In:	**KSC-BC-2020-06**
	The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Pre-Trial Judge**
	Judge Nicolas Guillou
Registrar:	Dr Fidelma Donlon
Filing Participant:	Defence Counsel for Jakup Krasniqi
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Krasniqi Defence Reply

to Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)

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I. INTRODUCTION

1. The Defence challenge to joint criminal enterprise ("JCE"), and to JCE III, is jurisdictional. JCE is not contained in Article 16 of Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("Law"), a fact unaltered by submissions about object and purpose. Moreover, the post-World War II cases do not establish that JCE III existed in customary international law ("CIL"). Accordingly, the Kosovo Specialist Chambers ("KSC") has no jurisdiction over JCE, alternatively no jurisdiction over JCE III.

II. PROCEDURAL HISTORY

2. On 15 March 2021, the Defence for Jakup Krasniqi ("Defence") filed their Preliminary Motion on Jurisdiction.[1]

3. On 23 April 2021, the Specialist Prosecutor's Office ("SPO") filed their Response to Preliminary Motions Challenging Joint Criminal Enterprise.[2]

III. SUBMISSIONS

A. THE DEFENCE CHALLENGE IS JURISDICTIONAL

4. The Defence submit that JCE – and particularly JCE III – are not part of CIL. That is not a challenge to the contours of JCE.[3] It is fairly and squarely a jurisdictional challenge as defined by the authorities relied upon by the SPO.

[1] KSC-BC-2020-06, F00220, Krasniqi Defence, *Krasniqi Defence Preliminary Motion on Jurisdiction* ("Defence Preliminary Motion on Jurisdiction"), 15 March 2021, public, with Annex 1, public.
[2] KSC-BC-2020-06, F00263, Specialist Prosecutor, *Consolidated Prosecution Response to Preliminary Motions Challenging Joint Criminal Enterprise (JCE)* ("SPO Response"), 23 April 2021, public.
[3] *Contra* SPO Response, paras 7-8.

5. The Defence have never contended that the scope of preliminary challenges to jurisdiction is infinite.[4] The authorities cited by the SPO hold that "an accused's contention that a form of responsibility does not exist in […] customary international law is properly characterised as a motion challenging jurisdiction".[5] They distinguish these jurisdictional challenges from contentions about the "contours" of a crime or mode of responsibility (which are not jurisdictional challenges).[6] Thus, Ojdanić's contention that JCE could not apply where the direct perpetrator was not a participant in the JCE, was not jurisdictional because it merely challenged the contours of JCE rather than the existence of JCE.[7] Similarly, Karadžić's challenge to the definition of the mental element of JCE III and the *actus reus* of crimes including hostage-taking was not jurisdictional because it only challenged the definition of JCE or those crimes not their existence in CIL.[8] The distinction is thus between challenges to the *existence* of a mode of responsibility in CIL (which are jurisdictional) and challenges to the *contours* of a mode of responsibility (which are not).

6. The Defence submission is that JCE – and JCE III most particularly – did not exist in CIL in 1998-1999. That is plainly a jurisdictional challenge because it relates to the *existence* of JCE.

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[4] *Contra* SPO Response, para. 7.

[5] ICTY, *Prosecutor v. Milutinović et al.*, IT-05-87-PT, Trial Chamber, *Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration* ("Ojdanić Co-Perpetration Decision"), 22 March 2006, para. 23, citing to ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Appeals Chamber, *Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise*, 21 May 2003, para. 11 and ICTY, *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Bench of the Appeals Chamber, *Decision Pursuant to Rule 72(E) as to Validity of Appeal*, 25 March 2003, p. 3 stating that "the appeal has been validly filed insofar as it challenges the jurisdiction of the Tribunal in relation to Ojdanić's individual criminal responsibility for his alleged participation in a joint criminal enterprise".

[6] Ojdanić Co-Perpetration Decision, para. 23.

[7] *Ibid*.

[8] ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-PT, Trial Chamber, *Decision on Six Preliminary Motions Challenging Jurisdiction*, 28 April 2009, paras 30-32.

7. It is wrong to submit that if it should be found that JCE I existed in CIL, any challenge to JCE III ceases to be jurisdictional.[9] In this motion, the Defence challenge the *existence* of JCE III in CIL not its *contours*. That is jurisdictional. Other Tribunals have reached this conclusion. Before the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), the Defence challenged jurisdiction over JCE as a whole and, in the alternative jurisdiction over JCE II and III.[10] After reviewing the jurisprudence,[11] the challenge was not only accepted as jurisdictional[12] but the Pre-Trial Chamber concluded that it had jurisdiction over JCE I and II but, critically, not over JCE III.[13]

8. Further, there is no merit in the surprising submission that determining whether JCE III existed in CIL at the material time would "hinder rather than help the progress of proceedings".[14] It is obviously in the interests of the parties to know immediately which modes of responsibility will be in issue at trial. In order to prepare for trial, the Defence are entitled to know the case that they have to meet. Moreover, the issues relating to JCE III have now been thoroughly and meticulously briefed. There is no reason to delay the resolution of this issue.

B. THE OBJECT AND PURPOSE OF THE LAW DO NOT SUPPORT THE APPLICATION OF JCE

[9] *Contra* SPO Response, para. 8.
[10] ECCC, *Co-Prosecutors v. Ieng Sary et al.*, 002/19-09-2007-ECCC/OCIJ (PTC38), Pre-Trial Chamber, *Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)*, 20 May 2010, para. 20.
[11] *Ibid*., paras 23-24.
[12] *Ibid*., para. 25.
[13] *Ibid*., paras 83, 88, and p. 69.
[14] SPO Response, fn. 23.

9. The SPO's rhetorical plea that the rejection of JCE (including JCE III) would "thwart the purpose of the Law and shield many perpetrators from justice" is inapposite and overstated.[15]

10. First, the terms of Article 16(1)(a) clearly provide for individual criminal responsibility for "a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of such a crime". The language is plain. There is no need for teleological interpretation. Five modes of responsibility are stated; only five modes of responsibility can be applied.[16]

11. Second, the SPO raises the spectre of an impunity gap without considering the other modes of responsibility stated in the Law. There is no "impunity gap for those who created and implemented criminal plans and policies"[17] in a Law which expressly specifies "plann[ing]" and "aid[ing] and abett[ing] in the planning, preparation or execution" as modes of responsibility. Similarly, the "role of those who made it possible for the physical perpetrator to carry out the crime"[18] is comprehensively covered by other modes of responsibility which (unlike JCE) are expressly stated in the Law.

12. Finally, the Defence did not submit that "the natural meaning of 'committed' would exclude all but the direct perpetrator",[19] but that "JCE III cannot fall within any natural meaning of the word 'committed'".[20] The SPO maintain that JCE is a form of commission.[21] But JCE III cannot conceptually fall within the meaning of "commission"; by its nature JCE III imputes responsibility to the Accused for a crime

[15] SPO Response, para. 17, *see also* paras 19, 24.
[16] ICC, *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-4, Trial Chamber II, *Judgment Pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert*, 18 December 2012, para. 16.
[17] SPO Response, para. 24.
[18] *Ibid*., para. 19.
[19] *Contra* SPO Response, para. 24.
[20] Defence Preliminary Motion on Jurisdiction, para. 22.
[21] SPO Response, para. 13.

that was not part of a criminal plan and which he did not intend. That cannot be consistent with "commission" and hence JCE III cannot be implied into the Law.

C. STATUTES AND JURISPRUDENCE FROM POST-WWII TRIALS DO NOT SUPPORT JCE III

13. The statutes and jurisprudence cited by the SPO do not establish the existence of JCE III in CIL. They do not evidence the existence of a mode of responsibility based on the foreseeability of crimes which fell outside a common plan.

14. Reliance on the Charter of the International Military Tribunal ("IMT Charter") and Control Council Law No.10 ("CCL10") is misplaced. Article II(2)(d) of CCL10 imposes responsibility on a person who was "connected with plans or enterprises involving its commission". That offers no support to JCE III. It makes no reference to foreseeability. Moreover, it would not apply in a JCE III case because the essence of JCE III is that the commission of the offence is *outside* the plans or enterprises. Article 6 of the IMT Charter also contains no reference to foreseeability or to JCE III. Further, a thorough analysis of the *travaux préparatoires* of the IMT Charter indicates that extended JCE responsibility "was never clearly raised during drafting".[22]

15. As predicted,[23] the SPO attempts to infer the existence of JCE III from limited available materials relating to seven post-World War II cases. All have been analysed and rejected as a basis for JCE III by the Supreme Court Chamber of the ECCC.[24] Before rebutting the SPO submissions in relation to each case individually, the Defence note the overarching deficiency in the Response. It is for the SPO to establish that JCE III

[22] Clarke, R. C., "Return to *Borkum Island* Extended Joint Criminal Enterprise Responsibility in the Wake of World War II", (2011) 9 *Journal of International Criminal Justice*, p. 841; *contra* SPO Response, paras 32-33.
[23] Defence Preliminary Motion on Jurisdiction, para. 34.
[24] ECCC, *Co-Prosecutors v. Nuon Chea et al.*, 002/19-09-2007- ECCC/SC, Supreme Court Chamber, *Appeal Judgment* ("ECCC SC Judgment"), 23 November 2016, paras 791-795, 800-801, 804.

existed in CIL. None of the cases relied on by the SPO contain a detailed judgment specifically addressing modes of responsibility which states that JCE III (or a mode of responsibility based on foreseeability) was applied. Proposing possible inferences from an incomplete record, without proving that JCE III was actually ever applied, cannot establish that JCE III existed in CIL.

Rüsselsheim

16. This case concerned a mob killing of downed airmen. The SPO fails to establish that convictions were entered pursuant to a foreseeability standard rather than, simply, because the killing of the airmen was or became part of the mob's plan.[25]

17. First, the 1946 US Manual for Trial of War Crimes does not "clearly resolve the matter".[26] The Manual is a secondary source. It is not the judgment of the Court but a digest which reprints only one part of the reviewing judge advocate's discussion. It is no more authoritative that any other subsequent commentary on the case.

18. Second, the quotation advanced by the SPO from the Manual,[27] stops before revealing the authority relied on for the proposition that "[a]ll who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one of them […]". The authority cited in the *Rüsselsheim* case was "29 Corpus Juris, Sec 46, p. 1073".[28] That is an encyclopaedia of American national

[25] *Contra* SPO Response, para. 73.
[26] *Contra* SPO Response, para. 73. The Defence assume that this is a reference to the Manual. No other reference to "available records" is offered by the SPO.
[27] SPO Response, para. 74.
[28] United States Army War Crimes Trials, *United States v. Josef Hartgen et al.*, Case No. 12-1497, *Review and Recommendations of the Deputy Theater Judge Advocate* ("Rüsselsheim Deputy Theater Judge Advocate"), 29 September 1945, p. 9.

law; the same rule appears in the current edition.[29] That reveals two fatal flaws in the SPO Response:

a. The proposition critical to the SPO case is not a rule of CIL at all, but a rule of the national criminal law of one State;

b. The rule cited by the SPO is one which even under the national law cited only applies to homicide. The existence of a national rule in relation to one offence cannot provide the existence of a generally applicable mode of responsibility in CIL.

19. Third, the SPO ignores the rest of the case record which is consistent with JCE I (i.e. that killing was within the common plan). The charge did not plead JCE III but that the accused did "wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing".[30] The evidence that "[t]he flyers were set upon by a large crowd […] and struck with rocks, clubs, and other objects until they lay bleeding and prostrate upon the ground" is entirely consistent with a common plan to kill.[31] The Deputy Theater Judge Advocate's review states "each of the five accused […] actively contributed to the death of the airmen. They were motivated by a common design and legally are all principals in the perpetration of the murders. It matters not that some assumed more brutal roles than others, or that the injuries inflicted by some were more severe than those inflicted by the others".[32] Similarly, the Staff Judge Advocate's review referred to "a blood-hungry, brutal mob, incensed by the damage done to their village during the preceding night's raid, determined to exact its revenge from the

[29] Common design of participants, 40 C.J.S. Homicide 30; *see also* Common design of participants-To kill, 40 C.J.S. Homicide 31.
[30] Rüsselsheim Deputy Theater Judge Advocate, p. 1.
[31] *Ibid*., p. 2.
[32] *Ibid*., p. 8.

helpless aviators".[33] These passages from both reviewing decisions and the evidence are perfectly consistent with JCE I.

Borkum Island

20. The SPO offers a possible interpretation that *Borkum Island* espouses the foreseeability standard, whilst failing to exclude the alternative that killings were found to fall within the common plan.

21. First, the SPO errs in relying on statements which are equally consistent with the killings being within the common plan. The Prosecutor's opening statement that "where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man", is more consistent with the killings being part of the common purpose because it refers to the mob having "carried out its purpose".[34] The statement in the Report of the Judge Advocate for War Crimes of the European Command that "[r]esponsibility was attached to those who incited mob action by shouts and other forms of encouragement as well as to those who did the actual beating and killing"[35] is entirely consistent with there being a common plan to kill, and says nothing whatsoever about crimes outside the common plan or foreseeability. In any event, that report, which might not even relate to this case,[36] is simply one person's review and carries no more authority than any subsequent commentary.

[33] United States Army War Crimes Trials, *United States v. Josef Hartgen et al.*, Case No. 12-1497, *Review of the Staff Judge Advocate*, 23 August 1945, p. 6.
[34] *Contra* SPO Response, para. 68.
[35] European Command, 'Report of the Deputy Judge Advocate for War Crimes', June 1944 to July 1948, p. 66.
[36] The SPO concede that the case is not identified by name, SPO Response, fn. 166.

22. Second, the SPO errs in relying almost exclusively on the Judge Advocate's review materials which do not prove what legal concepts or modes of liability were actually applied by the tribunal.[37]

23. Third, the SPO's reliance on Krolikovski's conviction is misplaced.[38] No record survives of what evidence or mode of responsibility the tribunal actually relied on against Krolikovski. The Judge Advocate's Review does not show that "intent was not required".[39] Instead it concluded that "his acts were compatible with the plan and in the furtherance thereof".[40] That suggests JCE I. The absence of any discussion of foreseeability excludes JCE III. Moreover, that Krolikovski took no active part in the beating / shooting does not exclude JCE I or intent. There was no finding that he had no knowledge that the airmen would be killed.[41] It is not accurate to say that he "attempted to take measures, which were however not considered sufficient".[42] Krolikovski "saw the guards hitting the fliers and did nothing to prevent it" and ordered a Lieutenant to follow them "but gave him no orders concerning any steps to be taken to protect the fliers".[43] He later ordered that "the soldiers were not to write or talk about the killing".[44] The Court could have inferred intent from his knowledge, his failure as a commanding officer to protect and the steps he took subsequently to cover up the killing.

24. Finally, the reference in the Judge Advocate's Review to *Rüsselsheim* adds nothing because *Rüsselsheim* itself does not rely on JCE III as set out above.[45] In any

[37] *See* ECCC SC Judgment, para. 791.
[38] *Contra* SPO Response, para. 69.
[39] *Contra* SPO Response, para. 69.
[40] United States Army War Crimes Trials, *United States v. Kurt Goebell et al.*, Case No. 12-489, *Review and Recommendations* ("Borkum Island Case"), 1 August 1947, p. 20.
[41] *Contra* SPO Response, para. 69.
[42] SPO Response, para. 69.
[43] Borkum Island Case, p. 18.
[44] *Ibid.*, p. 19.
[45] *See* paras 16-19 *supra*.

event, the reference relates to the "sufficiency of charges and particulars" rather than any substantive discussion of the case.[46]

Ikeda

25. The SPO submits that the *Ikeda* case must be an example of JCE III rather than JCE I or superior responsibility,[47] relying heavily on one sentence stating that the crimes "could and should have been anticipated and prevented by the accused".[48] In fact, this is merely one possible explanation of the case.

26. The SPO submits that superior responsibility is excluded because there was a criminal plan.[49] That offers a false dichotomy. The existence of a common plan does not exclude superior responsibility (especially where the SPO claims the crime falls outside the common plan); references to a common plan and superior responsibility are not mutually exclusive. Indeed, the SPO pleads JCE and superior responsibility in this very Indictment.[50]

27. In fact, *Ikeda* is replete with references to superior responsibility. The charge of "allow[ing] civilians and soldiers who were subordinate to him to take a group of about 35 women […] and force them into prostitution and to be raped, while he knew or ought reasonably to have suspected that these war crimes were being committed"[51] pleads the elements of superior responsibility. There are many references to his role "as a heitan officer" or his position "as a senior officer".[52] The final operative paragraph concludes "if the accused had appreciated and exercised the duties for

[46] Borkum Island Case, pp. 9-10.
[47] SPO Response, para. 79.
[48] Temporary Court Martial in Batavia, *The Queen v. Ikeda*, No. 72 A/1947, *Judgment* ("Ikeda"), 30 March 1948, p. 8.
[49] SPO Response, para. 80.
[50] KSC-BC-2020-06, F00045/A03, Specialist Prosecutor, *Further Redacted Indictment*, 4 November 2020, public, para. 172.
[51] Ikeda, p. 1.
[52] *Ibid.*, p. 1, 8, 9.

which he was responsible as a *heitan* officer correctly, it is inconceivable why he did not immediately start an investigation".[53] These references suggest superior responsibility. The single passage relied on by the SPO that crimes "could and should have been anticipated and prevented by the accused" is not a reference to JCE III but to the knowledge threshold for superior responsibility.

28. Furthermore, the judges could have found that all the crimes were implicit in the original criminal plan or that the crimes within the common plan expanded over time.[54] Finding that Ikeda "participated in formulating and elaborating the plan" and was "participating in the further elaboration of the plan"[55] are all consistent with JCE I and an expanding plan. Moreover, nothing in the finding that he "could and should have" anticipated certain crimes excludes intent.[56] Knowledge combined with acceptance have been held sufficient to infer intent in previous cases.[57]

29. Finally, the implausibility of the JCE III explanation is highlighted by the SPO's failure to identify which crimes fell within the common plan and which were convicted pursuant to JCE III.

Ishiyama and Yasusaka

30. The SPO rely on the advice of the Judge Advocate that "[i]f an act done by some one of the party in the course of his endeavours to effect the common object of the offenders results in the death of some person the others are equally liable for the murder as principals in the second degree".[58] There is nothing in the record to indicate that the Court actually applied this submission. The Court not the Judge Advocate

[53] Ikeda, p. 9.
[54] ICTY, *Prosecutor v. Krajišnik*, IT-00-39-A, Appeals Chamber, *Judgment*, 17 March 2009, para. 163.
[55] Ikeda, p. 8.
[56] *Contra* SPO Response, para. 79.
[57] ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-A, Appeals Chamber, *Judgment*, 29 November 2017, para. 1800.
[58] Australian Military Court, *Ishiyama et al.*, AWC No. 2225 and AWC No. 2229, *Trial of Japanese War Criminals* ("Ishiyama"), 8-9 April 1946, p. 24.

was "the sole judges of fact and also the judges of law".[59] Without evidence that the Court accepted this proposition, the Judge Advocate's words do not establish a rule of CIL.

31. Second, the facts of that case do not suggest that JCE III was applied. The precis of evidence records: Yasusaka said that he and Ishiyama decided to scare two prisoners and so tied them up; Yasusaka said that they should let the prisoners go; Ishiyama said 'we have gone this far, we may as well finish it' and then shot them. Only Ishiyama was convicted. The acquittal of Yasusaka,[60] despite apparent evidence of a common criminal plan at least to tie up and scare the victims and without any discussion whatsoever of whether the killing was foreseeable to him, suggests JCE III was not applied.

32. Third, the Judge Advocate's formulation is not consistent with JCE III. More specifically, the Judge Advocate provided that if "the only agreement between the two accused was to frighten the two Indians and that one of the accused decided to shoot them and that the shooting was not done by him in an endeavour to effect a common purpose then the other would not be liable as a principal in the second degree under the doctrine of common design".[61] That statement does not propose liability for crimes outside a common purpose on the basis of foreseeability. It is also limited to homicide cases in the same way as the principle of US national law cited in *Rüsselsheim*.

Essen Lynching

33. No conclusions can be drawn from this case. The submission that the "case record is brief in terms of legal reasoning" is a masterly understatement.[62] There is no record of any judgment or summing up; the legal reasoning is not "brief" – it is not

[59] Ishiyama, p. 24.
[60] *Ibid*., p. 27.
[61] *Ibid*., p. 25.
[62] SPO Response, para. 86.

recorded at all. As a result, any submissions about modes of responsibility are speculative. The SPO submits – without footnote or support – that "[i]t is apparent that this responsibility is attributed on account of the foreseeability or predictability of the fate".[63] It is not. The Prosecutor submitted in that case that "every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen, was guilty in that he was concerned in the killing".[64] The Prosecution theory was not based on foreseeability but was that murder was the plan from the outset, beginning with an "incitement to the crowd to murder".

34. The SPO relies on the Prosecution submission in that case that a finding of intent was not necessary for a conviction.[65] The Prosecution in fact submitted "[i]f you prove an intent to kill you would prove murder; but you can have an unlawful killing, which would be manslaughter, where there is not an intent to kill but merely the doing of an unlawful act of violence".[66] That submission was based on "British law".[67] Thus, for any conviction for murder, the Prosecution submitted in the *Essen Lynching* case that intent was required. As a result of a rule of 'British law' (not a rule of CIL), the Prosecution submission (which may or may not have been accepted by the Court) was that intent was not required for a conviction of manslaughter. At its highest, that reflects a rule of national law, establishing the *mens rea* of one specific offence, not a rule of CIL establishing a mode of responsibility applicable to all offences. In any event, that formulation offers no support whatsoever to a foreseeability standard.

[63] SPO Response, para. 86.
[64] British Military Court for the Trial of War Criminals, *Erich Heyer et al.*, Case No. 8, *Trial of Erich Heyer and Six Others*, 18-19 and 21-22 December 1945, UNWCC, Law Reports of Trials of War Criminals, Vol. I at 88-92, p. 89.
[65] SPO Response, para. 85.
[66] Prosecution Submission reproduced in ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, *Judgment*, 15 July 1999, para. 208.
[67] *Ibid.*

35. The SPO submission that intent could not have been inferred against one civilian because he "only struck the victims as they were marched through town" is speculative.[68] The record does not state the Court's conclusion in relation to *mens rea*. Intent could have inferred from the civilian's action in striking the victim, following what the Prosecution argued was an "incitement to the crowd to murder".

D'Ottavio and others

36. The SPO argue that *D'Ottavio* should not be disregarded because it may qualify as state practice relevant to the identification of a rule of CIL.[69] Fundamentally, however, *D'Ottavio* represents a national court applying national law. Even if *arguendo* it is relevant state practice, it would represent one case from one country. That cannot prove the existence of a rule of CIL.

37. In any event, the SPO bases its argument on p. 234 of the Judgement and submits that "[t]he principle underlying JCE III is thus central to the convictions".[70] But that submission ignores the preceding page of the Judgement, which makes it clear that JCE III was not applied:

> [W]here the crime committed is other than the one willed by one of the participants, also that participant is accountable for the crime if the criminal result is a consequence of his action or omission […] the participant's responsibility envisaged in Article 116 is grounded not in the notion of collective responsibility (provided for in Article 42(3) of the Italian Criminal Code) but in the fundamental principle of concurrence of interdependent causes […].[71]

38. The accused were not convicted because they foresaw the commission of a crime outside the common plan; they were convicted because in national law the crime was a consequence of their acts / omissions. The references to foreseeability cited by the SPO were only relevant to "psychological causation", an aspect of causation

[68] SPO Response, para. 85.
[69] *Ibid*., para. 88.
[70] *Ibid*., para. 89.
[71] Italian Court of Cassation, *D'Ottavio et al.*, No. 270, Criminal Section I, *Judgment* ("D'Ottavio"), 12 March 1947, published in (2007) 5 *Journal of International Criminal Justice*, p. 233.

appearing in the Judgement after the primary discussion of the "nexus of objective causation".[72] *D'Ottavio* does not apply the foreseeability standard but Italian rules on causation.

United States v. Tashiro et al.

39. *Tashiro* offers no support to the SPO. In that case, fires had started in a prison and officers were prosecuted for failing to evacuate prisoners of war so that they burned to death.

40. The SPO relies on the conviction of Koshikawa for "participat[ing] in formulating and adopting such a grossly negligent plan for the release of American [P's] that when same was put in operation, it resulted in keeping them confined during imminent danger and thereby proximately contributed to the death of at least a large majority".[73] That cannot be construed as an application of JCE III. There is no analysis of crimes outside the common plan or foreseeability. Instead, it sets a different standard based on "gross negligence" (at least where the accused had the duty to protect).

41. *Tashiro* established that "conspiracy to commit a war crime is not itself a war crime of which the commissions have jurisdiction".[74] The reasons for that conclusion were that conspiracy was not recognised in the applicable legislation and "[w]e have been unable to find where, under International Law, the charge of 'conspiracy to commit a war crime' […] is an offense".[75] The same should be said of JCE III.

[72] D'Ottavio, p. 234.
[73] United States Military Commission Yokohama, *United States v. Tashiro et al.*, Case No. 78, *Review of the Staff Judge Advocate*, 7 January 1949, p. 72.
[74] *Ibid.*, p. 70.
[75] *Ibid.*, p. 69.

IV. CONCLUSION

42. The SPO fails to establish that JCE is provided for in Article 16 of the Law or that JCE III existed in CIL. The KSC should find that it has no jurisdiction over JCE, alternatively over JCE III.

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