



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

**In:** KSC-BC-2020-07  
**The Prosecutor v. Hysni Gucati and Nasim Haradinaj**

**Before:** **Trial Panel II**  
Judge Charles L. Smith, III, Presiding Judge  
Judge Christoph Barthe  
Judge Guénaël Mettraux  
Judge Fergal Gaynor, Reserve Judge

**Registrar:** Dr Fidelma Donlon  
**Filing Participant:** Specialist Prosecutor  
**Date:** 30 September 2021  
**Language:** English  
**Classification:** Public

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**Prosecution submissions on the applicable law**

**with one public annex**

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## I. Introduction

1. As directed by the Trial Panel,<sup>1</sup> the Specialist Prosecutor's Office ('SPO') hereby files further written submissions on the elements of offences and modes of liability charged in the Indictment.<sup>2</sup> The Confirmation Decision<sup>3</sup> states the applicable law correctly, and Defence attempts to add elements or requirements beyond any reasonable statutory interpretation should be rejected.<sup>4</sup>

## II. Submissions

2. Before developing the legal submissions on the crimes and modes of liability below, two preliminary points must be emphasised.

3. First, this is the first contempt case before the KSC. The Pre-Trial Judge's applicable law should not be rejected just because he 'interpreted' the statutory provisions in question.<sup>5</sup> Judicial interpretation is an inevitable part of applying the law, and the law can still be stated correctly even if stated for the first time or without references. The Pre-Trial Judge relied on the plain and ordinary meaning of the relevant provisions, the appropriate starting – and in many cases ending – point in statutory interpretation. Where authorities were available and considered appropriate to reference, the Pre-Trial Judge in fact did cite them on many occasions.<sup>6</sup>

4. Second, Article 21(1) of the Kosovo Criminal Code ('KCC') makes clear that '[a] criminal offense may be committed with direct or eventual intent'. A person acts with

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<sup>1</sup> Transcript, 8 September 2021, p.710.

<sup>2</sup> Redacted Indictment, KSC-BC-2020-07/F00251/A02, 5 July 2021 ('Indictment').

<sup>3</sup> Public Redacted Version of the Decision on the Confirmation of the Indictment, KSC-BC-2020-07/F00074/RED, 11 December 2020 (redacted version notified 22 December 2020) ('Confirmation Decision').

<sup>4</sup> Defence arguments in this submission concentrate on those raised by the Gucati Defence. In this regard, it is noted that the Haradinaj Defence generally adopted these submissions. Transcript, 8 September 2021, p.663.

<sup>5</sup> Egs Transcript, 8 September 2021, pp. 651-53, 655-56, 660-61, 673, 677-678.

<sup>6</sup> Egs Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 50 n.35, 62 n.41, 83-88 n.46-50, 96 n.51.

direct intent when 'he or she is aware of his or her act and desires its commission'.<sup>7</sup> A person acts with eventual intent when 'he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence'.<sup>8</sup> When crimes have a further mental element beyond this direct or eventual intent, it is specified accordingly in the KCC.<sup>9</sup>

5. Article 21(1) of the KCC is not qualified, meaning that it applies to all crimes and modes of liability charged.<sup>10</sup> The Defence repeatedly argue that eventual intent should not apply, but in doing so ignore this explicit statutory language.

#### **A. OBSTRUCTING OFFICIAL PERSONS IN PERFORMING OFFICIAL DUTIES**

##### **1. Obstruction by serious threat (Count 1)**

6. Article 401(1) and (5) of the KCC provides that:

1. Whoever, by force or serious threat, obstructs or attempts to obstruct an official person in performing official duties or, using the same means, compels him or her to perform official duties shall be punished by imprisonment of three (3) months to three (3) years.

5. When the offense provided for in paragraph 1. or 2. of this Article is committed against a judge, a prosecutor, an official of a court, prosecution officer or a person authorized by the court and prosecution office, a police officer, a military officer, a customs officer or a correctional officer during the exercise of their official functions the perpetrator shall be punished by imprisonment of one (1) to five (5) years.

7. The Accused are charged with obstructing or attempting to obstruct KSC/SPO officials through serious threats. These threats were made by, amongst other acts: (i) disseminating the confidential information in the Batches;<sup>11</sup> (ii) accusing witnesses

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<sup>7</sup> Article 21(2) of the KCC.

<sup>8</sup> Article 21(3) of the KCC.

<sup>9</sup> See Article 22 of the KCC.

<sup>10</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.82. *Contra* Transcript, 8 September 2021, p.662. In contrast, see Article 30(1) of the ICC Statute (setting a default mental element which applies '[u]nless otherwise provided').

<sup>11</sup> The 'Batches' concern the three batches of confidential material relating to the investigations of the Special Investigative Task Force ('SITF') and SPO ('Batch 1', 'Batch 2', 'Batch 3') as described in the Indictment.

identified in that information of being, *inter alia*, liars, spies, and traitors; and (iii) declaring that their purpose in disseminating the confidential information and related acts was to obstruct KSC Proceedings.<sup>12</sup> By virtue of these serious threats: (i) witnesses were intimidated; (ii) the SPO's ability to effectively investigate and prosecute crimes, including by obtaining and securing relevant evidence, was thereby threatened; and (iii) SPO resources and time were diverted to address actual and potential consequences, including to witnesses and KSC Proceedings.<sup>13</sup>

8. The plain language of this article, referring to 'by force *or* serious threat' (emphasis added), leaves no doubt that either of the two alternatives suffices. Attempts to read in an additional requirement that the serious threat be one *of force* have no statutory basis.<sup>14</sup> The ordinary meaning of a serious 'threat', without more, connotes no such limitation.<sup>15</sup> Had such an additional requirement been intended, the legislature would have required a 'threat of violence' or 'threat of an imminent danger to the life or body' as these terms are used in other KCC provisions.<sup>16</sup> Notably, past criminal codes in Kosovo expressly required that the threat had to be of force.<sup>17</sup> In drafting the 2012 and 2019 KCC, the legislature intentionally removed this qualification, which is also consistent with the overall purpose of the provision to

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<sup>12</sup> Indictment, KSC-BC-2020-07/F00251/A02, paras 26-27; Transcript, 8 September 2021, pp.648-50.

<sup>13</sup> Indictment, KSC-BC-2020-07/F00251/A02, para.28; Transcript, 8 September 2021, p.666.

<sup>14</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 60, 68; *Contra* Transcript, 8 September 2021, p.660.

<sup>15</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.60 ('[a] serious threat may include threats to use force or to inflict serious harm on the health, well-being, safety, security or privacy of a person'); Black's Law Dictionary Online, 'Threat' ('[a] threat has been defined to be any menace of such a nature and extent as to unsettle the mind of the person on whom it operates [...]'). *See also* Annex 1, Ismet Salihu et al., Commentary on Penal Code of Republic of Kosovo, (GTZ, 2014) ('Salihu et al. Commentary'), p.1165 (despite elsewhere defining the term as a threat of force with no statutory basis, defines a threat as 'a declaration made to warn, that is, to inform a certain person that he might suffer something bad').

<sup>16</sup> *Egs* Articles 227(3) and 229(2) of the KCC.

<sup>17</sup> Article 316(1) of the Provisional Criminal Code of Kosovo (2004), ('[w]hoever, by force or threat of immediate use of force'). *See also* Article 183(1) of the Criminal Law of the Socialist Autonomous Province of Kosovo (1977) ('[w]hoever by force or by threat to directly use force [...]').

ensure undisturbed performance of official duties.<sup>18</sup> Noting that serious threats amounting to attempted obstruction suffice to complete the offence as defined in the KCC, it is likewise not required that the Accused succeed in obstructing the proceedings.<sup>19</sup>

9. There is no requirement to prove that any particular official of the KSC/SPO was threatened<sup>20</sup> or that any particular official duty was affected.<sup>21</sup> The KSC/SPO is a collective of official persons squarely within the meaning of the provision. If the Accused obstructed or attempted to obstruct the official work of the KSC/SPO, this necessarily extends to the individual official persons operating within the KSC/SPO and their official duties. In this regard, it is noted that the specificity of the Indictment has already withstood a preliminary motion.

10. Serious threats also need not be directed at the official persons themselves. They can be directed at other persons or even objects which have the effect of obstructing or attempting to obstruct the official person.<sup>22</sup> Noting that this crime can be committed through either direct or eventual intent, both explicit and implicit threats qualify.<sup>23</sup>

11. No issue of 'simultaneity', or concurrence of elements, arises in this case.<sup>24</sup> The threatening conduct must occur when the official duties are imminent or ongoing, and

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<sup>18</sup> Salihu et al. Commentary, p.1164.

<sup>19</sup> Salihu et al. Commentary, p.1165 ('[i]n this case, it is of no importance if the offender had or had no real possibility to carry out his or her threat, i.e. if he or she had or did not have the intention of materializing his or her threat; what matters is that the threat should be serious and feasible, i.e. the official person had reliable reason to believe that the threat could be carried out any moment').

<sup>20</sup> Transcript, 8 September 2021, p.665.

<sup>21</sup> Transcript, 8 September 2021, pp.668-69.

<sup>22</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.68; Salihu et al. Commentary, pp.1165-66 ('[t]he threat should be addressed to the official person with the intention of obstructing the official duties. However, it might also be addressed to another person or an object'). *Contra* Transcript, 8 September 2021, pp.660, 667.

<sup>23</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.73; Transcript, 8 September 2021, pp.664-65. *Contra* Transcript, 8 September 2021, p.661.

<sup>24</sup> Transcript, 8 September 2021, p.669.

the SPO agrees with the Salihu et al. Commentary cited by the Trial Panel that it would not be a crime within the meaning of the provision if the threatening conduct happened after the official duties ceased.<sup>25</sup> But the crimes charged in this case concern obstruction or attempted obstruction of active investigations and proceedings, making for a clear concurrence of elements.

## **2. Obstruction by participating in the common action of a group (Count 2)**

12. Article 401(2) of the KCC provides that:

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

13. This provision reflects the reality that obstruction or attempted obstruction of official duties by a group poses heightened danger warranting an additional sanction.

14. The term 'common action' has no qualifier, and does not require one. The obstruction under this provision can occur through any joint activity and is not limited to situations of mob action.<sup>26</sup> There is no need to limit the provision through interpretation to cover only common action to use force or serious threat.<sup>27</sup> That the official duties must be 'obstructed' necessarily requires the use of unlawful means; peaceful and lawful activity necessarily falls outside the provision.

15. The Accused satisfies both direct and eventual intent and, no different from the other crimes in the KCC, either suffices.<sup>28</sup>

## **B. INTIMIDATION DURING CRIMINAL PROCEEDINGS (COUNT 3)**

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<sup>25</sup> Salihu et al. Commentary, p.1166.

<sup>26</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.75; Transcript, 8 September 2021, p.670. In contrast, *see* Article 404 of the KCC.

<sup>27</sup> *Contra* Transcript, 8 September 2021, p.662.

<sup>28</sup> Transcript, 1 September 2021, pp.490-91. *Contra* Transcript, 8 September 2021, p.662.

16. Article 387 of the KCC provides that:

Whoever uses force or serious threat, or any other means of compulsion, a promise of a gift or any other form of benefit to induce another person to refrain from making a statement or to make a false statement or to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings shall be punished by a fine of up to one hundred and twenty-five thousand (125,000) EUR and by imprisonment of two (2) to ten (10) years.

17. As seen from the inclusive phrasing in the provision – covering force, threats, ‘any other means of compulsion’, gifts, and ‘any other form of benefit’ - any conduct falling within the enumerated parameters can be intimidating.<sup>29</sup>

18. It is not necessary to plead that specific individuals were intimidated.<sup>30</sup> It suffices that the Accused directed their conduct towards those likely to have information about crimes, perpetrators, and other important circumstances relevant to KSC Proceedings.<sup>31</sup> The provision extends to all potential information providers, and is not limited to witnesses the SPO intends to call in KSC proceedings.<sup>32</sup>

19. The inducement required by the provision is for a person: (i) to refrain from making a statement; (ii) to make a false statement; or (iii) to otherwise fail to state true information to the police, a prosecutor or a judge, when such information relates to obstruction of criminal proceedings. That the information in question relates to the ‘obstruction of criminal proceedings’ is only relevant for the third of these alternatives. If such information was construed as a general element across all three alternatives,

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<sup>29</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.59.

<sup>30</sup> Transcript, 1 September 2021, p.492.

<sup>31</sup> Indictment, KSC-BC-2020-07/F00251/A01, para.4.

<sup>32</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.61. *Contra* Transcript, 8 September 2021, p.659. *See also* Prosecution submissions on use of the term ‘witness’, KSC-BC-2020-07/F00282, 23 August 2021; ICC, *Prosecutor v. Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, ICC-01/05-01/13-2275-Red, 8 March 2018 (*Bemba et al. AJ*), para.720 ([i]n the Appeals Chamber’s view, the term “witness”, which is not defined in the Statute, can have different meanings, depending on the context and purpose of the relevant provision’).

this would lead to an absurd interpretation whereby only witnesses with information about obstruction could be intimidated.<sup>33</sup>

20. It is not required to prove that the person induced was actually intimidated.<sup>34</sup> It is the conduct that is intimidating; no particular consequence is required. This is in contrast to Article 386(1) of the KCC, which expressly requires a causal result for similar conduct (although Article 387 of the KCC applies to enumerated forms of conduct including force or serious threats, consistent with the latter offence having the higher sentencing range).<sup>35</sup>

21. No specific intent is required for this offence, meaning that the standard direct or eventual intent suffices.<sup>36</sup> When a further intention or purpose is specified in the KCC, then this is specified as such in the statutory provision. No such additional intent is specified in Article 387 of the KCC.<sup>37</sup>

### C. RETALIATION (COUNT 4)

22. Article 388(1) of the KCC provides that:

Whoever takes any action harmful to any person, including interference with lawful employment or livelihood of any person, with the intent to retaliate for providing truthful information relating to the commission or possible commission of any criminal offense to police, an authorized investigator, a prosecutor or a judge, shall be fined and punished by imprisonment of up to three (3) years.

23. The harmful action required by Article 388(1) of the KCC relates to the conduct itself. The harm intended need not have occurred,<sup>38</sup> as otherwise the KCC would

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<sup>33</sup> *Contra* Transcript, 8 September 2021, p.657.

<sup>34</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.62. *Contra* Transcript, 8 September 2021, pp.659, 673-75.

<sup>35</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.62, n.40; Transcript, 8 September 2021, pp.675-76.

<sup>36</sup> *See* Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 63-65. *Contra* Transcript, 8 September 2021, pp.660, 672.

<sup>37</sup> *Compare* Article 387 of the KCC *with* Article 388(1) of the KCC. *See also* Article 22 of the KCC.

<sup>38</sup> Transcript, 1 September 2021, pp.492-93. *See also* Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 52-53.



specify the harm as being ‘caused’ or being a ‘consequence’ as done in Article 388(5) and other offences against the administration of justice.<sup>39</sup> That the harmful action can include interference with well-being, privacy, or dignity is clear from the examples used in this provision, which include interference with ‘lawful employment or livelihood’ as harmful action.<sup>40</sup>

24. Articles 387 and 388(1) of the KCC are structurally similar to the offence of corruptly influencing witnesses in Article 70(1)(c) of the ICC Statute.<sup>41</sup> No consequence is required under this ICC provision, either – the *conduct* must be corruptly influencing, but that the witness *was corrupted* is not a requirement for the offence.<sup>42</sup>

25. This offence requires a specific intent, namely that the perpetrator act with the ‘intent to retaliate for providing truthful information relating to the commission or possible commission of any criminal offense to police, an authorized investigator, a prosecutor or a judge’. This specific intent was recognised in the Confirmation Decision.<sup>43</sup> Whether or not the witness actually gave truthful information is not an element of the offence;<sup>44</sup> all that is required is an intent to retaliate against such persons.<sup>45</sup>

26. That there is a specific intent for this offence is not incompatible with further requiring direct or eventual intent as defined in the Confirmation Decision.<sup>46</sup> The

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<sup>39</sup> Egs Articles 382(2), 384(3), 386(1), 392(3), 394(2), 404(1) and 404(4) of the KCC.

<sup>40</sup> See Salihu et al. Commentary, p.1125. *Contra* Transcript, 8 September 2021, p.655.

<sup>41</sup> This provision provides that: ‘[t]he Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally: [c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence.’

<sup>42</sup> *Bemba et al.* AJ, ICC-01/05-01/13-2275-Red, para.737.

<sup>43</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.136. *Contra* Transcript, 8 September 2021, p.654.

<sup>44</sup> Transcript, 8 September 2021, pp.676-677. *Contra* Transcript, 8 September 2021, p.655.

<sup>45</sup> See Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 110-13 (making no finding on the truth or falsity of the information provided).

<sup>46</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, paras 55-57; Transcript, 8 September 2021, pp.646-47. *Contra* Transcript, 8 September 2021, p.655.

specific intent is an additional mental element which must be satisfied above and beyond that required by Article 21 of the KCC.

**D. VIOLATING THE SECRECY OF PROCEEDINGS**

**1. Violation through unauthorized revelation of protected information (Count 5)**

27. Article 392(1) of the KCC provides that:

Whoever, without authorization, reveals information disclosed in any official proceeding which must not be revealed according to law or has been declared to be secret by a decision of the court or a competent authority shall be punished by a fine or by imprisonment of up to one (1) year.

28. By its plain language, the information in question had to have been provided without authorisation. Revealing information and claiming this is in the ‘public interest’, without any such authorisation by the relevant authority, cannot reasonably be construed as falling outside the scope of this provision.<sup>47</sup> Such an assertion is yet another indication that the Defence do not have a coherent legal basis for their ‘public interest’ arguments.

29. The protected information goes beyond information disclosed in proceedings or declared secret by a Court.<sup>48</sup> It also extends to all information which ‘must not be revealed according to the law’, and therefore includes all information protected under the KSC statutory framework.<sup>49</sup>

30. Either direct or eventual intent suffices for this offence, meaning that acting in the awareness that secret information might be revealed – short of actual knowledge – suffices.<sup>50</sup> This is consistent with an analysis of the authority relied upon by the

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<sup>47</sup> *Contra* Transcript, 8 September 2021, pp.652-53.

<sup>48</sup> *Contra* Transcript, 8 September 2021, pp.651-52, 677-78.

<sup>49</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.37.

<sup>50</sup> Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.49.

Defence, which was actually relied upon by the Pre-Trial Judge for the proposition that a reason to know that the information was secret is sufficient.<sup>51</sup>

## **2. Violation through revelation of the identities and personal data of protected witnesses (Count 6)**

31. Article 392(2)-(3) of the KCC provides that:

2. Whoever without authorization reveals information on the identity or personal data of a person under protection in the criminal proceedings or in a special program of protection shall be punished by imprisonment of up to three (3) years.

3. If the offense provided for in paragraph 2. of this Article results in serious consequences for the person under protection or the criminal proceedings are made impossible or severely hindered, the perpetrator shall be punished by imprisonment of six (6) months to five (5) years.

32. There is no limit in the provision as to where the information revealed is recorded, suggesting the information can be recorded in any form. When the SPO is in confidential correspondence with third parties, persons whose identity and/or personal data appear in those materials fall within the meaning of the provision.<sup>52</sup>

33. Eventual intent suffices,<sup>53</sup> and the same considerations for the mental elements of Count 5 apply here as well.<sup>54</sup>

### **E. MODES OF LIABILITY**

34. All modes of liability charged in this case are charged in the alternative in paragraph 47 of the Indictment.<sup>55</sup> The elements of each charged mode of liability are met, and the responsibility of the Accused can be potentially characterised under all

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<sup>51</sup> *Contra* Transcript, 8 September 2021, p.652. See Kosovo, Court of Appeal, M.Z., Judgment, PAKR 336/16, 13 December 2016, pp.7-9, as relied upon in Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.50, n.35.

<sup>52</sup> Transcript, 8 September 2021, p.679.

<sup>53</sup> *Contra* Transcript, 8 September 2021, pp.679-80.

<sup>54</sup> Paragraph 30 above. See Confirmation Decision, KSC-BC-2020-07/F00074/RED, para.50. *Contra* Transcript, 8 September 2021, p.653.

<sup>55</sup> Transcript, 8 September 2021, p.681.

of them. With this in mind, as potential sentencing considerations<sup>56</sup> and to ensure that any conviction entered can withstand appellate scrutiny,<sup>57</sup> the SPO intends to request that the Trial Panel make findings on all charged modes of liability.

35. That the modes of liability are charged in the alternative is a distinct matter from how criminal acts can be sub-divided within a single charge. The Trial Panel must determine a sentence in respect of each charge and a total sentence,<sup>58</sup> but there is no precedent at the KSC for how different criminal acts within a charge are assessed.

36. Counts 1-6 can be construed as an array of criminal acts across a timeframe, namely 7-25 September 2020. Within that timeframe, the Accused may be guilty for some acts on one mode of liability and a different one for others. Depending on how the charge is sub-divided, it is theoretically possible to find that inchoate offences and completed offences could be committed for different acts within a single charge.<sup>59</sup> The same could be true for principal and accessorial liability, such as, for example, when the Accused violated the secrecy of the proceedings themselves in some press statements but incited the same conduct in others.

37. Regardless of how the Trial Panel elects to sub-divide the criminal conduct within the charges, the full scope of criminal responsibility should be reflected in the

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<sup>56</sup> ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-T, Judgement (Vol.1), 26 February 2009, paras 77-78 (and the sources cited therein).

<sup>57</sup> See Article 46(6) of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('[w]hen the Court of Appeals Panel overturns a Trial Panel's finding of guilt based on one mode of liability and the Trial Panel has failed to make findings on alternative modes of liability, the Court of Appeals Panel shall consider the evidence contained in the trial record, as well as any other Trial Panel findings, to determine whether to enter convictions under an alternative mode of liability. Alternatively, if the Trial Panel is available and could more efficiently address the matter, the Court of Appeals may return the case to the Trial Panel to review its findings of guilt under an alternative mode of liability').

<sup>58</sup> Rule 163(4) of the Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020.

<sup>59</sup> Transcript, 8 September 2021, pp.682-83.

trial judgment. Any convictions should therefore be entered on as many modes of liability as are required to reflect the totality of the criminal conduct of the Accused.<sup>60</sup>

38. The Defence only raised submissions contesting the Confirmation Decision in relation to co-perpetration and incitement as an inchoate offence. On the Defence submissions to date, the interpretation of all other modes of liability in the Confirmation Decision (commission, attempt, other forms of incitement, assistance, agreement to commit the criminal offence) do not appear to be contested.

## 1. Co-perpetration

39. Article 31 of the KCC provides as follows:

When two or more persons jointly commit a criminal offense by participating in the commission of a criminal offense or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offense.

40. No specific intent can be distilled from the plain language of this provision.<sup>61</sup> That co-perpetrators commit crimes 'knowingly and wilfully' is not in the statutory language and, even if it was, these words are generally understood as an expression of only general intent.<sup>62</sup>

## 2. Incitement as an inchoate offence

41. Article 28(2) of the KCC only allows for attempt to be punished if the completed offence may impose a sentence of more than three years (or if otherwise expressly provided by law).<sup>63</sup> Not all offences charged have a maximum sentencing range over

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<sup>60</sup> See similarly ICTY, *Prosecutor v. Dorđević*, Judgement, IT-05-87/1-A, 27 January 2014, paras 831-34 (from para.831: '[t]he Appeals Chamber recalls that trial chambers are not inherently precluded from entering a conviction for a crime on the basis of more than one mode of liability, if this is necessary to reflect the totality of an accused's criminal conduct'); ICTR, *Ndindabahazi v. Prosecutor*, Judgement, ICTR-01-71-A, 16 January 2007, paras 122-23.

<sup>61</sup> *Contra* Transcript, 8 September 2021, p.663.

<sup>62</sup> *Contra* Transcript, 8 September 2021, p.663.

<sup>63</sup> Article 28(2) of the KCC.

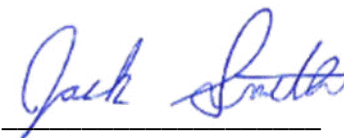
three years, which is why attempt is only charged under Counts 1-4 and 6.<sup>64</sup> The same principles apply to incitement under Article 32(3) of the KCC,<sup>65</sup> which provides:

Whoever intentionally incites another person to commit a criminal offense punishable by imprisonment of at least five (5) years and the offense is not even attempted, the inciter shall be punished for attempt.

42. On the basis of their plain language, 'a punishment of three or more years may be imposed' in Article 28(2) of the KCC and 'punishable by imprisonment of at least five (5) years' in Article 32(3) of the KCC do not amount to a meaningful difference beyond the length of the specified term. When the KCC wants to make the lowest possible sentence a reference point, it refers to a 'minimum term of imprisonment'.<sup>66</sup> Both Articles 28(2) and 32(3) of the KCC specify a term of years that is not linked to the minimum term, meaning that any offence with a possible sentence exceeding the specified term of years suffices.

43. Imprisonment of at least five years can be imposed within the sentencing ranges of Counts 1-3 and 6, which is why only those offences are charged in reference to Article 32(3) of the KCC. The minimum term of imprisonment for these offences does not affect the application of this mode of liability.

Word count: 4347



**Jack Smith**

**Specialist Prosecutor**

Thursday, 30 September 2021

At The Hague, the Netherlands

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<sup>64</sup> Indictment, KSC-BC-2020-07/F00251/A01, para.47(ii).

<sup>65</sup> Transcript, 8 September 2021, p.684. *Contra* Transcript, 8 September 2021, p.685.

<sup>66</sup> See Article 72 of the KCC.