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:	Specialist Counsel for Hashim Thaçi
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Thaçi Defence Reply to "Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE)"

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I. INTRODUCTION

1. In the 'Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise', the Specialist Prosecutor's Office ("SPO") states that in addition to the ICTY/R, IRMCT, SCSL, and STL:[1]

> "JCE III specifically has been affirmed by… **other international or internationalised tribunals**".

2. The SPO uses the plural when describing these different "tribunals". This gives the reader the misleading impression of widespread affirmation among different judicial mechanisms, supporting the SPO's position that JCE III forms part of customary law.

3. The footnote to this statement is "*Habré* TJ, para.1885".[2] Paragraph 1885 reads: "*[s]ur la base des développments precedents, la Chambre est donc satisfaite que l'ECCC III faisait partie du droit international coutumier au moment des faits*". Rather than being affirmed by "other international or internationalised tribunals", the SPO points to this one ruling from the Extraordinary African Chambers, in Senegal.

4. The SPO continues: "*in addition to the extensive sources outlined above, these courts and tribunals have identified and relied upon numerous other cases and materials in which further elements supportive of JCE III liability are to be found*".[3] The footnote reads: *"[f]or example, see JCE III sources cited in STL Decision on Applicable Law, fn. 355*".[4] The only JCE III sources in footnote 355 are five World War II cases, three of which are included in the "extensive sources outlined above" by the SPO. This submission is therefore

[1] KSC-BC-2020-06/F00263, Consolidated Prosecution response to preliminary motions challenging Joint Criminal Enterprise (JCE), 23 April 2021 ("SPO Response on JCE" or "SPO Response"), para. 103 (emphasis added).
[2] *Ibid,* fn. 229.
[3] *Ibid*, para. 103.
[4] *Ibid,* fn. 230.

circular; "extensive sources above" supported by "numerous other cases and materials", which substantially overlap.

5. By misrepresenting the strength of the support for JCE III in customary law, the SPO instead reveals the lack of it. The need to amplify JCE III's application demonstrates the lack of material that exists. Other misrepresentations are outlined below. They affect the credibility of the SPO Response on JCE, and warrant careful review of its claims. The SPO's decision to respond to the accused's separate filings in a global manner[5] has also left significant submissions unchallenged, as set out further below. Although the defence for Mr. Hashim Thaçi ("the Defence") maintains its original request in full,[6] this reply focuses on the SPO's submissions on JCE III. The absence of comment on any aspect of the SPO Response is not a concession as to its validity.

II. SUBMISSIONS

A. THE SPO RESPONSE MISREPRESENTS THE THAÇI REQUEST

6. The extent to which the SPO Response repeatedly misrepresents the Thaçi Request is alarming. The SPO first submits that *"the Defence Motions challenging the contours of JCE are not jurisdictional challenges*".[7] The Thaçi Request did not challenge JCE's contours, but said that JCE neither exists in the KSC Law nor formed part of customary law.[8] This is a proper jurisdictional challenge.[9] The SPO's attempt to

[5] *See,* KSC-BC-2020-06/F00248, Prosecution Response for the Extension of the Word Limit on Preliminary Motion Responses, 15 April 2021; KSC-BC-2020-06/F00250, Decision on Prosecution Request for Extension of the Word Limit, 16 April 2021.
[6] KSC-BC-2020-06/F00216, Preliminary Motion to Dismiss the Indictment due to Lack of Jurisdiction, 12 March 2021 ("Thaçi Request").
[7] SPO Response on JCE, p. 5.
[8] Thaçi Request, paras. 60-71.
[9] *See, for example*: ECCC, 002/19-09-2007-ECCC/OCIJ (PTC 138), Pre-Trial Chamber, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras. 23-24; ICTY, *Prosecutor v. Milutinovic et al.*, IT-05-87-PT, Trial Chamber, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, 22 March 2006, para. 23; ICTY, *Prosecutor v.*

mischaracterise the Thaçi Request in order to place it outside the scope of proper preliminary challenges must fail.

7. The SPO then claims that Thaçi "*misconstrues the role of English domestic law in JCE jurisprudence, falsely claiming that it represents the 'only support' found by the ICTY Appeals Chamber in determining the mens rea standard for JCE III*."[10] This is an extraordinary mischaracterisation.

8. The Thaçi Request correctly submitted that "*the only support that the ICTY Appeals Chamber found in Tadić* ***for treating foreseeability as a legal requirement*** *for the "extended" crimes stems from domestic jurisprudence– including* ***some*** *cases that Jogee either overturned or identified as inconsistent with treating foresight as a legal element*".[11] The Thaçi Request then cites to an *amicus* brief authored by, among others, the Queen's Counsel who led the appeal in *R v Jogee* and other members of her legal team, which makes the same submission.[12] This statement was, and is, correct. No assertion was made that the *Tadić mens rea* standard for JCE III relied only on English domestic law.

9. Nor does the Thaçi Request "ignore" that *Jogee* is not directly on point, as claimed.[13] The Thaçi Request details the factual underpinnings of the *Jogee* appeal, then sets out the position in the UK pre-*Jogee*, then summarises the UK Supreme Court

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Milutinović et al., IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 ("*Milutinović* JCE Decision"), paras. 5 and 10-11; ECCC, 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Pre-Trial Chamber, Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, paras. 60 and 68; ICTR, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Appeals Chamber, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para. 22.

[10] SPO Response on JCE, para. 120.

[11] Thaçi Request, para. 70 (emphasis added).

[12] *Ibid*, para. 70, fn. 98, citing ICTY, *Prosecutor v. Karadžić*, MICT-13-55-A, Appeals Chamber, Request for Leave to Make Submissions as *Amicus Curiae*, 24 August 2017, which states at para. 29: "The only support in *Tadić* for treating foreseeability as a legal requirement for extended liability stems from domestic laws – including some cases that *Jogee* either overturned or identified as inconsistent with treating foresight as a legal element".

[13] SPO Response on JCE, para. 120.

decision, and then addresses the significance of this correction to JCE in the present context.[14] It cannot be that the Defence was also required to state explicitly, "*Jogee* is not directly on point". The Pre-Trial Judge can be presumed able to fully understand the persuasive nature of this correction in domestic law, without being misled into thinking that *Jogee* addressed JCE III applied by the international criminal tribunals. The SPO's criticism of the Defence's submissions on the basis that "*Jogee* concerns English accomplice or accessorial liability"[15] is a non-argument. There was no suggestion otherwise.

10. The two pages spent by the SPO parsing a straightforward one-line submission concerning national and international implementation of JCE III are, again, undermined by a misstatement of the Thaçi Request.[16] The *Tadić* Appeals Chamber looked to domestic law precisely because of a lack of uniform international application, finding then that it was "not the case" that major legal systems of the world take the same approach,[17] which was then cited by the IRMCT in *Karadžić*.[18] The Thaçi Request cites to the lack of uniform application identified,[19] but nowhere asserts that the *Karadžić* Appeals Judgment made a finding thereon.[20]

11. Next, the SPO accuses the Thaçi Request of "overlooking" the fact that the ICTY Appeals Chamber had already addressed an issue raised.[21] Again, the SPO misunderstands (or deliberately misstates) the relevant submission. While the SPO is correct that the ICTY Appeals Chamber held in *Ojdanić* that the terms "common

[14] Thaçi Request, paras. 69-70.
[15] SPO Response on JCE, para. 120.
[16] *Ibid*, paras. 112-114.
[17] ICTY, *Prosecutor v. Tadić,* IT-94-1-A, Appeals Chamber, Judgement, 15 July 1999 ("*Tadić* AJ"), para. 225.
[18] ICTY, *Prosecutor v. Karadžić*, MICT-13-55-A, Appeals Chamber, Judgment, 20 March 2019, para. 436.
[19] Thaçi Request, para. 68.
[20] SPO Response on JCE, para. 114: "Contrary to THAÇI's submissions, the *Karadžić* Appeals Chamber did not find that JCE III had not been uniformly implemented…".
[21] *Ibid*, para. 115.

purpose" and "joint criminal enterprise" could be used interchangeably, which is uncontroversial, this has no relevance to the question of whether the prior **characterisation** of this mode of liability - sometimes as perpetration (or commission) and sometimes as accomplice liability - casts doubt over the alleged "firm" recognition of JCE under customary law. The interchangeable terminology recognised in *Ojdanić* has nothing to do with the more fundamental issue identified: namely that JCE was inconsistently characterised by the judicial rulings in which it was applied, affecting its status as custom, as identified in the cited academic texts.[22] The SPO argues in parallel to the Thaçi Request. Not only is this misleading, it means the SPO again fails to address the submissions raised, which again remain unchallenged.

12. The SPO then accuses the Thaçi Request of "exaggerating and misstating the content" of academic articles.[23] The sole example cited by the SPO is that "[Judge] Cassese's publication cannot be said to disavow JCE".[24] But the Thaçi Request correctly stated that Judge Cassese had disavowed **JCE III** (and not JCE as a whole) "**in its original form**".[25] This is an accurate statement, and supported by the remainder of the SPO's own footnote noting that Judge Cassese made suggestions on how to 'qualify' or 'straighten out' JCE III, which he "respectfully criticised" for special intent crimes.[26] By simply mischaracterizing the Thaçi Request, the SPO again fails to address the submissions made.

B. JCE IS ABSENT FROM THE KSC STATUTORY FRAMEWORK

13. The parties agree that the drafters consciously adopted the language of the ICTY/R Statutes in Article 16(1)(a) of the KSC Law.[27] The Thaçi Defence also agrees

[22] Thaçi Request, para. 65, fn. 87.
[23] SPO Response on JCE, para. 117.
[24] *Ibid*, fn. 264.
[25] Thaçi Request, para. 71.
[26] SPO Response on JCE, para. 117, fn. 264.
[27] Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office ("KSC Law").

that by 2015, the KSC drafters would have had "full awareness" of how the ICTY/R Statutes had been interpreted.[28]

14. They would also, however, have been fully aware of the extent and persistence of the criticism of JCE generally, and JCE III more specifically, questioning its status as reflective of custom, questioning its compatibility with the principle of culpability, and expressing unease at the way in which it had to be read into the ICTY Statute, and the sufficiency of the basis for doing so. The drafters would likely also have been aware that JCE III's attempted application at the ECCC and STL, post-*Tadić,* had prompted uncertainty, criticism and extensive litigation.[29] The drafters would also have been aware of the importance of a criminal statute exhaustively and clearly identifying and articulating the bases for individual criminal responsibility so as to engender fair and efficient proceedings, and ensure consistency with the principle of legality.[30]

15. In these circumstances, armed with this knowledge, it is unreasonable to conclude that the drafters intended the KSC to apply JCE, but preferred to leave it to the Judges to identify, articulate and justify it. It defies logic that the drafters would have preferred to expose the Court to the wasted resources arising from uncertainty, litigation, and guaranteed preliminary challenges, rather than articulate their intention in the Statute, or intended to leave the question as critical as the inclusion of a mode of liability to a singe Judge to determine, rather than those responsible for enacting the Statute.

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[28] SPO Response on JCE, para. 15.
[29] *See, for example:* ECCC, *Co-Prosecutors v. Nuon Chea and Khieu Samphân*, 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Appeal Judgement, 23 November 2016 ("*Nuon Chea* AJ"), paras. 775-810; STL, STL-11-01/AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras. 248-249.
[30] ICTY, *Prosecutor v. Hadzihasanovic et al.*, IT-01-47-AR72, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003, para. 55.

16. The more logical conclusion is that its omission was deliberate. That the drafters did not include JCE in the KSC Law because they did not intend the Court to prosecute accused through this controversial mode, and expose its judgments and legacy to criticism on this basis. Nor can it reasonably be submitted that the drafters would have needed to expressly exclude JCE in the KSC Law as claimed;[31] Article 16(1)(a) is deliberately framed exhaustively, and the principle of *expressio unius est exclusio alterius* undermines the SPO's position.

C. POST-WORLD WAR II CASES DO NOT ESTABLISH JCE III AS PART OF CUSTOM

17. The ICTY Appeals Chamber found that *Essen Lynching, Borkum Island*, and Italian case law demonstrate the existence of JCE III in customary international law.[32] A wealth of subsequent filings, commentary, and the ECCC Appeals Chamber, demonstrate persuasively why they do not.[33]

18. These arguments are well known. *Essen Lynching* contains elements of "common purpose" or "common design", insofar as the killings were attributed to all of the

[31] SPO Response on JCE, para. 15.
[32] *Tadić* AJ, paras. 205-220.
[33] *Nuon Chea* AJ, paras. 790-810; KSC-BC-2020-06/F00220, Krasniqi Defence Preliminary Motion on Jurisdiction with Public Annex 1, 15 March 2021 ("Krasniqi Preliminary Motion on Jurisdiction"), paras. 28-38; KSC-BC-2020-06/F00198, Selimi Defence Challenge to Jurisdiction – Joint Criminal Enterprise, 10 February 2021 ("Selimi Preliminary Motion on JCE"), paras. 36-38 and 56-68; KSC-BC-2020-06/F00223, Preliminary motion of the Defence of Kadri Veseli to Challenge the Jurisdiction of the KSC, 15 March 2021, paras. 98-105. See also ECCC, *Prosecutor v Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), *Amicus Curiae* Brief Submitted by Professor Kai Ambos, 27 October 2008, pp. 28-29 ("Ambos *Amicus* Brief"); S. Powles, 'Joint Criminal Enterprise - Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?' 2 JICJ (2004) 606 ("Powles"), at 615-617; Michael Karnavas, 'Case 003 Defence Submission in Intervention or *Amicus Curiae Brief* on JCE III Applicability', 12 January 2015, paras. 15-36 ("ECCC *Amicus* Brief"); L. Yanev, *Theories of Co-Perpetration in International Criminal Law: International Criminal Law Series* (Brill | Nijhoff, 2018), pp. 283, 286-297 and 310-314; A. Danner and J. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 California Law Review (2005) 75, at 110-112; ICTY, *Prosecutor v. Vlastimir Dordevic,* IT-05-87/1-A, Vlastimir Dordevic's Appeal Brief, 15 August 2011, paras. 29-31 and 68-71; L. Marsh and M. Ramsden, 'Joint Criminal Enterprise: Cambodia's Reply to Tadic', 11 International Criminal Law Review (2011) 137, at 148-152; J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 JICJ (2007) 69 at 75-76.

accused on this basis. However, it is not clear whether the tribunal convicted the accused on the basis of a shared intent with regard to the killing, or on the basis that it was foreseeable.[34] Similarly, the Appeals Chamber itself concedes that *Borkum Island* could also be considered a case of shared intent; namely JCE I.[35] The status of JCE III as part of customary law cannot be inferred from the remaining Italian cases, given that they did not apply international law, but exclusively relied on Article 16(1) of the Italian *Codice Penale*.[36] Nor is this Italian case law uniform, with the Italian Supreme Court (*Courte Supreme di Cassazione*) adopting dissenting decisions.[37]

19. Unsurprisingly therefore, the SPO tries to supplement and bolster *Tadić's* uncertain jurisprudential base as regards JCE III. In addition to *Borkum Island*, *Essen Lynching*, and the Italian case of *D'Ottavio*, the SPO adds *Rüsselsheim*, *Ikeda*, *Ishiyama & Yasukada*, and *Tashiro*;[38] making a total of seven cases offered to demonstrate JCE III's status as part of custom. The SPO's reliance is inapposite as *Rüsselsheim*, *Ikeda*, and *Tashiro* do not demonstrate the application of JCE III, and the Thaçi Defence adopts and endorses previous submissions illustrating why.[39]

20. The seventh source, *Ishiyama & Yasukada,* is the report of a hearing before an Australian military court in Papua New Guinea in 1946, which appears to have

[34] British Military Court for the Trial of War Criminals, *Trial of Eric Heyer and six others*, Essen, (18-19 and 21-22 December 1945), UNWCC Law Reports, Vol. 1, p. 88.
[35] *Tadić* AJ, para. 211: "It bears emphasising that by taking the approach just summarised, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases."
[36] *See further* Ambos *Amicus* Brief, p. 29.
[37] *Tadić* AJ, paras. 214-219.
[38] SPO Response on JCE, paras. 61-94.
[39] Selimi Preliminary Motion on JCE, paras. 66-68; Krasniqi Preliminary Motion on Jurisdiction, paras. 34 and 38. *See also Nuon Chea* AJ, paras. 793-794, 800-801; ECCC *Amicus* Brief, paras. 32 and 35-36; N. Jain, 'The joint criminal enterprise doctrine at the Extraordinary Chambers in the Courts of Cambodia', in K Sellars, *Trials for International Crimes in Asia* (CUP, 2015), pp. 291-293.

concluded by 11am the same morning it commenced (followed by 36 minutes of deliberation),[40] in which the Judge Advocate is reported as saying the following:[41]

> Common design includes a concerted design to commit murder or a felony. If 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.

21. This language is more ambiguous than the paraphrased version offered by the SPO.[42] Significantly, it contains no discussion as to the threshold (if any) for attribution of the extended crimes. It effectively stands for the proposition that anyone who agrees to commit a felony is liable if "some one of the party" commits murder, regardless of whether the murder was probable, or a natural consequence of the felony, or even foreseeable. This cannot be reasonably equated with JCE III in the form being advocated by the SPO. Moreover, the Judge Advocate is explicit that liability for the extended crimes makes defendants "principals in the second degree". This also conflicts with the SPO's insistence that JCE is a form of "commission" under Article 16(1)(a).[43]

22. The idea that this reference from one Judge Advocate "*amounts to valuable, clear and authoritative evidence*"[44] that JCE III was part of customary law in 1946 is hardly a credible submission. Between November 1945 and April 1951, Australian military courts conducted 296 trials of 924 foreign nationals under the *War Crimes Act 1945* (Cth).[45] Worldwide, tens of thousands of cases were prosecuted domestically post-

[40] Australia Military Court, *Prosecutor v. Kumakichi Ishiyama et al*., AWC 2225, AWC 2229, 8-9 April 1946, p. 27.
[41] *Ibid,* p. 24.
[42] SPO Response on JCE, para. 82.
[43] *Ibid*, paras. 15-16.
[44] *Ibid*, para. 83.
[45] National Archives of Australia, Factsheet No. 61, 'World War II war crimes', 2020, available at: https://www.naa.gov.au/sites/default/files/2020-05/fs-61-World-War-II-war-crimes.pdf.

World War II.[46] The international military tribunals prosecuted thousands of cases; 969 cases involving 3,470 accused in Europe, and 1024 cases involving 2,794 accused in the Far East.[47] In this context, one ambiguous paragraph from a Judge Advocate submission, with no discussion of the threshold of liability for extended crimes, is not "valuable, clear and authoritative evidence" of anything. It barely qualifies as scraping the barrel.

23. Even were this *Ishiyama & Yasukada* reference to be combined with the other references isolated from within the six other case records (all of which require lengthy submissions by the SPO to explain their link to JCE III), seven references, among the tens of thousands of post-World War II cases, falls far below the requirement that a rule's place in custom should be "beyond any doubt" in order to avoid the problem of adherence.[48]

24. The SPO then fails to engage with the Thaçi Request submissions on the relevance of the inclusion of co-perpetration in the Rome Statute. There is no doubt that "*the modes of liability applied at the ICC are based on its own detailed statute, which differs entirely from Article 16(1)(a)*".[49] The significance of this difference is that the Rome Statute is a text supported by a large number of States which *"may be taken to express the legal position i.e. opinio juris of those States"*.[50] Indeed, the goal of the Rome conference was to achieve the broadest possible acceptance of the ICC by mainly adopting into the ICC Statute provisions recognised under customary international law.[51]

[46] D. Crowe, *War Crimes, Genocide, and Justice* (Palgrave Macmillan, 2014), pp. 243-245 and 282.
[47] UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), p. 518.
[48] UNSC, UN Doc S/25704, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, para. 34.
[49] SPO Response on JCE, para. 22.
[50] *Tadić* AJ, para. 223.
[51] G. Werle, *Principles of International Criminal Law*, (TMC Asser, 2005) ("Werle"), p. 402, n. 108.

25. With this goal in mind, it is significant that the States in Rome adopted co-perpetration as the preferred form of reciprocal imputation of co-perpetrator's acts, rather than joint criminal enterprise. It undoubtedly weakens JCE's claim to customary status, and cannot be dismissed by insisting that the ICC's modes of liability "are based on its own detailed statute".[52] Instead, the relevant questions are why co-perpetration was included in the Rome Statute, and whether its inclusion undermines the SPO's position that JCE represents the practice of states. Of course, it does.

D. JCE III LIABILITY WAS NOT FORESEEABLE AND ACCESSIBLE TO THE ACCUSED

26. The SPO's insistence that the application of JCE III liability was foreseeable to Mr. Thaçi in 1998 is undermined by the subsequent confirmation by the Court of Appeals of Kosovo that "*JCE is not a mode of liability foreseen in the criminal code of Kosovo, as said, it is not one of the modes of criminal liability set out in any of the applicable codes*".[53]

27. The SPO points to Article 26 of the SFRY Criminal Code[54] as demonstrating that JCE liability was both foreseeable and accessible to the accused in 1998. Article 26 is a specific provision directed at "the **organizers** of criminal associations",[55] which criminalises the actions of organizers who are "creating or making use of an organization".[56] Unlike JCE, Article 26 does not attribute criminal liability to all members of a group on the basis of a shared common plan. The SPO's assertion that

[52] SPO Response on JCE, para. 22.
[53] Court of Appeals, PAKR Nr 455/15, Judgment, 15 September 2016, p. 45.
[54] Criminal Code of the Socialist Federal Republic of Yugoslavia (1976) ('SFRY Criminal Code').
[55] Article 26 is titled, 'Criminal responsibility and punishability of the **organizers** of criminal associations' (emphasis added).
[56] Article 26 provides: 'Anybody creating or making use of an organization, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself has committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of those acts.'

this Article *"specifically contemplates criminal liability for accused in which there are multiple persons in a group, for crimes committed based on a criminal plan or design"*,[57] skips over the central limitation of the Article, being its object.

28. Article 22 of the SRFY Criminal Code, cited in the Thaçi Request[58] but ignored by the SPO, is the more general provision which provides for the attribution of liability among members of a group, not limited to criminal organisers, and provides that "*[i]f several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act*." There is no basis to assert that this provision demonstrates that JCE III liability was sufficiently foreseeable to the accused at the time of the alleged crimes.

29. Regardless, after examining Article 26,[59] the ICTY Appeals Chamber went on to qualify that "*[a]lthough domestic law (in particular the law of the country of the accused) may provide some notice to the effect that a given act is regarded as criminal under international law, it may not necessarily provide sufficient notice of that fact.*"[60] Given the level of detailed analysis of Italian-language domestic cases and World War II case records in which the ICTY Appeals Chamber, with all the combined experience and expertise of the Judges and staff, was required to engage in 1998 before deciding that JCE III was part of customary international law, the idea that it was foreseeable to Mr. Thaçi or any regular citizen, cannot be sustained.

E. DECLINING JURISDICTION OVER JCE WILL NOT "SHIELD PERPETRATORS FROM JUSTICE"

[57] SPO Response, para. 130.
[58] Thaçi Request, para. 62.
[59] SPO Response, para. 131.
[60] *Milutinović* JCE Decision, para. 41. Paragraph 41 also states: "Customary law is not always represented by written law and its accessibility may not be as straightforward as would be the case had there been an international criminal code".

30. The SPO claims that without JCE, the purpose of the KSC Law will be thwarted, and "many perpetrators" will be shielded from justice.[61]

31. Without JCE, it is abundantly clear that "leadership figures"[62] can be held liable on the basis that they committed crimes, ordered crimes, planned crimes, aided and abetted in their commission, or were the superior of those who carried them out. No suggestion was made that "only" direct perpetrators should be prosecuted by the KSC.[63] Those who "made it possible for the physical perpetrator to carry out the crime"[64] are still caught by the modes of liability recognised by the KSC Law, if sufficient evidence exists. In this context, while securing convictions is undoubtedly easier with JCE in the mix, the impunity gap is an invention.

32. Moreover, the Thaçi Defence firmly rejects the SPO's suggestion that individual liability on the basis of foreseeability of extended crimes is warranted "especially in the context of grave international crimes".[65] Principles of culpability and individual criminal responsibility do not alter depending on the gravity of the crimes charged. If anything, the potential attribution of numerous crimes, which the accused did not himself physically commit or intend, mandates strict compliance with fundamental principles of culpability, and not the opposite. Given the consequences of conviction, the bar for liability should be rigorously applied, rather than diluted.

F. THE CENTRAL CONCERN ABOUT JCE III IS LEFT UNADDRESSED BY THE SPO RESPONSE

[61] SPO Response on JCE, para. 17.
[62] *Ibid*.
[63] *Ibid*, para. 19.
[64] *Ibid*.
[65] *Ibid*, para. 3.

33. In *Tadić*, the Defence did not challenge the existence of JCE liability, or whether it could be read into Article 7(1) of the ICTY Statute. As such, the fate of JCE III was sealed without a dissenting voice challenging the sufficiency of the underlying practice, and without concerns being raised as to the potential scope of this attenuated form of liability.

34. There is a reason why the criticism of JCE III has not diminished with time, and persists in a manner rarely seen in international criminal law. There is a reason why states in Rome charged with achieving the broadest possible consensus[66] excluded any form of criminal liability somewhat akin to JCE III from the realm of Article 25(3)(d) of the Rome Statute, with co-perpetration now considered a "conceptual improvement on JCE theory".[67] There is a reason why JCE III does not enjoy widespread adherence among states,[68] and why debate still persists as to whether it should properly be considered commission or accessorial liability.[69]

35. The reason is that JCE III differs from the other two forms because, despite the existence of the common purpose, the foreseeable crimes are not part of that plan, and there is no shared intention among the JCE members for their commission. The profound discomfort arises because all that is required is that the defendant himself (and not the other members) perceives the commission of the extended crimes by one

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[66] Werle, p. 402, n. 108.
[67] *See* E van Sliedregt and L. Yanev, 'Co-Perpetration Based on Joint Control over the Crime', in M Cupido, M. Ventura and L. Yanev, *Modes of Liability in International Criminal Law* (Cambridge: CUP, 2019), p. 86, citing K. Ambos, *Treatise on International Criminal Law - Volume I: Foundations and General Part* (Oxford: OUP, 2013), pp. 152-153; *See also* G. Werle and B. Burghardt, 'Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute', in E. van Sliedregt and S. Vasiliev, *Pluralism in International Criminal Law* (Oxford: OUP, 2014), pp. 316-317. See also J. Ohlin, 'Joint Intentions to Commit International Crimes', 11 Chicago Journal of International Law (2011) 693, at 693, calling co-perpetration "the new darling of the professoriate".
[68] Powles, at 615-616; ECCC *Amicus* Brief, paras. 40-43.
[69] *See*, H. Olasolo, 'Joint Criminal Enterprise and Its Extended Form: a Theory of Co-Perpetration Giving Rise To Principal Liability, a Notion of Accessorial Liability, or a Form of Partnership In Crime?', 20 Criminal Law Forum (2009) 263, at 284, citing Ambos *Amicus* Brief, at 3.5.

of the JCE members as a "possible consequence" of implementing the common plan. Put simply, an accused can be liable for international crimes that he did not physically commit, and did not intend, on the basis of a possibility that they will occur. In that way, as regards the "extended crimes", JCE III punishes accused for their mere association with perpetrators of a crime, raising an obvious conflict with the principle of culpability.

36. This is a legitimate and serious concern, which cannot be dismissed by simply repeating the elements of JCE and insisting it is "fair".[70] This important criticism merited a proper response. Nor can the consistently broad chorus of academic voices questioning the status of JCE III as being reflective of custom be dismissed by their mere characterisation as "extra-judicial" and "subsidiary", with no other examination of their merits.[71]

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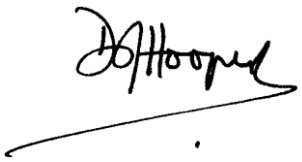
Respectfully submitted,



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14 May 2021

At London, United Kingdom

[70] SPO Response on JCE, para. 118.
[71] *Ibid*, para. 117.