⁶ **Witness 7** testified that **ZYRAPI**'s cooperation with the SPO was already public knowledge at the time of **SMAKAJ**'s Visits.¹¹⁰⁷

745. *Secondly*, the contents of **ZYRAPI**'s anticipated testimony in *Case 06* were likewise already in the public domain prior to the **SMAKAJ** Visits.

746. It is common knowledge that **ZYRAPI** was Chief of the KLA General Staff during the conflict.¹¹⁰⁸ **ZYRAPI** is a "*well-known and public figure in Kosovo*".¹¹⁰⁹ Witness 7 testified because of this, and because of his prior testimony before other courts, **ZYRAPI** did not benefit from protective measures in *Case 06*.¹¹¹⁰

747. **ZYRAPI** had testified extensively before other courts about the Kosovo conflict and his role within the KLA.¹¹¹¹ In particular, he testified *publicly* as a witness:

- i. in July 2002, in the *Sali Veseli et al.* trial before the District Court of Prizren, regarding the organization of the KLA and the role and murder of Commander Drini;¹¹¹²
- ii. in March 2003, in the *Sali Veseli et al.* trial before the District Court of Prizren, regarding the organization of the KLA, including the role of Drini, Sylejman SELIMI, and Kadri VESELI, his own relationship with Commander Drini, and his role within the Provisional Government;¹¹¹³

¹¹⁰⁵ 1D00013_ET, p.DHT1200252-ET; 1D00102_ET, p.DHT1200267-ET.

¹¹⁰⁶ [REDACTED].

¹¹⁰⁷ T.400-402 (Witness 7).

¹¹⁰⁸ 1D00014_ET.

¹¹⁰⁹ T.397, l.20 (Witness 7).

¹¹¹⁰ T.397, l.15-17 (Witness 7).

¹¹¹¹ F00740/A01, Fact of Common Knowledge n°57, referring to 083280-TR-ET Part 1, p.14, l.12-16: "[REDACTED]"; p.15, l.3-11: "[REDACTED]".

¹¹¹² 1D00064, pp.SITF00021542, SITF00021544, SITF00021548-54.

¹¹¹³ 1D00065, SITF00021527-29.

- iii. in June 2005, in the *Fatmir Limaj et al.* case before the ICTY, regarding the organization of the KLA, the General Staff, and his role within it in 1998-1999, including his entry into Kosovo in 1998 with **THAÇI** and Kadri VESELI, and his meeting with Rexhep SELIMI, *etc.*,¹¹¹⁴
- iv. in November 2006, in the *Sainovic et al.* case before the ICTY;¹¹¹⁵
- v. in April 2007, in the *Haradinaj et al.* case before the ICTY, regarding the organization of the KLA, the General Staff, and his role within it in 1998-1999, including his meetings with **THAÇI**, Kadri VESELI, Rexhep SELIMI;¹¹¹⁶
- vi. in March 2009, in the *Dordević* case before the ICTY, regarding the organization of the KLA, the General Staff, and his role within it from June 1998 to April 1999, including his knowledge about **THAÇI**, Rexhep SELIMI, Azem SYLA, Sokol DOBRUNA;¹¹¹⁷
- vii. in August 2011, in the *Haradinaj et al.* case before the ICTY, regarding the organization of the KLA, its General Staff, his role within it, and his meetings with **THAÇI**, Rexhep SELIMI, and Jakup KRASNIQI between March 1998 and November 1998;¹¹¹⁸
- viii. in June 2013, in the *Krasniqi et al.* case before the Basic Court of Pristina, regarding the organization of the KLA, the General Staff and his role within

¹¹¹⁴ 1D00066, pp.6820-22, 6824-25; 1D00067, pp.6847, 6849-53.

¹¹¹⁵ F00740/A01, Fact of Common Knowledge n°64, referring to SPOE00384934- SPOE00384938.

¹¹¹⁶ F00740/A01, Fact of Common Knowledge n°58, referring to IT-04-84 T3154-T3255; 1D00068, pp.3258-67, 3282; 1D00069, 3365-68, 3374, 3386.

¹¹¹⁷ F00740/A01, Fact of Common Knowledge n°65, referring to SPOE00384939-SPOE00384941; 1D00070, pp.2400-41, 2403, 2406, 2417; 1D00071, pp.2426, 2453, 2461-62; 1D00072, pp.2489-93, 2495-98, 2507-8.

¹¹¹⁸ F00740/A01, Fact of Common Knowledge n°63 (SPOE00384931-SPOE00384933); 1D00073; 1D00074, pp.679, 682, 688, 695, 756; 1D00075, pp.773-6.

it from May 1998 to October 1999, including the role of **THAÇI** within the Political Directorate;¹¹¹⁹

ix. in January 2018, in the *Fatmir Limaj* case before the Gjakova Basic Court, regarding the organization of the KLA, the General Staff, and his role within it from June 1998 to April 1999, including as Chief of the KLA General Staff.¹¹²⁰

748. **ZYRAPI**'s appearances before the ICTY were filmed and broadcast publicly online – the transcripts thereof remain publicly accessible online today – and his statements before domestic courts were also discussed in the media.¹¹²¹

749. Beyond formal evidence in other trials, **ZYRAPI** has often spoken publicly about his views and recollections regarding the Kosovo conflict and the KLA. **Witness 7** testified that **ZYRAPI** regularly expressed his views on such matters in the media, including on specific issues raised in *Case 06* and/or in his evidence, such as the issuance of an order to kill Gani Geci,¹¹²² the lack of authorship of communiques by **THAÇI**,¹¹²³ etc.

750. Consequently, as acknowledged by **Witness 7**, since **ZYRAPI** was a well-known public figure who had testified extensively before, and whose role was discussed in the media, the scope of his anticipated evidence in *Case 06*, namely his views about the Kosovo conflict and his role within the KLA, especially in the General Staff, was to a large extent in the public domain prior to **SMAKAJ**'s Visits.¹¹²⁴

751. The Defence notes that the SPO has not particularised its allegation that **THAÇI** revealed confidential information from the contents of **ZYRAPI**'s evidence. The

¹¹¹⁹ 1D00076, pp.SITF00393430-34, SITF00393438.

¹¹²⁰ 1D00077_ET, pp.SPOE00068076, SPOE00068079, SPOE00068081, SPOE00068083.

¹¹²¹ 1D00011; T.399 (Witness 7).

¹¹²² T.398 (Witness 7); 1D00010_ET.

¹¹²³ 1D00088_ET; F00740/A01, Fact of Common Knowledge n°57, referring to 083280-TR-ET, Part 5, pp.6-8, 10.

¹¹²⁴ T.403, 1.6-13 (Witness 7).

only specifically identified information appears in paragraph 106 of the SPO PTB where SPO alleges that **THAÇI** stated that “Witness 2 ‘explained [...] very well’ *THAÇI’s visit to the Llap Zone, including his trip to Prishtinë/Priština*”.¹¹²⁵ The SPO asserts that this alleged remark relates to an SPO interview on this topic “*where Witness 2 talked about a visit to Llap OZ around early August 1998, during which THAÇI and Rexhep SELIMI left for Prishtinë/Priština to follow up on the injury of Agim CELAJ, while Witness 2 was meeting the Llap OZ command*”.¹¹²⁶

752. The Defence stresses that **THAÇI**’s 1998 visits to the Llap OZ and Pristina are public knowledge. For example, they had been discussed in open session during the testimony of **MUSTAFA** in *Case 06* in July 2023. **MUSTAFA** testified that **THAÇI** was part of a delegation that arrived in the Llap OZ in August 1998 and that he was merely passing through, as he was on his way to meet Adem DEMACI in Pristina.¹¹²⁷ These events are also discussed in the publicly available book by Skender ZHITIA on the history of the Llap zone,¹¹²⁸ whose relevant excerpts were discussed in open session during **MUSTAFA**’s evidence in *Case 06*.¹¹²⁹

¹¹²⁵ SPO PTB, para.106, fn.386.

¹¹²⁶ SPO PTB, para.106, fn.387.

¹¹²⁷ F00740/A01, Fact of Common Knowledge n°48, referring to KSC-BC-2020-06 20230714 ENG, p.5723, l.3-11: “Q. Now, part of the General Staff delegation that arrived in your zone included Mr. Thaçi and Mr. Rexhep Selimi. And you were asked in your SPO interview about them, and you said that they were passing through and that they “had their own destination.” Do you recall where they were going? A. I did not ask them because they won’t tell me, but I think they were on -- on their way to meet Adem Demaci. Q. And Adem Demaci was in Prishtina? A. Yes.”

¹¹²⁸ F00740/A01, Fact of Common Knowledge n°52, referring to 082894-TR-ET Part 2, pp.18-19, p.21, l.21-23.

¹¹²⁹ F00740/A01, Fact of Common Knowledge n°46, referring to KSC-BC-2020-06 20230712 ENG RED, p.5532, l.14-23: “MS. LAWSON: And I’d like to call back up the Zhitia book, please. The reference is SPOE00055678, and we’ll go to page 55819. The English is SPOE00055799. And we’ll go to page 55819. Q. We can see there he’s describing this visit in August 1998; isn’t that correct? A. I cannot confirm it with certainty, but I have no reason to doubt the account of Mr. Skender. It’s hard for me, though, to make comments on other people’s writings. Q. And he mentions the other members of the delegation as Hashim Thaçi and Rexhep Selimi; isn’t that correct?”

753. Moreover, the SPO Transcript of the 7 October Visit only records **THAÇI** as having allegedly said *“he explained it very well when I was in Llap”*¹¹³⁰ and that *“Hashim went to Pristina”*.¹¹³¹ The SPO Transcript does not indicate any detail, such as reference to a date, SELIMI or Agim CELAJ.¹¹³² There is nothing in the SPO Transcript to suggest that **THAÇI** referred **ZYRAPI**’s SPO Interview, as opposed to any number of public discussions by **ZYRAPI** on this subject. Indeed, **ZYRAPI** had testified publicly before other courts about the Llap OZ’s composition and functioning,¹¹³³ his operational responsibilities during the war¹¹³⁴ and his meetings with **THAÇI**.¹¹³⁵

754. Accordingly, the events which the SPO alleges **THAÇI** mentioned to **SMAKAJ** during the 7 October Visit would have already been well known to his visitors. It would likewise have already been known to them that these events would form part of the evidence of **ZYRAPI**.

(2) Public information regarding other witnesses

(a) W04401

755. The SPO alleges that, during the 9 September Visit, **THAÇI** revealed to his visitors *“the identity of upcoming witness”* **BASHOTA**.¹¹³⁶

756. However, **BASHOTA**’s status as an SPO witness was already public prior to the 9 September Visit. Since 2019, the Kosovo press, at times with **BASHOTA**’s own

¹¹³⁰ P00110_ET, p.109, l.24-25.

¹¹³¹ P00110_ET, p.110, l.2.

¹¹³² P00110_ET, pp.109-110.

¹¹³³ 1D00071, p.2457; 1D00072, pp.2490-2491.

¹¹³⁴ F00740/A01, Fact of Common Knowledge n°58, referring to IT-04-84 T3154-T3255, p.3208; 1D00073, pp.644-645.

¹¹³⁵ See, *inter alia*, 1D00069, p.3374 (regarding his alleged presence in Dukagjin Zone at the end of August or beginning of September 1998 with **THAÇI** and others), p.3396 (regarding his alleged presence in Likofc [sic] with **THAÇI** and others); 1D00072, p.2507 (regarding his alleged presence in Rasat e Rahovecit with **THAÇI** after the attack of Orahovac in July 1998); 1D00071, pp.2483-2484 (regarding his alleged presence in Petrovo in April 1999 with **THAÇI** and others).

¹¹³⁶ SPO PTB, paras 86, 239-240.

confirmation, has reported that he was questioned in The Hague as a suspect¹¹³⁷ and that the SPO had offered him an agreement *“which would be favourable for him, but bad for the KLA”*.¹¹³⁸ **BASHOTA**’s public profile is further evidenced by press articles stating that *“he was welcomed by many citizens at Pristina International Airport”* upon his return from The Hague.¹¹³⁹ [REDACTED].¹¹⁴⁰ **Witness 7** stated that **BASHOTA** testified in *Case 06* without any protective measures because he is a *“well-known and public person in Kosovo”*,¹¹⁴¹ and confirmed that **BASHOTA**’s cooperation with the SPO was publicly known.¹¹⁴²

(b) [REDACTED]

757. [REDACTED] testified in *Case 06* on [REDACTED],¹¹⁴³ with protective measures.¹¹⁴⁴ The SPO also alleges that during the **SMAKAJ** Visits, **THAÇI** revealed the identity of [REDACTED] as an SPO witness and portions of her evidence provided in closed session.¹¹⁴⁵ The SPO also asserts that **THAÇI** disclosed confidential information about her during the visit of 15 September 2023 although this allegation is not part of the charges.¹¹⁴⁶

758. However, the evidence indicates that [REDACTED]’s status as an SPO witness in *Case 06* was already publicly known prior to the DC visits. [REDACTED],¹¹⁴⁷ [REDACTED].¹¹⁴⁸

¹¹³⁷ 1D00097_ET; 1D00025; 1D00102_ET, p.DHT1200268-ET.

¹¹³⁸ 1D00025, p.DHT1200279.

¹¹³⁹ 1D00097_ET.

¹¹⁴⁰ [REDACTED].

¹¹⁴¹ T.427 (Witness 7).

¹¹⁴² T.427, l.21-23 (Witness 7): *“Q. Thank you. And his prior collaboration with the SPO was also public, the fact that he had been interviewed; correct? A. Yes, that’s correct.”*

¹¹⁴³ F00740/A01, Fact of Common Knowledge n°51.

¹¹⁴⁴ F00740/A01 Fact of Common Knowledge n°16, referring to KSC-BC-2020-06 - F00338 RED, para.76(g).

¹¹⁴⁵ SPO PTB, paras 91, 102.

¹¹⁴⁶ SPO PTB, para.209, fn.688, referring to P00112_ET, pp.134-135, 137.

¹¹⁴⁷ T.363 (Witness 7).

¹¹⁴⁸ 1D00002.

(c) [REDACTED]

759. The SPO asserts that **THAÇI** disclosed [REDACTED]'s identity as an SPO protected witness and portions of his evidence provided in closed session.¹¹⁴⁹

760. Yet, as demonstrated above in Section VII.A.2.a)(2), [REDACTED].

761. Accordingly, the evidence in the case indicates the strong possibility that **THAÇI**'s visitors would have already been aware, prior to the 9 September and 7 October Visits, of the material concerning **ZYRAPI**, W04401, [REDACTED] or [REDACTED]. The SPO has not proved beyond reasonable doubt that **THAÇI** "revealed" this information to his visitors.

b) **THAÇI** lacked the relevant intent

762. In any event, there is no evidence that **THAÇI** intended to reveal confidential information to his visitors.

763. Most of the matters discussed were so widely known, that **THAÇI** would likely not have known of any formal confidential classification, but he certainly would have reasonably expected his visitors to already be familiar with these topics. For instance, when mentioning individuals such as **MUSTAFA**,¹¹⁵⁰ **BASHOTA**¹¹⁵¹ or **ZYRAPI**¹¹⁵², **THAÇI** was referring to key figures who held well-known, significant roles within the KLA or the conflict and who were widely known to be playing a role in the proceedings before the KSC. His comments were part of discussions among people who shared deep knowledge of the same events and were based primarily on information already known to them, or which was so easily deducible as to be obvious.

¹¹⁴⁹ SPO PTB, para.239.

¹¹⁵⁰ P00108_ET, p.201.

¹¹⁵¹ P00108_ET, pp.189,197; P00110_ET, p.112.

¹¹⁵² P00108_ET, pp.189, 195, 206; P00110_ET, pp.113-114.

764. With regard to his discussions about [REDACTED], concerning [REDACTED] and [REDACTED],¹¹⁵³ if such comments were made they amounted to mere gossip or idle chatter, and not a deliberate intent to reveal sensitive information.
765. Inadvertent or unknowing revelation of confidential information cannot amount to an offence under Article 392,¹¹⁵⁴ and the SPO has not proved that **THAÇI** had the intent to reveal such information.
766. Accordingly, the SPO has failed to prove beyond reasonable doubt that **THAÇI** committed the offence of violation of secrecy of proceedings during **SMAKAJ's** Visits. Count 5 must be dismissed.

3. Count 10, Contempt

767. The SPO alleges that **THAÇI** committed a contempt of court in the context of the 9 September and 7 October Visits.¹¹⁵⁵ The SPO's allegations in regard are based solely on the content of the SPO Transcripts. As these are unreliable (see Section VI.A above), Count 10 has not been proved beyond reasonable doubt.

D. THE KILAJ VISIT OF 6 OCTOBER 2023

768. The SPO alleges that during the 6 October 2023 Visit, **THAÇI** revealed confidential information to **KILAJ** and **KRYEZIU** regarding SPO witnesses, including **Witness 3** and **Witness 4**,¹¹⁵⁶ and gave instructions to be conveyed to **Witness 4** about how to testify, referencing and providing portions of **Witness 4's** confidential prior statements.¹¹⁵⁷
769. Based on these allegations, the SPO has brought three sets of charges against **THAÇI**.¹¹⁵⁸

¹¹⁵³ P00108_ET, pp.139-143; SPO PTB, para.239.

¹¹⁵⁴ Cf. [Nshogoza Trial Judgment](#), para.176; [Griffiths Contempt Judgment](#), para.45.

¹¹⁵⁵ SPO PTB, para.262.

¹¹⁵⁶ SPO PTB, para.242.

¹¹⁵⁷ Indictment, para.21.

¹¹⁵⁸ Indictment, para.46.

- i. Count 3 charges obstruction of official persons in performing official duties under KCC Article 401(2). As explained above in Section IV.C, the modes of liability charged are legally incoherent but refer to attempt, agreement (Article 35) and incitement (Articles 32(1) and (3)).
- ii. Counts 6 and 7 respectively charge the completed commission of violation of the secrecy of proceedings under KCC Article 392(1) and (2).
- iii. Count 11 charges the completed commission of contempt of court under KCC Article 393.

770. The SPO has failed to establish these charges beyond reasonable doubt.

1. Counts 3, Obstruction of official persons in performing official duties

771. **THAÇI** is charged with attempted obstruction, agreement to commit an attempted obstruction; and incitement to commit an attempted obstruction.

772. The constitutive elements of the offence of obstruction under KCC Article 401(2), which would be required for the *completed commission* of this offence, have been developed in Section III.A.1. and summarised at paragraph 501.

773. As a preliminary point, the Defence reiterates that:

- i. Count 3 is defective because the SPO has not identified which specific natural official persons and which specific tasks were the subject of attempted obstruction, and how these tasks were to be obstructed.¹¹⁵⁹
- ii. The SPO has applied an incorrect, extensive interpretation of Article 401 which must be rejected in accordance with the principle *in dubio pro reo*.¹¹⁶⁰

¹¹⁵⁹ Section IV.B.

¹¹⁶⁰ Section III.A and III.C.

iii. The modes of liability in Count 3 are incoherent. The charges relating to agreement and incitement, in particular, are defective and must be struck out.¹¹⁶¹

a) Attempt

774. As elaborated above,¹¹⁶² in order to establish an attempt under Article 401(2) and Article 28, the SPO must prove (i) a group of persons existed; (ii) each member of the group intended the actual commission of the crime;¹¹⁶³ and (iii) they took action toward the commission of the offence – but the offence was not completed.

775. In the present case, this has not been established.

(1) The alleged members of the group did not intend to obstruct the work of KSC/SPO Officials.

776. The SPO alleges that the participants in the 6 October Visit amounted to a group composed of **THAÇI, KILAJ** and **KRYEZIU**.¹¹⁶⁴ The Defence will address below whether (and if so at what time) a “group” existed. However, it will first address the extent to which the SPO has established the intent of these three men as relevant to Article 401(2).

777. The SPO’s central allegation regarding Count 3 is that **THAÇI, KILAJ** and **KRYEZIU** planned to convey instructions from **THAÇI** to **Witness 4**.¹¹⁶⁵

778. However, (a) this factual allegation has not been proven beyond reasonable doubt, and even if it had been established, it would not amount to an intention

¹¹⁶¹ Section IV.C.

¹¹⁶² Section III.B.2.

¹¹⁶³ The SPO does not appear to dispute that it must prove that each member of the group had such an intent - see for example SPO PTB, para.211, claiming that “*the group members acted jointly to pursue the obstructive purpose*”.

¹¹⁶⁴ Indictment, para.23; SPO PTB, para.6.

¹¹⁶⁵ SPO PTB, paras 217-218.

(b) to take “common action” within the meaning of that term under Article 401(2), and (c) to obstruct an official person in the performance of official duties.

(a) *The SPO has not proven that the members of the alleged group intended to influence*

Witness 4’s testimony

779. The SPO has not proved beyond reasonable doubt that all three men intended to influence **Witness 4’s** testimony.

780. First, the SPO’s allegations of intent are significantly founded entirely on the contents of the SPO Transcripts.¹¹⁶⁶ However, for the reasons explained above, these are unreliable and cannot found a conclusion about the intent of the three men beyond reasonable doubt.¹¹⁶⁷

781. Even if the Single Trial Judge accepts the contents of the SPO Transcripts as reliable, the SPO has not proved the required intent.

782. The SPO alleges the existence of a group composed of **THAÇI**, **KILAJ** and **KRYEZI** but consistently refers to exchanges between **KILAJ** and **THAÇI** only. In support of **KRYEZIU**’s participation in an alleged group, the SPO refers only to a few words allegedly spoken by **KRYEZIU** during the entire visit, which do not demonstrate any intent by him to influence the testimony of **Witness 4**.¹¹⁶⁸

i. The SPO alleges that **KRYEZIU** mentioned one or more prior attempts to contact a witness.¹¹⁶⁹ However, it is unclear whom the SPO alleges that **KRYEZIU** was referring to, whether it was a witness or not, when these attempts would have occurred, for example during the war or after. This

¹¹⁶⁶ SPO PTB, para.227; see also para.217.

¹¹⁶⁷ Prof. FRASER described the audios of this visit as unclear or even indistinct (1D00136, p.17).

¹¹⁶⁸ SPO PTB, para.227, referring to paras 137-139,144,152. The Defence stresses that the SPO could, but chose not to, interview **KRYEZIU**, an alleged co-perpetrator, being noted that [REDACTED].

¹¹⁶⁹ SPO PTB, para.137.

alleged utterance is simply too vague to be used to infer KRYEZIU's intent, even if it could be treated as a reliable reflection of what was said.

- ii. The SPO further alleges that KRYEZIU stated "We will sort it out, we will sort it out [Indiscernible] the problem.' [...] 'I told this one, I told him [Indiscernible] "Go and meet him".¹¹⁷⁰ However, it acknowledges that it does not know who he is referring to, the SPO having no "clarity as to the targeted witness".¹¹⁷¹ The SPO's version of this conversation is confused and the SPO's speculation regarding a 'targeted witness' are unsubstantiated. Indeed, this excerpt does not appear to relate to Case 06 proceedings at all but to a [REDACTED], "[REDACTED]", with whom **KILAJ** would have a dispute since **KILAJ** refers to the possibility that they see each other in Court.¹¹⁷²
- iii. Last, the SPO refers to a portion of the SPO Transcripts which alleges that KRYEZIU said "*do not ask him*" and **KILAJ** states "*I will get it done*".¹¹⁷³ The SPO alleges that this exchanges shows their agreement to execute **THAÇI**'s instructions.¹¹⁷⁴ However, while this discussion is also vague, this excerpt if anything would seem to show a *disagreement* from KRYEZIU rather than an acceptance of instructions.

783. Thus, none of these alleged utterances are clear as to their context and meaning: it is impossible to know which individual if any are being discussed, which actions if any are being planned or prohibited. Any meaning given to these

¹¹⁷⁰ SPO PTB, para.137. This portion was revised by LSU to say "*I will sort it out, I will sort it out [Indiscernible] the problem*" in P00109_LSU.2.

¹¹⁷¹ SPO PTB, para.138, referring to P00109_ET, p.146.

¹¹⁷² P00109_ET, p.145.

¹¹⁷³ SPO PTB, para.138; P00109_ET, p.111, l.13-21. This portion was revised by LSU at P00109_LSU.2, query 5.

¹¹⁷⁴ SPO PTB, para.138, referring to P00109_ET, pp.111-112.

words would be purely speculative and have no probative value regarding KRYEZIU's state of mind.

784. The SPO makes further submissions that KRYEZIU's intent is proved by his use of a *"normal speaking [voice] to provide cover to the obstructive intent of whispered conversations"*.¹¹⁷⁵ These submissions are also speculative and without merit.

785. Concerning the intent of **KILAJ**, the SPO's bases its allegations on (i) the contents of the SPO Transcripts and (ii) the documents found during the search of **KILAJ**'s home.¹¹⁷⁶

786. However, even if they were reliable (which is disputed), the relevant passages of the SPO Transcripts of the 6 October Visit do not demonstrate that **KILAJ** intended to convey any instruction to **Witness 4** regarding his testimony.

787. The SPO cites a portion of its Transcripts where **KILAJ** is alleged to have said *"I will get this done when I go back, I will get this done"*.¹¹⁷⁷ However, the Defence submits that responses of this kind from **KILAJ** cannot be understood as necessarily reflecting a genuine intent to act. As discussed earlier, **THAÇI** is detained thousands of kilometres away from his home country. In this context, his visitors would be likely to signal agreement with him, so as to avoid upsetting or antagonising him during their limited time together. In this context, any sign of apparent acquiescence cannot, without any subsequent positive action, be understood as **KILAJ**'s intent to act on any type of instruction or suggestion from **THAÇI**.

¹¹⁷⁵ SPO PTB, para.218.

¹¹⁷⁶ SPO PTB, para.227; see also para.217.

¹¹⁷⁷ SPO PTB, para.135, referring to P00109_ET, p.62, l.19-20. This portion was corrected by the LSU to read *"I will work on it at home [Indiscernible]"* (P00109_LSU.1, p.24).

788. The SPO again seeks to infer an illicit intent on the part of **KILAJ** from whispering. For the reasons already discussed, this is not the only reasonable inference to explain why persons would speak in a low voice or whisper.¹¹⁷⁸
789. The SPO also alleges that **KILAJ** brought documents home from the visit, and that this is evidence of his intent.¹¹⁷⁹ Yet, as previously demonstrated, the SPO has failed to establish that **THAÇI** printed **Witness 4**'s statements,¹¹⁸⁰ and has adduced no concrete evidence that **KILAJ** had in fact taken any document with him from the 6 October Visit. In any event, the fact **Witness 4**'s statements were found torn, in a plastic bag to be thrown away, only demonstrates that – whatever the provenance of these documents – **KILAJ** never intended to retain or use them in anyway.¹¹⁸¹
790. Most importantly, although the SPO seized and searched **KILAJ**'s phones and extracted relevant data¹¹⁸² it tendered no evidence of contacts between **KILAJ** and **Witness 4**, whether in person or by phone, during 2023 or thereafter.¹¹⁸³ This corroborates **KILAJ**'s statements during his SPO interview on 2 November 2023 that he had not spoken to **Witness 4** about his testimony.¹¹⁸⁴ It is clear that **KILAJ** took no steps to contact **Witness 4**, much less steps to influence his testimony. This is the best and clearest evidence that **KILAJ** never had any intention to contact and influence **Witness 4** with the requisite intent.

¹¹⁷⁸ Paragraph 488.

¹¹⁷⁹ SPO PTB, para.135.

¹¹⁸⁰ Section VI.B.

¹¹⁸¹ *Contra* SPO PTB, para.135.

¹¹⁸² T.684, T.686-T.687 (KELLY); 1D00030; 1D00031.

¹¹⁸³ Evidence of communications extracted from the phones was tendered but does not show any contact between **KILAJ** and **Witness 4** from 1 September 2023 until 4 June 2024 (3D00006; 3D00007). The SPO did not tender any location tracking data extracted from these phones. According to F00856, para.2: *"the SPO again underscores that the Indictment does not allege that KILAJ or Vllaznim KRYEZIU successfully contacted any witness following the 6 October Visit, nor is proof of such contact an element of any charged offence."*

¹¹⁸⁴ P00001_ET, 116809 TR AT Part 2 ET, pp.4,6.

791. Finally, the Defence notes that the SPO's PTB contains a lengthy section addressing interactions between **KILAJ** and **THAÇI** prior to the 6 October Visit.¹¹⁸⁵ Ultimately, it is unclear what the SPO contends as the relevance of this material to Count 3, since it is not referenced in the SPO's analysis of that Count.¹¹⁸⁶ In those circumstances the Defence submits that it cannot be used to contribute to a conviction for Count 3, since the Defence has had no notice of how the SPO considers this material to be relevant. However, out of an abundance of caution, the Defence will address why these factual allegations from the SPO do not support a conclusion that **KILAJ** and **THAÇI** planned to influence **Witness 4's** testimony.
792. Indeed, the material relied on by the SPO does not show that these prior events, including arrangements made for the 6 October Visit, were in any way linked to *Case 06* proceedings.
- i. On the SPO's own chronology, there was over one month between the notification of the list of the first 40 SPO witnesses in *Case 06* on 18 November 2022; and the 1st January 2023 phone call between **THAÇI** and **KILAJ**.¹¹⁸⁷ Furthermore, the transcript of that call shows that **THAÇI** and **KILAJ** merely exchanged new year wishes, and briefly mentioned the organisation of an upcoming visit and the pending visa process, prior to discussing some acquaintances and their health.¹¹⁸⁸
 - ii. Similarly, there is no link proved between the 30 January 2023 notification of witness identities in *Case 06* and the 2 February 2023 visit of **KILAJ** to

¹¹⁸⁵ SPO PTB, paras 115-122.

¹¹⁸⁶ SPO PTB, paras. 217-218,227.

¹¹⁸⁷ SPO PTB, paras 116-117.

¹¹⁸⁸ P00085_ET. Interestingly, the portion of the transcript relating to the organisation of an upcoming visit only amounts to 6 lines in a 4-page transcript. Furthermore, if anything, the discussion clearly shows that the scheduling of the visit is dependent upon the issuance of a visa, rather than anything else.

THAÇI.¹¹⁸⁹ There is no evidence that *Case 06* proceedings were discussed, or that **THAÇI** gave **KILAJ** any witness names during this visit.¹¹⁹⁰ Indeed, on that day, **KILAJ** visited **THAÇI** together with [REDACTED]; **THAÇI** received other visitors,¹¹⁹¹ and **KILAJ** also met other individuals.¹¹⁹² Contrary to the SPO's contention,¹¹⁹³ the duration of **KILAJ**'s visit to **THAÇI**, and the fact that individuals from Kosovo might have travelled together to visit *Case 06* detainees, are not evidence of any criminal intent.

- iii. The SPO relies on a picture of **KILAJ** taken the day of the 2 February 2023 visit,¹¹⁹⁴ wearing a similar jacket to that in which handwritten notes ("KILAJ Loose Notes")¹¹⁹⁵ were later found, arguing that this supports an inference that the KILAJ Loose Notes were taken during the visit on 2 February 2023.¹¹⁹⁶ However, the SPO has not demonstrated that it was the same jacket, nor produced any other evidence that the KILAJ Loose Notes were created on that day.¹¹⁹⁷ Contrary to the SPO's contention,¹¹⁹⁸ they cannot be dated simply by reference to the inclusion of three names which appear to match witness names disclosed on 30 January 2023: these individuals were old acquaintances of **KILAJ**, and were listed without witness codes,¹¹⁹⁹ meaning that they could have been written at any other time for any of various reasons. However, if the KILAJ Loose Notes were created during the visit of 2 February 2023, the fact that they remained in the same jacket so long

¹¹⁸⁹ SPO PTB, paras 118-119.

¹¹⁹⁰ See *contra*, SPO PTB, para.119.

¹¹⁹¹ P00112_ET.

¹¹⁹² P00152.

¹¹⁹³ SPO PTB, para.119.

¹¹⁹⁴ P00152.

¹¹⁹⁵ P00004.

¹¹⁹⁶ SPO PTB, para.119.

¹¹⁹⁷ The torn papers were not dated, and the SPO did not conduct any forensic analysis aiming at dating the documents, for instance using the solvent evaporation technique.

¹¹⁹⁸ SPO PTB, para.119, fn 445.

¹¹⁹⁹ P00004_ET, p.SPOE00343584,

afterwards¹²⁰⁰ would *contradict* an inference that **KILAJ** ever intended to do anything with them. The Defence disputes the SPO's assertion that the KILAJ Loose Notes contain "*what appear to be instructions on what witnesses should say*":¹²⁰¹ the document is vague and cannot be characterised as instructions.

- iv. The evidence does not support SPO's suggestion that **THAÇI** pressured **KILAJ** to visit him in order to plan criminal activity pertaining to **Witness 4**. Contrary to the SPO's allegation that **THAÇI** "*urged*" **KILAJ** to visit him during two September 2023 phone calls,¹²⁰² the SPO's transcripts of those calls merely show the two men planning to visit each other when possible,¹²⁰³ with **THAÇI**'s availability depending on *Case 06* court days. And at the time when **KILAJ** submitted his Visitor Application on 12 September 2023,¹²⁰⁴ the SPO had not yet notified the Defence of **Witness 4**'s upcoming testimony, which was only done on 2 October 2023.¹²⁰⁵
- v. The SPO argues that a redacted WhatsApp message¹²⁰⁶ shows that **KILAJ** contacted [REDACTED] on 6 February 2023 to invite him to have a coffee, and claims that this was related to the disclosure of [REDACTED]'s identify in January 2023 and **KILAJ**'s visit to **THAÇI** on 2 February 2023.¹²⁰⁷ However, the phone number of the message recipient is redacted, preventing the Defence and the Single Trial Judge from verifying his or her identity. In any event, even if this message was sent to [REDACTED], there is no reason to exclude the reasonable inference that this was an entirely

¹²⁰⁰ P00001_ET, 116809-TR-AT Part 2-ET, pp.11-19.

¹²⁰¹ SPO PTB, para.153.

¹²⁰² SPO PTB, para.120.

¹²⁰³ P00085_ET; P00095_ET.

¹²⁰⁴ P00064_ET.

¹²⁰⁵ SPO PTB, para.124, fn.454, referring to F00740/A01, Fact of Common Knowledge n°32.

¹²⁰⁶ P00203_ET.

¹²⁰⁷ F00676, paras 6-9.

innocent contact between two friends¹²⁰⁸ who have known each other since the war.¹²⁰⁹ Indeed, [REDACTED] told the SPO that nobody told him that they knew he was an SPO witness¹²¹⁰ or contacted him in relation to his witness status, and that he had never felt threatened or concerned for his safety.¹²¹¹

- vi. The SPO also relies on a WhatsApp exchange of April 2023 between **KILAJ** and [REDACTED],¹²¹² and on communications between **KILAJ** and [REDACTED] from March to September 2023¹²¹³ about *Case 06* witness [REDACTED]. However, the SPO has not given notice to the Defence as to how it considers this material to be relevant to the charges. In any event the Defence highlights that the SPO has not proved that **KILAJ** received any confidential information about [REDACTED] from **THAÇI**. To the contrary, the messages in question (i) confirm that **KILAJ** was highly familiar with [REDACTED]'s version of events based on their shared experience during the war; and (ii) it was obvious to people [REDACTED] familiar with historical events [REDACTED], that [REDACTED] would be an SPO witness in *Case 06*. In these circumstances this evidence neither demonstrates any wrongdoing on the part of **THAÇI**, nor indicates a willingness on the part of **KILAJ** to share information which he knew to be confidential.

793. Accordingly, the conduct of **KILAJ** and his interactions with **THAÇI** prior to the 6 October Visit also do not support an inference that he intended to influence the testimony of **Witness 4**.

¹²⁰⁸ F00697, paras 8-12.

¹²⁰⁹ F00740/A01, Fact of Common Knowledge n°[REDACTED].

¹²¹⁰ F00762/A01, Agreed Fact n°20, referring to [REDACTED].

¹²¹¹ F00762/A01, Agreed Facts n°21, referring to [REDACTED] and n°22, referring to [REDACTED].

¹²¹² P00205_ET.

¹²¹³ P00207_ET.

(b) The alleged intent would not amount to an intent to take common action

794. In any event, even if the Single Trial Judge were to conclude that each of **THAÇI**, **KILAJ** and **KRYEZIU** intended to contact **Witness** to influence the latter's *Case 06* testimony, this would not amount to an intention to take "common action" within the meaning of that term under Article 401(2), understood as a physical group acting together in a single location (see Section III.A.1.d).

(c) The alleged intent would not amount to an intent to obstruct an official person

795. Moreover, even if the SPO *were* able to demonstrate beyond reasonable doubt that each of **THAÇI**, **KILAJ** and **KRYEZIU** had intended to influence the testimony of **Witness 4** in *Case 06*, and even if the Single Trial Judge considered that this would constitute "common action", the Defence submits that it would nonetheless not amount to an intent to *obstruct an official person in performing official duties* within the meaning of Article 401(2).

796. **Witness 4** is not an official person and has no official duties. The Defence accepts that it may be theoretically possible to target an official person indirectly – for example, by harming or threatening to harm a family member – however, it remains the case that the intent to obstruct a specific official person must be proved.¹²¹⁴ In the present case, no official person has even been identified, let alone shown to be the target of obstructive intentions.

797. The SPO has never identified which official person or official duty is said to have been the target of the alleged attempted obstruction. While the SPO claims, in its PTB, that the conduct "*threatened the ability of the KSC/SPO to obtain accurate and truthful testimony of the witnesses concerned*",¹²¹⁵ this is not an "official duty", for

¹²¹⁴ [Case 07 Appeal Judgment](#), Partially Dissenting Opinion of Judge Ambos, para.12.

¹²¹⁵ SPO PTB, para.220.

the reasons explained above in Section III.A.1.b). It is also a baseless assertion in factual terms.

798. **THAÇI**'s reminder of the existence of a preparation session and recommendation that a witness speaks with brief sentences do not evidence any intent to interfere in the collection of truthful testimony.¹²¹⁶

799. According to the SPO Transcript, **THAÇI** said "[REDACTED]",¹²¹⁷ which tends to show, if it was accurate, that **THAÇI** was telling his visitors *not* to contact witnesses.

800. Besides, contrary to the SPO submissions, **THAÇI** did not "*apply any pressure or implicit threats*" with regard to **Witness 4**.¹²¹⁸ The fact that **THAÇI** is not charged under Article 401(1) shows that the SPO itself considers that **THAÇI** did not use any threat or force.

801. Accordingly, the SPO has failed to prove beyond reasonable doubt that **THAÇI**, **KILAJ** and KRYEZIU intended to obstruct any official person in performing official duties.

(2) There was no "KILAJ Group"

802. The SPO argues that the participants in the 6 October Visit amounted to a group composed of **THAÇI**, **KILAJ** and KRYEZIU.¹²¹⁹ This is not supported by the evidence.

803. As explained above in Section III.A.1.d), a proper understanding of Article 401(2) requires a group to be physically collocated. Accordingly, at best the SPO must be able to establish that **THAÇI**, **KILAJ** and KRYEZIU constituted a group *during* the 6 October Visit.

¹²¹⁶ *Contra*, SPO PTB, para.136. P00109_ET, p.56, l.7-11, p.60 l.6-7.

¹²¹⁷ P00109_ET, p.60, l.17-18.

¹²¹⁸ *Contra*, SPO PTB, para.134.

¹²¹⁹ Indictment, para.23; SPO PTB, para.6.

804. However, even if the Single Trial Judge declines to follow Kosovo court practice regarding the meaning of “group”, the existence of a group has nonetheless not been proved. The Defence submits that a group cannot exist without a shared intent, and awareness of the group from all of its members.
805. For the reasons already elaborated, the SPO has failed to prove that all three members of the group had a shared intent of passing instructions to **Witness 4** to influence his *Case 06* testimony. In the absence of such intent, it is unclear what united the three men into a group, other than their physical co-location, which lasted only for the duration of the 7 October visit.
806. Indeed, while the SPO appears to claim that **KILAJ** arranged his visit to the DC at **THAÇI**’s request and specifically for criminal purposes, any similar allegation concerning KRYEZIU is conspicuously lacking. Indeed, the SPO Transcripts of the non-charged visits suggest that the presence of KRYEZIU at the DC was instigated by **KILAJ** rather than by **THAÇI**,¹²²⁰ to please KRYEZIU’s desire to meet a friend and political associate.¹²²¹ According to the SPO Transcripts, when **THAÇI** was first told by **KILAJ** that he intended to bring KRYEZIU with him, he replied “*Whoever you want, whoever you want; whoever comes with you is welcome.*”¹²²² In this context, it is clear that KRYEZIU could not have been part of some form of organised criminal enterprise. The SPO’s construction of a “**KILAJ Group**” is nothing more than a further mechanism to enable the inappropriate application Article 401(2).

(3) No common action was initiated

807. Liability for an attempt requires that some acts towards the completed commission of the offence were taken, and that these exceed mere preparation.

¹²²⁰ P00095_ET, p.3; P00101_ET, p.1.

¹²²¹ P00066_ET, p.SPOE00363207.

¹²²² P00095_ET, p.3, l.13-14.

808. As set out above in Section III.A.1.d), common action of a group means unified action in a common location.¹²²³ It is clear that no acts towards “common action of a group” occurred. No action was taken which amounts to the beginning of a unified action in a common location among the various alleged group members.

809. Even if the Single Trial Judge rejects the Defence’s understanding of the elements of Article 401(2), and considers that a “common action” could be constituted by the separate and coordinated actions of group members, there is no evidence in this case of any such action having been commenced. Indeed, there is no evidence at all of any relevant action having been taken by any member of the alleged KILAJ Group after the 6 October visit.

*(a) Lack of contact with **Witness 4***

810. No step was taken by **KILAJ** or **KRYEZIU** to contact **Witness 4**. The SPO seized **KILAJ**’s Samsung and iPhone and extracted all communications¹²²⁴ therefrom. Yet the SPO tendered no evidence of any communication post 6 October 2023 that would suggest that **KILAJ** contacted **Witness 4** or even made efforts to do so. Similarly, the SPO [REDACTED],¹²²⁵ [REDACTED] did not tender, any evidence of communication or meeting between **KRYEZIU** and **Witness 4**, or any efforts of that kind.

811. The absence of any contact with **Witness 4** was confirmed by the witness himself. He repeatedly (on 28 September 2023, 30 January 2024, 2 May and 30 June 2025) denied being approached by anyone about his cooperation with the SPO or his witness status and reported no security concerns.¹²²⁶ On 30 January 2024, **Witness 4** was specifically asked about **KILAJ** and **KRYEZIU**. He replied that

¹²²³ Section III.A.1.d).

¹²²⁴ 3D00007.

¹²²⁵ The Defence notes that [REDACTED].

¹²²⁶ F00762/A01, Agreed Facts n°7, 8, 9, 10.

[REDACTED]. He stated that [REDACTED]. He confirmed that nobody had approached him in an attempt to interfere with his testimony.¹²²⁷ This is consistent with **KILAJ**'s SPO interview of 2 November 2023 according to which [REDACTED].¹²²⁸

812. The SPO has also brought only very limited evidence of contacts between **KILAJ** and **KRYEZIU** themselves, all of which took place before 7 October 2023. There is no proof of communication after that day. Of those limited contacts, in addition to a few phone calls, all messages concern topics unrelated to KSC proceedings: (1) [REDACTED] and (2) meeting up in the morning when in The Hague on 6 October; they also sent each other a few pictures taken during that October trip.¹²²⁹ The absence of any further communication between the two seriously undermines the SPO's allegation that they were part of a group planning to interfere with **Witness 4**: if they were collaborating in this way it would be expected that they would be in contact for that purpose.

813. There is also no evidence of **THAÇI** following-up on any of his alleged "instructions", though phone calls or subsequent visits for instance, although they were monitored.

814. This complete absence of any evidence can only support one conclusion: there was no attempt, no steps taken in furtherance of any alleged plan after the 6 October Visit.

*(b) The documents seized from **KILAJ**'s home*

815. The initiation of common action is not proved by the discovery of documents in **KILAJ**'s home.

¹²²⁷ F00762/A01, Agreed Fact n°8.

¹²²⁸ P00001_ET, 116809-TR-AT Part 2-ET, pp.5-6.

¹²²⁹ P00206_ET.

816. First, as previously demonstrated, **THAÇI** did not print **Witness 4**'s statements found on **KILAJ**.¹²³⁰
817. Indeed, the Defence observes the SPO Transcripts report **THAÇI** as having said, during the 6 October Visit, *"you mustn't take these with you"*.¹²³¹ There are plausible inferences that could explain how **KILAJ** obtained those statements other than from **THAÇI**: they could have been given to him by another accused, or by a confidential source (such as occurred in the leak to the KLA Veteran Association).¹²³²
818. Regarding the notebooks seized from **KILAJ**,¹²³³ there is no evidence that they are in any way related, discussed or brought up during the 6 October Visit. According to **KILAJ**, these materials were obtained following the leak from the KLA Veteran association.¹²³⁴ The SPO argues that this is impossible as some of the witness codes were assigned after the leak,¹²³⁵ yet, the only two SPO witnesses with pseudonyms higher than [REDACTED] are [REDACTED] and [REDACTED]. The Defence notes that these two witnesses are not mentioned in the SPO PTB and it is not alleged that they were discussed by **THAÇI** at any point during the visit.
819. In any event, even if **KILAJ** had received documents from **THAÇI** in the DC, and took them home, this does not constitute the initiation of "common action". The provision of papers would form part of the same discussion which clearly amounts to mere preparatory acts, at most. There is no evidence that **KILAJ** made any use of the papers; the evidence suggests that he deliberately destroyed

¹²³⁰ See Section VI.B.

¹²³¹ P00109_ET, p.52, l.10.

¹²³² This would also be consistent with **KILAJ**'s explanation when interviewed that he could not recall the exact origin of the statements and that such statements would regularly be communicated on social media: P00001_ET, 116809-TR-AT Part 1-ET, pp.15-16.

¹²³³ P00005_ET; P00006_ET.

¹²³⁴ P00001_ET, 116809 TR AT Part 2-ET, p.20, 116809-TR-AT Part 3-ET, p.8.

¹²³⁵ SPO PTB, para.160, referring to P00168, p.118244, para.6.

and sought to discard them. This cannot amount to “common action” towards contact with **Witness 4**.

(c) Mere discussions during the DC visit do not amount to an initiation of “common action”

820. In fact, the SPO itself seems to acknowledge that no conduct occurred after the 6 October Visit which could be characterised as the initiation of common action. Accordingly, the SPO PTB frames the “common action” as constituted by: “(i) **THAÇI** and **KILAJ**’s discussion of **THAÇI**’s detailed instructions for **Witness 4**’s anticipated testimony; (ii) **KILAJ**’s agreement to implement **THAÇI**’s guidance as to conveying the instructions to **Witness 4**; (iii) the **KILAJ** Group’s discussion of various Case 6 witnesses, including the substantial revelation of confidential information by **THAÇI** and references to prior efforts to contact some of them; and (iv) the evident pattern of the **KILAJ** Group – **THAÇI** and **KILAJ** on one hand and **THAÇI** and **KRYEZIU** on the other – using normal speaking voices to provide cover to the obstructive intent of whispered conversations about confidential witnesses and related instructions for **Witness 4**.”¹²³⁶

821. It is noteworthy that all of these allegations are merely different aspects of what the SPO says occurred *during the DC visit* on 6 October 2023. These are, at most, the definition of a mere preparatory act: identified in Article 27 of the KCC as including, relevantly “agreeing, planning or organizing”. Even if these allegations were founded on reliable evidence, which they are not, such conduct cannot amount to an attempt under Article 28.

b) Agreement

822. An agreement under Article 35 requires not only that the perpetrator agrees with one or more other persons to commit a criminal offence but also that one or more

¹²³⁶ SPO PTB, para.218.

of these persons undertakes any substantial act towards the commission of the criminal offence.

823. For the reasons set out above in Section III.B.3.a), this mode of liability cannot be charged in connection with Article 401(2). Additionally, for the reasons set out in Section IV.C.2., the charge based on the mode of liability of agreement under Article 35 is incoherent and must be dismissed. However, in the event that the Single Trial Judge does not dismiss it, the Defence submits that its requirements are not met.

824. First, unless the Single Trial Judge corrects the interpretation of “common action” adopted in previous KSC cases and by the SPO, he should rule that an offence under Article 401(2) cannot be charged using Article 35 agreement, since it would be duplicative.¹²³⁷

825. Secondly, the requirements have not been proved by the SPO. As discussed above,¹²³⁸ the SPO has failed to prove that **THAÇI** and the other alleged members of the group agreed to obstruct the work of KSC/SPO officials. Specifically, (i) no official persons were targeted; (ii) **THAÇI** did not give any instructions that **Witness 4** lie or withhold his testimony, and (iii) the SPO has not demonstrated that **KILAJ** and **KRYEZIU** agreed and intended to convey his alleged instructions to **Witness 4**. An agreement must cover all material elements of the offence. An agreement to obstruct an official person’s official duty would therefore require agreement on the target of the obstruction: in this case an official of SPO or KSC. Yet, at no point did **THAÇI** or any of his visitors expressed the will to obstruct the work of the SC or SPO, let alone specific official persons within them. Thus, even if **THAÇI** and the other members of the

¹²³⁷ Section IV.C.2.

¹²³⁸ See Section VII.D.1.a)(1).

group had agreed to talk to a witness, this would be insufficient to characterise an agreement to obstruct the work of KSC/SPO officials.

826. Furthermore, none of the three men undertook any *substantial* act towards the commission of the criminal offence, since (i) an agreement itself, including an exchange of papers within it, cannot be qualified as a “substantial act”,¹²³⁹ and (ii) no subsequent step was undertaken by any of the three men, following the DC visit, and accordingly no “substantial act” was undertaken.

827. This mode of liability should therefore be dismissed.

c) Incitement

828. An incitement is materialised by psychological influence on another person with a view to causing that other person to commit a criminal offence.

829. **THAÇI** is charged under Article 32(1) and Article 32(3). However, as explained above, Article 32(1) does not apply since obstruction under Article 401(2), (3) and (5) is not an offence punishable by imprisonment of *at least* five years.¹²⁴⁰ Accordingly, this mode of liability should be dismissed.

830. Article 32(1) is also inapplicable, since the SPO does not allege the completed commission of obstruction under Article 401(2) but only that it was attempted.

831. Besides, even if the SPO had charged **THAÇI** under Article 32(2), incitement would still not be established. That is because the SPO has not proved that any conduct occurred after the 6 October Visit which could constitute an attempt, much less that such conduct was caused by **THAÇI**.

832. Accordingly, this mode of liability should be dismissed.

¹²³⁹ Section III.B.3.a).

¹²⁴⁰ Section III.B.

2. Counts 6 and 7, Violating the secrecy of proceedings

833. The SPO asserts that, during the 6 October Visit, **THAÇI** disclosed confidential information regarding **Witness 3, Witness 4, [REDACTED]**.¹²⁴¹

834. First, the Defence notes that the SPO Transcripts are unreliable and therefore cannot be used to prove beyond reasonable doubt **THAÇI**'s disclosure of information during the DC visits. In any event, even if they were reliable, the SPO Transcripts do not even present **THAÇI** as having said that **Witness 3** was a SPO witness, contrary to the SPO submissions.¹²⁴² According to the SPO Transcripts **THAÇI** only mentioned his first name in relation to **[REDACTED]** **Witness 4**, but did not mention his status as a witness.¹²⁴³ The Defence also notes that the SPO has provided no evidence that it was **THAÇI** who gave to **KILAJ** the name and witness code of **Witness 3** which appears in his notebook(s). Indeed, the SPO Transcripts make no reference to the witness code as having been mentioned in the 6 October Visit.

835. However, in any event, most if not all of the information which is alleged to have been disclosed was in the public domain and would have been known to **KILAJ** and **KRYEZIU**. Such information could not have been "revealed" by **THAÇI** within the meaning of Article 392.¹²⁴⁴

a) Public information regarding Witness 3

836. The SPO alleges that during the 6 October Visit, **THAÇI** revealed to **KILAJ** and **KRYEZIU** **Witness 3**'s identity as an SPO witness "*and the substance of his anticipated evidence*".¹²⁴⁵

¹²⁴¹ SPO PTB, paras 140-152, 242-243, 248-253.

¹²⁴² See *contra*, SPO PTB, paras 141-142.

¹²⁴³ For instance, the reference to "[REDACTED]" at p.141, l.21 of P00109_ET does not reveal that "[REDACTED]" would be a SPO witness. See *contra*, SPO PTB, para.142.

¹²⁴⁴ See Section III.A.2.a).

¹²⁴⁵ SPO PTB, paras 141-142, 242.

837. The SPO acknowledges that no protective measures were sought for **Witness 3**.¹²⁴⁶ **Witness 7** explained that this was because he was a “[REDACTED]” and he had stated he did not want such measures.¹²⁴⁷

838. Indeed, the evidence demonstrates that both his status as an SPO witness and the contents of his evidence were already in the public domain at the time of the 6 October Visit.

(1) **Witness 3**’s status as SPO witness was public prior to 6 October 2023

839. **Witness 3**’s collaboration with the SPO became public as early as [REDACTED], when [REDACTED],¹²⁴⁸ as indicated in [REDACTED].¹²⁴⁹

840. Later, [REDACTED],¹²⁵⁰ with [REDACTED].¹²⁵¹ Indeed, before the 6 October Visit, [REDACTED],¹²⁵² [REDACTED].

841. [REDACTED] **Witness 3**’s status as an SPO witness was already in the public domain at the time of the 6 October Visit.¹²⁵³

(2) The contents of **Witness 3**’s evidence were in the public domain prior to 6 October 2023

842. In its PTB, the SPO details information it disclosed to the *Case 06* defence in November 2022 regarding the content of **Witness 3**’s anticipated testimony, including [REDACTED].¹²⁵⁴ The Defence does not dispute this SPO disclosure,

¹²⁴⁶ SPO PTB, para.115, fn.435, referring to F00740/A01, Fact of Common Knowledge n°20, referring to KSC-BC-2020-06 - F00631RED - A02CONFRED RED2, pp.4, 107.

¹²⁴⁷ T.404 (Witness 7); F00762/A01, Agreed Fact n°5, referring to [REDACTED].

¹²⁴⁸ T.407, 1.9-12 (Witness 7): “[REDACTED].”

¹²⁴⁹ For example, [REDACTED]: F00762/A01, Agreed Fact n°4, referring to [REDACTED]. See also F00762/A01, Agreed Fact n°5.

¹²⁵⁰ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁵¹ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁵² In particular, [REDACTED]. Besides, Witness 3 and Witness 4 [REDACTED].

¹²⁵³ [REDACTED].

¹²⁵⁴ SPO PTB, para.116.

however the information was already in the public domain before that disclosure occurred.

843. First, [REDACTED] have portrayed **Witness 3** as [REDACTED],¹²⁵⁵ “[REDACTED]”¹²⁵⁶ and [REDACTED].¹²⁵⁷ There is no doubt that **Witness 3’s** [REDACTED] was public.

844. Secondly, **Witness 3’s** [REDACTED] have been discussed and covered by the media [REDACTED]. [REDACTED].¹²⁵⁸ His [REDACTED].¹²⁵⁹ [REDACTED].¹²⁶⁰ For instance, as discussed above, [REDACTED]. [REDACTED]¹²⁶¹ [REDACTED],¹²⁶² [REDACTED].¹²⁶³ He also recounted [REDACTED].¹²⁶⁴ He confirmed that [REDACTED].¹²⁶⁵ He further commented on [REDACTED].¹²⁶⁶ He stated that after the war [REDACTED],¹²⁶⁷ adding that he [REDACTED].¹²⁶⁸ Thus, these allegations have been the subject of media and public attention [REDACTED],¹²⁶⁹ and the existence and content of **Witness 3’s** [REDACTED] are publicly known and [REDACTED].

845. In the course of his exchanges with the SPO, **Witness 3** himself observed that [REDACTED]. [REDACTED].¹²⁷⁰

¹²⁵⁵ 1D00016, p.DHT1200067; 1D00017, p.DHT1200247.

¹²⁵⁶ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁵⁷ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁵⁸ P00218.

¹²⁵⁹ 1D00015_ET, p.DHT1200412-AT-ET; T.405 (Witness 7); see also F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁶⁰ For example, see: 1D00016, pp.DHT1200067-DHT1200068; 1D00017, pp.DHT1200247-DHT1200248.

¹²⁶¹ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁶² F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁶³ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁶⁴ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁶⁵ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁶⁶ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED]; see also F00740/A01, Facts of Common Knowledge n°69, referring to [REDACTED] and n°68, referring to [REDACTED]; 1D00078_ET ([REDACTED]).

¹²⁶⁷ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁶⁸ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁶⁹ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁷⁰ F00762/A01, Agreed Fact n°5, referring to [REDACTED].

846. **Witness 7** thus testified that before **KILAJ's** Visit, [REDACTED];¹²⁷¹ and that [REDACTED].¹²⁷²

b) Public information regarding **Witness 4**

847. The SPO alleges that, during the 6 October Visit, **THAÇI** revealed **Witness 4's** identity as an SPO witness and "*the contents of his [REDACTED]¹²⁷³ Statement and his [REDACTED]¹²⁷⁴ [REDACTED] Statement*".¹²⁷⁵ Yet, **Witness 4's** cooperation with the SPO and the contents of his evidence were already in the public domain prior to **KILAJ** visit.

(1) **Witness 4's** cooperation with the SPO was public prior to 6 October 2023

848. It has long been publicly known in Kosovo that **Witness 4** [REDACTED].¹²⁷⁶

849. [REDACTED].¹²⁷⁷

850. [REDACTED].¹²⁷⁸ On 25 September 2020, the SPO [REDACTED] **Witness 4** [REDACTED].¹²⁷⁹

851. Moreover, it was publicly known that [REDACTED].¹²⁸⁰ Besides, as addressed above, by the time of the 6 October Visit, [REDACTED],¹²⁸¹ thus making it obvious that **Witness 4** was an SPO Witness.

852. When asked about this question in his SPO interview, **KILAJ** immediately made the point that **Witness 4's** status as an SPO witness was widely known.¹²⁸²

¹²⁷¹ T.407-411 (Witness 7); T.407, l.5-8 (Witness 7): [REDACTED].

¹²⁷² T.411, l.11-17 (Witness 7): [REDACTED].

¹²⁷³ P00172_ET.

¹²⁷⁴ P00173_ET.

¹²⁷⁵ SPO PTB, paras 140, 242.

¹²⁷⁶ 1D00018_ET, pp.DHT1200259-DHT1200261-ET; 1D00089_ET.

¹²⁷⁷ 1D00089_ET.

¹²⁷⁸ T.414, l.25-T.415, l.2 (Witness 7): [REDACTED].

¹²⁷⁹ F00762/A01, Agreed Fact n°6, referring to [REDACTED].

¹²⁸⁰ [REDACTED].

¹²⁸¹ [REDACTED].

¹²⁸² **KILAJ** observed that "*all citizens of [REDACTED] know that [REDACTED]*": P00001_ET, 116809-TR-AT Part 2-ET, p.6, l.12-13.

(2) The contents of **Witness 4's** evidence was in the public domain prior to 6 October 2023

853. As developed above,¹²⁸³ the Defence disputes that **THAÇI** gave a copy of **Witness 4's** [REDACTED] Statement and [REDACTED] Statement to **KILAJ**. However, the substance of these Statements was already in the public domain at the time of **KILAJ's** Visit. [REDACTED].¹²⁸⁴

854. **Witness 4** [REDACTED]¹²⁸⁵ and [REDACTED].¹²⁸⁶

855. The essence of his testimony was further made public because, [REDACTED],¹²⁸⁷ [REDACTED].¹²⁸⁸

856. Thus, it was well known that **Witness 4** [REDACTED].¹²⁸⁹ It was also publicly known that [REDACTED]¹²⁹⁰ and [REDACTED]¹²⁹¹ and that [REDACTED].¹²⁹²

857. [REDACTED] the scope of **Witness 4's** evidence in *Case 06* was already public before he testified in *Case 06*.¹²⁹³

858. Accordingly, details related to [REDACTED] **Witness 4**, which the SPO alleges **THAÇI** unlawfully revealed, were already widely known in Kosovo prior to the 6 October Visit.

c) KILAJ's personal knowledge about Witnesses 3 and 4

859. Last, the Defence highlights that even above and beyond what was in the public domain, **KILAJ** had already had a personal and extensive knowledge about

¹²⁸³ See Sections VI.B, VII.D.1.a)(3)(b)., VI.D.1.a.2.c.

¹²⁸⁴ 1D00015; F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁸⁵ 1D00018_ET.

¹²⁸⁶ 1D00089_ET; T.412-414 (Witness 7).

¹²⁸⁷ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁸⁸ 1D00078_ET, p.DHT03944-ET.

¹²⁸⁹ 1D00018_ET; 1D00089_ET.

¹²⁹⁰ F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁹¹ 1D00089_ET; F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁹² F00740/A01, Fact of Common Knowledge n°70, referring to [REDACTED].

¹²⁹³ [REDACTED].

Witness 3 and Witness 4.¹²⁹⁴ Indeed, **KILAJ** knew **Witness 4** [REDACTED].¹²⁹⁵

Similarly, **KILAJ** [REDACTED].¹²⁹⁶ Thus **KILAJ** was already aware of [REDACTED]¹²⁹⁷ and of the [REDACTED] since he [REDACTED].¹²⁹⁸

860. **KILAJ** thus explained that “*all citizens of [REDACTED] know that [REDACTED]*”.¹²⁹⁹ He added that he knew that **Witnesses 3 and 4** were witnesses, based on [REDACTED].¹³⁰⁰

d) Other witnesses

861. The SPO also alleges that **THAÇI** disclosed confidential information regarding other *Case 06* witnesses.¹³⁰¹ However, this material was also publicly known.

862. Regarding [REDACTED], as elaborated above, both his SPO witness status and the scope of his evidence were already in the public domain and thus could not have been “revealed” by **THAÇI**.¹³⁰² Moreover, **KILAJ** knew [REDACTED]¹³⁰³ and (i) already knew [REDACTED]’s story;¹³⁰⁴ (ii) already knew [REDACTED] had testified;¹³⁰⁵ and (iii) apparently already knew [REDACTED].¹³⁰⁶ Similarly, **KRYEZIU** had [REDACTED] and knew his background.¹³⁰⁷ Accordingly, **THAÇI** did not “reveal” information about [REDACTED] which was unknown his visitors.

¹²⁹⁴ See Section VI.C.

¹²⁹⁵ P00001_ET, 116809-TR-AT Part 2-ET, pp.4-5.

¹²⁹⁶ P00001_ET, 116809-TR-AT Part 2-ET, p.8.

¹²⁹⁷ P00001_ET, 116809-TR-AT Part 2-ET, p.11; P00109_ET, p.133, l.16-17.

¹²⁹⁸ P00001_ET, 116809-TR-AT Part 2-ET, pp.23-24.

¹²⁹⁹ P00001_ET, 116809-TR-AT Part 2-ET, p.6, l.12-13; see also p.7.

¹³⁰⁰ P00001_ET, 116809-TR-AT Part 2-ET, p.9, l.5-6.

¹³⁰¹ SPO PTB, paras 147-148 (re [REDACTED]), para.146 (re [REDACTED]), paras 149-150 (re [REDACTED] and [REDACTED]) and para.152 (re [REDACTED]).

¹³⁰² See Section VII.A.2.a)(2). *Contra*, SPO PTB, para.144.

¹³⁰³ P00001_ET, 116809-TR-AT Part 2-ET, p.15, l.13-15.

¹³⁰⁴ P00001_ET, 116809-TR-AT Part 2-ET, p.13.

¹³⁰⁵ P00205_ET, p.129911.

¹³⁰⁶ P00109_ET, pp.26, 33.

¹³⁰⁷ P00109_ET, p.30.

863. With regard to the contents of [REDACTED]'s evidence, the SPO further alleges that **THAÇI** disclosed parts of this information, including the name "[REDACTED]", and the description of "[REDACTED]" as "[REDACTED]".¹³⁰⁸ While the SPO does make references to portions of [REDACTED], these would constitute at best an inadvertent disclosure particularly as the details in question do not concern the substance of [REDACTED]'s evidence regarding the *Case 06* charges.
864. Regarding the alleged disclosures pertaining to [REDACTED], the Defence considers these to constitute no more than idle chatter. The conversation is that of friends sharing stories as gossip, in an innocent matter. The SPO Transcripts even state that the participants in the 6 October Visit commented that these "mini-stories" resemble the plot of a movie.¹³⁰⁹ With regard to [REDACTED] and [REDACTED], **THAÇI** did not mention their names, which confirms that he did not have the intention to reveal their identities, but simply to share what type of story he heard generally, without further details. For people [REDACTED], such as **THAÇI**'s visitors, the information provided by **THAÇI** was not sufficiently detailed to identify anyone, especially since [REDACTED] and [REDACTED] were [REDACTED]. With regard to [REDACTED], although the SPO claims, based on its Transcripts, that his name was mentioned, the SPO Transcripts do not suggest that **THAÇI** provided any information suggesting that [REDACTED] was a SPO witness, or gave any detail about his anticipated evidence.¹³¹⁰ The mere mention of his name does not constitute a violation of the secrecy of proceedings.

¹³⁰⁸ SPO PTB, paras 143-144.

¹³⁰⁹ P00109_ET, p.107, l.12-13: "*VLLAZNIM KRYEZIU: We are not here to watch a movie! [Laughs] HASHIM THAÇI: A movie, a swear!*" KRYEZIU's alleged utterance was revised by the LSU to "*We are not here to make a movie! [Laughs]*" in P00109_LSU.2, query 5.

¹³¹⁰ P00109_ET, pp.180-181.

3. Count 11, Contempt of Court

865. The SPO alleges that **THAČI** committed a contempt of court during the 6 October Visit.¹³¹¹ The SPO's allegations in this regard are based solely on the content of the SPO Transcripts. As these are unreliable (see Section VI.A above), Count 10 has not been proved beyond reasonable doubt.

VIII. CUMULATIVE CONVICTIONS

866. The Defence stresses that should **THAČI** be convicted, the Single Trial Judge cannot enter cumulative convictions for separate charges based on the same conduct.

867. This principle has been acknowledged by various panels of the KSC and by international tribunals:

For reasons of fairness to the Accused, only distinct crimes may justify multiple convictions. The Panel considers that, where two offences protect the same value(s) or social interest(s),¹³¹² cumulative convictions for both offences based on the same conduct are in principle not permissible. If the same conduct fulfils two different legal provisions, both protecting the same value(s) or social interest(s), the more specific prevails. If one, and only one provision requires an additional element not required by the other, the former would typically be the more specific provision and would prevail, as in such instances it is not possible to commit the more specific offence without also (and simultaneously) committing the less specific one. In other words, the more specific offence fully encompasses or consumes the less specific offence.¹³¹³

868. Although the charges brought by the SPO in the Indictment lack precision,¹³¹⁴ the Defence notes what appears to be a significant overlap between the alleged conduct underlying each alleged offence.¹³¹⁵ In other words, while the offences

¹³¹¹ SPO PTB, para.265.

¹³¹² For discussion of the "value test", see [Kupreškić Trial Judgment](#), paras 692-695.

¹³¹³ [Case 05 Trial Judgment](#), para.664; [Case 04 Trial Judgment](#), para.961. See also [Case 04 Appeal Judgment](#), para.241; [Case 07 Appeal Judgment](#), para.309; [Bemba et al. Appeal Judgment](#), para.751; [Ongwen Trial Judgment](#), para.2796; [Čelebići Appeal Judgment](#), para.412; [Kunarac Appeal Judgment](#), paras 168-174.

¹³¹⁴ See Section IV above.

¹³¹⁵ Compare Indictment, paras 24,26,29-32.

of violating the secrecy of proceedings, contempt of court, and obstruction of an official person contain distinct elements, where they are fulfilled by the same conduct *and* protect the same interest – such as the fair and effective administration of justice – the Single Trial Judge is barred from entering multiple convictions.¹³¹⁶

IX. ALTERNATIVE SUBMISSIONS ON SENTENCE

869. The following submissions on sentencing are made strictly in the alternative. The Defence reiterates its position that **THAČI** must be acquitted of all Counts. Should the Single Trial Judge nevertheless decide to enter any conviction, the Defence submits that he should consider the following observations. More detailed submissions will be made in response once the SPO's position on sentence is known.

A. APPLICABLE SENTENCING PRINCIPLES

870. Article 44(4) of the KSC Law provides that, for crimes under Article 15(2), punishment should be in line with the punishments for those crimes as set out in the KCC. Moreover, Article 44(5) of the KSC Law requires the Single Trial Judge to consider and balance aggravating and mitigating factors, including the gravity of the crime and its consequences as well as the individual circumstances of the convicted person. Deterrence “*must not be accorded undue prominence in the overall assessment of the sentences to be imposed*”.¹³¹⁷ Moreover, unlike in respect of core crimes, in contempt cases rehabilitation as a sentencing purpose should not be accorded less weight than retribution and deterrence.¹³¹⁸

¹³¹⁶ [Case 05 Trial Judgment](#), para.664.

¹³¹⁷ [Tadić Sentencing Appeal Judgment](#), para.48.

¹³¹⁸ [Senesie Sentencing Judgment](#), para.5.

871. Pursuant to Rule 163(6), the Single Trial Judge is required to deduct from any sentence the time for which **THAČI** has been detained prior to or during trial, that is since the notification of his arrest warrant on 5 December 2024.¹³¹⁹

B. GRAVITY OF THE ALLEGED CRIME AND ITS CONSEQUENCES

872. The gravity of the offence is the primary consideration in imposing a sentence.¹³²⁰ Acknowledging the seriousness of the alleged conduct, the Defence nevertheless emphasizes the limited scope and scale of the charged crimes, and thus the very real difference in gravity compared to other cases of a similar nature before both this court and international criminal tribunals.¹³²¹

873. Tellingly, the President of the KSC acknowledged the limited gravity of the confirmed charges when she noted that they are not classified as serious crimes under Article 22 of the CPC and decided to appoint a Single Trial Judge instead of a Panel of three judges.¹³²²

874. Indeed, **THAČI** is charged only with attempted obstruction and not the completed commission of obstruction.¹³²³ Besides, not only is there no evidence of any impact stemming from the alleged conduct, but the extent of such conduct is comparatively limited – the Indictment refers to only six out of hundreds of *Case 06* witnesses, and concerns a limited period of time.¹³²⁴ This stands in stark contrast to, for instance, *Case 07*, where “*hundreds of documents*” with a “*massive*

¹³¹⁹ F00048. See [Bemba et al. Re-Sentencing Decision](#), paras 124-125.

¹³²⁰ [Case 05 Appeal Judgment](#), para.451; [Case 07 Trial Judgment](#), para.950.

¹³²¹ See, for example, [Bemba et al. Sentencing Decision](#), pp.17-90; [Case 07 Trial Judgment](#), paras 964-967, 989-992; [Nzabonimpa Trial Judgment](#), para.389.

¹³²² F00543/COR, para.4.

¹³²³ Unlike to the Accused in *Case 07* and *Case 10*.

¹³²⁴ Indictment, paras 6-22. Cf. *Bemba et al.*, where the conduct was arguably graver since it concerned a high percentage of witnesses who subsequently testified falsely in the Main Case, the offences were extensive in scope, planning, preparation and execution and were committed over a lengthy period of 13 months: [Bemba et al. Re-Sentencing Decision](#), para.76. Cf. also [Nzabonimpa Trial Judgment](#), para.398 (“*repeated acts involving multiple witnesses spanning nearly three years [...] amongst the most brazen efforts to interfere with the administration of justice before an international tribunal*”). See also [Martić Trial Judgment](#), para.499; [Stanišić and Župljanin Appeal Judgment](#), para.1119.

amount of information"¹³²⁵ were revealed to a "*brazenly wide*"¹³²⁶ number of people¹³²⁷, even in the face of repeated orders.¹³²⁸

875. Moreover, in contrast with the *Bemba et al.* case for instance, no sophisticated measures, such as the provision of phones or money to witnesses, were envisaged to implement **THAÇI**'s purported instructions.¹³²⁹

876. In considering gravity, the Single Trial Judge must consider mitigating factors as delineated in Rule 163(1)(a) of the Rules, which is non-exhaustive. Such factors must be proved on the balance of probabilities.¹³³⁰

877. The primary mitigating factor the Single Trial Judge should consider is the *fact* that **THAÇI**'s alleged conduct had **no impact**¹³³¹ in practice: neither on the ongoing *Case 06* proceedings,¹³³² the SPO witnesses, the work of the SPO, nor the public confidence in the KSC's ability to maintain witness confidentiality.¹³³³

878. This is supported, firstly, by the Pre-Trial Judge's finding that the main consequences alleged by the SPO¹³³⁴ were not sufficiently grounded and by her subsequent amendment of the charge of obstruction to *attempted* obstruction.¹³³⁵

¹³²⁵ [Case 07 Trial Judgment](#), para.964.

¹³²⁶ *Ibid.*, para.966.

¹³²⁷ *Ibid.*, paras 561-562.

¹³²⁸ *Ibid.*, paras 298, 441, 666-671.

¹³²⁹ Cf. [Bemba et al. Sentencing Decision](#), para.208: "A series of sophisticated and elaborate measures were adopted to conceal the illicit activities, such as the use of codes, the use of third parties to effect payments, and the distribution of cell phones to some of the 14 Main Case Defence Witnesses without the knowledge of the Registry."

¹³³⁰ [Case 07 Trial Judgment](#), para.955.

¹³³¹ Cf. *ibid.*, paras 969, 994.

¹³³² Cf. [Bemba et al. Sentencing Decision](#), para.211.

¹³³³ *Inter alia*, the SPO was not barred from interviewing or calling any individual as witnesses in *Case 06* and the SPO has not tendered any evidence of any effective obstruction in their investigation or prosecution. Moreover, the six witnesses listed in the Indictment either testified in *Case 06* or were withdrawn from the SPO witness list by the SPO *proprio motu* (see KSC-BC-2020-06/F02576, para.2). Importantly, there was no stay in proceedings in *Case 06* for witness interference.

¹³³⁴ Indictment, paras 7-8.

¹³³⁵ F00036, paras 191-192, 194.

879. Secondly, the fact that witnesses listed in the Indictment, when interviewed by the SPO, denied any interference,¹³³⁶ and that no additional security measures, relocation, postponement of testimony or change of evidence occurred, further supports the above as a mitigating factor.¹³³⁷
880. Furthermore, given that most of the information allegedly discussed by **THAÇI** was already in the public domain and known to his visitors,¹³³⁸ these alleged disclosures would not put witnesses' security at risk. On the contrary, it was well known that they were witnesses for the SPO,¹³³⁹ and they had already publicly discussed – whether in the media or before other courts – their experiences of the war.¹³⁴⁰
881. Lastly, the Defence highlights the absence of aggravating circumstances: despite having recorded **THAÇI** for months, both during his DC visits and calls, the SPO Transcripts contain not a single instance of an instruction given by **THAÇI** to subject witnesses to threats, coercion or bribery,¹³⁴¹ and there is no evidence that the alleged implicated witnesses suffered any direct harm or risked being exposed to such harm.¹³⁴² This stands in stark contrast to *Case 07*.

C. INDIVIDUAL CIRCUMSTANCES

882. **THAÇI**'s individual circumstances warrant due consideration by the Single Trial Judge, and should contribute to the mitigation of any sentence handed down.

¹³³⁶ *Inter alia*, F00742/A01, Agreed Fact, paras 5-7; F00762/A01, Agreed Fact n°2; F00756/A01, Agreed Fact, para.4; F00762/A01, Agreed Facts n°7, 8, 9, 10, 11.

¹³³⁷ Cf. [Case 07 Trial Judgment](#), paras 537, fn.1115, 548.

¹³³⁸ See Section VI.C above.

¹³³⁹ As elaborated in Section VI.C and the relevant parts of Section VII above; see as another example: [Jović Trial Judgment](#), para.26.

¹³⁴⁰ See Section VI.C above.

¹³⁴¹ Cf. [Bemba et al. Sentencing Decision](#), para.173; [Senessie Sentencing Judgment](#), para.17.

¹³⁴² [Nzabonimpa Trial Judgment](#), para.402. Cf. [Case 07 Trial Judgment](#), paras 536-537, 596, 603-604; [Akhbar Beirut and Al Amin Sentencing Reasons](#), para.19; [Beqaj Trial Judgment](#), para.61.

883. Firstly, **THAÇI**'s full cooperation¹³⁴³ and compliance with both the Court and the DC should be given significant credit.¹³⁴⁴ *Inter alia*, **THAÇI** has always cooperated with the Court in *Case 12* and attended hearings.¹³⁴⁵ Following the notification of his arrest warrant in *Case 12*, he was granted provisional release on compassionate grounds twice, and at all times complied with the Panel's orders, displaying exemplary conduct in that regard.¹³⁴⁶

884. Moreover, it must be recalled that had it not been for the efforts and unwavering support of **THAÇI** towards the establishment of the KSC in the Assembly of Kosovo, the creation of the KSC may have never materialised.¹³⁴⁷

885. Ultimately, all factors above should significantly mitigate against any punishment imposed on **THAÇI**.

D. APPROPRIATE SENTENCING RANGE AND AGGREGATION

886. The Defence notes that the Single Trial Judge has stated that "*the sentencing range in case of conviction on each count of the most serious offence with which Mr Thaci is charged ranges from one to fifteen years*".¹³⁴⁸ The Defence contests this characterisation.

887. While **THAÇI** faces eleven separate counts, all concern inchoate forms of liability and have relevant forms of mitigation such that none of these allegations – even

¹³⁴³ The Defence recalls that **THAÇI** voluntarily surrendered in *Case 06* to KSC officials in Kosovo, having resigned from the position of the President of the Republic of Kosovo on 5 November 2020: [KSC-BC-2020-06/F00065/RED](#), paras 3-7; Euronews, "[Thaçi Resigns to Face War Crimes Charges](#)", 5 November 2020.

¹³⁴⁴ [Blagojević and Jokić Appeal Judgment](#), para.342; [New TV and Al Khayat Sentencing Reasons](#), para.18. Cf. [Akhbar Beirut and Al Amin Sentencing Reasons](#), para.16.

¹³⁴⁵ Cf. [Case 07 Trial Judgment](#), paras 996, 971.

¹³⁴⁶ F00213/RED; F00239/RED, paras 12, 14. **THAÇI**'s father passed away while he was detained in *Case 12*; **THAÇI** was barred from attending his funeral but permitted to visit his gravesite under very strict conditions, with which he dutifully obeyed; see F00230/COR, paras 26, 29(e).

¹³⁴⁷ [Kosovo Assembly Transcript of 26 June 2015](#), pp.17-18; [Kosovo Assembly Transcript of 3 August 2015](#).

¹³⁴⁸ F00973, para.15 (emphasis added).

if proved – could come close to attracting a maximum sentence on any one count. Once individual sentences have been imposed in a multi-charge case, establishing an overall sentence is not a matter of simple addition. Rule 163(4) of the Rules clearly requires that, where a punishment of imprisonment has been imposed for each criminal offense, the Single Trial Judge shall impose a single sentence,¹³⁴⁹ while KCC Article 76(2)¹³⁵⁰ provides that this sentence “*must be higher than each individual punishment but the aggregate punishment may not be as high as the sum of all prescribed punishments*”.¹³⁵¹ Article 76(2)(2.3) imposes a more specific limit where the court has imposed a punishment for each offense of up to three years’ imprisonment: in such cases, the aggregate sentence may not exceed eight years.

888. Consistently with these provisions, in both *Case 07* and *Case 10*, the Trial Panels determined single sentences that were considerably lower than the sum of the individual sentences imposed. In *Case 07*, Mr Gucati and Mr Haradinaj were each convicted of five counts, and the Trial Panel imposed the same sentences on each of them, namely: one year’s imprisonment; two years’ imprisonment; a fine of 100 EUR and four years’ imprisonment; one year’s imprisonment; and one year’s imprisonment. While the total of these sentences would have been nine years’ imprisonment (and 100 EUR) for each man, the Panel instead imposed an aggregate sentence of 4.5 years’ imprisonment on each, just slightly more than the largest individual sentence imposed. In *Case 10*, the Trial Panel issued Mr Shala two sentences of three years each, which were aggregated to a single

¹³⁴⁹ Rule 163(4).

¹³⁵⁰ Whilst KCC Article 76 is not expressly incorporated into the KSC legal framework, the Defence notes Judge Barthe’s separate opinion on the matter in *Case 07*, which was acknowledged by the Appeals Panel. See [Case 07 Appeal Judgment](#), fn.683: “Article 44(4) of the Law can be interpreted to allow for the application of fundamental legal principles that are inextricably linked with the imposition of punishments, such as the concurrence of crimes, and that they would apply in similar cases before the criminal courts in Kosovo”, referring to [Case 07 Trial Judgment](#), Separate Opinion of Judge Barthe, para.10.

¹³⁵¹ KCC Article 76(2)(2.2).

sentence of three years; while Mr Januzi and Mr Bahtijari each received two different sentences of two years, aggregated to a single sentence of two years each.¹³⁵² Accordingly, the practice in similar cases at the KSC alone is to aggregate multiple sentences so that that a single total sentence is either the same as, or only slightly larger than the highest individual sentence.

889. The Single Trial Judge should apply the same approach in the present case. This is required by the principle of equality before the law.¹³⁵³

890. Additionally, the Defence submits that should **THAÇI** be convicted both in *Case 06* and in the present case, **THAÇI**'s sentence should be served concurrently, in accordance with Article 44(7) of the KSC Law and Rule 163(4) of the Rules, taking into account that the two cases are linked.

891. In determining any sentence, the Single Trial Judge is bound to *consider* both domestic and international sentencing ranges imposed for similar offences in similar circumstances, pursuant to Article 44(2) of the KSC Law.¹³⁵⁴ This includes judicial practice on the relevant sentencing ranges.¹³⁵⁵ Moreover, the Single Trial Judge would be required to deduct the time during which **THAÇI** was detained prior to or during trial, pursuant to Rule 163(6), *i.e.* since the notification of his arrest warrant on 5 December 2024.¹³⁵⁶

892. The Defence observes that relevant cases both in international and Kosovo courts demonstrate relatively low, and often non-custodial sentences for offences comparable to those alleged in the present case, with the sentences imposed also noticeably shorter than the maximum sentences prescribed by the KCC for the

¹³⁵² [Case 10 Decision on Plea Agreements](#), paras 86-87, 94-95, 102-103.

¹³⁵³ [Case 04 Appeal Judgment](#), para.923; [Case 06 Krasniqi and Veseli Constitutional Court Decision](#), para.23.

¹³⁵⁴ [Case 05 Appeal Judgment](#), para.451; [Case 07 Trial Judgment](#), paras 472, 479.

¹³⁵⁵ [Case 05 Appeal Judgment](#), para.451; [Case 07 Trial Judgment](#), paras 472, 477.

¹³⁵⁶ F00048.

charges in this case.¹³⁵⁷ That is so even though the conduct in those other cases was generally far graver than that which is alleged conduct in the present case.

893. For example, as regards the practice of international tribunals: in *Bemba et al.*, where the conduct was arguably far more serious as it involved payments and actual interference, two convicted men were issued fines of 30,000 EUR and 300,000 EUR, respectively, which sentences of 11 months each of Mr Magenda and Mr Kilolo and 12 months for Mr Bemba.¹³⁵⁸ In various contempt cases before other international courts, sentences for contempt have often been by way of fine,¹³⁵⁹ or otherwise by custodial sentences of two years or less, sometimes limited to time served.¹³⁶⁰

894. The practice in Kosovo courts also reveals a practice of imposing relatively low sentences under Article 401 (the most serious of the offences charged in this case). The Defence emphasises that for Counts 1-3, concerning Article 401(2)-(3) and (5) of the KCC, **THAÇI** is only charged with *attempt* (and other inchoate modes of liability). This is in contrast to the vast majority of obstruction convictions in Kosovo reviewed by the Defence, where the courts were

¹³⁵⁷ KCC Article 401(2)-(3) and (5) imposes a range of 3 months to 3 years, up to 3 years, and 1 to 5 years respectively; KCC Article 393 imposes a sentence of up to 6 months; KCC Article 392(1)-(2) imposes a sentence of up to 1 year and up to 3 years respectively.

¹³⁵⁸ [Bemba et al. Re-Sentencing Decision](#), pp.50-51.

¹³⁵⁹ [Marijačić and Rebić Appeal Judgment](#), p.18 (a fine of 15,000 EUR for each Accused, payable in three periodic instalments); [Vujin Appeal Judgment](#), para.173 (a fine of just under 7,000 EUR); [Haxhiu Trial Judgment](#), para.17 (fine of 7,000 EUR, payable in two instalments); [Iović Trial Judgment](#), para.27 (fine of 20,000 EUR); [Akhbar Beirut and Al Amin Sentencing Reasons](#), paras 20, 24 (fine of 20,000 EUR and 6,000 EUR, respectively); [New TV and Al Khayat Sentencing Reasons](#), para.23 (fine of 10,000 EUR).

¹³⁶⁰ [Nzabonimpa Trial Judgment](#), paras 407-408 (where Mr Nzabonimpa, Mr Ndagijimana and Ms Fatuma were sentenced to time served (11 months) and Mr Ngirabatware was sentenced to two years imprisonment); [Fatuma Appeal Judgment](#), para.121 (where Mr Munyeshuli was sentenced to time served (5 months)); [Haraqija and Morina Trial Judgment](#), para.120 (two Accused sentenced to three and five months imprisonment, respectively); [Nshogoza Trial Judgment](#), paras 233-234 (time served (10 months), though on appeal, one judge considered that “the appropriate penalty [...] would either have been a reprimand or at most a fine of \$1,000”: [Nshogoza Appeal Judgment](#), Partially Dissenting Opinion of Judge Robinson, para.7); [Bangura Sentencing Judgment](#), para.101 (where Mr Kargbo received a suspended sentence and the other Accused received sentences ranging from 18 months to 1 year and 50 weeks); [Senessie Sentencing Judgment](#), para.22 (two years imprisonment).

concerned with the *completed commission* of the offence. Even so, in such cases the sentences were significantly lower¹³⁶¹ than the maximum sentence prescribed by the relevant Article of the KCC in force at the time, even where the conduct was graver than in the present case.¹³⁶² One example of a particularly serious case which concerned the 2016 riots at the Mitrovica courthouse,¹³⁶³ clearly demonstrates this conservative sentencing practice. That case involved charges of both individual and group obstruction of official persons,¹³⁶⁴ and was extremely serious in that one official person was actually killed as a result of the violent, physical obstruction which had occurred. The convicted men were given sentences ranging from two to six months on the counts concerning Article 401. In the few Kosovo cases where a person was convicted for *attempted* obstruction, the Accused was given a very short sentence which was ultimately converted into a fine.¹³⁶⁵ The sentences imposed are thus significantly lower than the maximum sentence prescribed by the relevant KCC article. This is true even where the *attempted* conduct was more severe than the one alleged in the present case.

¹³⁶¹ See, *inter alia*, Annex 5, Basic Court of Pristina, P. Nr. 572/19, 1 March 2021: a suspended sentence of three months and a 50 EUR fine; Court of Appeals of Pristina (EULEX), [PAKR 158/17](#), 7 December 2017: sentence for M.V. was reduced on appeal to one year and three months, and shall not be executed if they do not commit another criminal offence for a verification period of three years, and the sentence for R.R. was reduced to one year nine months with a four year verification period; Court of Appeals of Pristina (EULEX), [PAKR 147/16](#), 4 August 2016: one year imprisonment was suspended for three years; District Court of Pristina (EULEX), [P. Nr. 281/07](#), 14 June 2010: nine months imprisonment; Annex 5, Basic Court of Pristina, P.nr. 5594/16, 20 October 2020: 200 EUR fine for each defendant, to be converted to a custodial sentence should the fine not be enforced; Court of Appeals, [PAKR 513/2013 Judgment](#): four months for M.I. and two months for D.M. for group obstruction offence.

¹³⁶² The Defence notes that pursuant to KCC Article 46, a range of alternative punishments beyond those deemed to be "principal punishments" (KCC Article 40) are available, including suspended sentence. See also [Rašić Appeal Judgment](#), paras 17-18.

¹³⁶³ See Annex 7, Basic Court of Mitrovica (EULEX), P.nr.50/2012, 28 March 2013. See also Annex 3, item 87.

¹³⁶⁴ Pursuant to Articles 316 and 318 of the 2003 Provisional Code.

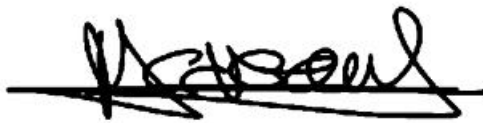
¹³⁶⁵ See Annex 5, Basic Court of Peja, P.nr.127/19, 6 April 2020, where a three-month custodial sentence converted to a 500 EUR fine was imposed; see also Annex 5, Basic Court of Ferizaj, P.nr.297/19, 14 November 2019, where a 6 month custodial sentence converted to a 6000 EUR fine was imposed.

X. CONCLUSION

895. The Defence requests that the Single Trial Judge acquit **THAÇI** of all counts in the Indictment, and order his immediate release.

[Word count: 94,228 words]

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sophie Menegon', written over a horizontal line.

Sophie Menegon

Counsel for Hashim Thaçi

Monday, 24 August 2026

Paris, France